

Native Advertising: FTC Guides Brands to Avoid Deceptive Commercial Speech

By Kyle-Beth Hilfer

I. Introduction

Masquer-ads. Advertorials. Infomercials. Paid search engine results. Advertising that feels and looks like editorial platform content has existed for decades. In the age of social media, however, “native advertising,” as it is now often called, has become more confusing. Brands have become more sophisticated at disguising their advertising messages within the editorial content, making it more difficult to differentiate commercial speech. The transition from editorial to sponsored content may be so seamless that consumers may not realize that they are perusing advertising. The Federal Trade Commission (“FTC”) remains consistently concerned about native advertising’s potential to deceive consumers.¹

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II. History of FTC Activity on Native Advertising

The FTC first started monitoring this form of advertising in 1917, scrutinizing vacuum cleaner reviews that failed to disclose that the author was an agent of the vacuum cleaner company.² Fast-forwarding to 1967, the agency took action when a newspaper article seemed to be a restaurant review column, but in fact was advertising for the restaurant.³

After years of consistent enforcement against commercial speech disguised as editorial content,⁴ in December 2013 the FTC conducted its first workshop on native advertising. The FTC’s goal was to examine the increasingly “blurred lines” between advertising and digital content.⁵ While *Ad Age* editor Bob Garfield condemned the trend as a “hustle, a racket, [and] a grift,”⁶ other attendees questioned whether today’s tech-savvy consumers are more astute than their parents had been. They also pointed out that in the digital age much of the native content feels more editorial in nature than a product review. Native content may speak to a brand’s philosophy, values and community connections, engaging consumers without even mentioning products or services.⁷ Workshop speakers also discussed the ameliorating factors of transparency and disclosure that have always been standards for ethical advertising.

After the workshop, the advertising industry relied on guidance from the American Society of Magazine Editors⁸ and the Interactive Advertising Bureau.⁹ These

organizations urged brands to use disclosures and label commercial speech clearly. Two years later, in December 2015, the FTC finally issued two new guidance documents: “Enforcement Policy Statement on Deceptively Formatted Advertisements”¹⁰ and “Native Advertising: A Guide for Businesses.”¹¹ These documents confirm that transparency and disclosures are crucial to ensuring that native advertising is not deceptive.

III. Current FTC Guidance

In announcing its new guidance, the FTC took pains to root its advice in long-standing principles interpreting Section 5 of the FTC Act. This statute governs unfair or deceptive practices that affect consumers.¹² The FTC starts with the presumption that the commercial nature of speech is of material concern to consumers since it is more likely to be biased: “Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it. Such knowledge also may influence whether and to what extent consumers choose to interact with content containing a promotional message.”¹³ To determine if the advertising is unfair or deceptive, the FTC considers the overall “net impression” on the reasonable consumer. Many factors influence “net impression” of advertising, including format, delivery method, audience, and content.¹⁴

Even if advertising content were truthful, the FTC would still view the speech as deceptive if consumers do not appreciate that it is commercial speech right from the outset. The Enforcement Policy discusses the FTC’s history of enforcement action against misleading “door openers.”¹⁵ At one time, this concept referred to door-to-door salesmen who tricked consumers into letting them into their homes without conveying that they were selling products. In today’s climate, the “door opener” can be a click-through ad, a headline that looks like news, or a social media post. The FTC clearly wants consumers to know they are looking at commercial speech before they click or tap to content. While industry members have questioned what harm comes from clicking, the FTC draws its current guidance from well-established law. The CAN-SPAM law requires that email subject lines convey clearly that the email is commercial content.¹⁶ The Tele-marketing Sales Rules requires telemarketers to let people know upfront that they are selling goods or services.¹⁷

In determining if the native advertising is deceptive or uses a “misleading door opener,” the FTC considers, among other things, “the similarity of [the ad’s] written, spoken, or visual style to non-advertising content offered on the publisher’s site,” “the degree to which [the ad] is

distinguishable from other content,” “expectations based on consumers’ prior experience [with the editorial medium]” and disclosures or qualifiers in the advertisement.¹⁸

Together, the Enforcement Statement and Business Guide provide direction to marketers. The Business Guide, in particular, provides a number of specific examples that provide insight into how the FTC may enforce the law. Legal counsel should ponder the questions listed below while reading these documents and advising the marketing team what disclosures may be necessary in advertising.

