



Native Advertising

Key Issues and Considerations

Julia Christie/Getty Images



DAVID ERVIN

PARTNER
CROWELL & MORING LLP

David is a partner in the firm's Washington, DC office and a member of the Advertising & Product Risk Management and Intellectual Property groups. His practice focuses on the relationship between advertising and intellectual property law, primarily for consumer brands making significant investments in media and content creation and licensing. Specifically, David assists clients with managing and protecting their brands and intellectual property rights in connection with their advertising, media, sponsorship, licensing, sports marketing, e-commerce, loyalty program, and joint promotion activities.

Native advertising is an increasingly popular and rapidly evolving form of advertising that has the potential to influence consumer behavior more effectively than traditional advertising. Companies seeking to conduct a native advertising campaign must understand the different types of native advertisements and the legal issues involved.

Native advertising is sponsored content that is intended to match the visual design of a hosting publication or website and to behave just like editorial content. Native advertising blurs the line between content and advertising.

For most companies, the goal is for a native advertisement to blend seamlessly with the medium on which it is displayed, so that consumers digest the information without losing interest because the content is an advertisement. The perfect native advertisement is one that consumers look at and are drawn to for its content, even though they ultimately recognize that it is an advertisement.

A native advertisement could be a blurb or page in a magazine, a YouTube video, a recommended article on a blog, or an in-stream link on a social media platform. The medium is not the primary focus. The form and function of the native advertisement are the key elements.

Native advertising is popular with advertisers, and the amount of resources being directed at it is expanding every day. However, native advertising can subject a company to consumer litigation and government enforcement actions. Several government agencies have expressed concerns about this type of advertising, and self-regulatory organizations are providing guidance to companies on best practices regarding a host of legal issues.

This article provides an overview of native advertising. In particular, it discusses:

- The various types of native advertisements.
- Key trends in native advertising.
- The primary risks and rewards of native advertising.
- The legal and self-regulatory framework surrounding native advertising.
- Best practices for protecting a company against advertising liability.



Search [Advertising: Overview](#) for a general overview of advertising rules and regulations in the US, including legal issues to consider when planning an advertising campaign.

TYPES OF NATIVE ADVERTISEMENTS

The term native advertisement covers a variety of advertisements that the Interactive Advertising Bureau (IAB) defines in its *Native Advertising Playbook*, issued in 2013 (available at [iab.com](#)).

According to the IAB, native advertisements include:

- **In-feed units.** These advertisements appear in the middle of editorial or social media content on sites such as Facebook or BuzzFeed.
- **Paid search units.** These advertisements are search results, typically highlighted in a different color, that appear at the top of the page before other search results on sites such as Google, Bing, or Yahoo!.
- **Recommendation widgets.** These advertisements are posts that appear on the side of a page or at the bottom of an

article and recommend additional content for the reader on sites such as Huffington Post or ESPN.

- **Promoted listings.** These advertisements are product listings that might appear on shopping websites or search pages that are promoted by sellers such as Amazon.com or Google.
- **In-ad with native element units.** These advertisements contain content that is meant to look like the editorial content around it.
- **Custom/can't be contained.** These advertisements fall into a catch-all category for other native content.

TRENDS IN NATIVE ADVERTISING

Sponsored content has existed since the earliest days of broadcast radio and television, when advertisers sponsored popular programs and directly influenced their content. Native advertising today is more fluid and subtle, taking advantage of the content opportunities created by digital, mobile, and video technology. Recent trends in native advertising center on how advertisers create content, as well as how mobile devices and applications increase both the efficiency of advertising campaigns and the complexity of issues advertisers must address. Key trends include:

