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# **THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION**

Policies and Procedures by  
**BBB National Programs, Inc.**

Procedures for:

**The National Advertising Division  
(NAD)**

**The National Advertising Review Board  
(NARB)**



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## 1.1 Definitions

**A.** The term “national advertising” shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.

**B.** The term “advertiser” shall mean any person or other legal entity that engages in “national advertising.”

**C.** The term “advertising agency” shall mean any organization engaged in the creation and/or placement of “national advertising.”

**D.** The term “public or non-industry member” shall mean any person who has a reputation for achievements in the public interest.

### **E. NAD Case Tracks:**

(1) The term “standard track case” refers to NAD challenges that are not Fast-Track SWIFT or complex track cases.

(2) “SWIFT” stands for Single Well-defined Issue Fast Track. A challenge is appropriate for Fast-Track SWIFT if it challenges a single well-defined issue, which does not require review of complex evidence or argument and will be capable of resolution within the Fast-Track SWIFT Timeline. A case that is not appropriate for Fast-Track SWIFT may be transferred to NAD’s standard or complex track processes.

(3) The term “complex track case” refers to NAD challenges that involve complex substantiation, such as challenges that may include multiple expert reports or scientific or other technical evidence that requires significant time to analyze, or that involve numerous claims made for a variety of different products.

**F. Holidays observed by NAD.** NAD will make available a list of the NAD-observed holidays.

## 2.1 NAD Function and Policies

**A. Function and Policies.** The National Advertising Division (NAD) of the BBB National Programs shall be responsible for receiving or initiating, evaluating, investigating, analyzing (in conjunction with outside experts, if warranted, and upon notice to the parties), and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising.

NAD and the National Advertising Review Board (NARB) are investigative or appellate units of the advertising industry’s system of voluntary self-regulation. Policies and procedures are established by BBB National Programs. A decision by NAD/NARB does not constitute a finding that the law has been violated. An advertiser’s voluntary participation in the self-regulatory process is not an admission and shall not be interpreted to constitute an admission by the advertiser or a finding that the law has been violated.

Any questions or concerns related to a pending case at NAD should be directed to the NAD Vice President. Questions or concerns regarding closed NAD cases should be directed to the BBB National Programs President and CEO or his or her designee.

**B. Advertising Monitoring.** NAD is charged with independent responsibility for monitoring and reviewing national advertising for truthfulness and accuracy. Monitoring cases follow the standard-track timeline.

**C. Upon receipt of any complaint, NAD shall promptly acknowledge receipt of the complaint and take the following actions:**

(1) If, at the commencement or during the course of an advertising review proceeding, NAD concludes that the advertising claims complained of are: (a) not national in character; (b) the subject of pending litigation or an order by a court; (c) the subject of a federal government agency consent decree or order; (d) permanently withdrawn from use prior to the date of the complaint and NAD receives the advertiser's assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service; (e) of such technical character that NAD could not conduct a meaningful analysis of the issues; or (f) without sufficient merit to warrant the expenditure of NAD's resources, NAD shall advise the challenger that the complaint is not, or is no longer, appropriate for formal investigation in this forum. Upon making such a determination, NAD shall advise the challenger that a case will not be opened, or in the event that an advertising review proceeding has already been commenced, shall administratively close the case file and report this action in the next issue of the Case Reports. When it can, NAD shall provide the challenger with the name and address of any agency or group with jurisdiction over the complaint.

(2) If the complaint relates to matters other than the truth or accuracy of the advertising, NAD shall so advise the challenger, as provided above, and where a significant national advertising issue is raised, shall forward a copy of the complaint to the BBB National Programs President and CEO or his or her designee who, in consultation with the NARB Chair, shall consider whether the complaint is appropriate for a consultive panel.

(3) If, in its discretion, NAD determines that a complaint is too broad or includes too many issues or claims to make resolution within the time constraints prescribed by these Procedures feasible, NAD may request that the challenger limit the issues or claims to be considered in the review proceeding, advise the challenger that the matter will require an extended schedule for review, or request that it be filed as a complex track challenge.

(4) If a complaint challenges advertising for more than one product (or product line), NAD may return the complaint to the challenger and request that separate complaints be submitted for each of the advertised products,, advise the challenger that the matter will require an extended schedule for review, or request that the challenger file the matter as a complex track challenge.

(5) If the complaint relates to the truth or accuracy of a national advertisement, NAD shall promptly forward the complaint by electronic mail to the advertiser for its response.

(6) Complaints regarding specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising; and questions of taste and morality are not within NAD's mandate. If the complaint, in part, relates to matters other than the truth and accuracy of the advertising, NAD shall so advise the challenger.

(7) NAD reserves the right to refuse to open or to continue to handle a case where a party to an NAD proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or has been, referred to NAD for resolution. The purpose of this right of refusal is to maintain a confidential, professional, unbiased atmosphere in which NAD can effect a timely and lasting resolution to a case in the spirit of furthering voluntary self-regulation of advertising and the voluntary cooperation of the parties involved.

(8) Fast-Track SWIFT: Within two business days of receipt, NAD will determine whether the challenge is appropriate for Fast-Track SWIFT. If NAD determines it is not appropriate for Fast-Track SWIFT, NAD will inform the challenger. After notice, the challenger may transfer the challenge to the standard NAD track or close the challenge. The filing fee will be applied to a case transferred to standard track or, for closed cases, refunded less a \$5000 processing fee. If NAD determines the challenge is appropriate for Fast-Track SWIFT, NAD will open the matter by electronically transmitting the FastTrack SWIFT challenge to the advertiser.

**D.** In all cases, the identity of the challenger must be disclosed to NAD who shall advise the advertiser of the identity of the challenger.

**E.** NAD will administratively close a case if, prior to NAD providing a copy of its decision to the advertiser, the challenger and advertiser consent in writing to closure of the case. Cases closed based on consent of the parties will be reported in the NAD Case Reports as “Administratively Closed on Consent of Parties.” If a case is administratively closed based on consent of the parties, NAD shall not be precluded from filing a complaint based on the same or similar claims as part of NAD’s monitoring responsibility pursuant to Section 2.1(B).

#### **F. Parties to NAD/NARB Proceedings**

(1) Except as provided in Section 2.1(F)(2), the parties to the proceeding are (i) NAD acting in the public interest, (ii) the advertiser acting in its own interest, and (iii) the challenger(s), whose respective rights and obligations in an NAD/NARB proceeding are defined in these Procedures.

(2) NAD shall not be a party to an NARB proceeding except in cases where NAD filed the complaint as part of its monitoring responsibility. When NAD is not a party to an NARB proceeding, NAD representatives have the right to attend all NARB hearings to answer questions from the NARB panel when requested. NAD representatives should attend any NARB hearing when requested by NARB.

#### **G. Information in NAD Proceedings**

(1) All information submitted to a standard or complex track NAD case by the challenger and the advertiser shall be submitted via the online portal (<https://portal.bbnp.org/>) or in an electronic format. Both parties shall simultaneously provide to NAD one courtesy hard copy of their submissions. NAD shall forward a copy to the other party in an electronic format. All transmittals by NAD during the course of an advertising review proceeding shall be paid for by the challenger, unless the challenger is a consumer or otherwise demonstrates economic hardship, in which case all transmittals shall be paid for by NAD.

(2) All information in a Fast-Track SWIFT challenge must be filed via the online portal (<https://portal.bbnp.org/>).

(3) Time periods for all submissions to NAD and NARB shall commence on and include the first day of business following the date of delivery of the triggering document and shall not include Saturdays, Sundays, Federal holidays, and other holidays defined by NAD in Section 1.1(H).

