



# **Self-Declaration Mandate for Ads - The Need to Ad(d) Nuance and Subtract Compliance Burdens**

July 2024



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# Introduction

Marketing is an essential tool for any business to establish its identity. Advertising, which is a critical component of marketing is used to build brand awareness, drive profit and growth and attract or retain customers. Essentially, advertising enables brands to communicate with consumers and generate recall value. Successful campaigns like Nike's 'Just Do It' and Snickers' 'You're Not You When You're Hungry' exemplify this by achieving lasting brand recognition. Advertising plays an equally important role for consumers. It helps establish a relationship with brands and allows customers to make informed choices about the goods or services they use. Targeted ads further enhance consumer satisfaction by minimising the effort required to gain visibility to a suitable product.

This symbiotic relationship between an advertiser and a consumer sustains due to suitable regulatory regimes, that are predictable and easily compliable. Globally, most jurisdictions have strong self-regulation in place for advertising. Until recently, India has also been home to a similar ad regulation ecosystem. However, a new directive by the Supreme Court (Court) could upend this *status quo*. This issue brief sheds light on the new regulations envisioned by the Court and analyses the possible impact – on extant ad regulation, the ad industry, and the advertiser's ability to conduct business with ease. We also analyse the Ministry of Information and Broadcasting's (MIB) subsequent advisories which provide more clarity on the regulatory regime.

The importance of accurate advertisements produced in good faith is not disputed. However, achieving good ads should not come at the cost of creative liberties or business processes. This paper argues that the Court's directive on self-declaration for advertising presents significant challenges for the booming Indian ad industry. These challenges could hinder growth, innovation, and ease of doing business, ultimately impacting consumer choice and experience.

## Recent Developments in Ad Regulation in India

### (a) The Supreme Court’s Recent Observations on Ad Regulation in India

On 7 May 2024, the Supreme Court passed an order while hearing a case against herbal products manufacturer *Patanjali Ayurved*. The Court observed that more needs to be done to regulate the content of ads in India.<sup>1</sup> The MIB shared data on the workings of the existing complaints mechanisms for ad regulation with the Court. The Court found that the existing complaints mechanisms for ad regulation in India were insufficient and that complaints were often transferred between departments without resolution. To address these shortcomings, the Court exercised its power under Article 141 of the Constitution and laid down binding law to establish a new regime for ad regulation.<sup>2</sup>

We elaborate on the timeline of the *Patanjali Ayurved* case below, which ultimately culminated in the creation of a new self-declaration mandate for advertisers and advertising agencies.

#### 1. Timeline of the *Patanjali Ayurved* Case

In 2021, the Indian Medical Association (IMA) filed a case against *Patanjali Ayurved* for allegedly using ads to claim their products can cure chronic issues like diabetes and infertility. The company also advertised a medicine, *Coronil*, as a cure for COVID-19. The IMA claimed that such ads are misleading and an insult to modern medicine. *Patanjali* maintained that these advertisements were not misleading. As the matter went on, in November 2023, *Patanjali Ayurved* assured the Court it will not partake in such advertising practices.

Despite its assurance, *Patanjali Ayurved* continued advertising misleading claims, leading to a temporary ban on promoting any product claiming to cure chronic illnesses. *Patanjali Ayurved* allegedly defied the ban and continued advertising these products. Finally in April 2024, the promoters of the company were held in contempt for non-compliance with the Court’s repeated instructions. The Court ordered the company to issue public apologies and added key government stakeholders like the MIB and the Ministry of Electronics and Information Technology (MeitY) as parties to the matter. In May 2024, after hearing all parties, the Court decided to set down a new regime for ad regulation.

