

# 2022 National Advertising Division (“NAD”) Conference and Federal Regulatory Enforcement Priorities

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Last week, the National Advertising Division of BBB National Programs held its annual conference to address recent advertising law developments. Debevoise partner David H. Bernstein was on the planning committee for the conference and spoke about the intersection of the NAD, Federal Trade Commission (the “FTC”), federal court and state court jurisdiction over advertising disputes. Panel discussions, which included representatives from the FTC, covered—among other things—claim substantiation, influencers and dark patterns, truth-in advertising in the metaverse, advertising claims concerning NFTs (non-fungible tokens) and cryptocurrency, and sustainability claims. The keynote speech was given by FTC Commissioner Alvaro Bedoya. Separately, the Consumer Financial Protection Bureau (the “CFPB”) recently announced its intent to enforce penalties against violations of federal consumer financial law against digital marketers that deliver targeted content and advertising to consumers on behalf of financial services companies. In this Debevoise Update, we recap key issues raised during the annual conference and the CFPB’s announcement.

**NAD Trends and Developments.** In the last 12 months, NAD reviewed approximately 102 cases. Of those, telecom companies were involved in the largest percentage of challenges (about one-third of the cases). Other industries or product categories with substantial activity at NAD included Drug and Health (14 cases), Food and Beverage (12 cases), Dietary Supplements (10 cases) and Household Products (10 cases). A significant percentage of cases concerned social media advertising, “#1” claims, claims touting third-party awards and certifications, alleged puffery claims, and co-branding claims.

Disclosure sufficiency remains a key focus for NAD: a large portion of their cases concerned disclosures that were insufficiently clear and conspicuous—either for being too small, hard to read, or appearing for an insufficient amount of time. NAD likewise is focused on the proliferation of online rankings and reviews that fail to reflect honest, representative reactions by consumers.

Companies are taking advantage of the new expedited procedure for “Single Well-Defined Issue Fast Track” (SWIFT) disputes (which aims to complete a challenge within 20 business days). NAD issued 13 SWIFT decisions in the last twelve months and

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is evaluating modifications to encourage greater use of SWIFT procedures, including potentially allowing more than one issue to be decided at a time and allowing challenges to implied claims in addition to express claims.

Notably, approximately one-quarter of NADs cases in the last year were compliance challenges (25 cases) and a large portion of these concerned improper disclosures. The significant number of compliance challenges suggests that challengers must be vigilant, even after obtaining a favorable NAD decision, to ensure the advertiser is complying with its obligations.

Somewhat surprisingly, in the last year, NAD referred only two cases to the FTC for enforcement proceedings (which NAD typically does when an advertiser refuses to participate or comply with NAD's recommendations). This is down from eight referrals the year before, suggesting that parties are continuing to engage in the self-regulatory process for resolving advertising disputes and that NAD remains an effective and efficient forum.

Making a bit of news, NAD announced that it will begin monitoring for harmful and misleading stereotyping in national advertising. NAD's announcement of this new policy against misleading stereotyping can be found [here](#). NAD's review will be limited to advertising—not other forms of related stereotyping such as biased products or expression. And not all stereotyping in advertising is subject to review, only that which is harmful and misleading. A number of attendees at the meeting expressed concern with how this new basis for challenging ads can be squared with the First Amendment and with NAD's traditional focus only on truth and accuracy in advertising. It remains to be seen how this new program will be implemented in practice and whether the FTC will be prepared to support these challenges with enforcement proceedings should advertisers decline to comply with NAD's recommendations.

**Lessons from the FTC.** Four panel discussions with FTC officials (one moderated by Debevoise's David H. Bernstein) provided valuable insight into FTC's priorities for the upcoming year and its approaches to advertising challenges. FTC's Serena Viswanathan (Associate Director, Division of Advertising Practices) indicated that her division is currently prioritizing endorsements and fake customer reviews, online and digital advertising, and health and wellness claims. To that end, she indicated that the FTC is working to update its ".com" Disclosure Guidance next year in an effort to address current ways advertisers interact with consumers. The FTC is also interested in the role online platforms play in combatting false and misleading claims, including assessing whether large platforms with the ability to prevent improper endorsement claims or fake reviews should be subject to legal exposure. Businesses soliciting reviews must also remember that FTC guidance requires reviews to be counted reliably, solicited neutrally, and that incentives for reviews be adequately disclosed.

