# THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION

Policies and Procedures by **BBB National Programs** 

Procedures for:

The Children's Advertising Review Unit (CARU)

The National Advertising Review Board (NARB)



#### 1.1 Definitions

- **A.** The term "national advertising" shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.
- **B.** The term "advertiser" shall mean any person or other legal entity that engages in "national advertising."
- **C.** The term "advertising agency" shall mean any organization engaged in the creation and/or placement of "national advertising."
- **D.** The term "public or non-industry member" shall mean any person who has a reputation for achievements in the public interest.

#### 2.1 CARU Functions and Policies

#### A. Function and Policies

The Children's Advertising Review Unit (CARU) of the BBB National Programs shall be responsible for receiving or initiating, evaluating, investigating, analyzing (in conjunction with outside experts, if warranted, and upon notice to the parties), and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising, or consistency with CARU's Self-Regulatory Program for Children's Advertising (the "Guidelines").

CARU and the National Advertising Review Board (NARB) are investigative or appellate units of the advertising industry's system of voluntary self-regulation. Policies and procedures are established by BBB National Programs. A decision by CARU or NARB does not constitute a finding that the law has been violated. An advertiser's voluntary participation in the self-regulatory process is not an admission and shall not be interpreted to constitute an admission by the advertiser or a finding that the law has been violated.

Any questions or concerns related to a pending case at CARU should be directed to the CARU Senior Vice President. Questions or concerns regarding closed CARU cases should be directed to the BBB National Programs President and CEO or his or her designee.

# **B.** Advertising Monitoring

CARU is charged with independent responsibility for monitoring and reviewing national advertising for truthfulness, accuracy and, consistency with the Guidelines.

### C. Case Reports

The BBB National Programs shall publish at least ten times each year the Case Reports, which will include the final case decisions of CARU and NARB, and summaries of any other matters concluded since the previous issue. Each final CARU and NARB case decision shall identify the advertiser, product or service, and subject matter reviewed. It shall also include a summary of each party's position, CARU and NARB's decision and its rationale, and a concise Advertiser's Statement, if any (See Section 2.9).

CARU shall publish in the Case Reports a summary of its actions, other than formal cases, during the preceding month (Activity Report). Included in this Activity Report shall be the following:

(1) Inquiries: summaries of informal inquiries under CARU's Expedited Procedure (see Section 2.12 below);

(2) Pre-Screening/Submissions: summaries of proposed advertising (including storyboards, roughcuts, animatics, etc.) submitted to CARU for review.

#### D. Guidance to the Public

From time to time, after consultation with the BBB National Programs Counsel:

- (1) CARU may inform the public, through the *Case Reports* and other media, of trends, principles and interpretations derived from previously published case decisions.
- (2) After consulting with the General Counsel, CARU may also inform the public of new interpretations of the Guidelines that it believes would provide appropriate advance notice of the application of the Guidelines to existing industry practices maintained by multiple advertisers. Prior to publication of any such interpretation, CARU will prepare appropriate explanatory materials for the BBB National Programs and may publish the interpretation in the *Case Reports* and other media if, after 30 days, BBB National Programs has not scheduled a meeting to consider the matter. If such a meeting is scheduled, CARU may publish the interpretation after BBB National Programs' consideration unless BBB National Programs revises the Guidelines in a manner that moots the interpretation.

# E. Confidentiality of /CARU/NARB Proceedings

- (1) CARU proceedings are confidential except for:
  - (a) publication of final case decisions and summaries of other actions, as provided by these Procedures:
  - (b) press releases announcing final case decisions and summaries;
  - (c) referrals to government agencies as provided by these Procedures; and
  - (d) actions taken by CARU under Sections 2.1(F)(2) and (F)(3) of these Procedures.
- (2) Published CARU decisions are the only permanent records required to be kept as to the basis of an inquiry, the issues defined, the facts and data presented, and the conclusions reached by CARU.
- (3) By participating in a proceeding, parties agree:
  - (a) to keep the proceedings confidential throughout the review process;
  - (b) not to subpoena any witnesses or documents regarding the review proceeding from CARU, NARB, or the BBB National Programs in any future court or other proceeding (except for the purposes of authentication of a final, published case decision); and
  - (c) to pay attorney's fees and costs if a subpoena is attempted in violations of Section (b) above

