

Influencer and Content Marketing

Challenges and Opportunities for Healthcare

May 15, 2019

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Understanding FTC's Guidance on Influencer Marketing and Native Advertising

- FTC's Endorsement Guides
- FTC's Native Advertising Guide
- Recent Regulatory Developments

Understanding Key IP Issues in Content Marketing

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**FEDERAL TRADE COMMISSION
16 CFR Part 255**

Guides Concerning the Use of Endorsements and Testimonials in Advertising

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This document includes only the text of the Revised Endorsement and Testimonial Guides. To learn more, read the Federal Register Notice at www.ftc.gov/opa/2009/10/endortest.shtm.

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§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

§255.0(b) defines **endorsement** as “**any advertising message** (including verbal statements, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that the **consumers** are **likely to believe reflects** the **opinions, beliefs, findings, or experiences** of a **party** other than the sponsoring advertiser...”

- Testimonials/review
- Pictures of products (including Instagram photos that include an image, logo or name of a product or brand)



This is the best care I've ever received.

This is the highest quality care!



Quick Note: Both advertiser and endorser must disclose any material connection between endorser and advertiser

§255.5 states that “[w]hen there exists a **connection** between the **endorser** and the **seller** of the **advertised product** that **might materially affect** the **weight** or **credibility** of the endorsement (i.e., the connection is not reasonably expected by the audience), such **connection must be fully disclosed....**”

Material connections that require disclosure include:

- **Free or reduced costs** for a service or product, **free travel**, monetary compensation
- Employment relationship (e.g., physicians endorsing a health provider's services)
- Family relationship

Example 4 from §255.5

An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

- Endorsements/testimonials must **reflect** the **honest opinions, findings, beliefs, or experiences** of the **endorser**.
 - A person representing him/herself as patient, must be an actual patient.
- If an ad represents that the endorser uses an endorsed product, the endorser must have been a **bona fide user at the time** the endorsement was given.
- **Advertiser** has a **responsibility** to make sure that **any claim** made in a **consumer endorsement** is **fully substantiated** as if the claim was made by the advertiser.
- An **endorsement** relating to the **experience of one or more consumers** on a key product attribute **must be representative** of what **consumers** will **generally achieve** – otherwise, the generally expected performance must also be disclosed conspicuously.

“Advertisers are subject to liability for **false or unsubstantiated statements made through endorsements**... **Endorsers also may be liable** for statements made in the course of their endorsement.” §255.1(d)

Example 3 from §255.1

An ad for an acne treatment features a dermatologist who claims that the product is “clinically proven” to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement.

The **Endorsement Guides** define an **expert** as “an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which **knowledge** is **superior** to what **ordinary individuals generally require.**”

- If an ad represents (including by implication) that the endorser is an expert with respect to the endorsement message, then the endorser must be a qualified expert.
- Physicians would be viewed as experts in their field.

Example 2 from §255.3

An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser’s expertise.

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Native Advertising is advertising “**content** that bears a **similarity to the news, feature articles, product reviews, entertainment**, and other material that surrounds it online” – FTC’s *Native Advertising: A Guide for Businesses*

- Advertiser’s blog
- Advertorial
- Documentary-style digital content featuring advertiser or its products or services

QUICK NOTE: Not all content funded by advertiser is native advertising. Content must contain an advertising or promotional message.



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580


Enforcement Policy Statement on Deceptively Formatted Advertisements

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” As the Commission set forth in its 1983 Policy Statement on Deception, a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer’s conduct or decisions with regard to a product or service.² In determining whether an advertisement, including its format, misleads consumers, the Commission considers the overall “net impression” it conveys.³ Any qualifying information necessary to prevent deception must be disclosed prominently and unambiguously to overcome any misleading impression created.

Source: https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

Two Key FTC Guidance Documents

1



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

ABOUT THE FTC | NEWS & EVENTS | ENFORCEMENT | POLICY | TIPS & ADVICE | I WOULD LIKE TO...