- **Rising investment in native advertising.** Native advertisements are becoming more important to brands, and companies are devoting increasing amounts of money to creating native advertising campaigns. Annual spending for native advertising in the US is expected to reach \$21 billion in 2018 (BI Intelligence, *Spending on Native Advertising Is Soaring as Marketers and Digital Media Publishers Realize the Benefits*, Business Insider (May 20, 2015)). Advertisers and advertising agencies also increasingly want to spend their advertising budget on social media.
- **Increasing use of user-generated content.** Brands are engaging more with their customers. The dialogue is increasingly interactive, and customers are actively generating original content that focuses on the brand. Companies are launching advertising campaigns that thrive by inspiring users to create their own content, including tweets and videos.
- **Reliance on lifestyle bloggers.** Companies are selling their products by relying on bloggers and other social influencers to sell a way of life to consumers that includes those products.
- **Creation of in-house sponsored content by publishers.** Publishers have been creating sponsored content for advertisers for several years. Most publishers generally view native advertising as a way to make up for lost revenue resulting from flagging print publications, non-performing online banner advertisements, and declines in more traditional forms of digital advertising. Publishers initially used designated staffs of writers and editors to create sponsored content for advertisers. Increasingly, publishers are relying on their existing editorial staffs to create sponsored content in addition to editorial content. In January 2015, for example, Condé Nast launched its in-house sponsored content group, 23 Stories by Condé Nast, which generates sponsored content for advertisers using the company's existing editorial and design staff (Steven Perlberg, *Condé*

Nast Unveils Branded Content Shop Powered by Editors, The Wall Street Journal (Jan. 26, 2015)).

- **Facilitation by third parties.** Startups are moving into the native advertising space and are creating custom content for companies and their brands, leading to new dynamics of content ownership and control.
- **Growing dependence on mobile browsing and technology.** Consumers are relying more on mobile devices and less on newspapers, magazines, and even computers. Traditional forms of advertisements are not very successful at transferring to on-the-go platforms. Native advertising is filling that space, with the help of technology advancements such as:
 - silent autoplay video;
 - infinite scrolling; and
 - real-time programmatic delivery platforms.
- **Distribution through viral campaigns.** With the success of viral campaigns, the dynamic of advertising cycles has shifted. Now, even after companies stop paying for ad placements, many native advertisements live on through viral distribution because web and mobile users repost them to their own social media pages and share them with friends.

RISKS AND REWARDS OF NATIVE ADVERTISING

Native advertising, when done right, can be more effective than traditional advertising. When done poorly, it can cost a brand credibility and lead to costly litigation and government enforcement.

RISKS

Advertisers must consider a variety of risks when developing a native advertising campaign, including:

- Violating Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition (15 U.S.C. § 45; for information on the FTC Act, search [FTC Act Section 5: Overview](#)).
- Facing regulatory enforcement actions, including under state Unfair and Deceptive Acts and Practices (UDAP) laws.
- Defending against consumer class action and competitor false advertising litigation.
- Losing consumer trust.

Most companies already face regulatory risks. Gaining and maintaining consumer trust, however, becomes more important with native advertising. Native advertising can damage a brand's integrity if consumers feel they have been duped into believing that the native advertisement they are reading or watching is editorial content, but later discover that it is brand-sponsored content. Additionally, readers might feel they can no longer trust a publisher's reporting if the publisher does not clearly disclose when content is sponsored by advertisers. Relevancy and the quality of contact between the content and consumers have a significant influence on the scope of these risks.

REWARDS

Native advertisements can be significantly more successful than traditional forms of advertising at drawing consumers in and making them remember a brand.

Native advertising can damage a brand's integrity if consumers feel they have been duped into believing that the native advertisement they are reading or watching is editorial content, but later discover that it is brand-sponsored content.

For example:

- According to an IPG Media Lab and Sharethrough study conducted in 2013, *Exploring the Effectiveness of Native Ads* (available at [ipglab.com](#)), consumers look at native advertisements 52% more frequently than banner advertisements, and native advertisements lead to an 18% higher intent to purchase an item advertised than traditional banner advertisements.
- The UK Association of Online Publishers (AOP) released a report in 2015, *The Power of Native*, which found that:
 - native advertisement drivers outrank traditional advertisements in key categories, including being informative, interesting, useful, and helpful. Traditional advertisements ranked about the same as native advertisements on being eye-catching and higher on being clear/easy-to-understand and ordinary;
 - 59% of consumers surveyed found native advertisements interesting; and
 - 33% of consumers surveyed were more likely to trust native advertising than traditional advertising.

(Press Release, AOP, AOP Releases The Power of Native Research Report (Mar. 4, 2015).)

