

TRUST THE PROCESS?
THE CHALLENGER'S PERSPECTIVE TO POLICING
COMPETITORS' ADVERTISING CLAIMS

Overview of program: The options for challenging competitors' claims are well known: Lanham Act litigation, complaints to federal or state regulators, and NAD challenges. However, with litigation costs limiting Lanham Act challenges to the most-critical issues and government action infrequent on purely competitive matters, self-regulation is often the best bet. Yet in 2018, challengers at NAD have become increasingly frustrated by advertisers' refusal to participate in the process or comply with decisions, resulting in more cases being appealed to NARB than ever before. Why should challengers trust the process? The panel will discuss trends at NAD, the impact of recent changes to ASRC procedures, proposals for continued improvement, and the advertiser's responsibility when it comes to building trust in industry self-regulation.

I. FTC Referrals Following Refusals To Comply And Participate

The Federal Trade Commission has long supported advertising industry self-regulation as a means of promoting truthfulness and accuracy in advertising. Numerous commissioners, including Mary Gardiner Jones,¹ Robert Pitofsky,² Deborah Platt Majoras,³ and Maureen Ohlhausen,⁴ among many others, have heralded the success of advertising self-regulation.

One of the key aspects of this success has been referral, or the threat of referral, to the FTC: advertisers that refuse to participate in the self-regulatory process or refuse to comply with recommendations after participating are referred to the appropriate government entity, usually the FTC's Division of Advertising Practices, which will review the claims at issue.⁵ Over the years, the specter of a National Advertising Division (NAD) referral to the FTC has prompted most advertisers to participate in the self-regulatory process and comply with the final decision.

¹ E. Zanot, The National Advertising Review Board, 1971-1976, 22 ASS'N FOR EDUC. IN JOURNALISM (1979).

² "Self-Regulation and Antitrust," Remarks by Robert Pitofsky, Chairman, Federal Trade Commission, D.C. Bar Association Symposium, (Feb. 18, 1998), available at: <https://www.ftc.gov/public-statements/1998/02/self-regulation-and-antitrust>.

³ "Advertising Resolutions for the New Year," Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, Association of National Advertisers (Jan. 17, 2007), available at: <http://www.ftc.gov/speeches/majoras/070117adresnewyear.pdf>.

⁴ "Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era," Remarks by Maureen K. Ohlhausen, BBB Self-Regulation Conference (June 24, 2014), available at: <https://www.ftc.gov/public-statements/2014/06/success-self-regulation-strategies-bring-mobile-global-era-better-business>.

⁵ Under relevant rules, the NAD may, and sometimes does, also refer advertisers to other "appropriate government agencies," such as the Food & Drug Administration or the Federal Communications Commission. See Policies and Procedures by the Advertising Self-Regulatory Council, Rule 4.1.

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An analysis of recent NAD cases, however, suggests that referrals are on the rise over the past two years. Last month, when the NAD referred Capillus, Inc. to the FTC for declining to comply with its recommendations to discontinue claims about its laser therapy medical device for hair growth, it marked the sixteenth time in 2018 the NAD referred advertising to the FTC – exceeding last year’s referral number of fifteen, which itself was well above historic referral rates.

This trend raises a number of questions. Are advertisers turning their back on self-regulation and rolling the dice at the FTC? And are they doing so based on an assessment of the risk that a referral could result in a major FTC investigation or enforcement action?

The Carrot and Stick Driving Participation

Since its inception in 1971, NAD procedures have encouraged advertiser participation through (1) publication of findings, decisions, and press releases related to the truthfulness and accuracy of challenged claims; and (2) referral to an appropriate government agency if the advertiser declines to participate or change its advertising if it does participate but declines to implement recommended changes.⁶

Each of these incentives advances notable goals of the self-regulatory process. By publishing decisions issued by experts in advertising law, NAD helps develop discourse on relevant advertising law principles and a useful resource for advertisers looking for guidance when evaluating claims and related support. In addition to this carrot incentivizing participation, the publication of decisions and press releases can also serve as a stick to encourage participation to avoid potential negative publicity.

