

Legal Issues

in

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

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Recommendations made by ALG in its *Firm Submissions* in response thereto

Consumer Protection Act, 2019

- ❖ “*Advertisement*”, “*Endorsement*” and “*Misleading Advertisement*” defined under the Consumer Protection Act
- ❖ Establishment of Central Consumer Protection Authority (CCPA)
- ❖ Powers of the CCPA- investigate, recall, refund and impose penalties
- ❖ Mode of filing complaint to CCPA

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Introduction

❖ *Aim of the Guidelines*

- Protecting consumers by curbing misleading advertisements across different mediums

❖ *What do the Guidelines cover?*

- All advertising/ marketing communications regardless of form, format or medium
- Manufacturer, advertisement agency and endorser
- Comparative advertisement, bait advertising, surrogate advertising, puffery, free claims, advertisements targeted at children, prohibited advertisements, disclaimers, endorsements, etc.

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Valid and Prohibited Advertisements under the Guidelines

❖ *What is considered a valid advertisement?*

- Clause 4 of the guidelines states that the advertisement should contain truthful and honest representation, not misleading or offensive to generally accepted standards of public decency

❖ *What Advertisements are prohibited?*

- Incite persons to commit crime and promotes disorder, violence or intolerance
- Derides or depicts in an unfavorable manner- persons of any race, caste, creed, sex, gender or nationality
- Adversely affects foreign relations with any other country
- Encourages the use of products banned under law
- Shows, glorifies, or refers to dangerous practice, disregards safety

Prohibited Advertisements- ALG's Recommendations

❖ *Insertion of clauses –*

- *“promotes gambling;*
- *infringes any person's copyright, trademark, privacy, or proprietary rights;*
- *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”*

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Comparative Advertisement

- ❖ No clear definition of comparative advertisement in India
- ❖ “*Comparative Advertising*” as per EU Comparative Advertising (MCA) Directive 2006/114/EC
 - Explicitly or by implication identifies a competitor or their goods or services
 - Must not discredit or denigrate trademarks or trade name of competitor.
- ❖ Comparative Advertisement as per Indian Case laws -
 - *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.* [63 (1996) DLT 29]
 - *Pepsi Co., Inc. and Ors. v. Hindustan Coca Cola Ltd. and Anr.* [2003 (27) PTC 305 Del]
 - *Colgate-Palmolive (India) Limited v Anchor Health & Beauty Care Private Limited* [2009 (40) PTC 653 (Mad.)]

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Comparative Advertisement

❖ *Conditions for Valid Comparative Advertisement under the Guidelines-*

- Factual, accurate and capable of substantiation
- No imitation or replica of a good or service with protected trademark or trade name
- Clear specification of the features of the competitor's product
- Not confer artificial or unjustifiable advantage upon the advertiser

7 ❖ *ALG's Recommendations –*

- Insertion of *“Shall not cause disparagement or defamation of others' goods or service nor discredit or denigrate the trade mark or trade name of another.”*

Surrogate Advertisements

- ❖ No clear definition of “*Surrogate Advertisement*”
- ❖ Discrepancy under the current law
 - Cable Television Networks (Regulation) Act, 1995
 - The Cigarettes and other tobacco products (prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act, 2003
 - The Advertising Standards Council Of India (ASCI)

Surrogate Advertisements

❖ *Parameters for determining Surrogate Advertisements under the Guidelines-*

- Unrestricted good or service produced and distributed in reasonable quantities
- Suggesting advertisement for restricted or prohibited goods or service
- No bar on mere use of brand name that may also be applicable to non-restricted good or services

❖ *ALG's Recommendations –*

- Clear definition of “*Surrogate Advertisement*”
- More power with the Advertising Standards Council of India
- Effective mechanism for implementation of international and national regulations
- Stricter penalties on companies featuring surrogate advertisements

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Free Claims under the Guidelines

- ❖ An advertisement shall not describe a good or service as ‘*free*’ if –
 - Consumers have to pay for packing, handling or administration
 - The cost of response to avail the offer has increased
 - The quality or quantity of the good or service has been reduced
- ❖ Other Requirements
 - Package element not to be described as ‘*free*’ if included in package price
 - No use of ‘*free trial*’ to describe a ‘*satisfaction or your money back*’

Free Claims- ALG's Recommendations

- ❖ Insertion of clause - *“Seller to establish:*
 - *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);*
 - *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*
 - *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”*

Honesty of statements and Due Diligence by Endorser

❖ *Standards under the Guidelines-*

- Descriptions, claims and comparisons should be capable of substantiation
- Should not be false, misleading or deceptive
- Assumption of due diligence
(Exception – knowledge or apparent deceptiveness given the circumstances)
- Endorsement by fictitious character
- Retain documentary evidence and contact details

Honesty of statements and due diligence by Endorser - ALG's Recommendations

❖ *Insertion of clauses—*

- *“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.”*
- *“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.”*

Expert Endorsements

❖ *Under the guidelines-*

- Qualification to make expert endorsement
- Supported by an actual exercise of the expertise in evaluating product features

❖ *ALG's Recommendation-*

- Insertion of *“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 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.”*

❖ Current ambiguities with respect to endorsements

Disclaimers and Puffery in Advertisements

- ❖ *Can you get away from misleading advertisement by adding a disclaimer?*
 - Not contradictory to the material claim
 - Not be an attempt to hide material information
 - Not be an attempt to correct a misleading claim made in an advertisement
- ❖ *Can you get away from misleading advertisement under puffery?*
 - Clause 9 of the guidelines allows obvious exaggeration

Way Forward – Observations

- ❖ Foreseeable issues in enforcement
- ❖ Lack of Clarity in definition of key terms such as- ‘advertising agency’, ‘trader’, ‘endorser’, ‘bait advertising’ and ‘surrogate advertising’, and resultant ambiguity in scope of applicability of guidelines
- ❖ CCPA clarification on the observed ambiguities in the Guidelines, and proposed collaboration with the industry in enforcement

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THANK YOU!

Questions?

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