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Qualified Small Business Stock Under IRC §1202: Tax-Free Money for the Masses?

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Introduction

Since January 1, 2013, taxpayers with gross incomes of \$250,000 or more have seen a significant increase in the rate at which their long-term capital gains are taxed. The American Taxpayer Relief Act of 2012 (Pub L 112-240, 126 Stat 2313) increased the rate from 15 percent to 20 percent and imposed a net investment income tax of 3.8 percent, bringing the total current rate on long-term capital gains to 23.8 percent.

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New Media Affords New Ways to Deliver Advertising and Branded Content —and New Challenges

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INTRODUCTION

Native advertising is content delivered to consumers in-stream or as a more organic part of the user experience. It is made with some collaboration or influence, as well as payment or another form of consideration, from a marketer. Well-known early types of native advertising include magazine “advertorials” and infomercials. The Internet and mobile technology provide new opportunities for advertisers to move from the sidelines with banner ads into the “main stage” discussion. These opportunities also bring compliance challenges for advertisers and their counsel.

This article first briefly discusses factors that distinguish editorial content from advertising. Focusing on the latter, the article then reviews recent Federal Trade Commission (FTC) guidance on native advertising, including when content needs to be disclosed as advertising and how to make appropriate disclo-

tures. Throughout, the article integrates discussion of best practices for disclosing sponsorship in certain specific formats.

WHEN SPONSORED CONTENT IS ADVERTISING

Whether speech is advertising or not affects the degree of First Amendment protection, and thus the degree of regulation, of that speech. The Supreme Court's landmark opinions on commercial speech provide the framework for determining whether speech is advertising. See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 US 525, 553. Commercial speech is “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980) 447 US 557, 561. In *Lorillard*, the Court restated its *Central Hudson* test, which is a “framework for ana-

lyzing regulations of commercial speech” (533 US at 554 (quoting *Central Hudson*, 447 US at 566)):

[A]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In-stream content is generally regarded as “native advertising” if the advertiser is creating a demand for its product or service through the native advertising piece, which would support the conclusion that the speech is commercial. It is also relevant whether the advertiser had a role, or not, in creating the content.

Further, it is relevant whether the sponsor of the content receives a commercial benefit from the sponsorship. In an early native advertising case involving Qualcomm, the National Advertising Division (NAD) of the Better Business Bureau suggested a rather broad reading of what constitutes advertising. See *Qualcomm, Inc.* (Snapdragon Processors), NAD Case Report #5633 (9/20/13). NAD ultimately concluded that (NAD Case Report #5633 at 3)

sponsored content can convey an explicit message about a product, the benefits of using the product, or the disadvantages of a competing product. In such circumstances consumers have a compelling interest in knowing the sponsor of the content because the content conveys a commercial message that benefits the advertiser.

Part of what makes the NAD’s view of what is advertising so expansive is the nature of the sponsorship that NAD was considering.

Qualcomm sponsored a series of articles on Mashable, called *What’s Inside*, looking at the technology behind many electronic devices. Qualcomm did not have editorial rights to the articles or even any say in “planning, creating, or posting” any of the pieces. NAD Case Report #5633 at 1. Qualcomm’s own processor, Snapdragon, was not featured in any of the *What’s Inside* articles. During the term of the sponsorship, the index page for the *What’s Inside* articles called out that they were “supported by Snapdragon,” and the articles included a yellow bar indicating that the content was sponsored. NAD Case Report #5633 at 1. Advertisements for Snapdragon also ran on Mashable, contiguous to the articles. At the end of the sponsorship, the articles remained on the website, but Mashable removed the references to the Snapdragon sponsorship.

NAD was asked to consider whether a disclosure was required after the term of the sponsorship had ended. NAD concluded that disclosure was not required. What is interesting is what NAD had to say about Qualcomm’s disclosure obligations during the term of the sponsorship.

The Supreme Court’s landmark opinions on commercial speech provide the framework for determining whether speech is advertising.

NAD concluded that it was necessary and appropriate to have disclosed this sponsorship during the term of the sponsorship (NAD Case Report #5633 at 3):

[C]onsumers can be misled when an advertiser conveys a commercial message without disclosing that it is the author of the message because sponsored content can convey an explicit or implicit message about a product, the benefits of using the product, or the disadvantages of a competing product.

