

NATIVE ADVERTISING

Native advertising is advertising that mimics the medium in which it is distributed—e.g., advertisements that appear to be news on social media platforms. The Federal Trade Commission recently issued guidance on when disclosures in native advertising are needed to prevent consumer deception. Attorneys from Manatt, Phelps & Phillips LLP survey the guidance and recommend ways in which advertisers can ensure compliance with the FTC's latest guidance.

**Navigating Native: A Checklist of Compliance
Steps for Ensuring Proper Disclosures for Native Ads**

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At its root, native advertising was designed to be the solution to a problem that had plagued content platforms and brands looking to advertise online—consumers would click on traditional online ads, such as banners, only by accident. Thus, to increase the likelihood that consumers will willingly click on ads, publishers and marketers started creating content that doesn't outwardly look like advertising. Instead, native advertising borrows the look and feel of the surrounding media, blending editorial and commercial content, with the goal of providing value to consumers by enhancing their online experience while simultaneously increasing the visibility of brands. For example, marketers have created content by commissioning informational news articles, sponsoring BuzzFeed lists and creating tweets with content that is entertaining to consumers—hopefully generating enough interest to be shared across social media virally.

However, because the goal of native advertising is to distribute paid content that looks organic, there is an inherent tension in meeting marketers' goals of increasing brand visibility with content that provides an informational and/or entertainment value to consumers while also maintaining transparency. In other words, how do marketers create content that looks like organic content without “tricking” or “deceiving” consumers into unwittingly viewing ads? This tension has attracted the interest of regulators charged with ensuring consumers aren't misled into believing the ads are independent, impartial or not from the sponsoring advertiser itself. The reason why a native ad can be deceptive is that knowing the source of an ad or promotional message typically affects the weight and credibility consumers will give the ad, and such knowledge may also influence whether and to what extent a consumer will choose to interact with the message.

While native advertising has gotten a lot of buzz in the advertising industry, there has been a significant amount of confusion as to what it is and what advertisers need to do to ensure that their native ads are

legally compliant. In order to address the ongoing uncertainty surrounding the disclosure requirements for native ads, on December 22, 2015, the Federal Trade Commission issued its long-awaited guidance on native advertising and published its *Enforcement Policy Statement on Deceptively Formatted Advertisements*¹ and its *Native Advertising: Guide for Business* ("FTC Native Ad Guide").² Before we take a deeper dive into the disclosures recommended by the FTC Native Ad Guide, it's first helpful to understand the legal landscape in terms of what has guided disclosure requirements for native advertising prior to the release of the FTC Native Ad Guide.

¹ See

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

² See <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

Native Ad Legal Background

- **Interactive Advertising Bureau (IAB):** In December 2013, the IAB addressed native advertising disclosures in its *Native Advertising Playbook*.³ In the playbook, the IAB explained that there's no single definition of native advertising "because, to a large extent, native is in the eye of the beholder, depending on where one sits in the ecosystem and the strategic and media objectives of the marketer." Rather than offer a cohesive definition, the IAB divided the native universe into types of native advertisements, ranging from custom content on Tumblr or BuzzFeed, to Taboola recommendation widgets, to promoted listings on eBay or Amazon, to custom blog posts, in an attempt to illustrate all of the possible iterations of native advertising. The playbook gave examples of commonly used disclosure language but didn't address specific recommendations for making effective disclosures other than providing a generic standard that: "clarity and prominence of the disclosure is paramount," "the disclosure must use language that conveys that the advertising has been paid for" and "be large and visible enough for a consumer to notice it in the context of a given page and/or relative to the device that the ad is being viewed on." In July 2015, the IAB issued a "Deep Dive on In-Feed Ad Units"⁴ to supplement the playbook but still failed to provide specifics on proper disclosures for native ads.

- **Mobile Marketing Association (MMA):** Similar to the IAB, the MMA weighed in on the native advertising discussion with its *The Mobile Native Ad Formats* guidebook.⁵ However, the MMA guidebook didn't provide any disclosure recommendations, nor did it provide any concrete guidance on how companies should disclose native advertising. It simply outlined the various formats through which native advertising can be presented on mobile devices.