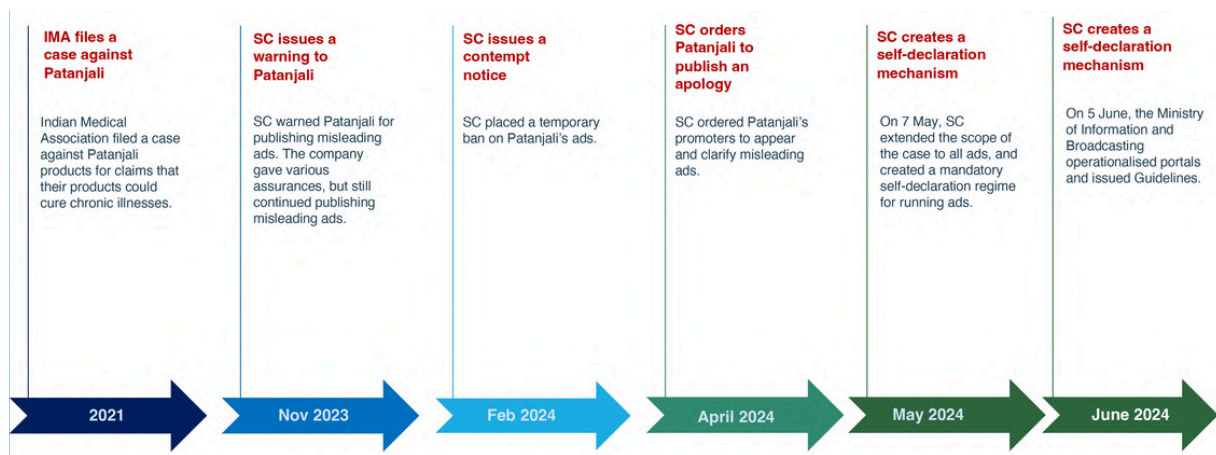


Fig. 1: Timeline of the *Patanjali Ayurved* Misleading Ads Case

## 2. Key Observations Made in the Court's Order

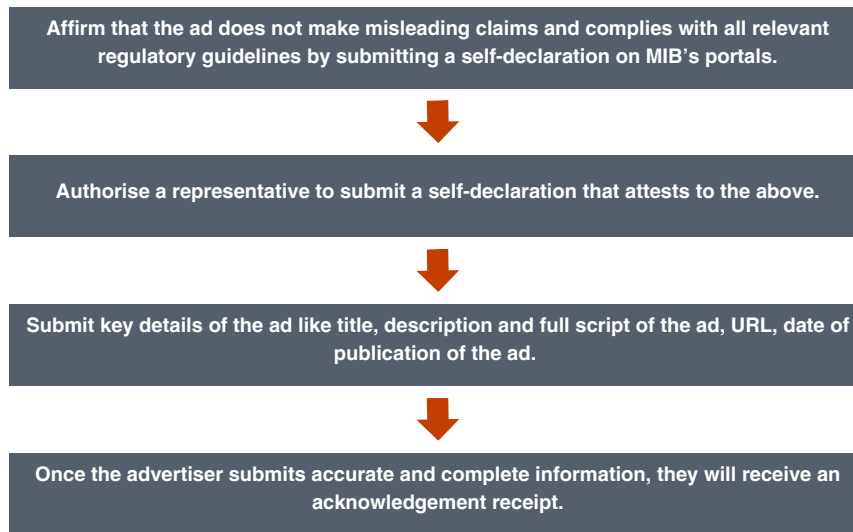
The Court's order aimed to establish a new mechanism of curbing misleading ads, emphasizing the public interest implications of such advertisements, particularly those related to health. It eventually expanded its scope of inquiry to all kinds of advertising. The order included the following key observations:

- The endorser and the advertiser must be held equally liable in cases of misleading advertisements and similar issues.
- The Court moved away from the current system of *ex-post* ad regulation where different regulators act against advertisers based on harm caused. Going forward, all advertisers and advertising agencies must submit self-declaration forms to confirm that their ads are not misleading and comply with existing laws before airing them on TV, print, or the 'internet'.
- Once a declaration is made, the advertiser must provide proof of submission to the relevant broadcasters, printers, or other publishers who will run their ads. These publishers must hold on to the declaration as records of submission.
- The MIB was directed to set up portals on which these forms can be submitted within four weeks from the date of passing of the order. The new mechanism had to be enforced as soon as the portals become operational.
- The Court also urged the MIB, MeitY and the Ministry of Consumer Affairs to devise mechanisms that encourage consumers to file complaints and ensure that these complaints are taken to their logical conclusions. To check compliance with the order and hear other parties involved, the next date of hearing is 9 July 2024.

## 3. MIB's Reaction to the Order

In response to the Court's order, the MIB took immediate action. On 3 June, the MIB activated two portals - the Broadcast Seva Portal (for TV ads) and the Press Council of India portal (for print and internet ads).<sup>3</sup> The MIB also published a set of guidelines (Guidelines) which provided directions on complying with the self declaration mandate.<sup>4</sup> The Guidelines were made applicable to all ads run after 18 June 2024. To supplement the Guidelines, the MIB issued its first advisory (First Advisory) to private satellite TV channels, FM radio stations, online curated content providers (OCCPs), digital news publishers, and newspapers on 3 June.<sup>5</sup> The First Advisory clarified the scope of the Guidelines, stated that non-compliance will lead to liability as per applicable laws, and directed broadcasters and publishers to strictly adhere to the Guidelines' requirements and refrain from running any advertisement until and unless a valid self-declaration certificate is submitted by the advertiser.

Broadly, the Guidelines and the First Advisory set the following obligations on an advertiser or advertising agency:



**Fig. 2:** Obligations on Advertisers and Advertising Agencies

The Guidelines and the First Advisory also lay down the following compliance obligations for the broadcaster or publisher of the ad:



**Fig. 3:** Obligations on Broadcasters and Other Publishers

## **(b) How Would the New Regime Impact Existing Ad Regulation in India?**

Advertising in India is regulated by different ministries and statutory bodies, which enact and enforce varying statutes and Guidelines. These include the MIB, the Central Consumer Protection Authority, and the Ministry of Health and Family Welfare (MoHFW) among others. These bodies regulate advertisements employing various approaches such as consumer protection and media governance. Additionally, these regulations are tailored to specific mediums or advertisers. They lay out the law and prescribe penalties in cases where it is contravened. Thus, the regime is an *ex-post* one, which can hold advertisers accountable for illegal conduct, once the ad has run. The new regime as prescribed by the Court seeks to upend this *status quo* and create *ex-ante* obligations, i.e., the conduct of advertisers will be evaluated before the ad is run.

From 18 June 2024 onwards, advertisers and advertising agencies were supposed to be in compliance with the aforementioned obligations. Essentially, compliance with the obligations would precede their ad strategies. These obligations came with their own set of challenges, such as an ambiguity in the definition of what an ad is, confidentiality issues on the portals, and possible adverse effects on the ad industry. Some of them are captured below.

