

# Highlights from the 2024 National Advertising Division Conference

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September 27, 2024

Last week, advertising and legal professionals, experts, regulators, and business representatives convened in New York for the annual National Advertising Division (NAD) Conference to consider hot topics, share perspectives on emerging issues, and discuss best practices for navigating a dynamic regulatory landscape. This year, trending topics included endorsements and reviews (especially in light of the [FTC's recently-issued rule on fake reviews](#)), dark patterns, claim substantiation, artificial intelligence, and FTC enforcement priorities. Keynote speakers included FTC Commissioner Melissa Holyoak and the Director of the FTC's Bureau of Consumer Protection, Samuel Levine, who addressed FTC positions and recent actions on a number of emerging issues in advertising law. In addition, [John Villafranco](#) led a conversation with BBB Executive Vice President Mary Engle addressing the impact of FTC guidance on NAD decisions.

We recap some of the most relevant insights below.

## **Contrasting Views on FTC Mission and Enforcement Priorities**

Earlier this week, we [summarized](#) Commissioner Holyoak's comments to NAD, which criticized the FTC for, in her view, overstepping its congressional authority and oversimplifying complicated data practices.

BCP Director Samuel Levine painted a very different picture of the agency's positions and accomplishments in his keynote. Levine lauded the Commission for its enforcement actions (calling it the "greatest public interest law firm in the world"), and specifically highlighted some recent FTC settlements relating to junk fees and subscriptions, telemarketing, multi-level marketing, rental practices, and artificial intelligence. Although Levine emphasized the FTC's proposed click-to-cancel rule and revised Green Guides, he did not provide an update on timing for either.

Holyoak's and Levine's contrasting views underscore that, despite [promises of unity](#) during the Republican Commissioners' confirmation hearings earlier this year, the Commission still appears to be divided among party lines, with the Republican Commissioners growing more vocal in their discontent.

## **Interplay Between FTC Guidance and NAD Decisions**

In a discussion with Executive Vice President Mary Engle, [John Villafranco](#) explored Engle's views on how the NAD should react to the FTC's increasingly more aggressive positions set out in recent guidance and proposed rules. This conversation was particularly timely in light of recent Supreme

Court decisions this summer that limit deference granted to administrative agencies.

The key questions explored in this panel were as follows:

- If the FTC's guides and proposed rules don't have the force of law, and FTC complaints do not allege violations of guides, but instead refer to Section 5, why should the NAD rely on agency guidance in concluding whether advertising is truthful and accurate?
- And if the FTC takes positions in guidance or in proposed rules that appear to be outside of its statutory authority and/or that federal courts have found to be unsupported, should NAD follow suit?

Engle's response centered around the need for consistency within the advertising space. She noted that unlike other countries, the U.S. does not have an advertising code to guide what marketers can and can't say or dictate the types of substantiation required for various claims. Instead, advertising common law has developed over the years through FTC enforcement actions. NAD generally seeks to apply the same interpretations as the FTC in order to create consistency between regulation and self-regulation.

That being said, it is important to keep in mind that guidance and proposed rules generally reflect the views of the *current* FTC staff and may not be shared by *future* staff. The panel discussed instances where the FTC has revised or rescinded prior guidance, causing upheaval in industries that had relied on those guidelines for many years. Should NAD simply follow any positions the FTC takes in such guidance documents, it may find itself needing to reverse course and reject its own precedent should the agency take a different view of the issue in the future.

### **Endorsements and Reviews**

Endorsements and reviews continue to be a hot topic for the NAD and FTC. This is not surprising, given that the FTC announced its final rule on "fake reviews" last month, which we wrote about [here](#). Highlights from this year's influencer marketing panel are included below.

- Speakers stressed that while built-in platform disclosure tools, such as those on Instagram, have come a long way in terms of providing clear and conspicuous disclosures, these disclosures often disappear when the content is "shared" to other platforms—meaning companies and their influencers should not rely solely on these built-in tools to make required disclosures. A [recent NAD decision](#) highlights this important takeaway.
- Panelists also emphasized that disclosures indicating a post is sponsored, but that do not make clear who sponsored the post, are likely to be ineffective in the eyes of regulators. In other words, companies and influencers should avoid using tags like #sponsored without making clear what brand is doing the sponsoring. NAD similarly expressed this position in its [recent Cariuma decision](#).
- Lastly, panelists remarked that paid content often requires a disclosure, even if the brand shares the content on its own social media feed. Brands should think twice before removing or excluding disclosures from influencer posts that appear on the brand's own channels.

### **Testing and Surveys**

As expected, many panels discussed claim substantiation, including what types of tests companies should rely on in substantiating their claims, and whether and when to engage an expert or to

commission consumer perception surveys. These discussions provided interesting insights into NAD attorneys' views on best practices within the NAD forum, including that practitioners should:

- Submit the majority of their supporting evidence in their first submission to NAD—not in their reply—as it sends a message to NAD about the strength of the party's evidence.
- Consider submitting expert reports when needed and consider utilizing experts in emerging and specialized areas, such as accounting.
- In the absence of an industry standard, make sure that the company is still providing reliable testing along with sufficient information about its methodology.

## **Puffery**

The line between puffery and deceptive advertising continues to be a subject of much discussion among practitioners and marketing professionals. The tension, astutely identified in a panel dedicated exclusively to this topic, is that on the one hand, advertisers argue puffery is not illegal because no reasonable consumer would believe it. In other words, it doesn't work. On the other hand, advertisers use puffery because (they believe) it is effective in convincing consumers to purchase products. In other words, it works. Panelists reviewed a number of NAD decisions relating to puffery that highlighted the case-specific nature of a puffery analysis. A few takeaways include:

- Whether a claim is puffery often hinges on whether the claim is presented alongside measurable attributes. For example, in cases involving "ultimate" claims, such as the "ultimate energy bar" claim at issue in *CLIF Energy Bars*, NAD has determined that a claim is not puffery when it is presented in the context of objectively measurable attributes—such as Clif's description that its energy bar contains "an optimal blend of protein, fat, and carbs."
- In cases involving "best" claims, like "best tasting," NAD has frequently found "world's best" claims more likely to be puffery than mere "best" claims.

## **Dark Patterns**

Dark patterns continue to be a priority for the FTC. While much of the panel's discussion mirrored the FTC's guidance, we offer some practice pointers to help you steer clear of deceptive practices:

- When conducting A/B testing, companies should optimize not only for conversions, but also for consumer experience. This is particularly important given the uptick in FTC settlements requiring companies to preserve their A/B testing, as Levine described in his [remarks](#), as well as numerous investigation requests from the FTC involving companies' A/B testing results in recent years.
- Explain material terms, ensure these terms are clear and conspicuous, and consider how the layout will appear on tablets, mobile devices, and computer screens.
- Monitor and consider chargebacks and consumer complaints, which could be an early indicator of consumer confusion.
- Assess whether default settings (if any) are beneficial to the consumer or the company.
- Assess cancellation methods through the lens of the consumer, making sure to allow cancellation through the same method as sign-up and evaluating the time and difficulty involved with the cancellation process.

## **Artificial Intelligence**

While panelists discussed the ethical implications of artificial intelligence, Commissioner Holyoak took a different approach, explaining her view that the FTC needs to learn more about AI through 6(b) studies, stakeholder dialogue, and targeted enforcement rather than assuming a few, highly visible problems are indicative of larger scale problems. Holyoak counseled caution and information gathering in order to make sound decisions that will not stifle the innovation of AI at its outset.