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## Reading Between the Lines: The Rise of Native Advertising and the FTC's Inability to Regulate It

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## NOTES

# READING BETWEEN THE LINES: THE RISE OF NATIVE ADVERTISING AND THE FTC'S INABILITY TO REGULATE IT

*"Ads are baked into content like chocolate chips into a cookie. Except it's actually more like raisins into a cookie because no one . . . wants them there."*<sup>1</sup>

## INTRODUCTION

A new marketing phenomenon—known as native advertising—has recently taken the media industry by storm. This new form of advertisement provides a lucrative and highly effective marketing platform by way of consumer deception. Native advertisement achieves this deception by seamlessly integrating advertisements (ads) into a website that mimic the “native” or “organic” content (or feed) of the original website.<sup>2</sup> Users are thereby unable to distinguish between the ad and the native feed of the site, making a user unaware they are looking at an advertisement at all.<sup>3</sup> This subliminal form of advertising—which is both difficult to recognize and define—allows advertisers to take advantage of online consumers (users),<sup>4</sup> who are left unprotected by current Federal Trade Commission (FTC) regulation.<sup>5</sup> Advertisers, through use of native advertisement, are left able to exploit the FTC's online disclosure requirements and gain access to consumers beyond the scope originally conceived through typical advertisement techniques.<sup>6</sup>

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1. See *Last Week Tonight with John Oliver: Episode #1.13* (HBO television broadcast Aug. 3, 2014) [hereinafter *Last Week Tonight*], [https://www.youtube.com/watch?v=E\\_F5GxCwizc](https://www.youtube.com/watch?v=E_F5GxCwizc).

2. Cooper Smith, *The Native Ad Rush Is On: Social Media Budgets Are Pouring Into In-Stream Ads*, BUSINESS INSIDER (Nov. 5, 2013, 8:00 AM), <http://www.businessinsider.com/the-rise-of-social-native-advertising-2013-10>.

3. *Id.*

4. While many online consumers are probably unfamiliar with the concept of native advertising, it is worth noting that consumers look at native ads roughly 52% more frequently than “banner” or “display” ads. *Exploring the Effectiveness of Native Ads*, SHARETHROUGH (2013), <http://www.sharethrough.com/resources/native-ads-vs-display-ads/> [hereinafter *Ad Effectiveness Study*].

5. In March 2013, the FTC provided guidelines on how businesses can create effective disclosures in digital ads online. See *Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N (Mar. 2013), <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [hereinafter *Effective Disclosures*].

6. See *id.*

Native advertisement has expanded the ways in which advertisers are able to access and engage with consumers, while also introducing a new revenue stream for online publishers.<sup>7</sup> The most common forums for native advertising include blogs, news articles, and Facebook.<sup>8</sup> Social media platforms particularly provide an ideal medium for publishers to effectively implore native advertising techniques.<sup>9</sup> For example, Facebook has found that native advertisements have increased clickthrough rate (CTR)<sup>10</sup> traffic to its site at a lower cost than traditional online banner ads while, LinkedIn and Twitter have recently begun utilizing native advertising campaigns of their own.<sup>11</sup> As such, social media has expanded the applicability of native advertising practices. Furthermore, online print publications such as the *New York Times*,<sup>12</sup> *Wall Street Journal*,<sup>13</sup> and *The Atlantic*<sup>14</sup> have also increased their use of native advertisements on their respective websites.

While native advertising continues to grow in popularity, the deceptive nature of native advertisement exposes problems for consumer protection. Studies have shown that consumers constantly struggle to distinguish native ads from the organic (or native) content of a website. For example, although the “general news audience” may have thought they would have little problem distinguishing sponsored content from regular news content, research has shown that the general news audience has actually been struggling to do so.<sup>15</sup> As a result, the FTC must adapt its regulatory

7. *The Native Advertising Playbook*, INTERACTIVE ADVERT. BUREAU, at 1 (Dec. 4, 2013), <http://www.iab.net/media/file/IABNativeAdvertisingPlaybook120413.pdf> [hereinafter *Advertising Playbook*].

8. “The most popular forms of native advertising are blog posts (65%), articles (63%), and Facebook (56%).” Ayaz Nanji, *Native Advertising Trends: Brands See Value, Publishers Like Sponsored Posts*, MARKETINGPROFS (Nov. 2, 2013), <http://www.marketingprofs.com/charts/2013/12056/native-advertising-trends-brands-see-value-publishers-like-sponsored-posts#ixzz3oyA9BQO6>.

9. *See id.*

10. Clickthrough rate (CTR) is defined as “a ratio showing how often people who see your ad end up clicking it. CTR can be used to gauge how well your keywords and ads are performing.” *Clickthrough Rate (CTR)*, GOOGLE ADWORDS, <https://support.google.com/adwords/answer/2615875?hl=en> (last visited Oct. 16, 2015).

11. “Facebook ads in the ‘News Feed’ achieve 49-times higher click-through rates and a 54% lower cost-per-click than traditional placements in the right-rail sidebar . . . LinkedIn jumped on the bandwagon and launched ‘Promoted Updates’ in July of this year. Twitter started the native-social ad trend with ‘Promoted Tweets’ in early 2010.” Smith, *supra* note 2.

12. *See* Ravi Somaiyaf, *Times Publisher Sets Out Plan for ‘Native’ Ads*, N.Y. TIMES, Dec. 19, 2013, at B4.

13. *See* Michael Sebastian, *Wall Street Journal Adopts Native Ads, Tactic Its Editor Has Said Can Lead to Faustian Pacts*, AD. AGE (Mar. 10, 2014), <http://adage.com/article/media/wall-street-journal-introducing-native-ads-site/292044/>.

14. *See* Erik Wemple, *The Atlantic’s Scientology Problem, Start to Finish*, WASH. POST (Jan. 15, 2013), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/01/15/the-atlantics-scientology-problem-start-to-finish/>.

15. “[M]ost business and entertainment news audiences (82% and 85% respectively) felt that in-feed sponsored content was easy to single out, while the general news audience had more

practices to ensure that native advertising techniques are not deceiving consumers. This requires the FTC to draft a clearer definition of native advertising and ultimately develop a more applicable advertising disclosure guideline.

This Note analyzes the FTC's failure to regulate native advertisements and proposes amendments to the regulation to better ensure consumer protection. Part I of this Note provides an overview of how native advertising has been defined by those within the media industry, how it has been commonly used throughout the media landscape, and what makes it so effective and appealing to advertisers. Part II discusses the FTC's current role in regulating advertising while focusing on disclosure requirements and other guidelines as regulatory mechanisms. Part III highlights criticism concerning native advertising and argues that the FTC's current regulation of native advertising is insufficient, largely due to the FTC's inability to define native advertising, the FTC's general passivity on the issue, and a lack of applicable disclosure guidelines. Lastly, Part IV proposes more acceptable methods for disclosure within native advertisements and suggests what the future may hold regarding the relationship between the law and native advertising.

## I. THE RISE OF NATIVE ADVERTISING

### A. WHAT IS NATIVE ADVERTISING?

Because native advertising is a relatively new phenomenon within the advertising and media industries, there is little agreement on how best to define it. Currently, there is no universally agreed-upon definition of native advertising. "This is because . . . native [advertising] is in the eye of the beholder, depending on where one sits in the ecosystem and the strategic and media objectives of the marketer."<sup>16</sup> As a result, members of the advertising industry<sup>17</sup>—including advertisers, publishers, marketers, and regulators—have become distracted by having to identify specific types of

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trouble, with less than half (41%) recognizing that the material was advertising." *Critical to Success of In-Feed Sponsored Content are Brand Familiarity, Trust and Subject Matter Authority, As well As Relevance, According to New Research From IAB & Edelman Berland*, INTERACTIVE ADVERTISING BUREAU (July 22, 2014), <http://www.iab.com/news/critical-to-success-of-in-feed-sponsored-content-are-brand-familiarity-trust-and-subject-matter-authority-as-well-as-relevance-according-to-new-research-from-iab-edelman-berland/> [hereinafter IAB].