(4) NAD shall not consider any data in any case proceeding regardless of track submitted by a challenger that has not been made available to the advertiser, and any materials submitted by a challenger on condition that they not be shown to the advertiser shall promptly be returned. In the case of studies, tests, polls and other forms of research, the data provided should be sufficiently

complete to permit expert evaluation of such study, test, poll or other research. NAD shall be the sole judge of whether the data are sufficiently complete to permit expert evaluation. If a party initially submits incomplete records of data that is then in its possession, and later seeks to supplement the record, NAD may decline to accept the additional data if it determines that the party's failure to submit complete information in the first instance was without reasonable justification.

(5) An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to NAD with the request that such data not be made available to the challenger, provided it shall:

- (a) clearly identify those portions of the submission that it is requesting be kept confidential in the copy submitted for NAD's review;
- (b) redact any confidential portions from the copy submitted by the advertiser to the challenger;
- (c) provide NAD with both a redacted and unredacted copy of the submission;
- (d) provide a separate written statement setting forth the basis for the request for confidentiality;
- (e) affirm that the information for which confidentiality is claimed is not publicly available and consists of trade secrets and/or proprietary information or data; and
- (f) attach *as separate exhibit* to NAD's and the challenger's copy of the submission a comprehensive summary of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained) and the principal arguments submitted by the advertiser in its rebuttal of the challenge. Failure of the advertiser to provide this information will be considered significant grounds for appeal of a decision by a challenger in a Standard Track and Complex Track Proceedings. (See Section 5.2)

(6) Prior to the transfer of data to the advertiser or challenger, NAD shall obtain assurances that the recipients agree that the materials are provided exclusively for the purpose of furthering NAD's inquiry; circulation should be restricted to persons directly involved in the inquiry; and recipients are required to honor a request at the completion of the inquiry that all copies be returned.

## **H. Confidentiality of NAD/NARB Proceedings**

(1) NAD and NARB proceedings are confidential except for:

- (a) publication of final case decisions and summaries of other actions, as provided by these Procedures;
- (b) NAD and NARB press releases announcing final case decisions and summaries;
- (c) referrals by NAD or NARB to government agencies as provided by these Procedures; and
- (d) actions taken by NAD under Sections 2.1(I)(2) of these Procedures.

(2) Published NAD and NARB decisions are the only permanent records required to be kept as to the basis of an inquiry, the issues defined, the facts and data presented, and the conclusions reached by NAD/NARB.

(3) By participating in a proceeding, parties agree:

(a) to keep the proceedings confidential throughout the review process;

(b) not to subpoena any witnesses or documents regarding the review proceeding from NAD, NARB, or the BBB National Programs in any future court or other proceeding (except for the purposes of authentication of a final, published case decision); and

(c) to pay attorney's fees and costs if a subpoena is attempted in violations of Section (b) above

#### **I. Parties' Agreement/Referrals to Law Enforcement Agencies**

(1) It is the policy of NAD, NARB, and BBB National Programs not to endorse any company, product, or service. Any decision finding that advertising has been substantiated should not be construed as an endorsement. Similarly, an advertiser's voluntary modification of advertising, in cooperation with NAD/NARB self-regulatory efforts, is not to be construed as an admission of any impropriety.

(2) By participating in an NAD or NARB proceeding, the parties agree:

(a) not to issue a press release regarding any decisions issued; and/or

(b) not to mischaracterize any decision issued or use and/or disseminate such decision for advertising and/or promotional purposes. NAD/NARB may take whatever action it deems appropriate if a party violates this provision, including the issuance of a public statement for clarification purposes.

(3) When NAD commences a review pursuant to Section 3.1(A), 4.1(A), and 6.1(A) of these procedures, and the advertiser elects not to participate in the self-regulatory process, NAD shall prepare a review of the facts with relevant exhibits and forward them to the appropriate federal or state law enforcement agency. Reports of such referrals shall be included in the Case Reports.

**J. Case Reports.** BBB National Programs shall publish at least ten times each year the Case Reports, which will include the final case decisions of NAD and NARB, and summaries of any other matters concluded since the previous issue. Each final NAD and NARB case decision shall identify the advertiser, challenger, product or service, and subject matter reviewed. It shall also include a summary of each party's position, NAD/NARB's decision and its rationale, and a concise Advertiser's Statement, if any. See Sections 3.6, 4.9 and 6.4(A).

**K. Case Report Headings.** NAD's decisions in the Case Reports shall be published according to disposition, under the headings:

- Advertising Substantiated
- Advertising Referred to NARB
- Advertising Modified or Discontinued
- Advertising Substantiated/Modified or Discontinued
- Administrative Closing



- Advertising Referred to Government Agency
- No Substantiation Received
- Compliance

## **L. Annual Summary**

The first issue of the Case Reports each calendar year shall include a summary, prepared by NAD, which includes the number, source and disposition of all complaints received and cases published by NAD during the prior year.

## **M. Guidance to the Public**

From time to time, after consultation with the BBB National Programs Counsel, NAD may inform the public, through the *Case Reports* and other media, of trends, principles and interpretations derived from previously published case decisions.

## **N. Counter-Challenges:**

The advertiser may not include in any case track a counter challenge (i.e., a request that NAD review advertising claims made by the challenger) in its response. Such a request must be filed as a separate complaint as described in these Procedures.

### **3.1 Standard Track Proceedings**

**A. Filing a Complaint.** Any person or legal entity may submit to NAD any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals, or to business entities. Likewise, NAD may initiate a proceeding as part of their monitoring responsibility pursuant to Section 2.1(B) of these Procedures. All complaints (except those submitted by consumers), including any supporting documentation, must be submitted via the online portal (<https://portal.bbbtnp.org/>).or in an electronic format (including evidentiary exhibits.) with one courtesy hard copy to NAD. Challengers filing standard track NAD cases should limit the length of their submissions to 20 typewritten pages (12-point type) excluding evidentiary exhibits and must identify all express and implied claims to be considered by NAD. A challenger may expedite the review of the contested advertising by waiving its right to reply (see Section 3.3(B)).

#### **B. Filing Fees**

(1) **National Partner Filing Fees.** Competitive challenges before NAD by National Partners shall be filed together with payment, made payable to BBB National Programs in the amount of: (a) \$8,000, if the challenger's gross annual revenue is less than \$250 million; (b) \$28,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$36,000, if the challenger's gross annual revenue is \$5 billion or more.

(2) **Non-National Partner Filing Fees.** Competitive challenges before NAD by companies that are not National Partners shall be filed together with payment by acceptable method, made payable to BBB National Programs in the amount of: (a) \$10,000, if the challenger's gross annual revenue is less than \$250 million; (b) \$35,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$45,000, if the challenger's gross annual revenue is \$5 billion or more.

The filing fee shall be accompanied by a statement indicating the category into which the challenger's revenues fall. In the case of a challenge filed by a subsidiary, the filing fee is determined by the gross annual revenue of the parent company.

(3) BBB National Programs shall have the discretion to waive or reduce the fee for any challenger who can demonstrate economic hardship. If a NAD case is administratively closed for any reason other than consent of the parties pursuant to Section 2.1(E), fifty percent of the filing fee will be refunded.

### **3.2 The Advertiser's Substantive Written Response**

**A.** The advertiser shall, within 15 business days after receipt of the complaint, submit to NAD one hard copy and one electronic format copy (including exhibits) and one electronic copy (including exhibits) to the challenger, of its written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.1(C)(1), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. In standard track cases, where the advertiser's written response to the challenger has redacted confidential material, the advertiser shall include, as a separate exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.1(G)(5) above. The advertiser shall provide NAD with both the redacted and unredacted versions of the written response as well as the separate comprehensive summary. The advertiser shall also submit the above to the challenger in electronic format.

