

FEDERAL TRADE COMMISSION**Enforcement Policy Statement on Deceptively Formatted Advertisements****AGENCY:** Federal Trade Commission.**ACTION:** Commission policy statement.

SUMMARY: The Federal Trade Commission has issued an Enforcement Policy Statement on Deceptively Formatted Advertisements. The Statement describes the underlying consumer protection principles that guide the Commission's enforcement actions, advisory opinions, and other guidance addressing various forms of deceptively formatted advertising, including advertising and promotional messages integrated into and presented as non-commercial content.

DATES: The Commission announced the issuance of the Statement on December 22, 2015.

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SUPPLEMENTARY INFORMATION:**Enforcement Policy Statement on Deceptively Formatted Advertisements**

The Federal Trade Commission issues this enforcement policy statement regarding advertising and promotional messages integrated into and presented as non-commercial content.¹ The statement summarizes the principles underlying the Commission's enforcement actions, advisory opinions, and other guidance over many decades addressing various forms of deceptively formatted advertising.

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,

¹ The scope of this enforcement policy statement is restricted to commercial speech the Commission has authority to regulate. The Commission traditionally considers factors articulated in *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 544-46 (1988), in evaluating whether speech is commercial. See, e.g., *POM Wonderful LLC*, 155 F.T.C. 1, 74-75 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015).

² *FTC Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) ("Deception Policy Statement").

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.

The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself. Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it. Such knowledge also may influence whether and to what extent consumers choose to interact with content containing a promotional message. Over the years, the Commission has challenged as deceptive a wide variety of advertising and other commercial message formats, including "advertorials" that appeared as news stories or feature 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 and purpose, mortgage relief ads designed to look like solicitations from a government agency, emails with deceptive headers that appeared to originate from a consumer's bank or mortgage company, and paid endorsements offered as the independent opinions of impartial consumers or experts.

With the emergence of digital media and changes in the way publishers monetize content, online advertising known as "native advertising" or "sponsored content," which is often indistinguishable from news, feature articles, product reviews, editorial, entertainment, and other regular content, has become more prevalent. In digital media, a publisher, or an authorized third party, can easily and inexpensively format an ad so it matches the style and layout of the content into which it is integrated in ways not previously available in traditional media. The effect is to mask the signals consumers customarily have relied upon to recognize an advertising or promotional message.

At the same time, the business models of many publishers also have undergone significant change, as, increasingly, consumers are able to skip or block digital ads while watching digitized programming or browsing publisher content. Consequently, many publishers

³ *Id.* at 178.

have begun to offer advertisers formats and techniques that are closely integrated with and less distinguishable from regular content so that they can capture the attention and clicks of ad-avoiding consumers.

Regardless of the medium in which an advertising or promotional message is disseminated, deception occurs when consumers acting reasonably under the circumstances are misled about its nature or source, and such misleading impression is likely to affect their decisions or conduct regarding the advertised product or the advertising. This statement sets forth generally applicable standards on which the Commission relies in making such a determination.

I. Deceptive Advertising Formats

The principle that advertising and promotional messages should be identifiable as advertising is found in Commission and staff policy guidance,⁴ specific cases challenging deceptive advertising in a wide range of media,⁵ and Congressional policy with regard to telemarketing calls and commercial email.⁶ As set forth below, over the years, the Commission and staff have addressed the potential for consumers to be deceived by various categories of advertising formats, such as ads appearing in a news or feature story format, deceptive endorsements, undisclosed sponsorship of advertising and promotional messages, and ads in search results.

A. Advertisements Appearing in a News Format or That Otherwise Misrepresent Their Source or Nature

The Commission first addressed the issue of print advertisements appearing in a news format in a 1967 press release and subsequent 1968 advisory opinion.⁷ A newspaper column, advertising the cuisine of local restaurants, was written in narrative form, with each write-up discussing such details as how a meal was prepared, the name of the chef and/or head waiter, cocktail service offered,

⁴ See, e.g., *Advisory Opinion No. 191*, *Advertisements which appear in news format*, 73 F.T.C. 1307 (1968) (hereinafter "*Advisory Opinion on Ads in News Formats*").

⁵ See, e.g., *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392 (1996) (consent); *JS&A Grp., Inc.*, 111 F.T.C. 522 (1989) (consent).

⁶ See *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 15 U.S.C. 7701-7713 (hereinafter the "CAN-SPAM Act"); *Telemarketing and Consumer Fraud and Abuse Prevention Act*, 15 U.S.C. 6101-6108 (hereinafter the "Telemarketing Fraud Act").