### 1. The Definition of an ‘Ad’ for the Purposes of the Guidelines Remains Unclear

A host of regulations that govern advertising in India have varying definitions of what constitutes an ‘advertisement’. These either target varying objectives such as consumer protection and media governance or are industry-specific. So, there is no all-encompassing definition of an advertisement or a singular approach to regulate advertising across sectors and media. The Court’s order fails to take into consideration these varying definitions and multiple approaches of ad regulation in India. Following the Court’s order, the MIB has devised a self-declaration mandate for advertising which doesn’t factor in the complex ad regulation ecosystem. To illustrate the concern, we highlight some definitions below:

	Statute/Guideline/Code	Theme	Definition of Ads
1	Code for Commercial Advertising on Doordarshan <sup>6</sup>	Media Governance	“Advertisement” includes any item of publicity for goods or services inserted in the programme telecast by Doordarshan with a view to increase sales.
2	Indecent Representation of Women (Prohibition) Act, 1986 <sup>7</sup>	Consumer Protection	“Advertisement” includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.
3	Consumer Protection Act, 2019 <sup>8</sup>	Consumer Protection	“Advertisement” means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents.
4	Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 <sup>9</sup>	Industry-specific	“Advertisement” includes any notice, circular, label, wrapper or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke.
5	Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 <sup>10</sup>	Industry-specific	“Advertisement” includes any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas.



6	The Food Safety and Standards Act, 2006 <sup>11</sup>	Industry-specific	“Advertisement” means any audio or visual publicity, representation or pronouncement made by means of any light, sound, smoke, gas, print, electronic media, internet or website and includes through any notice, circular, label, wrapper, invoice or other documents.
7	Indian Medical Council (Professional Conduct, Etiquette, and Ethics) Regulations, 2002 (Published in Part III, Section 4 of the Gazette of India, dated 6th April, 2002) <sup>12</sup>	Industry-specific	While the Regulations do not define advertisements, they state that physicians should observe all applicable laws of the country that regulate the practice of medicine. They must also adhere to provisions laid down by statutes like the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 which apply to advertising.
8	The Bharatiya Nyaya Sanhita (BNS) <sup>13</sup>	General Regulation (Ex-post)	The BNS prohibits the sale, advertisement, or distribution of any obscene material, including books, pamphlets, drawings, paintings, or representations. It also forbids the distribution, circulation, or advertisement of any picture or printed or written document that is grossly indecent.

As illustrated by the varying definitions of an ‘advertisement’ in existing laws and regulations, the Court’s order and the MIB’s Guidelines fail to address the complexity of the ad regulation ecosystem in India by not clarifying what qualifies as an ‘ad’ within their ambit. The First Advisory clarified that it covers ‘all advertisements’ under its ambit, and excludes classifieds (except those related to consumer products), personal advertisements, statutory advertisements, public information notices, tenders, and advertisements related to public functions. We elaborate on some of the unintended consequences of this definition and their impact on the different kinds of advertising in India.

#### ● Case 1: Comment Section - the New Ad Space

Food delivery platforms today have proactive social media teams. Their ad strategy on social media platforms centres on capitalising on trending memes to ensure brand visibility and for target consumers. Often, a brand’s Instagram handle also interacts with content posted by other creators, via comments and likes.

Considering the wide definition of ‘advertisements’, such strategic actions could also be considered ads, as they promote the brand, create a relationship between the brand and the customer, and generate a recall value. Since the Guidelines applied to all ads on the internet, it is possible that such social media posts will also be covered within their ambit. Brands would have to comply with the self-declaration requirements before making social media posts as well.

This raises concerns about dual obligations for publishers who also advertise their own products. For example, while brands host their ads on social media platform Instagram, the platform itself also runs ads which promote 'Instagram'. In such a case, the platform would have dual obligations - of both the advertiser and the publisher, casting a heavy compliance burden.

Thus, for the purposes of the Guidelines, it is essential that the definition of an ad be clarified, and the contours of what qualifies as an ad on the 'internet' be justified as well. Adopting the Advertising Standards Council of India's (ASCI) definition could be a possible solution. It specifies that ads are 'paid-for' communications,<sup>14</sup> and eliminates grey areas like self-promotion by brands on their social media. Thus, a brand's social media activity would fall out of the ambit of an ad, as it would not be a 'paid-for' communication but a self-made one.

## 2. The Guidelines can Hamper the Booming Ad Industry

India's advertising industry grew by 8.6% in 2022.<sup>15</sup> By the end of 2025, the expected market size is Rs 1,12,453 crore. Digital advertising is booming as well. It surpassed traditional mediums like TV and print for the first time in 2023.

Brands greatly value advertising, especially on the internet. It provides unparalleled reach and brand awareness. Digital advertising is so relevant today that the majority of ad spending next year is anticipated to be on online platforms. As per the latest edition of the FICCI EY Media and Entertainment Report, digital advertising grew by 15% in 2023, to become 51% of the total advertising revenue.<sup>16</sup> The report also predicts that digital advertising will continue to grow, on the back of improved governance. More than 30,000 small and medium fast-moving consumer goods brands now compete for ad market share to widen and deepen markets, earn customer loyalty, and differentiate products.<sup>17</sup> A self-declaration regime can stifle this growth in the following ways:

- Case 2: The Speed of Programmatic Ads

A pre-declaration mechanism could prove to be especially onerous in the context of digital advertising on the internet. The Supreme Court's order did not take into consideration that advertising on the Internet is largely automated through programmatic advertising. Automated tools allow ads to be sold and published in a fraction of a second. Programmatic advertising has emerged to solve one problem: match the high volume of advertisements with the ever-multiplying ad space available on websites and apps.<sup>18</sup>

To explain the complex ecosystem of programmatic advertising, the underlying process needs to be elaborated. For ads to be placed on websites or apps, publishers and advertisers use three ad tech products - *publisher ad servers* (for publishers to manage their ad spaces), *ad buying tools* (for small and large advertisers to buy ads), and *ad exchanges* (where buyers and sellers meet).<sup>19</sup> Ad sales occur through auctions. To illustrate this process, when a webpage loads, a publisher ad server requests a bid for a number of ad views (impressions) to an ad buying tool. The ad exchange receives the bid request, makes it more targeted by adding user data, and sends it to the ad buying tools. It then receives bid prices, determines the winner, and executes the sale on the publisher ad server. Finally, the ad is shown, all in a split second. This type of advertising limits human intervention to streamline the process and increase speed.

