

Native Advertising

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This Practice Note explains the different types of native advertising, including in-feed units, paid search units, recommendation widgets, promoted listings, and in-ad with native element units. This Note also describes the legal issues involved in using native advertising.

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. Several government agencies are expressing concerns about this type of advertising, and self-regulatory organizations are providing best practices guidance to brands regarding a host of legal issues. This Note describes the different types of native advertising and discusses the potential issues involved in its use.

The goal for most brands is for the native advertisement to blend seamlessly with the medium on which it is displayed so that consumers digest the information without being turned away by virtue of the content being an ad. It 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 essential; the form and function are the keys. The perfect native ad is the one consumers look at and are drawn to for the content, even if they ultimately recognize that it is an advertisement.

RULES OF NATIVE ADVERTISING

Native advertising blurs the line between content and advertising. It is popular with brands and advertisers, and the amount of resources being directed at native ads is expanding every day. While native advertising can cement a brand's place in pop culture, it can also subject the brand to consumer litigation and government enforcement actions. The parameters of what is allowed under applicable law, by government entities and by self-regulatory organizations in this space, are still largely undefined. Absent clearer

guidelines about what brands can and cannot do, much of what we know about the rules governing native advertising comes from:

- Existing government regulations, including guidance provided by the in December 2015.
- Past enforcement actions and litigation that concern issues faced with native advertisements, namely allegations of consumer deceptiveness and failure to disclose.
- The dynamics and incentives to act between competitors, consumers and the government.

TYPES OF NATIVE ADVERTISING

The term "native advertisement" covers a variety of advertisements that the Interactive Advertising Bureau (IAB) defines in its Native Advertising Playbook, issued in 2013, as including:

- **In-feed units.** Advertisements that appear in the middle of editorial or social media content on sites like Facebook or Buzzfeed.
- **Paid search units.** Search results, typically highlighted in a different color, that viewers see at the top of the page before other search results on sites like Google, Bing, or Yahoo.
- **Recommendation widgets.** Posts that appear on the side of a page or at the bottom of an article that recommends additional content for the reader on sites like Huffington Post or ESPN.
- **Promoted listings.** Product listings that may appear on shopping websites or search pages that are promoted by sellers like Amazon or Google.
- **In-ad with native element units.** Content meant to look like the editorial content around it.
- **Custom/can't be contained.** A catch-all category for other native content created by brands.

TRENDS IN NATIVE ADVERTISING

Sponsored content has been around 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. The latest trends center on how the content is created and how mobile devices and applications are increasing both the efficiency of the campaigns and the complexity of concerns and considerations advertisers must address, including:

- **The increasing importance of native advertising to brands.** Native advertisements are becoming more important to brands, and brands are devoting increasing amounts of money to creating native campaigns. According to BI Intelligence, annual spending for native advertising in the US is expected to exceed \$15 billion in 2017 and \$20 billion by 2018. Marketers and agencies also increasingly want to spend their ad dollars on social media.
- **User-generated content.** Brands are engaging more with their customers. The dialogue is increasingly interactive, and consumers are becoming active participants by generating original content focusing on the brand. Brands are launching ad campaigns that then thrive by inspiring users to create their own content, from tweets to videos.
- **Lifestyle bloggers.** Brands are selling products by relying on bloggers and other social influencers to sell a way of life to consumers that includes the brand's products.
- **Publishers creating in-house sponsored content.** Publishers have been creating sponsored content for advertisers for several years. However, that content was previously created by designated staffs of writers and editors. Increasingly, publishers are relying on their existing editorial staffs to create sponsored content. In January 2015, for example, Condé Nast announced the launch of its in-house sponsored content group, 23 Stories by Condé Nast, which generates sponsored content for advertisers using existing editorial and design staffers.
- **Third-party facilitation.** Start-ups are moving into this space and are creating custom content for brands, leading to new dynamics of content ownership and control.
- **Mobile browsing and technology.** Consumers are relying more on their mobile devices and less on their newspapers, magazines, and even computers. Traditional forms of advertisements are not so successful at transferring to these on-the-go platforms. Native advertising is filling that space, helped by technology advancements like:
 - silent autoplay video;
 - infinite scrolling; and
 - real-time programmatic delivery platforms.
- **Viral campaigns.** With the success of these campaigns, the dynamic of ad cycles has shifted. Now, even after brands stop paying for ad placements, many of these native advertisements live on through viral distribution as web and mobile users repost the content to their own social media pages and share with friends.

