

FTC ISSUES LONG-AWAITED NATIVE ADVERTISING GUIDANCE

by Lauren Aronson

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Introduction

On December 22, 2015, the Federal Trade Commission (“FTC” or “Commission”) issued long-awaited guidance on native advertising—commercial content designed with the look and feel of editorial content—and published its “Enforcement Policy Statement on Deceptively Formatted Advertisements”²⁸ (“Policy Statement”) and its “Native Advertising: Guide for Business”²⁹ (“Business Guide”). In the Policy Statement, the FTC stated that it “has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself.” The statement reflects the FTC’s earlier guidance regarding advertorials and infomercials, misleading door openers, and deceptive endorsements. The Commission made it clear that consumers must know at the outset whether a message is commercial.

However, the new guidance goes be-

yond simply reminding advertisers that commercial content must be identified as such. Instead, as discussed below, this latest guidance reflects the FTC’s view that consumers must be able to quickly and easily distinguish sponsored content from content that is independently created and produced. The FTC makes clear that consumers must know before they choose to view a native ad that the content is commercial in nature and that failure to clearly disclose the commercial nature is presumptively deceptive. Importantly, the guidance also provides very detailed recommendations as to how those disclaimers must appear.

When Is a Disclosure Required?

Whether a natively formatted advertisement must contain a disclosure identifying it as commercial content depends on how reasonable consumers would interpret the ad in a particular situation. However, in the Policy Statement and Business Guide, the FTC identified only a handful of circumstances where disclosure likely would not be required:

- Disclosure is not required if it is inherently obvious that a natively formatted ad contains commercial content. For example, the Policy Statement gives the example of an article with the headline “Come and Drive [X] today” and an image of a sports car.
- Disclosure is not required for paid



branded product placements in entertainment programming provided that (1) payment is unlikely to affect the consumer's decision to view the programming and (2) no claim is made. Thus disclaimers are not required for paid product placements that we regularly see in movies.

- Disclosure is not required either before or after a consumer clicks on an article, even if the article is sponsored by a brand, if the article itself does not feature, depict or promote any of the brand's products.

However, aside from these exceptions, the new guidance takes a sweeping view of advertising and accordingly, the accompanying disclosure requirements. In the Business Guide, the FTC provides numerous scenarios in which disclosure would and would not be required. Key recommendations include:

- **The more a native ad has a similar format appearance, format, and topic to surrounding editorial content, the more necessary a disclosure will be.** The FTC gives the example of an article entitled "The 20 Most Beautiful Places to Vacation." The article was not sponsored and featured 20 images of vacation spots. However, a resort hotel paid the publisher to add a 21st image to the article featuring one of its beach resorts. While no disclosure is necessary on the main page, before the consumer clicks on the article, a clear and prominent disclosure of the paid nature of the 21st photo is required.
- **Know the platform.** Whether a disclosure is necessary may vary depending on the platform. Consider how consumers custom-

arily interact with each website or program in which the content appears. While it may be obvious on some platforms that content is sponsored, consumers may be misled on other platforms or in other media.

- **It must be clear to consumers before they choose to view an ad that content is commercial.** If you use a share feature to allow consumers to share your native ad, the accompanying link or image must make clear that the content is commercial. Likewise, where articles appear in content, recommendation widgets must disclose if the content is commercial. The FTC also clarified that links and other visual elements appearing in non-paid search results must also effectively disclose the commercial nature of content when the content appears to be editorial on its face.
- **Paid dissemination of an independent article by a company may require disclosure.** The FTC gives the example of a car company that paid to disseminate an article ranking one of its cars as the "Best Hybrid." Although the article itself was independently written and published, if the company pays to disseminate the article through a recommendation widget, the company must ensure that all express and implied claims about the company and its products are truthful, non-misleading, and substantiated. Furthermore, the company should also disclose that the link on the recommendation widget was paid before consumers click on the link.
- **Disclosures may be required for branded product placements in entertainment programming—including video games,**

apps, social media videos, and television shows. Disclosure is required when objective claims or recommendations are made regarding a branded product and consumers would not realize that sponsors have paid for product placement. Notably, the recommendations do not need to be express—a recommendation could be made simply by zooming in on the sponsored product if consumers are likely to interpret the use of the product to be a recommendation and not a paid inclusion.

How Should Advertisers Make Clear and Prominent Disclosures?

The FTC reiterated the basic principles of its 2013 guidance document, “com Disclosures: How to Make Effective Disclosures in Digital Advertising.”³⁰ The guidance states that “Advertisers have flexibility as to how to identify native ads, as long as consumers notice and process the disclosures and comprehend what they mean.” However, not only should disclaimers be prominent and clearly understandable, the Business Guide also includes very specific guidance for placement that deviates from current industry practice. Key recommendations include:

- **Pay attention to how consumers view content on the website.** Disclaimers must be placed where consumers look first. For example, if a webpage is read from left to right, consumers are less likely to notice disclosures placed to the right of the native ads. The Commission recommends that the disclaimer be placed close to the headline, on the left. Similarly, if native ads appear in a vertical stream of content items, the disclaimer should appear “immediately in front of or above a native ad’s headline.”
- **Don’t assume that it will always be sufficient to place a disclaimer in a headline.** On some platforms, the FTC notes that focal points are images or graphics, not headlines or other written text. The FTC recommends that the advertiser place a disclosure **directly on the image itself.** This recommendation would likely apply to sponsored videos created by influencers on platforms such as YouTube.
- **However, when native content is only a small part of larger content (for example, one small element of a video that is primarily independent of the advertiser), the disclaimer must appear as close as possible to the advertising message.** The FTC notes that it may be “problematic” to make a disclosure too early in a video if, for example, the sponsored content is simply a video vignette or game shown part way through the video.
- **When native ads appear alongside editorial content, the native ads must be easily identifiable.** The FTC recommends against using a single disclosure to identify multiple native ads. The advertiser should use individual disclosures or, if a single disclosure is used, the advertiser should also use other visual cues (e.g., background shading or a clear outline or border) to make it obvious which items are native ads.
- **Advertisers must account for the effectiveness of disclosures when content is republished by others.** The location of the disclosure may need to change, depending on how the content is shared. The FTC states that links shared on social media or

email should include a disclosure at the beginning of the native ad's URL.

- **Choose the appropriate disclaimer.** While the FTC thinks “Ad,” “Advertisement,” “Sponsored Advertising Content” or similar are effective, the FTC states that “Promoted” or “Promoted Stories” are too ambiguous. Furthermore, disclaimers such as “Presented by [X],” “Brought to You by [X],” “Promoted by [X],” or “Sponsored by [X]” may be insufficient if the advertiser created or influenced the content. In such cases, consumers may falsely believe that the advertiser solely paid to publish the content.

Why It Matters

In 2016, the FTC will likely begin to aggressively monitor native ads, as it has aggressively monitored other forms of sponsored content. The Commission will likely bring carefully chosen native advertising cases to further elucidate and

clarify its thinking in this area. As advertisers think about native advertising going forward, they should pay close attention to the FTC's guidance when evaluating whether, when, where, and how to effectively disclose to consumers that content is sponsored. The FTC has made very specific recommendations regarding how and when disclaimers should appear that have important implications for both native advertising and sponsored content in social media more generally.

ENDNOTES:

²⁸See https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

²⁹See <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

³⁰See <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.