LEGAL AND SELF-REGULATORY FRAMEWORK

As with traditional advertisements, there is no one legal framework that applies to, or government body that oversees, native advertisements. Many organizations are releasing best practices guidelines for advertisers to follow, and several government agencies are indicating their concerns through advisory opinions, guidelines, and enforcement actions. Currently, however, only the Federal Trade Commission (FTC) has released rules or guidelines specific to native advertisements.

The parameters of what is allowed in the native advertising space are still largely undefined. Absent clear guidelines about what companies can and cannot do, native advertisers must consider a range of legal issues, including:

- First Amendment protection.
- Right of publicity laws.
- Guidance provided by the FTC.
- The potential for consumer litigation regarding false or misleading advertising.
- Actions by government agencies and self-regulatory organizations challenging deceptive native advertisements.
- The effectiveness of disclosures to prevent deception.

FIRST AMENDMENT PROTECTION

The First Amendment is relevant to all native advertising issues and may have significant ramifications for companies. In the traditional advertising context, if an advertiser includes an express offer of sale, the content will be classified as commercial speech. Commercial speech is afforded less First Amendment protection than non-commercial speech and is subject to more government regulation.

 Search [Advertising: Overview](#) for more on restrictions on commercial speech.

When advertisers create and distribute content that does not include an express offer of sale, however, it is unclear how courts and regulators will treat that content. Native advertising has been presumed to fit primarily into the commercial speech category, but courts presented with the issue might reach a different conclusion regarding the nature of native advertising, especially when no branding or product offers are included. If companies can create and publish content that qualifies for First Amendment protection, the dynamics of advertisements could change.

Many companies, for instance, are creating advertising campaigns that have a message of social change. Upworthy, a web publisher similar to BuzzFeed that aggregates content from around the web, partnered with Unilever in 2014 to promote Project Sunlight, a “long-term initiative ‘to motivate people to live sustainably by inspiring them to create a brighter future for children.’” The fact that Project Sunlight encourages consumers to purchase Unilever products was implicit in the content, but it was not the obvious, overarching theme of the campaign. (Michael Sebastian, *Upworthy to Run Native Ads That Try to Make You Feel Good*, *Advertising Age* (Apr. 1, 2014).)

This partnership was part of Upworthy’s advertising model called “Upworthy Collaborations,” the stated goal of which was to partner with companies and nonprofit organizations to generate native advertising content that has a social message. Upworthy reported that these campaigns generated \$10 million in revenue in 2014, and that Upworthy’s advertising content frequently outperforms editorial content in terms of the number of hits from readers. (Michelle Castillo, *Emotional and Effective, Upworthy’s Native Ads Have Brought in More Than \$10 Million for the Site*, *Adweek* (Feb. 20, 2015); Michael Sebastian, *Upworthy, Joining a Refrain, Says Paid Posts Get More Views Than Editorial*, *Advertising Age* (July 10, 2014).)

Whether this money-generating content is commercial speech or editorial content deserving First Amendment protection is not yet settled. For now at least, this content is subject to closer government oversight and receives less First Amendment protection. It remains to be seen whether this will change as native advertising evolves in the coming years.

RIGHT OF PUBLICITY

Advertisers that are active in the native advertising space might encounter issues involving the right of publicity. If a company produces a native advertisement that uses the name or image of a well-known person or celebrity, and the speech is considered



Native advertising has been presumed to fit primarily into the commercial speech category, but courts presented with the issue might reach a different conclusion regarding the nature of native advertising, especially when no branding or product offers are included.

commercial in nature, the company must obtain authorization for using it and typically pays that person a license fee for such use. If the company does not take these steps, it runs the strong risk of being sued.



Search [Right of Publicity: Overview](#) for more on the right of publicity, including the scope, enforceability, and transferability of the right, remedies for violations of the right, and principal exemptions and defenses to right of publicity claims.

For example, two grocery chains, Jewel Food Stores and Dominick's Finer Foods, placed advertisements in a commemorative issue of Sports Illustrated honoring Michael Jordan's induction into the Basketball Hall of Fame in 2009. Jewel's full page advertisement "salute[d] #23 on his many accomplishments" and "honor[ed] a fellow Chicagoan who was 'just around the corner' for so many years," playing off of the grocery chain's slogan that it was "just around the corner." Dominick's touted Jordan as "a cut above" and featured a coupon for steak.

