**Podcast Transcript**

# AD Nauseam: We Give This Podcast 5 Stars – A Closer Look at the FTC Rule on Consumer Reviews and Testimonials

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Rubenking: Thank you for joining us for another episode of BakerHosts' AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randall Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel talk about the FTC's newly finalized rule on the use of consumer reviews and testimonials. With that, welcome to AD Nauseum, and let's turn it over to Amy and Daniel.

Kaufman: Welcome back to AD Nauseum, and thank you so much for joining us. There are a few things I hate in life. I hate crowds, noise, people. But another thing I really hate is just having to say I told you so.

Mudge: Oh, seriously, Daniel? You love saying I told you so more than almost anybody I know.

Kaufman: Okay, can't really argue with that. Okay, but maybe I'm just cursed with always being right, Amy. Perhaps that is the case.

Mudge: That must be it. That must be it, D.

Kaufman: But okay. This is an easy I told you so, though. We've been telling you for a while that all those proposed rules the FTC has been putting out there left and right in the last few years, they were going to start getting issued in final form, and we knew it was going to happen this year. And we had another one drop in mid-August, the rule on consumer reviews and testimonials.

Mudge: So, Daniel, we're going to spend today reviewing this rule and what it means for advertisers. But can you first fill us in on why we need one? We've had the guides for use of testimonials and advertising, I think, since I've been practicing. They've been around for decades, and they were just updated last year. So, is this rule new news, or is this just doubling down in some duplication?

Kaufman: Rules are really cool when you're an enforcer. So, there, and there is a huge difference. You don't go into court and say, hey, this company violated our guides. That is not a legal violation. You can violate the FTC Act, and the guides are, well, they're no longer really relevant to a court's analysis, but, based on *Loper Bright*. But when you have a rule, a specific rule, you can go into court and say they didn't do X, X is required by the rule. They have to pay now civil penalties.

It tends to be an easier case for the FTC. You've got a specific rule that has said the company can't do X or has to do Y, and if you violate that, it makes it much easier for the agency to go into court and seek civil penalties. So, look, the guidance and all of that is incredibly important to lay groundwork for what the expectations are. But once you have that rule in place, it just makes it a lot easier for the agency to go after companies and to expedite litigation.

Mudge: Well, so, Daniel, not everything in the business guides is covered by the rule. So, it is not just a me too to say, hey, all this stuff we've been doing for a long time is now a rule. Is there a reason why some things would find its way into a rule and some things would still just be talked about in the business guidance?

Kaufman: It is a really good question. And we've had, when I was at the agency, at times, some people would ponder, well, can't you just take the guides and turn them into a rule? And the reality is there are real requirements about what a rule can and cannot be, and they have to be specific enough, and they have to have clarity, and they have to be based on things that are prevalent in the marketplace. So, you can do a business guidance piece about anything and that is fine, but once you start putting it into a rule, in a rule that is going to potentially have a company on the hook for 50-plus thousand dollars per violation, there are expectations and requirements by the court, by the FTC Act, as to what those rules look like, how specific they have to be. So, guidance is great for opining and thinking and giving some analysis and thought, but rules are a vastly different creature when it comes to the expectations about what is in them.

Mudge: And I've always said that the testimonial endorsement guides, and particularly the FAQs that the staff updates, are really good government because the staff can update those FAQs as there are new and emerging practices. Like a new social media platform that they might want to opine on, how disclosures can and can't be used. So, they are nimble in this way. But I guess you're right. With the rule, I think, don't rules have to include conduct that is also prevalent in the marketplace, in addition to being unfair or deceptive?

Kaufman: Yes, certainly the agency can't just come up with theoretical situations. Well, this conduct might possibly be deceptive, therefore we'll issue a preventative rule. You can't do that. There have to be a record of this being prevalent and problematic in the marketplace.

Mudge: Now, didn't the FTC fix this whole problem by sending out those Notice of Penalty Offense letters to all the major national advertisers in the U.S.? I mean, they said, hey, we're going to get penalties now because we sent you these letters.

Kaufman: Yeah, that didn't quite do the trick, to put it mildly. So, it is really interesting. Those letters the FTC sent out, and I think those were in 2021, they had a real impact. I mean, you and I remember. I'd just got into the firm…

Mudge: No, you, it was before you got here. It was right before you got here, I think, that some of them came out.

Kaufman: Yeah. No, I think the first round came out literally the week before I got here.

Mudge: Well, you were the boss of those. You approved those letters then. Okay.

Kaufman: No, actually, no. Sam Levine had taken over by then. But we can talk more about that another day. They had a real impact on the market, whether, again, we can talk about the legal enforceability. Those letters caused companies to take notice and to take a close look at what their practices were. So, on one level, certainly those letters were very successful. But as a legal matter, the FTC has authority under those Notice of Penalty Offense letters, slightly odd authority, and whether and how they can use it is definitely open to debate. It is not like there is a robust amount of case law on those Notice letters.