⁷ *Statement in Regard to Advertisements That Appear in Feature Article Format*, FTC Release, (Nov. 28, 1967) (hereinafter "*Statement on Ads in Feature Article Format*"); *Advisory Opinion on Ads in News Formats*.

whether dancing was permitted, hours, and the price range of the meal.⁸ The Commission found that the column “use[d] the format and ha[d] the general appearance of a news feature and/or article for public information which purport[ed] to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant.” The Commission also explained that the inclusion of the exact price of the meal advertised or listing a range of prices for other meals would not alter this impression. The Commission concluded that a clear and conspicuous disclosure that the column was an advertisement was necessary to prevent consumers from being deceived. Specifically, the Commission suggested placing “ADVERTISEMENT,” in clear type, sufficiently large to be readily noticed, in close proximity to the ad. The Commission, however, noted that in some instances, “the format of [an] advertisement may so exactly duplicate a news or feature article as to render the caption ‘ADVERTISEMENT’ meaningless and incapable of curing the deception.”⁹

Two decades later, in a case against a bookseller, the Commission applied this same analysis and concluded there was reason to believe that the bookseller violated the FTC Act through a deceptive direct-mail ad formatted to appear as if it were a book review torn out of a magazine, with a personalized note attached.¹⁰ The Commission alleged that the ad’s format communicated a misleading claim that it was “a book review written by an independent journalist or reviewer, containing the independent opinions of the journalist or reviewer, and was disseminated in a magazine or other independent publication.” The Commission observed that the ad was printed on glossy stock and had a ripped, left edge, and included other elements, such as the header “REVIEW,” a byline, a publication date, and page numbers, and part of an unrelated article on the reverse side, which, taken together, made it look like a published review of the book advertised. In evaluating what the ad communicated to consumers, the Commission also considered that affixed to each ad was a small, stick-on note containing what appeared to be a personalized, handwritten message,

with the recipient’s first name and saying, “Try this. It works! J.”

During the 1980s, after the Federal Communications Commission removed its ban on program-length commercials, such advertisements, known as infomercials, began to air on television and radio.¹¹ Concerned about the increasingly blurred line between advertising and non-promotional content, the Commission brought cases alleging that deception occurs when infomercials are presented as regular television or radio programming, such as a news report or talk show. In the Commission’s first such case in 1989, the Commission challenged a television infomercial that opened with the statement, “Welcome to ‘Consumer Challenge,’ hosted by Jonathan Goldsmith,” and went on to describe the program as one that “examines popular new products for you,” with the help of investigative reporters.¹² It then announced that the day’s program would investigate a particular brand of sunglasses, posing the question to viewers: “[N]ew Product innovation or consumer rip-off?” In evaluating the sunglass infomercial, the Commission asserted that its format was likely to mislead consumers into believing that it was “an independent consumer program . . . that conducts independent and objective investigations of consumer products,” including for the company’s sunglasses. Since bringing that case, the FTC has charged that numerous other television and radio infomercials were deceptively formatted. In nearly every such case, the Commission has issued an order requiring a clear and prominent disclosure, at the beginning of an infomercial and again each time ordering instructions are given, informing consumers that the program is a “PAID ADVERTISEMENT” for the particular product or service advertised.¹³

¹¹ See *Deregulation of Radio*, 84 F.C.C. 2d 968, 1007 (1981) (rescinding the FCC’s policy banning program-length radio commercials); *Revision of Programming and Commercialization, Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1075 (1984) (rescinding the FCC’s policy banning program-length television commercials).

¹² *JS&A Grp., Inc.*, 111 F.T.C. at 523–24.

¹³ See, e.g., *Vital Basics, Inc.*, 137 F.T.C. 254, 274, 340–41 (2004) (consent); *Nutrivida, Inc.*, 126 F.T.C. 339, 342–43, 351–52 (1998) (consent); *Bogdana Corp.*, 126 F.T.C. 37, 47, 100–01 (1998) (consent); *Mega Sys. Int’l, Inc.*, 125 F.T.C. 973, 986, 1218–19 (1998) (consent); *Olsen Labs., Inc.*, 119 F.T.C. 161, 167, 214 (1995) (consent); *Wyatt Mktg. Corp.*, 118 F.T.C. 86, 94, 113–14 (1994) (consent); *Del Dotto Enters., Inc.*, 117 F.T.C. 446, 452–53, 466 (1994) (consent); *Synchroneal Corp.*, 116 F.T.C. 989, 1002–03, 1045 (1993) (consent); *Michael S. Levey*, 116 F.T.C. 885, 900–01, 950–51 (1993) (consent); *Nat’l*

More recently, the Commission has brought a series of cases concerning ads disguised to look like news reports on weight-loss pills and other products, where a purported journalist tested the advertised product and authored the story.¹⁴ The ads used devices such as news-related names and headlines suggestive of a local television station, trademarks of established news companies, reporter by-lines, and reader comment sections to create that false impression. In one case, the Commission alleged the format was deceptive despite the presence of a small-print disclaimer “Advertorial” in the top border of some Web sites.¹⁵ Consumers reached all these fake news Web sites by clicking on ads presented as attention-getting news headlines, which frequently appeared on legitimate news Web sites.

