

To,  
Ms. Hilda Macwan,  
The Advertising Standards Council of India  
E-mail: hilda@ascionline.org

08.03.2021

**Subject: Recommendations on the Draft Guidelines for “Influencer Advertising on Digital Media”**

Ma'am,

We are a full-service law firm headquartered in New Delhi and are actively advising several players in advertising law and social media advertising. Over the years we have spent considerable time on complex legal queries in this space. At the very outset, we would like to express our gratitude to the Advertising Standards Council of India for recognising the need for express guidelines for influencers. The Guidelines for “Influencer Advertising on Digital Media” dated February 22, 2021 are praiseworthy and address concerns of all key stakeholders. It is a great starting point for a regulatory framework to be put in place in the previously unregulated sphere of social media advertising.

As mentioned in your draft guidelines, we have enclosed a set of high-level recommendations which will hopefully assist you in creating a framework that is balanced and a win-win for the influencers as well as consumers in the digital media advertising sector.

Sincerely,

For PSA



Dhruv Suri  
Partner



# **COMMENTS ON DRAFT GUIDELINES FOR INFLUENCER ADVERTISING ON DIGITAL MEDIA**

## **Introduction**

The introduction of draft guidelines for “Influencer Advertising on Digital Media” (“**Guidelines**”) by the Advertising Standards Council of India (“**ASCI**”) have addressed a growing need for protecting consumer rights in the digital sphere. Social media marketing has witnessed immense growth in a remarkably short amount of time. This has given birth to an “influencer” industry who spend hours on social media creating content which endorses, reviews or advertises brands.

Influencer marketing is a type of marketing that focuses on using key tastemakers to deliver the brand’s message to consumers. Rather than marketing directly, the brand hires or pays influencers to market the brand and its products.<sup>1</sup> This has proven to be a highly effective form of advertising since consumers can often relate more to the influencer than a big screen celebrity. For instance, a plus size brand like FUBU might choose plus sized influencers to post content with their products, since these influencers attract their desired demographic. According to a report titled, “The State of Influencer Marketing 2019: Benchmark Report”, 92% of consumers believed that influencer marketing was an effective form of marketing.<sup>2</sup>

With this background, we have aimed to address certain additional aspects pertaining to influencer marketing and hope you will take them into consideration while formulating the final guidelines.

### **1. Inconsistent definition of “Advertisement”**

The Guidelines were introduced to allow consumers to separate “advertisements” from “content”. Thus, the definition of an advertisement becomes crucial. The current definition has two aspects that require further deliberation:

(i) Payment for communication: The Guidelines define advertisement as a *paid for communication*, thereby implying that if the communication is unpaid, it would not be covered within the definition. However, the definition of “material connections/payments” includes monetary compensation as well as discounts, gifts, hospitality and other terms which are not traditionally considered as payment. For instance, it is quite common for brands to send free samples of products to influencers and ask them to share/tag the product in a post only if they like it. There is no obligation. Accordingly, we recommend that the requirement for a “paid communication” be removed from the definition of “advertisement”.

(ii) Influence opinions versus promote sales: The definition also states that the “purpose” of the advertisement must “*to influence the opinions and/ or behaviour of those to whom it is addressed*”. There is, however, no emphasis on whether the advertisement is for promoting sales of the product/service or not. It is often quite subjective, and therefore difficult, to determine whether a social media post *influences* its audience. For instance, an Instagram influencer with, say, 5 million followers, is likely to influence his/her followers with any post regardless of whether it is an advertisement or not. If the same post is shared by an influencer with, say, less than 20,000 followers, it may not *influence* the audience. Accordingly, in our view, the focus should be on

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<sup>1</sup> See: <https://www.tapinfluence.com/blog-what-is-influencer-marketing/>

<sup>2</sup> See: <https://www.business2community.com/marketing/the-rise-of-influencer-marketingand-what-to-expect-in-2020-02318375>

promoting sales of the product/service and not on whether the advertisement influences its audience. As another illustration, a prominent sports website in Australia featured a paid article by a shoe company titled “The 10 best cities for active holidays”. Though the Australian Association of National Advertisers (“AANA”)<sup>3</sup> did not consider this an advertisement since it does not advertise any products by the brand owner, it could be an advertisement under the proposed ASCI Guidelines as it possibly *influences* the audience.