For live events, like a cricket match, programmatic advertising is used for ads which appear pre-roll, mid-roll, and post-roll of such events. All these ads are transacted when the match is live, and the decision to run one ad over another is based on the traffic, guarantee of revenue and the demographic watching the match. These unpredictable factors also make it challenging to predict a targeted advertising strategy for such live events. Advertisers prefer using automated tools to transact their ad inventory for these events, as it offers them access to a large pool of demand accommodating changes in traffic and requiring minimal account management.

A preliminary reading of the Order and the initial MIB Guidelines indicated that the self-declaration mandate seemed to be designed for static, non-automated advertising. This approach is incompatible with the dynamic and automated ad transactions carried out through programmatic advertising tools. Programmatic auctions allow advertisers to compete for ad space based on real-time demand as discussed in the cricket match example. A pre-declaration could make advertisers miss out on opportunities arising from sudden surges in viewership. Delays could translate to ad space not getting filled and impact overall revenue for both advertisers and publishers. The automated nature of programmatic advertising makes verification by authorities or publishers practically impossible.

- Case 3: Creativity in Moment Marketing

Advertising, especially on the internet, is rooted in one thought - what appeals to a prospective consumer. Advertisers and advertising agencies utilise various creative measures to target their consumer base. Moment marketing is one such example.<sup>20</sup> It comprises timely communication with a consumer, based on an event or happening, combined with subtle brand integration. For instance, Amul leverages moment marketing effectively through the Amul Girl cartoons. The smart use of drawings to depict contemporary events or issues has ensured that these campaigns remain in the cultural consciousness of its audience.<sup>21</sup>

Social media has enabled brands to take their moment marketing up a notch, by undertaking it in real-time.<sup>22</sup> It helps enhance brand impressions and increase visibility by helping the brand attain virality.

To illustrate, consider a post promoted on a brand's Instagram handle. The post makes a reference to India's successful campaign in the recently concluded T20 World Cup. It is based on real-time updates from matches. In such cases, time is of the essence. Pre-scheduling all advertising to submit self-declaration forms would impede a brand's ability to undertake moment marketing as they would not be able to capitalise on live events. This could lead to a brand losing out on making the most of a key marketing opportunity.

- Case 4: Limit on Testing Multiple Ad Creatives

Advertisers test multiple creatives on social media before they can finalise one that audiences respond to the best.<sup>23</sup> The advent of Artificial Intelligence (AI) has further enabled and enhanced this process.<sup>24</sup> It allows for the creation of thousands of creatives from a small set of mother creatives, while conserving time and manpower. In such a scenario, advertisers would have to undertake an onerous task by filing hundreds of self-declaration certificates. This could set them back on their strategies and timelines, limit the creativity in their advertising, and keep them from availing the benefits offered by advertising.

### 3. Concerns Around Privacy and Confidentiality on the Portals

While the revised guidelines issued in July 2024 address some of these concerns, it's worth examining the privacy and confidentiality issues present in the initial framework.

News reports suggested that the *Broadcast Seva Portal* and the Press Council of India portal are searchable.<sup>25</sup> The First Advisory also implied this, as it states that publishers can verify form submission from the portals. This raises privacy concerns for the authorised representatives who are signatories to the forms. The MIB Guidelines required them to submit their mobile numbers and email addresses along with the certificates.

Additionally, advertisers and advertising agencies would have to submit declarations some time before they plan to actually run an ad. The searchability of the portal could allow competitors to gain access to upcoming strategies, product launches, or other confidential information. This could create an unfair advantage for competitors and breed unhealthy competition in the marketplace. It could also discourage advertisers and advertising agencies from carrying out honest self-declarations and complying with the Guidelines, frustrating their intent.

### 4. Impact on Ease of Doing Business

The Guidelines would be onerous for all players to implement. This is because they posed heavy compliance burdens, depending on the size of the advertiser and publisher.

- On broadcasters and publishers:

Large broadcasters would have to keep track of thousands of forms every day, due to the sheer volume of ads that are published by them. They could also have to account for different self-declaration forms in different languages, which would further pinch on resources (both manpower and capital). Smaller broadcasters and publishers, like local radios or regional daily newspapers, would also face similar challenges. Due to a limited pool of resources available at their disposal, keeping track of multiple self-declarations could be difficult. They may also lack the technical know-how to operate the portals to cross-verify advertisers' declarations. The obligations cast by the Guidelines could thus make them resource strapped and stifle their functioning.

- On advertisers:

- (Advertisers and advertising agencies would have to submit proofs to hundreds of entities that run their ads simultaneously. This would shift focus from creative work to administrative tasks.
- Advertisers would fall back on planned advertising launch cycles and announcements. They would have to dedicate more manpower than ever and create new internal systems to carry out the obligations laid down in the Guidelines. Depending on the size of the advertiser, the resource allocation would go beyond just one authorised signatory. This elaborate execution process would slow down the advertising cycle, impact day-to-day operations, and prevent businesses from capitalising on the right time to expand their offerings.
- The high compliance costs would eat into most of the small businesses' marketing budgets, discouraging them from complying. Many of these may also not have the resources or technical expertise to operationalise their activity on the portals.

