

## Social Media Marketing: A New Chapter in Consumer Protection Law

### 1. Introduction

Affordable and internet accessibility has significantly grown India's internet user base which, at present, is approximately 451 million.<sup>1</sup> Such growth has given impetus to various social media platforms like Facebook, Instagram, YouTube, Snapchat, TikTok etc., to extend their reach to different strata of society. These platforms are no longer limited to only connecting with friends but, in fact, have evolved into an online market place by attracting users to trade products online, which is termed as social commerce. Entities providing such online market place are referred to as electronic service providers. The social media space consists of certain users called influencers who have access to large number of followers as well as an audience due to the credibility established by them in a specific area. In order to target potential consumers, brands reach out to influencers for marketing and advertising their products. With an evolving business and digitized environment, it becomes essential to assess how this space needs to be regulated. The amended Consumer Protection Act, 2019 (“**Act**”) brings within its ambit influencers as well as electronic service providers. While the Act is yet to be notified in the official gazette and come into force, it has taken some steps towards affixing liability for some type of online behaviour.

The newsletter examines the impact influencers and electronic service providers have on the target audience consumers and their liability for non-compliance under the Act.

### 2. The Legal Framework & Enforcement

**2.1 Key Provisions:** An “influencer” is not defined under the Act, but gets covered under the definition of an endorsement. Under section 2(18) of the Act, “endorsement” in relation to an advertisement means a message, verbal statement, demonstration or depiction of identifiable personal characteristics of an individual or organization making a consumer believe that it reflects his or her personal opinion, finding or experience while making such an endorsement. Section 2(1) defines an “advertisement” which is not only confined to print media, but covers audio or visual publicity, endorsement and representations made through electronic media, internet or website as well. Therefore, influencers promoting products through social media fall within the ambit of the Act. Their audience is not just confined to their followers, but with followers of their own followers, due to peer-to-peer sharing of content.

Section 2(28) defines a “misleading advertisement” that includes one which (i) falsely describes a product or service; or (ii) gives false guarantees that mislead consumers about a product or service; or (iii) conveys a representation which would constitute an unfair trade practice; or (iv) deliberately conceals important information. Unfair trade practice is covered under section 2(47) and means adoption of deceptive and unfair methods such as falsely representing a product or service's quality, sponsorship or affiliation, performance, requirement, or giving false facts to disparage other goods in order to promote their own.

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<sup>1</sup> <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf> (Last accessed on January 17, 2020)

If influencers narrate their experience with a product they have not used, then it may be construed as misleading advertisement. Making claims about a product's quality, ingredients, effects without adequate knowledge or without sufficient diligence and which a manufacturer cannot prove, should be avoided. Consumers can be susceptible to marketing strategies and may end up believing a person's feedback combined with active promotion about the product as exact. Therefore, social media posts endorsing products should reflect transparency and provide accurate information. The relationship with followers is based on trust and providing misleading advertisements can lead to a breach of trust, leading to a ground for potential dispute, but more importantly can be damaging for the brand and influencer.

**2.2 *Electronic Service Providers or "ESPs":*** An ESP is one who provides a product seller, the technology and processes to engage in advertising or selling goods or services to a consumer and includes online auction sites, market places<sup>2</sup> as well as social media sites where buying and selling is possible. Therefore, such social media sites should verify advertisements of products published on its platform. If a vetting process is in place, it shall provide checks and balances on products advertised and marketed by influencers. If misleading advertisements by an ESP affect a class of consumers, the Central Authority may take cognizance of such an offence, as explained below.

**2.3 *Central Authority:*** To keep a check on consumer malpractices, a new authority called Central Consumer Protection Authority ("**Central Authority**")<sup>3</sup> shall be formed, once the Act comes into force. It shall regulate issues like false and misleading advertisements, consumer right violations, unfair trade practices which are prejudicial to consumer interest. A written complaint can be filed directly with the Central Authority regarding issues that are prejudicial to interests of "consumers as a class." This term implies a group of consumers having the same cause of action and seeking similar relief against a party. The Central Authority shall also have the flexibility to refer a complaint received by it to another regulator if, in its opinion, such complaint is not within the realm of its jurisdiction and would be best addressed by the appropriate regulator. For instance, an influencer advertising misbranded food items, gives Central Authority the power to refer the complaint to Food Safety and Standards Authority of India<sup>4</sup>.

