

Advertising + Marketing

Insights from the 2023 NAD Conference: ESG, Dark Patterns, AI & More

The Bottom Line

- The 2023 NAD Conference highlighted regulatory and self-regulatory priorities – including ESG claims, digital dark patterns, consumer review practices and AI use.
- Particularly with respect to evolving legal issues, companies can look to NAD guidance and precedent to fill gaps left by regulators.

The recent National Advertising Division (NAD) annual conference focused on the latest developments in advertising law, including issues like environmental, social and governance claims, dark patterns, consumer review practices, artificial intelligence (AI) and much more. As the self-regulatory adjudicative body for the advertising industry, NAD sets valuable precedent and its priorities generally reflect those of regulatory agencies, like the FTC. We attended this important and informative event and have some key insights to share.

NAD 2023 Overview

The telecommunications industry dominated NAD last year, with 37% of NAD case decisions concerning this industry. Other major industries that were the subject of NAD decisions included food & beverage (13%), drugs & health (10%), websites/webservices (8%), cosmetics/toiletries (6%), household products (6%) and dietary supplements (4%).

Over the last year, NAD reached instructive decisions in some of the most frequently challenged areas, including:

- **Misleading Stereotyping** – In *Magic Tavern (Project Makeover)*, NAD found that advertising for a game depicted harmful negative gender stereotypes about a woman's appearance (as it conveyed a misleading message that, to be treated fairly, women must present themselves in a specific, feminine way). Note that the advertising did not reflect actual gameplay, and NAD noted that negative stereotypes appeared to be used only for shock value and to attract attention to the game.

- **#1 Claims** – In *CreditAssociates, LLC (Advertising by CreditAssociates)*, NAD found that a “#1” claim was misleading when it was based on consumer reviews that were not representative of the general opinion of relevant consumers across the United States.
- **Environmental Benefit Claims** – In *JBS USA Holdings, Inc. (Net Zero 2040)* and *American Beverage Association (Every Bottle Back Initiative)*, the National Advertising Review Board (NARB) agreed with NAD that aspirational environmental benefit claims required modification.

In *JBS USA Holdings, Inc. (Net Zero 2040)*, NARB agreed with NAD that the advertiser’s efforts toward achieving a “net zero” claim were only exploratory and did not constitute a documented plan that was evaluated and found to have a reasonable expectation of achieving the stated goal. In *American Beverage Association (Every Bottle Back Initiative)*, NARB agreed with NAD that the advertiser overstated the extent to which recycled materials were currently used in products.

In *Dyper, Inc. (Dyper Baby Wipes & Diapers)*, NAD applied the FTC’s Green Guides and recommended that a “biodegradable” claim be qualified to make clear the circumstances in which the product components would actually degrade.

- **Digital Dark Patterns** – In both *Pier 1 Imports Online, Inc. (Pier 1 Rewards)* and *Blue Apron, LLC (Advertising for Blue Apron)*, NAD referenced the FTC’s [“Bringing Dark Patterns To Light”](#) report, which discussed user interface design practices that manipulate users into making choices they would not otherwise have made and that may cause harm.

In *Pier 1 Imports Online, Inc. (Pier 1 Rewards)*, NAD found that failing to disclose the material terms of a subscription-based customer loyalty program constituted a dark pattern when the subscription was automatically added to a consumer’s cart (and required that consumers affirmatively uncheck a prechecked-box to remove the membership).

In *Blue Apron, LLC (Advertising for Blue Apron)*, NAD determined that a “canceling meals is easy” claim was supported, as consumers could cancel the subscription-based service through the same medium as signup (here, online).

- **Puffery** – In *Molson Coors Beverage Company (Miller Lite)*, NARB agreed with NAD that the claim “light beer shouldn’t taste like water. It should taste like beer” was not puffery in the context of two challenged advertisements, given the use of compare-and-contrast visuals and voiceover placement of the challenged claim.

- **FDA Regulated Products** - While NAD does not enforce FDA regulations, it often considers FDA guidance and seeks to harmonize its decisions with relevant regulatory guidance. In *Ole Mexican Foods Inc. (La Banderita and Xtreme Wellness Tortillas)*, NAD found that a nutritional content claim was not misleading when the variance between claimed and actual nutrient levels fell within the variance permitted by the FDA. In *Coca-Cola Company (Powerade)*, NAD determined that the significance of a nutrient difference was overstated, in part because of FDA guidance on nutrient claims.

FTC Priorities

At the conference, FTC Bureau of Consumer Protection Director Sam Levine outlined the agency's priorities - and cautioned advertisers that the FTC will continue to actively bring enforcement actions and engage in rulemaking. In fact, the number of actions brought by the Bureau of Consumer Protection increased by around 70% between 2021 and 2022 and is expected to increase again this year.

Levine highlighted three enforcement priorities for the FTC:

1. Junk fees and deceptive pricing (where actual prices are not disclosed upfront or the consumer is charged unauthorized fees)
2. Dark patterns (such as countdown clocks or designing consent buttons to look visually more attractive)
3. Emerging forms of fraud, such as generative AI

With respect to the first two priorities, Levine highlighted several enforcement actions and rulemaking efforts - including the FTC's proposed motor vehicle dealers trade regulation rule (designed to ban junk fees and bait-and-switch advertising tactics) and its proposed click-to-cancel rule (intended to mandate simple cancellation and ensure proper consent for charges).

Regarding AI, Levine highlighted the need for fair, open and competitive markets, as well as FTC rules to help address potential harms from AI. Moreover, Levine noted that the use of AI to defraud the public could violate existing rules, such as the FTC Act and the Telemarketing Sales Rule.

While the [U.S. Supreme Court's decision in AMG Capital Management](#) has made it more difficult for the FTC to obtain monetary penalties, Levine made it clear that the FTC is using - and will continue to use - its authority under rules such as the Telemarketing Sales Rule and Restore Online Shopper's Confidence Act, as well as through its Penalty Offense Authority, to obtain monetary penalties and redress for consumers.

Focus on Consumer Reviews, ESG Claims and AI

With NAD focusing on consumer review practices, environmental, social, and governance (ESG) claims and AI, panels at the conference discussed the overlap between NAD and FTC priorities. These conversations were set against the backdrop of the FTC's revised [Endorsement Guides](#) and proposed rule to prohibit deceptive review and endorsement practices, as well as the FTC's ongoing review and potential revisions to the Green Guides (which are likely to be released in 2024, at the earliest) and recent AI claims guidance.

We expect the focus on these areas to only increase, and marketers should ensure that they have reviewed their advertising practices to avoid making misleading and deceptive claims. In particular:

- Advertisers should review their consumer review practices to ensure that they are not engaging in deceptive practices, like using fake reviews, suppressing honest negative reviews or paying for positive reviews.
- Companies should ensure that their ESG claims - including "sustainable," "recyclable" and "carbon neutral/net zero" claims - are supported and narrowly tailored. Particularly as companies may have to make mandatory ESG disclosures, it is critical to ensure that advertising claims align with ESG disclosures.
- AI continues to be at the forefront for both the FTC and the Biden administration, which recently issued a White House Blueprint for an AI Bill of Rights to guide the design, use and deployment of AI systems. Companies should be mindful that AI use implicates a number of potential legal issues - including intellectual property and publicity/privacy rights, truth-in-advertising and transparency issues, as well as discrimination and bias issues.

For More Information

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