Accordingly, we recommend that the Guidelines simplify the definition of an advertisement in the following manner:

Current Definition	Proposed Amendment
<p>An ADVERTISEMENT is defined as a paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions and/or behaviour of those to whom it is addressed.</p> <p>Any communication which in the normal course may or may not be recognized as an advertisement by the general public, but is owned or authorised by the advertiser or brand owner would be included in the definition.</p> <p>Explanation: An Advertisement shall be “Owned or Authorized” by an advertiser when there is a material connection with the publisher of the Advertisement.</p>	<p>An ADVERTISEMENT is defined as any communication, addressed to the public or a section of it, the purpose of which is to promote the sale or use of goods or services resulting from a material connection between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation or publishing the communication.</p>

## 2. Definition of “Material Connection/Payment”

The definition for “material connection/payment” is very thorough and accounts for various types of influencer agreements. However, its wording is slightly ambiguous and could possibly result in some interpretation difficulties. On a surface reading, it is unclear if the *benefits and incentives* are with respect to the *connection* between the parties or the *communication* made to the public. Moreover, the list provided is worded in an exhaustive manner and limits the scope of a material connection. Finally, removing the word “payment” from the definition of advertisement (*as recommended in point 1 above*) removes the need to define payment in an inconsistent manner and thus, the definition can simply be for material connections rather than *material connections/ payment*.

Accordingly, we recommend making the following changes to the definition for *Material Connection*:

Current Definition	Proposed Amendment
<p>Any connection between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation or publishing the communication that may</p>	<p>Any connection between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation or publishing the communication that may</p>

<sup>3</sup> Distinguishable Advertising Best Practices Guideline, Australian Association of National Advertisers, available at: [http://aana.com.au/content/uploads/2017/01/AANA\\_Distinguishable-Advertising-Best-Practice-Guideline\\_Final.pdf](http://aana.com.au/content/uploads/2017/01/AANA_Distinguishable-Advertising-Best-Practice-Guideline_Final.pdf)

<p>affect the weight or credibility of the representation, and that could include benefits and incentives, such as monetary or other compensation, free products with or without any conditions attached, discounts, gifts, contest and sweepstakes entries, and any employment relationship.</p> <p>Examples of a material connection or payment could be free products including those received unsolicited, direct monetary exchange, trips or hotel stays, media barter, coverage, awards, with the expectation—explicit or implied—that a promotion or inclusion of the advertiser’s products in a post occurs immediately or eventually.</p>	<p>affect the weight or credibility of the representation and such connection includes but isn’t limited to monetary or other compensation, free products with or without any conditions attached, discounts, gifts, contest and sweepstakes entries, any employment relationship, or any other benefits and incentives.</p> <p>Examples of a material connection could be free products including those received unsolicited, direct monetary exchange, trips or hotel stays, media barter, coverage, awards, with the expectation—explicit or implied—that a promotion or inclusion of the advertiser’s products in a post occurs immediately or eventually.</p>
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### 3. Permissible use of Filters

The Guidelines place an unfair burden on influencers to ensure that the filter does not exaggerate any claims made by brands as opposed to TV and print media advertising which faces no such restrictions on air brushing. While it is evident that this extra burden is placed on influencers due to the consumer relating to the influencer and presuming the content to be less manipulated than advertising on other media, it robs influencers of an avenue of editorial control. The use of filters is often another aspect which allows the influencer to make the product more digitally appealing and also to provide additional information about the product. For instance, food bloggers on Instagram often use different filters to highlight the restaurant’s ambiance which would otherwise not be discernable.