In another recent case, the Commission challenged as deceptive a Web site purported to originate from an independent scientific organization. The Commission alleged that dietary supplement marketers misrepresented that their Web site promoting the health benefits of their children’s supplements was an independent, objective resource for scientific and other information on treating a specific health condition, and that they failed to disclose their relationship to the Web site.¹⁶

The Commission also has challenged advertisements misrepresenting that a government agency endorsed or was

Media Corp., 116 F.T.C. 549, 559, 582 (1993) (consent); *CC Pollen Co.*, 116 F.T.C. 206, 209, 239–40 (1993) (consent); *Nu-Day Enters., Inc.*, 115 F.T.C. 479, 483, 488–89 (1992) (consent); *Twin Star Prods., Inc.*, 113 F.T.C. 847, 852–53, 862 (1990) (consent); *TV Inc.*, 113 F.T.C. 677, 679, 693 (1990) (consent); see also *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 209, 211 (D. Mass. 2009) (noting parties’ stipulation to an injunctive provision addressing deceptive formats), *aff’d*, 624 F.3d 1 (1st Cir. 2010).

¹⁴ See, e.g., Complaint at 4–5, 8–9, *FTC v. Circa Direct LLC*, No. 11-cv-2172 (D.N.J. Apr. 18, 2011) (stipulated order); Complaint at 3–4, 6–7, *FTC v. DLXM LLC*, No. CV 11–1889 (E.D.N.Y. Apr. 18, 2011) (stipulated order); Complaint at 3–4, 6–7, *FTC v. Coulomb Media, Inc.*, No. 211-cv-11618 (E.D. Mich. Apr. 15, 2011) (stipulated order).

¹⁵ See Complaint at 6, *FTC v. Circa Direct LLC*; see also Memorandum in Support of Plaintiff’s Motion for a TRO at 14, *FTC v. Circa Direct LLC* (Apr. 18, 2011). Similarly, in a Securities and Exchange Commission case concerning paid promotions of stocks that appeared in a news format, a court held that, “[t]he ‘advertorial’ label . . . simply does not convey to the reader that the articles, which appear in a news-item format, were indeed purchased by the subject companies; this label does not provide investors with the material information regarding the publishers’ bias.” *SEC v. Corp. Relations Grp., Inc.*, No. 6:99-cv-1222, 2003 U.S. Dist. LEXIS 24925, at *26–27 (M.D. Fla. Mar. 28, 2003).

¹⁶ Complaint at 3–4, 28–29, *FTC v. NourishLife, LLC*, No. 15-cv-00093 (N.D. Ill. Jan. 7, 2015) (stipulated order).

⁸ *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307.

⁹ *Statement on Ads in Feature Article Format*.

¹⁰ *Georgetown Publ’g House Ltd. P’ship*, 122 F.T.C. at 393–96.

affiliated with a product or service. For example, one such case against a seller of mortgage relief services concerned radio ads formatted to appear as public service announcements from the United States government, which began, "Please stay tuned for this important public announcement for those in danger of losing their home" and prominently featured the word "federal."¹⁷ A federal district court found these radio ads deceived consumers, observing that the defendants "intended to cause consumers to associate [those responsible for the ads] with the federal government so that consumers would be more likely to believe that [they] were credible and stable."¹⁸ The Commission similarly has alleged that direct mail mortgage loan modification ads sent in official-looking brown envelopes with a window and a Washington, DC return address identifying the sender as the "NHMC Department of Financial Records" or "Nations Housing Modification Center" were deceptive.¹⁹

In 2002, when online search was a relatively new medium, FTC staff issued guidance concerning the potential for consumers to be deceived by paid ads formatted to appear as the regular search results that search engines return in response to consumers' queries.²⁰ The Commission concurs with the staff's conclusion, as articulated in the 2002 guidance and updated guidance issued in 2013,²¹ that consumers ordinarily

would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party. Knowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers' decisions with regard to a search engine and the results it delivers. Thus, failing to clearly and prominently disclose the paid nature of such advertising results is deceptive.

B. Misleading Door Openers

Other formats that mislead consumers about a commercial message's nature or purpose also have been alleged or found to be deceptive, such as misleading sales visits and calls and emails with falsified sender information. An early example of such a challenge was a 1976 case against an encyclopedia seller.²² A salesperson would "disguise his role as a salesman and appear as a surveyor engaged in advertising research" or salespeople would "approach prospects' homes in the guise of delivering . . . gifts or prizes without identifying themselves as salesmen, or that the purpose of their visit is to sell encyclopedia."²³ The Commission order required the respondents' sales representatives to present a card that clearly disclosed the purpose of the visit before entering a prospect's home.²⁴ Subsequently, the Commission's Deception Policy Statement categorized this practice as a "misleading door opener," citing it for the general proposition that, "when the first contact between the seller and a buyer occurs through a deceptive practice, the law may be violated, even if the truth is subsequently made known to the purchaser."²⁵

protection-staff-updates-agencys-guidance-search; see also 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 ("Updated Search Engine Letter").

²² *Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495–97, 531 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), as modified, 100 F.T.C. 500 (1982); *see also* *Grolier, Inc.*, 99 F.T.C. 379, 383 (1982), *aff'd*, 699 F.2d 983 (9th Cir. 1983), as modified, 104 F.T.C. 639 (1984).