**B.** Advertisers should limit the length of their response to 20 typewritten pages (12-point type), excluding evidentiary exhibits. Advertiser responses in a standard track case addressed to the issue of NAD jurisdiction should be submitted as soon as possible after receipt of the complaint, but in any event, must be submitted no later than 15 business days after the advertiser receives the initial complaint. (See also Section 5.1(B) Failure to Respond.)

### **3.3 The Challenger's Reply**

**A.** Within ten business days of receipt of the advertiser's response, the challenger may submit to NAD one hard copy and one electronic format copy (including exhibits), of its reply, and one electronic copy (including exhibits) to the advertiser. Challengers should limit the length of their reply to 20 typewritten pages (12-point type), excluding evidentiary exhibits. If the challenger does not submit a reply, NAD shall proceed to decide the challenge upon the expiration of the challenger's time to reply, subject to a request by NAD for additional comments or data under Section 3.5(A). The challenger shall submit the above to the advertiser in electronic format.

**B. Expediting Review by Waiving the Reply** After the challenger has reviewed the advertiser's first substantive written response, the challenger may notify NAD in writing that it elects to waive its right to add to the record, thereby expediting the proceeding. In the event that a challenger waives its right to reply, additional information from either party may be submitted only upon request from NAD and shall be treated in the same manner as requests for additional comments or data under Section 3.5(A) of these Procedures and any meetings with the parties will be held at the discretion of NAD pursuant to Section 3.5(B) of these Procedures.

### **3.4 Advertiser's Final Response**

Within ten business days after receipt of the challenger's reply, the advertiser may submit to NAD one hard copy and one electronic format copy (including exhibits), of its reply, and one electronic copy (including exhibits) to the challenger. Advertisers should limit the length of their response to 20 typewritten pages (12-point type), excluding evidentiary exhibits.

### **3.5 Additional Information and Meetings with the Parties**

**A.** In the event that NAD deems it necessary and requests further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request via electronic format copy and hard copy to NAD, and via electronic format copy to opposing party. The advertiser or challenger will be afforded six business days to submit its own response to the submission, via electronic format copy and hard copy to NAD, and via electronic format copy to opposing party. Unless NAD requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by NAD will be returned.

**B.** NAD, in its discretion, may, in addition to accepting written responses, participate in meetings with either or both parties. These meetings may be held in person or via telephone or video conference. If NAD participates in a meeting in which only one party participates, NAD will notify the other party that a meeting has been scheduled to take place. Where feasible, upon request, an advertiser will be afforded the opportunity to schedule its meeting with NAD after the date of the challenger's meeting. All meetings in standard track cases with the parties will be held within 15 business days of NAD's receipt of the Advertiser's Final Response (Section 3.4).

**C.** Except upon request by NAD, as provided in Section 3.5(A) of these Procedures, no new evidence may be submitted for inclusion in the record at these meetings. Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by NAD in making its decision or by an NARB Panel in reviewing NAD's decision on appeal.

**D.** The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 3.2 through 3.5 above except upon agreement of NAD and the parties.

### **3.6 The Final Case Decision**

Within 20 business days of its receipt of the last document authorized by Sections 3.2 to 3.5 above, or, if NAD elects to meet with the parties, upon completion of the final meeting, NAD will formulate its decision on the truth and accuracy of the claims at issue; prepare the final case decision; provide a copy to the advertiser; and invite the advertiser to add an Advertiser's Statement (see Section 5.1(A)). within five business days of receipt.

### **4.1 Complex Track Proceedings**

**A. Filing a Complaint.** Any person or legal entity may submit to NAD any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals, or to business entities. All complaints (except those submitted by consumers), including any supporting documentation, must be submitted via the online portal (<https://portal.bbnp.org/>) or in an electronic format (including evidentiary exhibits) with one courtesy hard copy to NAD. Challengers filing NAD cases should limit the length of their submissions to 30 typewritten pages (12-point type) excluding evidentiary exhibits and must identify all express and implied claims to be considered by NAD. A challenger in a complex track case may expedite the review of the contested advertising by waiving its right to reply (see Section 4.6(B))

### **B. Filing Fees**

(1) **National Partner Filing Fees.** Competitive challenges before NAD by National Partners shall be filed together with payment by acceptable method, made payable to BBB National Programs, in the amount of: (a) \$24,000, if the challenger's gross annual revenue is less than \$250 million; (b)

\$40,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$60,000, if the challenger's gross annual revenue is \$5 billion or more.

(2) **Non-National Partner Filing Fees.** Competitive challenges before NAD by companies that are not National Partners shall be filed together with payment by acceptable method, made payable to BBB National Programs in the amount of: (a) \$30,000, if the challenger's gross annual revenue is less than \$250 million; (b) \$50,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$75,000, if the challenger's gross annual revenue is \$5 billion or more.

The filing fee shall be accompanied by a statement indicating the category into which the challenger's revenues fall. In the case of a challenge filed by a subsidiary, the filing fee is determined by the gross annual revenue of the parent company.

(3) BBB National Programs shall have the discretion to waive or reduce the fee for any challenger who can demonstrate economic hardship. If an NAD case is administratively closed for any reason other than consent of the parties pursuant to Section 2.1(E), fifty percent of the filing fee will be refunded.

#### **4.2 Advertiser's Request to Transfer a Challenge from Standard Track to Complex Track**

The advertiser, within 5 business days of receipt of a standard challenge, may request that the challenge be transferred to Complex Track by sending a letter to NAD, with a copy to the challenger, explaining why the case is appropriate for Complex Track, together with a fee of \$25,000 (\$20,000 for National Partners). BBB National Programs shall have the discretion to waive or reduce the fee for any advertiser who can demonstrate economic hardship. Within 5 business days of receipt of such a request, NAD will determine whether the challenge is appropriate for Complex Track. If NAD determines it is appropriate for Complex Track, in whole or in part, NAD will inform the parties and transfer the case in whole or in part to Complex Track.

#### **4.3 Scheduling Conference**

**A.** After the complaint is filed but before the default due date for the advertiser's first submission, the advertiser shall arrange a joint conference with NAD and the challenger to schedule submissions and meetings. If the parties cannot agree on a submission and meeting schedule, NAD will set the schedule. The period of time available for all communications, including meetings and written submissions, is set by default by Sections 3.2 through 3.5 above, unless a modified schedule for submissions and meetings is set.

**B.** The scheduling conference may be held via telephone or video conference. The advertiser should contact NAD after receipt of the complaint to schedule the scheduling conference. If the parties are unavailable for a scheduling conference before the default due date for the advertiser's first submission, NAD has discretion to modify the submission schedule until a pre-case conference occurs.

#### **4.4 The Advertiser's Initial Substantive Written Response**

**A.** The advertiser shall submit to NAD one hard copy and one electronic format copy (including exhibits), and to the challenger one electronic format copy (including exhibits) of its written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.1(C)(1), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. In complex track cases, where the advertiser's written response to the challenger has redacted confidential material, the advertiser shall include, as a separate exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.1(G)(5). The advertiser shall provide NAD with both the redacted and unredacted versions of the written response as well as the separate comprehensive summary.

**B.** Advertisers in a complex track case should limit the length of their response to 30 typewritten pages (12-point type), excluding evidentiary exhibits. An advertiser's response addressing the issue of NAD jurisdiction should be submitted as soon as possible after receipt of the complaint, but in any event, must be submitted in its full response no later than 15 business days after the advertiser receives the initial complaint. (See also Section 5.1(B) Failure to Respond.)

#### **4.5 Case Meeting After the Advertiser's First Response**

After the Advertiser's first response is submitted, both the advertiser and the challenger shall contact NAD to schedule a meeting. The meeting, to be held ex parte with each party, may be held via telephone or video conference and should occur before the due date for the Challenger's reply. Delay or failure to set a meeting will not result in a delay in the parties' submissions. However, in its sole discretion, NAD may modify the submission schedule based on the parties' availability or the evidence and arguments they submitted. NAD will notify the parties of the dates of the scheduled meetings with the opposing party.

