



# Advanced Media and Technology Law

Advertising and Promotions Law



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## FTC Issues Enforcement Statement, Business Guide on Native Advertising

The Federal Trade Commission this week issued an enforcement policy statement on “native advertising,” explaining how existing advertising regulations apply to this advertising format, among others. The [“Enforcement Policy Statement on Deceptively Formatted Advertisements”](#) stresses the FTC’s long-standing principle that advertisements and promotional messaging must be identifiable to consumers as advertising. Advertising that is not identifiable as advertising is deceptive if it misleads consumers into believing the content is impartial or not from the sponsoring advertiser. In the FTC’s words: *Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material.*

The companion [“Native Advertising: A Guide for Business,”](#) issued the same day, gives examples of permissible and impermissible native advertising, as well as guidance on when and how advertisers should make necessary disclosures in native advertising. The guide summarizes the principles of the policy statement:

- An advertisement or promotional message shouldn’t suggest or imply to consumers that it’s anything other than an ad.
- Some native ads may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure. In other instances,

a disclosure may be necessary to ensure that consumers understand that the content is advertising.

- If a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.

The FTC looks at the “net impression” that an ad makes on reasonable consumers in determining whether it’s deceptive.

The policy statement identifies several specific factors that the FTC considers in evaluating the net impression, including:

- Formatting.
- Delivery method.
- Target audience.
- Substance of the ad.
- Accompanying disclosures.

Formatting that matches surrounding content in a manner that disguises the distinction between content and advertising could be considered deceptive. Misleadingly formatted ads are deceptive even if the product claims communicated in the content are truthful and not misleading.

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At the outset, the FTC notes that native advertising in the digital context encompasses many different forms – written content, professionally produced or user-generated videos, infographics, images, animations, in-game modules, and playlists on streaming services – and is inserted into the stream of regular, non-sponsored content offered by a publisher on its site either by the publisher or by advertising networks.

In determining whether the format of native advertising is misleading, the FTC will scrutinize the entire ad, looking at a number of factors, including:

- Overall appearance.
- Similarity of its style (whether written, spoken or visual, depending on the medium) to non-advertising content offered on a publisher's site.
- To what extent the promotional content is distinguishable from non-sponsored content.

The standard, as always, is the interpretation of reasonable consumers in the particular situation. Given the increasing prevalence of targeting in digital advertising, the policy statement notes that the FTC will consider the impression of the ad on reasonable consumers within the specific audience to which the ad was targeted.

Because consumers receive ads in a number of different ways in digital media, the FTC also looks at the way in which an ad is disseminated, taking into consideration the expectations of reasonable consumers based on their prior experience with the particular medium in which the ad appears and the formatting of the ad as it relates to the medium. For example, as the policy statement notes, if an ad formatted as a news story appears in the content stream of a site that customarily offers news articles, reasonable consumers would be unlikely to recognize it as advertising.

The substance of a native ad is also a key factor. As the policy statement notes, even if the formatting is identical to the surrounding regular content, sponsored

content that includes explicit advertising language or promotional messaging (“Test-drive a ...”) creates a different impression than content that looks more like a news item touting a product in technical terms.

Finally, the FTC considers disclosures or any qualifying information accompanying the ad in determining whether the ad is deceptive. Referencing its guidance document “.com Disclosures: How to Make Effective Disclosures in Digital Advertising Disclosures,” the Commission advises that disclosures must be sufficiently prominent and unambiguous, use simple and unequivocal language, be suited to the method of delivery of the ad (e.g., audio, text labels or visual cues), and be conspicuous in its placement within the ad. The FTC determines the adequacy of disclosures based on whether reasonable consumers perceive the ad with the disclosures as advertising. A disclosure also must be clear and prominent on all devices and platforms where consumers may view native ads, and generally must be made contemporaneously with the claim it is intended to qualify, and the policy statement specifically notes that disclosures that inform consumers of the commercial nature of a native ad “after they have clicked on and arrived at another page will not cure any misleading impression created when the ad is presented in the stream of a publisher site.” The business guidance provides specifics on how to make clear and prominent disclosures in native advertising.

In the policy statement, the FTC also cautions advertisers that representations about the true nature or source of advertising are material representations and that certain “misleading formats” are presumed to be material – including misrepresenting advertisements as news items or featured articles, reviews, investigative reports, or scientific research.

### Key Takeaways

- **When to Disclose:** Context matters. The more a native ad is similar in format and topic to content on the publisher's site, the more likely it is that a disclosure will be necessary to prevent deception.

- **How to Disclose:** The “clear and conspicuous” standard applies, but the FTC has provided more specific direction cautioning against the use of terms such as “promoted.” Terms such as “Presented by ...” or “Sponsored by ...” may suggest to consumers that a sponsoring advertiser funded or “underwrote” but did not create or influence the content.
- **It’s Material:** Misleading representations or omissions about an advertisement’s true nature or source (including that a party other than the sponsoring advertiser is the source of the advertising) affect consumer behavior and are presumed to be material.

- **It’s Not Just for “Advertisers”:** The FTC may also take action against other parties that helped create deceptive advertising content – for example, ad agencies and operators of affiliate advertising networks.
- **Watch for Enforcement:** Reviewing the FTC policy statement is important for brands, agencies and other companies operating in the native advertising ecosystem. FTC enforcement actions frequently follow the Commission’s issuance of guidance.

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