A. Does the Content Require a Disclosure?

A threshold question is whether the content is advertising or editorial. Digital media has brought about the proliferation of many different types of native advertising: advertising provided exclusively and directly from the brand; branded content that is relevant to and funded by the brand, but coming from a third party; or content that the advertiser and publisher jointly produce with advertiser approval. Not all native advertising requires a disclosure.¹⁹

The FTC permits some native content to be seen as editorial in nature. For instance, Example 2 in the Business Guide cites an article about vacation spots “presented by” a running-shoe company. The article was accompanied by the company’s logo, but it did not mention any company products.²⁰ The FTC would not require a disclosure in this instance because the article, itself, is editorial and the “presented by” tag and logo are self-explanatory clearly commercial advertising. In contrast, in Example 6, an article in a news magazine sponsored by an advertiser and mentioning its products requires a disclosure when it resembles a news article.²¹ Laura Sullivan of the FTC’s Division of Advertising Practices has indicated that content that is related solely to “brand integrity, brand equity, or improv[ing] the brand image, it [may not be considered] advertising.”²²

The Business Guide also analyzes re-purposed content. Example 8, for example, features an advertiser who republishes an unsolicited third-party favorable review.²³ The review itself would not constitute advertising, but if the advertiser places it into third party media, that placement is an “ad” requiring disclosure. More nuanced examples in the Business Guide revolve around shares and their context. What are the reasonable expectations of the viewer in these circumstances? If the share comes directly from a company, a disclosure is likely necessary as opposed to a share coming through a different independent site.²⁴ The Business Guide examples make it clear that if the advertiser’s content facilitates sharing (with social media buttons, for example), the share link must contain a disclosure.

Paid content that appears in non-paid search results are also problematic. The FTC opines in the Enforcement

Policy that consumers expect non-paid search results to be impartial. Consequently, such content requires a disclosure.²⁵ The Business Guide provides some examples of paid content: “any link or other visual elements, for example, webpage snippets, images, or graphics, intended to appear in non-paid search results.”²⁶ Laura Sullivan explained: “If the search results would appear like any other article housed on a publisher site, then within the headline link there should be a disclosure.”²⁷

The FTC’s guidance makes it clear that identifying commercial speech is a nuanced, fact-specific inquiry. If the brand and its counsel are uncertain of how to proceed, the Business Guide’s examples are a starting point for analysis.

B. What Should the Disclosures Say?

Having identified native content as potentially deceptive, counsel should direct marketers to make transparent disclosures that limit the risk of deception. The FTC prefers clear, no-nonsense disclosures in “simple, unequivocal” language.²⁸ It has previously endorsed disclosures like “Ad,” “Advertisement,” “Sponsored Advertising Content,” etc. On the other hand, the FTC views as ambiguous labels like “Promoted,” “Sponsored,” “Presented by,” “Promoted/Sponsored Story” or “More Content for You.”²⁹ Undoubtedly, inside counsel will have some negotiating to do with the marketing team in following the FTC’s advice.

Similarly, just branding the content with a company logo is most likely an inadequate disclosure. While the logo may convey that an advertiser funded the content, it is inadequate to convey that the advertiser influenced the content.³⁰ Another consideration in forming a disclosure is the common language of the editorial platform. Counsel for brands should consider how other advertising material is labeled on the platform and adopt similar language. Ultimately, the FTC has made it clear that the “effectiveness of any [disclosure] is context driven.”³¹

C. How Should Brands Make Their Disclosures?

Disclosures are not a cure-all, even if they use unambiguous language. Per the FTC’s guidance, a disclosure must be clearly and conspicuously placed in relation to the native advertisement. Again, the FTC relies on standards it has enforced consistently with print or television advertising to delineate what “clear and conspicuous means.” The disclosure should be as close as possible to the content, in font and color that is easy to read and contrasts with the background. In some instances, borders to offset the advertising from editorial text may be appropriate. In videos, the disclosures should be on screen long enough to be noticed, read and understood. Audio disclosures should be read at a cadence and volume that allows consumers to understand their meaning.³² Notably, the FTC refers businesses to another business guidance document for more details on disclosures, “.com Disclosures:

*How to Make Effective Disclosures in Digital Advertising.*³³ That guide states that disclosures in digital media should be “unavoidable” to the consumer, and this principle should inform all of counsel’s advice to its brand marketing team.³⁴

D. Where Should the Disclosure Go?

Disclosures should be located to match consumers’ normal viewing predilections. They should be near headlines or the top of the content. If text flows from left to right, disclosures should be placed on the left side of the copy. If a focal point of the ad is graphic, however, the disclosure might need to be placed near that focal image. In addition, the ad’s disclosures need to be platform responsive, even in the mobile context. Finally, the disclosure likely will be necessary multiple times, first at the originating link before the consumer views the native content, and then again on the click-through material.³⁵

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IV. FTC’s First Enforcement Action on Native Advertising

Industry members were surprised to see swift enforcement of the FTC’s Enforcement Policy. On March 15, 2016, the FTC announced its first consent order dealing with the Enforcement Policy. Retailer Lord & Taylor (“L&T”) had run a highly successful social media “product bomb” campaign in March 2015 to launch its apparel line Design Lab. The campaign focused on one paisley, asymmetrical dress. L&T contracted with *Nylon*, an online fashion magazine, to run an article about the collection and feature the paisley dress. L&T also required *Nylon* to post a photo of the dress on its Instagram page. L&T reviewed both the article and the Instagram post before publication but failed to require a disclosure that they were paid advertising. Instead, the FTC alleged that L&T falsely and deceptively presented *Nylon*’s content as independent opinion about the Design Lab line.