But NAD went on to opine that (NAD Case Report #5633 at 3)

[i]f the content simply conveys information about an issue with which the advertiser wants to be associated, the advertiser may still have an obligation to identify itself as the sponsor because consumers generally will attach different significance to articles that are sponsored than those that are not sponsored and purely editorial. As a result, failing to disclose the sponsor of an article may deprive consumers of insight into why a particular article was published, including the motivations of the author.

This suggests that, in NAD’s view, there may be times when a sponsor has an obligation to disclose the sponsorship of an article that does not touch directly on the sponsor’s line of business.

Another factor to consider is whether the content refers to the sponsor’s products. For example, the FTC may not go as far as NAD when the content does not expressly refer to the sponsor’s product, the product category, or a competitor’s product. The FTC uses an example of an article on great vacation spots for fitness enthusiasts, presented by a running shoe company that does not promote (or mention) any of the sponsor’s products, to demonstrate when an article does not legally need to be identified as an advertisement. The FTC points to the article as an example of content that is not advertising. See FTC, *Native Advertising: A Guide for Businesses* (December 2015) (Business Guide), Part II, Example 2 (available at

<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>).

Determining exactly where the line is between advertising and editorial content that is published on behalf of a marketer may not be an issue of primary importance. Even if content is more likely considered editorial rather than commercial speech, the trend has been for advertisers to find ways to disclose the sponsorship consistent with the guidelines available to them, which are discussed below. After all, the point of native advertising is to engage with viewers and, hopefully, have them associate engaging, smart, entertaining content with a brand.

FTC GUIDANCE

Native advertising may be taking on new forms with the advent of new technology, but the FTC's position is that it is nothing really new as far as the applicable legal analysis is concerned. The FTC has been addressing advertising that does not look like advertising since 1968, when a misleadingly sponsored restaurant review appeared in a newspaper. The FTC's current guidance on how to prevent consumer confusion is rooted in this long history.

In December 2015, the FTC issued an Enforcement Policy Statement on Deceptively Formatted Advertisements (Enforcement Statement) (available at <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted>) addressing native advertising—that is, as the FTC explained, “advertising and promotional messages integrated into and presented as non-commercial content.” Enforcement Statement at 1.

The Enforcement Statement summarizes the principles underlying the FTC's decades of work addressing various forms of deceptive advertising and is clear that those principles apply in equal force to native advertising. In other words, native advertising fits comfortably within a large category of advertising that includes infomercials, deceptive door-openers, and online search results. The Enforcement Statement references the FTC's Policy Statement on Deception (Oct. 14, 1983) (1983 Policy Statement) (available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>).

In its 1983 Policy Statement, the FTC wrote that “[c]ertain elements undergird all deception cases” and set forth its view of the meaning of deception (1983 Policy Statement at 1):

First, there must be a representation, omission or practice that is likely to mislead the consumer. . . .
Second, we examine the practice from the perspec-

tive of a consumer acting reasonably in the circumstances. . . . Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service.

The same principles undergird the FTC's view of native advertising.

The Enforcement Statement also reminds advertisers that, as in the past, advertisements must be clearly recognized as such by consumers and that any necessary disclosure that content is “advertising” must be made at the outset rather than later. Therefore, before clicking or tapping on a link, consumers must know that they are accessing an advertisement.

Of course, in today's marketing world, there are a myriad of ways to design and deliver advertising. When determining whether an advertisement is clearly recognizable as such, the FTC will look to the overall impression conveyed by the material, including images and the interaction of all of the advertisement's elements. The FTC will also evaluate the net impression of the advertisement from the perspective of reasonable members of its target audience. See Enforcement Statement at 1. For obvious reasons, advertisers and their legal counsel should understand the target audience before relying on them to understand a disclosure.

Native advertising fits comfortably within a large category of advertising that includes infomercials, deceptive door-openers, and online search results.

The FTC released the Business Guide contemporaneously with the Enforcement Statement in 2015. Consistent with the Enforcement Statement, the Business Guide emphasizes the importance of context. For example, an “article” on running shoe shock absorption that appears on a financial news site is unlikely to be confused with true editorial content. See Business Guide, Pt I, Example 1. Similarly, billboard ads that appear in a video game are likely to be understood by consumers as paid content, so no additional disclosure is necessary. See Business Guide, Pt I, Example 9. The Business Guide also answers its own question about why disclosure and contextual issues are so important: “Why would it be material to consumers to know the source of the information? Because knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or

credibility consumers give the information it conveys.” Business Guide, Pt I.