Rules are very different. They're a lot easier. They're a lot cleaner. The Notice of Penalty Offense letters are a bit of more of a backstop, I would say. But again, if you're looking at order of preference, you'd far rather have rule and be able to rely on that rather than those Notice of Penalty letters.

Mudge: Our last podcast we talked about this, that we're seeing challenges to rules, particularly after the Supreme Court's *Loper Bright* decision. And there are certainly lots of District Court cases right now challenging the FTC's also pretty new noncompete rule. Do you think that we're going to see similar rushes to the courthouse for challenges to this rule?

Kaufman: That is really a good question. I feel like there are so many rules coming out of the FTC that folks are being a little selective about which rules they challenge. For example, the imposter rule. That was finalized a few months ago. As far as I know, nobody has challenged it. It is a rule that was pretty consistent with the FTC Act. With deception, you can't pretend to be a company you're not, and I don't think anyone was really out there saying that that rule is deeply problematic and we're going to challenge it.

Now, of course if they amend the rule as they're considering, to make it broader, that is a whole different thing. And I think this rule might be a little more similar to the imposter rule in terms of it is sticking pretty closely to well-established deception law and is focused on conduct that you and I know the good players are not doing. So, you have to have a reason to challenge a law. Now there are other rules coming down the pike that absolutely will be challenged, the negative option rule, the junk fees rule. Those will be challenged probably on day one. I think there is a little more ambiguity as to whether this rule is going to be challenged.

Mudge: One of the things I found really interesting, and we're going to talk about this, is there were some pretty significant changes between the proposed rule and this rule. And I'm not sure if *Loper Bright* had the FTC getting a little bit more conservative, but I was actually really excited about something. I was talking to one of the staff attorneys who was the primary drafter of this and one of the poor souls that had to sift through all the comments, although I think this one only got 100, which compared to some of these other rules is a drop in the bucket. But you still, the staff has to read all of these and publish in the Federal Register what it thought about the different comments.

And Michael Ostheimer, when I reached out to him to say, hey, you taking a vacation now? This looked like a lot of work. And he actually said, he said the industry comments were really, really helpful to the FTC's thinking in terms of how they shape the final rule and that there were some pretty significant changes to some things that industry flagged as ambiguous or potentially overbroad. I think that is good government. But this rule was voted in 5-0, and I know you have been waiting for some scandalous dissents by our new Republican commissioners. Did it surprise you that this one seemed to sail through?

Kaufman: I mean, initially it did because I've just been expecting, there is such a concern by Republicans about the breadth of rulemaking at the FTC. But they were thoughtful about this, and they looked at the rule. They didn't issue any statements which I thought was interesting, or maybe they'll have some that are issued eventually. But I think they really focused on, let me look at this specific rule and see how I react to it, how consistent it is with the grant of authority that Congress gave us. And I do think this is a case where this rule seems consistent with the authority that the FTC gave them under Section 18 of the FTC Act. So yeah, no, I'm looking forward to some spicy dissents. Absolutely. And we're seeing them on the competition side left and right, certainly, and on the noncompete rule.

And there will be final rules that come out the door where we're going to have spicy dissents that we can talk about and something to look forward to, but I'm really glad to hear what you said about Mike Ostheimer and the importance of industry complaints, because I remember looking at some of the industry comments and looking at some of them in mind, and they were really thoughtful. They were providing really helpful information about the impact that fake reviews have on the market, have on companies, and all the efforts that are underway by all good companies to root these things out. It is difficult, and there's huge efforts underway to address this issue. So, again, that goes to my thinking, this is less likely to be challenged than other rules. Then again, that said, if the FTC is investigating your company and they're concerned about it, hey, go to federal Court of Appeals and challenge the rule.

Mudge: Yeah. Well, I think even before that, though, I think this was a good lesson in when a proposed rule comes out and there is this notice and comment period, and companies are like, we have a day job, should we get involved in this? Those, I think it is important that folks hear that those comments really are read. And if they're, particularly, if there's areas where there is ambiguity, get right in there and let the FTC know. You might not prevail, but they're certainly going to consider it. But hey, before we dive into the substance today, let's talk about our own use of testimonials and reviews. Are there products that you will never buy without consulting consumer reviews? And similarly, are there testimonials by a celebrity or an influencer that you will always rely on, that can maybe get you to buy stuff you didn't think you needed?

Kaufman: I am totally a creature of habit when it comes to, like I'm using the same toothpaste I used when I was a kid, so…

Mudge: Okay.

