

NATIVE ADVERTISING: RECENT FTC CASES REQUIRE DISCLOSURE OF PAID ENDORSEMENTS ON SOCIAL MEDIA

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Two recent cases by the Federal Trade Commission (“FTC”) demonstrate its position that paid endorsements in social media must be disclosed. These cases reinforce the FTC’s stance on transparency in native advertising, which is paid advertising made to look like the media content around it.

The FTC has approved a final consent order with Machinima, Inc. requiring the company to disclose when it has compensated “influencers” to post online videos or product endorsements. According to the FTC’s complaint, the California-based online entertainment network engaged in deceptive advertising by paying influencers to post online videos endorsing a home video game system and several games, without disclosing that they were being paid for their opinions.

Although not yet final, the FTC has also proposed a consent order with department store chain Lord & Taylor, based on that company’s advertising campaign for a new apparel line using a paid article in online fashion magazine, Nylon, as well as other online posts. The FTC complaint alleges that Lord & Taylor paid fashion influencers between \$1,000 and \$4,000 each to post a photo of themselves in a particular dress, styled any way they like, with the photo tag @lordandtaylor. Lord & Taylor did not, however, require Nylon or the influencers to disclose that they had been paid, which the FTC complaint alleges constituted false advertising.

In both cases, the orders prohibit the companies from falsely claiming – expressly or by implication – that an endorser, influencer or blogger is an independent user or ordinary consumer. According to the FTC, if there is a “material connection” between the company and an endorser, it must be disclosed in close proximity to the claim.

What is a material connection? In its [Native Advertising: A Guide for Businesses](#) the FTC states that a material connection is any relationship that might materially affect the weight or credibility a consumer gives the endorsement. The FTC further states in its [Endorsement Guides: What People Are Asking](#) that endorsements by individuals on social media sites should disclose whenever there is a paid relationship concerning a product’s use, endorsement, or placement, and that paid relationship would not otherwise be apparent to consumers.

Where disclosure is required, the FTC's [Native Advertising: A Guide for Businesses](#), recommends that such disclosures:

- **Use clear and unambiguous language.** The FTC guidelines recommend using terms such as “Ad,” “Advertisement,” “Paid Advertisement,” “Sponsored Advertising Content,” or some variation. The guidelines discourage the use of terms such as “Promoted by,” “Presented by,” or “Sponsored by” unless the sponsoring advertiser funded or underwrote but did not create or influence the content.
- **Appear as close as possible to the content to which they relate.** Disclosures should appear in front of or above the headline, directly on the focal point, or at the beginning of the influenced content. If the focal point is an image or graphic, the disclosure may need to appear on the focal point itself.
- **Appear on the main website page, and any click-into page, post or infographic.**
- **For video ads, appear on the screen long enough** to be noticed, read, and understood.
- **For audio disclosures, read at a cadence that is easy to follow** and in words consumers will understand.

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