

ALERT

FTC Provides Guidance on Native Advertising; Tips Its Hand at Enforcement

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Native advertising is flourishing across television, news properties, social media, content portals, video-sharing sites, and streaming services, and the Federal Trade Commission (FTC) is taking notice. By creating ads that are in the same format as the content audiences have sought out to consume—whether as native ads, sponsored content, or branded content—marketers hope to provide a much less disruptive advertising experience. The FTC is concerned that consumers not be deceived in the process and has published guidance on how advertisers can be transparent with consumers, or risk enforcement action.

Interest in native advertising is growing because of its demonstrated results in attracting and engaging consumers. In addition to providing a more seamless experience, this type of advertising has proven effective, drawing higher click rates than traditional forms of advertising, particularly on mobile devices. Largely for this reason, spending on native ads is expected to grow to \$21 billion in 2018, rising from \$4.7 billion in 2013. Native ads were even a topic of discussion at the 2016 Consumer Electronics Show, where one broadcaster showcased its plan to replace traditional commercial breaks with two-to-three minute-long native ads for a single advertiser.

As content producers and marketers intensify their focus on native ad content as a business model, however, they should exercise caution to avoid running afoul of consumer protection rules put in place to protect the public from unfair advertising practices. Indeed, the qualities that make native advertising appealing also raise questions about whether such evolving formats deceive consumers by blurring the distinction between advertising and content. According to Jessica

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L. Rich, Director of the FTC's Bureau of Consumer Protection, "People browsing the web, using social media, or watching videos have a right to know if they're seeing editorial content or an ad."

To this end, on December 22, 2015, the FTC released two guidance documents to help marketers (and anyone else involved in the creation or presentation of an ad) to stay on the right side of its rules: (1) an Enforcement Policy Statement on Deceptively Formatted Advertisements (Policy Statement); and (2) Native Advertising: A Guide for Businesses (Business Guide). These new documents provide important insight into how the FTC will enforce its rules with respect to native ads going forward. Both are discussed in detail below.

Enforcement Policy Statement on Deceptively Formatted Advertisements

The Policy Statement summarizes the principles underlying the FTC's enforcement actions, advisory opinions, and other guidance as they relate to various forms of deceptively formatted advertising. According to the Policy Statement, deception occurs when "an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material." In determining whether an advertisement, including its format, misleads consumers, the FTC considers the overall "net impression" it conveys. The FTC will examine such factors such as overall appearance of the ad, the similarity of its written, spoken, or visual style to non-advertising content, and the degree to which the ad is distinguishable from such other content. The Policy Statement further explains that any qualifying information necessary to prevent deception must be disclosed prominently and unambiguously to overcome any misleading impression created. Such disclosures should be made at the outset—"disclosures that subsequently inform consumers of a natively formatted ad's commercial nature after they have clicked on and arrived at another page will not cure any misleading impression created when the ad is presented in the stream of a publisher site."

That said, not all ads formatted like non-advertising content are likely to mislead consumers acting reasonably. The Policy Statement recognizes that some ads, by the very nature of their message, may be inherently obvious as advertising to consumers. "For instance, if a natively formatted ad with an image of a particular sports car and the headline 'Come and Drive [X] today' were inserted into the news stream of a publisher site, that ad likely would be identifiable as an ad to consumers, even though it was presented in the same visual manner as news stories in the stream."

Native Advertising: A Guide for Businesses

The Business Guide applies the principles found in the Policy Statement specifically to native advertising. First, the Business Guide offers examples of when businesses should disclose that content is native advertising. Second, the Business Guide offers advice on how to make clear and prominent disclosures to avoid misleading consumers.

In assessing when businesses should disclose that content is native advertising, marketers should consider the following:

- Advertisers cannot use “deceptive door openers” to induce consumers to view advertising content. Advertisers are responsible for ensuring that native ads are identifiable as advertising before consumers arrive at the main advertising page.
- The more a native ad is similar in format and topic to content on the publisher’s site, the more likely that a disclosure will be necessary to prevent deception. Disclosures may be needed both on the publisher site and the click- or tap-into page on which the complete ad appears.
- The same principles of transparency and disclosure apply to alternative ways for advertisers to disseminate content to consumers, including news feeds and content recommendation widgets.
- A disclosure may be necessary where native ads are integrated into content, including entertainment programming and video games.
- In evaluating whether consumers are likely to understand a native ad is advertising, advertisers should consider the particular circumstances in which native ads are presented to consumers. These circumstances include consumers’ ordinary expectations based on their prior experience with the media in which the ads appear, as well as how they consume content in that media.
- Advertisers should take steps to ensure that any non-paid search listings for a native ad do not suggest or imply to consumers that it is something other than an ad.

With respect to making disclosures, the FTC’s guidance for native ads tracks previous guidance for businesses found in *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*. As such, the Business Guide covers proximity and placement, prominence, and clarity of meaning for disclosures and offers the following specific advice:

- Disclosures should appear on the main page of the publisher site where consumers will notice them and easily identify the content to which the disclosure applies.
- Disclosures should be placed in front or above the headline of the native ad.
- If a native ad’s focal point is an image or graphic, a disclosure might need to appear directly on the focal point itself.
- A single disclosure that relates to more than one native ad should be accompanied by visual cues that make it clear the disclosure applies to each ad in the grouping.
- Disclosures should remain when native ads are republished by others.
- Once consumers arrive on the click- or tap-into page where the complete native ad appears, disclosures should be placed as close as possible to where they will look first.
- In multimedia ads, a disclosure should be delivered to consumers before they receive the advertising message to which it relates.
- Advertising disclosures should stand out so consumers can easily read or hear them.
- Disclosures must be understandable. Advertisers should avoid using technical or industry jargon, different terminology to mean the same thing in different places on a publisher site, the same terminology to mean different things on a publisher site, terms that customarily have different meanings

to consumers in other situations, unfamiliar icons or abbreviations, or company logs or brand names unaccompanied by a clear text disclosure. According to the FTC, terms likely to be understood include "Ad," "Advertisement," "Paid Advertisement," "Sponsored Advertising Content," or some variation thereof.

Conclusion

The key message for those who want to use native ads is to be transparent. The FTC's Policy Statement makes clear that a native ad may be deceptive and in violation of FTC rules if it materially misleads consumers about the ad's commercial nature, including through any implied or express representation that it comes from a party other than the sponsoring advertiser. To avoid potential FTC enforcement activity, advertisers—and others involved in creating or presenting an ad—should carefully review the Policy Statement and the Business Guide. In creating ads, advertisers and others should consider the "net impression" of the ad as well as the types of disclosures that may be necessary to ensure that consumers can differentiate advertising from other content.