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FTC Targets “Native” Advertising

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Influencer marketing — paying a reality TV star with 10 million followers on Instagram to take and share a selfie wearing your products — is one form of “native” advertising that is garnering particular attention from advertisers (and reality TV stars). Native advertising also includes other forms of paid advertising that are integrated into the media in which the advertising appears. Native advertisements commonly appear online but can be found in almost any media, including radio, television and print. Examples include sponsored articles in magazines, movies or video games that have integrated a particular make and model of vehicle into the story line in exchange for consideration from the automotive manufacturer, and blog posts reviewing a product written by bloggers who received compensation (including free products) from the seller.

Native advertising can serve laudable goals and can benefit publishers, advertisers and consumers. For many publishers, advertising that is integrated into the user experience is less disruptive, which, in turn, helps the publisher attract readers/viewers and keep them engaged. Put simply, seeing an advertisement integrated into a newsfeed annoys users far less than having an ad pop up and take over the screen. Advertisers, too, often prefer having their products and promotions presented to potential consumers in non-disruptive ways.

Native advertising has drawn close attention from the Federal Trade Commission. The FTC’s concern is that consumers will be unable to distinguish between paid advertising and objective, third-party endorsement or use of products. The FTC has an active policy and enforcement agenda that covers all forms of native advertising and has issued guidelines to



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advertisers to signal that native advertising crossing the line is in the enforcer’s crosshairs.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce,” and grants the FTC the authority to prevent parties from engaging in deceptive practices. Pursuant to this authority, the FTC has long held that advertising that consumers cannot identify as advertising is deceptive when it misleads consumers into believing it is independent, impartial or not from the sponsoring advertiser itself.

As far back as 1968, the FTC issued an advisory opinion finding it deceptive to publish an advertisement in the format of a news article without adequately disclosing it is an advertisement. In December 2015, the agency issued its Enforcement Policy Statement Addressing “Native” Advertising and Deceptively Formatted Advertisements setting forth the “rules of the road” for native advertisers and publishers.

The December 2015 guidance came on the heels of several FTC enforcement



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actions, and generally reflects the policies underlying those actions.

Moreover, just after publishing the guidance in December, the FTC announced an action against the department store Lord & Taylor alleging that it deceived consumers by not adequately disclosing that its native advertisements were paid promotions, along with providing payments to more than 50 fashion influencers to post Instagram pictures featuring a Lord & Taylor dress without ensuring that the influencers adequately disclosed that the endorsement was paid for. The posts included the “@lordandtaylor” Instagram designation and the “#DesignLab” campaign hashtag, but failed to include any disclosure “that the influencer had received the dress for free, that she had been compensated for the post, or that the post was a part of a Lord & Taylor advertising campaign.”

Collectively, these actions reflect a substantial FTC investment to police native advertising practices. These actions also reveal several fundamental principles that underlie the agency’s legal analysis:

- Advertising should be transparent — advertisers are responsible for ensuring that consumers can identify native advertising as paid advertising.
 - When the subject matter of the advertising relates to the surrounding content, the advertising likely requires disclosure — the FTC’s December 2015 guidance provides 17 examples to help clarify when disclosures in native advertising are required. Although the context matters, one theme that emerges is that disclosure is likely required when the subject matter of the native advertising content is related to the surrounding content.
 - Disclosures must be noticeable and easy to read — if disclosures are required, they should be “clear and conspicuous,” meaning that the disclosure is written in plain language, easy to see and close to the advertising content. Disclosures should use the word “ad” or “advertisement” instead of terms like “promoted by,” “sponsored by,” or “brought to you by.” Disclosures should appear on all devices that consumers will use to access the content, and disclosures should be carried through if republished (e.g., shared on Facebook).
- Both publishers and advertisers should be mindful of the FTC’s guidance in how they present native advertisements. While the FTC’s enforcement actions to date have focused on advertisers and their agents, the FTC would likely not hesitate to pursue publishers, including in situations where the publisher knew (or should have known) of non-compliant advertising and was well positioned to address the issue. •

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