Jordan filed lawsuits against both grocery chains for violation of his right of publicity. In August 2015, a jury awarded Jordan \$8.9 million after a federal judge determined that Dominick's violated Jordan's rights under the Illinois Right of Publicity Act (765 ILCS 1075/40) (Verdict and Settlement Summary, *Jordan v. Dominick's Finer Foods*, 2015 WL 5656038 (N.D. Ill. Aug. 21, 2015) (No. 10-00407)).

However, because Jewel's advertisement did not contain an explicit offer of sale encouraging consumers to purchase something, a federal district court concluded that the content did not qualify as commercial speech. The US Court of Appeals for the Seventh Circuit overturned that decision and remanded the case to the district court. Several months after the jury verdict was entered against Dominick's, Jewel settled its right of publicity case with Jordan. (*Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1112 (N.D. Ill. 2012), rev'd, 43 F.3d 509, 512 (7th Cir. 2014); Jon Seidel, *Michael Jordan Settles with Jewel, Dominick's*, Chicago Sun-Times (Nov. 22, 2015).)

FTC GUIDANCE

The FTC has clearly stated that deception is unlawful no matter the medium (FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (2013) (.com Disclosures Guide) (available at [ftc.gov](#))).



Search [Advertising and Promotions in Social Media](#) for more on the .com Disclosures Guide, including the requirement that disclosures be clear and conspicuous.

In December 2013, the director of the FTC's Bureau of Consumer Protection indicated at the FTC's workshop on native advertising, "Blurred Lines," that, particularly with native advertising, there "could be [FTC] enforcement, based on existing law and existing standards" (Transcript at 300, *Blurred Lines: Advertising or Content? – An FTC Workshop on Native Advertising* (2013) (available at [ftc.gov](#))). This statement suggests that, in the FTC's view, the legal framework governing general

advertising provides sufficient statutory and regulatory support to regulate native advertising.

In December 2015, the FTC published its long-anticipated guidance, *Native Advertising: A Guide for Businesses* (Native Advertising Guide) and an *Enforcement Policy Statement on Deceptively Formatted Advertisements* (available at [ftc.gov](#)). While the FTC noticeably did not further define commercial speech in the native advertising context, the Native Advertising Guide makes clear that:

- Transparency is the key concern.
- Some native advertisements are so commercial in nature that additional disclosures are not required.
- If disclosure is necessary to prevent deception, the disclosure must be clear and prominent.



Search [FTC Releases Policy Statement Explaining Deceptive Ad Formats for Native Advertisements](#) for more on how consumer protection principles apply to different advertising formats, including native advertisements.

The Native Advertising Guide seeks to identify disclosure practices that prevent deceptive use of native advertising, providing 17 examples, and makes clear that potential liability extends to "[e]veryone who participates directly or indirectly in creating or presenting native ads." Like all FTC guidance, however, complying with the Native Advertising Guide does not provide a safe harbor from liability under Section 5 of the FTC Act.

THE POTENTIAL FOR CONSUMER LITIGATION

Native advertisements seek to engage with consumers in a way that feels more like editorial content and less like a promotion. As a result, in some respects, native advertisements carry a heightened potential to be considered false and, in particular, misleading. The content might be false or misleading in the usual sense, by making unsubstantiated or misleading claims about a product or offering. The content might also be considered misleading by virtue of its form, if consumers cannot tell that what they are reading or watching is an advertisement. This standard is not new, but its importance is much greater in the native advertising space.

However, many native advertisements are effective precisely because they do not make product claims. The content might sell a lifestyle, with the hope that consumers will think they can gain that lifestyle if they buy the product, but the advertisement makes no specific claim or express reference to the advertiser's product or service. Without a product claim, native advertisements are not deceptive in the same way as traditional advertisements, so it can be difficult to demonstrate consumer harm.

Unlike with traditional advertisements, there probably will not be much competitor-driven litigation regarding native advertisements. Companies all have a similar incentive to operate in this space, and competitor actions would only thwart the growth of native advertisements. There might, however, be litigation by consumers claiming they were deceived by a native advertisement.

