

# Technology Law Analysis

December 06, 2024

## SECURITIES MARKET REGULATOR'S CONTINUED QUEST AGAINST "UNFILTERED" FINANCIAL ADVICE

- Framework proposed for SEBI to recognize digital platforms and intermediaries as "Specified Digital Platforms".
- SDPs of all sizes required to comply with extensive preventive and curative measures such as content review using AI/ML tools to identify and review financial content.
- Potential overlap with existing due diligence framework under information technology laws for intermediaries to avail safe harbour protection for content hosted on their platforms.
- Potential impact on free-flowing financial discourse and risk of curtailing fin-fluencers' freedom of speech and expression.
- Inter-ministerial alignment and legislative process preferred to balance interests of public, content creators and digital platforms.

### 1. BOTTOM-LINE

Securities and Exchange Board of India ("SEBI"), the Indian securities and commodity market regulator in India, has proposed to curb unregistered financial influencers or "fin-fluencers" from posting content/advertisements on social media platforms, which may sway 'followers' into making misinformed and risky investments. SEBI has observed that fin-fluencers engage in practices that "*lure and induce*" the public into investing in the stock market under the pretence of offering "*educational courses*," which serve as a means for them to generate income.<sup>1</sup>

In pursuance of curbing such 'unfiltered' advice/claims, SEBI released a *Consultation Paper on the Draft Circular for Specified Digital Platforms*<sup>2</sup> ("SDP Circular") on October 22, 2024, aimed to protect the public from finance and securities-related advertisements and content by unregistered persons, including fin-fluencers. Public comments on the SDP Circular were invited till November 26, 2024. It would be interesting to see SEBI's next move, and whether the SDP Circular is issued "as is" or with due changes based on industry feedback.

### 2. BUILD-UP

The SDP Circular builds on prior SEBI actions, including its *Consultation Paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers)* ("CPF").<sup>3</sup> The CPF aims to address the risks posed by "*unregistered and unauthorised Investment Advisors ("IAs") and Research Analysts ("RAs")*", i.e., unregistered fin-fluencers, who influence investor decisions and promote securities in exchange for undisclosed compensation.<sup>4</sup> SEBI had emphasized that regulated intermediaries and registered entities should avoid monetary and non-monetary associations with unregistered fin-fluencers.<sup>5</sup>

Prior to this, in April 2023, SEBI released an *Advertisement Code for Investment Advisers and Research Analysts* ("ACIR") which enforced disclosure standards (such as name, registration number) on IAs and Ras<sup>6</sup> and barred the publication of misleading/deceptive testimonials<sup>7</sup> or misleading statements by them.<sup>8</sup>

On August 26, 2024, SEBI amended three regulations<sup>9</sup> that prohibit SEBI-regulated entities (including recognized stock exchanges, recognized clearing corporations, registered depositories, and their agents) from associating with (i) unregistered securities advisors or (ii) persons not permitted to make claims pertaining to the performance or returns related to securities. These amendments are referenced in the SDP Circular, and further state SEBI-regulated entities are permitted to associate with recognised SDPs. In essence, SDPs are allowed to display investor-education content from fin-fluencers, compliant content from IAs and RAs, and other approved content from SEBI-regulated entities.

In this hotline, we provide an overview of the framework proposed under the SDP Circular, followed by a detailed analysis of the obligations mentioned.

### 3. PROPOSED FRAMEWORK

#### A. Applicability

The contents of SDP Circular are applicable to all (i) digital platforms, and (ii) entities regulated/recognised by SEBI, including intermediaries, stock exchanges, clearing corporations, depositories and BSE Limited.

#### B. Requirements

The SDP Circular specifies the measures and compliance requirements that digital platforms must fulfil to gain recognition as an SDP. This recognition enables SDPs to establish associations with SEBI-regulated entities. Platforms that are not SDPs cannot be associated directly or indirectly with SEBI-regulated entities. To achieve this status, digital platforms are mandated to adhere to 'Preventive Measures' and 'Curative Measures,' (*as discussed below*) which include actively monitoring content and taking stringent actions against violations within prescribed timelines.

These measures require platforms to review and supervise content uploaded or published by users/fin-fluencers, to ensure compliance with SEBI regulations. The objective is to prevent misleading content that could unduly influence vulnerable investors to invest in securities. Additionally, the SDP Circular requires prompt actions to be taken such as take down of violative content, or removal of channels within defined timelines to

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safeguard market integrity and investor interests.

