

## MEMORANDUM

**From:** Steven B. Steinborn  
Mary B. Lancaster

**Date:** April 10, 2020

**Re:** **National Advertising Division Launches Fast-Track Challenge Process**

The National Advertising Division (NAD), a self-regulatory arm of the Better Business Bureau, recently announced that a new “Fast Track” challenge process is now available to members of the advertising industry. <sup>1/</sup> The SWIFT (Single Well-defined Issue Fast Track) process aims to adapt to the new speed at which claims come and go in the marketplace by offering a more efficient challenge process for single-issue claims that do not require complex substantiation. Unlike standard NAD challenges, the challenges deemed suitable for the SWIFT process would aim to be resolved in just 20 business days. The SWIFT process arises from workshops, consultation with stakeholders and full consideration by NAD in fashioning this novel approach.

NAD has identified three types of claims issues reserved for the new SWIFT challenge process:

- **Disclosures.** The prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews;
- **Pricing and Sales.** Misleading pricing and sales claims; and
- **Express claims.** Misleading express claims that do not require review of complex evidence or substantiation such as a review of clinical or technical testing or consumer perception evidence. <sup>2/</sup>

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<sup>1/</sup> Press Release, “BBB National Programs’ National Advertising Division Launches NAD Fast-Track SWIFT, an Expedited Challenge Process for Certain Digital Advertising Claims (April 2, 2020), available at <https://bbbprograms.org/media/details/bbb-national-programs-national-advertising-division-launches-nad-fast-track-swift-an-expedited-challenge-process-for-certain-digital-advertising-claims>. See also, BBB National Programs National Advertising Division Fast Track SWIFT FAQs, available at <https://bbbprograms.org/programs/nad/NAD-Fast-Track-SWIFT/Fast-Track-SWIFT-Frequently-Asked-Questions>.

<sup>2/</sup> BBB National Programs National Advertising Division Fast-Track SWIFT Case Examples, available at <https://bbbprograms.org/programs/nad/NAD-Fast-Track-SWIFT/Fast-Track-SWIFT-Case-Examples>.

### NAD's Voluntary Process Backed by Prospect of FTC Referral

The high cost of litigating an advertising challenge and the low priority competitive disputes often receive at the FTC or state regulators has contributed to the broad attraction the NAD process has for competitors who seek an objective forum in which to challenge advertising claims.

For those not fully familiar with the traditional NAD process, this forum allows competitors or others to challenge advertising largely on the question of what claims are conveyed and if the advertiser has appropriate substantiation. Once a dispute is initiated at NAD, should the challenged advertiser choose to participate, both parties submit briefs in writing and have the option of meeting with the NAD before it issues a formal written decision. If recommendations for changes to advertising are made by NAD, the advertiser must either agree to comply or appeal the decision to the National Advertising Review Board (NARB). Advertisers who decline to comply may be referred to the FTC for further review and potential enforcement. Several FTC enforcement actions have been initiated from an NAD referral. Standard NAD proceedings take several months from start to finish.

### Streamlined SWIFT Procedures Lessen Time to Decisions

The SWIFT process promises expedited decisions by reducing submission timelines, number of briefs, and page count. The clock on the 20-business-day timeline starts when NAD submits the challenge to the advertiser. SWIFT participants each make only a single submission to NAD, with page limits (5 pages) far shorter than the traditional NAD process.

The advertiser is given 10 days to submit its response and, within the first 4 days of that time, can submit written objections to the SWIFT designation. Objections do not toll the response time. Within 5 business days of the advertiser's response being submitted, each party may, at NAD's discretion, schedule an *ex parte* video or teleconference meeting with NAD. Finally, NAD will issue its decision within 20 business days of the challenge being submitted to the advertiser. The SWIFT process converts the advertiser's statement from a mandatory element to an optional one. Decisions will be published on a monthly or quarterly basis depending on volume.

A similarly abbreviated NARB appeal process is available to the advertiser, though it can only be used to address the merits arising in a given dispute, and not the use of the SWIFT process.

The SWIFT procedures have been incorporated into updated BBB Policies and Procedures. <sup>3/</sup>

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Competitors will benefit from paying close attention to changes underway at NAD and determining how the SWIFT program will affect real-world decision-making on development of strategies to challenge a competitor's objectionable advertising practices. While the goals of the SWIFT process complement NAD's long-standing commitment to self-regulation, it offers distinct rules and underlying dynamics that savvy companies will carefully consider in evaluating potential challenges and in being prepared to defend against challenges brought through the SWIFT process.

Whether a cease and desist letter, considering the threat or response to litigation, or self-regulatory procedures available at NAD and its sister forums, the latest innovation by NAD via the SWIFT process warrants careful consideration. We will monitor how this process unfolds and keep you apprised of these and related developments. Should you have any questions, please contact us.

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<sup>3/</sup> Policies and Procedures by BBB National Programs, Inc. (April 2, 2020 rev.) available at [https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbbnp---nad-caru-narb-procedures-2020.pdf?sfvrsn=12c75bab\\_8](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/bbbnp---nad-caru-narb-procedures-2020.pdf?sfvrsn=12c75bab_8).