



## REGULATORY MATTERS: WHAT NATIVE ADVERTISERS NEED TO KNOW

by Vejay G. Lalla and Paavana L. Kumar

Digital native content is a hot topic, with active industry and regulatory discussion around whether and how traditional advertising law principles apply to native advertising. The buzz is for good reason: [Native advertising spending](#) rose from \$4.7 billion in 2013 to \$7.9 billion in 2014 and is projected to skyrocket beyond \$20 billion by 2018, according to data reported by Business Insider.

A virtue of native advertising is that brands can create content that takes on the tone, context, and visual design of its surroundings to appeal to a certain audience or key demographic. However, this also poses the potential to mislead consumers if marketers don't stay cognizant of how content is being presented to the consumer. It also can invite regulatory scrutiny and risk a marketer's credibility with the audience it is trying to engage.

### WHAT ARE THE REGULATORS SAYING?

Regulators have not yet issued concrete guidelines for disclosing native content as sponsored by a brand. However, the FTC has structured its response to continually evolving digital marketing practices around a trio of key principles of consumer protection, all of which should be considered when developing and placing native content:

- 1) Transparency:** Content marketing should be transparently disclosed as such, so the consumer understands that he or she is not viewing editorial content, as consumers weigh editorial content differently than advertising content.
- 2) Disclosure:** Marketers or their partners should disclose any material connection between the content and the marketer behind it and ensure that the disclosures themselves (including style and format) do not mislead consumers.
- 3) Monitoring and enforcement:** Marketers should ensure their partners, whether brands, publishers, or technology providers, work together in ensuring that consumers understand and put into context any marketing communications they are viewing.

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## WHEN IS DISCLOSURE NECESSARY?

The National Advertising Division of the Council of Better Business Bureaus (NAD) addressed content marketing and disclosure issues, recommending that Shape magazine, which promoted its SHAPE Water Boosters product in editorial pieces, clearly and conspicuously designate this content as [advertising](#) and to refrain from labeling such content “news” (even though Shape was both the publisher and the advertiser of the content in question).

The fact that brand products may be featured in the native content, however, is not the only factor requiring disclosure; the NAD has also taken the position in certain circumstances that where sponsored content brings an advertiser a commercial benefit (but advertiser products are not necessarily mentioned), disclosures are still required, since an advertiser directing consumers from a third-party website to its own website should avoid misleading consumers about the purpose of the initial contact.

## WHAT ARE CLEAR AND CONSPICUOUS DISCLOSURES?

In a recent [survey](#) commissioned by native ad platform TripleLift and eye-tracking firm Sticky, even where native content is labeled, a majority of consumers don’t notice it. While regulators have not required any specific disclosure language, recent NAD decisions illuminate creative choices that may increase the prominence and transparency of disclosures. The NAD has found that disclosures such as “You may like” or “More from the Web” may confuse consumers as to why the content is linked, so, for transparency, the disclosure must be made more appropriately and more prominently—for example, in terms of font size, color, boldness, and placement on the page.

The FTC also recently updated its guidance generally with respect to .com disclosures, emphasizing that disclosures should always be close in proximity to the content itself. Another evolving disclosure issue is whether continuous disclosure is necessary when native content is shared (e.g. retweeted) across multiple digital platforms, since the content may blend seamlessly into a social media newsfeed when reposted. While the NAD has indicated that disclosures should be included every time a link to the applicable content is provided, an interesting issue not directly considered by the NAD is whether native content, when shared by users themselves and not marketers, may no longer constitute advertising content, but rather organic viral content that is outside of the marketer’s control.

## AM I RESPONSIBLE? WHAT DO I HAVE TO DO AS A MARKETER?

Whether you are an advertising agency, publisher, brand, or technology company, recent NAD guidance indicates that each party will be responsible to ensure compliance as applicable. Moreover, the FTC has recently warned that “publishers are creating the ads and acting more like ad agencies ... and ad agencies traditionally have responsibilities for deceptive advertising.” As such, marketers, agencies, and publishers should always keep the core principles of transparency, disclosure, and monitoring in mind while focusing on creating compelling content that functions effectively in the context of its surrounding environments.

## KEY TAKEAWAYS FOR NATIVE CONTENT CREATION

Marketers should bear in mind:

- >> Native advertising should include understandable disclosures in accordance with NAD's recent decisions as well as traditional FTC regulations, the FTC's history of enforcement, and ongoing FTC developments.
- >> Regardless of who created the content, marketers should treat native content as any other traditional advertising content, which includes ensuring that content does not infringe third-party rights and that deceptive product claims are not being made. Marketers and their agencies typically bear the responsibility when the content references a brand's products or services.
- >> Publishers and media companies should ensure that sales and legal teams work together to determine the appropriate format, style, and disclosures included on native content and any widgets on publisher sites.

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