

The Future of Ad Law: A Wrap Up from the 2021 NAD Conference

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At the end of September and beginning of October we spent some extra screen time attending the annual NAD Conference that once again was held virtually in New York. We heard from a number of great speakers, including the Hon. Rebecca Kelly Slaughter, Commissioner at the Federal Trade Commission, Mary Engel, EVP at BBB National

Programs, Katherine Armstrong, the Deputy Director of NAD and in-house counsel from The Clorox Company, Campbell Soup Company and T-Mobile USA, Inc. If you could not spare the screen time, don't worry – here's a quick wrap-up of the highlights:

Ad Claims for Political, Diversity and other Social Issues – Brands jumping in on social movements is nothing new, but in recent years and especially in the past 18 months, we've seen a rise in brands posting online and otherwise showing support for various social issues. In fact, a brand staying silent on certain issues can speak volumes these days. So for us advertising attorneys, the question becomes do you need to substantiate social media posts on a brand site that aren't even selling products, but are showing support for a social movement? One example given was a simple Instagram post with the copy STOP ASIAN HATE. The panelists did a great job moving through a series of questions to assess if the brand in question actually stands with the Asian community – is it appropriate for the company to enter this conversation? What has the company done for the Asian community to date? Would a single monetary donation be enough? Should we look at the history of the company's philanthropy? What about diversity hiring and retention practices? All great questions to ask if you are asked to review such a post for your brand. Another tip, if you are joining the conversation, make sure you prepare reactive messaging ahead of time in case questions are raised about

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the position taken by the company. A brand's consumers may well put the brand to the test by asking what they have done and/or looking at the company's history of actions or inaction.

Consumer Reviews – In the past year, both the FTC and NAD have spent time and resources on ad claims related to consumer reviews. For example, in late 2020, the FTC settled with Sunday Riley, a cosmetics company, over allegations that its CEO directed employees to create fake profiles and post reviews for the company's products on Sephora. While no monetary fines were imposed, the company agreed to twenty years of on-demand compliance monitoring. Earlier this year, NAD dealt with two consumer review cases addressing the quantification of reviews (e.g., "over 110,000 5-star product review!") – the takeaway is to make sure you count properly and don't double count. The panel also gave some tips about addressing unsubstantiated claims in reviews – consider responding on the review website, if that's possible. Just make sure the response contains only substantiated statements.

Influencers – This would not be an NAD conference if there wasn't a lively discussion about influencers. In terms of new guidelines and rules, NAD released its own tips for influencer marketing earlier this year. Then, Instagram and TikTok each released branded content rules for their own platforms. Social media platforms are clearly trying to evolve past the FTC's initial take that built-in tools are not an effective disclosure. Whether the FTC will agree in the next set of its guidelines is TBD. In any case, the guiding principles of influencer marketing remain: Truth. Substantiation. Disclosure.

Health Claims – Health and safety has been a key focus for everyone since the pandemic started. The FTC and NAD are no different and in fact, both have put more resources into stopping and preventing unfair and deceptive health claims. This past year the FTC sent more than 400 warning letters for COVID-related claims. But not everything was COVID-related. We saw enforcement actions for CBD products, supplements and, last month, the FTC announced a set of cease and desist (as opposed to warning) letters that it issued along with the FDA, directed to companies making diabetic treatment claims without the necessary scientific substantiation. These letters were a bit unique in that they invoked a seldom-used authority of the FTC Act to impose civil penalties for future violations. This is an example of the FTC putting a bit more teeth behind its letters.

Until next year...