

# Client Update

## The FTC Draws the Line on Native Advertising

### NEW YORK

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The FTC has settled false advertising charges with Lord & Taylor, marking the Commission's first enforcement action since issuing guidance recently in one of its hot priority areas: native advertising. What did Lord & Taylor do that set the Commission off, and how can companies learn from this case to effectively utilize native advertising within the emerging bounds being set by the FTC?

“Native advertising” is online advertising content that adopts the look and feel of the editorial content that surrounds it. It has become all the rage in digital media, with young companies like BuzzFeed setting the pace and venerable companies like *The New York Times* joining in. A recent analyst report projects annual growth of over 150% in native advertising spending for each of the next five years. Native advertising generates higher click rates, a less disruptive user experience—and, the FTC worries, deception.

The FTC signaled its interest in policing this space with the issuance, last December, of its [Policy Statement on Deceptively Formatted Advertising](#) and a guidance document, [Native Advertising: A Guide for Businesses](#). The Commission emphasized that it is deceptive, and thus a violation of Section 5 of the FTC Act, to mislead consumers about the commercially sponsored nature of what looks like editorial content. The FTC also stressed that clear and prominent disclosures may be necessary to prevent such deception.

The case against Lord & Taylor not only helps set the boundaries for native advertising, but also sheds light on a related area of Commission concern: advertisers' reliance on bloggers and other “influencers” who promote products online in exchange for samples or other benefits.

### SAY YES TO THE DRESS?

The FTC's [complaint](#) centered on Lord & Taylor's efforts to promote a paisley dress that was a focus of its “Design Lab” marketing campaign. Lord & Taylor paid for and approved an article in *Nylon*, an online fashion magazine, that featured a photo of the dress. Lord & Taylor also paid for, reviewed and approved a photo of the dress that *Nylon* posted on its Instagram page. Lord & Taylor's

native advertising drew the ire of the FTC because it appeared to be independent editorial content in a legitimate fashion magazine, when in fact it was paid commercial advertising—a fact that was not disclosed in either the article or the Instagram post.

Lord & Taylor also gave the paisley dress to 50 “select fashion influencers” and paid them to post photos of themselves in the dress on Instagram. Lord & Taylor preapproved each of the influencers’ posts, requiring inclusion of a specific hashtag and Instagram user handle, and, in some cases, edited the posts. Yet there was no disclosure to consumers of the compensation to the “influencers” or of Lord & Taylor’s role in their posts. Nor did Lord & Taylor’s contracts with the influencers require disclosure.

### WHAT DOES THE SETTLEMENT REQUIRE?

Under the [proposed consent order](#), assuming it is approved, Lord & Taylor will be prohibited from misrepresenting that its paid advertising is from an independent source, and must take steps to ensure that its paid endorsers clearly disclose when they have been compensated in exchange for endorsements. These steps include monitoring the endorsers’ representations and disclosures, and maintaining records of Lord & Taylor’s own monitoring efforts. As is typical of FTC consent orders, Lord & Taylor will be subject to these obligations for 20 years.

### WHAT’S A MARKETER TO DO?

#### First and Foremost, Disclose Native Advertising

The FTC clearly wants to see native advertising, such as the *Nylon* article paid for by Lord & Taylor, accompanied by prominent and straightforward disclosures that identify the content as advertising. It appears that the FTC saw this as a relatively easy case: Because there was no disclosure at all with the *Nylon* article, there was no need to assess the sufficiency of a disclosure. The simplest lesson of the Lord & Taylor case is: when it comes to native advertising, some disclosure is plainly better than none.

Marketers looking for more precise guidance on what sort of disclosure is sufficient would be well-advised to look back to the FTC’s December documents and its related public statements. There, the Commission urged marketers “to consider the ad as a whole, and not just focus on individual phrases, statements, or visual elements.” If a reasonable consumer is likely to think the native advertisement is editorial content, then add a disclosure. FTC guidance on the form of disclosure is quite specific:

- Disclosures should be prominent, and appear at the onset (*i.e.*, prior to the consumer clicking on the link) near the headline of the native advertisement.

- Once the advertisement is accessed, the disclosure should appear in the top left above the byline or near the advertisement's focal point.
- The disclosure should "follow" the advertisement if the advertisement is republished on other platforms, such as in search results or social media.
- The disclosure should be visible on all devices and platforms in which the consumer might view the advertisement.
- The disclosures should employ the term "Advertisement" (or variants thereof, e.g., "Paid Advertisement" or "Sponsored Advertising Content"), while the terms "Promoted" or "Promoted Stories" should be avoided as ambiguous and potentially misleading.
- Company names or logos on their own are insufficient to identify that content is commercial content.
- Terms such as "Presented by [X]," "Brought to You by [X]," "Promoted by [X]," or "Sponsored by [X]" may be acceptable if the company has had no influence on the content.

According to the FTC's Guide for Businesses, not all native advertising requires disclosure: "Some ads by the very nature of their promotional message communicated may be inherently obvious as advertising to consumers." An advertiser also need not disclose as advertising independently created editorial content that is sponsored or underwritten by an advertiser if the content does not actually feature or promote the advertiser's product.

### **Disclose Paid Endorsements Too**

Here, the FTC was enforcing guidance it gave in 2009 with its [Guides Concerning Use of Endorsements and Testimonials in Advertising](#), and refined in [2013](#) and [2015](#). The rules of the road, which the FTC contends that Lord & Taylor violated, are fairly straightforward: Compensating an endorser is a material connection that must be disclosed with the endorsement, and the advertiser must take steps to ensure that the disclosure occurs. Contracts with bloggers and other social media "influencers" should include requirements that influencers disclose the benefits they receive from the advertiser; the advertiser should monitor what influencers post to ensure they are disclosing their connections; and disclosures should be clear and conspicuous.

Again, the Lord & Taylor case itself provides little guidance on what constitutes a sufficient disclosure by, and monitoring of, the paid acts of influencers. This is because—according to the Commission—there was no disclosure at all. But some disclosure and monitoring are clearly better than none.

Above all, through the Lord & Taylor case, the FTC sends this simple message to marketers: The Commission is watching, and its guidance on these issues has been out there long enough that the FTC is now fully comfortable taking

enforcement action when it sees what it regards as noncompliance. As the FTC builds a track record in this area, the potential is there for harsher results, including monetary penalties. Business imperatives may be driving publishers and advertisers toward more and more blurring of the lines between advertising and organic editorial content. But the FTC clearly still prefers bright lines.

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We would be pleased to discuss the issues raised by the Lord & Taylor case with our clients and friends.