- **Word of Mouth Marketing Association (WOMMA):** In November 2014, the WOMMA released a "Don't Be Naïve About Native"⁶ white paper on how marketers should approach disclosures in native advertising. The white paper emphasized that disclosure and transparency must be prioritized when planning native advertising campaigns, and it provided substantive, practical recommendations with respect to disclosure obligations for various categories of native advertising and on different platforms using specific examples. Generally, the white paper noted that the use of disclosure tags such as "sponsored by," "presented by," "promoted by," and "ad" could more clearly drive audience expectation because they are the most prevalently used disclosures across platforms. The white paper recommended using visual cues to separate disclosures from editorial content but cautioned that symbols alone shouldn't be used to independently make disclosures unless and until they have been universally adopted. In the custom content category, it recommended that publishers place a disclosure and the marketer's name on every page that includes sponsored content and drives the audience to sponsored content. It further recommended that viewers be informed in advance if they are being redirected to a third-party marketer's site by clicking on a native advertising content link. With respect to advertorials, the white paper stated that many publishers effectively disclose such native content by using the label "ADVERTISEMENT" across the top of the advertorial. For paid search results on search engines (including search functionality in social media and publisher sites), the white paper recommended that marketers choose search engines which clearly identify paid results as "ads" and which create separation between organic and paid results. For recommendation widgets, the white paper stressed that it may not be eminently clear to audiences that sponsored links are paid for by marketers, especially given the title of widgets

such as "YOU MAY LIKE" or "RECOMMENDED FOR YOU." While noting the great complexity associated with the execution of disclosures with recommendation widgets, the white paper stated that it would be ideal for the recommendation widget to clearly convey that "the link itself is sponsored and who the sponsor is" and "whether or not the linked content is owned by the marketer paying for the link."

• **American Society of Magazine Editors (ASME):** On April 15, 2015, the ASME (the trade organization for magazine publishers) updated its Guidelines for Editors and Publishers ⁷ to address native advertising disclosures. The ASME guidelines discussed the necessity for differentiating between editorial content and advertising content. With respect to addressing the issue of native ads in particular, the guidelines stated: "Regardless of platform or format, the difference between editorial content and marketing messages should be clear to the average reader. On websites populated by multiple sources of content, including user-generated content, aggregated content and marketer-provided content, editors and publishers must take special care to distinguish between editorial content and advertising. Advertisements that mimic the "look and feel" of the print or digital publication in which they appear may deceive readers and should be avoided. Print and digital advertisements that resemble editorial content should be identified as advertising in compliance with FTC regulations." To ensure that such labeling is clear and conspicuous, the ASME recommended the use of terms such as "advertisement," "advertising" and "special advertising section" for print advertising units and further recommended that these terms be printed horizontally and centered at the top of each advertising unit in readable type. ASME also recommended that native advertising on websites and in social media be clearly labeled as advertising by using terms such as "sponsor content" or "paid post" and that collections of sponsored links be clearly labeled as advertising and visually separated from editorial content.

• **The National Advertising Division of the Council of Better Business Bureaus (NAD):** The NAD is the self-regulatory body for the advertising industry and has taken an active role in addressing native advertising head-on. Before the FTC released guidance in late 2015, the NAD filled the void by bringing numerous challenges, primarily as part of its routine monitoring of the industry, and created a body of law to guide advertisers, with the goal of increasing transparency. These cases, drawing on the FTC's guidance on advertorials and infomercials, recommended that advertisers clearly and conspicuously disclose that native/sponsored content is actually advertising. The NAD has even taken the position that a disclosure is required "when the content does not mention a specific product or service... [because] failing to disclose the sponsor of an article may deprive consumers of insight into why a particular article was published, including the motivations of the author." ⁸ The NAD's cases have even prescribed appropriate placement of disclaimers, noting that consumers are less likely to notice and read disclaimers on the upper right-hand corner versus the upper left-hand corner of a webpage. ⁹

³ See <http://www.iab.com/wp-content/uploads/2015/06/IAB-Native-Advertising-Playbook2.pdf>.

⁴ See http://www.iab.com/wp-content/uploads/2015/07/IAB_Deep_Dive_on_InFeed_Ad_Units.pdf.

⁵ See <http://www.mmaglobal.com/documents/mobile-native-ad-format>.

⁶ Available for download by visiting <http://womma.org/free-womm-resources/>.

⁷ See <http://www.magazine.org/asme/editorial-guidelines>.

⁸ *Pursuit of Research/Nutriiveda Dietary Supplement*, NAD Case Report #5725 (June 2014).

⁹ *Taboola, Inc./Online Advertising*, NAD Case Report #5708 (May 2014).

FTC's New Native Ad Guidelines

The recently released FTC Native Ad Guide goes beyond simply reminding advertisers that commercial content must be identified as such. Instead, the FTC's newest guidance document 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 guidance emphasized 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 provided detailed recommendations as to what those disclosures should be and how they 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, the FTC identified only a couple of circumstances where disclosure likely would not be required:

- where it is inherently obvious that a natively formatted ad contains commercial content.
- where paid branded product placements appear 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.
- 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.

Aside from these exceptions, the FTC Native Ad Guide takes a sweeping view of advertising and the accompanying disclosure requirements. As a general principle, the more a native ad has a similar appearance, format and topic to surrounding editorial content, the more likely a disclosure will be necessary.

