

# THE NATIONAL LAW REVIEW

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## FTC Statistics Confirm Risks to Advertisers of Refusing to Participate in NAD Proceedings

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No advertiser likes challenges to its advertising, whether by private litigants, state or federal governmental agencies, or in voluntary self-regulatory NAD proceedings. But for companies whose advertising is challenged at NAD, there are good reasons to participate and to abide, like it or not, by NAD's recommendations or those of NARB, the appellate arm of advertising voluntary self-regulation. The powerful reasons for compliance include the vastly reduced expense of NAD proceedings compared to litigation, NAD's unquestioned expertise in advertising claim substantiation issues compared to that of the federal and state judiciary, and the long-term, the-shoe-will-one-day-be-on-the-other-foot benefit resulting from industry-wide adherence to a system of voluntary self-regulation of advertising.

Still, when a company's very expensive advertising campaign is put at risk in a purely voluntary dispute resolution proceeding, it can be very tempting (albeit shortsighted) for the advertiser to decline to participate or, after participating, to decline to follow NAD's (or NARB's) recommendation if adverse to the advertiser. Recognizing that (i) a declination to participate in an NAD challenge or to abide by NAD's recommendation will result in NAD referring the matter to the appropriate federal regulatory body, typically the FTC, and (ii) FTC investigation and litigation can be hugely expensive and can result in severe financial and other penalties, most advertisers historically have avoided thumbing their noses at NAD.

Occasionally, advertisers have chosen the course of taking their proverbial ball and going home, gambling on the assumption that the FTC will be stretched too thin on its own consumer protection matters to devote its scarce resources to NAD referrals. Today, however, an article written by NAD Staff Attorney Alexander Goldman reveals the fallacy of the assumption that FTC is too busy to handle NAD matters. Relying on FTC's own statistics, Mr. Goldman reports that in 2017-18 (a period coinciding with the Trump presidency), the FTC took action in 15 of the 19 matters NAD referred to FTC. Mr. Goldman noted that the percentage of NAD referrals that FTC acted upon during this two year period was virtually identical to that during the preceding two-year period of 2015-16, while President Obama was in office.

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