²³ *Encyc. Britannica, Inc.*, 87 F.T.C. at 496.

²⁴ *Id.* at 524–26, 533–34.

²⁵ *Deception Policy Statement*, 103 F.T.C. at 180 & n.37. A number of courts have stated or held, both before and after issuance of the *Deception Policy Statement*, that the FTC Act is violated if a consumer's first contact is induced through deception, even if the truth is clarified prior to purchase. *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632 (6th Cir. 2014); *Resort Car Rental Sys., Inc.*

In 1994, concerned about deception and abuse occurring in the telemarketing of goods and services, Congress enacted the Telemarketing Fraud Act,²⁶ which prohibited the use of deceptive door-openers in telemarketing. That Act, among other things, outlawed as an abusive practice a telemarketer's failure to "promptly and clearly disclose . . . that the purpose of the call is to sell goods or services" when that is the case.²⁷ The Commission implemented Congress's intent to prohibit this practice when it promulgated the Telemarketing Sales Rule.²⁸ In enforcing that Rule, the Commission has brought cases against telemarketers who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies.²⁹

When Congress passed the CAN-SPAM Act,³⁰ among the practices the law was intended to address were emails that "mislead recipients as to the source or content of such mail."³¹ Specifically, Congress concluded that "[m]any senders of unsolicited commercial electronic mail purposefully disguise the source of such mail" and "include misleading information in the messages' subject lines in order to induce the recipients to view the messages," and that the recipients of such mail "incur costs for the . . . time spent accessing, reviewing, and discarding such mail . . ." ³² The CAN-SPAM Act therefore effectively prohibited deceptive door-openers in commercial email. The Act outlawed the sending of emails containing falsified header information,

v. FTC, 518 F.2d 962, 964 (9th Cir. 1975); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961); *Carter Prods., Inc. v. FTC*, 186 F.2d 821, 824 (7th Cir. 1951); *FTC v. LeanSpa, LLC*, No. 3:11-cv-1715, 2015 U.S. Dist. LEXIS 26906, at *33–34 (D. Conn. Mar. 5, 2015); *FTC v. Ivy Capital, Inc.*, No. 2:11-cv-00283, 2013 U.S. Dist. LEXIS 42369, at *23 (D. Nev. Mar. 26, 2013); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1066 (C.D. Cal. 2012); *FTC v. City West Advantage, Inc.*, No. 2:08-CV-00609, 2008 U.S. Dist. LEXIS 71608, at *7–9 (D. Nev. July 22, 2008); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008); *FTC v. Connelly*, 2006 U.S. Dist. LEXIS 98263, at *49 (C.D. Cal. Dec. 20, 2006).

²⁶ 15 U.S.C. 6101–6108.

²⁷ *Id.* at section 6102(a)(3)(C).

²⁸ 16 CFR 310.4(d)(2).

²⁹ *See* Complaint at 26, 28, *FTC v. FTN Promotions, Inc.*, No. 807-cv-1279 (M.D. Fla. July 23, 2007) (stipulated orders); Complaint, *Millennium Indus., Inc.*, No. 01–1932 (D. Ariz. Oct. 18, 2001) (stipulated order); Complaint, *Creditmart Fin. Strategies Inc.*, No. C99–1461WD (W.D. Wash. Sept. 14, 1999) (stipulated order); Complaint, *Liberty Direct, Inc.*, No. 299–cv–01637 (D. Ariz. Sept. 14, 1999) (stipulated order).

³⁰ 15 U.S.C. 7701–7713.

³¹ *Id.* at section 7701(b)(2).

³² *Id.* at section 7701(a)(3), (7), and (8).

¹⁷ Complaint at 6, 12, *Fed. Loan Modification Law Ctr., LLP*, No. SACV–09–401 (C.D. Cal. Apr. 3, 2009) (summary and default judgments). The Commission similarly has challenged sweepstakes prize promotion mailings misrepresenting a government affiliation. *See, e.g.*, Complaint at 11–12, 15, *FTC v. Nat'l Awards Serv. Advisory, LLC*, No. CV–10–5418 (N.D. Cal. Nov. 30, 2010) (stipulated judgment) (some of the challenged mailings claimed a government affiliation using words such as "State of Illinois Commissioners of Regulation" or the "OFFICE OF THE PRESIDENT OFFICIAL NOTIFICATION," and included language, symbols, and artwork evoking a government connection, such as "In God We Trust" or a bald eagle).

¹⁸ Order Granting Plaintiff's Motion for Summary Judgment Against Boaz Minitzer at 7, *Fed. Loan Modification Law Ctr., LLP*, No. SACV–09–401 (C.D. Cal. Nov. 17, 2010).

¹⁹ Complaint at 5, 13, *Fed. Hous. Modification Dep't, Inc.*, No. 09–CV–01753 (D.D.C. Sept. 15, 2009) (stipulated orders).

