

## CLIENT ALERT

### The National Advertising Division Announces its Fast-Track SWIFT Challenge Process

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The National Advertising Division (NAD), the ad industry self-regulatory forum, has just announced a major new initiative designed to speed up certain types of simple advertising challenges that proceed before NAD. NAD's new Single Well-defined Issue Fast Track (SWIFT) challenge process promises to resolve matters in approximately three weeks that normally take approximately four or five months. Over the last few months, NAD and the BBB have reached out to outside counsel and in-house lawyers who are regular participants in the NAD process for feedback on various draft SWIFT proposals. Now, in an April 2, 2020 press release, NAD is announcing the initial launch of the SWIFT process, which it may refine from time to time as it gains experience with the process.

The new SWIFT process can only be used for certain types of discrete, well-defined challenges relating to:

- Influencer disclosures;
- Native advertising disclosures;
- Misleading pricing and sales claims; and
- Express claims that do not require complex claim substantiation.

NAD leadership has from time-to-time referred to these types of cases as “slam dunks” – referring to the concept that their decision should be straightforward and likely not require complex balancing of factors. Accordingly, the submission and decision process for SWIFT is much more truncated than the typical NAD process. A SWIFT challenge must be limited to only a single issue. Each party may file only one substantive submission. There is no right of reply for the challenger. NAD says it will issue a final decision on the challenge within 20 business days from the initiation of the challenge.

To initiate a SWIFT challenge, the challenger must submit a challenge, no more than five pages long, through [the SWIFT online portal](#). To file, the challenger must include, among other things, a statement as to why the advertising claim fits within the defined, SWIFT categories, along with a copy of the challenged advertising and when and where it appeared, and no more than 5 supporting exhibits.

As a threshold matter, NAD will first decide within two business days whether the challenge is even appropriate for the SWIFT process. The advertiser has no say in that initial decision. Only after a case is opened under SWIFT will the challenge be electronically transmitted to the advertiser. If the advertiser objects to application of the SWIFT process as inappropriate, perhaps because of the complexity of the issues, it may initially object within four days after NAD transmits its opening letter. NAD will then decide whether to reverse its initial decision to open the challenge within two days thereafter. However, advertisers who object to the SWIFT process will not buy extra time to submit a substantive response.

If the SWIFT challenge passes these initial hurdles, the advertiser must respond by the tenth business day of the process, submitting its argument letter (no more than five pages) and up to five exhibits in support of claim substantiation. Another

difference between the ordinary NAD challenge and the new SWIFT process is that party meetings will only be “held at NAD’s discretion” via telephone or video conferencing and must take place between days 11 and 15. As with typical NAD proceedings, a press release will also be distributed.

**How much does the SWIFT process cost?** The filing fees for SWIFT challenges are higher than standard track challenges. For BBB National Partners, the filing fee is \$30,000 (compared to \$25,000 for the standard process). For non-Partners, the filing fees are tiered depending on gross annual revenue, ranging from \$15,000 to \$40,000 (compared to a range of \$10,000 to \$35,000 for the standard process). If NAD determines that the challenge is not appropriate for the SWIFT process, the challenger can elect to transfer the challenge over to the standard track process and the filing fee paid for SWIFT will be applied. If the challenger elects not to file a challenge, the filing fee will be returned minus a \$5,000 processing fee.

**Can the advertiser appeal?** Yes, through an abbreviated appeal timeline. On receipt of an adverse decision, the advertiser has three days to appeal. The filing fee for an appeal is \$30,000 (compared to \$25,000 for standard track). The advertiser’s appellate brief is due on day eight and the challenger’s responsive brief is due on day 17. To simplify scheduling, NARB meetings will be held via videoconference. NARB’s decision is due within three days of the videoconference. There is no right of cross-appeal.

Time will tell how useful the SWIFT process will be for NAD participants. However, because of the significantly abbreviated timeline and the limited briefing process, it is wise for advertisers to become familiar with SWIFT in case they receive a SWIFT challenge in the future. More information about the Fast-Track SWIFT process may be found [here](#), and FAQs may be found [here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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