**2.4 *Investigative Power & Penalties:*** The Central Authority is empowered to take cognizance and investigate a matter, either on its own motion or where the Central Government provides information. The first step in the process is a prima facie preliminary finding that a class of consumers is affected. If it is satisfied about such presence, it shall initiate investigation through its investigation wing. If there is a conclusive finding that an advertisement is false, misleading and prejudicial to consumer interest, it can (a) issue directions to the endorser to either modify or discontinue such advertisement<sup>5</sup>; (b) impose a penalty up to INR 1 million (*about USD 14,000*)<sup>6</sup>; (c) pursuant to Section 21(3), prohibit an endorser of a misleading statement from making any endorsements for upto one year. To determine the quantum of penalty, the Central Authority shall evaluate the impact on the population and area, duration of offence, vulnerability of persons and gross revenue earned from such offence. During an investigation, if an endorser can establish successfully that they exercised reasonable care to authenticate the claims made in the

<sup>2</sup> See Section 2(17) of the Act

<sup>3</sup> Chapter III of the Act deals with Central Authority

<sup>4</sup> FSSAI is a statutory body constituted under the Food Safety and Standards Act, 2006 for regulating food safety and standards in India

<sup>5</sup> See Section 21(1) of the Act

<sup>6</sup> See Section 21(2) of the Act

advertisement, no penalty will be levied<sup>7</sup>. Before an order is passed under section 21, the alleged accused shall be provided an opportunity to defend its case.

Under section 88, failure to comply with Central Authority's directions can lead to imprisonment of upto 6 months or fine of upto INR 2 million (*about USD 28,000*), or both. Furthermore, section 89 states that any false or misleading advertisement released by a "service provider" that adversely affects consumers shall have penal and fiscal consequences for such "Service Provider." The law provides possibility of an imprisonment of upto 2 years and/or fine upto INR 1 million (*about USD 14,000*) or both. The Central Authority's order can be appealed before the National Commission<sup>8</sup> by an aggrieved person within 30 days from the receipt of such order. Section 96(1) provides for compounding of offences under sections 88 and 89, either before or after prosecution has been instituted on payment of prescribed fee.

### 3. Obligation to Publish Content Responsibly

In a paradigm shift, companies market products over social media by engaging influencers primarily due to their larger outreach to potentially influence consumer audience and their buying behaviour. Most often influencers promote and/or review products on their social media page, for instance, Instagram posts often highlight when there is a "paid promotion or paid partnership." In such instances, the audience is, at least, cognizant of the fact that the influencer has a commercial gain by promoting the brand. The key point is that the endorser must ensure a clear description is inserted to avoid potential allegations of misleading advertisements or withholding important information. Therefore, Influencers have to exercise caution and be responsible for statements put out by them while endorsing or reviewing products.

In *Marico Limited v. Abhijeet Bhansali*<sup>9</sup>, the Defendant, a YouTuber reviewed multiple product brands on his channel for the audience, and in one particular instance, uploaded a video pertaining to Plaintiff's product i.e. Parachute coconut oil, titled "Is parachute Coconut Oil 100% pure?." In the impugned video, Defendant compared the product to another coconut oil and alleged that it was of inferior quality after conducting certain tests. Plaintiff alleged that Defendant made false claims which were not backed by cogent evidence in order to attract viewers. The Bombay High Court held that the Defendant did not disclose what kind of coconut oil he used for comparing it with the Plaintiff's product. Moreover, the impugned video did not provide any scientific study or report and used false tests to evaluate the product. The court further held that such claims were misleading consumers who were using the Plaintiff's product. In its judgement, the court observed (a) that the Defendant was not the Plaintiff's competitor or member of general public expressing an unbiased opinion but, in fact, was an influencer; (b) Such person cannot make statements with the same impunity available to an ordinary person and also bear a higher burden to ensure truthfulness in their statements. While this case did not delve into consumer protection law in particular; however, it did observe how false, misleading and disparaging statements by influencers can mislead consumers. Therefore, it is imperative that influencers keep a check on statements released by them on social media.

<sup>7</sup> See Section 21 (5) of the Act which states that no penalty shall be payable by an endorser if he or she has verified the claims made in the product being endorsed by him.

<sup>8</sup> As per Section 2(29) of the Act, National Commission shall mean the National Consumer Disputes Redressal Commission

<sup>9</sup> (COMIP No. 596 of 2019)

## Conclusion

With increasing digitization, there is a need to ensure this space is regulated. The introduction of specific provisions under the Act covering influencers and ESPs is a step in the right direction and heralds a new chapter for consumers. Once the Act comes into force, both the Central Authority as well consumer forums shall have to keep a strong vigil and take cognizance of activities of influencers on social media. The rules are yet to be framed under the Act, and ought to cover detailed obligations for social media posts containing endorsements. Further, the Advertising Standards Council of India should also release guidelines for product and service endorsements through social media. Lastly, but by no means least, social media companies should have strict contracts in place with influencers to ensure there is no risk of misleading consumers.

## Author

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