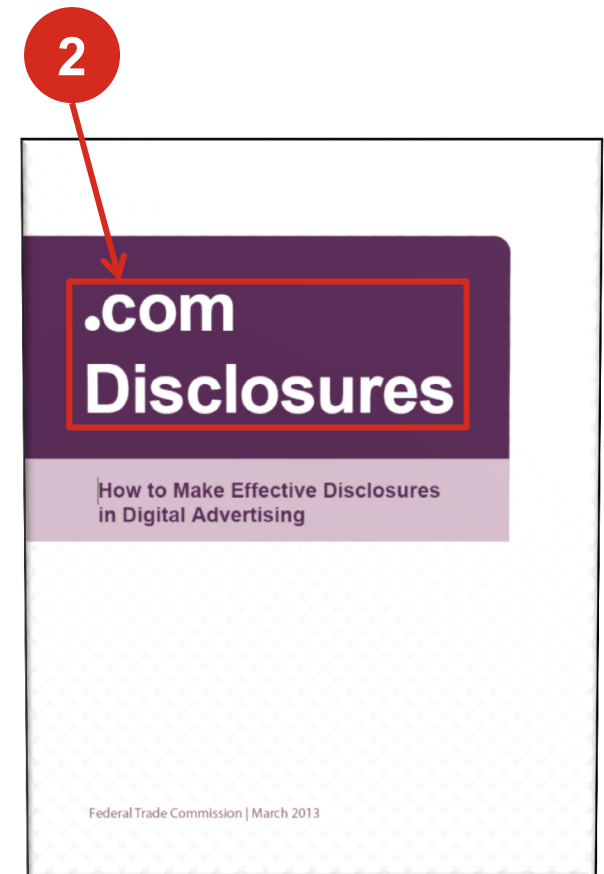
Home » Tips & Advice » Business Center » Guidance » Native Advertising: A Guide for Businesses

Native Advertising: A Guide for Businesses

TAGS: Advertising and Marketing | Advertising and Marketing Basics | Endorsements | Online Advertising and Marketing

Marketers and publishers are using innovative methods to create, format, and deliver digital advertising. One form is "native advertising," content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online. But as native advertising evolves, are consumers able to differentiate advertising from other content?

2



.com Disclosures

How to Make Effective Disclosures in Digital Advertising

Federal Trade Commission | March 2013

Sources: <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>;
<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

- An ad or **promotional message** should **not imply to consumers** that the **content is anything other than an ad**
- Unless an ad is clearly commercial in nature that consumers would not be misled in perceiving that the content is not an ad, the **ad should be labeled as an ad.**
- Advertisers **cannot use “deceptive door openers”** to induce consumers to view advertising content.
 - An article that discusses how someone’s life has changed after having a physical therapy assessment and receiving a specific piece of equipment, but the physical therapy practice and equipment manufacturer sponsored (i.e., paid for) the article. The physical therapy practice and equipment manufacturer feature the article on their websites and in other promotional materials.

Deceptive door openers are thumbnail **images**, short **description**, **links**, or other **lead-ins to content** that **disguise the commercial nature** of advertising content.



Avoid Pitfalls

- Advertising disclosure should comply with the following guidelines
 - **Clear and unambiguous** language
 - In a font and color that's **easy to read**
 - In a shade that **stands out** against the background
 - For video ads, **on the screen long enough** to be noticed, read and understood
 - For audio disclosures, read at a **cadence that's easy for consumers to follow** and in words consumers will understand
 - **Clear and prominent on all devices and platforms** that consumers may use to view ads

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- In September 2017, FTC settled charges with Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, two **social media influencers** in the online gaming community, for **deceptive endorsement** of the online gambling service CSGO Lotto, including **failure to disclose** their **joint ownership** in the company.
- In April 2017, FTC staff sent out more than **90 letters to influencers and advertisers** that **influencers** should **clearly and conspicuously disclose their relationships to brands** in their **social media posts**. Several months later, FTC sent follow-up warning letters to 21 of the influencers previously contacted.
- In March 2019, **Truth in Advertising, Inc. (TINA)**, filed a formal complaint with FTC, having **collected over 1,400 examples of influencers promoting more than 500 companies**.