Moreover, it does not restrict the use of air-brushing by influencers. An influencer can air brush content promoting skincare products and still state that the content is unfiltered. This defeats the purpose of the Guidelines. Instead of providing a narrow restriction on filters, the influencer must ensure that they do not digitally alter the content to give a misleading view of the brand’s efficacy and quality.

Accordingly, we recommend that the Guidelines amend the clause in the following manner:

Current Provision	Proposed Amendment
Filters should not be applied to social media advertisements if they exaggerate the effect of the claim that the brand is making- e.g. makes hair shinier, teeth whiter etc.	The influencer must not digitally alter any social media advertisement to exaggerate the effect of the claim that the brand is making- e.g. makes hair shinier, teeth whiter etc.

### 4. Duty against Promoting Harmful and Objectionable Behaviour

The Guidelines should include additional clauses on the type of content which is unacceptable as an advertisement on digital media. They must impose a duty on influencers to not promote any goods or services which are potentially harmful or against public decency. The content of the advertisement must adhere to Chapter II of the ASCI code which imposes a duty

to ensure that advertisements are not offensive to generally accepted standards of human decency. For instance, many have called for a popular influencer Eugenia Cooney to be removed from YouTube for promoting eating disorders.<sup>4</sup>

Reference can also be made to the French code on digital marketing advertising which requires that digital advertisements should not shock or offend with representations or situations, explicit or implicit, that can be perceived as degrading or humiliating; depreciate a person because of their sex, age, sexual orientation, disability, social group; carelessly use stereotypes (sexual, racial, religious, social, etc.), and disrespect the dignity of a person; condone, incite or trivialize violence, whether moral, physical, explicit or implicit.<sup>5</sup>

Accordingly, we recommend that the Guidelines append the following clause:

The influencer must ensure that the advertisement is not offensive to generally accepted standards of human decency. They must also take care not to promote any behaviors or acts which could pose a potential risk to self or others.

## 5. Protection of Children and Teenagers

As digital media offers easily accessible information and great interactivity, it is often used by children and teenagers. Many influencers are followed by these younger demographics who are vulnerable to exploitation. This is best exemplified by the weight loss lollipop advertised by Kim Kardashian on her social media accounts.<sup>6</sup> A lollipop is traditionally a children's snack and many impressionable young girls and teenagers follow Kim Kardashian on Instagram.

The Guidelines must provide some restrictions on content which shall be viewed by younger audiences. France in their digital marketing code<sup>7</sup> imposes a duty on the advertiser to take special care:

- *not to encourage illegal, aggressive, dangerous or antisocial behaviour*
- *not to undermine the authority of parents, teachers and other educators*
- *not to present children and teenagers in a degrading way*
- *not to display indecent and/or violent images and/or comments, that could shock them*
- *not to exploit their inexperience and/or credulity*

Thus, a clause should be inserted requiring brands to make use of targeted information and take note of whether the followers of the influencer are children who should not view an advertisement by their brand. Influencers must also ensure that where they advertise to children, they do not use objectionable content and advise children to consult their parents or guardians before purchasing the product or providing personal information online.

Accordingly, we recommend that the Guidelines append the following clause:

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<sup>4</sup> See: <https://www.businessinsider.in/thelife/news/youtubers-are-campaigning-to-deplatform-an-influencer-over-eating-disorder-concerns-experts-say-that-wont-fix-the-problem-/articleshow/80725498.cms> [accessed on March 3, 2021]

<sup>5</sup> Digital Advertising and Marketing Communications Code, Autorité de Régulation Professionnelle de la Publicité, available at: <https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/digital-advertising-and-marketing-communications-code/> [accessed on March 3, 2021]

<sup>6</sup> See: <https://www.independent.co.uk/news/world/americas/kim-kardashian-lollipops-appetite-suppressant-diet-flat-tummy-co-outrage-a8353831.html> [accessed on March 3, 2021]

<sup>7</sup> Ibid at 5

In messages directed to children and young people or to which they could be exposed, special care must be taken to ensure that there is no content which could cause mental or physical harm, and/or cause some form of exploitation.