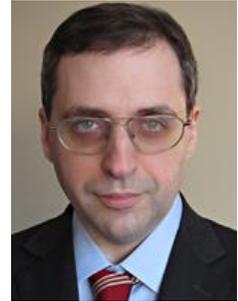


# Advertisers Should Heed FTC Stats On NAD Referrals

*By Alexander Goldman*

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Brands have been challenging the truthfulness of competing advertising campaigns for nearly 50 years at the Better Business Bureau's National Advertising Division, a voluntary self-regulatory system put in place by the advertising industry to increase consumer trust in advertising. The NAD holds advertising to consistent standards for truth and accuracy and provides meaningful protection to consumers while leveling the playing field for brands.



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A high percentage of advertisers, large and small, participate in the voluntary process and comply with the NAD's recommendations, showing strong support for advertising self-regulation. Every year, however, a handful of advertisers choose not to participate or decline to follow the NAD's recommendation at the end of a proceeding.

When an advertiser refuses to participate or follow the NAD recommendation, the NAD will refer the case record for further inquiry and investigation to the relevant government agency (or agencies) — usually the Federal Trade Commission but sometimes another appropriate regulatory agency such as the U.S. Food and Drug Administration or the Federal Communications Commission or, in appropriate cases, the state attorney general.[1]

For the last several years, the FTC has publicly tracked its response to NAD referrals and posted its closing letters on its website. The transparency in the FTC responses itself demonstrates strong support for self-regulation and ensures that the NAD and the public are aware of all final dispositions of cases referred. FTC staff and commissioners' public support for self-regulation, including stating that it is a priority, provides further support.

FTC Chairman Joseph Simons reinforced, in his first consumer protection speech, "While the Commission remains committed to its own national advertising enforcement efforts, I also believe that effective self-regulation is important. I support advertising self-regulation by programs like the NAD and other Council of Better Business Bureaus programs. We very much appreciate the NAD's referrals and we thoroughly review them." [2]

The FTC's track record in following up on NAD referrals provides a strong warning to advertisers who might gamble that a busy FTC staff will not have sufficient time or resources to review the issues raised by an NAD referral. A close examination of the available data shows that the FTC has historically investigated or resolved nearly three quarters of the complaints that were referred to it, and the FTC continues to do so. While the FTC cannot, and should not, be expected to act on every referral from the NAD, companies that choose not to participate make a risky bet. The FTC's record of follow up after an NAD referral has been remarkably strong and consistent.

## **The Data**

Among 19 closed cases from NAD referrals in the last two years (2017-2018), the FTC took no action in only four cases. The advertiser returned to the NAD in four, modified or discontinued their advertising in another nine, and in two cases the FTC investigated the matter, reviewed nonpublic information and took no further action.[3] In 15 out of 19 closed cases from 2015-2016 involving NAD referrals, the results were substantially the same — in only four cases, the FTC took no action.

The advertiser returned to the NAD in nine cases, modified or discontinued their advertising in five, and in one case, the FTC investigated the matter and closed the case after reviewing nonpublic information provided by the referred advertiser. Exactly 15 of 19 of referrals were resolved by the FTC in both recent and earlier referrals thus demonstrating the consistency in the FTC's response and its strong support for advertising self-regulation.[4]

In the vast bulk of referred cases, the advertiser is new to the NAD. In the last two years, two-thirds (66 percent) of referrals involved an advertiser who had never before participated in an NAD proceeding, while in 2016-2017 just over two-thirds (71 percent) involved an advertiser who had never before participated in an NAD proceeding. In the few remaining cases, often, the advertiser had participated in an NAD proceeding only one or two times.

After an NAD referral, the FTC response, in many cases, is swift. Many cases resolve quickly — in a month or less — when a company returns to the self-regulatory process or discontinues its claims.[5] Other times, the advertiser quickly agrees to make changes after being contacted by the FTC.