Mary K. Engle
Associate Director

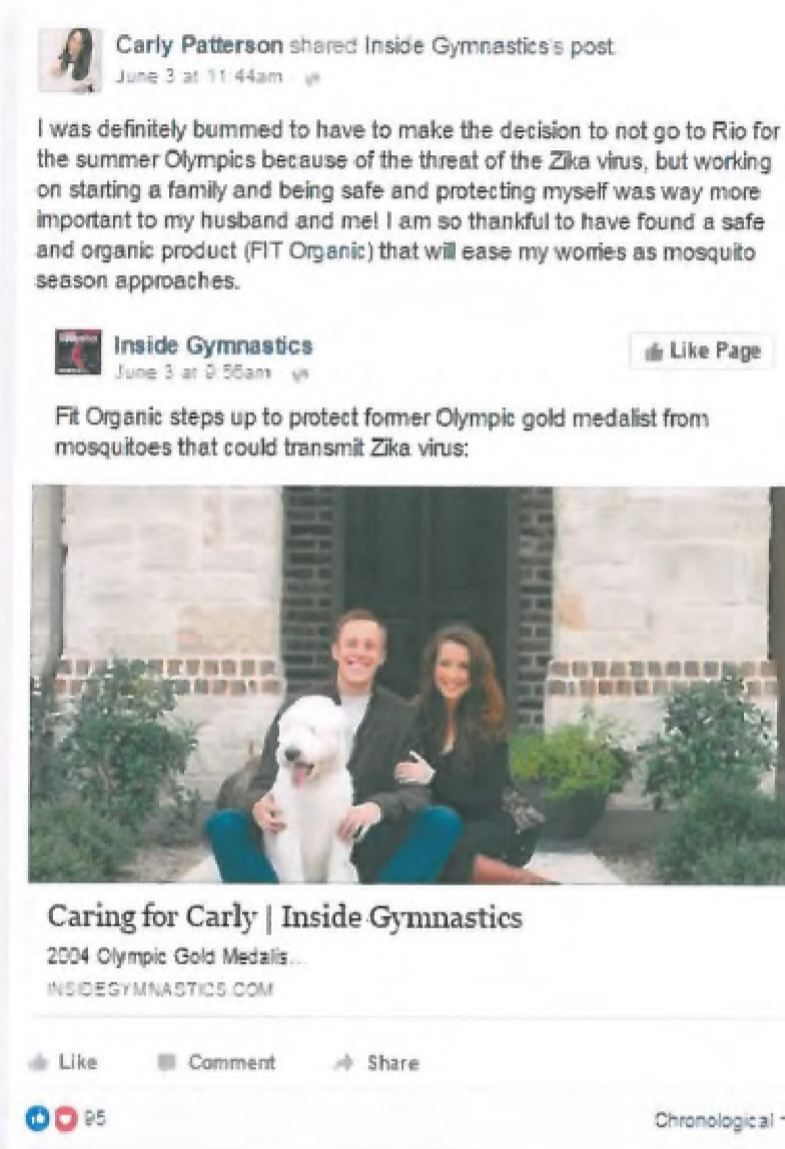
United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

September 6, 2017

{Name and Address}

Dear *{Name}*:

As you may recall, I wrote to you in March regarding one of your Instagram posts endorsing *{product or products}*. As I said in my earlier letter, if you are endorsing a brand and have a “material connection” with the marketer (that is, a connection or relationship that might affect the weight or credibility that your followers give the endorsement), then your connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the endorsement. Material connections could consist of a business or family relationship, or your receipt of payment, free products or services, or other incentives to promote the brand.