#### **4.6 The Challenger's Reply**

**A. Reply Submission.** The challenger may submit to NAD one hard copy and one electronic format copy (including exhibits), of its reply, and one electronic copy (including exhibits) to the advertiser of its reply, if any. Challengers should limit the length of their reply to 30 typewritten pages (12-point type), excluding evidentiary exhibits. If the challenger does not submit a reply, NAD shall proceed to decide the challenge upon the expiration of the challenger's time to reply, subject to a request by NAD for additional comments or data under Section 4.8.

**B. Expediting Review by Waiving the Reply.** After the challenger has reviewed the advertiser's first substantive written response, the challenger may notify NAD in writing that it elects to waive its right to add to the record, thereby expediting the proceeding. If the challenger waives its right to reply, additional information from either party may be submitted only upon NAD's request and shall be treated in the same manner as requests for additional comments or data under Section 4.8(A) of these Procedures. Any meetings with the parties will be held at NAD's discretion pursuant to Section 4.8(B).

#### **4.7 Advertiser's Final Response**

The advertiser shall submit to NAD one hard copy and one electronic format copy (including exhibits) of its final response, if any, and one electronic format copy (with exhibits) to the challenger. Advertisers should limit the length of their response to 30 typewritten pages (12-point type), excluding evidentiary exhibits.

#### **4.8 Additional Information and Final Meetings with the Parties**

**A.** If NAD deems it necessary and requests further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request via electronic format copy and hard copy to NAD, and via electronic format copy to the opposing party. The advertiser or challenger will be afforded six business days to submit its own response to the submission, via electronic format copy and hard copy to NAD, and via electronic format copy to opposing party. Unless NAD requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by NAD will be returned.

**B.** In addition to accepting written responses, NAD may meet with either or both parties. In a complex track NAD case, these meetings may be held in person or via telephone or video conference. If NAD participates in a meeting in which only one party participates, NAD will notify the other party that a meeting has been scheduled to take place. Where feasible, upon request, an advertiser will be afforded the opportunity to

schedule its meeting with NAD after the date of the challenger's meeting. These final meetings with the parties will be held within 15 business days of NAD's receipt of the Advertiser's Final Response (Section 4.7).

C. Except upon request by NAD, as provided in Section 4.8(A) of these Procedures, no new evidence may be submitted for inclusion in the record at these meetings. Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by NAD in making its decision or by an NARB Panel in reviewing NAD's decision on appeal.

#### **4.9 The Final Case Decision**

Within 30 business days of its receipt of the last document authorized by Sections 4.5 to 4.8 above, or upon completion of the final meeting, NAD will formulate its decision on the truth and accuracy of the claims at issue; prepare the final case decision; and provide a copy to the advertiser inviting the advertiser to add an Advertiser's Statement within five business days of receipt.

### **5.1 Standard and Complex Track Advertiser's Statements, Failure to Respond, Publication of Decision, and Appeals**

**A. Advertiser's Statement.** If NAD decides that some or all the advertising claims at issue are misleading or not substantiated and therefore require modification or discontinuance, the advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement. An Advertiser's Statement shall initially state whether the advertiser:

- (1) agrees to comply with NAD's recommendations, or
- (2) will appeal all or part of NAD's decision to the NARB as specified in Section 5.2.

The Advertiser's Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12-point type), which does not reargue the merits of the case, mischaracterize the decision, or contain new facts. NAD reserves the right, following consultation with the advertiser, to edit for length or inappropriate material. If the advertiser fails to submit an Advertiser's Statement as required by this Section, NAD may refer the matter to an appropriate government agency for review and possible law enforcement action.

#### **B. Failure to Respond**

- (1) If an advertiser fails to file a substantive written response within the period provided in these Procedures, NAD shall provide a press release and notice to the advertiser summarizing the advertising claims challenged in the complaint and noting the advertiser's failure to substantively respond.
- (2) If the advertiser fails to file a substantive written response within an additional 5 business days, NAD may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared and shall report the referral in the next issue of the Case Reports.
- (3) If a challenger fails to file a reply within the time provided in these Procedures or an advertiser fails to file a response within the time set forth in these procedures, the untimely document shall not be considered by NAD, or by any panel of the NARB.

**C. Publication of the Decision.** Upon receipt of the final version of the Advertiser's Statement, NAD shall provide copies of the final case decision to the advertiser and the challenger, by electronic or overnight mail or messenger, and make the decision available to the public through press announcements and publication of the decision in the next Case Reports.

## **5.2 Standard and Complex Track Case Appeals**

**A. Advertiser's Appeal** When an advertiser appeals NAD's decision on one or more issues involved in a case, the case will be reviewed by a panel of the NARB. To appeal an NAD decision, an advertiser shall make a request for a referral to the NARB and specify all issues for appeal in the Advertiser's Statement it prepares in response to NAD's decision pursuant to Section 5.1(A). All advertiser requests to appeal a final case decision to the NARB shall be submitted electronically together with payment (check made payable to BBB National Programs, Inc. or electronic payment with procedures on payment) in the amount of (a) \$27,000 if the advertiser is a National Partner or (b) \$33,750 if the advertiser is not a National Partner. In such cases, NAD will publish its decision and the Advertiser's Statement in the next Case Reports under the heading "Advertising Referred to NARB."

**B. Challenger Request to Appeal.** Within ten business days after the date of receipt of a NAD final case decision, the challenger may request review by the NARB by filing a letter, not to exceed 20 double-spaced pages (12-point type) plus any relevant attachments from the NAD case record, explaining why there is a substantial likelihood that the NARB would reach a different result from NAD. The letter shall be accompanied by a non-refundable review fee of \$5,000 in a check made payable to BBB National Programs, Inc. or electronic payment, which will be credited toward the filing fee required by Section 5.2(B) if the review is granted, and should be addressed to: Chair, National Advertising Review Board (NARB), 112 Madison Ave., 3rd Floor, New York, NY 10016 The challenger shall send a copy of this letter to the advertiser and to NAD. Within ten business days after receipt of the copy of the request for review, the advertiser and NAD shall each submit a response to the NARB Chair, not to exceed 20 double-spaced pages (12-point type) plus any relevant attachments from the NAD case record. A copy of the advertiser's and NAD's responses shall be sent by the advertiser and NAD, respectively, to the challenger, except that portions of the case record that were submitted to NAD on a confidential basis shall not be sent to the challenger unless the advertiser consents. No other submissions shall be made to the NARB Chair. These letters, together with the relevant sections of the case record provided by the parties, shall be reviewed by the NARB Chair who shall render a determination as to whether to grant the challenger's request for an appeal within ten business days after receipt of the NAD's and advertiser's responses. If the NARB Chair grants the challenger's request for an appeal, the appeal shall proceed pursuant to Section 5.2(D). The challenger shall submit a payment (check made payable to BBB National Programs, Inc. or electronic payment), as per instructions from the NARB Coordinator, in the amount of (a) \$22,000 (\$27,000 less \$5,000 non-refundable review fee) if the challenger is a National Partner or (b) \$28,750 (\$33,750 less \$5,000 non-refundable review fee) if the challenger is not a National Partner.

**C. Cross Appeal.** If the advertiser exercises its right to an appeal under Section 5.2(A), the challenger shall have the right to appeal any additional issues considered by NAD that have not been appealed by the advertiser.

