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## BLURRED LINES NO MORE: THE REGULATORS ARE GOING NATIVE IN 2016

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An [article](#) for *MediaPost* published in 2013 explored what native advertising is and whether it is here to stay. Fast forward — native advertising spending is on the rise and is projected to rocket beyond \$20 billion by 2018, according to data reported by *Business Insider*, and regulators are on the march.

Increasingly, native advertising is being tailored to appeal to key demographics and individual consumers on a programmatic basis. In light of such advances and despite self-regulatory efforts by the IAB and MMA and recent NAD case decisions, the FTC — two years after its workshop entitled “Blurred Lines: Advertising or Content” — has felt compelled to issue an enforcement policy statement and business guidelines reminding marketers that if they do not keep a closer watch on how native content is being presented and disclosed to the consumer, native advertising can be as deceptive in the FTC’s eyes as print ads posing as news in the 60’s, encyclopedia salesman presenting themselves as surveyors in the 70’s, infomercials in the 80’s, and paid-search ads formatted as organic search results in 2002.

### WHAT DO THE NATIVE ADVERTISING GUIDELINES SAY?

The FTC has expressly memorialized its position that long-standing consumer protection principles apply to native advertising under Section 5 of the FTC Act, and that where consumers may be misled about the source of an advertisement and if such misconception is likely to affect the consumers’ choices or conduct with respect to the advertised products or services, clear, proximate and prominent disclosures are needed. Whether in the form of a sponsored DIY video placed on a home improvement TV show Web site or an in-app ad such as a sponsored game icon, where content is not obviously advertising to the consumer (which is impacted by how similar the native content is to its surroundings and the context of the presentation), the more crucial the disclosure.

### WHAT DOES THE FTC RECOMMEND?

The FTC states that disclosures should be placed in front of or above a native advertising headline and/or be accompanied by visual cues such as shading or borders. Furthermore, disclosures should be in “simple, unequivocal language” such as “advertisement” or “sponsored advertising content” rather than more ambiguous terms such as “You may Like”, or “More from the Web,” which the FTC calls “deceptive door openers,” or “promoted” or “promoted stories” that could mislead consumers that advertising content is endorsed by a publisher site. The FTC’s position is that “both what the ad says and the format it uses to

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convey that information will be relevant,” so disclosures such as “Presented by Advertiser” may or may not be sufficient or appropriate depending on the circumstances — such as whether the advertiser simply funded the content versus created or influenced the content.

## **AS A MARKETER, SHOULD I NOW AVOID NATIVE ADVERTISING? WHAT DOES THIS MEAN FOR 2016?**

Absolutely not. The FTC has been clear since its workshop that it will view native advertising just like any other advertising, which must follow the key principles of transparency and disclosure, without which the consumer may be harmed. The FTC notes that a natively formatted ad with an obvious headline such as “Come and Drive X today” is identifiable as an ad to consumers, and the net impression of the native content will be the key factor in determining whether disclosure is needed. This should not prevent marketers from continuing to become content labs, but will require more scrutiny to ensure that advertising content is labeled and presented to consumers in a transparent manner without disguise, and will also require marketers to work closely with publishers — the last line of defense.

Marketers should expect to see more self-regulatory and regulatory enforcement by the FTC in 2016 in situations where consumers are harmed by deceptive native ads that knock on the consumer’s door posing as something else.

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