The recognised SDP would then be a valid source for users to access content related to investor education, as well as content uploaded by SEBI registered IAs and RAs. However, from the perspective of implementation, the measures appear to be stringent, and not aligned the existing framework on content regulation and intermediary liability.

### C. Preventive and Curative Measures

To obtain recognition as an SDP, the digital platform is required to demonstrate both (i) preventive, and (ii) curative measures in place. The SDP Circular lists out the measures under both the categories. We have discussed these measures below.

#### C.1. Preventive Measures

The Preventive Measures aim to prevent (i) fraud, (ii) impersonation, (iii) unauthorized claims, and (iv) presence of unregistered entities.<sup>10</sup> To be recognised with SEBI as an SDP, digital platforms must implement the following measures:

##### Information Sharing

- **Platform Activity:** Establish a policy to share aggregated or specific securities-related data on the platform with SEBI (as and when required) and act on SEBI's guidance.<sup>11</sup>
- **Periodic Reports:** Submit periodic reports on instances of fraud, impersonation, unregistered activities, and unauthorized claims and action taken against these instances.<sup>12</sup>

##### Content and Advertisement Review

- **Identification:** Use technical tools (specifically AI/ML tools), systems and expertise to identify and analyse securities-related content and advertisements, assessing if they are compliant or in violation of SEBI regulations.<sup>13</sup>
- **Permitted Content Policy:** Limit content/advertisements to those by SEBI-recognized/registered entities, exempted persons, or for investor education.<sup>14</sup>

##### Labelling and Verification

- **Auto-Check:** Implement auto-check mechanisms to verify intermediary or entity registration/recognition status with SEBI (or its agents) or AMFI and stock exchanges.<sup>15</sup>
- **Verified Badge:** Provide a verified label or badge for SEBI-registered persons on the platform.<sup>16</sup>

##### Action Policies

- **Enforcement:** Create policy and take action to address fraud, impersonation, unregistered activities, and non-permitted claims related to the securities market.<sup>17</sup>
- **Violation Policy:** Establish policy to handle violations related to advice, recommendations, and claims by unregistered and non-permitted entities.<sup>18</sup>
- **Impersonation Protection:** Take strict measures against impersonation of SEBI, its officials, and regulated entities, Market Infrastructure Institutions ("MII") and their agents.<sup>19</sup>

#### C.2. Curative Measures

To address gaps in Preventive Measures, digital platforms should implement the following Curative Measures:<sup>20</sup>

**Content Analysis:** Establish policy and systems to analyze and address violative content and advertisements using AI/ML tools.

**Unlawful Content Reporting:** Set up reporting/escalation channels for unlawful content or advertisements, accessible to (i) SEBI, SEBI-regulated persons, including MIs, and (ii) platform users.

**Responsive Action:** Implement procedures to respond to reported content/advertisements (including posts, chats etc.) within a specified Turn Around Time, by taking actions including (i) take down, (ii) blocking, (iii) prevention of sharing, (iv) deactivating/disabling the links, and (v) blacklisting of repeat offenders.

### D. Actions

Digital platforms should address violations through the following structured actions:<sup>21</sup>

**Advertisements and Content:** Preventive and Curative Measures should be taken for violative advertisements and content. For advertisements, curative actions should only be implemented if preventive actions were not successful.

**Channels:** Remove channels after three instances of violative content.

**Entity:** Blacklist an entity after the removal of three channels operated by it.

### E. Turn Around Time For Action

The SDP Circular provides for a specific Turn Around Time ("TAT") for the above-mentioned actions to be taken, described below:<sup>22</sup>

##### Advertisements

- **Preventive Measures:** Identify and review advertisements prior to publication.
- **Curative Measures:** Address issues within 24 hours if preventive measures were insufficient.

##### Content/Channel/Entity

- **Preventive Measures:** Take action within 24 hours.
- **Curative Measures:** Resolve violations within 72 hours.

### F. Dispute Resolution

- The SDP Circular designates the relevant authority to resolve that may arise from platforms, entities and the SEBI.<sup>43</sup>
- **Platform and Entity Disputes:** SEBI will handle disputes between a platform and an entity.
- **Platform and SEBI Disputes:** The Securities Appellate Tribunal will manage disputes between SEBI and the platform.