If the NARB Chair grants a challenger's request to appeal, under Section 5.2(B), the advertiser may appeal any additional issues considered by NAD that have not been appealed by the challenger, notwithstanding that its time to file an appeal as of right has expired. The challenger or advertiser may exercise the right to appeal under this paragraph by submitting a letter to the NARB at the address listed in Section 5.2(B), requesting the appeal and specifying the additional issues it wishes to appeal.

The cross-appellant shall pay a filing fee by check or electronic payment made payable to BBB National Programs in the amount of (a) \$27,000 if the cross-appellant is a National Partner or (b) \$33,750 if the cross-appellant is not a National Partner.

In the case of the challenger, the letter shall be due within five business days of receipt of the final case decision with the advertiser's statement indicating the advertiser's election to appeal; in the case of the advertiser, the letter is due within five business days of the date of receipt of the NARB Chair's determination granting the challenger's request to appeal. The issuing party shall send copies of these letters to all other parties.

**D. Appellate Case Record.** NAD will prepare the relevant portions of the case record and forward them to the NARB within five business days of the issuance of the NAD Decision to the challenger. NARB will then send a digital copy of the case record to the parties, except that portions of the case record that were submitted to NAD on a confidential basis will not be sent to the challenger unless the advertiser consents. The appellant shall pay for all NARB copying and transmittal costs incurred as a result of an appeal or request for appeal pursuant to Sections 5.2 through 5.7 of these Procedures. Where the advertiser and the challenger both appeal, these costs will be divided equally between them. In any event, NARB will pay these costs for any party that can demonstrate economic hardship.

**E. Fee Waiver.** The Executive Vice President, Policy, of BBB National Programs shall have the discretion to waive or reduce the fee for an appellant or cross-appellant who can demonstrate economic hardship.

#### **F. Submission Schedule**

(1) **Submissions when there is no cross-appeal.** The party appealing shall, within ten business days of receipt of the case record prepared by NAD, submit to the NARB Chair, addressed as indicated in Section 5.2(B) with a copy to NAD, a letter not to exceed 30 double-spaced pages explaining its position. The appellant shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 30 double-spaced pages, to the NARB Chair with copies to the other party and to NAD. No other submissions shall be made.

(2) **Submissions when there is a cross-appeal.** Each party shall, within ten business days of receipt of the case record prepared by NAD, submit to the NARB Chair, addressed as indicated in Section 5.2(B) with a copy to NAD, a letter not to exceed 15 double-spaced pages explaining its position with respect to its appeal. Each party shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 15 double-spaced pages, to the NARB Chair with copies to the other party and also to NAD. No other submissions shall be made.

#### **5.3 Content of Submissions to NARB**

Written submissions to the NARB may contain new arguments and cite to applicable legal precedent, including NAD or NARB precedent, even if it was not cited in submissions to NAD in the underlying proceeding. Written submissions to NARB shall not contain any evidence or facts that are not in the case record forwarded to NARB pursuant to Section 5.2(D) of these Procedures. If the NARB Chair, after consultation with the parties, determines that a party has included evidence or facts outside this record in its submission to NARB, the Chair may, in his/her discretion:

(1) return the brief to the party with a request that it redact any information that NARB has identified as outside the record and resubmit its brief within three business days. If the party fails to submit a properly redacted brief within three days, it shall be deemed to have defaulted on its appeal; or



(2) remand the matter to NAD for a determination on whether the additional information constitutes “newly discovered evidence” sufficient to warrant reopening of the case under the “extraordinary circumstances” provisions of Section 8.2 of these Procedures. If NAD determines that it is not appropriate to reopen the case, NAD shall return the brief to the NARB Chair who shall handle any information outside the record in the manner provided by Section 5.3(1) above.

#### **5.4 Appointment of Review Panel**

The NARB Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who shall serve as panel Chair.

#### **5.5 Eligibility of Panelists**

**A.** An “advertiser” NARB member shall be considered as not qualified to sit on a particular panel if his/her employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An “agency” NARB member shall be considered as not qualified if his/her employing advertising agency represents a client that sells a product or service which directly competes with the product or service involved in the proceeding.

**B.** Any NARB member shall disqualify himself/herself if, for any reason arising out of past or present employment or affiliation, (s)he believes that (s)he cannot reach a completely unbiased decision.

**C.** The NARB Chair shall inform the parties of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests shall be subject to approval by the NARB Chair.

#### **5.6 Composition of Review Panel**

Each panel will be composed of one “public” member, one “advertising agency” member, and three “advertiser” members. A panel may proceed with four panel members. The NARB Chair may change the composition of the panel, if necessary, due to the unavailability of panel members in any category. The panel will meet at the call of NARB. The NARB Panel Chair will preside over its meetings, hearings, and deliberations. The concurring vote of three members is required to decide any substantive question before the panel. Any panel member may write a separate concurring or dissenting opinion, which shall be published with the majority opinion.

#### **5.7 Procedure of Review Panel**

**A.** As soon as the panel has been selected, the NARB Chair shall inform all parties as to the identity of the panel members. As soon as the panel has been selected, the NARB Chair shall inform all parties as to the identity of the Panel members and send copies of all submissions to each of the Panel members.

**B.** If any party to the dispute before NAD requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given notice of any meeting at which the matter is to be presented to the panel upon scheduling. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

The case record in NAD and/or NARB proceedings shall be considered closed upon the publication of the final case decision as described in Section 3.6 (Standard Track Final Case Decision) or 4.9 (Complex Track Final Case Decision).

#### **C. NARB Decision**

(1) The Panel Decision shall be based upon the portion of the record before NAD which it has forwarded to the panel, the submissions under Section 5.2(F), and any summaries of the record, facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts that were presented to NAD and to present new arguments, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel shall honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger shall therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with NAD and the advertiser.

(2) The panel shall not consider any evidence or facts if they are outside the evidence and facts presented to NAD. In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to NAD's findings and recommendations.

### **5.8 Timing and Reporting of Panel Decisions**

**A.** When the panel has reached a decision after a panel hearing, the NARB Chair will transmit the decision to NAD and then to the advertiser. The advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement that states in the first sentence whether or not the advertiser agrees to comply with the panel's recommendations. The Advertiser's Statement may include a concise supporting statement, no longer than one half of one double-spaced typewritten page (12-point type), which may not reargue the merits of the case, mischaracterize the decision, or contain new facts. The NARB Chair reserves the right, upon consultation with the advertiser, to edit for length or inappropriate material. If the advertiser fails to submit an Advertiser's Statement as required by this Section, NARB may refer the matter to an appropriate government agency for review and possible law enforcement action. Thereafter, the Chair will incorporate the Advertiser's Statement into the decision. After incorporating the Advertiser's Statement into the decision, the Chair will send the final decision to NAD and the parties. BBB National Programs will draft a press release and send to all the parties for comment prior to its release. Thereafter, the press release will be issued and the Panel Decision posted to the BBB National Programs, Inc. archive.

**B.** In the event that a panel has recommended an advertiser's claim be discontinued or modified, and the advertiser fails to indicate that it shall comply with the Panel Decision within a time period appropriate to the circumstances of the case, the NARB Chair shall issue a decision indicating that the full record on the case shall be referred to the appropriate government agency. If the advertiser fails to respond or does not agree in writing to comply with the decision and recommendations of the panel within five days of the issuance the decision, the NARB Chair shall so inform the appropriate government agency by letter, shall offer the complete NARB file upon request to such government agency. Thereafter the press release is issued and the Panel Decision is posting to the BBB National Programs, Inc. archive. The NARB Chair shall report to the NARB at its annual meeting on, among other things, the number, source and disposition of all appeals received by NARB.

### **5.9 Closing a Case**

When a case has been concluded with the publication of a NAD decision or, when a panel has turned over a decision to the NARB Chair, and when the Chair has executed the procedures in Section 5.8 of these Procedures, except as provided for in Section 8.1(A) (Reopening a Case), the case shall be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD.