GOVERNMENT AND SELF-REGULATORY ENFORCEMENT

Various government agencies and self-regulatory organizations enforce advertising standards, but none have asserted enough native advertising claims to draw clear lessons for future advertisements. Federal government agencies have clearly signaled, however, that they will not hesitate to step in and challenge deceptive advertisements.

The FTC and the National Advertising Division (NAD) of the Council of Better Business Bureaus are the most active in the native advertising space and the most likely to undertake enforcement actions, provide guidance, and issue advisory opinions. Still, there is limited precedent in terms of case law and regulatory enforcement.

Examples of content likely to draw regulatory attention include:

- Product endorsements or recommendations by “experts” who are actually paid employees or contractors of the company.
- Seemingly unbiased reviews by ordinary customers that are actually written by employees of a public relations firm hired by the company.

FTC Enforcement

In March 2016, the FTC announced the settlement of an enforcement action against retailer Lord & Taylor, LLC, regarding a native advertising campaign and social media influencer activities that promoted a new dress line. Citing its recently published guidance, the FTC challenged a “seemingly objective” online magazine article that provided a favorable review of the dress line, but was actually a paid ad placement. Online fashion influencers also posted favorable images of the new dress line on Instagram and failed to disclose they were compensated by Lord & Taylor, a fact that gave rise to a separate deceptiveness claim. (Press Release, FTC, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers” (Mar. 15, 2016).)

The FTC has also brought enforcement actions in recent years against companies engaged in deceptive consumer review practices, including against companies that:

- Pay their employees or affiliates to post reviews as if they were ordinary consumers (*In re Reverb Commc'ns, Inc.*, 2010 WL 3441879 (F.T.C. Aug. 26, 2010) (employees); *In re Legacy Learning Sys., Inc.*, 151 F.T.C. 383 (2011) (affiliates)).
- Encourage their employees to post favorable reviews without disclosing their employee or agency connection (*In re Sony Comput. Entm't Am. LLC*, 2015 WL 1573331 (F.T.C. Mar. 24, 2015); *In re Deutsch LA, Inc.*, 2015 WL 1573330 (F.T.C. Mar. 24, 2015); Press Release, FTC, Game over: FTC Challenges Sony's Claims for PlayStation Vita and Tweets by Deutsch LA (Nov. 25, 2014)).
- Pay experts to endorse a product without disclosing those payments (*In re ADT LLC*, 2014 WL 2996162 (F.T.C. June 18, 2014)).

Settlements occasionally include substantial financial penalties, but usually the most significant negative impact of a settlement, for any company, is being subject to a 20-year consent order that requires legal compliance and FTC review of similar advertising.

Future FTC enforcement actions might involve publishers. It is worth noting that some of the FTC's guidance in the Native Advertising Guide sets up a potential battle with publishers by requiring that disclosures:

- Be placed on sponsored images and graphics.
- Survive republication.
- Include more than company logos and names alone.

In response to these disclosure requirements, many leading publishers cite the First Amendment and flatly reject these restrictions on native advertising, especially on content that their editorial staff produces. The first test case the FTC brings against a publisher under the Native Advertising Guide will be one to watch closely.

NAD Enforcement

The NAD is an enforcement arm of the advertising industry's self-regulatory system. Several NAD decisions since 2013 show that the NAD is skeptical of native advertisements that involve other deceptive elements, including a failure to:

- Disclose the relationship of the creator of the content to the advertiser (American Media, Inc. (Shape Water Boosters), Case No. 5665 (Dec. 18, 2013)).
- Clearly label the content as sponsored content (Taboola, Inc., Case No. 5708 (May 5, 2014)).

The NAD also concluded in one case that, after a company stopped promoting native content, it did not need to monitor whether that content, when recirculated, was identified as being sponsored content (Press Release, Advertising Self-Regulatory Council, Native Advertising Review: NAD Examines Qualcomm/Mashable Sponsored Series (Sept. 30, 2013)). The difficulty with drawing clear standards from these cases, however, is that NAD decisions are not binding precedent.