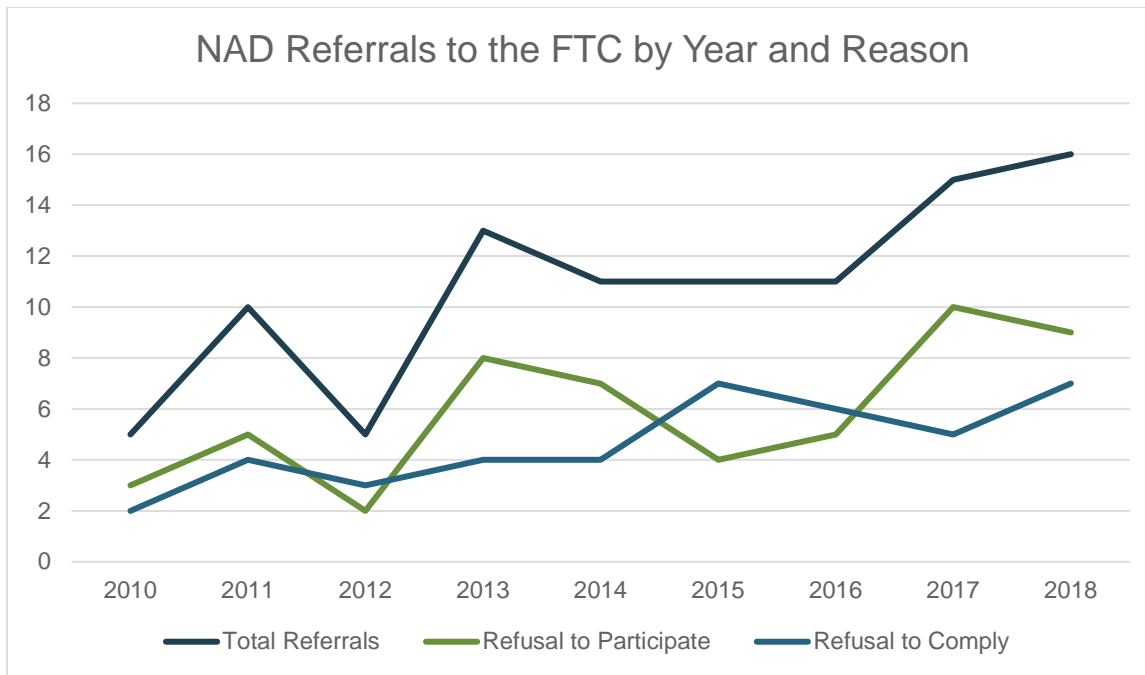
While these are important aspects to the self-regulatory process that embolden participation, the primary mechanism to ensure widespread industry participation has always been the potential for referral to the FTC. FTC investigations can be long and expensive, with the potential result being burdensome orders, and industry players have historically been overwhelmingly willing to participate in the self-regulatory process and modify advertising to avoid the prospect of FTC investigation or enforcement.

More Cases Are Being Referred than Ever Before

Based on an analysis of NAD and NARB referrals since 2010, there has been a notable increase in the number of referrals since the beginning of 2017 when President Trump took office, as compared both to the immediately preceding years and the aggregate preceding seven-year period. From 2010 to 2016, there were 65 total referrals out of 664 decisions – an average of under 10 referrals per year. Conversely, there were fifteen referrals in 2017 and sixteen in 2018. As shown in the chart below, the uptick in referrals in 2017 and 2018 has been driven by refusals to

⁶ Referrals for failure to comply with recommendations can take place immediately after a decision if, for example, an advertiser affirmatively indicates in their advertiser statement that they do not intend to comply, or down the road, as a result of a compliance proceeding.

participate – with ten advertisers refusing to participate in 2017 and nine advertisers refusing to participate in 2018.⁷



Longtime Participants Declining to Participate

The mere uptick in referrals by itself would be interesting but likely unimportant if, for example, the trend was attributable to NAD challenges of newer advertisers less familiar or less committed to advertising self-regulation. But this doesn't appear to be the case, as some longtime NAD participants are also refusing to participate or comply.

