

# THE GOVERNMENT CLAMPS DOWN ON SURROGATE ADVERTISEMENTS AND FORMULATES GUIDELINES TO PREVENT MISLEADING COMMERCIALS

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*“Guidelines aim at protecting consumers from misleading advertisements and protect the consumers’ rights. CCPA may charge a penalty of Rs 10 lakh and for subsequent contravention, Rs 50 Lakh for violation.”*

## Introduction:

The Central Consumer Protection Authority (CCPA), a division of the Department of Consumer Affairs, has issued 'Guidelines for Prevention of Misleading Commercials and Endorsements for Misleading Commercials, 2022' in order to combat misleading advertisements and protect consumers.

Section 2(28) of the Consumer Protection Act, 2019 defines “misleading advertisement” as in relation to any product or service, means an advertisement, that—

“(i) falsely describes such product or service; or (ii) gives a false guarantee to or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or (iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or (iv) deliberately conceals important information.”

## The Guidelines additionally introduce definitions of:

- **"bait advertisement"** is an advertisement in which goods, or services are offered for sale at a low price in order to attract consumers; a "surrogate advertisement" is an advertisement for goods, or services whose advertising is otherwise prohibited or restricted by law, by getting around such prohibition or restriction and portraying it to be an advertisement for other goods, or services, the advertising of which is not prohibited or restricted by law.<sup>1</sup>

It aims to protect consumers' interests by making advertising more transparent so that customers can make informed decisions based on facts rather than false narratives and exaggerations.

- the term **"advertising agency"** refers to a person or organization that offers services in the planning and production of advertisements as well as other activities related to advertising in exchange for a commission or fee;

In exchange for a commission or fee, an "advertising agency" is a person or organization that provides services in the planning and creation of advertisements, as well as other advertising-related tasks.

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<sup>1</sup> Centre issues 'guidelines on prevention of misleading advertisements and endorsements for misleading advertisements, 2022'. Press Information Bureau. Retrieved June 21, 2022, from <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1832906>

Advertising agencies routinely communicate with talent, photographers, media, production companies, and musicians on behalf of their clients.

Determining whether the agency is engaging in contracts with third parties as principal or as the client's agent at the outset of an agency-client relationship is critical. If the agency is designated as an agent, it will most likely be permitted to bind the client in third-party transactions

- an individual, a group, or an institution can be considered as an "**endorser**" if they make an endorsement of any goods, products, or services in an advertisement and the opinion, belief, finding, or experience of the "endorser" appears to be the message that the advertisement appears to reflect.<sup>2</sup>

The CCPA now holds the endorsers accountable for appearing in fraudulent advertisements. Because of the CCPA's enhanced scrutiny, the endorsers will be more cautious while recommending brands.

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- a "**service provider**" is a person who offers a service of any kind to a person who has the capacity to use that service.

Service providers include email marketing firms, analytics firms, and Customer Relationship Management (CRM) firms. A service provider is not allowed to keep, use, or disclose the personal information it obtains from the business for any reason not authorized by the CCPA or the conditions of the agreement.

According to an official statement released by the Ministry of Consumer Affairs, these recommendations are, keeping the ongoing malpractices in mind, intended to prevent customers from being deceived by unjustified claims, exaggerated promises, false information, and fraudulent claims.

The statement continued by stating that marketing of this sort violates various customer rights, including the right to be informed, the freedom to choose, and the right to be safeguarded from potentially dangerous goods and services.

According to the ministry's explanation, the purpose of the guidelines is to defend the interests of the consumers by providing greater openness and clarity to the publication of advertising. This will enable consumers to make educated judgments based on the available information.

In accordance with Section 10 of the Consumer Protection Act of 2019, the CCPA was established to regulate issues connected to the infringement of consumer rights, unfair commercial practices, and false or misleading marketing that are detrimental to the public and consumer interests.

### **Highlights of the Guidelines:**

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<sup>2</sup> Ibid. 1

Given the importance of advertisements in encouraging the sale of products or services to people of all ages and backgrounds, there has been some concern regarding advertisements that make untrue, fraudulent, or deceptive claims or attempt to influence consumers through misleading claims. While the Consumer Protection Act of 2019 (Act) contains general provisions for the prevention of deceptive advertising, the CCPA has now exercised its authority under Section 18 of the Act and issued these Guidelines, which include a number of principles and criteria for determining what is permissible and what is prohibited.