## G. Application Deadline

Digital platforms who seek to be recognised as SDPs should submit their applications within 3 months from the issuance of the SDP Circular.<sup>24</sup>

## 4. ANALYSIS

### A. Balancing Free Speech with Consumer Protection

The SDP Circular broadly defines 'content', and subsumes 'advertisement' as a type of content. Hence, all user-posted materials including 'paid promotions,' or 'sponsored' videos would be subject to review by the SDP under the Preventive Measures.

While the rigorous pre-publication review of advertisements and post-publication review of other financial content (within a tight timeline) aims to curb misinformation, it may inadvertently suppress essential financial discourse related to the securities market. This could negatively impact content created and shared for the sole purpose of investor education and could curb financial discourse (including independent views and opinions of the public) on digital platforms. Such restrictions on financial discourse and education may not be in alignment with the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution.<sup>25</sup> The fundamental right to freedom of speech and expression may only be curbed by a law (in operation or yet to be created) that imposes a "*reasonable restriction*" on the right in the interest of, amongst others, the sovereignty and integrity of India, public order, or decency or morality.<sup>26</sup> Hence, restricting financial commentary to a select group of "*registered*" individuals may not align with the "*reasonable restrictions*" permissible to be imposed against the fundamental right to freedom of speech and expression.<sup>27</sup>

At the same time, safeguarding investors from misleading claims or advice by unregistered or unrecognized IAs and RAs is crucial. However, such measures should be carefully balanced to ensure they do not infringe on the fundamental right to free speech and expression. To safeguard interests at both ends of the spectrum—investor education and investor protection—SEBI could consider adopting a more nuanced and well-debated regulatory framework developed through the legislative process, by placing drafted rules or regulations before the Parliament to deliberate on the issue.<sup>28</sup> This approach would ensure a thorough deliberation and application of legislative intent, striking an appropriate balance between promoting financial literacy and safeguarding investors from potential harm.

### B. The Issue with Over-regulation

The SDP Circular seeks to regulate advertisement related content. However, the law in force has sufficient checks and balances to regulate the advertising sector. For instance, the *Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements*, 2022 prohibit the advertisement of goods, products or services prohibited under the law,<sup>29</sup> and this should include advertisements in contravention of the ACIR issued by the SEBI.

The Ministry of Consumer Affairs, Food and Public Distribution has taken an active stance for the regulation of endorsements done by influencers (including virtual influencers) on social media and have released a guide titled "*Endorsements Know-hows! for celebrities, influencers and virtual influencers on social media platforms*" in 2023.<sup>30</sup> This guide is in alignment with the provisions of the *Consumer Protection Act, 2019* to ensure that consumers are not misled by endorsements on social media platforms. Further, the creation of a self-regulating body for influencer marketing companies has also been suggested by the secretary of the Department of Consumer Affairs.<sup>31</sup>

Further, pursuant to the direction of the Supreme Court in the matter of *Indian Medical Association v Union of India*,<sup>32</sup> the Ministry of Information and Broadcasting issued a press released<sup>33</sup> to announce the introduction of a "*self-declaration certification*" for advertisers and advertising agencies which would also be applicable to advertisements published on 'electronic media' which includes digital platforms. This requires the advertisers and advertising agencies to submit the self-declaration to the digital platform prior to publication. This approach levies the responsibility on the person issuing the advertisement and not on the platform acting as a mere conduit for its display. You may read our detailed analysis over on the 'self-declaration certification' mechanism [here](#).<sup>34</sup>

Additionally, the Addendum dated August 17, 2023 to the *Guidelines for Influencer Advertising in Digital Media*<sup>35</sup> issued by the Advertisements Standards Council of India ("*ASCI*") specifically addresses influencers providing financial advice. It states that influencers providing advice related to stock/investments in the banking, financial services and insurance sector should be registered with the SEBI and details of such registration should be given to the consumers/other users. In fact, for other financial advice as well, which may include investor education, the influencer should have suitable educational qualifications. This is in addition to the other obligations such as material disclosures (like monetary compensation received by the influencer) being made. While these guidelines are not legally binding, they are followed by ASCI members as a standard practice.

### C. AI/ML tools vis-à-vis Smaller Platforms

The SDP Circular applies uniformly to all digital platforms seeking recognition as an SDP, without differentiating based on quantitative thresholds such as user base size. Consequently, all applicants, regardless of their scale or financial resources, are subject to identical obligations, irrespective of their size in terms of users, views and reach. A critical requirement under the Preventive Measures prescribed is the review of content and / or advertisements using AI/ML tools. However, implementing this measure may not be practical and cost efficient, especially for smaller platforms with lesser financial resources.

