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October 1, 2020

To Mr. J.C. Rout,
(Deputy Secretary to the Government of India)
Government of India
Ministry of Consumer Affairs
Food and Public Distribution

RE: Comments on Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020

Dear Mr. J.C. Rout,

ALG India Law Offices LLP (“ALG”) submits its comments in response to the invitation for feedback on the draft of the *Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020* (hereinafter referred to as the ‘Guidelines’) published by the Central Consumer Protection Authority vide No.J-25/4/2020-CPU(CCPA) on September 4, 2020.

ALG represents several domestic and foreign companies having an interest in consumer protection laws and related regulations. In the course of advising its clients, ALG has had the occasion to consider and reflect on the current legal landscape in India pertaining to various laws aimed at preventing unfair trade practices as well as protecting the interests of the consumers. Our key comments and suggestions (discussed in detail in the enclosed Note) are aimed at bringing clarity in the clauses outlined in the Guideline dealing with comparative advertisement, surrogate advertisement, free claims, prohibited advertisements, honesty of statements and due diligence by an endorser in relation to advertisements, and expert endorsements.

We appreciate the considerable effort that has gone into the Guidelines. We recognize the time pressures and challenges under which the Ministry is working, particularly in COVID-19 times. We thank you for your time and consideration of these comments.

ALG India Law Offices LLP

Through

Abhimanyu Kumar, Partner

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**NOTE CONTAINING ALG’S COMMENTS AND SUGGESTIONS
ON THE DRAFT CENTRAL CONSUMER PROTECTION AUTHORITY
(PREVENTION OF MISLEADING ADVERTISEMENTS
AND NECESSARY DUE DILIGENCE FOR ENDORSEMENT
OF ADVERTISEMENTS) GUIDELINES, 2020**

1. Comments and suggestions on Clause 6 of the guidelines pertaining to Comparative Advertising:

1.1. ALG’s Observations

Comparative advertisements, in as far as they do not use false or misleading statements and make honest representations, should be permissible. There should be no disparagement or defamation of the goods or services of a manufacturer-competitor while making statements that puff up one’s own goods or services.

In India, there is no clear definition of comparative advertisement under any statute unlike in the EU, where Comparative Advertisement is regulated by the Misleading and Comparative Advertising (MCA) Directive 2006/114/EC. As per this MCA Directive, “*comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.*”

Under EU legislation, a Comparative Advertisement is permissible if multiple conditions are met. One such condition is that the Comparative Advertisement “not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor”.

1.2. ALG’s Recommendations



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We recommend insertion of the below Clause 6(1)(c) in **green**:

“6. Comparative advertising.– (1) In order for a comparative advertisement to be considered permissible, it--

(a) shall be factual, accurate and capable of substantiation;

(b) shall not present a good or service as an imitation or replica of a good or service with a protected trademark or trade name;

(c) Shall not cause disparagement or defamation of others’ goods or service nor discredit or denigrate the trade mark or trade name of another.

2. Advertisements containing comparisons with other manufacturers, suppliers, producers or with other products, including where a competitor is named, shall be permitted in the interest of promoting competition, where--

(a) the features of the competitor’s product being compared to the features of the advertiser’s products are specified clearly within the advertisement;

(b) the subject matter of the comparison is not of such nature so as to confer an artificial or unjustifiable advantage upon the advertiser;

(c) the nature of comparisons is such that they are factual, accurate and capable of being substantiated; and”

2. Comments and suggestion on Clause 8 of the guidelines pertaining to Surrogate Advertisements.

2.1 ALG’s Observations

The existing laws and regulations governing surrogate advertisements such as The Cable Television Networks (Regulation) Act, 1995, The Advertising Standards Council Of India (ASCI), etc. have given rise to contradictory positions when it comes to whether a particular advertisement qualifies as a surrogate advertisement. It is recommended that the laws be made



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uniform, unambiguous and transparent, banning surrogate advertisements for different products under a single brand name.

2.2 *ALG's suggested measures to combat surrogate advertising*

- i) More power needs to be vested with the Advertising Standards Council of India to address complaints received from consumers against false and misleading advertisements to take appropriate action immediately.
- ii) An effective mechanism needs to be put in place for implementation of international and national regulations on surrogate Advertising.
- iii) Stricter penalties need to be imposed on companies featuring surrogate advertisements without any actual product.

