

Comments and recommendations to the

# Guidelines for “Influencer Advertising on Digital Media”

8th March 2021

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# Introduction

The Centre for Internet and Society (CIS) is a non-profit research organisation that works extensively on policy issues relating to privacy, freedom of expression, accessibility for persons with diverse abilities, access to knowledge, intellectual property rights and openness. In the past, CIS has also engaged with and contributed to an extensive body of work in India, concerning intermediary liability, regulation of social media and platform governance. The research at CIS seeks to understand the reconfiguration of social processes and structures through the internet and digital media technologies, and vice versa.

Please find below our recommendations for the Guidelines for "Influencer advertising on digital media" ["the Guidelines"]. The first section summarizes a few of our specific comments and concerns with the Guidelines, while the second section brings up a few other general observations that the ASCI ought to take into account. CIS is grateful for the opportunity to submit its views.<sup>1</sup>

## High-level comments

### Operation of these Guidelines vis-a-vis the Consumer Protection Act, 2019

The Consumer Protection Act, 2019 ["the Act"], makes provisions for regulating 'advertisements' and 'endorsements.' For instance, section 2(1) of the Act defines advertisements as:

*"[...] any audio or visual **publicity, representation, endorsement or pronouncement** made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents;"*

Further, section 2(18) of the Act defines endorsement, in relation to an advertisement as:

*"[...] (i) any message, verbal statement, demonstration; or*

*(ii) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or*

*(iii) depiction of the name or seal of any institution or organisation,*

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<sup>1</sup> This document differs from our submission to ASCI in the following regards:

1. Operation of these Guidelines vis-a-vis the Consumer Protection Act 2019, was earlier a part of the Other Comments Section, it has been now highlighted as a high level comment.
2. Added another suggestion to the section: **Guidelines on advertisements directed at children**

***which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement.”***

Additionally the Central Consumer Protection Authority (CCPA) is vested with the power to conduct investigations in instances of false or misleading advertisements,<sup>2</sup> order discontinuation or modification of advertisements,<sup>3</sup> and impose penalties.<sup>4</sup>

We believe these provisions are expansive enough to cover those aspects of influencer advertising that the ASCI is intending to regulate. In light of this, it is important for the ASCI to clarify how the Complaints Procedure set up in the original ‘The Code for Self Regulation’ would operate vis-a-vis the power of the CCPA.

## Proposed Guidelines

### Definition

#### Digital Media

More specific definitions for Digital Media

While it is commendable that the Guidelines identify a multitude of entities and services to encompass the definition for ‘Digital Media,’ we must highlight that these definitions are currently ambiguous. For instance, the Guidelines do not make it clear what Near Video on Demand, Subscription Video on Demand, Pay Per View, etc. are. These are pertinent details that would help consumers identify the nature of the viewed content, as well as allow influencers and brands to make clearer advertisement decisions.

Additionally, in light of the notification of The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 [“the 2021 rules”], which encompass online curated content providers (OCCPs), it is important for the Guidelines to clarify the relationship between its identified Digital Media entities and the OCCPs under the relevant law. While we recognize that the obligations for the different entities under the Guidelines and the 2021 rules are distinct, the lack of clarification might lead to a confusing ecosystem of regulatory obligations for entities that can be assuaged at this stage.

#### Influencer

The Guidelines define “Influencers” as *“someone who has access to an audience and the power to affect their audience’s purchasing decisions or opinions about a product, service, brand or experience, because of the influencer’s authority, knowledge, position, or relationship*

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<sup>2</sup> Section 19 of the The Consumer Protection Act, 2019

<sup>3</sup> Section 21 of the The Consumer Protection Act, 2019

<sup>4</sup> Section 21 of the The Consumer Protection Act, 2019

*with their audience, An influencer can intervene in an editorial context or in collaboration with a brand to publish content.” Although this definition is all encompassing, it could lead to confusion among users of social media on the matter of whether they are Influencers or not, since the Guidelines don’t mention any specific audience thresholds that serve as a prerequisite for qualifying under the Guidelines. The confusion also extends to the existing definition of “Celebrities” under the ASCI Guidelines For Celebrities In Advertising.<sup>5</sup>*

The Guidelines For Celebrities In Advertising state that:

*“Celebrities” are defined as famous and well-known people who are from the field of Entertainment and Sports and would also include other famous and well-known personalities like Doctors, Authors, Activists, Educationists, etc. who get compensated for appearing in advertising.*

The definition is substantiated by an endnote which states that a celebrity is one who is

*“\*Compensated Rs. 20 lakhs or above as per current limit for appearing in a single advertisement or a campaign or per year, whichever is more AND / OR is listed in top 100 celebrities as per any one of the current and immediate past list of Forbes or the Times or Celebrity track report of Hansa Research or any such list which is intended to be indicative and not exhaustive.”*

We believe that a more clearer definition of “Influencers” similar to the definition of “Celebrities” in the Guidelines with markers such as verification, number of followers, income from posts per year etc., could be used to highlight who these Guidelines apply to. This will benefit the Influencer, the user, and the complaint handling authority.

## **Details of specific media channels**

In the chapter ‘Ready reckoner for specific media channels,’ the Guidelines mention a catalogue of places and instances where such disclosure ought to be made, for specific media channels. While the Guidelines mention the exact details for Facebook, and Instagram (including reels, stories, etc.), these details are missing for some of the other media channels mentioned, including Twitter, Pinterest, and Snapchat.

For Twitter, the Guidelines state: *“Include the disclosure label or tag at the beginning of the body of the message as a tag.”* Similar directions are given for promotions to be done via Pinterest. and Snapchat, where the disclosure is ought to be in the ‘message.’ However, the main method of communication on all these platforms is via other methods, and not ‘messages.’ Since this direction does not clarify where the disclosure ought to be, it has the potential to create confusion for both influencers, and brands on how best to comply with the

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<sup>5</sup> <https://ascionline.org/images/pdf/guidelines-for-celebrities-in-advertising.pdf>

Guidelines. Hence, we believe that the Guidelines should be updated to reflect the exact specifications of the media channels, and the places where the disclosures ought to be made.

## Other Comments

### **The need for some guidelines on advertisements directed at children**

It is estimated that as of February 2021, 10.6 percent of Instagram users in India are from the age group of 13-17 years.<sup>6</sup> Hence there is a need to look at responsible advertising as well as think of the products that the influencers advertise. Additionally, a large number of influencers' posts are targeted at children and teenagers, which increases their responsibility connected to advertisements. The draft Personal Data Protection Bill, 2019 prohibits guardian data fiduciaries, i.e. data fiduciaries who operate commercial websites, or online services directed at children (or process large volumes of personal data of children) from profiling, tracking, or behavioural monitoring of, or targeted advertising directed at, children and undertaking any other processing of personal data that can cause significant harm to the child.<sup>7</sup> Though this is a good move, the obligation to not target advertisements at children is not extended to all data fiduciaries. While we do understand that it is difficult to gauge which posts are being viewed by children, the Guidelines could recommend that the Influencers who are aware of their main demographic being children, or teenagers, must take more care in the products they endorse, and take greater care to make the children aware that the post they are sharing is an advertisement.

Additionally we suggest that based on the control that the brands have in terms of content and decision making, and choose the influencer they want to engage with the brands could also ensure the correct audience for their product. Hencer along with the influencer the brand should also take care to ensure who the influencers main demographic are and see if the product is suited for that age group.

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<sup>6</sup> <https://napoleoncat.com/stats/instagram-users-in-india/2021/02>

<sup>7</sup> Section 16 of the Draft Personal Data Protection Bill, 2019