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## FTC issues a friendly warning on certain types of online advertising

**D**o you know how much of the content on your favorite digital news site or print magazine is advertising? Probably more than you think.

Many advertisements are obvious because they have a clear promotional message, style and format that sets them apart from the surrounding content — whether it's in print or on a digital platform. But a new form of advertising — native advertising — is specifically designed not to look like traditional advertising. In fact, these advertisements may even blend in with the surrounding content.

The Federal Trade Commission believes that these new advertisements not only are a problem, but also may be a violation of Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices,” including advertising.

Native advertising is paid content placed or “delivered” within the “stream” of the editorial content in a way that does not interrupt or impede the reader's interaction with the publisher's editorial content.

At its simplest, it is paid or sponsored content by a brand or advertiser designed to look and feel similar to a platform's editorial content. When consumers are not able to distinguish between the advertising and the editorial, the FTC believes this type of advertising may cross the line into deceptive advertising.

In December, the FTC issued an enforcement policy statement and a companion guide for businesses explaining how existing advertising regulations apply to this new format and giving examples of permissible and impermissible forms of native advertising.

The FTC's “Enforcement Policy Statement on Deceptively Formatted Advertisements” stresses the FTC's long-standing principle that advertising and promotional messaging must be identifiable to consumers as advertising. If consumers cannot identify advertisements and believe that the advertisements are impartial or not paid for by the sponsoring advertiser, then the FTC believes that the advertisements may be in violation of the FTC act as deceptive.

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.”

In the companion “Native Advertising: A Guide for Business,” issued the same day, the FTC 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 clearly commercial in nature and 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, using several factors, including the formatting, the substance of the ad, the target audience and any accompanying disclosures.

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### Formatting

For the FTC, formatting that is so consistent with the surrounding content that it disguises the distinction between content and advertising could be considered deceptive. This type of advertising misleads readers into believing that the content is not sponsored. Even if any product claims in the content are truthful and not misleading, the FTC still believes that these advertisements are deceptive.

In determining whether the format is misleading, the FTC will examine a number of factors. These factors include the overall appearance of the content, the similarity of its style (whether written, spoken or visual) to non-advertising content offered on a publisher's site, and the degree to which the promotional content is distinguishable from non-sponsored content.

### Substance

The substance of native advertising content also is a key factor. Even if the formatting is identical to the surrounding editorial content, native advertising that includes an explicit

promotional messaging (“Test drive a ...”) creates a different impression than content that resembles a review or a news item discussing the technical attributes of a product.

### Target audience

The standard the FTC applies is, as always, how a reasonable consumer would interpret the advertisement in the particular situation. And, because advertising — including native advertising — has increasingly become more accurately targeted in the digital media, the FTC considers the impression of the content on the reasonable consumers within the specific targeted audience.

When considering the target audience, the FTC will take into consideration the expectations of reasonable consumers based on their experience with the particular medium in which the content appears.

For example, as the policy statement notes, if an advertisement formatted as a news story appears in the content stream of a site that customarily offers news articles, reasonable consumers would have a harder time recognizing it as advertising.

### Disclosures

The FTC also considers whether and how disclosures are made in determining whether advertising — including native advertising — is deceptive. 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.

Simply having a disclosure, however, may not be enough. As with all advertising, the “clear and conspicuous” standard applies to native advertising. Referencing its guidance document “.com Disclosures: How to Make Effective

Disclosures in Digital Advertising Disclosures,” the FTC 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.

For native advertising, however, the FTC has provided more specific direction, cautioning against the use of

terms like “promoted,” as well as “presented by,” or “sponsored by,” which may suggest (inaccurately) to consumers that a sponsoring advertiser funded but did not create or influence the content.

Disclosures also must be clear and prominent on all devices and platforms where consumers may view native ads and generally must be contemporaneous with the claim it is intended to qualify. The policy statement specifically notes that disclosures on another

page that readers must navigate to will not cure any misleading impression created by the advertisement.

The FTC also cautions that 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.

The policy statement also identifies certain “misleading

formats” that are presumed to be material — including misrepresenting advertisements as news items or featured articles, reviews, investigative reports or scientific research.

Finally, it’s important to note that the FTC’s guidance does not only apply to advertisers. The agency also may take action against other parties — ad agencies and operators of affiliate advertising networks — that helped create deceptive advertising content.