Historically, nearly every reputable company that was regularly forced to defend or chose to bring an NAD challenge agreed both to participate and comply once a decision was reached. Prior to January 1, 2017, there was a single instance of an advertiser refusing to participate when that advertiser had participated at NAD more than once.⁸ There also were only a few instances where advertisers that regularly appeared before NAD *refused to comply*, but did participate.⁹ But at least some longtime participants now seem inclined to evaluate whether it is in their best interest to participate and comply. Since January 1, 2017, there have been four instances where a regular

⁷ Total referrals by year equals referrals for refusals to participate and comply, except in 2011 and 2013 when one advertiser each year was referred to the FTC based on the contested claims being subject to an existing FTC consent decree.

⁸ And that case was atypical – a 2015 challenge initiated by NAD of Walmart's claims about increasing the minimum starting wage for its employees, not a typical product/service claim. *Walmart Stores, Inc. ("Raise in Pay" Commercial)*, NAD Case No. 5862 (July 8, 2015).

⁹ See, e.g., Merial Limited (Frontline Plus), Compliance Proceeding from NAD Case No. 5249 (July 6, 2011) (referring matter after NAD and NARB decisions and subsequent compliance inquiry "[b]ased on Merial's unwillingness to modify its advertising as recommended by NAD and NARB").

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NAD participant refused to *participate*: Conair (seven-time participant at NAD/CARU); Implus, LLC (two-time participant); T-Mobile (nine-time participant); and Verizon (24-time participant).

Yet a closer examination suggests that longtime participants remain committed to self-regulation. T-Mobile and Verizon, for example, were in a unique position based on questions surrounding the FTC's common carrier jurisdiction and have both participated at the self-regulatory process subsequent to their refusals to participate.¹⁰ After being referred to the FTC, Conair quickly agreed to modify its advertising. And Implus had not participated in the self-regulatory process for years. Based on the circumstances surrounding these referrals, it seems fair to characterize these examples as anomalies and to conclude that referrals generally involve newcomers to self-regulation who are unfamiliar with the NAD and its mission.

Are Recent FTC Rapid Responses Emboldening Refusals?

Another possibility is that advertisers have been more willing to roll the dice based on recent responses from the FTC to NAD referrals. While the FTC has historically taken some time to respond to an NAD referral, there appears to be a trend towards the FTC quickly issuing a closing letter and indicating that the advertiser has either discontinued the claim or that it plans to take no further action. Since January 1, 2017, the FTC has provided at least eight responses within 40 days, which is more under 40-day responses than the preceding seven-year period combined. Two recent response letters also came more quickly than ever before – one to Perfect Prime three days after the referral and the other to T-Mobile fifteen days after the referral.

The rapid response to T-Mobile makes some sense given it was on jurisdictional issues,¹¹ but the Perfect Prime response stands out as the FTC's response simply indicates that they were declining to take action based on “a number of factors related to resource allocation and enforcement priorities, as well as the nature of any FTC Act violation, the type and severity of any consumer injury, and the likelihood of preventing future unlawful conduct and securing consumer redress or other relief.”¹² Notably, the letter goes out of its way to reiterate that “[t]he Commission is grateful for the NAD's role in offering a voluntary forum to address practices that may violate your

¹⁰ *T-Mobile USA, Inc. (T-Mobile Streaming Video)*, NAD Case No. 6214 (October 26, 2018); *T-Mobile USA, Inc. (T-Mobile Wireless Service)*, NAD Case No. 6117 (Sept. 18, 2017) (Verizon challenging claims made by T-Mobile for wireless service).

¹¹ See FTC Letter to Laura Brett, Esq. regarding Advertising for T-Mobile USA, Inc. (Feb. 28, 2018), available at: https://www.ftc.gov/system/files/documents/public_statements/1334343/t-mobile_ack_resolution_letter.pdf (“Because the FCC has jurisdiction over all of T-Mobile's conduct at issue, we believe it would be more efficient for the FCC to address this matter. Accordingly, we have determined not to review your referral on the merits at this time.”).