# F. Parties' Agreement/Referrals to Law Enforcement Agencies

(1) It is the policy of CARU, NARB, and BBB National Programs not to endorse any company, product, or service. Any decision finding that advertising has been substantiated should not be construed as an endorsement. Similarly, an advertiser's voluntary modification of advertising, in cooperation with CARU/NARB self-regulatory efforts, is not to be construed as an admission of any impropriety.

- (2) By participating in a CARU or NARB proceeding, parties agree:
  - (a) not to issue a press release regarding any decisions issued; and/or
  - (b) not to mischaracterize any decision issued or use and/or disseminate such decision for advertising and/or promotional purposes. /CARU may take whatever action it deems appropriate if a party violates this provision, including the issuance of a public statement for clarification purposes.
- (3) When CARU commences a review pursuant to Section 2.2 of these procedures, and the advertiser elects not to participate in the self-regulatory process, CARU shall prepare a review of the facts with relevant exhibits and forward them to the appropriate federal or state law enforcement agency. Reports of such referrals shall be included in the Case Reports.
- **G**. Academic and Other Expert Advisors CARU may establish a panel of academic and other experts as needed from which CARU may obtain advice pertinent to advertising, cognitive ability, nutrition and other matters, and on the application of the Guidelines.

## 2.2 Filing a Complaint

A. Any person or legal entity may submit to CARU any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals, or to business entities. Likewise, CARU may initiate a proceeding as part of their monitoring responsibility pursuant to Section 2.1(B) of these Procedures. All CARU complaints (except those submitted by consumers), including any supporting documentation, must be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible.) Challengers should limit the length of their submissions to 20 typewritten pages (12-point type) excluding evidentiary exhibits and must identify all express and implied claims to be considered by CARU. Under certain circumstances, such as a national health emergency, complaints will only be accepted via email or the online portal. A challenger may expedite the review of the contested advertising by waiving its right to reply (see Section 2.6(B)). or by requesting an "Expedited Review" pursuant to Section 2.11 of these Proceedings.

## CARU Filing Fees:

- (1) CARU Filing Fees Competitive challenges before CARU shall be filed together with payment by acceptable method, made payable to BBB National Programs, in the amount of \$2,500 (for National Partners) or \$6,000 (for non-National Partners or CARU Supporters).
- (2) BBB National Programs shall have the discretion to waive or reduce the fee for any challenger who can demonstrate economic hardship. If a CARU case is administratively closed for any reason other than consent of the parties pursuant to Section 2.2(D).
- **B.** Upon receipt of any complaint, CARU shall promptly acknowledge receipt of the complaint and, in addition, shall take the following actions:
  - (1) If, at the commencement or during the course of an advertising review proceeding, CARU concludes that the advertising claims complained of are: (a) not national in character; (b) the subject of pending litigation or an order by a court; (c) the subject of a federal government agency consent decree or order; (d) permanently withdrawn from use prior to the date of the complaint and CARU

receives the advertiser's assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service; (e) of such technical character that CARU could not conduct a meaningful analysis of the issues; or (f) without sufficient merit to warrant the expenditure of CARU's resources, CARU shall advise the challenger that the complaint is not, or is no longer, appropriate for formal investigation in this forum. Upon making such a determination, CARU shall advise the challenger that a case will not be opened, or in the event that an advertising review proceeding has already been commenced, shall administratively close the case file and report this action in the next issue of the Case Reports. When it can, CARU shall provide the challenger with the name and address of any agency or group with jurisdiction over the complaint.