For example, on May 14, 2018, the NAD referred to the FTC claims by Conair Corp. that its Cuisinart line of products was “The Most Trusted Name in the Kitchen.” The FTC closed the matter on July 18, 2018, just two months later, after Conair Corp. agreed to discontinue its claim. Referrals which result in lengthy investigations or litigation take longer to resolve and can remain open for several months[6] or even several years.[7]

## **Conclusion**

When companies take the chance that a referral to the FTC will not result in an investigation of their advertising, our statistics show that the gamble is unlikely to pay off. Most gamblers will face an early choice between either undergoing an FTC investigation or returning to the NAD. Of those that do participate in an FTC investigation, most will discontinue or modify the advertising at issue, although a few will prevail upon the FTC to take no further action. A small number will pursue the option of fighting the FTC in court.

As an industry self-regulatory forum, the NAD serves a different purpose than the FTC and other law enforcement agencies by providing a forum for industry to efficiently resolve competitor disputes over the truthfulness of advertising claims. But the NAD and the agencies share a common goal: promoting truth in advertising. The justifications for advertising law are familiar: truth-in-advertising laws promote an efficient market and accurate information helps protect consumers. Brands — and their advisers — play a crucial role in promoting truth in advertising, by deciding to challenge untruthful advertising or to participate in self-regulation. It is our hope, in presenting this data, that companies will use it to make the smart choice and participate in industry self-regulation.

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[1] Although the NAD refers cases to agencies other than the FTC, it refers so few cases to other agencies that data on referrals to other agencies is not meaningful. In a few cases, a company's case is referred to an agency after it participated in an NAD proceeding but refused to comply with the NAD's recommendations.

[2] See

also [https://www.ftc.gov/system/files/documents/public\\_statements/1413760/andrew\\_smith-nad\\_speech.pdf](https://www.ftc.gov/system/files/documents/public_statements/1413760/andrew_smith-nad_speech.pdf) ("We appreciate the NAD's referrals and are grateful for the industry's role in offering a voluntary forum to address national advertising practices, and we are disappointed when companies fail to participate. Companies should take heed that Commission staff is committed to reviewing NAD referrals and recommending enforcement actions where appropriate.")

[3] It is worth noting that a case in which the FTC decides to take no action after conducting an investigation does not suggest a lack of support from the FTC on an NAD referral. If the FTC bases its decision on nonpublic information provided after a referral, and the NAD never reviewed the challenged claims, it is possible that the NAD would have reached the same conclusion.

[4] Open cases were not included in our analysis. Nor did we include cases in which the FTC determined it lacked jurisdiction.

[5] For example, on April 3, 2018, the NAD referred flu-related claims by The Silver Edge for its Micro-Particle Colloidal Silver Generator to the FTC. After consulting with the FTC, The Silver Edge returned to the NAD on May 14, 2018. Communication took about one month. See <http://case-report.bbb.org/cases/casereport/6172.pdf> (subscription required). The NAD referred claims by 2BeUnstoppable that its My Perfect Bones product was clinically shown to reduce osteoporosis pain on May 1, 2018, and later the same month, on May 21, 2018, the FTC replied that the websites selling the product had been taken down. [https://www.ftc.gov/system/files/documents/public\\_statements/1383691/nad\\_2beunstopable\\_resolution\\_letter\\_5-21-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1383691/nad_2beunstopable_resolution_letter_5-21-18.pdf).

[6] On June 28, 2017, the NAD referred to the FTC claims made by LABDOOR, Inc. for its dietary supplement rating and ranking website after LABDOOR, Inc. refused to participate in an NAD proceeding. <http://case-report.bbb.org/cases/casereport/6094.pdf> (subscription required). The FTC closed the matter on Feb. 27, 2018, eight months later, indicating that it

would take no further action based upon its review of nonpublic information. [https://www.ftc.gov/system/files/documents/closing\\_letters/nid/closing\\_letter\\_to\\_labdoor\\_inc.pdf](https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_to_labdoor_inc.pdf).

[7] On Dec. 20, 2013, the NAD referred “gray elimination” claims by COORGA Nutraceuticals Corporation to the FTC. The FTC filed a complaint in the United States District Court for the District of Wyoming on May 13, 2015. On Sept. 23, 2016, an FTC press release noted that the parties had agreed to injunctions, and that the defendants agreed to pay \$391,335. <https://www.ftc.gov/news-events/press-releases/2016/09/ftc-wins-summary-judgment-against-marketers-supplement-claimed> (the press release acknowledged the National Advertising Division of the Council of Better Business Bureaus for its referral of the COORGA Nutraceuticals case). Litigation took nearly three years from referral to judgment.