Kaufman: That would be brand loyal. Takes a huge amount to get me to switch, so I can't think of anyone who, look, if Stevie Nicks started hawking some new product, I would certainly buy it. But I think most of the people I follow just aren't hawking products. But there are products and services where for me reviews are essential, and I'm going to be a little bit specific. Vacuum cleaners. Anytime I'm buying a vacuum cleaner, I obsessively…

Mudge: You are a tidy, tidy person, Daniel, and we know you've just moved, bought a new car. I bet that vacuum cleaner is getting a lot of play.

Kaufman: So, I aspire to be a tidy, tidy person. We'll say that.

Mudge: Well, you're tidier than me. We can agree on that.

Kaufman: Anytime when I'm out of town somewhere, I'm looking for restaurants, reviews are incredibly important to me. If I'm hiring contractors, plumbers, painters, anything like that, I read reviews quite a lot. Sometimes it doesn't have to be a big purchase, just something where I'm curious. What do people think about it? It is rare that I'm not looking at reviews. How about you?

Mudge: It is true. I mean the pattern of behavior now that reviews are so ubiquitous, I almost can't imagine buying anything without looking at least at the first couple or maybe at the average star ratings. I remember in the old days, I did hunker down with Consumer Reports. It would only really be before I'd make a really big purchase, like a refrigerator, a new washer-dryer, usually something for the household, that I'd take a look at those reviews and evaluations. But they really are, they're everywhere today.

For testimonials, I have to say, I don't think any of the current influencers on social media have sway over me the way those old late-night infomercials did. I loved Richard Simmons, RIP. I bought Sweatin' to the Oldies from the television. I bought the Deal-a-Meal diet plan that I was definitely invested in. I don't think I ever opened it, but I purchased it. I do Barefoot Contessa. When she tells you what kind of olive oil to use or what kind of tomatoes, I will listen to her. I think she is a trustworthy soul.

Kaufman: If we did Sweatin' to the Oldies now, it would have music by Depeche Mode and Culture Club in it.

Okay, let's dive in. Okay, so, Amy, certainly a lot of talk coming out of the agency about material connection disclosures and what the standard is for and what it means to be clear and conspicuous. Do we get any clarity from the rule here?

Mudge: Well, yes and no. Okay, the rule gives some flexibility, but it definitely doubles down on the standard that disclosures should be unavoidable and difficult to miss. In the commentary that was published in the Federal Register, I think there were some great quotes, and the staff said, look, unavoidable means that a consumer cannot avoid a disclosure. And they gave some examples, such as by failing to click on a link or failing to scroll. So, to the extent that people were thinking unavoidable meant smack you over the head, maybe not. It means you don't have to hunt and peck too deep.

And then they said that easily noticeable, this was the come on standard. This is, it is simple. It is an objective standard that is evaluated from the perspective of the reasonable consumer. It is something marketers should know, how to get people to notice things, and they really stuck by that new iteration. So, unavoidable and easily noticeable are the new clear and conspicuous.

Now the original draft rule would have required, and this is, I should say it is a little odd. It is in the context specifically of employee and company insider disclosures, alright. But they said the original draft rule would have required that any needed material connection disclosure be in writing and in audio. The final rule backed away from that a bit and said, look. The disclosure's got to be in the same medium as the claim. So, if the testimonial is in writing, the material connection disclaimer should be in writing. If the endorsement is spoken, the disclaimer should be spoken. The commentary of the rule again says this is only applicable for these employee-company insider testimonials. But it is hard to see in practice why the FTC would set up a different standard for other incentivized reviews. So, I really think this is required reading and something that is the FTC's current articulation of what they expect here. But, Daniel, think we should probe what else has changed from the initial rule and what jumped out at you?

Kaufman: So, probably the biggest change was the removal of, you may recall, the prohibition on review hijacking, and I thought this was particularly significant. I don't know if you remember, Amy, at the NAD conference last year when Serena Viswanathan of the FTC spoke about the proposal, tons of questions from the audience on this specific review hijacking thing. And you may remember this came about, there was a case the FTC brought against a diet sup company that had included good reviews on online third-party platforms for one product that appeared to be applicable to other products that were not yet that favorably reviewed. So, it was an interesting issue. There was one case, staff here in the Federal Register Notice said they've gotten comments that they just didn't have time to resolve. So, they set this aside.

I think part of the issue is maybe this is not really prevalent in the market. So, it would have been a weakness for the FTC, but also, and this goes to more of the wonky FTC rulemaking. Once there are material questions of fact, and there are a lot of questions of fact about this review hijacking, like what does it mean and in what situation. Once there is that material question of fact, it opens up a broader range of inquiry that the FTC has to do, and that would have slowed things down tremendously. So, although they've indicated that they didn't have time to resolve it, it is not that they didn't have time to resolve it. It would have required a much broader inquiry to the whole rulemaking, so a lot easier for them to just put that aside and move forward on it.