²⁰ Letter from Heather Hipsley, Acting Associate Director, Division of Advertising Practices, Federal Trade Commission to Gary Ruskin, Executive Director, Commercial Alert (June 27, 2002) ("Search Engine Guidance"), available at www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf.

²¹ 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-

including sender or subject information, and made doing so a violation of the FTC Act.³³ Even prior to the law's passage, in a case against an email marketer, the Commission alleged it was deceptive to forge an email's header information so as to make recipients believe a well-known bank or mortgage company sent it.³⁴

C. Deceptive Endorsements That Do Not Disclose a Sponsoring Advertiser

Consumers may also be misled about an advertisement's nature or source as a result of an advertiser's use of consumer and other endorsements. As the Commission stated in the Endorsement Guides, "When 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. . . . clearly and conspicuously . . ." ³⁵ In revising the Guides in 2009, the Commission specifically addressed paid endorsements in non-traditional forms of advertising, such as user-generated social media, personal blogs, online comment forums, or television talk show interviews.³⁶ The Commission's advice was based on the principle that when the content in which an endorsement is disseminated is not identifiable by consumers as advertising, consumers would not ordinarily expect an endorser to be speaking on behalf of a sponsoring advertiser and such connection must be disclosed to avoid deceiving consumers.

Since revising the Endorsement Guides, the Commission has brought a number of cases underscoring this principle.³⁷ For example, in a case

³³ *Id.* at section 7704(a)(1) and (2). In certain circumstances, materially falsifying header information also can be a crime punishable by a fine, imprisonment, or both, and enforceable by the United States Department of Justice. See 18 U.S.C. 1037.

³⁴ Complaint, *GM Funding, Inc.*, No. SACV 02-1026 (C.D. Cal. May 5, 2003) (stipulated order). The Commission has since brought a number of other cases challenging spam emails with deceptive sender and subject line information. See, e.g., Complaint at 21, *FTC v. Sale Slash, LLC*, No. CV15-03107 (C.D. Cal. Apr. 27, 2015); Complaint at 10-11, *FTC v. Cleverlink Trading Ltd.*, No. 05C 2889 (N.D. Ill. May 16, 2005) (stipulated order); Complaint, *Phoenix Avatar, LLC*, No. 04C 2897 (N.D. Ill. Apr. 23, 2004).

³⁵ Guides Concerning Use of Endorsements and Testimonials in Advertising (hereinafter "Endorsement Guides"), 16 CFR 255.5 (Disclosure of material connections).

³⁶ *Id.* Examples 3, 7, 8, 9.

³⁷ See, e.g., *Machinima, Inc.*, No. C-4569, 2016 FTC LEXIS 37, at *8-10 (Mar. 16, 2016) (consent); *AmeriFreight, Inc.*, 159 F.T.C. 1627, 1629 (2015) (consent); *Deutsch LA, Inc.*, 159 F.T.C. 1164, 1169

against an app developer, employees of a public relations firm hired by the developer posted reviews about its games in the iTunes app store, without disclosing their relationship to the company.³⁸ The Commission asserted that the posted reviews were misrepresented as independent reviews reflecting the opinions of ordinary consumers, and that the failure to disclose the reviewers' material connection to the app company was deceptive. Another case concerned a home security firm's hiring of spokespersons who appeared on television and radio programs as impartial expert reviewers but failed to make known their connection to the company.³⁹

II. Commission Policy on Deceptively Formatted Advertising

The recent proliferation of natively formatted advertising in digital media has raised questions about whether these advertising formats deceive consumers by blurring the distinction between advertising and non-commercial content. Natively formatted advertising encompasses a broad range of advertising and promotional messages that match the design, style, and behavior of the digital media in which it is disseminated. The ads can appear in a wide variety of forms, including written narratives, videos, infographics, images, animations, in-game modules, and playlists on streaming services. Often natively formatted ads are inserted into the stream of regular content a publisher offers,⁴⁰ generally referred to in this statement as a "publisher site," such as news and news aggregator sites and social media platforms.⁴¹ In some instances, publishers place these ads on their sites and, in other instances, advertising networks operating ad content-recommendation engines do so. Advertising and promotional messages

(2015) (consent); Complaint at 5, *ADT LLC*, No. C-4460 (June 18, 2014) (consent); Complaint at 10, *United States v. Spokeo, Inc.*, No. CV12-05001 (C.D. Cal. June 19, 2012) (stipulated order for civil penalties); *Legacy Learning Sys., Inc.*, 151 F.T.C. 383, 386-87 (2011) (consent); *Reverb Commc'ns, Inc.*, 150 F.T.C. 782, 784 (2010) (consent).

³⁸ *Reverb Commc'ns, Inc.*, 150 F.T.C. 782, 783-84 (2010) (consent).

³⁹ Complaint at 1-5, *ADT LLC*.

⁴⁰ Commonly, when a natively formatted ad appears on a publisher site, it consists of headline text, a short description, and a thumbnail image, which, if clicked, lead to additional content.