The FTC also focused on the significant lapses pursuant to the FTC’s Endorsement & Testimonial Guides.³⁶ L&T paid fifty independent influencers between \$1,000-\$4,000 and gave them all the dress. In return, the influencers posted photos of themselves wearing the dress on Instagram on the “product bomb” weekend, identifying their posts with L&T and Design Lab tags. Again, while L&T preapproved the posts, even editing some of them, the retailer failed to require a disclosure of the material connection between the influencers and L&T.

The L&T case represents a step forward in the FTC’s enforcement activity as it is closing the case with a consent order rather than a closing letter (as it had in previous E&T Guides’ cases). The final consent order, approved just two months after its initial release, prohibits L&T from “misrepresent[ing], in any manner, expressly or by implication, that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.”³⁷ In addition, the consent contained prohibitions regarding misleading endorsements and required disclosures. Finally, the consent order picks up the comprehensive monitoring requirements established pursuant to case law interpreting the E&T Guides.³⁸ L&T must have procedures to monitor influencer posts, obtain separate signed acknowledgements regarding disclosure requirements, and terminate social influencers after two violations. These monitoring requirements, while closely tied to the E&T Guides, should also guide inside counsel when determining how to set up internal procedures on native advertising cases.

In addition, the Lord & Taylor case demonstrates the close intersection between testimonial and endorsements and native advertising campaigns. In-house counsel should be particularly careful when reviewing influencer-marketing campaigns that have native advertising components. The FTC has clearly left the education phase on the E&T Guides, and if a campaign has native advertising components, attorneys may find themselves defending charges under both the E&T Guides and the Enforcement Policy.

V. Practice Tips

When working with brand marketers on native advertising concepts, in-house attorneys should keep them focused on the guiding principles of transparency and disclosure. In deciding whether advertising requires disclosures, counsel can coach clients with the following practice tips:

- Err on side of transparency.
- Consumers must know content is commercial speech before they interact with it.³⁹
- Disclosures should change or clarify the meaning of the advertising message, making it crystal clear that the advertising message is commercial speech.
- Disclosures should be in simple language and placed in a clear and conspicuous location.
- In-text disclosures may not be sufficient. They should be proximate to the headline on the left side.
- Click-through ads require disclosures on both the originating page, even if it is a newsfeed, and the click-through itself.

- If reproducing an independent article as recommended content, the brand likely needs to include a disclosure if it is not clear that the recommendation came from the brand.
- When a customer shares an independent article with its originating link coming from the brand, the link likely requires a disclosure.
- Sponsored videos that look like non-sponsored content require disclosures.
- Paid content that appears in non-paid search results typically requires a disclosure.
- Product placements or clear advertising (e.g., billboard graphic) in entertainment formats, such as video games, may not require disclosures, but click-throughs that look like gaming content would require a disclosure before the consumer clicks.⁴⁰
- Remember that brands are responsible for the veracity of any product/service claims in the native content and the activity of their agencies.
- Counsel should design monitoring policies that require disclosures and encourage brands to enforce these policies as a way of protecting the company.

VI. Conclusion

Many brands truly do not see their native advertising as commercial content, but rather as an additional value for their customers. The marketing team may be resistant to labeling this content as advertising due to concerns about decreased consumer engagement and conversion rates. On the other hand, astute marketers realize that they must remain transparent to ensure customer loyalty, and counsel should highlight this fact when trying to mitigate legal risk. Furthermore, counsel will want to underscore the risk of coming to the FTC's attention. Consent orders can remain in place for 20 years or more and damage the corporate reputation.

FTC representatives have indicated that they are in a phase of education and clarification for businesses.⁴¹ The agency welcomes questions from industry and may eventually issue a FAQ document, just as it did with its Endorsement & Testimonial Guides.⁴² In September 2016, the FTC will hold a workshop "Putting Disclosures to the Test" to evaluate the effectiveness of consumer disclosures, perhaps to create additional guidelines.⁴³ On the other hand, the L&T case shows that native advertising may be part of enforcement activity right away, particularly if the fact pattern overlaps with other deceptive practices.

Typically, the FTC looks at the most aggressive proliferators of deceptive practices or brands that have a broad reach in the marketplace. With regard to native advertising and the Enforcement Policy, the FTC has indicated that it is likely to be most concerned with native content

that takes the form of news/feature stories, product reviews, investigative or scientific reports, or phony government or business endorsements.⁴⁴ Counsel should look to implement monitoring programs with teeth, modeled after the L&T case, that demonstrate a strong commitment to transparency. Such programs may be the best safe harbor available against enforcement.

