

Native Advertising: Here to Stay, and So Are Regulators

5th Edition: Trends in Marketing Communications Law

The native advertising trend is showing no signs of slowing down. With regulators paying increased attention to adequate disclosures of paid relationships in digital, mobile and social media, marketers, publishers and their agencies should not be lulled into a false sense of security due to the relative lack of recent enforcement action in the native advertising space.

Nearly two years after the Federal Trade Commission (FTC) first issued its Enforcement Policy Statement Regarding Deceptively Formatted Advertisements and the accompanying Native Advertising Guide for Businesses (the Native Guides), regulators may be primed to bring enforcement actions in 2018 against those who fail to comply. In fact, a recent study released by the Native Advertising Institute found that 11% of news media publishers were not labeling native ads at all, and a survey of magazine publishers reported similar levels of compliance. Parties along the chain of a media buy or custom content deal are struggling to balance the need to meet budget demands with the need to appropriately label sponsored content, as marketers and their agencies negotiate to determine contractual and practical responsibility for making compliant disclosures.

Regulators continued their focus on social media and mobile platforms in 2017, an important trend to recognize as the nexus between influencer marketing and native content intensifies. Influencers are becoming their own production companies and content creators, working with publishers across online and multi-channel networks, and sometimes beyond visual platforms. For example, online podcasts and even virtual voice assistants frequently feature marketer content that is read live by podcast hosts, while entire series of podcasts are now being developed by marketers themselves, blending editorial as well as sponsored content. In light of these recent developments, regulators are likely to revisit their position on native advertising practices going into 2018.

As a potential harbinger of actions to come, in December 2017, the FTC published a report detailing the agency's findings pursuant to a multi-year study of consumer recognition of paid search and native advertising. During the study, participants viewed two versions of native ads: an "original" version and a "modified" version which had been altered by the FTC to comply with the Native Guides. Perhaps not surprisingly, the FTC found that the altered versions, which included modified disclosures to improve their prominence, legibility or clarity, greatly increased the likelihood that a participant understood the content to be advertising. The FTC re-emphasized that the overall impression of the ad matters (including position, text size and other visual cues such as borders and background shading), not just the disclosure.

Key Takeaways

- As native advertising formats continue to evolve, marketers and their agencies must ensure that sponsored segments incorporated into new formats remain readily identifiable to consumers as ads in compliance with the Native Guides.

- Stay on top of the FTC's activity in the spheres of paid search, online reviews and influencer marketing, as these are all connected to native advertising and may inform the FTC's future guidance on these practices.
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