The Guidelines deal with the following issues:

1. General principles to ascertain what is a misleading advertisement
2. Conditions for bait advertisements
3. Prohibition of surrogate advertising
4. Guidelines for free claim advertisements
5. Conditions for advertisements targeting children or featuring children
6. Rules on disclaimers in advertisements
7. Due diligence and disclosure of material connection by an endorser
8. Responsibilities of manufacturers, service providers, advertisers, and advertising agencies.

#### **Conditions for bait advertisements:**

Bait advertising is an advertisement that provides a good, product, or service at a low price in order to entice clients. The Guidelines do not prohibit bait advertisements, but they do contain certain restrictions that must be observed in such cases.

It must be guaranteed that the advertised good/service will be made accessible to the buyer at the advertised price. At the time of the publication of the advertisement, it should also be ensured that there is sufficient supply to meet the projected demand. If the provided good/service is only accessible in limited quantities, the advertisement must mention so.

Additionally, there should also be no incentive to buy the good/service in less favourable market conditions than typical market conditions.

#### **Prohibition of surrogate advertising:**

The Guidelines prohibit the use of intermediary or indirect advertising. The Guidelines declare explicitly that no advertisement may directly or indirectly imply that it is for the products or services for which advertising is otherwise prohibited or restricted by law. The idea of "surrogate advertisement" clearly addresses avoiding such limitations or limits by disguising an advertisement as an advertisement for other goods or services whose advertisement is not prohibited or restricted by law.

#### **Guidelines for free claim advertisements:**

The Guidelines also address advertisements that make "free claims" or claim that a good, service, or feature is free or without cost to the user. In this regard, the Criteria establish rules for free claims advertisements and a list of what is not considered a "free" or "without cost" good/product/service.<sup>3</sup>

The Guidelines stipulate, among other things, that such advertisements shall not claim a good /service to be free if the consumer is required to pay anything other than the unavoidable cost of responding to such advertisement and collecting or paying for delivery of such item, and that such advertisements shall also specify the level of consumer commitment required to take advantage of the free offer.

The Guidelines state that a good or service cannot be described as free if it requires the consumer to pay for packing, packaging, handling, or administration of the good, product, or service, or if there is cap on quantity of the goods they must purchase to take advantage of the offer.<sup>4</sup>

### **Conditions for advertisements targeting children or featuring children:**

Advertisements aimed at or starring children should take care to not take advantage of their inexperience or ignorance. Any advertisement addressing, targeting, or using children must adhere to several restrictions outlined in the Guidelines, which include, among other things, that such advertisements must not:

- i. condone, encourage, inspire or unreasonably emulate behaviour that could be dangerous for children;
- ii. claim any health or nutritional claims or benefits without being adequately and scientifically substantiated by a recognized body;
- iii. be such as to develop negative body image in children;
- iv. exaggerate the features of goods/products/services in a manner so as to lead children to have unrealistic expectations thereof; etc.

Such advertisements are not allowed to feature personalities from the field of sports, music, or cinema for goods/services, which under any law, require a health warning or cannot be purchased by children.

In addition, the Guidelines stipulate that advertisements for junk foods, such as potato chips, carbonated beverages, and similar snacks and beverages, are not permitted during children's programming or on channels dedicated to children. Similarly, it cannot be implied that the offered products are superior to the natural, traditional foods ingested by children.

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<sup>3</sup> Indulia, B., Sharma, D., Auroshree, Saba, Editor, & Bhardwaj, P. (2022, June 10). *Guidelines for prevention of misleading advertisements and endorsements for misleading advertisements, 2022*. SCC Blog. Retrieved June 21, 2022, from <https://www.sconline.com/blog/post/2022/06/10/guidelines-for-prevention-of-misleading-advertisements-and-endorsements-for-misleading-advertisements-2022/>

<sup>4</sup> The Federal, AM, 6:28, & Aprameya. (2022, June 11). *To curb misleading advertisements, centre issues new guidelines*. The Federal. Retrieved June 21, 2022, from <https://thefederal.com/news/to-curb-misleading-advertisements-centre-issues-new-guidelines/>

