

## NEW SERNAC INTERPRETATIVE CIRCULAR ON NATIVE ADVERTISING AND INFLUENCERS

The National Consumer Service ("**SERNAC**") recently issued an "Interpretative Circular on native advertising and influencers" (the "**Circular**"), setting forth general guidelines on regulation, legal principles and good practices to the native advertising mechanism and the influencers.

This Circular addresses the proliferation of unconventional advertising mechanisms, such as the implementation of native advertising and the emergence of influencers, which may result in the consumer not noticing their advertising nature or evaluating them less rigorously or cautiously.

Pursuant to the provisions of Law No. 19,496 Consumer Protection Act ("**CPA**") and advertising principles, the Circular pursues 4 objectives: (i) conceptualize the mechanism of native advertising; (ii) conceptualize influencers as advertising subjects; (iii) determine the regulation or principles applicable to both advertising actors; and (iv) identify and encourage the implementation and compliance of good practices within these areas.

### I. Concept of native advertising

Although there is no definition of native advertising, it may be included within the definition of "advertising" contained in article 1° n° 4 of the CPA.

SERNAC, following the guidelines of the National Council for Self-Regulation and Advertising Ethics ("**CONAR**") in the Chilean Code of Advertising Ethics ("**CChEP**") and the definitions contained in the documents prepared by international consumer protection entities, such as the Advertising Standards Authority ("**ASA**") together with the Committee of Advertising Practice ("**CAP**") -in the United Kingdom-, the Federal Trade Commission ("**FTC**") -in the United States- and the International Bureau of Advertising ("**IAB**"), defines the concept of native advertising as an "advertising trend that consists of inserting advertising content in the media, maintaining the format and editorial

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Carey y Cía. Ltda.  
Isidora Goyenechea 2800, Piso 43.  
Las Condes, Santiago, Chile.  
[www.carey.cl](http://www.carey.cl)

style of the same".

Following such concept, its main characteristics are: (i) it is similar or coincides with the content of the media where the advertisement is inserted; and (ii) the advertisement was requested or paid by an advertiser of a product or service to be inserted in the media.

## **II. Influencers**

The Circular, using the definition proposed by CONAR in its CCHeP and the requirements and concepts developed by international entities (such as the European Advertising Standards Alliance, the Spanish Association of Advertisers and Self-Regulation, the Argentine Advertising Self-Regulation Council and the National Institute for the Defense of Competition and Protection of Intellectual Property of Peru and the ASA), conceptualizes influencers as "those persons who, due to their degree of credibility and / or recognition in social networks or other similar digital platforms, can influence, motivate or induce their followers to perform a certain act of consumption, through the dissemination of content or positive comments regarding the products or services offered by the advertiser, in exchange for any type of benefit or compensation for the advertising done, whether agreed between the influencer and the advertiser or delivered spontaneously by the latter".

The Circular seeks to give examples of common advertising practices developed by influencers, such as:

1. Unboxings
2. Swaps
3. Sweepstakes and giveaways
4. Advertising photos or videos
5. Redirection to a supplier's profile or website.

## **III. Regulation of Native Advertising and Influencers**

Both native advertising and influencer activity are governed by current regulations and the principles that derive from them.

### **a. Legal principles that inform advertising activity.**

The most important principles governing the advertising activity are:

1. Principle of legality
2. Principle of truthfulness

3. Principle of verifiability
4. Principle of advertising integration
5. Principle of availability and access to information
6. Principle of authenticity
7. Principle of respect for competition
8. Principle of self-sufficiency of the advertising support.

#### **b. Liability for infringement of the CPA rules**

Although the Circular points out that the CPA does not have rules that resolve this matter, a harmonious reading of its provisions shows that civil and infringement liability falls on the advertiser, provided that there is a link between the advertiser and the person who makes the advertisement.

Likewise, by virtue of the advertiser's duty of professionalism, the advertiser must demand that its agents act within the margins of the law, directly verifying that this is so, since the obligation to control, supervise, detect and correct possible infractions of the CPA falls on it.

Notwithstanding the above, influencers may be directly liable for infringements to the CPA and for damages caused to consumers, in those cases that meet the requirements to be considered suppliers - advertisers, considering that they can market and offer their own products or services or be civilly liable, when they act autonomously, without a contractual relationship with the supplier of the product or service.