- (2) If the complaint relates to matters other than the consistency with the Guidelines, CARU shall so advise the challenger, as provided above, and where a significant national advertising issue is raised, shall forward a copy of the complaint to the BBB National Programs President and CEO or his or her designee who, in consultation with the NARB Chair, shall consider whether the complaint is appropriate for a consultive panel.
- (3) If, in its discretion, CARU determines that a complaint is too broad or includes too many issues or claims to make resolution within the time constraints prescribed by these Procedures feasible, CARU may request that the challenger limit the issues or claims to be considered in the review proceeding, or, in the alternative, advise the challenger that the matter will require an extended schedule for review.
- (4) If a complaint challenges advertising for more than one product (or product line), CARU may return the complaint to the challenger and request that separate complaints be submitted for each of the advertised products.
- (5) If the complaint relates to the consistency with the Guidelines, CARU shall promptly forward the complaint by overnight or electronic mail to the advertiser for its response.
- (6) Complaints regarding specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising, are not within CARU's mandate. If the complaint, in part, relates to matters other than the consistency with the Guidelines, CARU shall so advise the challenger.
- (7) CARU reserves the right to refuse to open or to continue to handle a case where a party to a CARU proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or has been, referred to CARU for resolution. The purpose of this right of refusal is to maintain a professional, unbiased atmosphere in which CARU can affect a timely and lasting resolution to a case in the spirit of furthering voluntary self-regulation of advertising and the voluntary cooperation of the parties involved.
- **C.** In all cases, the identity of the challenger must be disclosed to CARU who shall advise the advertiser of the identity of the challenger.
- **D.** CARU will administratively close a case if, prior to CARU providing a copy of its decision to the advertiser, the challenger and advertiser consent in writing to closure of the case. Cases closed based on consent of the parties will be reported in the CARU Case Reports as "Administratively Closed on Consent of Parties." If a case is administratively closed based on consent of the parties, CARU shall not be precluded from filing a complaint based on the same or similar claims as part of CARU's monitoring responsibility pursuant to Section 2.1(B).

# 2.3 Parties to /CARU/NARB Proceedings

**A.** Except as provided in Section 2.3(B), the parties to the proceeding are (i) CARU acting in the public interest, (ii) the advertiser acting in its own interest, and (iii) the challenger(s), whose respective rights and obligations in an CARU/NARB proceeding are defined in Sections 2.2, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 3.1, 3.2, 3.3, 3.5, and 4.1 of these Procedures.

**B.** CARU shall not be a party to an NARB proceeding except in cases where CARU filed the complaint as part of its monitoring responsibility. When CARU is not a party to an NARB proceeding, CARU representatives may attend the NARB hearing to answer questions from the panel when requested by the NARB Panel Chair.

# 2.4 Information in CARU Proceedings

**A.** All information submitted concerning a CARU case by the challenger and the advertiser, pursuant to Sections 2.4 through 2.10 of these Procedures shall be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible). Upon receipt of a filing by any party, CARU shall forward a copy to the other party by messenger, electronic or overnight mail. Under certain circumstances, such as a national health emergency, complaints will only be accepted via email or the online portal. All transmittals by CARU during an advertising review proceeding shall be paid for by the challenger, unless the challenger is a consumer or otherwise demonstrates economic hardship, in which case all transmittals shall be paid for by CARU.

**B.** Time periods for all submissions to CARU and NARB shall commence on and include the first day of business following the date of delivery of the triggering document and shall not include Saturdays, Sundays, Federal holidays, and other holidays defined by CARU in Section 1.2(G).

**C.** CARU shall not consider any data submitted by a challenger that has not been made available to the advertiser, and any materials submitted by a challenger on condition that they not be shown to the advertiser shall promptly be returned. In the case of studies, tests, polls and other forms of research, the data provided should be sufficiently complete to permit expert evaluation of such study, test, poll or other research. CARU shall be the sole judge of whether the data are sufficiently complete to permit expert evaluation. If a party initially submits incomplete records of data that is then in its possession, and later seeks to supplement the record, CARU may decline to accept the additional data if it determines that the party's failure to submit complete information in the first instance was without reasonable justification.