Most recently, the NAD offered direction on the placement of disclosures in native advertisements (Joyus, Inc., Case No. 5956 (May 19, 2016)). Citing the Native Advertising Guide, the NAD determined that express disclosures in video links were required to avoid misleading consumers, even when other audio and visual cues made the connection clear.

THE EFFECTIVENESS OF DISCLOSURES

One of the key unanswered questions regarding native advertising is whether disclosures can cure native advertisements of being considered deceptive or misleading, or whether some native advertisements are so inherently deceptive that no amount or type of disclosures can cure them. However, the FTC did recognize the opposite situation in its Native Advertising Guide. The FTC stated that some native advertisements are so inherently commercial in nature that additional disclosures may not be necessary.

Native advertisers should be aware of various sources of guidance on disclosures, including:

- Rules developed in the traditional advertising context.
- Previous guidance for broadcasters and search engine companies.
- FTC guidance on disclosures.

Traditional Advertising Rules

The rules and best practices developed over the years for traditional advertising still apply to native advertising, but advertisers need to pay even more attention to their disclosures in the native advertising space, where context does matter. Because there is a lack of specific regulations for native advertising, the risks can be mitigated but not eliminated. The first step in reducing risk is applying the rules and regulations that are in place for more traditional forms of advertisements.

Therefore, when creating native advertising disclosures, companies should:

- Use an understandable label.
- Use consistent language for disclosures.
- Present the disclosure clearly and conspicuously, including by use of visual cues.
- Use brand logos.
- Place the disclosures close to the advertisement.
- Visually separate the advertisement from editorial content.
- Avoid interaction between the editorial content and the advertisement.
- Avoid over-disclosing.

The rules and best practices developed over the years for traditional advertising still apply to native advertising, but advertisers need to pay even more attention to their disclosures in the native advertising space, where context does matter.

Guidance for Broadcasters and Search Engines

Native advertisers can learn from previous disclosure guidance for broadcasters. The Communications Act of 1934 provides the most basic guidance (47 U.S.C. § 151). It requires broadcasters to disclose to their listeners or viewers if matters have been aired in exchange for money, services, or other valuable consideration.

In addition, the FTC also provided relevant guidance on disclosures to search engine companies. The FTC advised search engines in 2013 that when consumers view search results, they “should be able to easily distinguish a natural search result from advertising that a search engine delivers.” The FTC cited a study that found that 62% of the consumers surveyed could not tell, without additional disclosures, that the top advertisements appearing in search results were paid advertisements.

Even though one of the tactics the search engines used to differentiate sponsored results from other results was to use different background shading, many consumers could not tell the difference. The FTC counseled search engines to consider best practices, including:

- Labeling the advertising results as “sponsored” or “ad.”
- Shading any advertising result with a different background color.
- Segregating any advertising from the natural results.

(Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Bureau of Consumer Protection, FTC (June 24, 2013) (Search Engine Letter), at 1, 2 nn.3-4 (available at ftc.gov).

Some of these lessons apply to native advertisements. Language such as “sponsored,” “ad,” or “branded content” signals to readers that they are encountering a paid advertisement.

FTC Digital Disclosures Guidance

The FTC provided relevant guidance on disclosures in the .com Disclosures Guide. When companies advertise in digital publications, the .com Disclosures Guide states that the “ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.” The FTC advises advertisers to “adopt the perspective of a reasonable consumer” and to recognize that consumers will not read every word on the page or the screen. To provide a meaningful disclosure, the FTC advises that advertisers should pay attention to several factors, including:

- The location of the disclosure and its proximity to the claim.
- The prominence of the disclosure.
- Whether the consumer can avoid seeing the disclosure.
- Distractions on the page that might overshadow the disclosure.
- Whether the disclosure must appear in more than one location to ensure that consumers see it.
- Whether the disclosure language is understandable to the intended audience.

(.com Disclosures Guide, at 1, 6, 7.)

Native advertisers also must consider additional questions, which remain unresolved, regarding disclosure of sponsorship. In the digital space, native advertising can be a 30-second clip or a documentary that is several minutes long. It is unclear whether disclosing the sponsoring party at the start of the film is enough, or whether the disclosure should be repeated throughout the film.