### **Rules on disclaimers in advertisements:**

The Guidelines govern the use of disclaimers in advertisements. These are equivalent to the disclaimer-related sections of the ASCI Code. For instance, disclaimers may expand, clarify, qualify, or resolve ambiguities in a claim, but they should not contradict the material claim or main message of the advertisement, nor should they attempt to conceal material information with respect to any claim made in the advertisement, thus deceiving or concealing the commercial intent of the advertisement. In addition, the disclaimers are not meant to address any incorrect advertising claims.

The Guidelines also give phrasing, typeface, placement, tempo, and legibility guidelines for disclaimers to ensure that they are clear, noticeable, and readable to a normally-sighted person reading the marketing communication from a fair distance at a decent pace.

### **Due diligence and disclosure of material connection by an endorser:**

Before supporting advertisements, the Guidelines stipulate that proper diligence must be conducted. In addition, an advertisement's endorsement should not be dishonest; it should reflect the true, relatively current opinion of the individual, group, or organization making the representation, and be based on adequate knowledge or expertise with the indicated goods/products/services.<sup>5</sup>

The Guidelines also require disclosure of any substantial link between the endorser and the trader/manufacturer/advertiser that could jeopardize the credibility of the endorsement.

### **Responsibilities of manufacturers, service providers, advertisers, and advertising agencies:**

The Guidelines outline the responsibilities and the duties of manufacturers, service providers, advertisers, and advertising agencies. The objective is to guarantee that advertising claims are examined, confirmed, verified, or supported by pertinent evidence. For comparative purposes, claims and descriptions in advertisements that relate to objectively observable facts should be supported, and the CCPA may require the relevant party to furnish such evidence.

Parties must also ensure that the advertisements do not contain any reference to a particular person, company, or an institution that confers an unjustified advantage on the advertised product or brings such a person, company, or institution into ridicule or disrepute, unless the concerned person, company, or institution has granted permission.

The concerned manufacturer/service provider/advertiser/advertising agency must also examine statements that are likely to mislead consumers for exaggeration, omission, or ambiguity.

### **Penalization for non-compliance with the Guidelines:**

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<sup>5</sup> Bureau, A. (2022, June 10). *Govt clamps down on surrogate ads; issues new guidelines to prevent misleading ads*. Adgully.com. Retrieved June 21, 2022, from <https://www.adgully.com/govt-clamps-down-on-surrogate-ads-issues-new-guidelines-to-prevent-misleading-ads-118900.html>

The Guidelines do not separately set out penalties for non-compliance. However, on a combined reading with the Act, penalties stipulated under the Act include the imposition of fines, which range from INR 10 to 50 lakh by the CCPA, which would apply in case of violation of the aforementioned guidelines.<sup>6</sup>

Similarly, although no specific enforcement mechanism has been set out under these Guidelines, the CCPA could exercise powers for investigation and enforcement including those as laid down under section 18 of the Act.<sup>7</sup>

### **Conclusion:**

The Act's Guidelines will undoubtedly tighten the knot, limiting an advertiser's capacity to explore grey areas while creating and releasing advertisements. They represent a significant turning point in the advertising regulatory landscape, which formerly depended mainly on self-regulation under the ASCI Code. There is also a possibility that the restrictions imposed may also affect the commercial viability of advertisements for particular products/services.

Given that the Guidelines cover advertisements in all forms, formats, and media, even unconventional forms of advertising, such as social media influencers, advertisements in the form of non-fungible tokens, and pop-up/disappearing advertisements on the internet, must comply with the provisions of the Act and the Guidelines. The Guidelines would also play a vital role in legal actions involving comparative advertising/disparagement issues, which were previously governed by tort law and judicial precedents alone.

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<sup>6</sup> Ibid. 7

<sup>7</sup>The Federal, AM, 6:28, & Aprameya. (2022, June 11). *To curb misleading advertisements, centre issues new guidelines*. The Federal. Retrieved June 21, 2022, from <https://thefederal.com/news/to-curb-misleading-advertisements-centre-issues-new-guidelines/>