The required AI/ML tool would have to be 'fine-tuned' or trained to filter and assess the content (including advertisements) to check if it is compliant with SEBI regulations. This process would have to undertake by the digital platform and would require (i) expertise with SEBI related regulations to pick-up content/advertisements which are in violation, (ii) skilled man-power such as AI/ML experts to conduct the process and (iii) significant financial resources. For established digital platforms, that primary challenge would be to master SEBI regulations and develop an advanced algorithm capable to distinguish between genuine educational content and fraudulent financial advertisements or content. Further, even if the AI/ML tool is fine-tuned and trained, the outcomes produced may be subject to hallucinations and be inaccurate, for which a human oversight mechanism would have to be adopted. In addition to this hurdle, shortage of financial resources and lack of skilled man-power would make it even more difficult for smaller digital platforms to comply with these regulations and be categorised as an SDP.

Hence, subjecting all digital platforms to the same obligations would make it difficult for smaller digital platforms and start-ups to be recognised as an SDP. This goes against the government's envisaged Digital India policy to promote and encourage start-ups and small businesses.

### D. The Threat to Safe Harbour

Intermediaries are granted safe harbour protection under Section 79 of the Information Technology Act, 2000 ("*IT Act*"),<sup>36</sup> which means that

intermediaries would not be held liable for “*any third party information, data or communication link*”, i.e., content/advertisements published by a user, hosted or made available by the intermediary, subject to certain conditions. One of these conditions is that the function of an intermediary is “*limited to providing access to the communication system*”. However, the SDP Circular expands the duty of an intermediary beyond this limited scope and obligates monitoring of content/advertisements posted, which may risk the safe harbour protection granted to the intermediaries/digital platforms under Section 79.

## E. Regulatory Overlap with the IT Act

In addition to the existing regulations applicable to advertisements mentioned above, Section 79 of the IT Act states that intermediaries should observe “*due diligence*” as envisaged under the IT Act and the guidelines issued by the Indian central government. Due diligence obligations for an intermediary have been provided under the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (“**Intermediary Guidelines**”) issued under the IT Act. As per these Intermediary Guidelines, the intermediary is obligated to take “*reasonable efforts*” to ensure that certain categories of information are not displayed, uploaded, modified, published, transmitted, stored or shared over their platform.<sup>37</sup> The information categories include, amongst others, those related to (i) impersonation<sup>38</sup> and (ii) any misinformation or information which the knowledge and intent that is it “*patently false and untrue or misleading*”<sup>39</sup>. Hence, under the safe harbour regulations, there are sufficient safe guards to ensure that other users on the platform are not misled. Furthermore, the focus on intermediaries making reasonable efforts to ensure compliance allows them to incorporate principles into their policies, enabling a principle-based approach to addressing misinformation.

The intermediaries are obligated to remove or disable access to material only upon the receipt of “*actual knowledge*” that the material is linked to the commission of unlawful act. Such “*actual knowledge*” is received only through a court order or through a notification issued by the appropriate government or its agency.<sup>40</sup>

In addition to this, one cannot negate the possibility of a content/advertisement in contravention of SEBI regulations and the SDP Circular being published on the digital platform post the required review process. In such a situation, the digital platform may be held liable as their safe harbour would have been diluted under Section 79 (*as discussed above*). In the case of *MySpace v Super Cassettes Industries*,<sup>41</sup> the Delhi High Court upheld the intermediary’s (MySpace) compliance with the safe harbour principles as an “*affirmative defence*” against the allegation of the publication of infringed copyright content on MySpace’s website. Here, compliance with the Preventive Measures may dilute this “*affirmative defence*” of safe harbour protection, available to intermediaries for content they host.