- Common perception is that advertising costs are often offset to the consumer.<sup>26</sup> In such cases, as advertising helps to boost sales, the final product pricing depends on the impact of marketing campaigns as well. To carry out effective implementation of the Guidelines, a brand would have to further enhance marketing budget. Ultimately, the end consumer would bear the brunt of these increased costs for advertisers, agencies, and publishers. For example, ad agencies would have to bill brands for providing them compliance-related services as well. This would impact the ability of smaller businesses to get ads produced. Similarly, the brand would also try to justify the added workload and expenditure by pricing their goods and services higher. This would reduce a brand's customer base, lead to lesser retention, and also hamper consumer choice and experience.
- How the Guidelines would impact international advertisers and advertising agencies remained unclear. Today, Indian consumers have greater visibility on international brands and their advertising campaigns due to social media and the internet. Foreign brands often also target Indian audiences. Enforcing these Guidelines and expecting international advertisers to comply could discourage them from catering to the India market. This could negatively impact the interests of Indian consumers, by limiting their awareness and access to a greater pool of goods and services to choose from.

The First Advisory clarified that non-compliance with the Guidelines will result in action in accordance with applicable laws and regulations. This raised a pertinent question - what purpose is the additional layer of compliance in the form of a self-declaration serving? The regime seemed virtually unaffected, but on closer scrutiny, significant challenges became apparent. These could have varying consequences, ranging from deterring the creativity of the ad industry, stifling its growth, and impacting ease of doing business. Due to the inherent frequency, volume, and pervasiveness of advertising, ensuring compliance with the Guidelines in letter and spirit also seemed to be impossible.



# Is Stronger Self-Regulation the Best Way Forward?

Given the concerns raised about the self-declaration mandate, this section explores alternative approaches to ad regulation by examining international best practices. It highlights the prevalence of strong self-regulation in other jurisdictions, suggesting that a similar approach could be more effective in India.

## (a) Self-Declaration is Exceptional in the Global Context

Globally, most jurisdictions have advertising regulations akin to India - strong self-regulation and various laws and regulations governing advertising in an *ex-post* manner. Some international practices are highlighted below:

S. No.	Jurisdiction	Is advertising subject to self-declaration?	How are ads regulated?
1.	United States	No	<p>The consumer protection regulator - the Federal Trade Commission (FTC) regulates advertising in the United States.<sup>27</sup> Per the FTC Act, claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based. Ancillary laws and regulations also apply, depending on the subject matter of the ad. These include the Communications Act of 1934, the Children’s Online Privacy Protection Act (COPPA), and the Lanham Trademark Act, among others.</p> <p>Upon receiving a complaint, the FTC will conduct an investigation and may initiate an enforcement action. The FTC has a variety of legal remedies at its disposal, including imposing cease and desist orders, civil penalties, and corrective advertising and disclosures. Self-regulation in advertising is also prevalent, largely in outdoor advertising.</p>
2.	European Union	Partly yes (Voluntary self-declaration obligations exist for sale of goods)	<p>The regulatory framework, including the Unfair Commercial Practices Directive (UCPD) and the Audiovisual Media Services Directive (AVMSD), ensures that advertisements are not misleading and are socially responsible.<sup>28</sup> Compliance is enforced through national regulatory bodies and self-regulatory organisations coordinated by the European Advertising Standards Alliance (EASA).<sup>29</sup></p> <p>The EU does implement some self-declaration mechanisms, but these apply to products being sold in the EU markets. A mutual recognition declaration is a voluntary declaration that can help authorities across EU countries to show to authorities across EU countries to show to authorities that their goods comply with the rules in another EU country, where they are already being sold.</p>

			<p>However, this declaration is voluntary. In a similar vein,<sup>30</sup> products being sold in EU markets also carry a CE mark. The Conformité Européene (CE) Mark is defined as the European Union's (EU) mandatory conformity marking for regulating the goods sold within the European Economic Area (EEA) since 1985. The CE marking represents a manufacturer's declaration that products comply with the EU's New Approach Directives. The CE marking, mandatory for products sold within the EEA, serves as a manufacturer's self-declaration of product conformity with EU standards, but not as a quality assurance guarantee.</p> <p>However, a CE marking is not self-declaration. It does not provide any specific information to the consumer. It is not a quality assurance declaration, does not show evidence of third-party testing, and should not be confused with any independent certification mark of the type issued by international or European notified test bodies.</p>
3.	United Kingdom	No	<p>The Advertising Standards Authority (ASA) is a self-regulatory body which regulates ads by enforcing the Committee of Advertising Practice (CAP) Code, which requires that all advertisements must be legal, decent, honest, and truthful. The CAP Code is written and maintained by the Committee of Advertising Practice (CAP) which is made up of representatives of advertisers, agencies, media owners and other industry groups. The ASA, which was also formulated by the CAP, handles complaints and monitors advertisements to ensure compliance.<sup>31</sup></p> <p>The ASA regulates certain kinds of advertising. Political advertising, claims on packaging of goods and services, claims on shop window displays, TV and radio programme sponsorship, and ads containing discriminatory claims fall outside its remit.<sup>32</sup></p>
4.	Singapore	No	<p>Ads in Singapore are regulated by a self-regulatory body - the Advertising Standards Authority (ASA) of Singapore. The ASA relies principally on a system of guidance and voluntary compliance, rather than punitive measures, to facilitate observance to its Singapore Code of Advertising Practice.<sup>33</sup></p>
5.	Japan	No	<p>Ads in Japan are primarily regulated by the Consumer Affairs Agency (CAA), which administers its Act Against Unjustifiable Premiums and Misleading Representations.<sup>34</sup> Some sector specific rules apply as well, such as those pertaining to tobacco, cosmetics, and health ads.</p> <p>Additionally, the Japan Advertising Review Organization (JARO), a self-regulatory body established by the advertising industry, handles complaints and enquiries from consumers, competitors and others, and makes recommendations for the modification or discontinuance of questionable representations.<sup>35</sup></p>