- **D.** An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to CARU with the request that such data not be made available to the challenger, provided it shall:
  - (1) clearly identify those portions of the submission that it is requesting be kept confidential in the copy submitted for CARU's review;
  - (2) redact any confidential portions from the copy submitted by the advertiser to the challenger;
  - (3) provide CARU with both a redacted and unredacted copy of the submission;
  - (4) provide a written statement setting forth the basis for the request for confidentiality;
  - (5) affirm that the information for which confidentiality is claimed is not publicly available and consists of trade secrets and/or proprietary information or data; and

- (6) attach as separate exhibit to CARU's and the challenger's copy of the submission a comprehensive summary of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained) and the principal arguments submitted by the advertiser in its rebuttal of the challenge. Failure of the advertiser to provide this information will be considered significant grounds for appeal of a decision by a challenger. (See Section 3.1)
- **E.** Prior to the transfer of data to the advertiser or challenger, CARU shall obtain assurances that the recipients agree that the materials are provided exclusively for the purpose of furthering CARU's inquiry; circulation should be restricted to persons directly involved in the inquiry, and recipients are required to honor a request at the completion of the inquiry that all copies be returned.
- **F.** Whenever CARU has consulted an expert from the panel established under Section 2.1(G), or otherwise, in connection with the filing of a complaint, consideration of a complaint, the expert's opinion shall be in writing, or summarized in writing by CARU. The expert's opinion and a brief description of the expert's qualifications shall be made available to the parties promptly. The advertiser or challenger may respond to the expert's opinion in any submission under Sections 2.5, 2.6, 2.7 or 2.8. When furnished to the advertiser or challenger, CARU shall inform the parties that there has been no final determination by CARU on any matter contained in the expert's opinion.

# 2.5 The Advertiser's Substantive Written Response

The advertiser shall, within 15 business days after receipt of the complaint in a submit to CARU and the challenger, one hard copy and one electronic format copy (including exhibits when possible), of its written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.2(B)(1), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. Where the advertiser's written response to the challenger has redacted confidential material, the advertiser shall include, as a separate exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.4(D) above. The advertiser shall provide CARU with both the redacted and unredacted versions of the written response as well as the separate comprehensive summary

The advertiser may not include a counter-challenge (i.e., a request that CARU review advertising claims made by the challenger) in its response. Such a request must be filed as a separate complaint as described in Section 2.2 of these Procedures.

## 2.6 The Challenger's Reply

- **A.** Within ten business days of receipt of the advertiser's response, the challenger may submit to both CARU and the advertiser, one hard copy and one electronic format copy (including exhibits when possible), of its reply, if any. Challengers should limit the length of their reply to 20 typewritten pages (12-point type), excluding evidentiary exhibits. If the challenger does not submit a reply, CARU shall proceed to decide the challenge upon the expiration of the challenger's time to reply, subject to a request by CARU for additional comments or data under Section 2.8(A).
- **B. Expediting Review by Waiving the Reply** After the challenger has reviewed the advertiser's first substantive written response; the challenger may notify CARU in writing that it elects to waive its right to add to the record, thereby expediting the proceeding. In the event that a challenger waives its right to reply, additional information from either party may be submitted only upon request from CARU and shall be treated in the same manner as requests for additional comments or data under Section 2.8(A) of these Procedures and any meetings with the parties will be held at the discretion of CARU pursuant to Section 2.8(B) of these Procedures.

# 2.7 Advertiser's Final Response

Within ten business days after receipt of the challenger's reply, the advertiser shall submit a response, if any, to both CARU and the challenger, one hard copy and one electronic format copy (including exhibits when possible). Advertisers should limit the length of their response to 20 typewritten pages (12-point type), excluding evidentiary exhibits.

