

Practice Update

The 2015 FTC Policy Statement: An Advertisement Can Be Deceptive Based On Its Formatting

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By [Ira S. Sacks](#) and Patricia M. Carlson

Starting a few years ago, the FTC began increasing its efforts to address online disclosures in new media. For example, in 2013, the FTC issued *.com Disclosures: How To Make Effective Disclosures in Digital Advertising*, which provided new guidance for mobile and other online advertisers on how to make online disclosures clear and conspicuous to avoid deception. In 2014, the FTC launched an initiative called Operation Full Disclosure to ensure that advertisers comply with federal law and avoid misleading consumers. As part of that initiative, the FTC sent warning letters to more than 60 undisclosed companies in a wide range of industries that failed to make adequate disclosures in their television and print ads. The inadequate disclosures for which warning letters were sent fell into many different categories, including where advertisements:

- quoted a price for a product or service but did not disclose the conditions for obtaining that price;
- did not adequately disclose an automatic billing feature;
- claimed an accessory was included but did not explain that they first had to buy or obtain

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- an additional product or service;
- claimed a product was unique or superior in a product category but did not adequately disclose how that category was defined or the basis for the comparison;
 - promoted a “risk free” or “worry free” trial period without disclosing that consumers would have to pay for initial/return shipping; and
 - made absolute or otherwise broad statements having inadequate disclosure explaining exceptions or limitations.

Then, last year, the FTC issued its initial guidance that specifically addressed native advertising, namely, it issued its *Enforcement Policy Statement on Deceptively Formatted Advertisements* (the “2015 Policy Statement”). The 2015 Policy Statement, which is discussed in detail below, explains the nature of today’s digital marketplace and how the truth-in-advertising disclosure rules apply to it.

Basic FTC False Advertising Principles

The prohibition on false advertising generally means that all express and implied claims that are made in advertising must be truthful and not deceptive, and that there must be proof of claims before they are disseminated.

Specifically, Section 5 of the FTC Act prohibits “deceptive” acts or practices.^[1] 15 U.S.C. §45. A misrepresentation or omission is “deceptive” if it is likely to mislead the consumer acting reasonably under the circumstances to the consumer’s detriment. To be actionable, however, the misrepresentation or omission must be material in that it will likely affect the consumer’s conduct or decision with respect to a product or service. The following are presumptively material to consumer purchases: express claims, health and safety claims,

and claims involving the central characteristics of a product or service.

Applying those principles, the FTC has long held that advertising that is not identifiable as advertising to consumers is deceptive if it misleads consumers into believing that they are independent, impartial, or not otherwise from the sponsoring advertiser itself. These principles have been applied in connection with a wide variety of advertising formats, including advertorials that appeared as news stories or featured articles, direct-mail ads disguised as book reviews, infomercials presented as regular television or radio programming, in-person sales practices that misled consumers as to their true nature.

Thus, for example, a local restaurant's advertisement that appeared in a newspaper column violated the FTC Act. The FTC found that it misled consumers into thinking that it was independent and unbiased view of the cuisine facilities of the restaurant and issued an advisory opinion concluding that a clear and conspicuous disclosure was required to prevent consumers from being deceived. The FTC held that that the disclaimer "ADVERTISEMENT" was necessary to prevent consumers from being deceived. The FTC required that the disclaimer be made in clear type, sufficiently large to be readily noticed in close proximity to the column.^[2]

Similarly, a bookseller's direct-mail advertisement that looked like a book review torn out of a magazine, with a personal note attached that said "*Try this. It works! J.*" misled consumers because it looked like a book review written by an independent journalist's opinion from a magazine or other independent publication. The FTC concluded that the bookseller violated the FTC Act.^[3]

Last year, the FTC found that a website was misleading where it failed to disclose its relationship to dietary supplement markets and purported to

originate from an independent scientific organization promoting health benefits of their children's supplements for treating a specific health condition.^[4]

The FTC has also noted that paid ads formatted to appear as regular search results that are returned by search engine's in response to inquiries by consumers would be deceptive unless the paid nature of the advertising is clearly and prominently disclosed. According to the FTC, consumers would expect that a search engine's results would be based upon relevance to a search query based upon impartial criteria, not based upon payment from a third party.^[5]

Deceptively Formatted Advertisements

In the 2015 Policy Statement, the FTC noted that in today's digital marketplace, native advertising and sponsored content is often indistinguishable from news, feature articles, product reviews, editorial, entertainment and other regular content. The format of advertising and sponsored content can be easily matched to the style and layout of the surrounding content so that it matches and the signals that customers would usually rely upon to recognize an advertisement or promotional messages are simply not there. Adding further complexity is the fact that advertising is no longer a one-way street but a conversation in which consumers are actively participating in the generation of advertising conduct.

First, in light of those issues, the FTC noted that the formatting of an advertisement by itself can cause an advertisement to be misleading. Thus, an advertisement could be deceptive according to the FTC's guidance even where the product claims communicated in it are truthful and non-misleading. The FTC provided factors to be considered in making a determination on whether its formatting is deceptive:

- the net impression of the ad's impression that is conveyed to reasonable consumers;
- the particular circumstances in which the ad is disseminated, including the customary expectations based upon consumers' prior experience with the media in which it appears;
- the target audience of the ad;
- the nature of the promotional message and whether it may be inherently obvious as advertising to consumers; and
- any qualifying information contained in the ad, such text labels, audio disclosures, or visual cues to distinguish the ad from other content into which it is integrated.

The FTC will measure an advertisement by whether a reasonable consumer would perceive the ad as advertising. A disclosure to correct the impression conveyed by an advertising format, must be in simple, unequivocal language so that consumers comprehend what it means and generally must be made contemporaneously with the misleading claim it is intended to qualify.

Second, the FTC further noted that advertising content is misleading if it appears to reflect the independent, impartial views, opinions or experiences of ordinary consumers or experts – such as those you would find in a news or feature article, independent product review, investigative report, or scientific research – but the sponsored advertiser is actually the source of the advertising. Similarly, where a spokesperson is used, to avoid misleading consumers, any connection between that person and the advertiser that is not reasonably expected must be fully, clearly and conspicuously disclosed. The failure to do so, says the FTC, will misled consumers into believing those messages are impartial when they are really paid-for or sponsored advertisements.

The FTC's 2015 Policy Statement was the first action by the FTC on the specific issue of native advertising. It was not, however, the latest action by the FTC on that issue. Tune in for further discussion to come on further guidance provided by the FTC and the FTC's latest enforcement concerning native advertising.

[1] Section 5 also prohibits acts or practices that are “unfair.” An act or practice is “unfair” under Section 5 of the FTC Act, where it “causes or is 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.” 15 U.S.C. §45(n). Actions challenged as unfair focus on whether a practice causes injury rather than on deception.

[2] 2015 Policy Statement at 3 (*citing Statements in Regard to Advertisements That Appear in Feature Article Format*, FTC Release (Nov. 28, 1967); *Advisory Opinion on Ads in News Format* (1968)).

[3] 2015 Policy Statement at 3 (*citing Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392, 393-96 (1996) (consent)).

[4] 2015 Policy Statement at 5 (*citing Complaint at 3-4, 28-29, FTC v. NourishLife, LLC*, No. 15-cv-00093 (N.D. Ill. Jan. 7, 2015) (stipulated order)).

[5] 2015 Policy Statement at 6 (*citing Press Release, Federal Trade Commission, FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results* (June 25, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search; Exemplar letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission to General Purpose Search

Engines (June 24, 2013), *available at* www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf.

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