### **5.10 Withdrawal of an Appeal**

If an advertiser decides to withdraw an appeal, it must notify NARB, NAD, and the challenger in writing, and the appeal shall be deemed withdrawn upon receipt of such notice. Upon withdrawing the appeal, the advertiser shall have five (5) business days to submit a revised Advertiser's Statement to the NAD indicating whether it will comply with NAD's recommendations that had been the subject of the withdrawn appeal.

If the advertiser withdraws its appeal where the challenger has requested a cross-appeal (and the cross-appeal fee has already been paid), the withdrawal occurs before the advertiser's submission of its appellate brief, and the challenger wishes to proceed with its appeal, the challenger must request review by NARB pursuant to Section 5.2(B) of the NAD/NARB Policies and Procedures within ten (10) business days from the date the advertiser withdrew its appeal. If the request to proceed with the cross-appeal is denied, the challenger shall be entitled to a refund of the fee already paid minus ten thousand dollars (\$10,000). If the challenger has not paid the cross-appeal fee at the time the advertiser gives notice that it is withdrawing its appeal, the challenger shall not have a right to seek to continue its cross-appeal.

If the advertiser withdraws its appeal where the challenger has requested a cross-appeal, and the withdrawal occurs after the advertiser's submission of its NARB brief, the challenger may proceed with its cross-appeal.

### **6.1 Fast-Track SWIFT (Single Well-defined Issue Fast Track)**

**A. Filing a Complaint.** Any person or legal entity may submit a Fast-Track SWIFT complaint to NAD regarding national advertising, regardless of whether it is addressed to consumers, professionals, or business entities. Challengers filing a Fast-Track SWIFT challenge should limit the length of their submissions to five typewritten pages (12-point type) and should include no more than five evidentiary exhibits (each not more than five pages long, in addition to samples of the challenged advertising. Fast-Track SWIFT challenges must be filed via the online portal (<https://portal.bbbnp.org/>). If filed after 4:00 pm, the challenge is considered received on the next business day.

#### **B. Filing Fees**

(1) Fast-Track SWIFT competitive challenges before NAD by National Partners shall be filed together with payment by acceptable method, made payable to BBB National Programs in the amount of: (a) \$12,000, if the challenger's gross annual revenue is less than \$250 million; (b) \$32,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$40,000, if the challenger's gross annual revenue is \$5 billion or more.

(2) Fast-Track SWIFT competitive challenges before NAD by companies that are not National Partners shall be filed together with payment by acceptable method, made payable to BBB National Programs in the amount of: (a) \$15,000, if the challenger's gross annual revenue is less than \$250 million; (b) \$40,000, if the challenger's gross annual revenue is between \$250 million and \$5 billion; (c) \$50,000, if the challenger's gross annual revenue is \$5 billion or more.

The filing fee shall be accompanied by a statement indicating the category into which the challenger's gross revenues fall. In the case of a challenge filed by a subsidiary, the filing fee is determined by the gross annual revenue of the ultimate parent together with its subsidiaries.

**C. Appropriateness for SWIFT.** Within two business days of receipt of any Fast-Track SWIFT complaint, NAD will determine whether the challenge is appropriate for Fast-Track SWIFT. If NAD determines it is not appropriate for Fast-Track SWIFT, NAD will inform the challenger. After notice, the challenger may transfer the challenge to the standard or complex NAD track or close the challenge. The filing fee will be applied to a case transferred to standard or complex track or, for closed cases, refunded less a \$5000 processing fee. If NAD determines the challenge is appropriate for Fast-Track SWIFT, NAD will open the matter by electronically transmitting the Fast-Track SWIFT challenge to the advertiser.

## **6.2 The Advertiser's Objection and Substantive Written Response**

**A. Advertiser's Objection to Fast-Track SWIFT.** If an advertiser objects to the Fast-Track SWIFT process determination (Section 2.1(C)(8)), an advertiser may send its objection via the online portal (<https://portal.bbbnp.org/>) in writing to NAD and the challenger within four business days after NAD transmitted the challenge to the advertiser. An advertiser shall also address the issue of NAD jurisdiction (Sections 2.1(C)(1)) in its objection. The advertiser should limit the length of their submission to five typewritten pages (12-point type) and should include no more than five evidentiary exhibits (each not more than five pages long, in addition to samples of the challenged advertising). If an advertiser chooses to file evidence in support of its objection to the Fast-Track SWIFT process, it can submit any evidence in support of this objection confidentially to NAD without providing a copy to the challenger. NAD will review the objection and any supporting evidence within two business days and notify both parties of its final determination as to whether the challenge can be determined in the Fast-Track SWIFT process. If NAD determines it cannot, NAD will inform both parties. After notice, the challenger may transfer the challenge to the standard or complex NAD track or close the challenge. The filing fee will be applied to a case transferred to Standard or complex track or, for closed cases, refunded less a \$5000 processing fee.

**B. Advertiser's Substantive Response.** In a Fast-Track SWIFT challenge, if NAD determined that the challenge is still appropriate for Fast-Track SWIFT despite the advertiser's objection, the advertiser shall, no later than ten business days after NAD transmitted the challenge to the advertiser, submit via the online portal (<https://portal.bbbnp.org/>) to NAD and the challenger its written response that provides substantiation or arguments concerning the challenged advertising, together with any supporting evidence. The advertiser should limit the length of their submission to five typewritten pages (12-point type) and should include no more than five evidentiary exhibits (each not more than five pages long, in addition to samples of the challenged advertising). The time for resolution of any objection to the Fast-Track SWIFT process does not toll the time for the advertiser's response, which will be due ten business days after NAD transmitted the challenge to the advertiser. If the advertiser designates information in its response as confidential and redacts it from the copy sent to a challenger, it shall include, as a separate exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.1(G)(5) above. NAD will receive both the redacted and unredacted versions of the written response as well as the separate comprehensive summary. In a Fast-Track SWIFT challenge, this is the final submission in the matter and closes the record.

**C. Appropriateness for SWIFT During Pendency of Challenge:** Notwithstanding section 6.1(C) or section 6.2(B), if NAD determines at any point during the pendency of the challenge that it is no longer appropriate for SWIFT, NAD will inform the parties. After notice, the challenger may transfer the challenge to the standard or complex NAD track or close the challenge. The filing fee will be applied to a case transferred to standard or complex track or, for closed cases, refunded less a \$5000 processing fee.

## **6.3 Additional Information and Meetings with the Parties**

**A.** In addition to accepting written responses, NAD may participate in meetings with either or both parties. In a Fast-Track SWIFT challenge, meetings will be held via telephone or video conference. All meetings in Fast-Track SWIFT cases with the parties will be held within 5 business days of NAD's receipt of the Advertiser's Substantive Written Response (Section 6.2(B)).

**B.** No new evidence may be submitted for inclusion in the record at these meetings. Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by NAD in making its decision or by an NARB Panel in reviewing NAD's decision on appeal.

**C.** The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 6.2 through 6.3, except that NAD may, in its discretion,

adjust the deadlines upon which the meetings and submissions shall occur without exceeding the 20 day time frame (Section 6.4(A)).

#### **6.4 Decision**

**A. The Final Case Decision.** Within 20 business days after NAD transmitted the challenge to the advertiser, NAD will issue its decision on the truth and accuracy of the claim before it and provide a copy to both parties simultaneously.

**B. Advertiser's Statement.** If NAD decides that the advertising claim at issue is unsubstantiated, the advertiser may submit, within five business days of receiving the decision, an Advertiser's Statement to be incorporated into the decision when the press release is issued.

