

January 4, 2016

## FTC Issues Much-Anticipated Guidance Regarding “Native” Advertising

The Federal Trade Commission (FTC) released two highly anticipated documents regarding “native” advertising, namely, its [Enforcement Policy Statement on Deceptively Formatted Advertisements](#) and [Native Advertising: A Guide for Businesses](#). The documents detail FTC’s views and enforcement approach to native ads and similar types of sponsored content.

“Native” advertising is advertising or sponsored content that “bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.” In other words, native advertising content looks and feels like other non-advertising content, such that it blends in and may not come across as advertising to viewers. Native ads have become increasingly prevalent given the changing technology allowing consumers to skip or block ads and the corresponding changing business models of publishers. As explained by FTC, “many publishers have begun to offer advertisers formats and techniques that are closely integrated with and less distinguishable from regular content so that they can capture the attention and clicks of ad-avoiding consumers.”

According to the FTC guidance, native ads will be considered deceptive “if they convey to consumers expressly or by implication that they’re independent, impartial, or from a source other than the sponsoring advertiser – in other words, that they’re something other than ads.” This is “[b]ecause 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.”

FTC reiterates in its native ad guidance that transparency is key, and that traditional advertising rules apply with equal force in new media, including with respect to native content. FTC considers the “net impression” of the content, including words, images, audio, and so forth, in deciding whether the content is deceptive. The FTC further emphasized the importance of disclosures being straightforward, and that while terms like “Ad” or “Paid Advertisement” were likely to be understood, “Promoted” or “Promoted Story” are ambiguous and potentially misleading.

Some forms of native ads will require clear and prominent disclosures signaling that the content is indeed paid advertising. FTC also recognizes, however, that some content may be

### Key Take-Away

As publishers and advertisers focus more on native ad content as a business model, advertisers (and everyone involved in creating or presenting ad content) must keep in mind the “net impression” of any native advertising, and what types of disclosures or features may be necessary so that consumers can quickly and readily differentiate advertising from the publisher’s independent content.

For more information, please contact any of the following members of Katten’s **Advertising, Marketing and Promotions** practice.

Roger P. Furey  
+1.202.625.3630  
roger.furey@kattenlaw.com

Doron S. Goldstein  
+1.212.940.8840  
doron.goldstein@kattenlaw.com

Michael R. Justus  
+1.202.625.3575  
michael.justus@kattenlaw.com

Jessica M. Garrett  
+1.212.940.6523  
jessica.garrett@kattenlaw.com

---

so clearly commercial in nature that it will be unlikely to deceive consumers even without further disclosure. The more similar in format and topic the sponsored content is to, and the less it is distinguished from, the non-sponsored content on the site, the more likely that disclosure will be necessary. FTC points out that it is also necessary to take into account the target audience of the ad, consumers' ordinary expectations regarding with the type of media in which the ad appears, and how consumers consume content in that media. Regarding the mechanics of disclosures, FTC's new guidance reminds advertisers to follow its previously issued [.com Disclosures: How to Make Effective Disclosures in Digital Advertising](#).

Advertisers, and those who create ads, may find the *Guide for Businesses* document especially helpful. It contains numerous examples of what may and may not be considered deceptive, and when a disclosure would or would not be required. For example, the *Guide* addresses thumbnail versions of native content (that are clicked on to lead to the full version of the content), abbreviated versions of native content in news feeds and "content recommendation widgets," content integrated into entertainment programming and video games, and, of course, native content on social media.

Finally, FTC made clear that its enforcement policy does not apply only to advertisers, but rather to "everyone who participates directly or indirectly in creating or presenting native ads," including ad agencies and operators of affiliate networks.

# Katten

Katten Muchin Rosenman LLP [www.kattenlaw.com](http://www.kattenlaw.com)

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2015 Katten Muchin Rosenman LLP. All rights reserved.

*Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at [kattenlaw.com/disclaimer](http://kattenlaw.com/disclaimer).*

12/28/15