# 2.8 Additional Information and Meetings with the Parties

- **A.** If CARU deems it necessary and requests further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request. CARU will immediately forward the additional response to the advertiser or challenger, who will be afforded six business days to submit its own response to the submission. Unless CARU requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by CARU will be returned.
- **B.** CARU, in its discretion, may, in addition to accepting written responses, participate in meetings with either or both parties. Those meetings may be held in person or via telephone or video conference. If CARU participates in a meeting in which only one party participates, CARU will notify the other party that a meeting has been scheduled to take place. Where feasible, upon request, an advertiser will be afforded the opportunity to schedule its meeting with CARU after the date of the challenger's meeting. All meetings in CARU and standard track cases with the parties will be held within 15 business days of CARU's receipt of the Advertiser's Final Response (Section 2.7).
- **C.** Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by CARU in making its decision or by an NARB Panel in reviewing CARU's decision on appeal.
- **D.** The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 2.4 through 2.8 above except upon agreement of CARU and the parties.

#### 2.9 The Final Case Decision

Within 20 business days of its receipt of the last document authorized by Sections 2.5 to 2.8 above, or, if CARU elects to meet with the parties, upon completion of the final meeting, CARU will formulate its decision on the truth and accuracy of the claims at issue, or consistency with the Guidelines; prepare the final case decision; provide a copy to the advertiser; and invite the advertiser to add an Advertiser's Statement within five business days of receipt.

#### **B.** Advertiser's Statement

If CARU decides that some or all the advertising claims at issue are misleading or not substantiated, the advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement.

An Advertiser's Statement shall initially state whether the advertiser:

- (a) agrees to comply with CARU's recommendations, or
- (b) will appeal all or part of CARU's decision to the NARB as specified in Section 3.1.

The Advertiser's Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12-point type), which does not reargue the merits of the case, mischaracterize the decision, or contain new facts. CARU reserves the right, following consultation with the advertiser, to edit for length or inappropriate material. If the advertiser fails to submit an Advertiser's Statement as required by this Section, CARU may refer the matter to an appropriate government agency for review and possible law enforcement action.

#### C. Publication of the Decision

Upon receipt of the final version of the Advertiser's Statement, CARU shall provide copies of the final case decision to the advertiser and the challenger, by electronic or overnight mail or messenger, and make the decision available to the public through press announcements and publication of the decision in the next Case Reports.

#### **D.** Case Report Headings

CARU's decisions in the Case Reports shall be published under the headings:

- · Advertising Substantiated
- Advertising Referred to NARB
- Advertising Modified or Discontinued
- Advertising Substantiated/Modified or Discontinued
- Administrative Closing
- Advertising Referred to Government Agency
- No Substantiation Received
- Compliance

## E. Annual Summary

The first issue of the Case Reports each calendar year shall include a summary, prepared by CARU, which includes the number, source and disposition of all complaints received and cases published by CARU during the prior year.

## 2.10 Failure to Respond

- **A.** If an advertiser fails to file a substantive written response within the period provided in Section 2.5 above, CARU shall provide a press release and notice to the advertiser summarizing the advertising claims challenged in the complaint and noting the advertiser's failure to substantively respond.
- **B.** If the advertiser fails to file a substantive written response within an additional 15 business days, CARU may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared and shall report the referral in the next issue of the Case Reports.
- **C.** If a challenger fails to file a reply within the time provided by Section 2.6, or an advertiser fails to file a response within the time provided in Section 2.7, the untimely document shall not be considered by CARU, or by any panel of the NARB.

# 2.11 Requests for Product

When CARU's monitoring identifies an advertisement, which may raise concerns under the Guidelines, but only physical inspection of the product or packaging can determine whether such concerns exist, CARU will request a sample of the product from the advertiser. If the advertiser complies with CARU's request within five business days, and inspection of the product reveals no questions of non-compliance with the Guidelines, no inquiry will be opened.