The Advertiser's Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12-point type), which does not reargue the merits of the case, mischaracterize the decision, or contain new facts. NAD reserves the right, following consultation with the advertiser, to edit for length or inappropriate material.

Failure to file an Advertiser's Statement alone will not result in referral of the matter to an appropriate government agency; rather, non-compliance with NAD's recommendations will result in a referral of the matter to the appropriate government agency for review and possible law enforcement action.

**C. Publication of the Case Decision.** Upon receipt of the final version of the decision, NAD shall provide copies of the final case decision to the parties electronically, and make the decision available to the public through press announcements and publication of the decision in the Case Reports.

#### **6.5 Failure to Respond**

If the advertiser fails to file a substantive written response within the period provided by Section 6.2(B), NAD may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared and shall report the referral in the next issue of the Case Reports.

#### **7.1 Appeal in a Fast-Track SWIFT Proceeding**

**A. Notice of Appeal.** When an advertiser appeals NAD's decision the case will be reviewed by a panel of the NARB., the advertiser shall notify NAD and NARB within three business days of NAD's transmission of its decision to the advertiser, stating that it intends to appeal the decision, except, however, an advertiser may not appeal NAD's decision that a case is appropriate for Fast-Track SWIFT. All documents shall be transmitted electronically. All advertiser requests to appeal a Fast-Track SWIFT case decision to the NARB shall be filed together with payment by acceptable method, made payable to BBB National Programs, Inc, submitted as per instructions from the NARB Coordinator in the amount of (a) \$27,000 if the advertiser is a National Partner or (b) \$33,750 if the advertiser is not a National Partner. In such cases, NAD will publish its decision and the Advertiser's Statement in the next Case Reports under the heading "Advertising Referred to NARB." The Executive Vice President, Policy, of BBB National Programs shall have the discretion to waive or reduce the fee for an appellant or cross-appellant who can demonstrate economic hardship.

**B. Cross Appeal.** The challenger shall have no right to cross-appeal an appeal of a Fast-Track SWIFT decision.

**C. Challenger Appeal.** The challenger shall have no right to request leave to appeal of a Fast-Track SWIFT decision to NARB.

**D. Appellate Case Record.** The advertiser shall prepare the case record, including page numbers, and forward copies electronically to the challenger, NARB, and NAD within eight business days of its receipt of NAD's decision. The case record for NARB shall not contain any evidence or facts that are not in the case record forwarded to NAD in the underlying proceeding. If the advertiser submitted confidential information, it shall prepare a redacted case record with page numbers, and forward copies electronically to the challenger, NARB, and NAD, and it shall prepare an unredacted case record with page numbers and forward copies electronically to the NARB and NAD. The failure to prepare and forward a case record will result in dismissal of the appeal.

Within two business days of receiving the case record, either NAD or the challenger may object to the advertiser's case record and submit suggested case record corrections to the NARB Chair. Within two business days of receiving an objection, the Chair will make a final determination on the objection(s).

**F. Submission Schedule.** All submissions shall be sent electronically. The advertiser shall, within eight business days of its receipt of NAD's decision, submit electronically to the NARB Chair, addressed as indicated in Section 5.2(B) with a copy to NAD, a letter not to exceed 15 double-spaced pages, 12-point type, explaining its position. The appellant shall send a copy of the letter to the opposing party who shall have nine business days after its receipt to submit a response electronically, not to exceed 15 double-spaced pages, 12-point type, to the NARB Chair with copies to the other party and to NAD. No other submissions shall be made.

## **7.2 Content of Submissions to NARB**

Written submissions to the NARB may contain new arguments and cite to applicable legal precedent, including NAD or NARB precedent, even if it was not cited in submissions to NAD. Written submissions to NARB shall not contain any evidence or facts that are not in the case record forwarded to NARB pursuant to Section 7.1(D) of these Procedures, and an appeal of a Fast-Track SWIFT decision may not include arguments regarding the appropriateness of the case for Fast-Track. If the NARB Chair, after consultation with the parties, determines that a party has included evidence or facts outside this record in its submission to NARB, or, in the case of a Fast-Track SWIFT appeal, has included arguments regarding the appropriateness of the case for Fast-Track SWIFT, the Chair may, in his/her discretion:

(1) return the brief to the party with a request that it redact any information that NARB has identified as outside the record and resubmit its brief within three business days. If the party fails to submit a properly redacted brief within three days, it shall be deemed to have defaulted on its appeal; or

(2) remand the matter to NAD for a determination on whether the additional information constitutes "newly discovered evidence" sufficient to warrant reopening of the case under the "extraordinary circumstances" provisions of Section 8.1 of these Procedures. If NAD determines that it is not appropriate to reopen the case, NAD shall return the brief to the NARB Chair who shall handle any information outside the record in the manner provided by Section 7.1(A) above.

## **7.3 Appointment of Review Panel**

The NARB Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who shall serve as panel Chair. As soon as the panel has been selected, the NARB Chair shall inform all parties as to the identity of the Panel members and send copies of all submissions to each of the Panel members.

## **7.4 Eligibility of Panelists**

**A.** An “advertiser” NARB member shall be considered as not qualified to sit on a particular panel if their employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An “agency” NARB member shall be considered as not qualified if his/her employing advertising agency represents a client that sells a product or service which directly competes with the product or service involved in the proceeding.

**B.** Any NARB member shall disqualify themselves for any reason arising out of past or present employment or affiliation, (s)he believes that (s)he cannot reach a completely unbiased decision.

**C.** The NARB Chair shall inform the parties of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests shall be subject to approval by the NARB Chair.

### **7.5 Composition of Review Panel**

In an appeal of a Fast-Track SWIFT decision, the panel may be selected from the “public,” “advertising agency,” and/or “advertiser” members. The NARB Chair has absolute discretion to choose which types of members will comprise the panel. The panel will be comprised of three members; a concurring vote of two members is required to decide any substantive question before the panel. The panel will meet at the call of NARB. The NARB Panel Chair will preside over its meetings, hearings, and deliberations. Any panel member may write a separate concurring or dissenting opinion, which will be published with the majority opinion. In an appeal of a Fast-Track SWIFT decision, the meeting will be held by telephone or video conference, at the discretion of the NARB Chair.

### **7.6 Procedure of Review Panel**

**A.** As soon as the panel has been selected, the NARB Chair shall inform all parties as to the identity of the panel members. At the same time, (s)he shall mail copies of all submissions under Section 7.1(D)) to each of the panel members, and shall, in like manner, send them any response or request submitted by any other party or parties.

**B.** If any party to the dispute before NAD requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given notice of any meeting at which the matter is to be presented to the panel upon scheduling. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

The case record in NAD and/or NARB proceedings shall be considered closed upon the publication of the final case decision as described in Section 3.6 (Standard Track Final Case Decision) or 4.9 (Complex Track Final Case Decision).

### **C. NARB Decision**

(1) The Panel Decision shall be based upon the portion of the record before NAD which it has forwarded to the panel, the submissions under Section 7.1(F), and any summaries of the record, facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts that were presented to NAD and to present new arguments, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel shall honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger shall therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with NAD and the advertiser.

(2) The panel shall not consider any evidence or facts if they are outside the evidence and facts presented to NAD. In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to NAD's findings and recommendations.

## **7.7 Timing and Reporting of Panel Decisions**

When the panel has reached a decision after a panel hearing, the NARB Chair will transmit the decision to NAD and then to the advertiser.

**A. Timing.** The NARB Chair will transmit the decision within three business days after the panel hearing.

**B. Advertiser's Statement.** The advertiser may, within five business days of receipt of the decision, submit an Advertiser's Statement, to be incorporated into the decision at the time of the press release. If the advertiser elects to submit an Advertiser's Statement, the statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12-point type), which may not reargue the merits of the case, mischaracterize the decision, or contain new facts. The NARB Chair reserves the right, upon consultation with the advertiser, to edit for length or inappropriate material. BBB National Programs will draft a press release and send to all the parties for comment prior to its release. Thereafter, the press release will be issued and the Panel Decision posted to the BBB National Programs, Inc. Archive.