16. See *Advertising Playbook*, *supra* note 7.

17. For the purposes of this Note, an advertiser refers to a merchant seeking to promote a product or service he or she is attempting to sell. Meanwhile, a publisher refers to one who selects the means by which the advertisement is displayed (i.e., website, blog, etc.). A marketer refers to someone who is responsible for developing the advertising campaign.

ads as native advertisements, instead of focusing on consumer deception prevention through disclosure law.<sup>18</sup>

To make matters more complex, many publishers have defined native advertising in a variety of different ways.<sup>19</sup> According to Sharethrough,<sup>20</sup> a leading software company specializing in providing native advertising capabilities, there are two essential components of every native advertisement: (1) form—“native ads match the visual design of the experience they live within, and look and feel like natural content”<sup>21</sup>—and (2) function—“native ads must behave consistently with the native user experience, and function just like natural content.”<sup>22</sup> Native advertising seamlessly provides a unique and interactive way by which publishers can effectively reach their intended audience.<sup>23</sup>

## B. TYPES OF NATIVE ADVERTISING

The Interactive Advertising Bureau (IAB), a business organization founded in 1996 and comprised of many leading media and technology companies, develops industry standards and best practices for digital advertisement online.<sup>24</sup> With respect to native advertisement, the IAB established six core native ad formats.<sup>25</sup> These include “in-feed units,” “paid search units,” “recommendation widgets,” “promoted listings,” “in-ad with native element units,” and “custom” or “can’t be contained” advertisements.<sup>26</sup> These six formats will be described below.

### 1. In-Feed Units

Given its wide variation in execution, in-feed units are the most commonly utilized type of native advertising.<sup>27</sup> Essentially, in-feed units replicate and mimic the exact form and function of content found elsewhere

18. See *Advertising Playbook*, *supra* note 7, at 1.

19. One survey reveals that 53% of publishers accepted the definition of native advertising as “sponsored content.” Another 47% of surveyed publishers defined native advertising as “featured content,” while 45% accepted “content ‘brought to you by,’” as a definition. Additionally, 25% accepted the definition of “micro sites,” along with 38% accepting “company branded pages.” Jimmy Atkinson, *The Ultimate Guide to Native Advertising*, MONETIZE PROS (Jan. 16, 2014), <http://monetizepros.com/blog/2014/the-ultimate-guide-to-native-advertising/>.

20. *Native Advertising: The Official Definition*, SHARETHROUGH, <http://www.sharethrough.com/nativeadvertising/> (last visited Nov. 5, 2015).

21. *Id.*

22. *Id.*

23. “It is clear that most advertisers and publishers aspire to deliver paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong.” *Advertising Playbook*, *supra* note 7, at 2.

24. See *About the IAB*, INTERACTIVE ADVER. BUREAU, [http://www.iab.net/about\\_the\\_iab](http://www.iab.net/about_the_iab) (last visited Oct. 16, 2015).

25. *Id.* at 3–4.

26. *Id.* at 4–5.

27. *Id.* at 7.

within the feed.<sup>28</sup> Typically, in-feed units come in two forms: (1) sponsored articles or content and (2) in-feed promotions.<sup>29</sup> Examples of sponsored content can commonly be found on websites such as *Buzzfeed*, *Gawker*, *Forbes*, *BrandVoice*, and *Mashable*.<sup>30</sup> In-feed promotions, on the other hand, are similar to sponsored articles or content “but instead . . . they focus on direct response and link to content off of the site.”<sup>31</sup> In other words, in-feed promotions, if clicked on, will bring a user directly to the sponsor’s website. Examples of in-feed promotions can be found on *YouTube*, *Facebook*, *Twitter*, and *LinkedIn*.<sup>32</sup>

## 2. Paid Search Units

Paid search units are delivered straight to the consumer and appear along the side of search engine results.<sup>33</sup> Paid search units tend to be located above organic search results and look nearly identical to the surrounding results.<sup>34</sup> Functionally, paid search units link to the page much like the search results, and are typically sold with a guaranteed placement on the search engine so that advertising agencies are aware of the context that surrounds it.<sup>35</sup> In other words, advertising agencies are given superior placement within search results—usually the first few results to appear—in order to draw consumer attention as quickly as possible. Examples of paid search units can be found on websites such as *Yahoo!*, *Google*, *Bing*, and *Ask*.<sup>36</sup>

## 3. Recommendation Widgets

Recommendation widgets include ads or paid content links that are delivered via a “widget.”<sup>37</sup> A widget is a type of consumer software typically found on social media sites, which provides “such features as videos, music players, photo viewers, weather forecasts, puzzles, or news headlines in a tiny area of a Web page otherwise devoted to social networking, on a personal blog, or on the desktops of some personal computers.”<sup>38</sup> Typically, recommendation widgets are fully integrated into

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28. *Id.*

29. See *The Six Core Types of Native Ads*, FLITE (Mar. 26, 2014), <http://flite.com/blog-post/home/2014/3/25/the-six-core-types-of-native-ads> [hereinafter *Core Types*].

30. See *id.*

31. *Id.*

32. See *id.*

33. *Id.*

34. See *Advertising Playbook*, *supra* note 7, at 9.

35. See *id.* at 9.

36. See *Core Types*, *supra* note 29.

37. See *Advertising Playbook*, *supra* note 7, at 10.

38. *Widget*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/technology/widget> (last visited October 16, 2015).

the main page and do not imitate the appearance of editorial content.<sup>39</sup> Recommendation widgets are distinct from other forms of native advertisements because they typically all look the same, regardless of the site.<sup>40</sup> Examples of recommendation widgets are commonly found on *Outbrain*, *Taboola*, *Disqus*, and *Gravity*.<sup>41</sup>

#### 4. Promoted Listings

Promoted listings are fairly similar to in-feed promotions and paid search units; however, they are given their own category because they are utilized on websites that tend to lack traditional editorial content.<sup>42</sup> Moreover, promoted listings are “designed to fit seamlessly into the browsing experience, are presented to look identical to the products or services offered on a given site, [and] link to a special brand/product page.”<sup>43</sup> Promoted listings are typically found on online shopping websites such as *Etsy* and *Amazon*.<sup>44</sup>

#### 5. In-ad with Native Element Units

Also known as the “IAB standard ad,” in-ad with native element units are ads that can be found embedded within a traditional banner ad. These types of native ads are generally placed outside of in-feed content,<sup>45</sup> yet contain elements that include “contextually-relevant content within the ad.”<sup>46</sup> In other words, the IAB standard ad performs like traditional banner ads in that it is removed from the native content; however, the ad itself refers to native content found on the site. Examples have been found on *Martini Media* and *Onespot*.<sup>47</sup>

#### 6. “Can’t Be Contained”

Native advertisements that are classified under the “can’t be contained” category include those ads that do not neatly fit into one of the other six groups or perhaps are too platform-specific to be given their own category.<sup>48</sup> Examples of native ads that can’t be contained are commonly found on custom playlist sites such as *Spotify* and *Pandora*.<sup>49</sup>

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39. See *Advertising Playbook*, *supra* note 7, at 10.

40. The native experience for these widgets comes from the consistent user experience across many sites, which allows them to still blend in to some degree. See *Core Types*, *supra* note 29.