## F. Tight TATS

The TAT for taking action against violative content/advertisement is notably shorter compared to other legislations addressing content review and takedown. This is particularly significant given the complexity of securities-related content, which may necessitate multiple levels of identification and review to ensure accuracy and compliance. For instance, as per the Intermediary Guidelines, intermediaries (including social media intermediaries) should acknowledge user complaints within 24 hours and resolve these complaints within 15 days.<sup>42</sup> Further, complaints related to certain categories, such as impersonation,<sup>43</sup> and any misinformation or information which the knowledge and intent that is it “*patently false and untrue or misleading*”<sup>44</sup>, should be resolved within 72 hours.<sup>45</sup> Additionally, intermediaries are given a TAT of 36 hours to disable or remove any information after the receipt of a court order or a notification from the appropriate government.<sup>46</sup>

## 5. WAY FORWARD

The analysis above underscores significant practical challenges associated with the Preventive and Curative Measures outlined in the SDP Circular. Notably, the absence of quantitative criteria, such as user thresholds, to differentiate between digital platforms places an undue compliance burden on smaller platforms and start-ups. This lack of distinction exacerbates the challenges they may face in meeting regulatory expectations. Inputs from stakeholders, big and small, must be considered before the implementation of the SDP Circular to ensure the development of the social media industry as a whole. Additionally, excessive measures, such as mandating the review of every piece of content, may infringe upon the fundamental right to freedom of speech and expression guaranteed under the Indian Constitution,<sup>47</sup> further complicating the regulatory landscape.

Moreover, the risk of over-regulation looms large, given the existence of existing laws that already govern content and advertisements. To counter this, the conduct of an inter-ministerial discussion should be considered to streamline efforts to control the spread of misinformation over digital platforms. An aligned strategy to counter misinformation on all fronts would go a longer way to ensure financial safety of the public, encourage fin-fluencers to spread educative content, and allow digital platforms to play to their strengths and not overreach.

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You can direct your queries or comments to the relevant member.

<sup>1</sup>*Interim Order cum SCN in the matter of unregistered investment advisory activities of Mohammad Nasiruddin Ansari/ Baap of Chart*, Securities and Exchange Board of India (Oct 25, 2023), available at [https://www.sebi.gov.in/enforcement/orders/oct-2023/interim-order-cum-scn-in-the-matter-of-unregistered-investment-advisory-activities-of-mohammad-nasiruddin-ansari-baap-of-chart\\_78333.html](https://www.sebi.gov.in/enforcement/orders/oct-2023/interim-order-cum-scn-in-the-matter-of-unregistered-investment-advisory-activities-of-mohammad-nasiruddin-ansari-baap-of-chart_78333.html) [Last accessed Dec 6, 2024]; Investment Advisors providing advice pertaining to the securities market are required to be registered with the SEBI as per the *Securities and Exchange Board of India (Investment Advisers) Regulations, 2013*.

<sup>2</sup>*Consultation Paper on the Draft Circular for Specified Digital Platforms*, Securities and Exchange Board of India (Oct 22, 2024), available at [https://www.sebi.gov.in/reports-and-statistics/reports/oct-2024/consultation-paper-on-recognition-as-specified-digital-platform\\_87839.html](https://www.sebi.gov.in/reports-and-statistics/reports/oct-2024/consultation-paper-on-recognition-as-specified-digital-platform_87839.html) [Last accessed Dec 6, 2024].

<sup>3</sup>*Consultation Paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers)*, Securities and Exchange Board of India (Aug 25, 2023), available at [https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-association-of-sebi-registered-intermediaries-regulated-entities-with-unregistered-entities-including-finfluencers\\_75932.html](https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-association-of-sebi-registered-intermediaries-regulated-entities-with-unregistered-entities-including-finfluencers_75932.html) [Last accessed Dec 6, 2024].

<sup>4</sup>Clause 2.3 and 2.4, CPF.

<sup>5</sup>Clause 4.2, CPF.

<sup>6</sup>Clause 1(b)(i), ACIR.

<sup>7</sup>Clause 1(c)(iii), ACIR.

<sup>8</sup>Clause 1(c)(iv), ACIR.

<sup>9</sup>SEBI issued the following amendments:

(i) *SEBI (Intermediaries) (Arrendment) Regulations, 2024*;

(iii) SEBI (Depositories and Participants) (Second Amendment) Regulations, 2024.

<sup>10</sup>Clause 6.1, SDP Circular.

<sup>11</sup>Clause 6.1(i), SDP Circular.

<sup>12</sup>Clause 6.1(viii), SDP Circular.

