

# KIRKLAND ALERT

October 2015

## NAD and NARB Propose New Rules to Govern Advertising Challenges

The National Advertising Division of the Council of Better Business Bureaus (“NAD”) provides a self-regulatory forum for the advertising industry. NAD investigates national advertising to ensure that it is accurate and properly substantiated. Its review body, the National Advertising Review Board (“NARB”), adjudicates appeals of NAD rulings. The NAD/NARB process is a common forum in which competitors challenge each other’s advertising claims.

In response to recommendations from the ABA’s Advertising Disputes & Litigation Committee and Consumer Protection Committee, NAD and NARB are planning to implement revisions to the Advertising Self-Regulatory Council (“ASRC”) Procedures that govern their proceedings for adjudicating advertising challenges. NAD announced the upcoming rule changes during a September 29, 2015 panel at NAD’s 2015 Annual Conference. The revisions are intended to streamline the process and help focus NAD’s resources so NAD can issue decisions more quickly in the advertising challenges it hears.

NAD described the following noteworthy changes to the ASRC Procedures:

- **NAD No Longer Will Be a Party to NARB Appeals:** Under current ASRC Procedures, NARB appeals typically involve three parties: the advertiser, the challenger, and NAD.<sup>1</sup> NAD files a brief in support of its decision in the underlying proceeding, and an NAD staff attorney presents NAD’s case to the NARB panel. Under the revised rules, NAD no longer will file a brief in NARB appeals and will only attend NARB hearings if requested by the NARB panel chair in individual cases. In practice, this means there will be one less party arguing in support of the decision below, ending the “two-on-one” dynamic that has been typical in NARB appeals.
- **Private Settlements Will Be Permitted to Close Cases:** Currently, when an advertiser and a challenger resolve a challenge by settlement, NAD may continue to pursue the investigation into the accuracy of and substantiation for the challenged claims. Under the new rules, NAD will close adversarial proceedings upon settlement. Such agreements may be made until NAD provides its draft decision to the advertiser. When cases resolve by settlement, however, NAD will reserve its right to examine the challenged ad claims thereafter in a new monitoring proceeding.
- **Requirements for Advertiser’s Statements:** The new procedures will require that, when NAD recommends an advertiser discontinue or modify some or all of the claims challenged in a proceeding, the advertiser must indicate in the

**The revisions are intended to streamline the process and help focus NAD’s resources so NAD can issue decisions more quickly in the advertising challenges it hears.**

first sentence of its Advertiser's Statement whether it (a) will comply with NAD's recommendations, (b) will not comply with NAD's recommendations, or (c) will appeal the decision to NARB. Advertisers no longer will be permitted to rely on the common refrain that they will "take NAD's recommendations into account in future advertising."

- **Changes to NAD Scheduling Procedures:** The new rules will require NAD to issue its decision in an advertising challenge within 20 business days of either the last paper submission or meeting with the parties, whichever is later. Further, NAD staff attorneys no longer will control the schedules in their proceedings. Instead, all case scheduling will be controlled by a single NAD administrator. NAD's opening letter to the parties in new challenges will include a complete schedule as it would occur under the rules if no extensions were granted. The parties are free to agree to changes in this schedule; however, in the event the parties cannot agree to changes, the NAD administrator will have authority to amend the schedule as she deems fit.
- **Formalities in NAD Submissions:** The new rules require that challengers list out each express and implied advertising claim being challenged in an NAD proceeding. This is intended to prevent challengers from disputing new ad claims after receiving the advertiser's opening response letter. NAD will not be permitted to challenge additional advertising claims in the proceeding, but may institute its own separate monitoring proceeding as necessary. The proposed revisions also indicate that all letters filed during NAD proceedings should be limited to 20 double-spaced pages in length.
- **NARB Scheduling and Formalities:** The new rules require that appeal briefs be no longer than 30 double-spaced pages; however, in cross appeals, each brief will be limited to 15 double-spaced pages. In cross appeals, both parties will file their opening appellate briefs and then their responsive briefs simultaneously.

These are only a few of the revisions being implemented to NAD's and NARB's procedures. Other changes are likely to be adopted as well, and a full review of the final updated ASRC Procedures will be necessary to appreciate them all. The current rules are available on the ASRC website, at <http://www.asrcreviews.org/asrc-procedures/>.

According to NAD, the new procedures will go into effect November 1, 2015; however, NAD will adopt its new hands-off role in NARB proceedings in appeals filed on or after September 30, 2015.

**Advertisers no longer will be permitted to rely on the common refrain that they will "take NAD's recommendations into account in future advertising."**

---

1 NAD monitoring cases are the exception. In those proceedings, NAD essentially serves as challenger in support of the public interest. Under the revised procedures, NAD will remain a party to NARB appeals of its decisions in monitoring cases.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Ross M. Weisman, P.C.  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/rweisman](http://www.kirkland.com/rweisman)  
+1 (312) 862-2120

Ian J. Block  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654  
[www.kirkland.com/iblock](http://www.kirkland.com/iblock)  
+1 (312) 862-3684

*This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.*

© 2015 KIRKLAND & ELLIS LLP. All rights reserved.

[www.kirkland.com](http://www.kirkland.com)