- In February 2019, FTC entered into two consent orders with Creaxion Corporation and Inside Publications.
- Creaxion partnered with *Inside Gymnastics* magazine to obtain athlete endorsers and otherwise promote Creaxion's mosquito repellent.
- FTC's charges included:
 - **Failure** of athlete influencers to **disclose** their **paid relationship** with Creaxion
 - Publication of **paid ads** in *Inside Gymnastics* magazine **disguised as features** or other articles of interest

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- **Copyright protects original works of authorship** that are fixed in tangible medium of expression
- Copyrightable materials include:
 - literary works (e.g., books, articles)
 - musical works (e.g., songs, composition, lyrics)
 - dramatic works
 - pantomimes and choreographic works
 - pictorial, graphic, and sculptural works (e.g., works of art, graphic designs, photographs)
 - motion pictures and other audiovisual works (e.g., movies, videos)
 - sound recordings (e.g., recorded performance of a song)
 - architectural works (e.g., buildings, building designs)



- Copyright protects actual expressions; mere ideas, concepts, principles, procedures, or methods of operation are not copyrightable
- **Original works**, regardless of the purpose for which they were created (e.g., artistic, commercial or personal), **can be protected by copyright**
- **Exceptions** to copyright protection include **works** for which **copyright** protection has **expired** and are in the **public domain**
- Certain **uses** of **copyrighted** works may qualify as “**fair use**,” in which case permission from the copyright owner is not necessary



- Identify who is participating in the creation of content (e.g., agency, director, producer, editor, talent)
- Obtain written contracts from all participants that include work-for-hire/IP assignment provisions
- Consider pros and cons of obtaining copyright registration

Note: On March 4, 2019, SCOTUS held in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC* that a copyright infringement suit may be commenced only after the Copyright Office has registered the copyright.

- **Trademark protects brand names and logos** used on goods and services and identifies goods and services as being from a particular source
- Trademark protection can be attached to the following:
 - brand names and other words
 - logos and slogans
 - product designs and product configurations
 - some architectural elements, such as distinctive landmark buildings



- **Trademarks** are **source identifiers** and are associated with one or more classes of goods or services
- It's possible to have **multiple trademark owners** of the **same brand** name (e.g., clothing brand, videogame brand)
- A **trademarked** name **may be used generically** in a manner that does not identify a particular source
- **Nominative use of trademarks** are **permitted without permission**
 - Use is necessary to refer to the product or service in question;
 - Use is limited to only as much of the trademark as is reasonably necessary to identify the product or services; and
 - Use does not imply any association, sponsorship, or approval by the trademark owner

- Right of publicity laws **protect unauthorized use** of an **individual's identifiable attributes**, such as:
 - name
 - voice
 - likeness
 - image
 - distinctive personal attributes (e.g., gestures or phrases)
- Use of any of the above attributes for **commercial purposes** (e.g., advertising, marketing, or otherwise for the purpose of promoting goods, services, or brands) **requires the individual's express consent** (which may need to be in writing in certain states).

- Right of publicity laws are **designed to protect only identifiable or recognizable** traits of individuals
- Using the **first name** of a person or **voice** that **cannot** be **generally recognized** as belonging to an individual **does not require consent** from the individual whose name or voice is used
- Unlike copyright and trademark protection, **right of publicity protection is provided** at the **state** level and the scope of such protection **differs from state to state**
- Some states do not recognize right of publicity after an individual's death, whereas other states extend such protection for certain number of years after the person's death (the duration of such **post-mortem protection** also differs by state)

- Identify all protectable third-party elements
 - Third-party copyrighted material (e.g., music, artwork, photographs, video clips)
 - Third-party trademarks (e.g., logos, brand names, marketing campaign slogans)
 - Name, voice, picture or likeness, or other identifiable traits of any individual
- Determine who owns or controls the rights of third-party elements
- Evaluate whether consent, license, or release is necessary
- Determine what type of consent, license, or release is necessary
- Obtain written consent, license, or release

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Avoid Pitfalls: HIPAA still applies and a patient authorization is required!