Know the Platform

Whether a disclosure is necessary may vary depending on the platform on which the content will be distributed. 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 native articles appear in news feeds and in content recommendation widgets, publishers must disclose if the content is commercial. Further, the FTC clarified that links and other visual elements appearing in nonpaid search results must 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 also require disclosure. Further, 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 wouldn't realize that sponsors have paid for product placement. Notably, the recommendations don't 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?

In the FTC Native Ad Guide, the FTC reiterated the basic principles of its 2013 guidance document “Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising”¹⁰, which stated 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, the FTC Native Ad Guide also included very specific guidance for placement that deviates from current industry practice. Key recommendations include:

- Pay attention to how consumers view content on the website or other online service. Disclosures need to be near the ad's focal point (e.g., in front of or above the headline or image). The FTC recommended 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 noted that focal points are images or graphics, not headlines or other written text. The FTC recommended that the advertiser place a disclosure directly on the image itself (e.g., on a thumbnail of a sponsored video on platforms such as YouTube).

¹⁰ See <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

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 noted 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 partway through the video.

When native ads appear alongside editorial content, the native ads must be easily identifiable. The FTC recommended 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 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 stated that links shared on social media or e-mail should include a disclosure at the beginning of the native ad's URL. If the ad has audio, an audio disclosure is recommended. For video ads, the disclosure needs to remain on screen long enough to be read and understood, and may need to be repeated throughout longer programming.

Choose the Appropriate Disclosure

While the FTC thinks “ad,” “advertisement,” “sponsored advertising content” or similar terms are effective, it stated that the terms “promoted” or “promoted Stories” are too ambiguous and should be avoided. Furthermore, disclosures 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.

When in Doubt, Disclose!

In sum, native advertising has generated a lot of buzz among advertising attorneys, marketers and regulators alike, and advertisers should exercise caution as they create and publish advertising that looks like unpaid, editorial content. With the FTC Native Ad Guide now in place, the FTC is clearly putting advertisers and publishers on notice as to what native ad practices may be deceptive, and giving companies involved in the digital media ecosystem the opportunity to modify their current methods to comply with the FTC's truth-in-advertising principles. 2016 will likely see multiple enforcement actions to further clarify the FTC's interpretation its FTC Native Ad Guide. Here is a quick checklist of compliance recommendations so you can avoid having the FTC investigate whether your disclosure practices violate the FTC Native Ad Guide:

- Be transparent. Content that promotes the benefits and attributes of goods and services should be clearly identifiable as advertising to consumers. Such promotional content is deceptive if it misleads readers “into believing it is independent, impartial, or not from the sponsoring advertiser itself.” Even where content once it's viewed is clearly an ad, if the content is not also apparently an ad before it's viewed, then it must be clearly identified as an ad in a manner that enables consumers to understand that before they go on to view that content.
- If a native advertisement appears in-line or in-feed with editorial content, advertisers must ensure that the native/sponsored content is easily distinguishable as advertising. In addition to labeling the content as an “ad,” the FTC also recommended adding other cues such as background shading or a clear border as a differentiator.
- Disclosures should remain when ad content is shared virally or republished. Many of the most popular social media sites today fail to continue to carry the sponsored disclosure after sponsored content is shared by a user. This is an area that may quickly become a battleground between content publishers and regulators.
- For native articles, disclosures should be near, above or to the left of the story headline.
- For native video ads, disclosures should be made in the ad itself *and before a consumer receives the ad's message*. On platforms using thumbnails—for example, YouTube—the FTC indicated that “ad” should appear on the thumbnail image for a sponsored video, not simply on the link. Also, when any kind of link is involved, the disclosure has to appear at least twice—once with the link and then a second time with the content.
- Choose disclosures that are easily understood by consumers. The determination of which

disclosure is most appropriate will need to be made on a case-by-case basis depending on the nature of the native content, how the content is presented to consumers and the platforms on which it appears.

- The phrase “presented by” is appropriate to disclose that an advertiser paid a publisher to create and publish an article that may be of interest to its consumers where the article doesn't reference or promote the advertiser's products or services. There, the ad is the sponsorship, not the content. However, were the article to depict or discuss the advertiser's products or services, the article (or the applicable part of it) would need to be clearly and prominently disclosed as an advertisement. The placement of required disclosures will vary depending on the nature of the advertiser's involvement in the editorial content.
- “More Content for You” and “From Around the Web,” commonly used in recommendation widgets, don't sufficiently disclose that associated ad content is advertising and not independent editorial.
- If a paid product placement doesn't include or suggest objective claims about a product or service but does link to an ad (e.g., in an interactive game), that placement should be identified as an ad before the user clicks out to the ad.
- The target audience should also be considered. For example, if the native ad will be targeted to children, you should consider whether the Children's Advertising Review Unit's Self-Regulatory Program For Children's Advertising ¹¹ Guidelines addressing “Blurring of Advertising and Editorial/Program Content” apply.

¹¹ See <http://www.caru.org/guidelines/guidelines.pdf>.

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