Mudge: Move it. Get it out. Get it, yeah. Get it out the door. And maybe it was smart. Maybe this provision would have been a weakness that could have had the whole rule invalidated if challenged.

Kaufman: That probably would have been challenged if they kept that in. I actually think because it would have been controversial, there would have been enough concern in industry about it that that probably would have been challenged. But, Amy, let's get into what is covered and what this really means for advertisers.

Mudge: Alright, so, first thing is that, well, I said this a minute ago. Many of these prohibitions focus on any sort of employee reviews, okay, where the employment connection is not disclosed and separate and apart from general influencer disclosures. There was talk about company insider posts or posts that a company encourages or requires relatives or investors to make, or maybe even ad agency employees. So, the rule only prohibits encouraging or requiring these types of reviews without a material connection disclosure. If the company knew or should have known that employees and friends and family were reviewing company products or making recommendations without a material connection disclosure. But there is clear language and an expectation that companies will give their employees direction on how to disclose their connection to the company in inappropriate cases.

Kaufman: Yeah. Similarly, there is a prohibition, not surprisingly, against negative review suppression or hiding bad reviews. And we've seen a lot of FTC cases over the past few years that have included those kinds of allegations. So, it is interesting. The rule includes a list of content and reviews that do form a legitimate basis for not posting of reviews, such as profanity, hate speech, PII. But there are some pretty subjective exceptions such as you cannot post reviews that are clearly fake.

And I actually wondered if there were some other exclusions that perhaps the agency should have thought about. But the bottom line is you just need to treat looking at good and bad reviews with the same criteria to determine what gets published and what does not. And we know sometimes it is easier said than done, but review moderation is a really important part of the rule and certainly review suppression can now get you some massive penalties.

Mudge: Probably the most obvious prohibitions are the ones that our listeners would never consider, things like buying fake reviews, or offering to write fake reviews, or soliciting fake reviews. Also in this bucket is the prohibition against taking steps to make your product look more popular by doing things like buying likes.

Kaufman: It is interesting that the prohibitions really do come straight out of some of the FTC cases we've been seeing, but certainly one of the concerns they flag, and we see the FTC talking about AI quite a lot, is that AI tools may be able to make this a little more readily accessible. The rule also does prohibit a brand hosting a product review website that it holds out as being independent.

Mudge: Yeah, this was another area where there were some significant changes from the final rule. As originally written, this review website prohibition was, actually was broader, and it could have applied potentially to consumer review forums on third-party e-tailer sites, and the FTC narrowed this considerably. The rule discussion really made it clear that incentivizing reviews is okay, but incentivizing only for positive reviews or incentivizing for negative reviews of your competitors is not okay and is swept in by this rule.

Now, Daniel, the most important question I have for you is, are we going to see more enforcement? We didn't really see much after the testimony endorsement guides were updated. I was surprised by that. What are we going to see now?

Kaufman: The agency has been chomping at the bit to get this rule out, and part of the reason is when they just had the FTC Act to go for review issues, it was always hard to figure out what is the appropriate amount of money to seek based upon bad review practices. How do you get at a dollar amount? And it's always been incredibly unscientific and challenging. How many people bought the product because of the fake reviews? And how many would have bought it otherwise? And it is just run around in circles. Now you've got a rule. You can get civil penalties. It makes it a lot easier for the FTC to go forward, bring cases, and seek money. And as we know, FTC wants to get money, so we're going to see cases. We're going to see a lot more cases. It is going to be a high priority. It is time to make sure your house is clean. And look, it is really a good time to look at a few particular areas that are specifically covered by the rule and where non-compliance can cost you huge amounts of money. We expect our listeners are on top of this and have been doing the right thing all along because we know our listeners. We adore you. You're wonderful. But it is always worth a fresh pair of eyes anytime a new rule is issued.

So first, look at the policies and practices you have for engaging with employees and whether and how they post reviews or recommendations about the company or its products on social media or elsewhere online. Many companies have policies about company social media use that should be really refreshed in light of this rule.

Second, you want to look closely at your review moderation practices. We know a lot of companies outsource this reviewing reviews function to third parties, but taking a fresh look at the criteria your agents are using on your behalf to post or not post reviews is a really good idea. As well, it makes sense to ask to see a sampling of the reviews that have not been posted to make sure they comfortably fall into that bucket of what the FTC has okayed for exclusion.

And finally, number three, take a look at how you are instructing those material connections to be posted. Consider the advice given in the rule to match the form of the disclaimer to the claim.

And with that, it is always exciting to have a new rule. We're going to have more. We're going to have more. I can guarantee that before the end of this year, we're going to see some more rules, Amy. With that, thank you so much for joining us AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law Blog at www.adventures-in-law.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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