The importance of the disclosure is increased the more native the placement is. In other words, if commercial content is shaded or otherwise visually separated from the noncommercial content that surrounds it, readers are more likely to appreciate that the content is commercial; therefore, the disclosure itself may not be as critical. The more the content is seamlessly woven into pure editorial content, the more important an upfront disclosure becomes. Because context is king, these are at best merely guidelines for advertisers to follow.

“Magic” Disclosure Words

While there are no clear “go” words or “stop” words, some words are better than others at notifying consumers that particular content is an advertisement.

The Enforcement Statement, for example, endorses use of the words “Advertisement” or “Paid Advertisement.” See Enforcement Statement at 13. The Business Guide proceeds to suggest more flexibility, as long as some variant of “ad” appears. The Business Guide prefers terms such as “ad,” “advertisement,” “paid advertisement,” and “sponsored advertising content.” See Business Guide, Pt III, Section C.

The FTC discourages the use of “promoted” or “promoted stories,” because these terms could confuse consumers into believing that the content is endorsed by the publisher site rather than being a commercial message from a marketer. See Business Guide, Pt III, Section C. Company logos or names alone without more information are also inadequate to signal commercial content.

When determining whether an advertisement is clearly recognizable as such, the FTC will look to the overall impression conveyed by the material, including images and the interaction of all of the advertisement’s elements.

Beyond these guidelines, marketers may find other terms that are (or are not) capable of adequately disclosing sponsorship. The FTC states that (Business Guide, Pt III, Section C)

depending on the context, consumers reasonably may interpret other terms, such as “Presented by [X],” “Brought to You by [X],” “Promoted by [X],” or “Sponsored by [X],” to mean that a sponsoring adver-

tiser funded or “underwrote” but did not create or influence the content.

The FTC has also expressed concern with such terms if they are used to mean different things on the same website. Conducting consumer research on exactly what viewers understand terms like “sponsored by X” or “promoted by X” to mean is something the FTC always recommends.

The underlying goal is to disclose the association between the sponsor and the content. If the words used in a particular context fail to disclose the association, then an advertiser may find itself on the other end of a dispute.

Where to Place the Disclosure

As in the case of the words used to disclose sponsorship, certain places to put the disclosure are better than others. The Business Guide addresses two common placement issues: timing and physical placement. See Business Guide, Pt III, Section A. First, the Business Guide addresses whether disclosures must happen once, or twice, when a link is involved. When the content itself is advertising, the disclosure must appear twice: once with the link and then a second time with the content. This ensures that consumers know before clicking that they are going to view an advertisement and ensures that the disclosure travels with that advertisement. See Business Guide, Pt I, Example 7. Further, if there is a social media plug-in at the end of an article or video that allows viewers to share the content with their social network, any link generated should include a disclosure.

The Business Guide also addresses where, specifically, to place disclosures. See Business Guide, Pt III, Section A. The key, of course, is to make sure that the disclosure is seen. Therefore, an advertisement on a website might be placed on the main page. Depending on how a website is read, placement on the left or at the top is preferred to placement on the right or at the bottom (where the consumer is more likely to click into the advertisement before seeing the disclosure). Disclosures should be placed as close as possible to where a consumer might look (*e.g.*, the focal point of a picture or graphic or the byline). If the content is in video format, the disclosure should appear in the video itself and not exclusively in text surrounding the video.

DIFFERENT MEDIA PRESENT DIFFERENT DISCLOSURE CHALLENGES

Technology enables advertisers to creatively integrate advertising into content in many different ways. Therefore, how an advertiser meets its disclosure ob-

ligations depends in part on the medium in which the advertiser places the native advertising. And as the available media evolves, advertisers and their counsel will need to evolve too. Guidance and experience, more than bright-line rules, will likely continue to be the bases for lawyers' counsel.

Print

Native advertising in print media is subject to the clearest rules for disclosing the facts of the sponsorship.