- If a patient signs an authorization to allow the use of his or her PHI for content marketing, the specified PHI may be disclosed to the people or entities listed on the authorization
- A valid authorization must include, among other things:
 - The PHI to be disclosed
 - People/entities who are permitted to disclose and receive PHI
 - The purpose of the disclosure
 - The termination date of the authorization
 - The patient's or personal representative's signature
- **Practice Tip:** This consent form cannot be combined with other types of consent forms.

HIPAA AUTHORIZATION FOR RELEASE OF MEMBER TESTIMONIAL/REVIEW

As a customer, I hereby authorize my clinic and each of their affiliates and related organizations, successors and assigns (collectively, “Clinic”), to use, release and disclose any of the following protected health information about me that I voluntarily choose to include in my voluntary review of Clinic. This information may include anything included in my review, including but not limited to:

- [List]

Clinic may use this information for advertising and promotional purposes, including, without limitation, posting it on Clinic’s website or other marketing material. Clinic will not receive any direct or indirect payment from or on behalf of any third party in exchange for the release of this information about me. I also understand that I will not receive any compensation in connection with Clinic’s use of information about me.

I understand the provision of healthcare treatment, payment for my healthcare and my healthcare benefits are not dependent on this authorization or providing a review. I understand any information used or disclosed pursuant to this authorization may be subject to redisclosure. I understand that I am choosing to leave a review on a voluntary basis.

This authorization remains in effect until I revoke it. I understand I have the right to revoke this authorization at any time by writing to Clinic at:

_____, except to the extent information has already been used or released pursuant to this authorization at the time of the revocation.

By checking the box when posting my review to Clinic’s website, I acknowledge and agree that I have read and understand the above authorization and agree to all terms described. I further acknowledge that I am of legal age and have voluntarily agreed to this authorization.

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Is your ad at risk of violating the law?

Question	Yes	No
Are you incentivizing patients, customers, or other individuals to provide positive reviews on your website or on social media?		
Are you paying a physician, provider, or “influencer” to endorse or promote your product or service?		
Can you substantiate each claim made by expert or consumer endorsers, or “influencers”, in their social posts or product reviews?		
Are you paying for a study that directly or indirectly promotes your product and using it in your ad campaign?		
Does your ad or sponsored content include someone else’s copyrighted material? Trademark? Likeness?		
Is PHI being used as part of the advertisement?		

If **Yes** to any of the above, ensure compliance with our practice tips!

- Require influencer to clearly identify relationship with advertisers
- Disclosure must be made early, ideally at the beginning of a longer post
- Disclosure must grab the attention (not below the fold or after “read more”)
- Disclosure should be made viewers are likely to look
- Repeat disclosures for streamed content

The Do's and Don'ts for Social Media Influencers

FTC RECOMMENDATIONS	PRACTICES TO AVOID	FTC RECOMMENDATIONS	PRACTICES TO AVOID
 Clearly DISCLOSE when you have a financial or family relationship with a brand	 DON'T ASSUME followers know about all your brand relationships	 Treat sponsored tags, including tags in pictures, LIKE ANY OTHER endorsement	 Don't use AMBIGUOUS DISCLOSURES like "Thanks," #collab, #sp, #spon, or #ambassador
 Ensure your sponsorship disclosure is HARD TO MISS	 Don't assume disclosures BUILT INTO social media platforms are sufficient	 On image-only platforms like Snapchat, SUPERIMPOSE DISCLOSURES over the images	 Don't rely on disclosures that people will see only if they CLICK "MORE"

Source: Federal Trade Commission

Ensuring Compliance

- ✓ Have proper agreements with influencers and content marketing partners that clearly lay out the disclosure and other legal requirements
- ✓ Develop social media influencer guidelines, and require influencers and content marketing partners to comply with such guidelines
- ✓ Train marketing team and influencers on legal requirements
- ✓ Monitor influencer and partner activity
- ✓ Enforce compliance with legal requirements and social media influencer guideline, with clear penalties for noncompliance



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