41. See *id.*

42. *Id.*

43. *Advertising Playbook*, *supra* note 7, at 11.

44. See *Core Types*, *supra* note 29.

45. See *Advertising Playbook*, *supra* note 7, at 12.

46. *Core Types*, *supra* note 29.

47. See *id.*

48. See *Advertising Playbook*, *supra* note 7, at 14.

49. See *Core Types*, *supra* note 29.

### C. WHY UTILIZE NATIVE ADVERTISING?

Online publishers have recently struggled to attract advertisers largely because traditional banner ads are so ineffective.<sup>50</sup> In fact, as of April 2014, consumers tend to click on banner ads only 0.17% of the time they are online.<sup>51</sup> Thus, it makes sense why online publishers eagerly utilize native advertising techniques. Studies project that spending on native advertising will nearly double from \$2.4 billion in 2015 to \$4.6 billion by 2017.<sup>52</sup> Currently, 41% of “big name brands” are running native ad campaigns and 20% of brands that have yet to run native ad campaigns have said that they plan on doing so in the near future.<sup>53</sup>

So what is it that makes native advertising so attractive? Native advertising is relatively simple to implement, it can be used across various platforms (i.e., computer screens and mobile devices), and most importantly, it is extremely effective. “[T]he key benefit of [native advertisements] is that they are placed where audiences are already actively looking for content.”<sup>54</sup> As such, native ads were viewed 4.1 times on average per online session compared to traditional banner ads, which were viewed only 2.7 times on average per online session.<sup>55</sup> Additionally, consumers were measured to look at in-feed ad placements—the most common editorial native ad format—25% more often than they looked at typical display ad units.<sup>56</sup> Native ads also recorded an 18% higher lift in purchase intent and a 9% higher lift for brand affinity responses than traditional banner ads.<sup>57</sup>

Native advertising has certainly benefited publishers and online advertisers. According to *Buzzfeed* CEO Jonah Peretti, the online social media site derives 100% of its revenue from native advertising,<sup>58</sup> and expects to make roughly \$120 million in native ad sales this year.<sup>59</sup> Native

50. See *Last Week Tonight*, *supra* note 1.

51. See *Display Benchmarks*, RICH MEDIA GALLERY (Apr. 2014), <http://www.richmediagallery.com/resources/benchmarks/>.

52. See Atkinson, *supra* note 19.

53. *Id.*

54. Chris Schreiber, *What You Need to Know About the Brand-New Native Ad Exchanges*, VENTUREBEAT (Apr. 9, 2014, 4:30 AM), <http://venturebeat.com/2014/04/09/what-you-need-to-know-about-the-brand-new-native-ad-exchanges/>.

55. See *Ad Effectiveness Study*, *supra* note 4.

56. See *id.*

57. “Brand lift . . . refers to the percentage increase in the primary marketing objective of the advertising campaign.” See *Brand Lift Metrics*, VIZU, <http://brandlift.vizu.com/solutions-technology/platform/brand-lift-metrics/>.

58. Kevin O’Keeffe, *John Oliver Takes on Native Advertising*, *Journalism’s Raisin Cookie*, THE WIRE (Aug. 4, 2014), <http://www.thewire.com/entertainment/2014/08/john-oliver-takes-on-native-advertising-journalisms-raisin-cookie/375513/>.

59. Josh Constone, *BuzzFeed’s Future Depends On Convincing Us Ads Aren’t Ads*, TECHCRUNCH (Aug. 12, 2014), <http://techcrunch.com/2014/08/12/buzzhome/>.

advertising has become so lucrative that some publishing companies have even begun creating teams specifically geared toward native advertising development and placement throughout their websites.<sup>60</sup> As such, there are various positive implications for online publishers: (1) Native ads garner more appreciation than banner ads by consumers and offer a better user experience for a given website; (2) native ads afford marketers a new medium to connect with consumers; and (3) native ads present a strong ability to drive high brand affinity among brand loyalists, which bolsters the opportunity for publishers to continually drive demand from advertisers.<sup>61</sup>

Given the effectiveness of native advertising coupled with the ineffectiveness of traditional banner ads, it is not surprising to see this overwhelming use of native advertising practices by online publishers.

## II. THE FTC AND DISCLOSURE REGULATION

### A. BACKGROUND: SPONSORSHIP DISCLOSURE

In order to understand the disclosure requirements in online advertising, it is important to review the origins of disclosure law in the United States. In the early twentieth-century, in an effort to garner further business, advertisers would prominently attach their involvement to a given project.<sup>62</sup> Consumer protection and deceptive advertising practices were not yet governmental concerns.<sup>63</sup> However, Congress increasingly grew concerned with unfair benefits received by publishers.<sup>64</sup> In 1912, Congress enacted the Newspaper Publicity Act, which required publishers to label advertisements that could be easily mistaken for legitimate editorial content.<sup>65</sup>

As radio broadcasting became popular throughout the 1920s, by way of commercial sponsorship, Congress as well as broadcasters looked to the Newspaper Publicity Act as a framework for developing regulations. To better deal with the new issues arising from radio technology, Congress passed the Radio Act of 1927. Section 19 of the Radio Act<sup>66</sup> required

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60. For example, Time Inc. developed an eight-person team focusing exclusively on native advertisement. See Max Willens, *Time Inc. Creates Native Ad Group to Forge Programs Across Brands*, AD. AGE (July 17, 2014), <http://adage.com/article/media/time-creates-native-advertising-group/294164/>.

61. See *Ad Effectiveness Study*, *supra* note 4.

62. For example, advertisers would attach their names to radio programs' titles, introductions, or sign offs. See Leah W. Feinman, Note, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 117 (2011).

63. See *id.*

64. See *id.*

65. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 327, 335 (2004).

66. See generally Radio Act of 1927, ch. 169, § 19, 44 Stat. 1162, 1927 (1927).

broadcasters to disclose the role of sponsors within programming.<sup>67</sup> In 1929, the National Association of Broadcasters (NAB) adopted the Code of Ethics, which further attempted to ban fraudulent and deceptive material from the airwaves.<sup>68</sup> Finally, when the Federal Communications Commission (FCC) was established through the Communications Act of 1934, the sponsorship disclosure requirement was formally codified in 47 U.S.C. § 317 without any congressional opposition.<sup>69</sup>

While instances of consumer deception involving advertising could have been reviewed on a case-by-case basis or through other forms of regulation, regulators found that sponsorship identification or disclosures proved to be the most effective in safeguarding consumer protection.<sup>70</sup> This policy decision was justified by policymakers' inherent faith in the marketplace.<sup>71</sup> In other words, because radio stations tended to rely on advertising dollars, those who relied too much on their sponsors feared that their listeners would be driven to competing stations more accustomed to the public interest.<sup>72</sup> As such, "regulation by the marketplace . . . worked best when the audience could distinguish a sponsored message from the surrounding programming or recognize programming itself as sponsored content."<sup>73</sup> Therefore, to this day, disclosure regulation remains the strongest means of ensuring consumer protection against deceptive advertising.

## B. FTC REGULATION

### 1. The FTC's Authority

In the aftermath of the Supreme Court's decisions in *Standard Oil v. United States*<sup>74</sup> and *United States v. American Tobacco*<sup>75</sup>—cases involving crackdowns on monopolistic endeavors and thwarting anti-competitive behavior by big business—President Woodrow Wilson signed the Federal Trade Commission Act (FTCA) on September 26, 1914, formally establishing the FTC.<sup>76</sup> Under the FTCA, the FTC became authorized to

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67. See Kielbowicz & Lawson, *supra* note 65, at 333.

