



# MARKETERS MUST HEED NEW FTC NATIVE-AD GUIDELINES

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As marketers continue to find ways to interact with ever-more distracted consumers online, and new technologies such as ad blocking threaten to make it even more difficult to reach them, native advertising is growing to comprise a more significant component of marketers' online budgets.

Increasingly, native advertising is also being tailored to appeal to certain audiences, key demographics, and even individual consumers via programmatic and other targeting techniques.

Our [earlier 2015 article for CMO.com on native advertising](#) emphasized that marketers should stay cognizant of the FTC's key principles of transparency, disclosure, monitoring, and enforcement when presenting advertising content to consumers that takes on the tone, context, theme, or visual design of its surroundings, or else risk losing the trust of consumers or getting into hot water with the regulators.

Now, in an important, recent development, the FTC has issued an enforcement policy and business guidelines on native advertising. In addition, it has already followed up with its first case against an advertiser for deceptive use of native advertising practices.

## WHAT DO THE GUIDELINES SAY?

The FTC states that where a consumer may not readily be able to distinguish between independent editorial content and advertising content (e.g., where a marketer pays a publisher to write about its products or otherwise to create content that in *any way* promotes a particular advertiser or product), the source of the messaging must be clearly disclosed.

The native guidelines also emphasize that consumers should not be misled about the purpose of the initial contact with the content—a practice that the FTC refers to as a “deceptive door opener”—and, as a rule of thumb, they should be made aware that content is advertising before even choosing to interact with it.

So whether you as a marketer wish to develop branded videos or embed product integrations into such videos, conduct in-app game sponsorships, or even place sponsored articles on editorial sites, disclosure in many of these cases will be required, and marketers should ensure, both contractually and in practice, that this actually happens.

Although in some situations a combination of factors—such as headlines with commercial messaging, obvious branding, or placement on a platform with a history of promoting advertising content—may eliminate the need for disclosure, the more similar the native content is to its surroundings, and the more integrated it is into the overall context of a platform, together with the extent to which the content promotes a marketer's products or services, the more likely a disclosure is necessary.

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## HOW SHOULD DISCLOSURES BE MADE?

The FTC's position is that "both what the ad says and the format it uses" is relevant. For example, the FTC states that disclosures such as "Presented by" or "Sponsored by" are more appropriate where the advertiser simply funds the content as opposed to having created or influenced the content. Where an advertiser has paid for advertiser products to be mentioned in the article or has otherwise created the content, the FTC recommends disclosures such as "advertisement," "sponsored advertising content," or "paid advertising."

The FTC's first case enforcing this latter position targeted the retailer Lord & Taylor for failing to make or require any disclosures when it paid an online publisher, Nylon, to place a story promoting Lord & Taylor products. The retailer also was cited for paying influencers on Instagram to post photos of themselves in a particular dress. Notably, the FTC required the advertiser to refrain from misrepresenting that paid ads are from an independent, editorial source and to monitor and enforce disclosure obligations across partner and publisher relationships.

The FTC does not recommend disclosures such as "Promoted" or "Promoted Stories" because they could mislead consumers that advertising content is independently recommended by a publisher. Further, disclosures should use fonts and colors that stand out, and video or audio content should include visual or audio disclosures that are seen or heard long enough to be understandable and are easy and simple to read or hear. Disclosures should be displayed in front of or above the content headline, as well as in lead-in or tap-in pages.

Also consistent with prior NAD cases, the FTC has advised that disclosures must be clearly visible when native content is shared (e.g., retweeted) across platforms—for example, by building disclosure into the shareable headline or the name of the URL, a key technological challenge marketers should discuss with their publisher partners.

## WHAT SHOULD MARKETERS DO NOW?

Regulators continue to emphasize that each party—whether the agency, marketer, publisher, or technology company—is responsible to ensure compliance. We expect the FTC to continue to enforce its native guidelines going forward, consistent with its allegations in the Lord & Taylor action, so all involved parties should keep the following principles in mind:

- >> Review current marketing practices to identify how native advertising executions are being developed (e.g., the degree to which your teams are involved in the development or approval of native content) to ensure, when necessary, clear and proximate disclosures are being made in accordance with the guidelines.
- >> Consider developing your own native advertising policies to ensure your internal teams, as well as your outside business partners, are adhering to the guidelines.
- >> Remember that in evaluating whether an ad's format is misleading, the FTC will examine its "net impression"—considering factors such as its overall appearance, the similarity of its style to non-advertising content offered on a publisher's site, and the degree to which it is distinguishable from other such content.

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