In 1968, the FTC issued Advisory Opinion No. 191, which looked at "whether it was deceptive to publish an advertisement in a format of a news article without disclosing it was an advertisement." FTC, Advisory Opinion Digests, No. 191, Advertisements which appear in news format (available at https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-73/ftcd-vol73january-june1968pages1289-end.pdf). The FTC concluded that disclosure was appropriate in the case of a restaurant review that was sponsored and

uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant . . . [but] in fact consists of a series of commercial messages which are paid for by the advertisers.

The FTC advised that the disclosure should "clearly and conspicuously disclose it is an advertisement." FTC, Advisory Opinion Digests, No. 191.

More recently, NAD took on the issue of native advertising in the print medium involving an issue of Shape magazine. Shape branded fitness and health products that it advertised, including advertisements within Shape magazine itself. "NAD was concerned that promoting SHAPE-branded products in a format that makes it look like editorial content blurs the line between editorial content and advertising in a way that can confuse consumers." *American Media, Inc.* (Shape Water Boosters), NAD Case Report #5665 (12/18/13), 1. In the September 2013 issue of Shape magazine, the letter from the editor announced the launch of the Shape product line and promised to discuss the products within the pages of Shape. The magazine had an article, captioned "news" and called *Water Works*, about the benefits of hydration and mentioned new Shape Water Boosters as a way to add flavor to ordinary water. See NAD Case Report #5665 at 2. About ten pages later (not contiguous to the article) were full-page advertisements for Shape Water Boosters. Shape argued that "because consumers are

aware of the connection between the magazine and the SHAPE-branded product, it has no obligation to disclose that its promotion of Shape-branded products is advertising." NAD Case Report #5665 at 3. However, NAD believed that consumers would attach different significance to the recommendation and might believe that the writer of the article was independent from Shape because the article was captioned "news." See NAD Case Report #5665 at 4.

Disclosures should be placed as close as possible to where a consumer might look (e.g., the focal point of a picture or graphic or the byline).

NAD's decision refers to the FTC's 1968 Advisory Opinion No. 191. "NAD considered, but was not persuaded by, the advertiser's argument that the editor's note . . . disclosed the connection between *Shape* Magazine and Shape Water Boosters was sufficient to alert customers that the article was an advertisement." NAD Case Report #5665 at 4. The report concluded that "NAD precedent is clear that effective disclosures must be in close proximity to the main claim, meaning that they can be read at the same time a consumer reviews the claim." NAD Case Report #5665 at 4. Shape ultimately agreed to remove the "news" heading from content that discussed its branded products.

In print, using words such as "advertisement" is the safest course of action and is an accepted industry practice.

Technologically Rendered Content

Content delivered online or consumed on mobile devices proves the most challenging for lawyers advising creative clients on how to make adequate disclosures consistent with the goals of a marketing campaign.

In March 2013, the FTC published *.com Disclosures: How to Make Effective Disclosures in Digital Advertising (.com Disclosures)* (available at <https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital>). Not surprisingly, the FTC noted that "new issues arise almost as fast as technology develops," but, of course, "cyberspace is not without boundaries, and deception is unlawful no matter what the medium." *.com Disclosures* at i.

Without providing an exhaustive list of required disclosures (although providing comprehensive guidelines), the FTC advised advertisers to disclose the fact of sponsorship within the content or near it, to dis-

courage scrolling, and to discourage hyperlinks for simple disclosure such as sponsorship (unless industry adopts a symbol that is recognized by consumers). The FTC further advised advertisers that disclosures should be clear and conspicuous on all devices and platforms and counseled advertisers to “[k]eep abreast of empirical research about where consumers do and do not look on a screen.” *.com Disclosures* at ii. The FTC stated that, ultimately (*.com Disclosures* at 2),

[t]here is no litmus test for determining whether a disclosure is clear and conspicuous, and, in some instances, there may be more than one method that seems reasonable. In such cases, the best practice would be to select the method more likely to effectively communicate the information in question.

Although *.com Disclosures* does not single out native advertising per se, the FTC clearly indicated that it applies broadly to advertising “online” (*i.e.*, “via Internet and other electronic networks”) and are “device neutral.” *.com Disclosures* at 1 n1.