# 2.12 CARU Expedited Proceeding

Notwithstanding Sections 2.2 through 2.10 above, in instances of incorrect commercial placement or technical error, if the advertiser responds within five business days of receipt of an inquiry regarding non-compliance with the Guidelines and the advertising is substantiated, or if within an additional five business days any violation of the Guidelines is remedied, no formal case will be opened, and the results will be published in the CARU Activity Report.

# 3.1 Appeal

A. When an advertiser appeals CARU's decision on one or more issues involved in a case, the case will be reviewed by a panel of the NARB. To appeal a standard track CARU decision, an advertiser shall make a request for a referral to the NARB and specify all issues for appealed in the Advertiser's Statement it prepares in response to CARU's decision pursuant to Section 2.9(B). All advertiser requests to appeal a standard track final case decision to the NARB shall be submitted electronically together with payment (check made payable to BBB National Programs, Inc. or electronic payment with procedures on payment) in the amount of \$25,000. In such cases, CARU will publish its decision and the Advertiser's Statement in the next Case Reports under the heading "Advertising Referred to NARB."

**B.** Challenger Appeal—Within ten business days after the date of receipt of a copy of a CARU final case decision, the challenger may request review by the NARB by filing a letter, not to exceed 20 double-spaced pages (12-point type) plus any relevant attachments from the CARU case record, explaining why there is a substantial likelihood that the NARB would reach a different result from CARU. The letter shall be accompanied by a non-refundable review fee of \$5,000 in a check made payable to BBB National Programs, Inc. or electronic payment, which will be credited toward the filing fee required by Section 3.1(C) if the review is granted, and should be addressed to: Chair, National Advertising Review Board (NARB), 112 Madison Ave., 3rd Floor, New York, NY 10016. The challenger shall send a copy of this letter to the advertiser and to CARU. Within ten business days after receipt of the copy of the request for review, the advertiser and CARU shall each submit a response to the NARB Chair, not to exceed 20 double-spaced pages (12-point type) plus any relevant attachments from the CARU case record. A copy of the advertiser's and CARU's responses shall be sent by the advertiser and CARU, respectively, to the challenger, except that portions of the case record that were submitted to CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. No other submissions shall be made to the NARB Chair. These letters, together with the relevant sections of the case record provided by the parties, shall be reviewed by the NARB Chair who shall render a determination as to whether to grant the challenger's request for an appeal within ten business days after receipt of CARU's and advertiser's responses. If the NARB Chair grants the challenger's request for an appeal, the appeal shall proceed pursuant to Section 3.1(C). The challenger shall submit a payment (check made payable to BBB National Programs, Inc. or electronic payment) in the amount of \$20,000 (\$25,000 less \$5,000 non-refundable review fee) to: Chair, National Advertising Review Board (NARB), 112 Madison Ave., 3rd Floor, New York, NY 10016.

# C. Appellate Case Record

CARU will prepare the relevant portions of the case record and forward them to the NARB within five business days of the issuance of the CARU Decision to the challenger. NARB will then send a digital copy of the case record to the parties, except that portions of the case record that were submitted to CARU on a confidential basis will not be sent to the challenger unless the advertiser consents. The appellant shall pay for all NARB copying and transmittal costs incurred as a result of an appeal or request for appeal pursuant to Sections 3.1 through 3.6 of these Procedures. Where the advertiser and the challenger both appeal, these costs will be divided equally between them. In any event, NARB will pay these costs for any party that can demonstrate economic hardship.

**D.** Cross Appeal —If the advertiser exercises its right to an appeal under Section 3.1(A), the challenger shall have the right to appeal any additional issues considered by CARU, If the advertiser exercises its right to an appeal under Section 3.1(A)(1), the challenger shall have the right to appeal any additional issues considered by CARU, In the event that the advertiser shall exercise its right to an appeal under Section 3.1(A), the challenger shall have the right to appeal any additional issues considered by CARU that have not been appealed by the advertiser. In the event that a challenger's request to appeal is granted by the NARB Chair under Section 3.1(B), the advertiser may appeal any additional issues considered by CARU that have not been appealed by the challenger, notwithstanding that the time to file an appeal as of right has expired. The challenger or advertiser may exercise the right to appeal under this paragraph by submitting a letter to the NARB at the address listed in Section 3.1(B), requesting the appeal and specifying the additional issues it wishes to appeal. The cross-appellant shall pay a filing fee by check made payable to BBB National Programs in the amount of \$25,000. Executive Vice President, Policy and Program Development of BBB National Programs shall have the discretion to waive or reduce the fee for any cross-appellant who can demonstrate economic hardship.