It is also crucial to remember that the FTC's guidance does not only apply to advertisers but also to their agencies. The Business Guide states, "In appropriate circumstances, the FTC has taken action against other parties who helped create deceptive advertising content—for example, ad agencies and operators of affiliate advertising networks."⁴⁵

Going forward, counsel for brands and their agencies should immediately implement internal reviews of their advertising practices to reach philosophical and practical conclusions about their native advertising programs.

Endnotes

1. This article is current as of May 15, 2016, when it was submitted for publication.
2. See *Annual Report of the Fed. Trade Comm'n*, at 10 (FY 1917), available at https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1917/ar1917_0.pdf.
3. *Statement in Regard to Advertisements that Appear in Feature Article Format*, FTC Release, (Nov. 28, 1967); *Advisory Opinion No. 191, Advertisements which appear in news format*, 73 F.T.C. 1307 (1968).
4. *FTC Enforcement Policy Statement on Deceptively Formatted Advertisements*, at 3-8 (Dec. 2015), available at https://www.ftc.gov/system/files/documents/public_statements/896923/151222_deceptiveenforcement.pdf (hereinafter *Enforcement Policy*).
5. FTC, Workshop, "Blurred Lines: Advertising or Content?" available at <https://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native>.
6. FTC, Workshop, "Blurred Lines: Advertising or Content?" (transcript at 129), available at https://www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf.
7. *Id.* at 74.
8. American Society of Magazine Editors, *ASME Guidelines for Editors and Publishers* (April 15, 2015), available at <http://www.magazine.org/asme/editorial-guidelines>.
9. Interactive Advertising Bureau, *IAB Native Advertising Playbook* (Dec. 04, 2013), available at <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>.
10. *Enforcement Policy*, *supra*.
11. *Native Advertising: A Guide for Businesses*, Fed. Trade Comm'n Bus. Ctr. (Dec. 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> (hereinafter *Business Guide*).
12. 15 U.S.C. § 45.
13. *Enforcement Policy*, *supra* at 1.
14. *Id.* at 11.
15. *Id.* at 7.
16. 15 U.S.C. § 7704.
17. 16 C.F.R. § 310.3.
18. *Enforcement Policy*, *supra* at 11.

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19. See, e.g., ASRC Press Release, *Native Advertising Review: NAD Examines Qualcomm/Mashable Sponsored Series*, (Sept. 30, 2013), available at <http://www.asrcreviews.org/2013/10/native-advertising-review-nad-examines-qualcomm-mashable-sponsored-series/>.
20. Business Guide, *supra* at Ex. 2.
21. *Id.* at Ex. 6.
22. Laura Sullivan, Attorney, Fed. Trade Comm'n, *A Virtual Fireside Chat with the FTC on Native Advertising* (Feb. 11, 2016) (hereinafter FTC Fireside Chat).
23. *Id.* at Ex. 8.
24. *Id.* at Ex. 14-16.
25. Enforcement Policy, *supra* at 6.
26. Business Guide, *supra* at Ex. 17.
27. FTC Fireside Chat, *supra*.
28. Enforcement Policy, *supra* at 13. (Citing, *Thompson Medical Co.*, 104 F.T.C. 648, 743 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).
29. Business Guide, *supra* at IIIC.
30. See, e.g., Business Guide, *supra* at Ex. 7.
31. FTC Fireside Chat, *supra*.
32. Business Guide, *supra* at III.
33. FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.
34. *Id.* at 7.
35. Business Guide, *supra* at III.
36. See, *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. Pt. 255, et al. (hereinafter E&T Guides).
37. In the Matter of Lord & Taylor, LLC, File No. 152-3181, *Agreement Containing Consent Order* (F.T.C. May 23, 2016), available at https://www.ftc.gov/system/files/documents/cases/160315lordandtaylororder.pdf?utm_source=govdelivery.
38. In the Matter of Machinima, Inc., File No. 142-3090, *Agreement Containing Consent Order* (F.T.C. September 2, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150902machinimaorder.pdf>.
39. See, e.g., Business Guide, *supra* at Ex. 12.
40. Business Guide, *supra* at Ex. 9-13.
41. FTC Fireside Chat, *supra*.
42. *The FTC'S Endorsement Guides: What People Are Asking*, FTC Business Center Guidance, May 2015, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.
43. See "Putting Disclosures to the Test" workshop description, available at: https://www.ftc.gov/news-events/events-calendar/2016/09/putting-disclosures-test?utm_source=govdelivery.
44. FTC Fireside Chat, *supra*.
45. Business Guide, *supra* at IIIC.

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