REWARDS AND RISKS OF GOING NATIVE

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

REWARDS

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

- According to the Sharethrough and IPG Media Lab study conducted in 2013, consumers look at native ads 52% more frequently than banner ads, and native ads lead to an 18% higher intent to purchase an item advertised than traditional banner ads.
- The UK Association of Online Publishers (AOP) conducted a study, 5 Vital Ingredients of Native Advertising, and 6 Other Useful Things to Know, which found that:
 - native advertisement drivers outrank traditional ads in key categories, including informative, interesting, useful, and helpful. Traditional ads ranked about the same on being eye-catching and a bit higher on clear/easy-to-understand and ordinary;
 - 59% of consumers surveyed found native advertisements interesting, compared with only 14% who did not; and
 - native advertisements increase click rates by 31%.

RISKS

While the potential rewards may be great, advertisers must also consider a variety of risks when developing a native advertising campaign, including:

- Violating Section 5 of the Federal Trade Commission Act (FTC Act). For more information on Section 5, see Practice Note, FTC Act Section 5: Overview ([7-586-7865](#)).
- 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.

Regulatory risks are already familiar to most brands. The issue of gaining and maintaining consumer trust, however, becomes more important with native advertising. Native advertising may damage a brand's integrity if consumers feel they have been duped into believing that what they are reading or watching is editorial content but later find out that the content was sponsored by a brand. Readers may also feel they can no longer trust the publisher's reporting if content sponsored by advertisers is not clearly disclosed. Relevancy and quality of contact between the content and the consumers have a significant influence on the scope of these risks.

LEGAL AND SELF-REGULATORY FRAMEWORK

As with traditional advertisements, there is no one legal framework or government body responsible for reviewing and enforcing native advertisements. Many organizations are releasing best practices guidelines for advertisers to follow, and several government agencies are indicating their concerns via advisory opinions, guidelines, and enforcement actions. As of now, however, only the FTC has released rules or guidelines specific to native advertisements. There are several agencies and industry guidelines

to consider and a range of legal issues of which a native advertiser must be aware, including:

- The First Amendment (see First Amendment Protection).
- Privacy and right of publicity laws (see Privacy and Right of Publicity).
- The FTC (see FTC Guidance).
- The National Advertising Division (NAD) of the Council of Better Business Bureaus.
- The IAB.
- The Communications Act of 1934.
- Consumer litigation (see False or Misleading Advertising Claims and Consumer Litigation).
- Publishing industry guidelines.

FIRST AMENDMENT PROTECTION

The First Amendment hovers in the background of all native advertising issues and may have significant ramifications for brands. We know from traditional advertising that 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. When advertisers create and distribute content that does not include an express offer, however, it is unclear how courts and regulators will treat that content. Until recently, it has been presumed that native advertising fits primarily into the commercial speech category, but courts might reach a different conclusion regarding the nature of native advertising, especially when no branding or product offers are included. If brands can create and publish content that qualifies for First Amendment protection, it could change the dynamics of advertisements.

Many brands, 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 create Project Sunlight, described in *Advertising Age* as 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. This was part of Upworthy’s advertising model called “Upworthy Collaborations,” the stated goal of which was to partner with companies and nonprofits to generate native advertising content that has a social message. These campaigns are reported to have generated \$10 million in revenue for Upworthy in 2014, and Upworthy reported to *Advertising Age* that its advertising content frequently outperforms editorial content in terms of the number of hits from readers.

Whether the fact that the content is generating money for Upworthy and brands makes this content advertising or content deserving of First Amendment protection is not yet settled but, for now at least, this content is still subject to closer government oversight and less First Amendment protection. Whether that changes as native advertising evolves in coming years remains to be seen.

PRIVACY AND RIGHT OF PUBLICITY

Advertisers that are active in the native ad space also risk running into issues surrounding the right of publicity (for more information on the right of publicity, see Practice Note, Right of Publicity: Overview ([2-505-8377](#))). If a company produces a native advertisement that uses the name or image of a person, typically a celebrity, and the speech is considered commercial in nature, the company must get authorization and typically must pay that person a license fee for using it. If they do not, they run the strong risk of being sued.

For example, two grocery chains, Jewel Food Stores and Dominick’s Finer Foods, placed ads in a commemorative issue of *Sports Illustrated* honoring Michael Jordan’s induction into the Basketball Hall of Fame in 2009. Jewel’s full page ad “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 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 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. However, because Jewel’s insert did not contain any explicit offer of sale encouraging consumers to buy something, a district court initially concluded that the content did not qualify as an advertisement. The US Court of Appeals for the Seventh Circuit later overturned that decision and remanded the case back to the district court. Several months after the jury verdict was entered against Dominick’s, Jewel settled its right of publicity case with Jordan.