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Samuel Levine (Director, Bureau of Consumer Protection, Federal Trade Commission) [noted](#) that the FTC is paying particularly close attention to commercial surveillance, sensitive data collection and use, and targeted marketing. Commercial surveillance and [dark patterns](#) (practices that subvert or impair consumers' autonomy, decision-making or choice, such as "bait-and-switch techniques, treating consumer silence as consent, and practices that make cancelling a product or service difficult) are top priorities for the FTC. Mr. Levine reiterated that the Commission intends to focus on larger players in the industry to stimulate industry-wide changes in commercial practices. Additionally, the proliferation of "greenwashing" and unsubstantiated environmental claims (which we previously discussed [here](#)) has caught the FTC's attention in recent years and remains a focus. Updates to the FTC's Green Guides are also expected in 2023.

Ms. Viswanathan and Mr. Levine also discussed the FTC's intention to use its statutory authority to seek settlements and monetary relief, even despite the United States [Supreme Court's ruling in AMG Capital Management, LLC v. FTC](#), which held that Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), does not grant the FTC authority to obtain [monetary remedies](#) in federal court. Mr. Levine announced a change in FTC practice: In recent years, the FTC focused more on injunctive relief rather than monetary relief when challenging national advertisers; now, the FTC intends to seek monetary remedies as well in order to discourage unfair and deceptive advertising practices. The FTC has recently increased its use of Notice of Penalty Offense letters (pursuant to 15 U.S.C. §45(m)(1)(B)) and is increasingly looking to utilize § 19 of the FTC Act, 15 U.S.C. § 57b, which authorizes monetary relief for rule violations and violations of Section 5 of the FTC Act that are proven to be "dishonest or fraudulent" as a basis for monetary relief, where possible. While these paths to monetary relief are slower and more challenging than pre-AMG, the FTC sees monetary relief as a crucial component of protecting consumers, particularly with advertising in emerging technologies (such as the metaverse).

In his remarks, Commissioner Bedoya emphasized that consumer data privacy is of prime importance. The FTC is not merely concerned with the collection and storage of such data, but its use, secondary use and commercialization. He cited the [FTC's recent suit against Kochava](#) for its sale of geolocation data as an example of this increased effort to protect sensitive information. Commissioner Bedoya identified a few additional priorities for the FTC's Notice of Proposed Rulemaking: (1) concerns about the use of algorithmic fairness and AI and, in particular, concerns that social media platforms are using addictive algorithms to keep teens online, which FTC believes poses risks to physical and mental health; (2) fraud occurring in languages other than in English; and (3) the use and handling of geolocation data. We discussed the FTC's recent Notice of Proposed Rulemaking in a four-part series available at parts [One](#), [Two](#), and [Three](#), and a forthcoming four.

**CFPB Asserts Jurisdiction over Digital Marketers.** Last month, the CFPB issued an [interpretive rule](#) to assert that digital marketers that collect and analyze consumer data to deliver targeted advertisements to consumers on behalf of financial services companies may be held liable for violations of federal consumer financial law, including the prohibition in the Consumer Financial Protection Act of 2010 (the “CFPA”) on unfair, deceptive, or abusive acts or practices. Specifically, by being involved in developing content strategy, described by the interpretive rule as “identifying or selecting prospective customers and/or selecting or placing content to affect consumer engagement, including purchasing or adoption behavior,” the CFPB contends that digital marketers may act as “service providers” within the meaning of the CFPA by providing a “material service” to financial services companies in connection with the offering or providing of a consumer financial product or service, *see* 12 U.S.C. § 5481(26)(A), and, therefore, may be subject to the full extent of the CFPB’s enforcement authority.

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If you have any questions about these regulatory and NAD developments, or about advertising law more generally, please do not hesitate to let us know.

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