More recently, in the second part of its Business Guide, the FTC used examples to explain how to make disclosures effectively and prevent deception. Although the Business Guide provides general guidance only, it confirms the basic tenet of *.com Disclosures* (among other guidance from the FTC) that “no matter how consumers arrive at advertising content, it must not mislead them about its commercial nature.” Business Guide, Pt II.

NAD has also opined on disclosures in an online environment. In a matter involving Taboola, NAD rejected a contention that Taboola “needed to use the word ‘advertisement’ to inform consumers that its links are sponsored.” *Taboola, Inc.* (Online Advertising) NAD Case Report #5708 (5/5/14), 7. NAD concluded that “in the absence of consumer-perception evidence demonstrating that consumers do not understand the words ‘sponsored content’ or ‘promoted content’ to mean that the content is paid, NAD is reluctant to mandate specific words to use for disclosure.” NAD Case Report #5708 at 7. Key to this decision and other guidance is the importance of understanding how consumers will perceive a disclosure. The case sets out NAD’s views on how to accomplish disclosure clearly and conspicuously in the context of a content recommendation widget, including a preference for disclosure at the top of the box in a font that contrasts sufficiently with the background for viewers to notice it.

Search Results

Perhaps the original type of native advertising online consists of sponsored search results—that is, search engine results that an advertiser has paid to

have delivered to a user before any other search result.

The FTC has repeatedly advised that to distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an “advertisement” and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement. In a June 24, 2013, sample letter to general purpose search engines (June 2013 Sample Letter) (available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>), the FTC laid out some clear ground rules for search engines to follow. Although the FTC ultimately left it up to search engines to determine what method to use, that method must be “noticeable and understandable to consumers.” June 2013 Sample Letter.

If commercial content is shaded or otherwise visually separated from the noncommercial content that surrounds it, readers are more likely to appreciate that the content is commercial.

For search engines choosing to use visual cues, the FTC advised that the luminosity of font colors and other visual cues needed to improve. The FTC advised search engines to use more prominent shading than had previously been the standard. In particular, search engines were advised to consider how a chosen font color will be viewed on various devices, in various technological settings, and in various lighting conditions. The FTC also advised search engines to use a more prominent border “that distinctly sets off advertising from natural search results.” June 2013 Sample Letter. Of course, search engines can use both prominent shading and a prominent border to identify the sponsored result.

Further, the FTC advised search engines to use text labels (in addition to or in lieu of visual cues) to separate the sponsored results from natural search results. Search engines should use language that “explicitly and unambiguously conveys if a search result is advertising.” June 2013 Sample Letter. The text used to convey that message must be “large and visible enough for consumers to notice it.” June 2013 Sample Letter. (Similarly, if audible cues are used to make the disclosure, the aural disclosure must be loud enough and at an appropriate cadence for the listener to hear and comprehend it.) In addition to using large text, the

FTC recommended that the text be located either immediately before the advertisement or at the top left corner of an advertisement box. Consumer studies have shown that the right side of the screen receives less attention, so placement there is not a best practice.

As the technological media for delivering search results evolve, the basic principle of ensuring that disclosures of sponsored results are noticeable and understandable to consumers will remain.

Social Media

The FTC has also made recommendations about social media. In social media, some sponsored content may not need to be explicitly disclosed when users will know, on the basis of their customary use of the social media, that the content is sponsored. One example is a video sourced from a vendor that a user does not follow that shows up in that user's regular feed. Again, it is important for an advertiser and its counsel to have a good understanding of the target audience to craft effective disclosures.

When content is not obviously sponsored, however, a disclosure will need to be made. For instance, if a video is sponsored content, the publisher must ensure that if that video is posted by a user to social media, it will include a disclosure of the sponsorship. In the Business Guide, the FTC explains that "[a]dvertisers should ensure that the format of any link for posting in social media does not mislead consumers about its commercial nature." Business Guide, Pt II, Example 15.

The FTC has repeatedly advised that to distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an "advertisement" and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement.

Lord & Taylor ran afoul of its disclosure obligations after it launched an advertising campaign consisting of Lord & Taylor-branded social media posts and the use of a team of "influencers" to post on social media. Although the influencers were paid and Lord & Taylor reviewed their social posts, Lord & Taylor did not require the influencers to disclose that Lord & Taylor had paid them and exercised control over their content. The FTC believed that disclosure was required and filed a complaint against Lord &

Taylor in 2016, resulting in a settlement. See documents relating to *In re Lord & Taylor LLC*, available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter>.