FTC GUIDANCE

The Federal Trade Commission (FTC) Disclosure Guidelines clearly state that deception is unlawful no matter the medium. (For more information on the FTC Disclosure Guidelines, see Practice Note, Advertising and Promotions in Social Media: Clear and Conspicuous Disclosures ([1-538-6609](#))). In December 2013, the director of the FTC’s Bureau of Consumer Protection indicated at the Commission’s workshop on native advertising, “Blurred Lines,” that, particularly with native advertising, “there could be [FTC] enforcement based on ... existing enforcement.” That means that, in the FTC’s view, the legal framework governing general advertising provides them with sufficient statutory and regulatory support to regulate native advertising.

In December 2015, the FTC published its long-anticipated Native Advertising: A Guide for Businesses (Native Advertising Guide) and Enforcement Policy Statement on Deceptively Formatted Advertisements (see Legal Update, FTC Releases Policy Statement Explaining Deceptive Ad Formats for Native Advertisements ([w-001-1166](#))). While the FTC noticeably avoided any attempt to further define commercial speech in the native advertising context, the Native Advertising Guide makes clear that:

- Transparency is the key.
- Some native ads 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.

The Native Advertising Guide seeks to identify practices that prevent deceptive use of native advertising, providing 17 illustrative examples, and makes clear that potential FTC 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 potential liability under Section 5.

In March 2016, the FTC announced an enforcement action against retailer Lord & Taylor regarding a native ad campaign and social media influencer activities that promoted a new dress line. Citing the recently published Native Advertising Guide, the FTC challenged a “seemingly objective” online magazine article that provided a favorable review of the dress line but that was actually a paid 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. Outside of this recent FTC action, however, federal agencies have not yet been active in the native ad space, and there are a limited number of enforcement actions to look to for trends. Federal agencies have clearly signaled, however, that they will not hesitate to step in and challenge deceptive advertisements.

FALSE OR MISLEADING ADVERTISING CLAIMS AND 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 may be false or misleading in the usual sense: making unsubstantiated or misleading claims about a product or offering. The content may also be considered misleading by virtue of its form: if consumers cannot tell that what they are reading or watching is an advertisement, the ad will likely draw additional scrutiny. This standard is not new, but its importance is much greater in the native space.

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

Unlike with traditional advertisements, we are unlikely to see much competitor-driven litigation or many enforcement actions. Brands all have a similar incentive to operate in this space, and competitor actions will only thwart the growth of native advertisements. There may, however, be litigation involving consumers claiming they were deceived into thinking they were viewing different content than they actually were viewing.

GOVERNMENT AND SELF-REGULATORY ENFORCEMENT

Various government agencies and self-regulatory organizations enforce advertising standards, but none have engaged in enough native advertising claims to draw clear lessons for future

advertisements. The FTC and the NAD are most active in this space and are the bodies most likely to engage in enforcement activities, advisory opinions, and enforcement actions. Still, there is limited precedent in the way of case law or regulatory enforcement. Examples of content likely to draw regulatory attention include:

- Reliance on “experts,” who are actually paid employees or contractors of the brand, to endorse or recommend a product.
- Seemingly unbiased reviews by ordinary customers that are actually written by public relations firm employees hired by the brand.

The big question in this space, however, is whether the FTC or the NAD will release guidelines specific to native advertisements that go beyond those the FTC already announced. The challenge with crafting these guidelines is that there are so many different types of native advertisements, and each inquiry is fact-specific.

FTC Enforcement

In addition to the Lord & Taylor native advertising settlement (see FTC Guidance), the FTC has brought enforcement actions in recent years against companies engaged in deceptive consumer review practices, including against companies that:

- Pay their employees to post reviews as if they were ordinary consumers (*Reverb Commc’ns*, 2010 WL 3441879 (F.T.C. Aug. 26, 2010) and *Legacy Learning Sys., Inc.*, 151 F.T.C. 383 (2011)).
- Encourage their employees to post favorable reviews without disclosing their employee or agency connection (*Sony Comput. Entm’t Am. LLC*, 2015 WL 1573331 (F.T.C. Mar. 24, 2015) and *Deutsch LA, Inc.*, 2015 WL 1573330 (F.T.C. Mar. 24, 2015)).
- Pay experts to endorse a product without disclosing those payments (*ADT LLC*, 2014 WL 2996162 (F.T.C. June 18, 2014)).

Occasionally, the financial penalties included in settlements can be substantial, but usually the most significant negative impact for any brand is being subject to a 20-year consent order that requires similar advertising to be subject to legal compliance and review by the FTC.

It is worth noting that some of the FTC’s guidance included 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.