#### **c. Best practices: native advertising and influencers**

The Circular proposes a number of good practices in the advertising field which, if complied with, will favor and contribute to the due protection of consumer rights and guarantees, and whose non-compliance may give rise to the exercise of the powers conferred by law to SERNAC. These are:

**1. Clear and prominent identification of advertising content:** In order to respect the principle of authenticity (advertising must be easily identifiable as such), following the FTC, it is recommended that advertising agents:

- i. Take the necessary precautions to ensure that the receiver of the message sees and understands that the content is an advertisement.

At least, it should be in Spanish, be express, be in the same font size or larger than the rest of the content, and not be subject to interpretation;

ii. The identification of the advertisement must be difficult to overlook;

iii. That the visibility of the advertising identification is not dependent on any additional action by the recipient (such as selecting the "see more" option or selecting a link that redirects to another publication, tab or website);

iv. They should refrain from mixing or interspersing the identification of advertising content with hashtags or links;

v. If the content is in videos or images of short duration, they must ensure that viewers have enough time to notice and read the identification of the advertising;

vi. If the advertisement is in a video, the identification should be made in both written and audio form; and

vii. If advertising content is aired in a live broadcast, the identification of the advertising should be repeated periodically throughout its duration.

**2. Clear information regarding the link with the advertiser:** Pursuant to articles 1° n°4, 3° first paragraph letter b) of the LPDC and 33 of the CPA, advertising agents, especially influencers, must clarify the link or connection they maintain with the advertiser.

**3. Clear exposition of the characteristics of the product or service:** It is necessary that the native advertising content and that transmitted through influencers, be completely truthful, sincere, responsible and transparent in relation to the information provided about the product or service offered, otherwise, advertisers and advertising agents may incur in the assumptions of misleading or false advertising and the civil liability that may arise from it.

**4. Honest and complete opinion about the product or service:** By virtue of the principle of truthfulness, when advertising a product or service, advertising agents should strive to provide honest and complete information, even when reviewing the product or service.

**5. Advertising should not promote stereotypes:** Due to its relevance

and high presence in advertising, the Circular focuses on the recommendations of good practice against gender stereotypes. In this regard, by virtue of the provisions of Article 3, paragraph one, letter c) of the CPA (which enshrines the basic right of consumers not to be arbitrarily discriminated against by suppliers of goods and services) and the principle of legality (according to which advertising must respect the regulations in force in addition to the rights and principles enshrined in the Constitution, among which are equality and dignity), advertising agents are recommended to refrain from:

- i. Associating certain products or services with a certain gender, by virtue of the role or characteristics that society has traditionally assigned to them;
- ii. Incorporate advertising content or messages that reflect a preconceived view of the position or role that both genders should occupy;
- iii. Publish or promote content that objectifies or sexualizes the female body;
- iv. Perpetuate through their publications beauty standards that make the consumption of certain products and services necessary, among others.

**6. Verification of truthfulness of objective claims:** In virtue of the principles of truthfulness and verifiability and the inalienable right of consumers to truthful and timely information (article 3, first paragraph, letter b) of the CPA), it is recommended that advertisers and advertising agents verify the claims made in their advertising and review whether the evidence or studies on which the advertised products and services are based are suitable and sufficient to prove such claims.

**7. Safeguarding of advertising content aimed at children and teenagers:** Pursuant to Articles 53 and 55 of Law No. 21,430 on guarantees and comprehensive protection of the rights of children and teenagers, which expressly recognizes the quality of consumers of children and teenagers and establishes the principles of action of advertising directed to them, the Circular establishes that advertising content directed to them:

- i. Must not seek to mislead them or take advantage of the characteristics inherent to their stage of development;

ii. It must not distort the characteristics or benefits of a given product or service through the excessive or ill-intentioned use of elements that are particularly appealing to them;

iii. The characteristics of products and services must be clearly and carefully presented, so that the target public can fully understand them; and the rules and principles governing advertising must be respected with the utmost care and rigor.

**Autores:** Guillermo Carey; Aldo Molinari; Mónica Pérez; Kureusa Hara; Eduardo Reveco