3. Comments and suggestion on Clause 10 of the guidelines pertaining to Free Claims

3.1 *ALG's Observations*

In respect of conditional-purchase promotions, the term “free” should be used if customers are required to buy other items, provided their liability for all costs is made clear and the quality or composition of the paid-for items has not been reduced. Moreover, it must be ensured that the price of the paid-for items has not been increased to recover the cost of supplying the free item.

To demonstrate that an item is genuinely being supplied free, conditional on the purchase of another item, the seller must be able to show:



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- (i) Either that the free item is genuinely additional to the item(s) usually sold for that price or that the free item is genuinely separable from the paid-for item(s);
- (ii) That, unless the customer complies with the terms of the promotion, they do not supply the “free” item with the paid-for item(s) and;
- (iii) That consumers are aware of the stand-alone price of the item(s) they are paying for and that the price remains the same with or without the free item.

4. Suggestion on Clause 12 of the guidelines which pertains to Prohibited Advertisements

4.1 ALG's Suggestion

We recommend insertion of additional sub-clauses (f) to (h) to Clause 12 of the Guideline, as stated in **green**, below:

In addition to the prohibited activities as set out above, no advertisement shall be permitted, which--

(a) is likely to incite persons to commit crime and promotes disorder, violence or intolerance;

(b) derides or depicts in an unfavorable manner, persons of any race, caste, creed, sex, gender or nationality;

(c) affects foreign relations with any other country in an adverse manner;

(d) encourages or propagates the use of products which are banned under any law for the time being in force; or

(e) shows, glorifies, or refers to a dangerous practice, or manifests a disregard for safety or encourages negligent behaviour.



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(f) promotes gambling;

(g) infringes any person's copyright, trademark, privacy, or proprietary rights;

(h) promotes pyramid promotional schemes under which consumers pay or give other consideration for the opportunity to receive compensation derived from the introduction of other consumers into the scheme, and not the sale or consumption of goods or services.

5. Suggestion on Clause 15 of the guidelines which deal with honesty of statements and due diligence to be made by an endorser in relation to advertisements.

5.1 ALG's Suggestion

We recommend the insertion of additional sub-clauses (5) and (6) to Clause 15 of the Guideline, as stated in **green**, below:

(1) Every endorser endorsing a product or service shall take due care to ensure that all descriptions, claims and comparisons that they endorse or that are made in advertisements they appear in are capable of being objectively ascertained and are capable of substantiation.

(2) Every endorser endorsing a product or service shall take due care to ensure that their endorsement does not convey any express or implied representations that would be false, misleading or deceptive if made by the trader or manufacturer or advertiser of the relevant product or service.

(3) Any endorser who obtains advertising advice from an advertising self-regulatory organisation or a legal opinion from an independent legal practitioner regarding the honesty of statements in their endorsement and its compliance with these guidelines and the Act may be considered to have carried out due diligence for the purposes of his liability under the Act:

Provided that no such advice or opinion may be considered adequate if it is otherwise found that the endorser had knowledge that the endorsement would be false, misleading or deceptive, or that its falsity or misleading or deceptive nature was apparent given the circumstances.

(4) Where any trader, manufacturer or advertiser uses an endorsement of a fictitious character, such endorsement shall not be framed so as to give the impression that real persons are making the endorsement:



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Provided that where any endorsement is represented as being made by a real person, the trader, manufacturer or advertiser using the endorsement shall retain documentary evidence of the endorsement and contact details of the endorser.

(5) Endorsements must reflect the honest opinions, findings, beliefs, or experiences of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.

(6) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has reasonable ground to believe that the endorser remains a bona fide user of the product.

6. Suggestion on Clause 17 of the guidelines which deal with expert endorsements

6.1 ALG's Suggestion

We recommend inserting additional sub-clause 3 to Clause 17 of the Guideline, as stated in green, below:

(1) Where an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications shall in fact give the endorser the expertise that he is represented as possessing with respect to the endorsement.

(2) Any expert endorsement shall be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he is an expert and which are relevant to an ordinary consumer's use of or experience with the product:

Provided that an expert may, in endorsing a product, take into account other factors not within his expertise, particularly subjective factors such as taste or price.

(3) Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of subjective factors that vary from individual to



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individual. Therefore, an organization's endorsement must be arrived at by a process which ensures that the endorsement fairly reflects the collective judgment of the organization.

X-----X