

# Bird & Bird ATMD

## Legal Update: Influencing The Influencers



*Last month, the United Kingdom's ("UK") competition watchdog released its latest guidelines for social media influencers. The guidelines elucidate the application of existing consumer protection laws and industry rules on advertising to the sphere of social media influencers ("**Influencers**"). In January 2018, the Advertising Standards Authority of Singapore ("**ASAS**") concluded a public consultation seeking post-implementation feedback on Singapore's equivalent, the Guidelines for Interactive Marketing Communication & Social Media ("**Singapore Guidelines**").*

*In particular, it sought feedback on areas where the Singapore Guidelines can be fine-tuned, and the areas that ASAS should consider including in an update of the same. The ASAS has yet to publish its response to the feedback received. In light of the UK's recent efforts to fortify consumer protections in the context of social media marketing, how do the existing Singapore Guidelines hold up against their UK counterpart? And what can we do to improve the Singapore Guidelines?*

### The UK Guidelines

The UK's Competition & Markets Authority ("**CMA**") had published two successive sets of guidelines targeted at Influencers ("**UK Guidelines**"). The first ("**Advertising Guidelines**") were released in September 2018 and developed in collaboration with the Advertising Standards Authority ("**ASA**"), which is the UK's advertising regulator, and the Committee of Advertising Practice ("**CAP**"), which is the UK advertising industry's self-regulatory body. The Advertising Guidelines provide guidance on relevant advertising rules, and practical tips to avoid running afoul of such rules, by making clear when social media posts constitute advertisements. The Advertising Guidelines canvass the rules applicable to Influencers, what the ASA considers to be an advertisement, how to make clear that advertisements are advertisements, what the CMA's

requirements are, and what happens when someone complains about a social media post to the ASA.

The second set of guidelines, published in January 2019 ("**Transparency Guidelines**"), focuses on transparency with social media followers and provides further guidance on how Influencers should disclose posts for which any form of reward was received. The Transparency Guidelines specify that such disclosure should be made upfront, on all content, and using language that is clear and recognisable to the intended audience. The obligation to disclose is a continuing one, meaning the promoted products must continue to be disclosed when they appear in future content.

While the UK Guidelines do not have force of law, they are a useful guide to how existing consumer protection laws and industry rules apply to Influencers and their content. In particular, the UK

Guidelines focus on the Consumer Protection from Unfair Trading Regulations 2008 ("**UK Regulations**"), enforced by the CMA, and the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing ("**UK Code**"), enforced by the ASA. Influencers who post misleading content risk breaching consumer protection laws and industry rules, and could face enforcement action from the CMA (which has both civil and criminal enforcement powers) and the ASA, among others. The industry rules referred to in the UK Guidelines are backed by sanctions which include compelling Influencers to amend or withdraw content, or subjecting Influencers to pre-vetting of material before publication.

## The Singapore Guidelines

In August 2016, in response to consumer feedback, the ASAS issued the Singapore Guidelines to regulate advertising on interactive and social media. Under the Singapore Guidelines, which form part of the Singapore Code of Advertising Practice ("**SCAP**"), the key obligation of Influencers is to prominently disclose commercial relationships in a manner that is both easy to understand and appropriate for the form of communication, and clearly distinguish paid reviews, testimonials and endorsements from other editorial content. Additionally, the Singapore Guidelines prohibit digital marketers from disguising reviews as being from impartial sources, and boosting user engagement through fraudulent means such as the purchase of bulk 'likes' and the creation of fake accounts.

While the Singapore Guidelines and SCAP are not legally binding, non-compliance can result in industry-level sanctions. For example, the ASAS has the power to instruct flouters to amend or withdraw their posts. Additionally, marketers who fail to comply with the Singapore Guidelines risk having their advertising space withheld or their trading privileges withdrawn. For severe cases, the threat of adverse publicity looms large as the ASAS may publish details of the outcomes of its investigations.

## Measure of the Comparisons

A significant distinction between the Singapore Guidelines and UK Guidelines is that the former are part of the industry rules on advertising, while the latter is a collation of the pre-existing industry rules *and laws* that are applicable to social media marketing. As the Singapore Guidelines constitute only industry rules, an Influencer perusing them

would not get a full picture of the applicable laws and regulations relevant to his craft. For instance, the Singapore Guidelines do not refer to Singapore's Consumer Protection (Fair Trading) Act, which provides that a person who, in the course of his business, makes a false claim in promoting the use or purchase of goods or services can be sued by the consumer. Perhaps it is worth considering how to dovetail the Singapore Guidelines to the applicable laws and regulations to add bite to the bark. Cross-references to the relevant laws and regulations would serve the dual purpose of giving Influencers a more complete picture of the rules applicable to digital marketing, and providing aggrieved consumers with a better understanding of their rights under the law.

While the Singapore Guidelines do comprehensively set out the minimum ethical standards expected of social media advertisers, the UK Guidelines are a compendious and digestible guide for the uninitiated. For example, the Advertising Guidelines spell out the circumstances under which the UK Code and UK Regulations will apply. The former applies to all advertisements – that is, where the partner brand has made some form of payment to the Influencer, *and* has editorial control over the content. The latter applies so long as there has been 'payment', even if the partner brand has no control over the content of the post. The Advertising Guidelines also provide guidance as to what constitutes "payment" and "control", and include information about what happens after the ASA receives a complaint about a post, as well as a list of resources available to Influencers. An infographic flow chart helps Influencers determine what rules they must abide by. The Transparency Guidelines provide detailed advice on complying with the UK Code and UK Regulations, including negative examples of practices which the CMA considers to be insufficiently transparent. Collectively, the UK Guidelines form a compendium of information for Influencers. An expansion of the Singapore Guidelines to include a broader range of information would be far easier to comprehend for the uninitiated.

Thirdly, in contrast with its UK counterpart, the Singapore Guidelines provide Influencers with greater autonomy in deciding how to disclose sponsored content. The guidance notes to the Singapore Guidelines approve wording such as "*sp*", "*sponsored*", "*endorsed*" and "*in partnership with*" as being sufficient for disclosing the nature of content as sponsored. The UK Guidelines, on the other hand, are more prescriptive, endorsing only

wording that clearly references the post as an "ad" or "advertisement", and state that words such as "sponsorship" and "in collaboration with" do not go far enough to make clear that it's advertising. It is worth considering whether the Singapore Guidelines ought to be tightened in this respect.

## Conclusion

Since the introduction of the Singapore Guidelines in 2016, the number of controversies relating to influencer transparency has not abated. The Singapore Guidelines, while comprehensive as an ethical code, may not constitute a complete and easily digestible guide for Influencers on the boundaries and obligations associated with social media advertising. The contents and design of the Singapore Guidelines are functional, but perhaps more could be done to make them easier to understand for their intended audience. Finally, further thought should also be had as to whether or not to make the Singapore Guidelines and the SCAP legally binding and to give it the force of legislation.

*This article does not constitute legal advice and is intended to provide general information only based on the currently available information. Please contact our lawyers if you have queries on any specific legal matter.*

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