68. See *id.* at 335.

69. See *id.* at 335–36.

70. See *id.* at 331.

71. See *id.*

72. See *id.* at 331 (citing ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935, at 27 (1993)).

73. *Id.*

74. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

75. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

76. Federal Trade Commission Act (FTCA), ch. 311, §5, 38 Stat. 717, 719–21 (1914) (codified as amended at 15 U.S.C. § 45(a)(2) (2012)).

prevent individuals, partners, and corporations from using unfair or deceptive practices in or affecting commerce.<sup>77</sup> Today, the FTC acts as a bipartisan federal agency that focuses on consumer protection and antitrust missions.<sup>78</sup>

Shortly after its passage, the FTC interpreted the FTCA as a means by which it could outlaw misleading or deceptive advertisements.<sup>79</sup> As a result, Congress amended the FTCA in 1938 to include “a prohibition against unfair and deceptive acts and practices in advertising.”<sup>80</sup> Since then, the FTC has actively taken administrative action toward combating deceptive practices in advertising. For example, the FTC’s “Division of Advertising Practices” protects consumers by bringing administrative lawsuits to stop unfair and deceptive advertising.<sup>81</sup> The FTC maintains a broad degree of authority when it comes to regulating advertising practices within the marketplace.<sup>82</sup>

## 2. Enforcement Actions: Consumer Protection

Pursuant to section 6 of the FTCA, the FTC has the authority to investigate<sup>83</sup> and gather information regarding the business conduct and practices of any person, partnership, or corporation engaged in or affecting commerce.<sup>84</sup> Following a thorough investigation, the FTC may bring an enforcement action against a particular party if the agency has reason to believe that the law is being or has been violated.<sup>85</sup> Initially, the FTC will determine whether a violation has occurred through either an adjudicative<sup>86</sup> or rulemaking<sup>87</sup> proceeding. After determining through either form of proceeding that a practice is unfair or deceptive, the FTC cannot enforce

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77. See *About the FTC: Our History*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/our-history> (last visited Sept. 18, 2015).

78. Specifically, the FTC’s mission is “to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.” *About the FTC: What We Do*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/what-we-do> (last visited Sept. 19, 2015) [hereinafter *FTC: What We Do*].

79. See Feinman, *supra* note 62, at 118.

80. *Id.*

81. See *FTC: What We Do*, *supra* note 78.

82. Specifically, the FTC “conduct[s] investigations, sue[s] companies and people that violate the law, develop[s] rules to ensure a vibrant marketplace, and educate[s] consumers and businesses about their rights and responsibilities.” *Id.*

83. See FTCA, ch. 311, § 6, 38 Stat. 717, 721 (codified as amended at 15 U.S.C. § 46 (2012)).

84. FTCA, 15 U.S.C. § 46(a) (2012).

85. *About the FTC: A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Sept. 18, 2015) [hereinafter *FTC Enforcement*].

86. See *id.*

87. See *id.*

penalties and orders without the assistance of a court.<sup>88</sup> Nevertheless, the FTC maintains the ability to challenge such a practice directly in court.

Section 13(b) of the FTCA grants the FTC the authority to seek both preliminary and permanent injunctions to remedy “any provision of law enforced by the Federal Trade Commission.”<sup>89</sup> Courts have uniformly accepted the FTC’s interpretation of section 13(b), and as such, most consumer protection enforcement actions are conducted directly in court rather than through an administrative adjudication.<sup>90</sup> However, there are significant advantages for the FTC to pursue an administrative adjudication over direct judicial enforcement. For example, “the Commission has the first opportunity to make factual findings and articulate the relevant legal standard. On review, the court is obliged to affirm the Commission’s findings of fact if supported by substantial evidence . . . [and] accord substantial deference to [the Commission’s] interpretation of the [FTCA].”<sup>91</sup> Alternatively, in a 13(b) or direct suit, the FTC receives no greater deference than any ordinary government plaintiff would, and thus, the FTC may have a tougher time establishing its consumer protection enforcement actions in court.<sup>92</sup> Therefore, the FTC tends to prefer administrative adjudication in cases involving original legal issues or complex fact patterns.<sup>93</sup>

Specifically, enforcement actions may be brought against consumer protection violations under section 5(a) of the FTCA, which states that “unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.”<sup>94</sup> Unfair practices are those “that ‘cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.’”<sup>95</sup> Typically, in order for the FTC to classify a practice as deceptive, there must be a material representation that is likely to mislead a consumer who is acting reasonably under the given circumstances.<sup>96</sup> First, the FTC sets out to determine whether a representation, omission, or practice is likely to mislead a consumer.<sup>97</sup> Then, the FTC evaluates the practice in question from the viewpoint of a

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88. Specifically, “the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules.” *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *See* Letter from James C. Miller III, Chairman of Fed. Trade Comm’n, to Hon. John D. Dingell, Chairman of Comm. on Energy and Commerce, Fed. Trade Comm’n (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

97. *Id.*

reasonable consumer.<sup>98</sup> In other words, if the practice is directed towards a particular group of people (e.g., the elderly), then the FTC will examine reasonableness from the perspective of that group.<sup>99</sup> Lastly, the FTC examines whether the representation, omission, or practice is “material,” meaning it inquires as to “whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.”<sup>100</sup> Should the FTC conclude that the practice or representation in question is material, then consumer injury is probable because consumers, but for the deception, would have likely made a different decision regarding a product or service.<sup>101</sup>

### 3. Dot Com Disclosure Guidelines

In May 2000, the FTC issued the “Dot Com Disclosures” (the Guidelines)—a framework to help advertisers and businesses better understand the applicability of FTC disclosure rules to the Internet.<sup>102</sup> Although not legally enforceable, the original Guidelines suggested how the FTC’s consumer protection regulations should apply to advertising and sales online.<sup>103</sup> Eleven years later, the FTC updated the Guidelines in order to reflect a decade’s worth of progress online.<sup>104</sup> In March 2013, “Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising” was issued by the FTC as an update to the previous version of the Guidelines.

The primary goal for updating the Guidelines is to provide direction on how to ensure disclosures are both clearly and conspicuously posted when required.<sup>105</sup> While determining the deceptiveness of an ad depends on the facts at hand, the Guidelines indicate that the ultimate test is “whether the information intended to be disclosed is actually conveyed to consumers.”<sup>106</sup> Regardless, disclosures are required if a significant minority of reasonable consumers are likely to be misled by the advertisement.<sup>107</sup> Additionally, disclosures are also required should an ad expressly or impliedly make misleading claims without qualifying any pertinent information.<sup>108</sup>

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98. *Id.*

99. *See id.*

100. *Id.*

101. *Id.*

102. *See Effective Disclosures, supra* note 5.

103. The guidelines recommend, “disclosures be presented clearly and conspicuously, in the context of online advertising.” *Id.*

104. *See id.*

105. *See id.*

106. *Id.*

107. *See* Feinman, *supra* note 62, at 117.

108. *Effective Disclosures, supra* note 5, at 5.