In a print native advertisement designed to look like a magazine feature, it is not clear:

- Whether it is enough to include a “sponsored content” label at the top of the first page.
- Whether the included label should appear more than once in the article.
- How prominent the included label needs to be.

(.com Disclosures Guide, at 17, 19-20.)

The intended audience is another factor to consider. The .com Disclosures Guide indicates that a disclosure must be understandable by the intended audience (.com Disclosures Guide, at 21). However, the FTC also has cited its Policy Statement on Deception, which states:

“An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive.”

(Search Engine Letter, at 3 n.6.)

This guidance suggests that native advertisers may be held responsible if consumers who were not the intended audience are misled. A goal of digital native advertising is to go viral, and companies need to be attuned to the risk that their native advertisements will reach and be interpreted by unintended audiences.

While the .com Disclosures Guide references the FTC Policy Statement on Deception as expressly applicable to native advertisements, the more recently published Native Advertising Guide provides the following guidance regarding the disclosures needed to ensure that consumers understand when content is advertising:

- The effectiveness of disclosure is influenced by:
 - consumers’ customary use of a social media site and experience with content on that platform (that is, context matters);

- whether content can be accessed through multiple channels;
 - what the content format is and, therefore, the required consumer focal point for placement of the disclosure; and
 - the advertiser’s use of sponsored content outside of the original publisher’s site.
- The way in which consumers choose to interact with content on a specific website or social media platform affects the materiality analysis, as does the weight or credibility consumers give to information published on that site or platform.
 - The FTC prefers “ad” or “advertisement” to “promoted by” for native advertising disclosures.
 - The triggers for additional disclosures in sponsored content include:
 - a camera zooming in on the product label or branding;
 - an express recommendation or preference for the sponsor’s product;
 - the use of video or other content with a sponsored message that is presented in the same style as non-sponsored content on the website or platform; and
 - the appearance of a native advertisement in non-paid search results.

We do not yet know whether native advertising will cross a line where no amount of disclosure can cure its potential to be deceptive or misleading, but every company should consider this possibility. However, it is clear most native advertising needs to be labeled with some form of disclosure.

BEST PRACTICES

Native advertising has significant potential to affect consumer behavior. Companies seeking to exploit this potential should pay particular attention to their actions in the native advertising context because of the unclear legal and regulatory framework. Though there is no one-size-fits-all formula for creating native



We do not yet know whether native advertising will cross a line where no amount of disclosure can cure its potential to be deceptive or misleading, but every company should consider this possibility.

advertisements, adhering to best practices will help protect a company from scrutiny and liability.

USE CLEAR LABELING AND DISCLOSURES

Companies can avoid liability for native advertisements if they are careful and transparent. Disclosures must be understandable to a reasonable consumer, regardless of who the targeted audience is. If a company tailors its native advertisement toward medical professionals, for instance, and a casual reader sees the advertisement, that casual reader must be able to recognize and understand the disclosure. The number of consumers confused by whether content is a native advertisement, and the intended audience for the native advertisement, are largely irrelevant.

The FTC has outlined several factors that it considers when evaluating the sufficiency of a disclosure in the context of editorial content. Companies must compare their advertisements against the editorial content and consider attributes such as:

- Font size.
- Font color.
- Boldness.
- Placement on the page.

Publishers must also consider the language used to disclose that the content is advertising. As noted above, the FTC prefers the use of the word “ad” or “advertising,” but phrases such as “sponsored content,” “brought to you by,” and “promoted by” all remain common varieties of native advertisement disclosures. These examples appear to be acceptable language for disclosing native advertisements, but their size, placement, and frequency in the content are equally important. Companies should also pay attention to consistency. If a company is running native advertisements in every issue or on multiple pages of a website, the same disclosure language should appear every time to simplify the identification process for consumers.

DISCLOSE AFFILIATION WITH USER-GENERATED CONTENT

The ability to reach consumers through social media and encourage them to generate their own content allows companies to engage with consumers like never before. Intuitively, companies might view this as a way to promote their products without exposing themselves to liability for false or misleading claims. If a consumer shares a post on a social media site that declares her love for a product and the company had nothing to do with encouraging that post, that likely is not something a company can control or for which it would be held responsible.