Most publishers generally see native advertising as a way to make up for lost revenue resulting from:

- Flagging print publications.
- Non-performing online banner ads.
- Declines in more traditional forms of digital advertising.

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 is produced by their editorial staff. The first test case the FTC brings against a publisher under the Native Advertising Guide will be one to watch closely.

NAD

Several NAD decisions since 2013 show that it 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 brand (Shape Water Boosters).
- Clearly label the materials as sponsored content (Taboola).

The NAD also concluded in one case that, after a brand stopped promoting native content, it did not need to monitor whether recirculation of that content was identified as being sponsored content (Qualcomm). The difficulty with drawing clear standards from these cases, however, is that NAD decisions, because they are issued by a self-regulatory body, are not binding precedent.

Most recently, the NAD offered direction on the exact placement of disclosures in native ads (Joyus, Inc. 05/19/16). Citing the FTC's *Native Advertising Guide*, the NAD determined that express disclosure in video links was required to avoid misleading consumers even when other audio and visual cues made the connection rather clear.

CURING THROUGH DISCLOSURE

One of the key unanswered questions is whether disclosure will cure native advertisements of being considered deceptive or misleading, or whether there are some native ads that are inherently deceptive, meaning that no amount of disclosure can cure the ad. The FTC recognized the opposite in the recently published *Native Advertising Guide*, namely, that some native ads are so inherently commercial in nature that additional disclosures may not be necessary (see FTC Guidance).

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

When creating native ad disclosures, brands should remember to:

- Use an understandable label (see Use Clear Labeling and Disclosures).
- Be consistent.
- Present the disclosure clearly and conspicuously, including by use of visual cues.
- Use brand logos.
- Place the disclosure in close proximity to the ad.
- Visually separate the ad from editorial content.
- Not have the editorial content and ads "talking" to each other.
- Not over-disclose.

The Communications Act of 1934 provides the most basic guidance. It requires broadcasters to disclose to their listeners or viewers if matters have been aired in exchange for money, services, or other valuable consideration. The FTC further advised search engines, in a letter dated June 24, 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 to a study

that found that 62% of the searchers surveyed could not tell that the top ads appearing in the search results were paid advertisements (without additional disclosures). Additionally, even though one of the tactics the search engines used to differentiate sponsored results from other results was to use different background shading, many people 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.

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

The FTC also provided relevant guidance in its 2013 publication, *.com Disclosures*. When brands advertise in digital publications, the FTC said that the "ultimate test is whether the information intended to be disclosed is actually conveyed to consumers." The FTC advised advertisers to "adopt the perspective of a reasonable consumer" and to recognize that consumers will not read every single word on the page or the screen. To provide a meaningful disclosure, the FTC advised 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 may overshadow the disclosure.
- Whether the disclosure must appear in more than one location to ensure consumers see it.
- Whether the language is understandable to the intended audience.

These factors are all important for native advertisers to consider, but there are additional questions not fully answered. In the digital space, native advertising may be a 30-second clip or a several-minutes-long documentary. It is unclear whether a disclosure of the sponsoring party at the start of the film is enough or whether there should be disclosures throughout the film. In a print native ad designed to look like a magazine feature, it is not clear:

- Whether it is enough to label the top of the first page as "sponsored content."
- Whether the included label should appear more than once throughout the article.
- How prominent included labels need to be.

The intended audience factor is another consideration. While the FTC's *.com Disclosures* indicates that the disclosure must be understandable by the intended audience, the FTC in its letter to search engines cited to its Policy Statement on Deception, which said:

"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."

This suggests that native advertisers may be held responsible for misleading consumers who were not the intended audience.

When the goal of much digital native advertising is to go viral, brands need to be particularly attuned to the risk that their native ads will reach and be interpreted by unintended audiences.

While citing the FTC Policy Statement on Deception as expressly applicable to native advertisements, the more recently published Native Advertising Guide provides the following specific directions regarding disclosures:

- When required, the effectiveness of a disclosure is influenced by:
 - consumers' customary use of the 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 disclosure; and
 - the advertiser's use of sponsored content outside of the original publisher's site.
- How consumers choose to interact with content on a specific website or social 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" over "promoted by" for native ad disclosures.
- Triggers for additional disclosures in sponsored content include:
 - camera zoom to 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 same style as non-sponsored content on the website or platform; and
 - non-paid search results.

We do not yet know whether native advertising will cross a bright line where it goes so native that no amount of disclosure can cure the potential to be deceptive or misleading, but it is something that every brand should consider. Clearly, however, most native advertising needs to be labeled with some form of disclosure.