Whenever a disclosure is required, the disclosure itself must adhere to a “clear and conspicuous” standard.<sup>109</sup> This adherence is measured by the disclosure’s performance—“how consumers actually perceive and understand the disclosure within the context of the entire ad.”<sup>110</sup> The most important feature is the “net impression”<sup>111</sup> of the ad. Net impression focuses on a reasonable consumer’s understanding of an ad. The overall net impression standard is based on whether a reasonable consumer views an ad (including its disclosure) as both “truthful” and “substantiated.”<sup>112</sup> In evaluating the net impression, the FTC analyzes the ad’s words, pictures, and even the product’s name.<sup>113</sup>

Native advertising poses a problem to the net impression standard and the FTC’s ability to utilize it. Essential to the net impression standard is a reasonable consumer’s ability to recognize the ad in the first place. The power and purpose behind native advertising, however, is to inhibit this ad recognition by mimicking and blending the ad into the native content of the website, making many consumers unaware they are looking at an ad to begin with. Therefore, consumers are not able to substantiate the ad and determine whether or not its claims are truthful, and thus, the consumers’ net impression cannot be properly ascertained. Only when the disclosure attached to the ad is both clear and conspicuous and the consumer is aware that they are viewing an ad can their net impression be determined. Because the FTC relies on the overall net impression standard for regulating disclosures and ads, the FTC is ultimately unable to properly regulate native ads, which bypass this standard through their inherently deceptive nature. The result is consumers are left unprotected as advertisers continue to take advantage of this regulatory loophole. A clear and conspicuous disclosure should enhance the overall net impression by ensuring that this change takes place.

While there is no concrete formula for determining what constitutes a clear and conspicuous disclosure, the FTC offers various factors for evaluation.<sup>114</sup> These factors include: (1) the placement of the disclosure in the ad, (2) the proximity of the disclosure to the claim it seeks to qualify,

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109. *See id.*

110. *Id.* at 6.

111. “The deception standard assesses the net impression of an advertisement in its entirety. That means a defendant cannot defeat a government challenge by focusing on one element of an advertisement if the overall message of the advertisement is likely to mislead reasonable consumers.” Michael Benoit, *Sweeps, Standards and the FTC*, F&I MAGAZINE (Mar. 2014), <http://www.fi-magazine.com/channel/compliance/article/story/2014/03/sweeps-standards-and-the-ftc.aspx>.

112. *Effective Disclosures*, *supra* note 5, at 6.

113. *See FTC Fact Sheet: It’s The Law*, FED. TRADE COMM’N, [http://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Ad-Marketing\\_The-Law.pdf](http://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Ad-Marketing_The-Law.pdf) (last visited Sept. 18, 2015) [hereinafter *FTC Fact Sheet*].

114. *Id.* at 2.

(3) the disclosure's prominence, (4) whether the disclosure cannot be avoided, (5) whether other parts of the ad may distract a consumer's attention away from the disclosure, (6) whether in order to be effective the disclosure needs to be repeated several times or because consumers may miss the disclosure entirely depending on where and how they enter the website, (7) the adequacy of the volume, cadence, and duration of disclosures for audio ads, and (8) whether the intended audience can understand the disclosure's language.<sup>115</sup> Upon consideration of these factors, if the reasonable consumer is unable to comprehend or even notice the disclosure, the FTC suggests that the disclosure in question is deceptive, and thus requires improvement.<sup>116</sup>

Because the Guidelines refer to advertising without limiting the manner in which it is disseminated,<sup>117</sup> online advertisements thus fall under the Guidelines as well. As such, the FTC suggests various principles that online advertisements must adhere to in order to avoid violation of FTC regulations. These include: (1) advertising must be truthful and not misleading, (2) advertisers must provide evidence to substantiate their claims, and (3) advertisements cannot be "unfair."<sup>118</sup> Online advertising is particularly unique because it contains various specialized features, which may alter the appearance of both the ad and the accompanying disclosure.<sup>119</sup> For example, for space constrained ads, such as banner ads and tweets, where the disclosure itself may not fit on the screen, either the advertisement itself must be modified so that a disclosure is not required,<sup>120</sup> or if this is not possible, then the space constrained ad should not be used at all.<sup>121</sup>

### C. THE FTC AND NATIVE ADVERTISING

While the FTC remains committed to evaluating online advertising practices,<sup>122</sup> native advertising certainly presents an interesting conundrum for the agency. This is largely because of the various, aforementioned ways in which native advertising can be so seamlessly integrated into editorial

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115. *Id.* at 7.

116. *See id.*

117. *See id.* at 4.

118. In determining whether an advertisement is unfair, the FTC asks three main questions, (1) "Was the harm serious?;" (2) "Could the consumer have avoided the harm?;" and (3) "Is the harm to some consumers outweighed by some benefits to other consumers, or to competition?" *FTC Fact Sheet*, *supra* note 113, at 1.

119. *See Effective Disclosures*, *supra* note 5, at 5.

120. A disclosure is required if a significant minority of reasonable consumers are likely to be misled by the advertisement in question. *See* Feinman, *supra* note 62, at 117.

121. *Id.* at 16.

122. *See id.* at 21.

space on online and mobile platforms.<sup>123</sup> On December 4, 2013, in order to address whether native advertising requires formal regulation and if so, in what capacity, the FTC held a workshop entitled “Blurred Lines: Advertising or Content?”<sup>124</sup> Ultimately, the workshop left many questions unanswered,<sup>125</sup> particularly in determining how best to disclose native advertisements without undermining the purpose of native ads.<sup>126</sup>

The most important takeaway from the workshop was that the FTC re-established its authority by maintaining the ability to bring enforcement actions against companies that utilize native advertisements in an unfair or deceptive manner.<sup>127</sup> This suggests that while the FTC may not yet know exactly how to handle the advent of native advertising, the FTC believes that at the very least it maintains the authority to do so. As will be discussed below, this uncertainty is due to various reasons, one of which is the FTC’s inability to accept and declare a uniform definition for the practice of native advertising. The FTC’s uncertainty coupled with an inadequate disclosure guideline presents an extremely disconcerting problem for online consumers.

### III. THE NEED FOR FTC NATIVE ADVERTISEMENT REGULATION

The FTC’s most powerful mechanism for regulating deceptive advertisements is the disclosure requirement. As previously mentioned, the FTC Guidelines, although not legally enforceable, provide advertisers with guidance to ensure that disclosures are on par with FTC standards. However, as the FTC updated its Guidelines to encompass ads displayed across online and mobile platforms—particularly through social media outlets—the FTC has yet to consider the application of these Guidelines to

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123. See Frankfurt, Kurnit, Klein, & Selz PC, Client Advisory, Highlights from FTC’s Native Advertising Workshop: More Questions Than Answers? (Dec. 9, 2013), <http://fkks.com/news/highlights-from-ftcs-native-advertising-workshop-more-questions-than-answer> [hereinafter Workshop Highlights].

124. *Workshop on Native Advertising, Blurred Lines: Advertising or Content?*, FED. TRADE COMM’N (Dec. 9, 2013), <https://www.ftc.gov/news-events/audio-video/video/blurred-lines-advertising-or-content-ftc-workshop-native-advertising-1> [hereinafter FTC Workshop].

125. At the workshop, Mary Engle, the associate director of the FTC’s Division of Advertising Practices stated: “[The workshop] actually has raised more questions than it’s answered . . . to a surprising degree . . . more thought and some more research would be very valuable on.” FTC Workshop, *supra* note 124. In her closing remarks, Jessica Rich, the Director of the Bureau of Consumer Protection noted, “as stakeholders develop these guidelines and strive for greater transparency, we do think the updated [“Dot Com Disclosures”] . . . would be very helpful. In terms of our . . . next steps, we’re going to . . . consider what we’ve learned here . . . and determine whether additional guidance in this area would be useful from us or not.” *Id.*

126. See Shannon Harell, *The Current State of Native Advertising*, LAW 360 (Jun. 20, 2014, 11:54AM), <http://www.law360.com/articles/549525/the-current-state-of-native-advertising>.