¹² See FTC Letter to Laura Brett, Esq. regarding Advertising for Perfect Prime Anti-Aging Face Serum (Mar. 22, 2018), available at: https://www.ftc.gov/system/files/documents/public_statements/1365479/perfect_prime_resolution_letter_3-22-18.pdf. An even more recent response to a referral involving Pharmavite, LLC recites the same factors to explain the Commission's decision not to recommend enforcement action at this time. *FTC Letter to Laura Brett, Esq. regarding Advertising Claims for NatureMade Omega-3 with Xtra Absorb Technology Supplements* (Sept. 28, 2018), available at: https://www.ftc.gov/system/files/documents/public_statements/1415789/nad_naturemade_resolution_letter_9-28-18.pdf.

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guidelines and the principles of the FTC Act” and that it “fully support[s] the NAD's self-regulatory process.”¹³

But, at the same time, the reference to “resource allocation and enforcement priorities” is striking, particularly given the Trump Administration’s stated goals to reduce regulation and control regulatory costs.¹⁴ In her comments at the 2018 NAD Annual Conference, Mary Engle, Associate Director of the FTC’s Division of Advertising Practices, acknowledged that resource allocation is always a consideration but warned that the new Commissioners – all five of whom were sworn in after May 2018– believe strongly in enforcement and are not likely to give free passes to advertisers. Ms. Engle also downplayed the timing of FTC Staff’s responses, noting that some of the referrals were acted upon quickly because they were also referred to other agencies like the FDA and FCC, while others were simply reviewed quickly and efficiently.

What Exactly is Going on?

While there is no dispute that the number of referrals has increased recently, it’s not clear that this is based on an actual shift in substantive responses by the FTC. Indeed, a review of FTC responses to referrals over the past seven years shows that the overwhelming majority of referrals still result in either the advertiser returning to NAD or the advertiser discontinuing or modifying the relevant claims. Ms. Engle has explained that the FTC always starts by encouraging the advertiser to go back to NAD to participate in the self-regulatory process. If they still decline, FTC staff will undertake a more substantive review, even though many of the types of claims referred by the NAD would not typically be on the Commission’s radar. As such, it should not be surprising then that enforcement actions are relatively rare following NAD referral.

At the same time, there is evidence that there has been an uptick in FTC “no action” responses (*i.e.*, those where the advertiser continued to refuse to participate, discontinue or modify advertising, or the FTC took no action or issued a closing letter without modifications).¹⁵ These responses are still the exception and not the rule, but the trend does suggest that it’s at least possible that advertisers have taken note of modest changes in FTC responses and adjusted their self-regulatory calculus as a result. More likely, however, is that the increase in refusals to participate is based more on perception than hard calculations of probability.

So What Does It Really Mean?

Here is what we know: there is an upward trend in referrals; increasingly, those referrals involve advertisers who regularly participate before NAD; the FTC is issuing responses more quickly than

¹³ *Id.*

¹⁴ *See, e.g.*, Executive Order 13771 – Reducing Regulation and Controlling Regulatory Costs (signed January 30, 2017), 82 Fed. Reg. 9339 (February 3, 2017); *see also* Executive Order 13777 – Enforcing the Regulatory Reform Agenda (signed, February 24, 2017), 82 Fed. Reg. 12,285 (March 1, 2017).

¹⁵ *See, e.g.*, FTC Letter to Laura Brett, Esq. regarding Advertising for LG Electronics USA, Inc. (Dec. 21, 2018)(stating the FTC’s intention not to take action at this time, based on “factors related to resource allocation and enforcement priorities, as well as the nature of any [alleged] FTC Act violation and type and severity of any consumer injury.”).

ever before; and many of those responses are concluding that no action is warranted. The question is why.

Could it be a result of a shift in thinking at the Commission under President Trump, or at least the result of industry's perception that thinking has changed? After all, the President has made clear his intention to reduce "regulatory overreach" of federal agencies. Former Chair Maureen Ohlhausen seemed to follow the President's direction, becoming a vocal proponent of "regulatory humility" in the months after the presidential election. All of this has caused some to theorize that there has been a change in thinking at the FTC when it comes to NAD referrals and the threat of FTC action following a refusal to participate or comply has lessened. And, even if there hasn't been an actual change in thinking, the perception of change could still be enough to adjust an advertiser's calculation of pros and cons of self-regulatory participation.