⁴¹ The term "publisher site" refers to any media platform on which consumers consume content and media creators and curators publish content. The content may be delivered by publishers through various means, including the web and mobile applications, and may be accessed by consumers on different devices, including computers, smartphones, tablets, and televisions.

also can be embedded into entertainment programming, including professionally produced and user-generated videos on social media.

Regardless of an ad's format or medium of dissemination, certain principles undergird the Commission's deceptive format policy. Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material. In this regard, a misleading representation is material if it is likely to affect consumers' choices or conduct regarding the advertised product or the advertisement, such as by leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise would not have interacted.⁴² Such misleadingly formatted advertisements are deceptive even if the product claims communicated are truthful and non-misleading.⁴³

Although the particular facts will determine whether an advertisement formatted like the material in which it appears is deceptive, this statement sets forth the factors the Commission will consider in making that determination.

A. An Advertisement's Format Can Mislead Consumers as to Its Nature or Source

In evaluating whether an ad's format is misleading, the Commission considers the net impression the advertisement conveys to reasonable consumers, not statements in isolation.⁴⁴ Ads can convey claims by means other than, or in addition to, written or spoken words, such as visual or aural imagery and the interaction among all elements of the ad.

Applying the net impression standard in its *Advisory Opinion on Ads in a News Format*, the Commission commented that inclusion of exact price information would not change the overall impression conveyed that a series of newspaper ads were feature articles giving independent and

⁴² By product or advertising claims, the Commission generally means any representations about the benefits or attributes of a product, type of product, or category of products, including disparaging claims about a competitor's products.

⁴³ The Commission has challenged advertising formats as deceptive without challenging product claims made in advertisements. See, e.g., Complaint, *ADT LLC; Georgetown Publ'g House Ltd. P'ship*, 121 F.T.C. 392; *JS&A Grp., Inc.*, 111 F.T.C. 522.

⁴⁴ *FTC v. Am. Home Prods. Corp.*, 695 F.2d 681, 687 (3d Cir. 1982), citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

impartial restaurant reviews.⁴⁵ In a case against a bookseller, the Commission's complaint noted a number of elements, including the challenged ad's printing on magazine-like paper, a ripped left edge, page numbering, inclusion of a publication date and byline, and an affixed personalized sticky note, in alleging that the overall impression created was that the ad was an independent book review.⁴⁶ Thus, in evaluating whether an ad's format is misleading, the Commission will scrutinize the entire ad, examining such factors as its overall appearance, the similarity of its written, spoken, or visual style to non-advertising content offered on a publisher's site, and the degree to which it is distinguishable from such other content.

Any determination of whether an advertisement's format misleads as to the ad's nature or source depends on how reasonable consumers would interpret the ad in a particular situation. To be reasonable, an interpretation or response of consumers to a particular ad need not be the only one nor be shared by a majority of consumers.⁴⁷ Interpretations that advertisers intend to convey about an advertisement's nature or source are presumed reasonable.⁴⁸

In digital media, consumers can encounter natively formatted ads in a wide variety of situations, including in the news feed or main page of a publisher site, or through other means, such as posts in social media, in search results, and in email. In evaluating whether reasonable consumers would recognize ads as such, the Commission will consider the particular circumstances in which the ads are disseminated, including customary expectations based on consumers' prior experience with the media in which it appears and the impression communicated by the ad's format.⁴⁹ For instance, if a natively formatted ad appearing as a news story is inserted into the content stream of a publisher site that customarily offers news and feature articles, reasonable consumers are unlikely to recognize it as an ad.

The target audience of an ad also may affect whether it is likely to mislead

reasonable consumers about its nature or source. Increasingly, in digital media, advertisers can target natively formatted ads to individual consumers and even tailor the ads' messaging to appeal to the known preferences of those consumers.⁵⁰ The propensity of an ad to mislead as to its nature or source may be different when considered from the perspective of its target audience. To the extent that an advertisement is targeted to a specific audience, the Commission will consider the effect of the ad's format on reasonable or ordinary members of that targeted group.⁵¹

Certain ads that are formatted like the non-advertising content with which they are presented, however, may be unlikely to mislead consumers acting reasonably. Some ads by the very nature of their promotional message communicated may be inherently obvious as advertising to consumers. For instance, if a natively formatted ad with an image of a particular sports car and the headline "Come and Drive [X] today" were inserted into the news stream of a publisher site, that ad likely would be identifiable as an ad to

⁵⁰ There may be a host of data collection and use activities associated with natively formatted ads disseminated programmatically in digital media, some of which may not be transparent to consumers. This enforcement policy statement is not intended to address the legal and policy implications of such practices. Existing Commission and staff guidance address the privacy issues raised by digital advertising and consistently recommend that companies provide truthful and prominent information and choices to consumers about their data collection, use, and sharing practices. See, e.g., FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers (Mar. 2012), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> (recommending a framework for addressing consumer privacy, including transparency and simplified choice regarding the online collection and use of consumer data for marketing purposes); FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising: Tracking, Targeting, and Technology (Feb. 2009), available at www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadvreport.pdf (setting forth proposed principles related to online behavioral advertising).