127. See Sophia Cope, *FTC Explores Native Advertising*, NEWSPAPER ASS’N AM. (Dec. 17, 2013), <http://www.naa.org/News-and-Media/Blog/FTC-explores-native-advertising.aspx>.

native advertising, which thrives off of new media space on the aforementioned platforms. The FTC's inability to define what native advertising is, the FTC's irresolution, and the inadequacy of the Guidelines as it relates to native ads present various reasons as to why the FTC has been unable to regulate native advertisements. Meanwhile, the overwhelming inability of consumers to recognize native advertisements presents the seminal reason as to why the FTC should.

#### A. COMMON CRITICISMS REGARDING NATIVE ADVERTISING

Although native advertising is a highly effective marketing technique, its effectiveness relies upon consumer deception. As advertisers continue to spend billions of dollars on native ad space,<sup>128</sup> coupled with the fact that consumers are looking at native ads 53% more frequently than traditional banner ads,<sup>129</sup> it is imperative that consumers are able to recognize the difference between content and ads. Startlingly, this is far from the case.

According to one study, when shown examples of native advertisements, as many as 35% of respondents incorrectly mistook a native advertisement for legitimate, in-feed content.<sup>130</sup> And as previously mentioned, in a separate study, less than half of the general news audience could not recognize that the material they were reading was advertising.<sup>131</sup> If advertisers are willing to increase native ad spending and consumers are less likely to recognize that native advertisements are not content, but are in fact ads, then the effectiveness and true value of such ads almost certainly derives from consumer deception.<sup>132</sup>

Native advertisers have also successfully exploited the presentation of online editorial content by blurring legitimate news sources with unrecognizable native ads.<sup>133</sup> In evaluating consumer reception toward

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128. See Smith, *supra* note 2.

129. Schreiber, *supra* note 54.

130. FTC Workshop, *supra* note 124.

131. See IAB, *supra* note 15.

132. "According to a poll conducted by the research institute IFOP, only 29% of those questioned [identified] Native Advertising as advertising, compared with 77% for standard banner ads. Based on this finding, the advertisers are migrating towards a more empathic form of marketing, seeking to charm rather than convince." *Will Digital Advertising Go Native?*, IDWEAVER (May 22, 2014), <http://www.idweaver.com/en-be/news-idweaver/native-advertising/>.

133. One of the most notorious examples of native advertising in editorial content—also known as advertorials—came in January 2013. The magazine, *The Atlantic*, published an article celebrating the Church of Scientology's success and global expansion. However, the article was marked with a yellow banner classifying it as "sponsored content." As a result, some journalists criticized *The Atlantic's* willingness to sell ad space to the oft-controversial Church of Scientology, while others denounced the magazine for how closely the sponsored article resembled *The Atlantic's* editorial content. See Jared Keller, *The Atlantic, the Church of Scientology, and the Perils of Native Advertising*, BUSINESSWEEK (Jan. 15, 2013), <http://www.businessweek.com/articles/2013-01-15/the-atlantic-the-church-of-scientology-and-the-perils-of-native-advertising>.

native advertising, one study concluded that readers tended to view the least commercial material as the most credible, while their purchase intent and attitudes towards brands increased when viewing content that mirrored news content.<sup>134</sup> This is noticeably problematic because native advertising inherently attempts to appear less commercial and more newsworthy. And not surprisingly, “59 percent of readers believe a news site loses credibility if it runs articles sponsored by a brand.”<sup>135</sup> Therefore, native advertisers have much to gain by making ads appear more like editorial content.

### **B. THE FTC’S RELUCTANCE TO DEFINE “NATIVE ADVERTISING”**

To prevent further consumer deception online, the FTC must regulate native advertising practices across all platforms. Undoubtedly, this can be accomplished by imposing more stringent and applicable disclosure requirements on advertisers. However, before determining how best to disclose native ads, the FTC must first recognize that native advertising is an entirely distinguishable and unique marketing technique that has only recently entered the online and mobile space. By acknowledging that native advertising is distinct from other forms of online advertising, the FTC would be better prepared to modify current disclosure requirements accordingly. Nonetheless, the FTC has been reluctant to formally define native advertising and unwilling to accept it as something novel.

At the FTC’s workshop on native advertising in 2013,<sup>136</sup> Chairwoman Edith Ramirez stated:

[t]he practice of native advertising, which imitates the form and style of the media in which it’s featured isn’t new. Neither are . . . ads that resemble digital editorial content. And at the FTC, we have been concerned with consumers’ ability to distinguish between paid and editorial content for many years.<sup>137</sup>

Critics have been quick to point out that the FTC’s understanding of native advertising is fundamentally flawed. One critic recounted:

At a recent presentation, a Federal Trade Commission staffer announced, with tongue-in-cheek pride, the FTC’s first native advertising enforcement action: a 1915 case involving an advertisement posing as a magazine news article. It was a cute way to make the point that nothing in advertising law is really new, and to reinforce the FTC’s perennial position that any truth-

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134. Stacey Miller, *Consumers Dazed and Confused by Native Ads*, ONE BIG BROADCAST (Jan. 11, 2014, 1:48 AM), [http://onebigbroadcast.com/autospeakstraighttalk/view/570/Consumers\\_Dazed\\_and\\_Confused\\_by\\_Native\\_Ads.html](http://onebigbroadcast.com/autospeakstraighttalk/view/570/Consumers_Dazed_and_Confused_by_Native_Ads.html).

135. See Joe Lazauskas, *Study: Sponsored Content Has a Trust Problem*, CONTENTLY (July 9, 2014), <http://contently.com/strategist/2014/07/09/study-sponsored-content-has-a-trust-problem-2/>.

136. See Workshop Highlights, *supra* note 123.

137. FTC Workshop, *supra* note 124, at 6.

in-advertising issue can be resolved by reference to the broad principles stated in the FTC Act.<sup>138</sup>

The FTC's apparent failure and unwillingness to accept a more modern and workable understanding of native advertising demonstrates that the FTC's current conception of native advertising is inherently flawed. This is largely because the FTC continues to believe that an ad is merely a paid message placed alongside news or entertainment content run by publishers and broadcasters.<sup>139</sup> This is a misguided assumption<sup>140</sup> because today's most effective ads successfully stand by themselves.<sup>141</sup> In sum, the FTC is convinced that advertising and content are always two separate things.<sup>142</sup> However, a more workable definition for native advertising would prove otherwise.

### C. CURRENT FTC DISCLOSURE METHODS ARE INADEQUATE

In regards to native advertising, the FTC's Guidelines<sup>143</sup> are inherently inadequate. The FTC is reluctant to both recognize native advertising as a unique development within the advertising world and modify current disclosure rules accordingly. Consequently, native advertisers continue to take advantage of this inadequacy by disclosing their ads as minimally as possible, and thus leaving consumers severely deceived.

In fact, native ad disclosures tend to be so poorly displayed that many consumers do not even recognize them. When asked to read a web page containing native ads, respondents to a study claimed to not even remember seeing "sponsored by" posts, and furthermore, the majority of respondents did not even know what the word 'sponsored' meant.<sup>144</sup> Moreover, while most publishers assume that online readers understand what it means when a post is labeled as "sponsored content," the majority of online consumers

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138. August T. Horvath, *Breaking Down the FTC's Definition of 'Native Advertising' in Games*, INSIDECOUNSEL (Apr. 18, 2014), <http://www.insidecounsel.com/2014/04/18/breaking-down-the-ftcs-definition-of-native-advert>.

139. Kirk Cheyfitz, *Why Native Advertising Won't Survive, Regardless of FTC Involvement*, CONTENT MARKETING INSTITUTE (Apr. 20, 2014), <http://contentmarketinginstitute.com/2014/04/native-advertising-wont-survive-regardless-of-ftc/>.

