Monday, June 22, 2020

In April 2020, the National Advertising Division (NAD) rolled out a Fast-Track SWIFT option (“Single Well-defined Issue Fast Track”) for certain cases under review. The new SWIFT track expedites the process for single-issue disputes that do not require complex evidence or argument and meet certain parameters. On June 10, the NAD published its first trio of SWIFT decisions that illustrate what participants can expect from the new process.

**A Need for Speed**

One of the prized benefits of the NAD’s self-regulatory process has always been its quicker time-to-resolution compared to litigation. With the SWIFT option, NAD has again raised the bar. Participants can expect a decision within 20 business days after NAD transmits the challenge to the advertiser. This ambitious timeframe was developed in response to industry concern that the NAD’s standard process may have been too cumbersome and time consuming for simple but prevalent advertising issues.

SWIFT’s increased efficiency means that both challengers and advertisers may see decreased burden in pursuing or fighting a challenge. Under SWIFT, briefs are limited to five pages, rather than the 20 page limit for standard track cases, with only five exhibits allowed. In addition, SWIFT allows only one substantive
submission per party, all submissions are made online, and a meeting with NAD is not guaranteed.

The expedited process results in a less burdensome process for participants – but can also trap the unwary. After a challenge is filed, NAD reviews the papers to determine whether SWIFT is appropriate, a determination NAD makes within two business days. NAD then transmits the challenge to the advertiser, which may object to SWIFT within 4 business days (if the advertiser chooses to do so, NAD will turn around a decision on the objection within 2 business days). The advertiser has ten business days to provide substantiation for the challenged claim regardless of whether the advertiser objected to SWIFT. The accelerated process is sure to keep both NAD and participants on their toes.

**Narrowing the Field**

Unsurprisingly, SWIFT is not designed for all case types and is geared mostly towards recurring issues in digital marketing. Initially, the NAD considers eligible challenges that are limited to a single issue and fall into one of three buckets:

1. The prominence or sufficiency of disclosures (NAD points to cases dealing with influencer, incentivized review, and native advertising disclosures);
2. Misleading pricing and sales claims; and
3. Misleading express claims that do not require review of complex evidence or substantiation (here NAD points to a review of clinical or technical testing or consumer perception evidence).

When it unveiled SWIFT, NAD provided a host of hypothetical examples running the gambit from an influencer pushing “SuperHottie Tea” without disclosure of a material connection to an advertiser tweeting a BOGO offer that has a hidden fee. But now, there are three real-world examples illustrating SWIFT in action.

The first case involved an advertiser objecting to SWIFT because, in its view, the challenged claim (having to do with 5G service) was an implied claim that did not fit into NAD’s eligibility criteria. NAD disagreed, deciding that the claim was express and that the case fell into the first bucket – whether there were sufficient disclosures. The advertiser did not submit a substantive response to the challenge, and NAD referred the matter to government enforcers. In the second case, the advertiser agreed to voluntarily modify a “clinically proven” claim by disclosing specific portions of the product that were clinically tested in response to the challenge. The third case was closed by consent of the parties and no details were disclosed. These cases – one objection, one voluntary dismissal, and one closure by consent of the parties – illustrate that outcomes of the new SWIFT process will still hinge on the participants’ unique characteristics, strategies, and views on self-regulation.

Especially during the ongoing COVID-19 pandemic, where a civil litigants’ time in court may be more uncertain than ever, NAD’s SWIFT process may step in as a fast alternative to resolving disputes involving common digital marketing issues. SWIFT’s lower barrier to entry and speedy time to decision could create an uptick in challenges for cases meeting the eligibility criteria. Whether your business gets tagged with a SWIFT challenge or is considering bringing one, Hunton’s Advertising...