Ms. Engle believes there's been no such change in thinking at the Commission, and is quick to point out that there is an entirely new slate of Commissioners "who believe in the importance of law enforcement and supporting self-regulation." She also warns that companies are unlikely "to see a hands-off approach from the FTC" anytime soon. From her perspective, NAD Director Laura Brett sees the recent uptick in referrals as an anomaly caused by a handful of relatively new companies unfamiliar with the self-regulatory process – not a broader trend.

Time will tell if this is the case, and whether more companies will refuse to participate or comply in the self-regulatory process and risk an investigation under Part 2 of the FTC Rules of Practice and a possible order. What is certain is that this is a high stakes decision that requires a careful assessment of (1) how the facts of a case might be evaluated by the FTC staff under Section 5 of the FTC Act, (2) the agency's resource allocation and enforcement priorities, and how they relate to the advertising at issue, and (3) the type and severity of any consumer injury that flows from the allegedly false advertising. Getting it right could allow an advertiser to continue to market its products in a manner that self-regulation might not permit; getting it wrong could lead to a burdensome consent order that would govern how a company operates for years to come.

II. NARB Appeals Since 2012

In light of recent trends related to NAD decisions and refusals to comply and participate, we also analyzed potential trends related to appeals from NAD decisions to the National Advertising Review Board (NARB), including the frequency that decisions were appealed, how often NARB affirmed NAD's decision and/or made certain findings that appeared to conflict with NAD, and other trends.

Notably, the ASRC announced rule changes in September 2015 in response to a Working Group report by the Advertising Disputes and Litigation and Consumer Protection Committees of the American Bar Association. Notable revisions to ASRC Rules, as they relate to NARB appeals included the following new provisions:

- "NAD/CARU shall not be a party to an NARB proceeding except in cases where NAD/CARU filed the complaint as part of its monitoring responsibility. When NAD/CARU is not a party to an NARB proceeding, NAD/CARU representatives may

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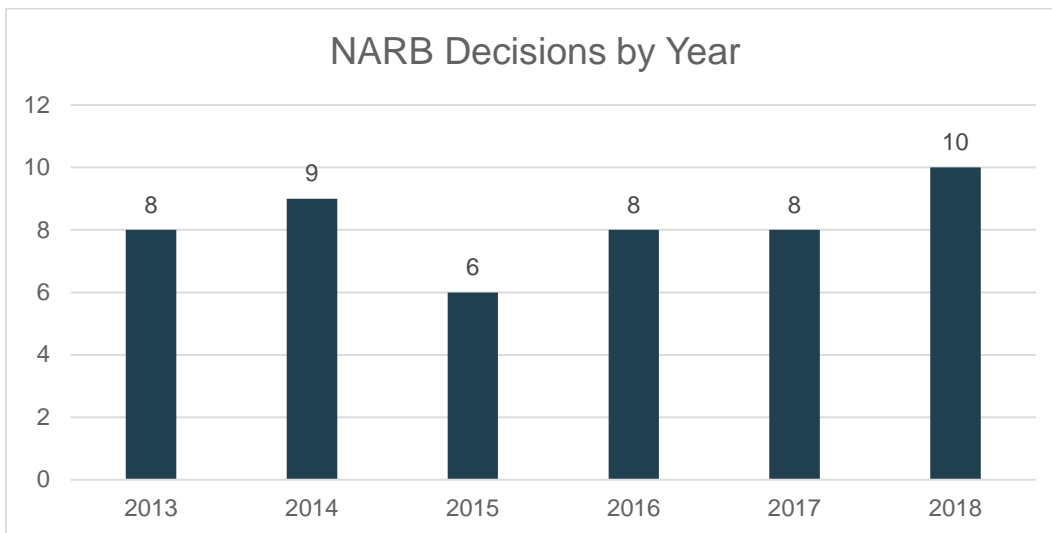
attend the NARB hearing to answer questions from the panel when requested by the NARB Panel Chair.”¹⁶

- “The written submissions to the NARB may contain new arguments and cite to applicable legal precedent, including NAD, CARU, or NARB precedent, even if it was not cited in submissions to NAD or CARU.”¹⁷
- “The panel will consider no evidence or facts if they are outside the evidence and facts presented to NAD/CARU. In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to NAD or CARU’s findings and recommendations.”¹⁸

Cases are being decided at roughly the same rate.