140. "In the FTC's version of reality, ads get seen solely because the publisher's editorial content or the broadcaster's show attracts an audience. Working under this 19th century assumption, the FTC, many advertisers, and virtually all publishers fail to see that publishers and their audiences are not particularly valuable to advertisers in a digital world." *Id.*

141. *See id.*

142. *See id.*

143. The FTC requires that disclosures be "presented clearly and conspicuously" and provides various factors that are used to determine what constitutes both "clear" and "conspicuous." *Effective Disclosures*, *supra* note 5.

144. *See* Miller, *supra* note 134.

and readers are not so sure.<sup>145</sup> Therefore, if consumers are unable to locate or even understand what disclosures represent, it is evident that the FTC's current disclosure requirements are ineffective and unclear.

Even the most common form of disclosure used by websites to distinguish paid posts from content is not working.<sup>146</sup> When native advertisements are disclosed, far more people are likely to recognize the disclosure's presence, and thus the ad itself.<sup>147</sup> Yet, the problem remains that in-content disclosures—those that would be used to distinguish native ads—are rarely employed in comparison to other disclosure techniques.<sup>148</sup> This is because publishers are hesitant to over-disclose brands sponsoring their content.<sup>149</sup> Thus, as publishers continue to fear disclosing native advertisements, people will continue having difficulty differentiating between paid and unpaid ads.

The most prevalent example illustrating the FTC's inability to regulate the advent of native advertising is demonstrated through the lack of disclosure on paid search units<sup>150</sup> found on the most popular search engines on the Internet. In 2013, the FTC warned Google Inc. (Google), Yahoo Inc. (Yahoo), and Microsoft Corp. (Microsoft) to more clearly highlight ads in their search engine results in order to prevent deceiving consumers.<sup>151</sup> Consequently:

[T]he three leading U.S. search engines have done little, making it difficult for users to distinguish ads from “natural” search results. Google . . . stopped placing colored shading around ads, and now displays a small yellow “Ad” label next to some paid links. The shading of ads on Yahoo and Microsoft's Bing search results is nearly imperceptible; both search engines label ads with a single line of light-gray text.<sup>152</sup>

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145. Accordingly, “while a plurality (48.2 percent) of respondents believe that ‘Sponsored Content’ means that an advertiser paid for the article to be created and had influence on the article's content, more than half (51.8 percent) thought it meant something different [including, that:] ‘the news site wrote it, but a sponsor's money allowed it to happen’ (20.0%); ‘that a sponsor paid for its name to appear next to existing content like a banner ad’ (18.0%); ‘that a sponsor wrote the article’ (12.6%); ‘other’ (1.1%).” See Lazauskas, *supra* note 135.

146. See Andrew Sullivan, *When Corporations Make Journalism*, THE DISH (Sept. 19, 2014, 2:03 PM), <http://dish.andrewsullivan.com/2014/09/19/when-corporations-make-journalism/>.

147. “In contrast, Nudge found that over half of the 100 people it polled were able to identify ads that featured disclosures within the content itself.” *Id.*

148. *Id.*

149. See *id.*

150. See Dordzhaka Ednyashev, *IAB Native Advertising Playbook*, STACKADAPT (July 30, 2014), <http://www.stackadapt.com/blog/2014/07/30/iab-native-advertising-playbook/>.

151. See Rolfe Winkler, *Deceptive Web Ads Draw Flak, Little Action*, WALL ST. J. (Oct. 14, 2014, 1:21 AM), <http://online.wsj.com/articles/SB21955092128744023881304580209130724690218?tesla=y>.

152. See *id.*

What is even more troublesome is that these major search engines continue to believe that they have remained compliant with FTC Guidelines.<sup>153</sup> As search ads generate roughly half of all advertising revenue online,<sup>154</sup> search engines are unlikely to improve their disclosure practices. Harvard researcher Ben Edelman “shows how, over the past twelve years, Google steadily lightened the colored shading behind its ads, before eliminating it entirely . . . . The shading behind ads on Bing and Yahoo is so light that it is difficult for search-engine users to notice.”<sup>155</sup> Typically, the shading behind the aforementioned ads was used to differentiate them from search results. As the shading grew lighter, it became more and more difficult for consumers to tell the difference between ads and results. Furthermore, in blatant violation of FTC standards:

Google doesn’t use the “Ad” label for all paid links. Some product ads that appear with search results are labeled “sponsored” in light gray text. That doesn’t comply with an FTC guideline to use “the same terminology to label any form of advertising.” Yahoo also uses varying language, sometimes labeling ads as “ads,” and sometimes as “sponsored.”<sup>156</sup>

In conclusion, if Google, Yahoo, and Microsoft are found to be compliant, it is clear that the FTC’s standards for disclosure are far too lenient.

Lastly, and most importantly, consumers themselves have revealed the extent to which they have been deceived by native advertising. Accordingly, “[t]wo-thirds of [online] readers have felt deceived upon realizing that an article or video was sponsored by a brand”<sup>157</sup> and “54 percent of readers don’t trust sponsored content.”<sup>158</sup> Because of this distrust, most consumers also prefer to see their favorite websites run traditional banner ads as opposed to sponsored articles.<sup>159</sup>

As such, the FTC’s current disclosure guidelines are inherently inadequate. As major players in the online advertising space continue to generate significant amounts of revenue through native advertising, consumers will continue to be deceived. The FTC’s unwillingness to accept native advertising as a unique marketing technique, and thus inability to properly define it, has led to severe consumer deception. As a result, the

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153. For example, “Yahoo said it believes ‘our practices in displaying search results to be consistent’ with the FTC guidelines. Microsoft said it has ‘instituted clear labels to distinguish ads from organic search results.’ Google said it has ‘always prominently labeled advertisements.’” *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Lazauskas, *supra* note 135.

158. *Id.*

159. “Fifty-seven percent of readers said that they’d prefer that their favorite blogs and news sites run banner ads instead of sponsored articles.” *Id.*

FTC must be willing to modify its current disclosure guidelines to conform to the challenges that native advertising presents.

## V. PROPOSAL

The FTC must adopt a more applicable disclosure guideline that encompasses native advertising. To do so, the FTC must first accept a more thorough and concrete definition of native advertising. Secondly, the FTC should update the Guidelines in a manner that permits a reasonable consumer to be both fully aware of a disclosure's presence and maintain a full understanding of the disclosure's purpose when required.

### A. A STANDARD DEFINITION

There are a variety of ways in which the concept of native advertising can be and already has been defined. Yet, this is largely part of the problem. If the FTC continues to believe that native advertising is nothing new, and continues to assume that advertising and content are always separate things, currently acceptable forms of disclosure are likely to be insufficient.

Although the FTC insists that native advertising is nothing new, at the "Blurred Lines" workshop Chairwoman Edith Ramirez noted, "Native advertising . . . imitates the form and style of the media."<sup>160</sup> This would not be an adequate definition for native advertising because, while true, it does not consider how advertisers associate the advertisement with the target content. Alternatively, both the IAB and Sharethrough offer more comprehensive definitions. The IAB suggests that native advertising delivers "paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong."<sup>161</sup> Meanwhile, Sharethrough defines native advertising as "a form of paid media where the ad experience follows the natural form and function of the user experience in which it placed."<sup>162</sup> These definitions are more appropriate because they not only explain how native ads are presented, but they also explain that the advertiser has explicitly paid for the sponsored content.

Solve Media<sup>163</sup>—a digital advertising firm—defines native advertising as "a specific mode of monetization that aims to augment user experience by providing value through relevant content delivered in-stream."<sup>164</sup> This definition is effective because it demonstrates how native advertising works

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160. FTC Workshop, *supra* note 124.