⁵¹ Deception Policy Statement, 103 F.T.C. at 177–78. For example, special considerations may be relevant in determining whether a natively formatted ad directed to children would be misleading. *Id.* at 177; cf. Commission Enforcement Policy Statement in *Regard to Clear and Conspicuous Disclosure in Television Advertising*, CCH Trade Regulation Reporter, ¶ 7569.09 (Oct. 21, 1970) available at www.ftc.gov/system/files/documents/public_statements/288851/701021tvadv-pr.pdf (disclosures in television ads that are intended to qualify misleading claims communicated to children "must be written and presented in a manner that would be understood by them and have the capacity to attract their attention").

consumers, even though it was presented in the same visual manner as news stories in the stream.

Finally, in determining the overall impression communicated by an ad, the Commission also will consider any qualifying information contained in the ad.⁵² Advertisements may include disclosures to inform consumers of their commercial nature, including text labels, audio disclosures, or visual cues distinguishing the ad from other content into which it is integrated. Any disclosure used must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."⁵³ A disclosure's adequacy ultimately will be measured by whether reasonable consumers perceive the ad as advertising.⁵⁴

A disclosure must be made in "simple, unequivocal" language, so that consumers comprehend what it means.⁵⁵ For example, in infomercial cases, the Commission has required the use of the words "Paid Advertisement."⁵⁶ In its Advisory Opinion on Ads in a News Format, the Commission suggested use of the term "Advertisement" to prevent consumers from being deceived by those particular advertising formats.⁵⁷ Disclosures also must be made in the same language as the predominant language in which ads are communicated.⁵⁸

The conspicuousness of the disclosure will depend on the method of delivery and placement within the ad. Depending on the circumstances, a disclosure in the text may not remedy a misleading impression created by the headline because reasonable consumers might glance only at the headline.⁵⁹ In Commission cases and Rules addressing audio ads, the Commission has required audible disclosures to be delivered in a volume, cadence, and speed sufficient

⁵² Deception Policy Statement, 103 F.T.C. at 181.

⁵³ *Removatron Int'l Corp. v. FTC*, 884 F. 2d 1489, 1497 (1st Cir. 1989).

⁵⁴ See *supra* note 47 and accompanying text.

⁵⁵ *Thompson Medical Co.*, 104 F.T.C. 648, 783 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

⁵⁶ See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 209, 211; *Vital Basics, Inc.*, 137 F.T.C. at 340–41; *Nutrivida, Inc.*, 126 F.T.C. at 351–52; *Bogdana Corp.*, 126 F.T.C. at 100–01; *Mega Sys. Int'l, Inc.*, 125 F.T.C. at 1218–19.

⁵⁷ *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307–08; *Statement on Ads in Feature Article Format*.

⁵⁸ See, e.g., Final Order and Judgment at 8, *Direct Mktg. Concepts, Inc.*, No. 04–11136–GAO (D. Mass. Aug. 13, 2009) (as to Direct Marketing Concepts, Inc. and others); Free Annual Credit Disclosures, 16 CFR 610.4(a)(3)(ii) (general requirements for disclosures).

⁵⁹ Deception Policy Statement, 103 F.T.C. at 180.

⁴⁵ *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307–08.

⁴⁶ *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. at 393–96.

⁴⁷ Deception Policy Statement, 103 F.T.C. at 177 n.20. "A material practice that misleads a significant minority of reasonable consumers is deceptive." *Id.*

⁴⁸ *Id.* at 178.

⁴⁹ For example, consumers' customary use of and prior experience with search engines are relevant to the need to distinguish paid from regular search results. See Updated Search Engine Letter, at note 2 and accompanying text.

for ordinary consumers to hear and understand them.⁶⁰

To be effective, a disclosure also generally must be made contemporaneously with the misleading claim it is intended to qualify. For example, disclosures that subsequently inform consumers of a natively formatted ad's commercial nature after they have clicked on and arrived at another page will not cure any misleading impression created when the ad is presented in the stream of a publisher site. This approach also reflects and is consistent with long-standing public policy, as codified in the CAN-SPAM Act⁶¹ and Telemarketing Fraud Act⁶² and found in Commission cases,⁶³ that material misrepresentations as to the nature or source of a commercial communication are deceptive, even if the truth is subsequently made known to consumers.