There have been 50 NARB decisions issued since January 2013. In the 3+ year period since the NAD [announced](#) a series of rule changes to the NARB appeals process in October 2015, there have been 28 NARB decisions released. In the preceding roughly 3 year period since January 2013, there were 22 NARB decisions.

The following graph shows NARB decisions by year and shows that it recently peaked with 10 decisions in 2018.



Importantly, these data only show the number of decisions. They do not show the number of appeals that are filed and pending. Given the length of time between filing and decision, there is a strong indication that there is a significant backlog of appeals waiting to be decided. To its credit, steps are being taken to eliminate that backlog.

¹⁶ New Rule 2.3(B).

¹⁷ New Rule 3.2.

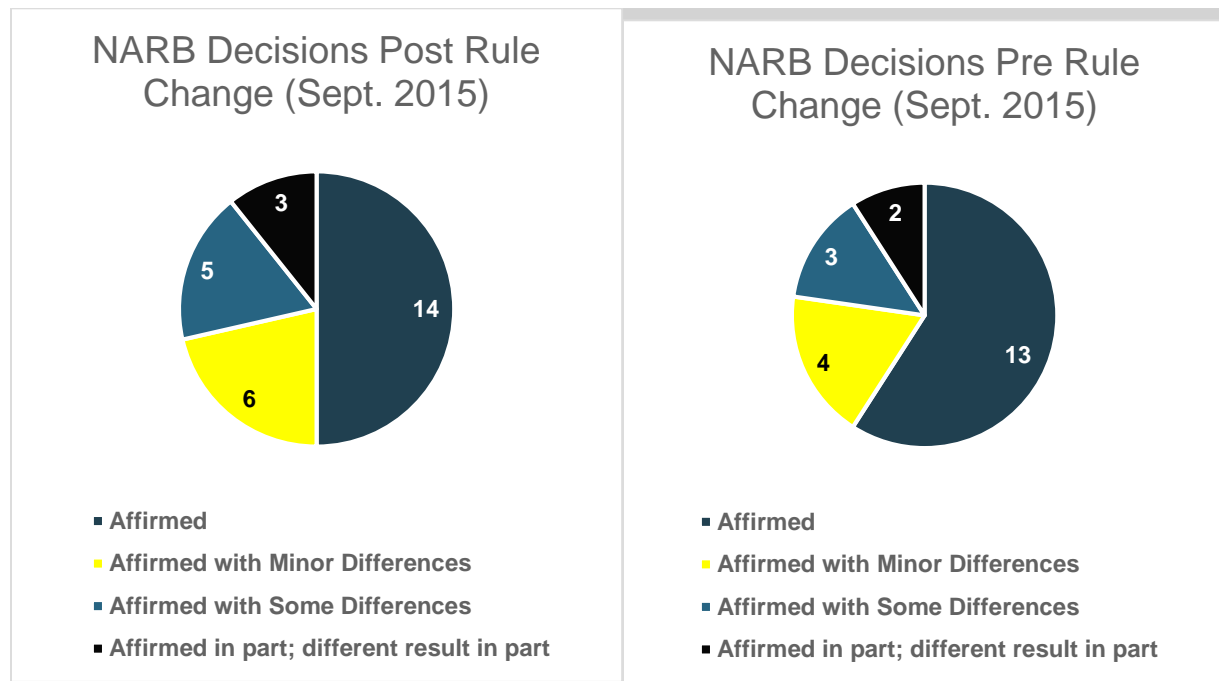
¹⁸ New Rule 3.6(D)(2).

NARB decisions are less likely to simply restate NAD’s analysis and recommendations post-rule change, and are more likely to substantively differ from NAD decisions.

The graphs below categorize NARB decisions based on the following categories:

- Affirmed – NARB affirmed NAD’s decision without notable differences in analysis and recommendations
- Affirmed with minor differences – NARB generally affirmed NAD’s decision but offered different analysis and/or modestly different recommendations (*e.g.*, related to disclosures or qualifications)
- Affirmed with some differences – NARB generally affirmed NAD’s decision but offered materially different analysis and/or different recommendations (*e.g.*, related to disclosures or qualifications)
- Affirmed in part; different results in part – NARB affirmed part of NAD’s decision and overturned part of NAD’s decision.