The analysis detailed in the table above clarifies that *ex-ante* self-declarations are an unheard-of practice across various jurisdictions. Countries like the United Kingdom, Japan, and Singapore regulate advertising via strong self-regulation. Laws apply, but in cases where harm occurs. In the European Union, self-declaration exists, but as a voluntary mechanism, and only at the distribution stage of a product. These systems are working well, and indicate that India must continue its approach, which is in line with international best practices.

The UK's experience with the ASA demonstrates the effectiveness of self-regulation in upholding standards without stifling creativity. Similarly, Singapore's reliance on guidance and voluntary compliance reflects a successful model for responsible advertising. These examples suggest that India should leverage its existing self-regulation infrastructure and consider strengthening the ASCI's mandate.

### **(b) India's Ad Industry is Subject to Structured Self-Regulation**

The Advertising Standards Council of India (ASCI) is a voluntary self-regulatory organisation. Its Code for Self-Regulation of Advertising Content (the Code) in India regulates advertising in India, by placing obligations on advertisers, while complementing a myriad of regulations and statutes that apply.<sup>36</sup> The goal of the Code is 'to ensure honesty, truthfulness and decency in advertising, non-exploitation of vulnerable sections of society, especially children and fairness in competition'. The ASCI also acknowledges that its mission is to promote responsible advertising, but not at the cost of hampering the sale of products.<sup>37</sup>

The applicability of the Code is widespread and prescribes specific Guidelines for specific categories. These include advertisements depicting automotive vehicles, advertising of foods & beverages, advertising of educational institutions and programmes, advertising for skin lightening or fairness improvement products, advertising of online gaming for real money winnings, advertising of virtual digital assets and linked services, advertisements making environmental or green claims, among others. The Code also recognises medium-specific differences. For example, the Code lists an expansive definition of digital media advertising, including advergames, sponsored posts, branded content, promotional blogs, paid-for links, gamification, in-game advertising, teasers, viral advertising, augmented reality, native advertising, connected devices, influencers, etc. This detail-oriented approach and the ability and resources to create future-proof regulations and cater to the demands of tech advancements, has allowed the ASCI to become an effective and efficient self-regulator. This is evidenced by the following:

- The ASCI's Code is a part of the Advertising Code prescribed under the Cable Television Network Rules, 1994.<sup>38</sup> The Rules state that no advertisement can be carried in cable service unless it complies with the Code. The Code is also appended in the Press Council of India's Norms of Journalistic Conduct 2010 Edition. The Drug Controller General of India (DCGI) has also recognised self-regulation in advertising through ASCI's Code. The Insurance Regulatory and Development Authority Act, the Maharashtra Directorate of Technical Education (DTE) Act, and the Transport Department, Government of NCT, Delhi also recognise ASCI. The Supreme Court has also affirmed and recognised the self-regulatory mechanism put in place for advertising content by ASCI.<sup>39</sup> Thus, the Code also carries the force of the law.
- The ASCI collaborates with various government agencies and bodies to strengthen their ad regulation endeavours. For example, the ASCI had hosted a consultation with the Department of Consumer Affairs (DoCA) on dark pattern regulation, which was followed by a set of Guidelines.<sup>40</sup> In fact, government action on dark patterns was preceded by the publication of a set of Guidelines by the ASCI.<sup>41</sup> The body is also working to enhance the efficiency of misleading ad regulation efforts with the Ministry of Ayush and the Food Safety and Standards Authority of India. This indicates the ASCI's proactiveness and subject matter expertise.



- ASCI's regulation mechanisms have proven to be effective. The Supreme Court Committee on Road Safety has appreciated the ASCI on the launch of their WhatsApp number for registration of complaints by consumers.<sup>42</sup> In the year 2023-24, ASCI evaluated 8,299 advertisements, of which 81% were found to be misleading. 94% of these violations were identified through proactive monitoring. Additionally, 98% of the ads required modification, with 49% being promptly withdrawn or modified.<sup>43</sup>
- The ASCI receives more complaints against ad violations than other entities and bodies. Per the submissions made in the Supreme Court during the *Patanjali Ayurved* hearing, out of the 1654 complaints received for ad violations on TV between 2018 and 2024, around half, i.e., 769 were to the ASCI.<sup>44</sup> The ASCI also undertakes efficient tracking of ads across mediums to check for non-compliance. In Financial Year 2023-2024, the ASCI reported 3,200 ad violations to relevant government departments for a direct violation of law.<sup>45</sup> The Central Consumer Protection Authority had also recently requested the ASCI to forward any advertisement that is non-compliant with the Code and could potentially violate the Consumer Protection Act, 2019, along with its accompanying Guidelines.<sup>46</sup>