Failure to submit an Advertiser's Statement in response to a Fast-Track SWIFT NARB decision will not result in referral of the matter to an appropriate government agency; rather, non-compliance with NARB's recommendations will result in a referral of the matter to the appropriate government agency for review and possible law enforcement action.

## **7.8 Closing a Case**

When a case has been concluded with the publication of a NAD decision or, when a panel has turned over a decision to the NARB Chair, and when the Chair has executed the procedures in Section 7.7 of these Procedures, except as provided for in Section 8.1(A), the case shall be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD.

## **7.9 Withdrawal of an Appeal**

If an advertiser decides to withdraw an appeal, it must notify NARB, NAD, and the challenger in writing, and the appeal shall be deemed withdrawn upon receipt of such notice. Upon withdrawing the appeal, the advertiser shall have five (5) business days to submit a revised Advertiser's Statement to the NAD indicating whether it will comply with NAD's recommendations that had been the subject of the withdrawn appeal.

## **8.1: Case Reopening and Compliance in Standard, Complex, or Fast-Track SWIFT Proceedings**

**A. Case Reopening.** A closed NAD or NARB case may be reopened if the NAD Vice President, in his/her sole discretion, determines that extraordinary circumstances warrant the reopening. In making this determination, the NAD Vice President shall take into account (1) the advertiser's compliance with any recommendations by NAD or NARB relating to the claims at issue; (2) if the reopening is requested based on new evidence, whether there is a satisfactory showing that the new evidence was not reasonably available to the party at the time the NAD record was closed; (3) if the reopening is requested based on new evidence, whether the new evidence would have likely changed the NAD or NARB decision in a material way; and (4) whether the request has sufficient merit to warrant the expenditure of NAD resources.



(1) A petition requesting that a case be reopened may be submitted by either party to the underlying proceeding to the NAD Vice President together with a non-refundable initial petition to reopen fee of \$5,000.

(2) If the NAD Vice President grants the petition to reopen, the petitioning party shall pay an additional nonrefundable filing fee equal to the applicable NAD Challenge Fee minus the \$5000 initial petition to reopen fee. NAD will send notice to any parties to the prior case of NAD's decision to reopen, together with any supporting evidence. Fee waivers can be submitted to the BBB National Programs President and CEO or his or her designee pursuant to Sections 3.1(B)(3) (Standard Track) or 4.1(B)(3) (Complex Track).

(3). Any reopened case will proceed as though a challenge were filed on the reopened claims in accordance with Sections 3.1-3.6 (Standard Track Proceeding), 4.1-4.9 (Complex Track Proceedings), or 6.1-6.5 (Fast-Track SWIFT Proceedings), of these procedures, beginning with a submission from the challenger in the original case and concluding with a final case decision (as provided in Sections 3.6 (Standard Track Final Case decision), 4.9 (Complex Track Final Case Decision), and 6.4(A) (Fast-Track SWIFT Final Case Decision) that may be appealed as set out in Sections 5.1-5.9 (Standard and Complex Track Appeals) or 7.2-7.8 (Fast-Track SWIFT Appeals) of these procedures. Should a challenger elect not to participate in the reopened case, the case will proceed as though NAD opened the matter on its own initiative. The petition requesting that a case be reopened will not be incorporated into the newly reopened case record.

## **B. Compliance Proceedings**

(1) **Standard or Complex Track.** After a standard or complex track NAD case or NARB panel decision requesting that advertising be "Modified or Discontinued" is published, together with an Advertiser's Statement indicating the advertiser's willingness to comply with NAD or the NARB panel's recommendations, NAD or the NARB, either on its own or at the request of a challenger or a third party, may request that the advertiser report back, within ten business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision.

Any evidence that NAD or the NARB relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

In response to a request that the advertiser report on its compliance with an NAD or NARB decision, as described in the preceding paragraph, an advertiser may file a petition to reopen the case under Section 8.1(A) (Reopening a Case) and providing notice to any party in the case that a petition to reopen has been filed. If a petition to reopen is filed, the compliance inquiry will be suspended until the NAD Vice President decides whether the case will be reopened. If the petition to reopen is denied, the compliance inquiry will resume and a response to the compliance inquiry shall be provided within ten business days after the request to reopen is denied. If the petition to reopen is granted, the compliance inquiry will be terminated, and the termination will be reported in the NAD Case Reports.

(2) **Fast-Track SWIFT.** For a Fast-Track SWIFT case, after an NAD or NARB panel decision requesting that advertising be "Modified or Discontinued" is transmitted to the parties, NAD or the NARB (either on its own or at the request of a challenger or a third party) may request that the advertiser report back, within five business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision.

Any evidence that NAD or the NARB relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

In response to a request that the advertiser report on its compliance with an NAD or NARB decision, as described in the preceding paragraph, an advertiser may file a petition to reopen the case under Section 3.9 of these procedures and provide notice to any party in the case that a petition to reopen has been filed. If a petition to reopen is filed, the compliance inquiry will be suspended until the NAD Vice President decides as to whether the case shall be reopened. If the petition to reopen is denied, the compliance inquiry will resume and a response to the compliance inquiry shall be provided within five business days after the request to reopen is denied. If the petition to reopen is granted, the compliance inquiry will be terminated, and the termination will be reported in the NAD Case Reports.

**(3) Standard, Complex and Fast-Track SWIFT Proceedings: Compliance with NAD Decisions.** If, after reviewing the advertiser's response to a request for a status report on compliance with an NAD decision, and after reviewing the current advertising, NAD determines that:

(a) The advertising complies with NAD recommendations, NAD shall conclude that no further action is required and close the compliance inquiry and continue to monitor for compliance;

(b) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with NAD recommendations and/or the representations made in the Advertiser's Statement, or the advertiser fails to respond to the compliance inquiry, NAD will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;

(c) The advertiser has made a reasonable attempt to comply with an NAD decision, but NAD remains concerned about the truthfulness and accuracy of the advertising as modified, NAD will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.

(i) If NAD finds that the advertiser has accepted and agreed to promptly implement the recommendations, NAD will determine that no further action is required, close the compliance inquiry, and report this in the Case Reports and continue to monitor for compliance;

(ii) If NAD finds that the advertiser has not agreed to promptly implement the recommendations, after notification to the advertiser, NAD will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the Case Reports.

**(4) Compliance with NARB Decisions.** After reviewing the advertiser's response to a request for a status report on compliance with an NARB decision, and after reviewing the current advertising, NAD will submit to the NARB Chair the file relating to compliance along with NAD's recommendations. If the NARB Chair determines that:

(a) The advertising complies with the NARB panel's recommendations, the NARB Chair will decide that no further action is required and close the compliance inquiry;

(b) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with the NARB panel's recommendations and/or the

representations made in the Advertiser's Statement, or the advertiser fails to respond to the compliance inquiry, the NARB Chair will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the NAD Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;

(c) The advertiser has made a reasonable attempt to comply with an NARB panel decision, but the NARB Chair remains concerned about the truthfulness and accuracy of the advertising as modified, the NARB Chair will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.

(i) If the NARB Chair finds that the advertiser has accepted and agreed to promptly implement the NARB Chair's recommendations, the NARB Chair will determine that no further action is required, close the compliance inquiry, and report this in the NAD Case Reports.

(ii) If the NARB Chair finds that the advertiser has not agreed to promptly implement the NARB Chair's recommendations, after notification to the advertiser, the NARB Chair will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the NAD Case Reports.