In the case of the challenger, the letter shall be due within five business days of receipt of the final case decision with the advertiser's statement indicating the advertiser's election to appeal; in the case of the advertiser, the letter is due within five business days of the date of receipt of the NARB Chair's determination granting the challenger's request to appeal. Copies of these letters shall be sent by the issuing party to all of the other parties

**E.** BBB National Programs shall have the discretion to waive or reduce the fee for an appellant or cross-appellant who can demonstrate economic hardship.

#### F. Submission Schedule

- (1) **Submissions in an appeal when there is no cross-appeal.** The party appealing shall, within ten business days of receipt of the case record prepared by CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B) with a copy to CARU, a letter not to exceed 30 double-spaced pages explaining its position. The appellant shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 30 double-spaced pages, to the NARB Chair with copies to the other party and to CARU. No other submissions shall be made.
- (2) **Submissions in an appeal when there is a cross-appeal.** Each party shall, within ten business days of receipt of the case record prepared by CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B) with a copy to CARU, a letter not to exceed 15 double-spaced pages explaining its position with respect to its appeal. Each party shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 15 double-spaced pages, to the NARB Chair with copies to the other party and also to CARU. No other submissions shall be made.

## 3.2 Content of Submissions to NARB

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 CARU. The written submissions to NARB shall not contain any evidence or facts that are not in the case record forwarded to NARB pursuant to Section 3.1(C) of these Procedures. If the NARB Chair, after consultation with the

parties, determines that a party has included evidence or facts outside this record in its submission to NARB, the Chair may, in his/her discretion:

- (a) return the brief to the party with a request that it redact any information that NARB has identified as outside the record and resubmit its brief within three business days. If the party fails to submit a properly redacted brief within three days, it shall be deemed to have defaulted on its appeal; or
- (b) remand the matter to CARU for a determination on whether the additional information constitutes "newly discovered evidence" sufficient to warrant reopening of the case under the "extraordinary circumstances" provisions of Section 3.9 of these Procedures. If CARU determines that it is not appropriate to reopen the case, CARU shall return the brief to the NARB Chair who shall handle any information outside the record in the manner provided by Section 3.2(a) above.

# 3.3 Appointment of Review Panel

The NARB Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who shall serve as panel Chair.

# 3.4 Eligibility of Panelists

**A.** An "advertiser" NARB member shall be considered as not qualified to sit on a particular panel if his/her employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An "agency" NARB member shall be considered as not qualified if his/her employing advertising agency represents a client that sells a product or service which directly competes with the product or service involved in the proceeding.

- **B.** Any NARB member shall disqualify himself/herself if, for any reason arising out of past or present employment or affiliation, (s)he believes that (s)he cannot reach a completely unbiased decision.
- C. The NARB Chair shall inform the parties of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests shall be subject to approval by the NARB Chair.

# 3.5 Composition of Review Panel

Each panel will be composed of one "public" member, one "advertising agency" member, and three "advertiser" members. A panel may proceed with four panel members. The NARB Chair may change the composition of the panel, if necessary, due to the unavailability of panel members in any category. The panel will meet at the call of NARB. The NARB Panel Chair will preside over its meetings, hearings, and deliberations. The concurring vote of three members is required to decide any substantive question before the panel. Any panel member may write a separate concurring or dissenting opinion, which shall be published with the majority opinion.

## 3.6 Procedure of Review Panel

**A.** As soon as the panel has been selected, the NARB Chair shall inform all parties as to the identity of the panel members. At the same time, (s)he shall mail copies of all submissions under Section 3.1(C) to each of the panel members, and shall, in like manner, send them any response or request submitted by any other party or parties.