B. Misleading Claims About the Nature or Source of Advertising Are Likely Material

Deception occurs when an ad misleads consumers about a material fact.⁶⁴ Material facts are those that are important to consumers' choices or conduct regarding a product.⁶⁵ Misleading representations or omissions about an advertisement's true nature or source, including that a party other than the sponsoring advertiser is the source of the advertising, are likely to affect consumers' behavior with regard to the advertised product or the

advertisement.⁶⁶ Consumers with such a misleading impression, for example, are likely to give added credence to advertising messages communicated and to interact with advertising content with which they otherwise would have decided not to interact.⁶⁷

The Commission presumes that claims made expressly and claims the advertiser intended to make are material.⁶⁸ The Commission also considers certain misleading formats to be presumptively material. Depending on the facts, false claims that advertising and promotional messages reflect the independent, impartial views, opinions, or experiences of ordinary consumers or experts are presumed material.⁶⁹ Similarly, the Commission views as material any misrepresentations that advertising content is a news or feature article,⁷⁰ independent product review,⁷¹ investigative report,⁷² or scientific

research or other information from a scientific or other organization.⁷³ Commercial communications that mislead consumers that they are from the government,⁷⁴ a legitimate business, such as a well-known bank,⁷⁵ or a marketing surveyor⁷⁶ also are presumed to be material.

III. Conclusion

Although digital media has expanded and changed the way marketers reach consumers, all advertisers, including digital advertisers, must comply with the same legal principles regarding deceptive conduct the Commission has long enforced. This statement sets forth principles of general applicability on which the Commission will rely in determining whether any particular advertising format is deceptive, in violation of Section 5 of the FTC Act. The Commission will find an advertisement deceptive if the ad misleads reasonable consumers as to its nature or source, including that a party other than the sponsoring advertiser is its source. Misleading representations of this kind are likely to affect consumers' decisions or conduct regarding the advertised product or the advertisement, including by causing consumers to give greater credence to advertising claims or to interact with advertising content with which they otherwise would not have interacted.

By direction of the Commission.

Donald S. Clark,
Secretary.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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Submission for OMB Review; Taxpayer Identification Number Information

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

⁷³ See, e.g., *supra* note 16 and accompanying text.

⁷⁴ See, e.g., *supra* notes 17, 18, 19 and accompanying text.

⁷⁵ See, e.g., *supra* notes 29, 34 and accompanying text.

⁷⁶ See, e.g., *supra* note 23 and accompanying text.

⁶⁰ See, e.g., Final Order and Judgment at 8, *Direct Mktg. Concepts, Inc.* (radio disclosures must be "in a volume and cadence sufficient for an ordinary consumer to hear"); *Carrot Neurotechnology, Inc.*, No. C-4567, 2016 FTC LEXIS 24, at *4 (Feb. 22, 2016) (consent) (necessary disclosures under the order must be "in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand"); Free Annual Credit Disclosures, 16 CFR 610.4(a)(3)(iv) ("Audio disclosures shall be in a slow and deliberate manner and in a reasonably understandable volume and pitch.").

⁶¹ 15 U.S.C. 7701-7713 at 7704(a)(2).

⁶² 15 U.S.C. 6101-6108 at 6102(a)(3)(C).

⁶³ See, e.g., *supra* notes 22, 25, 34 and accompanying text.

⁶⁴ *Deception Policy Statement*, 103 F.T.C. at 182.

⁶⁵ *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) ("a claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product'") (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. at 165). Material information may influence consumer behavior apart from the purchase of a product. *Deception Policy Statement*, 103 F.T.C. at 182 n.45. A material misrepresentation is one "the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important." *Id.* (citing Restatement (Second) of Torts, section 538(2) (1965)).

⁶⁶ There are some exceptions, where consumers might not act differently if they were to identify certain forms of advertising as such. For example, if a branded product is included in entertainment programming in exchange for payment or other consideration from an advertiser, unless this paid product placement communicates an objective claim about a product, the fact that such advertising was included because of payment is unlikely to affect consumers' decision-making. When no objective claims are made for the product advertised, there is no claim to which greater credence can be given; thus, whether an advertiser had paid for the placement or the product appeared because of the program writer's creative judgment would not likely be material to consumers. See generally Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005), available at www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf (response to a petition from a consumer group to issue guidelines requiring the on-screen disclosure "ADVERTISEMENT," whenever paid product placement occurred in television programming; FTC staff concluded that such a disclosure would not generally be necessary to prevent deception and that when particular instances of paid product placement or brand integration were deceptive, they could be adequately addressed on a case-by-case basis).

⁶⁷ In evaluating materiality, the Commission takes consumer preferences as given rather than considering whether they are objectively justified. *Deception Policy Statement*, 103 F.T.C. at 182 n.46.

⁶⁸ *Deception Policy Statement*, 103 F.T.C. at 182.

⁶⁹ See, e.g., *supra* notes 36, 37, 38, 39 and accompanying text. Regarding the specific issue of advertisers using spokespersons to promote products in programming without disclosing the spokesperson's financial ties to the advertiser, a connection between an advertiser and an endorser that is not reasonably expected by the audience must be fully disclosed. See, e.g., *ADT LLC*, No. C-4460, 2014 FTC LEXIS 142, at *3, 5-6 (June 18, 2014) (consent); Endorsement Guides, 16 CFR 255.5.

⁷⁰ See, e.g., *supra* notes 7, 8, 13, 14 and accompanying text.

⁷¹ See, e.g., *supra* note 10 and accompanying text.

⁷² See, e.g., *supra* notes 12, 13 and accompanying text.