The Lord & Taylor case serves as an important reminder that disclosure obligations in social media extend beyond posts that the advertiser makes directly. When posts are paid for by the advertiser, disclosure of that fact should be made.

Television

The FTC has been consistent that not all product placements need to be disclosed with a large "advertising" warning label. In some cases, this is true even though there is no discussion of the product or product category attributes or benefits or other objective claims.

To distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an "advertisement" and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement.

For example, in a letter dated February 10, 2005, addressed to Gary Ruskin, Executive Director, Commercial Alert (February 2005 Ruskin Letter) (available at https://www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf), the FTC stated that not every sponsored product placement without a disclosure is misleading, using as an example the American Idol judges with their ubiquitous Coke cups. According to the February 2005 Ruskin Letter,

Some products appear in programming because advertisers pay for such placement, while other products appear because of the creative judgment of the program's writers. We are not aware of any empirical data concerning whether consumers distinguish between these two uses of products in programming. . . . Assuming, however, that consumers are not aware when an advertiser has paid for a product to appear in programming, . . . it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act.

The FTC explained that "the rationale for disclosing that an advertiser paid for a product placement" is

generally absent when all that occurs is the product's placement on-screen without any claims about the product's attributes. February 2005 Ruskin Letter.

More recently, the Business Guide reached the same conclusion. The Business Guide includes an example involving product placement in a video game in which game characters wear a particular clothing brand or drink a beverage but do not make objective product claims. No disclosure is required. See Business Guide, Pt II, Example 10.

Because there is no per se rule exempting product placements from disclosure requirements, advertisers need to tread just as carefully in this arena as they do in others.

On the other hand, some types of product placements do trigger disclosure requirements. One of the first consent orders involving an infomercial was brought when BluBlockers aired a program-length advertisement in a format that allegedly looked like an investigative journalist report similar to *20/20*. The FTC required that the programs disclose that they are "paid advertisements" at least twice in any spot longer than 15 minutes, so that consumers understand that they are watching an advertisement and not an objective news program. See *In re JS&A Group, Inc.*, FTC Consent Order, Feb. 24, 1989 (available at https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-111/ftc_volume_decision_111_july_1988-june_1989pages_522_-_620.pdf).

In the Business Guide, the FTC provides another example in which an "expert" on a home improvement show appears in a video and uses a particular product but does not expressly recommend it. In that example the FTC recommends disclosure of the paid inclusion, because consumers may mistake the expert's use of the product as being based on his or her own independent evaluation. See Business Guide, Pt II, Example 13.

In some cases the risk of not disclosing will not be worth any perceived gains. Because there is no per se

rule exempting product placements from disclosure requirements, advertisers need to tread just as carefully in this arena as they do in others.

Repurposing

The Business Guide provides several examples involving the repurposing of content. In the first example, an advertiser wants to republish an independent favorable review. Because the advertiser did not solicit the review, the review itself does not need to be labeled as an "ad," but its placement by the advertiser in other third party media is an "ad" and should be disclosed. Business Guide, Pt II, Example 8.

Similarly, advertisers sometimes want content to appear in consumers' social media feeds. If the link appears in a manner that is not typical for an advertisement (e.g., if it looks like a user's friend has just posted a link to an article in a magazine), then the advertiser must be certain that the reposting conveys that the link will take the user to advertising content. The same advice holds true if the article can be found through nonpaid search engine results.

CONCLUSION

Native advertising is not new, although current modes of delivery may be. There is every reason to expect that media will continue to evolve, and how consumers receive advertising will evolve as well. Is virtual reality the new frontier for native advertising? What will the resulting disclosure guidelines be?

The basic rules that advertisers and their legal counsel have employed to deliver nonmisleading advertising to consumers still apply to native advertising. But the rules are also evolving and adapting to new media as we learn more about how consumers view native advertising and what they understand about disclosures. As the industry encounters the nuances and some of the particular challenges of evolving technology, it has FTC guidance on how to continue to provide advertising in native form that is not misleading. To continue to publish nonmisleading advertising, it is and will remain important for advertisers and their counsel to stay abreast of developments in content delivery technology and how native content is perceived by target audiences.