161. *Advertising Playbook*, *supra* note 7, at 2.

162. *Native Advertising: The Official Definition*, *supra* note 20.

163. See generally SOLVE MEDIA, <http://solvemedia.com/index.html> (last visited Aug. 26, 2015).

164. Todd Wasserman, *This Infographic Explains What Native Advertising Is*, MASHABLE (Dec. 13, 2012), <http://mashable.com/2012/12/13/infographic-native-advertising/>.

while also connecting the advertiser's intentions with consumer's experience. Ultimately, the FTC should consider a hybrid of all three of these definitions. This ensures that the disclosure guidelines will most effectively conform to native advertising practices while considering the presentation of native ads, the fact that they are unambiguously paid for by advertisers, and intertwine with the consumer's online experience.

In sum, the FTC should adopt a standard definition which states: native advertising is an explicit means of monetization<sup>165</sup> that seeks to enhance a consumer's online experience<sup>166</sup> through the use of paid ads<sup>167</sup> that follow both the natural form and function<sup>168</sup> of this experience by seamlessly integrating the ads into the design and page content, while remaining consistent with the platform behavior of which the viewer feels most connected.<sup>169</sup>

## B. PROPER DISCLOSURE GUIDANCE

The FTC requires that disclosures be presented clearly and conspicuously,<sup>170</sup> which depends on the overall net impression of the ad.<sup>171</sup> If a reasonable consumer is unable to see or comprehend a disclosure's presence, then the consumer is likely being misled.<sup>172</sup> However, many online consumers cannot recognize disclosures for sponsored content, and most consumers do not understand the disclosure's intended purpose.<sup>173</sup> Therefore, the FTC must adopt a more applicable standard that conforms well to native advertising practices.

As the online consumer experience and interaction with brands is constantly evolving, it is truly impossible to recommend a one-size-fits-all disclosure mechanism.<sup>174</sup> The IAB, however, recognizes that advertising and content are not always separated online. The IAB's standard states, "[r]egardless of context, a reasonable consumer should be able to distinguish between what is a paid native advertising [versus] what is publisher editorial content."<sup>175</sup> Thus, this standard is more applicable to native advertising techniques than the clear and conspicuous standard because it considers the confusion consumers are faced with while attempting to decipher between advertising and content.

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165. *Id.*

166. *Id.*

167. *Advertising Playbook*, *supra* note 7, at 3.

168. *See Native Advertising: The Official Definition*, *supra* note 20.

169. *Advertising Playbook*, *supra* note 7, at 3.

170. *See Effective Disclosures*, *supra* note 5, at 6.

171. *Id.*

172. *Id.*

173. *See Miller*, *supra* note 134.

174. *See Advertising Playbook*, *supra* note 7, at 15.

175. *Id.* at 14.

Although disclosures should be both clear and conspicuous, the FTC does not go far enough to protect consumers by failing to recognize that ads and content can be blended as one in the same. Publishers implore a wide array of disclosure labels for native ads.<sup>176</sup> Yet, because consumers generally tend to ignore ads, especially when they are clearly disclosed using the “advertisement” label, publishers utilize less obvious and weaker labels (e.g., “presented by” and “promoted by”) to identify their ads.<sup>177</sup> As a result, these weaker labels leave consumers confused and sometimes even unaware they are looking at ads at all, while allowing publishers to take advantage of consumers by use of deception. While any of this disclosure language can be presented in a clear and conspicuous manner, consumers still largely fail to recognize their presence and purpose.<sup>178</sup>

In order to minimize confusion, the FTC should formally adopt the IAB’s recommendations. In particular, the IAB suggests that disclosures must (1) “use language that conveys that the advertising has been paid for, thus making it an advertising unit, even if that unit does not contain traditional promotional advertising messages,”<sup>179</sup> and (2) “be large and visible enough for a consumer to notice it in the context of a given page and/or relative to the device that the ad is being viewed on.”<sup>180</sup> In essence, the IAB’s proposal incorporates the clear and conspicuous requirement, but, as seen in the first prong, it also requires paid-for messages to be disclosed regardless of any indication that the message is an advertisement. This standard effectively expands the FTC’s standard by naturally encompassing native advertising.

Lastly, the FTC should consider properly educating online consumers on what disclosures attempt to accomplish, and in doing so, ban certain ineffective disclosure language. The FTC notes, “[i]f there are indications that a significant proportion of reasonable consumers are not . . . comprehending a necessary disclosure, the disclosure should be improved.”<sup>181</sup> This is not an issue that the clear and conspicuous standard is capable of fixing because while certain disclosure labels can be presented both clearly and conspicuously, it is still likely that these labels will confuse

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176. Today, commonly used disclosure mechanisms for in-feed ads—the most common form of native advertising—includes: “‘advertisement’ or ‘AD’ (Google, YouTube), ‘Promoted’ or ‘Promoted by [brand]’ (Twitter, Sharethrough), ‘Sponsored’ or ‘Sponsored by [brand]’ or ‘Sponsored Content’ (LinkedIn, Yahoo), ‘Presented by [brand]’ + ‘Featured Partner’ tag (BuzzFeed, Huffington Post), and ‘Suggested Post’ + a ‘Sponsored’ tag (Facebook).” *See id.* at 8.

177. *See* Lucia Moses, *How Native Advertising Labeling Confuses People, in 5 Charts*, DIGIDAY (May 4, 2015), <http://digiday.com/publishers/5-charts-show-problem-native-ad-disclosure/>.

178. Miller, *supra* note 134.

179. An example of acceptable language could include, “paid for by.” *Advertising Playbook*, *supra* note 7, at 14.

180. *Id.*

181. *Effective Disclosures*, *supra* note 5, at 7.

consumers.<sup>182</sup> Instead, the FTC should limit or altogether ban the use of “stand-alone”<sup>183</sup> disclosure language.

To make reasonable consumers comprehend that native advertisements are truly ads, disclosures, in conjunction with the IAB standard, should specify who has paid for the advertisement. This should further clarify the purpose of the disclosure by informing the consumer to consider any motivations and preconceived notions prior to reading or viewing written content. The Church of Scientology’s sponsored article in *The Atlantic* provides a clear example for the need to improve disclosure regulations.<sup>184</sup> If regulations made it mandatory for the Church of Scientology to explicitly disclose that the article was paid for by the Church, in addition to being labeled as “sponsored content,” consumers would be in a better position to recognize the article as a native ad, as opposed to legitimate content on the website. Ultimately, enforcing more explicit disclosures provides the key to combating native ads.

## CONCLUSION

Native advertising provides businesses with a powerfully effective and highly profitable marketing tool that reaches online consumers on an intimate level. As a result, the FTC must take accountability and ensure that consumers are not being deceived. As marketers continue to reluctantly label everything an advertisement,<sup>185</sup> and as current FTC disclosure guidelines remain inadequate, native advertising is likely to continue to cause consumer confusion and deception. Therefore, the FTC should seek to minimize these consequences by adopting guidelines that make disclosures easier to both recognize and understand.

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182. For example, disclosure labels such as “presented by” and “promoted by” have been found to be most potentially confusing to consumers. *See* Moses, *supra* note 177.

183. I have defined stand-alone disclosure mechanisms as those that do not always reveal who purchased the advertisement. Instead, they merely notify the consumer that the content being read is an advertisement. Examples of stand-alone disclosures would include: “ad,” “advertisement,” “sponsored,” “sponsored content,” “promoted,” etc.

184. “The piece was classified as ‘sponsor content,’ hardly a novel approach to generating online revenue.” Keller, *supra* note 133.

185. *See* Harell, *supra* note 126.

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