### (c) Strengthening Existing Self-Regulation: The ASCI

The MIB's Guidelines were well-intentioned. However, they came with challenges of their own. Aside from the operational issues highlighted here, fulfilling the intent of the Guidelines and ensuring effective implementation could be challenging for the MIB. More than 30,000 small and medium fast-moving consumer good brands cater to the needs of 80% of India's population today.<sup>47</sup> They undertake advertising to engage with existing customers and capture new markets and consumers. Accounting for different sectors and brands, the number of active brands and advertisements released by them will become exponentially higher. The MIB's Guidelines applied across mediums, including print, TV, and the internet, further expanding the scale of advertising that the MIB would have to regulate. On the internet particularly, ads are not just high in volume, but also often hidden. These ads can be in the form of product placements in influencer videos, memes, or even subtle modifications in user interfaces. It would be difficult for the MIB to track such ads, due to a lack of resources, expertise and qualified professionals. Alternatively, the steep compliance burdens cast by the Guidelines could encourage more and more advertisers to take such steps and covertly publish their ads.

To mitigate these concerns, the government should have considered strengthening and recognising extant self-regulatory processes. Doing so will be in line with international best practices, conform with the government's goal of 'minimum government, maximum governance' and allow ease of doing business. As highlighted above, the ASCI is a body dedicated to effectively regulating ads in India. As opposed to the MIB, which is the nodal agency for a variety of media regulation, the ASCI has a fixed mandate - to uphold good advertising practices. The body is also composed of personnel with subject matter expertise in advertising. It was established by representatives of all sectors of the ad industry – the businesses who sponsor or pay for the advertising, the ad agencies who conceptualise and produce ads, the mediums that carry these ads and allied professions such as PR and market research that support the development and spread of the ad.<sup>48</sup> This deep-rooted understanding of the ad industry also reflects in its holistic and detailed Code.

Additionally, ASCI may not have the capacity constraints that a government body may have. Its private nature can allow for greater freedom to take swift decisions and actions, without constraints that can generally slow down bureaucratic processes. In the last financial year alone, ASCI examined 10,093 complaints and investigated 8,299 advertisements, 81% of which were related to misleading claims.<sup>49</sup> While the ASCI may not be able to address every violation, its industry-backed approach has proven more effective than a government-led regime. Combined with existing laws that penalize violations, this approach offers greater effectiveness than a self-declaration mandate.

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## FICCI Recommendations to the MIB

FICCI also took a proactive stance in opposing the new mandate, understanding the industry's concerns and voicing them. To that end, it sent the following recommendations to the MIB:

- ➔ Engage in extensive consultations with all stakeholders, including advertisers, advertising agencies, publications, broadcasters, digital advertising platforms, ad exchanges, and other relevant parties, to develop a viable solution. Collaborate with industry stakeholders, such as advertising associations, consumer advocacy groups, and government agencies, to develop and refine regulatory standards and enforcement mechanisms.
- ➔ The Advertisement and Publication Industry is already regulated by ASCI which monitors and curbs misleading advertisements, requiring explanations from advertisers. Publications adhere to the Press Council of India's Norms of Journalistic Conduct, including the Model Advertisement Policy Guide, 2014, ensuring ads are vetted before publishing. Strengthening existing mechanisms offers a more efficient approach than imposing additional self-certification requirements. Self-regulation, as an alternative to self-certification, is a viable solution. Instead of requiring advertisers and advertising agencies to certify compliance with regulatory guidelines themselves, self-regulation involves industry stakeholders voluntarily adhering to already established codes of conduct and best practices, through regular audits, conflict resolution processes, and sanctions for non-compliance.
- ➔ Considering the substantial operational and administrative challenges, FICCI requested the Ministry to defer the self-declaration requirement until the guidelines are fully clarified. The existing ambiguities around advertisement scope, advertiser/agency responsibilities, and technical feasibility for digital platforms create major compliance hurdles. Postponing the implementation will allow time to resolve these issues, develop clear instructions, and ensure stakeholders are prepared for the new regulatory demands.
- ➔ The Department of Consumer Affairs has established user-friendly mechanisms for receiving consumer complaints: (a) Through the National Consumer Helpline (NCH) portal [consumerhelpline.gov.in](http://consumerhelpline.gov.in), launched as an integrated Grievance Redressal Mechanism (INGRAM) involving consumers, government agencies, and companies; (b) Partnering with ASCI on the Grievances Against Misleading Advertisements (GAMA) portal [ref.gama.gov.in](http://ref.gama.gov.in). Consumers and regulators can also file grievances against advertisers with the Central Consumer Protection Authority (CCPA).
- ➔ The relevant regulators and key industry members could pledge to conduct extensive awareness campaigns on various media in this regard. Such campaigns could be repeated from time to time.
- ➔ The Order's broad scope necessitates clarifications for effective implementation. Given the vast array of products and services in the market, as categorized by the 45 classes under the Trademarks Act, 1999 (Annexure 1), it is impractical to apply the Order universally. The Order frequently references health claims and related products, necessitating clarification on whether the self-declaration requirement is limited to products or services with health claims. Requiring self-declarations for non-health-related products like clothing, furniture, and hardware appears disproportionate. Additionally, the Order lacks clarity on the types of advertisements covered. Specifically, it is unclear if self-declarations are required for: (a) product packages and labels or QR codes; (b) advertisements tested on small groups before public release; and (c) social media posts that simply display a brand name without making any claims. These ambiguities need resolution to ensure the Order's practical and effective enforcement.

