

FTC Releases Guidance on Native Advertising

“Native advertising” – the practice of integrating advertising with editorial content — has exploded in recent years. Spending in this area is expected to exceed \$20 billion by 2018. Advertisers who use native advertising techniques often intend to provide a meaningful, non-disruptive advertising experience to users. However, advertisers, ad agencies, ad networks, publishers, and others in the advertising ecosystem should be aware that the Federal Trade Commission recently issued a new **enforcement policy and business guidelines** regarding native advertising.

This new guidance emphasizes that the FTC intends to analyze native advertising techniques within its existing anti-deception standards. For decades, the agency has alleged that many different types of ads – from direct mail pieces that resemble a friend’s handwritten recommendation to infomercials that resemble an investigative report to paid online search results that are indistinguishable from non-paid online search results – are deceptively formatted because they present commercial content as noncommercial content. The FTC’s new guidance reminds advertisers that these existing standards regarding deceptive formats apply to new advertising techniques like native ads.

The bottom line, according to the FTC, is that consumers must recognize advertising as such when it is presented to them. Otherwise, the FTC may well challenge the advertising format as deceptive. The FTC’s business guidance says that “knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys.”

In analyzing whether it views a native ad’s format to be deceptive, the FTC indicates that it will review the “net impression” created by the ad. This means the agency will review the entire ad as a whole as well as its individual components and the context in which the ad is presented to determine whether consumers are likely to recognize the ad as such. The agency also said it will take into account the nature of the ad’s target audience. An ad targeted to children is therefore likely to be analyzed differently than an ad targeted to physicians.

In some cases, the FTC says, a disclosure like “Ad,” “Advertisement,” or “Paid Advertisement” may be useful to prevent the ad’s format from being deceptive. The best place for such disclosures is near, above, and to the left of the headline. According to the FTC, the disclosure should “travel with” the ad content – as the ad content is republished in different media, the disclosure should also be republished. The FTC cautions against the use of disclosure terms that it considers too vague, like “Promoted,” “Promoted Stories,” “More Content for You,” or “From Around the Web.” The FTC also suggests that disclosure terms like “Sponsored by,” “Brought to you by” or “Presented by” should only be used when an advertiser funded content, but did not create or influence it.

In other cases, the FTC acknowledges, a disclosure may not be necessary. For example, if an advertiser funds a story that does not mention the advertiser or its products, no disclosure may be

required. Similarly, the FTC has said that product placements that do not convey any express or implied product performance claims — like the placement of a brand name on cups placed on a table in front of judges in a television talent show — may not require a disclosure. Finally, the FTC notes that in some cases, no disclosure may be necessary if it is inherently obvious to consumers that particular content is advertising.

The issuance of the new guidance materials indicates that the FTC has spent time educating itself on native advertising techniques. If the agency follows its typical course of conduct, we should expect to see FTC enforcement actions involving native advertising in the near future. To be prudent, advertisers and advertising service providers should strongly consider reviewing their internal compliance policies and practices on native advertising now that the new FTC guidance has been released.

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