PROTECTING THE COMPANY AGAINST ADVERTISING LIABILITY: BEST PRACTICES

Despite significant potential to affect consumer behavior, brands should pay particular attention to their actions in the native advertising context because of unclear legal and regulatory frameworks. Though there is not a one-size-fits-all formula for native advertisements, adhering to some best practices will help protect a brand from scrutiny and liability.

USE CLEAR LABELING AND DISCLOSURES

Native advertising is legal if a company is careful and transparent. Disclosures must be understandable to a reasonable consumer, regardless of who the targeted audience is. If a brand is gearing a native advertisement toward medical professionals, for instance, and a casual reader sees the ad, that casual reader must be able to recognize and understand the disclosure. The number of people confused by a native ad and the intended audience are largely irrelevant factors.

The FTC has outlined several factors that it considers when judging the sufficiency of the disclosure in the context of the editorial content. Brands must compare their ads against the editorial content for things like:

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

Publishing companies must also consider the language used to disclose that the content is advertising.

While the FTC has indicated a preference for the use of "ad" or "advertising," phrases like "sponsored content," "brought to you by," and "promoted by" all remain common varieties of native advertisement disclosures. These appear to be examples of acceptable language for disclosing native advertisements, but their size, placement, and frequency in the content are equally important. Publishing 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 language should appear on every story 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 brands to engage with consumers like never before. Intuitively, it also may seem like a way for brands 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 brand had nothing to do with encouraging that post, that is not something a brand can likely control or for which it would likely be held responsible. In 2015, however, the FTC issued a clarification to the 2009 Guides Concerning Use of Endorsements and Testimonials in Advertising to make clear that brands are still responsible for disclosing the relationship between the consumer's content and the brand in certain circumstances (see FTC: The FTC's Endorsement Guides: What People Are Asking; see also Legal Update, FTC Updates Enforcement Guides FAQ ([9-615-9367](#))). If the customer is generating content to receive benefits from the brand 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 brand to indicate on its own website that it is sponsoring a contest or offering benefits to consumers who generate content. The FTC said that a hashtag must be associated with each individual social media post by consumers. The hashtags "#contest" and "#sweepstakes" are acceptable forms of disclosures.

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

MANAGE SOCIAL INFLUENCER CONTENT

Brands are also increasingly relying on relationships with bloggers and other social influencers to generate content and support for the brand. Influencers are also becoming increasingly sophisticated and

generating significant revenue for themselves and for brands. These relationships provide a significant opportunity for brands, but they also expose brands to various risks.

The question of whether a fashion blogger has created editorial content or a sponsored advertisement when she receives a new dress from a brand, takes photos of it, and posts about how much she loves it may depend on the agreement the brand has with that blogger (and the amount of consideration provided), but the brand at least has a vested interest in the content. To protect its brand and mitigate against deceptiveness claims, the brand should have a clear understanding with social influencers that:

- Provides information and guidelines clearly stating what is expected. For example, it should be clear whether the brand 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 the blog or in produced content.
- Clearly sets out the scope of the work. If a brand is providing goods in exchange for content, the brand should specify:
 - the amount of content the brand requires the influencer to generate;
 - whether the content will appear on one platform or on multiple platforms;
 - whether the content will be repackaged for the blog, Instagram, or Facebook; and
 - whether the content will appear only once or multiple times over a period of time.
- Lays out all of the material terms of engagement. The brand should at least require the influencer to:
 - speak the truth and only publish opinions based on their actual use of the sponsor's product or service;
 - remove or qualify their postings when the brand requests it; and
 - disclose their connection to the brand.

CONSIDER WHO CARRIES THE RISK

Third-party native advertising companies simplify life for brands in many ways, either by creating the content or by disseminating the content across different platforms. Still, brands must pay attention to which party bears the risk if the campaign is deemed to have false or misleading claims. Review any agreements with these third parties and pay attention to these issues. Be sure to have a clear understanding of how the content will appear across all relevant platforms and how the content will be disclosed as being sponsored by the brand.

ASK KEY QUESTIONS

The FTC's Native Advertising Guide and a handful 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 brands will have a clearer sense of the rules that apply. Until then, advertisers must follow a set of best practices to minimize the risk of facing an enforcement action or litigation. Key questions to ask regarding sponsored content or native placements include:

- Is a claim being made about the brand's product, or is there a commercial offer being made to the consumer?
- Is someone being paid to promote the product, or is someone's likeness being used without their permission?
- Is the sponsored nature of the content being disclosed to consumers? Is it transparent enough for the context and format of the content to avoid misleading consumers in a material way?

These questions are fact- and circumstance-specific, but paying attention to these elements will help minimize the company's risk while still providing the benefits that native advertisers seek to realize.

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