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# Industry Response and Revised Guidelines

While compliance with the Guidelines began, it was fragmented and non-uniform. Within almost a month of the institution of the new regime, about 35,000 self-declaration certifications were filed across the two portals.<sup>50</sup> Submissions were higher on the Press Council of India portal, than the *Broadcast Seva Portal*, indicating that there were medium-specific disparities.

The industry responded with mixed reactions, with advertisers and publishers citing implementation-related issues. Some industry associations filed intervention applications before the Court, seeking that they be made parties and heard in the matter.<sup>51</sup> Representatives wrote to the MIB, seeking a timeline extension.<sup>52</sup> They also met with the Ministry to discuss practical challenges on two occasions – on 11 June and again on 25 June. During the first meeting, the MIB refused to modify the compliance deadline, and stated that the industry must make its own representations before the Court.<sup>53</sup> The second meeting was organised after the date passed, to understand operational difficulties being faced by advertisers and publishers.

The meeting held on 25 June was highly productive, with active participation from various industry stakeholders. The MIB demonstrated considerable support and receptiveness to industry concerns, fostering open dialogue for potential regulatory improvements. Key recommendations included restricting the self-declaration guidelines to food and health advertisements, in line with the Court's directive, introducing an annual one-time declaration process for legal entities to enhance efficiency, and simplifying the online portal by removing PDF and ad-script upload requirements and incorporating a digital signature facility. These suggestions aimed to streamline compliance, reduce redundancy, and create a more business-friendly environment while maintaining regulatory oversight. However, these proposals were preliminary and subject to approval by the Additional Solicitor General (ASG). MIB assured representatives that steps will be taken to simplify the seemingly cumbersome declaration processes and their concerns will be accommodated in its submission before the Court on 9 July.<sup>54</sup>

On 3 July 2024, as a welcome development MIB released a new advisory. It superseded the Guidelines and the First Advisory and reduced the scope of the mandate to just health and food ads. Additionally, the advisory made compliance mandatory at the advertiser-level. Now, advertisers must make an annual declaration that their ads are not misleading and comply with applicable laws, rather than filing a certificate before releasing every single ad. The two portals remain active and shall be used for the purposes of the yearly declaration.

The revised July 2024 advisory significantly addresses initial concerns by narrowing the scope to health and food ads and shifting to an annual declaration process. This change will likely reduce the burden on advertisers and publishers, allowing for greater efficiency and flexibility in their operations. However, uncertainties remain about the precise definition of 'health and food' ads, which will require further clarification from the MIB.

The new development has allowed the industry to breathe a sigh of relief. While health and food ads have been saddled with this additional obligation, ad regulation will continue to primarily be *ex-post*, with ASCI playing a key role. This will allow brands to maintain confidentiality of their business plans, follow set timelines for product launches and ad releases, and continue to undertake innovative steps like moment marketing and social media marketing. The threats to digital advertising will also diminish with the removal of overbroad bureaucratic red tape. Automated and programmatic advertising will flourish, and lead the ad industry to new, greater heights.

Broadcasters and other publishers of ads will also not have to deploy significant manpower to maintain records of self-declaration certificates or undertake verification of thousands of documents. With reduced administrative hurdles, cash-strapped smaller players will now be able to optimise their limited resources to fulfil more relevant objectives. Overall, while certain uncertainties on which brands will be covered under the food and health segment remain, the backtracking makes the mandate easy to implement and oversee. It allows advertisers the requisite ease of doing business to survive in a dynamic and creative industry, while also ensuring responsible advertising.

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## Conclusion

In conclusion, the MIB's recent advisory indicates a positive shift towards a more balanced and industry-friendly approach. By focusing on strengthening existing self-regulation mechanisms like the ASCI, India can ensure responsible advertising without compromising the industry's growth and innovation. Maintaining this focus on effective self-regulation, while respecting the separation of powers between the judiciary and the executive, will be crucial for the continued success of the Indian advertising landscape.

We appreciate the MIB's proactiveness in acting in the industry's interest. The new advisory frees advertisers and publishers from onerous obligations, while maintaining a level of regulatory scrutiny. We believe it will have a larger impact, engendering greater trust between the nodal regulator and the entities it oversees. It will also allow for greater dialogue in the future, resulting in well-rounded and operationally-sound policies and regulations. We hope that during the next hearing in the *Patanjali* case on 9 July, the Court reaffirms the advisory and accepts the inputs from the industry.

The current, largely *ex-post* ad regulation regime must be allowed to continue, as it appears to be better suited and is well-accepted by the industry. It functions like a well-oiled machine with ASCI as a competent watchdog. Giving ASCI more teeth and recognising its potential can help both the government and the industry to navigate this crossroad. Continued collaboration between the MIB and industry stakeholders will be crucial in refining and implementing the newly charted out measures successfully. Ongoing dialogue is essential to ensure that regulatory framework evolves to support both compliance and industry growth.

Lastly, we hope these recent developments serve as lasting precedent. As a practice, it is essential to maintain separation of powers between the different organs of the government. Policy formation falls under the executive's jurisdiction, while the judiciary's role is to uphold laws and the Constitution, underscoring the need for a clear separation of powers. The Supreme Court has also reiterated this principle previously, stating that Courts must not trench upon the realm of policy making and assume jurisdiction over matters which lie with the executive. In this case, the Court should have entrusted the MIB to devise a mechanism to target misleading ads. This is because administrative arms of the government, like the MIB in this case, have the requisite subject matter expertise and proximity with the industry to formulate targeted policy interventions which would be easier to implement.

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