<sup>13</sup>Clause 6.1(ii), SDP Circular. The review process should consider whether the content and / or advertisement is:

- related to the securities market.
- published by a SEBI registered/recognised intermediary/entity or its agents.
- in the nature of recommendation or advice or services, and if it is issued by an entity permitted by SEBI to do so.
- a claim (explicit or implicit) of return or performance related to/in respect of security or securities. exclusively for the provision of education pertaining to securities market.
- redirecting users to another medium (such as Telegram, WhatsApp) and functioning as an advertisement.

<sup>14</sup>Clause 6.1(v), SDP Circular.

<sup>15</sup>Clause 6.1(ii)(b), SDP Circular.

<sup>16</sup>Clause 6.1(vi), SDP Circular.

<sup>17</sup>Clause 6.1(vii), SDP Circular.

<sup>18</sup>Clause 6.1(iii), SDP Circular.

<sup>19</sup>Clause 6.1(iv), SDP Circular.

<sup>20</sup>Clause 6.2., SDP Circular.

<sup>21</sup>Clause 7, SDP Circular.

<sup>22</sup>Clause 8, SDP Circular.

<sup>23</sup>Clause 9, SDP Circular.

<sup>24</sup>Clause 10, SDP Circular.

<sup>25</sup>Article 19(1)(a) of the Constitution of India, 1950 – “19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right—

(a) to freedom of speech and expression; ....”

<sup>26</sup>Article 19(1)(2) of the Constitution of India, 1950 – “(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”

<sup>27</sup>Article 19(2), Constitution of India, 1950.

<sup>28</sup>Section 31, Securities and Exchange Board of India Act, 1992.

<sup>29</sup>Guideline 9, Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022.

<sup>30</sup>Centre releases endorsement guidelines for Celebs and Social Media Influencer, PIB [Jan 20, 2023] available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1892527> [Last accessed: Nov 16, 2024].

<sup>31</sup>Department of Consumer Affairs, Government of India, organized a round table discussion with influencers, content creators, and their agencies on the recently released guidelines for celebrities, influencers, and virtual influencers on social media platforms in Mumbai, PIB, [Apr 19, 2023] available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1918003> [Last accessed: Nov 16, 2024].

<sup>32</sup>[Writ Petition (Civil) No 645/2022], Supreme Court.

<sup>33</sup>Supreme Court Mandates Self-Declaration by Advertisers/ Advertising Agencies Before Releasing Advertisements, PIB [Jun 3, 2024], available

at: <https://pib.gov.in/PressReleasePage.aspx?PRID=2022649#:~:text=The%20self%2Ddeclaration%20certificate%20is%20to%20certify%20that%20the%20advertisement,of%20Press%20Council%20of%20India> [Last

accessed: Nov 16, 2024].

<sup>34</sup>Self-Declaration Mechanism for Misleading Advertisements: A House Built On Sand, June 18, 2024, available at <https://www.nishithdesai.com/NewsDetails/15026#:~:text=June%2018%2C%202024,v.> [Last accessed: Nov 16, 2024].

<sup>35</sup>Guidelines for Influencer Advertising in Digital Media, ASCI, available at: <https://www.ascionline.in/wp-content/uploads/2023/08/GUIDELINES-FOR-INFLUENCER-ADVERTISING-IN-DIGITAL-MEDIA.pdf> [Last accessed: Nov 16, 2024].

<sup>36</sup>Section 79, IT Act –

“79. Exemption from liability of intermediary in certain cases.—

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.”

<sup>37</sup>Rule 3(1)(b), Intermediary Rules.

<sup>38</sup>Rule 3(1)(b)(vi), Intermediary Rules.

<sup>39</sup>Rule 3(1)(b)(v), Intermediary Rules.

<sup>40</sup>Section 79(3)(b), IT Act. The Supreme Court in *Shreya Singhal v Union of India*, (MANU/SC/0329/2015) upheld that this interpretation of the receipt of 'actual knowledge' by the intermediary to remove or disable the content.

<sup>41</sup>MANU/DE/3411/2016.

<sup>42</sup>Rule 3(2)(a)(i), Intermediary Rules.

<sup>43</sup>Rule 3(1)(b)(vi), Intermediary Rules.

<sup>44</sup>Rule 3(1)(b)(v), Intermediary Rules.

<sup>45</sup>Proviso to Rule 3(2)(a)(i), Intermediary Rules.

<sup>46</sup>Second Proviso to Rule 3(1)(d), Intermediary Rules read with Section 79(3)(b), IT Act.

<sup>47</sup>Article 19(1)(a), Constitution of India.

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