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FINFLUENCERS IN THE CROSSHAIRS: SEBI'S REGULATORY CLAMPDOWN

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Introduction

The Undoubtedly, we are in the age of social media, where a significant amount of information acquisition takes place through the consumption of influencer-generated media content. This has given rise to the era of 'finfluencers' which is a mixed bag of legitimate financial educators and unqualified persons promoting products, services or securities in which they hold certain monetary or non-monetary interest, without disclosing existence of such interest.

In our previous [article](#), we had highlighted how the present regulatory regime does not adequately address the finfluencer phenomenon. In this article, we seek to assess the regulatory approach of the Securities Exchange Board of India (SEBI) and the Advertising Standards Council of India (ASCI) in their journey to regulate finfluencers.

The SEBI approach

SEBI finally recognised the threat that unregulated finfluencer phenomenon pose and released the 'Consultation paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers)' on 25 August 2023 (SEBI Consultation Paper). The SEBI Consultation Paper is aimed at limiting the association of SEBI registered/regulated entities with unregistered entities like finfluencers.

At the outset, SEBI recognises that finfluencers are operating either as regulated entities registered with relevant regulators, such as, SEBI, Reserve Bank of India, Pension Fund Regulatory and Development Authority, or Insurance Regulatory and Development Authority (IRDA), or operating without any registrations, licenses and permits (i.e., unregulated entities).

The SEBI Consultation Paper proposes to disrupt the revenue model for unregulated finfluencers. The securities market watch dog seeks to prohibit SEBI registered entities or their agents from having any monetary or non-monetary relationship for any promotion or advertisement of their services/products, with any such unregistered finfluencer. Further, entities registered with SEBI or stock exchanges or Association of Mutual Funds (AMFI) shall not share any confidential information of their clients with any such unregistered entities.

SEBI prohibits the registered entities to pay a trailing commission as referral fee. For instance, for a mutual fund product that was purchased by a consumer in the influence of a finfluencer, through his / her referral link, no referral fee can be made payable to the finfluencer as commission for the consumer holding the mutual fund product. This aims to

hit at the core revenue stream of finfluencers. However, retail investors are permitted to refer products, services, etc., and may continue to receive referral fees in that regard from the SEBI registered entities. Interestingly, the SEBI Consultation Paper does not clarify the scope of 'retail investors' and in the absence of a clarification, it is difficult to ascertain whether a finfluencer would not fall within the scope of retail investor permitted to receive referral fees from SEBI registered entities.

With respect to finfluencers registered with SEBI or stock exchanges or AMFI, SEBI proposes to mandate display of registration number, contact details, investor grievance redressal helpline, along with appropriate disclosure and disclaimer on any posts. They are required to comply with the code of conduct under their relevant regulations and the advertisement guidelines issued by SEBI, stock exchanges & SEBI recognised supervisory body. This calls for a clarification on whether the scope of registered finfluencers referred herein is limited to entities registered under existing heads of regulated entities such as Investment Advisers (IAs), Research Analysts (RAs), stockbrokers, etc. or whether SEBI intends to carve out a separate registration requirement for finfluencers.

Therefore, SEBI in its approach assumes perversity of finfluencers who are unregulated and attempts to eliminate them altogether. SEBI has in fact together with the SEBI Consultation Paper, released the Consultation Paper on mechanism for fee collection by SEBI registered IAs and RAs proposing a unique fee payment platform for them that would help investors identify, isolate and avoid unregistered entities/finfluencers.

ASCI's view

The rampant misuse of social media to advertise financial products led the ASCI to step in and extend its framework to finfluencers. Only a week prior to the release of SEBI Consultation Paper, ASCI by way of an addendum to the Guidelines for Influencer Advertising in Digital Media on 17 August 2023 (ASCI Influencer Guidelines 2023) had created a requirement for finfluencers to have the necessary qualifications and certifications in order to provide financial information and advice to consumers. However, the ASCI Influencer Guidelines 2023 are ambiguous on the nature of SEBI registration that would be required for finfluencer as the current regulatory regime does not provide clarity towards such registration and disclosure requirements.

Is ASCI relevant?

ASCI is an independent, voluntary self-regulatory organisation that aims to ensure advertisements in India are honest, truthful, decent, safe, fair and are duly responsible towards safeguarding the interests of the consumer. In an effort to protect consumer interests, the ASCI has developed a self-regulatory code (the ASCI Code). The ASCI Influencer Guidelines 2023 form a part of the ASCI Code.

ASCI is neither a government body nor empowered in any manner to formulate rules for the public or relevant industries. While the ASCI has developed a mechanism for complaints against non-compliance, there is no mechanism to enforce the compliance of any recommendation as highlighted by the Delhi High Court in the case of *Procter and Gamble Home Products Private Limited v Hindustan Unilever Limited* (2017 SCC OnLine Del 7072). Some regulators like IRDA and cable networks require adherence for insurance companies to ASCI Codes. However, ASCI is built on the touchstone of 'self-regulation' and most advertisers voluntarily abide by the recommendations of the ASCI. Therefore, ASCI is a good indicator of market mood and perceptions to certain regulations.

Future of Finfluencers

SEBI has rightly highlighted the issue that finfluencers are often unregistered individuals who, with their engaging content, influence consumers into purchases which are rooted in the gains of finfluencers rather than that of the consumers. Thus, by proposing restriction on SEBI registered entities to enter into engagements with unregulated finfluencers, it aims to safeguard investors from any material risks and losses.

However, while requiring influencers to be registered to undertake any engagement with SEBI regulated entities, it is relevant to bear in mind that both SEBI and ASCI do not provide for registration requirements specific to influencers. SEBI operates with the assumption that influencers may legally operate by registering themselves as any of the SEBI regulated entities such as – IAs, RAs, etc.

SEBI can potentially look at influencers as a separate category and carve out specific regulatory requirements of registration, disclosure, etc., for them. With the rise in trading activity across the country, influencers have become a key channel for many brands. SEBI, in an attempt to isolate influencers, might potentially fail to adequately harness the power of digital media to increase overall financial awareness in a fair and transparent manner. We hope that as we progress to finally regulate the influencers, SEBI is able to take a more forward-looking approach to this new market.

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