



## Native Advertising Takes Center Stage: New NAD Decision Recommends Disclosure of Branded Content as Advertising

Many advertising industry predictions for 2014 have trumpeted the rise of “native advertising” and “content marketing” in digital media, where advertising or sponsored content is integrated with or designed to resemble traditional editorial content. Consumer protection concerns arising from these marketing practices have been expressed by the Federal Trade Commission (FTC) and, more recently, addressed by self-regulatory bodies.

As the FTC pointed out in its [December 4th workshop on native advertising](#), blurring the distinction between paid messages and editorial content has been happening for decades. FTC staff reinforced at the workshop that even though the term native advertising is relatively new, the FTC already has jurisdiction to challenge native advertising under its general authority under Section 5 of the FTC Act to examine unfair or deceptive acts or practices. Indeed, the FTC highlighted several actions it has taken throughout the years where advertising campaigns too closely resembled editorial content. Whether the Commission will provide industry guidance specific to native advertising remains to be seen.

A key consumer protection concern expressed by the FTC is that consumers may be deceived if they believe the information contained in editorial content comes from an unbiased source when it does not. The [National Advertising Division](#) (“NAD”) of the Council of Better Business Bureaus recently announced a decision that echoes that concern.

### NAD’S Shape Magazine Decision

In its third decision addressing native advertising, NAD found that the publisher of [Shape Magazine](#) failed to appropriately distinguish between editorial articles and an article promoting its own Shape-branded products (Shape Water Boosters), which was included under a

“news” heading (American Media, Inc., #5665, 2013). NAD reasoned that consumers could believe that editorial recommendations in the magazine are independent of sponsor/advertiser influencers and thus attach greater weight to editorial recommendations than those made in an advertising format. For that reason, NAD recommended that the advertiser/publisher “clearly and conspicuously” designate paid content as advertising. The publisher agreed to make changes, including to stop using the term “news” in connection with articles that promoted its own products.

Importantly, NAD initiated the review itself as part of its routine monitoring activity - not in response to a competitive challenge - just as it did in other recent cases where it has challenged an advertiser’s use of non-branded content or websites to promote products without making appropriate disclosure (Snapdragon Processors, #5633, 2013; eSalon, #5645, 2013). These cases highlight the ongoing scrutiny likely to face native advertising and content marketing as it increases in popularity.

### IAB Guidelines

The [IAB](#) (Interactive Advertising Bureau) has also added to the conversation by issuing its [Native Advertising Playbook](#) (Dec. 4, 2013) and its [Content Marketing Primer](#) (Dec. 16, 2013). These self-regulatory guidelines do not advocate for a specific form of disclosure, but expressed the IAB’s basic view on native advertising:

*“Simply put: Regardless of context, a reasonable consumer should be able to distinguish between what is paid advertising vs. what is publisher editorial content.”*

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More specifically, the guidelines state that disclosures for paid ad units must “(a) use language that conveys that the unit has been paid for by a third party, thus making it an advertising unit, even if that unit does not contain traditional promotional advertising messages, and (b) be large and visible enough for a consumer to notice it in the context of a given page and relative to the device that the ad is being viewed on.”

### Key Takeaways

Based on recent regulatory and self-regulatory activity, there are a few key takeaways to consider as companies explore native advertising opportunities:

- (1) The FTC already has rules and guidance that give them a basis for enforcement action (as evidenced by historical settlements involving predecessors in the non-digital space), and self-regulatory bodies like NAD are likely to maintain a keen interest in reviewing disclosure practices.
- (2) There is not yet clear consensus on how, when, and where to effectively label sponsored or advertising content. For example, FTC workshop panelists and industry members debated whether disclosures should be made in connection with a link to sponsored content or on the landing page where the content itself appears, and whether it is sufficient just to label content as “sponsored” or the sponsor should be identified.
- (3) The form of disclosure may also depend on the circumstances - for example, whether an advertiser participated in the creation of the content or is merely “sponsoring” content created by a publisher and whether the content relates to the advertiser’s products and services. In evaluating the adequacy of disclosures, consider the following: When communicating information about a product or service, is it clear whose interest or point of view is being expressed in the content?

- (4) FTC’s [Dot-Com Disclosures](#) and IAB’s Native Advertising Playbook and Content Marketing Primer provide important guidance on when disclosures are necessary and considerations for their adequacy.

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