In 2015, however, the FTC issued a clarification to the 2009 *Guides Concerning the Use of Endorsements and Testimonials in Advertising* to make clear that a company is still responsible for disclosing the relationship between the consumer’s content and the company in certain circumstances. If a consumer is generating content to receive benefits from the company as part of a sponsored campaign, that affiliation must be disclosed.

The disclosure must appear in the user’s content. It is not enough for the company to indicate on its own website that

it is sponsoring a contest or offering benefits to consumers who generate content. The FTC stated that a hashtag must be associated with each individual social media post by consumers. The hashtags “#contest” and “#sweepstakes” are acceptable forms of disclosure.

(16 C.F.R. pt. 255; FTC, *The FTC’s Endorsement Guides: What People Are Asking* (May 2015) (available at ftc.gov).



Search [FTC Updates Endorsement Guides FAQ](#) for more on the FTC’s responses to frequently asked questions from advertisers, advertising agencies, bloggers, and other interested parties.

The easiest way for companies to ensure that their customers will abide by this standard is to tie eligibility for benefits to inclusion of this hashtag. If a social media user does not include the required hashtag with her posted content, she is ineligible to receive the benefits of the contest or offer.

MANAGE SOCIAL INFLUENCER CONTENT

Companies are increasingly relying on relationships with bloggers and other social influencers to generate content and support for their brands. Influencers are also becoming increasingly sophisticated and generating substantial revenue for themselves and companies. These relationships provide a significant opportunity for companies, but they also expose companies to various risks.

If a fashion blogger receives a new dress from a company, takes photos of it, and posts about how much she loves it, the question of whether she has created editorial content or a sponsored advertisement might depend on her agreement with the company (and the amount of consideration provided), but the company at least has a vested interest in the content. To protect its brand and prevent deceptiveness claims, the company should have an agreement with a social influencer that:

- Provides information and guidelines clearly stating what is expected. For example, it should be clear whether the company is providing a product to the influencer and:
 - leaving it up to the influencer to decide whether to review the product; or
 - expecting the product to be featured on a blog or in produced content.
- Clearly sets out the scope of the work. If a company is providing goods in exchange for content, the company should specify:
 - the amount of content the company requires the influencer to generate;
 - whether the content will appear on one platform or multiple platforms;
 - whether the content will be repackaged for a blog, Instagram, or Facebook; and
 - whether the content will appear only once or multiple times over a period of time.
- Sets out all of the material terms of the engagement. The company should require the influencer to:
 - speak the truth and only publish opinions based on actual use of the company’s product or service;

- remove or qualify postings when the company requests it; and
- disclose the connection to the company.

CONSIDER WHICH PARTY BEARS THE RISK

Third-party native advertising companies simplify the process for companies in many ways, either by creating the content or by disseminating the content across different platforms. However, companies must pay attention to which party bears the risk if the native advertisement is deemed to make false or misleading claims. A company should review any agreements with these third parties and pay attention to these issues. A company also should have a clear understanding of how the content will appear across all relevant platforms and how the company's sponsorship of the content will be disclosed.

ASK KEY QUESTIONS

The Native Advertising Guide and a number of non-binding NAD decisions help provide a framework for determining when disclosures may be required and how sponsored content can be presented with reduced risks. However, the law must evolve concerning native advertisements, especially regarding a publisher's disclosure obligations and the articulation of disclosure requirements in specific content formats, before companies will have a clearer sense of the rules that apply. Until then, native advertisers must follow a set of best practices to minimize the risk of facing an enforcement action or litigation.

Companies should ask key questions regarding sponsored content and native advertising placements, including whether:

- A claim is being made about the company's product, or whether a commercial offer is being made to the consumer.
- The company is paying someone to promote the product, or using someone's likeness without permission.
- The sponsored nature of the content is being disclosed to consumers, as well as whether the disclosure is transparent enough for the context and format of the content to avoid misleading consumers in a material way.

The answers to these questions depend on the specific facts and circumstances, but paying attention to these elements will help minimize the company's risk while still providing the benefits that native advertisements offer.