There were no instances where the NARB entirely overturned NAD’s decision. The graphs below show that NARB has been more likely to offer some different analysis and/or recommendations since the rule change was implemented. Before the rule change, roughly 60% of NAD decisions were wholly affirmed by NARB – that percentage has since declined to roughly 50%.

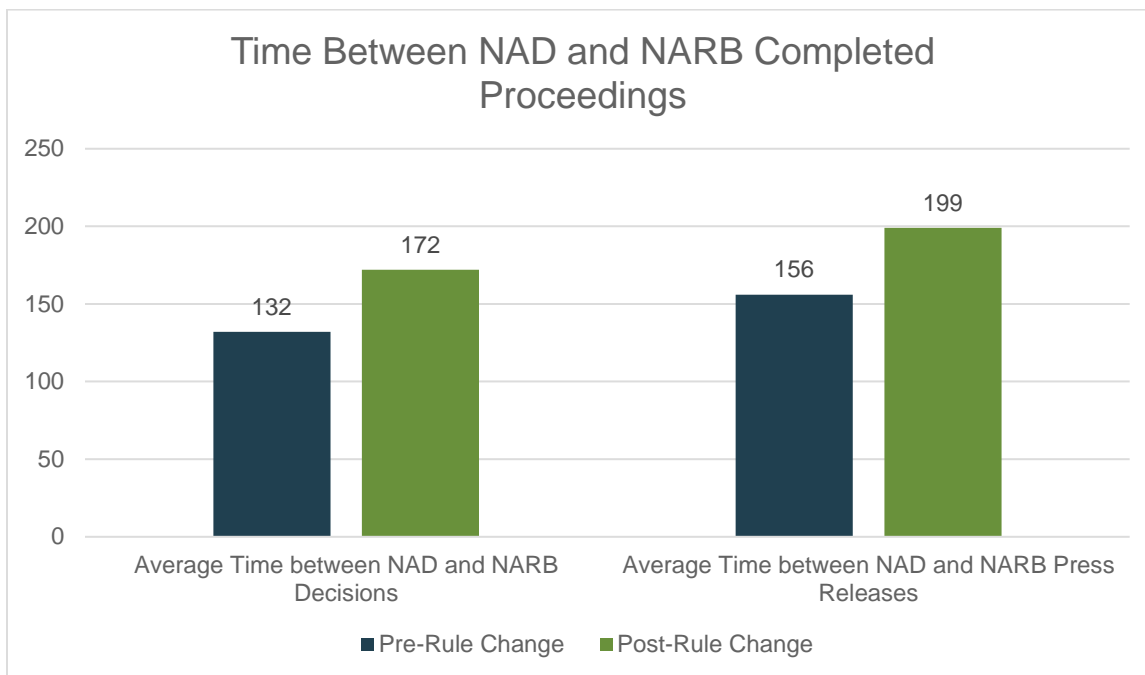


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The difference seems primarily attributable to decisions where NARB offered different analysis and/or modestly different recommendations but did not fundamentally disagree with NAD. This makes some sense given the rule changes in September 2015: (1) provided that NAD shall no longer be a party to an appeal; (2) allowed the appellant to introduce new arguments to NARB; and (3) expressly specified that NARB will exercise its own judgment.

Decision times have gotten slower.

Since the rule change, the average time between an NAD decision and NARB decision is 172 days. Prior to the rule change, the average time between the NAD decision and NARB decision was 132 days. The numbers are slightly different if you look at press release dates, but the same trend holds. Since the rule change, the average time between the NAD release and NARB release was 199 days. Prior to the rule change, the average time between the NAD release and NARB release was 156 days. (A few decisions don't have press releases. For those, we just used the decision date.)



Decisions have gotten slightly longer.

Since the rule change, the average decision length is 6.64 pages. Before the rule change, the average decision length was 6.14 pages.

A few firms handle the majority of appeals.

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