**B.** If any party to the dispute before CARU requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given notice of any

meeting at which the matter is to be presented to the panel upon scheduling. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

The case record in CARU and/or NARB proceedings shall be considered closed upon the publication of the final case decision as described in Section 2.9.

#### C. NARB Decision

- (1) The Panel Decision shall be based upon the portion of the record before CARU which it has forwarded to the panel, the submissions under Section 3.1(F), and any summaries of the record, facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts that were presented to CARU and to present new arguments, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel shall honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger shall therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with CARU and the advertiser.
- (2) The panel shall not consider any evidence or facts if they are outside the evidence and facts presented to CARU. In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to CARU's findings and recommendations.

## 3.7 Timing and Reporting of Panel Decisions

A. When the panel has reached a decision after a panel hearing, the NARB Chair will transmit the decision to CARU and then to the advertiser. The advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement that states in the first sentence whether the advertiser agrees to comply with the panel's recommendations. The Advertiser's Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12-point type), which may not reargue the merits of the case, mischaracterize the decision, or contain new facts. The NARB Chair reserves the right, upon consultation with the advertiser, to edit for length or inappropriate material. If the advertiser fails to submit an Advertiser's Statement as required by this Section, NARB may refer the matter to an appropriate government agency for review and possible law enforcement action. Thereafter, the Chair will incorporate the Advertiser's Statement into the decision. After incorporating the Advertiser's Statement into the decision, the Chair will send the final decision to CARU and the parties. BBB National Programs will draft a press release and send to all the parties for comment prior to its release. Thereafter, the press release will be issued and the Panel Decision posted to the BBB National Programs, Inc. archive.

**B.** In the event that a panel has recommended an advertiser's claim be discontinued or modified, and the advertiser fails to indicate that it shall comply with the Panel Decision within a time period appropriate to the circumstances of the case, the NARB Chair shall issue a decision indicating that the full record on the case shall be referred to the appropriate government agency. If the advertiser fails to respond or does not agree in writing to comply with the decision and recommendations of the panel within five days of the issuance the decision, the NARB Chair shall so inform the appropriate government agency by letter, shall offer the complete NARB file upon request to such government agency. Thereafter the press release is issued and the Panel Decision is posting to the BBB National Programs, Inc. archive. The NARB Chair shall report to the NARB at its annual meeting on, among other things, the number, source and disposition of all appeals received by NARB.

# 3.8 Closing a Case

When a case has been concluded with the publication of a CARU decision or, when a panel has turned over a decision to the NARB Chair, and when the Chair has executed the procedures in Section 3.7 of these Procedures, except as provided for in Section 3.9, the case shall be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by CARU.

## 3.9 Reopening a Case

A. A closed CARU or NARB case may be reopened if the Senior Vice President of CARU, in his/her sole discretion, determines that extraordinary circumstances warrant the reopening. In making this determination, the CARU Senior Vice President shall take into account (1) the advertiser's compliance with any recommendations by CARU or NARB relating to the claims at issue; (2) if the reopening is requested based on new evidence, whether there is a satisfactory showing that the new evidence was not reasonably available to the party at the item the CARU record was closed; (3) if the reopening is requested based on new evidence, whether the new evidence would have likely changed the CARU or NARB decision in a material way; and (4) whether the request has sufficient merit to warrant the expenditure of the CARU resources.

- B. A petition requesting that a case be reopened may be submitted by either party to the underlying proceeding to the CARU Senior Vicie President together with a non-refundable initial petition to reopen fee of \$5000.00.
- C If the CARU Senior Vice President grants the petition to reopen, the petitioning party shall pay an additional nonrefundable fee equal to the applicable CARU Challenge Fee minus the \$5000.00 initial petition to reopen fee. CARU will send notice to any parties to the prior case of CARU's decision to reopen, together with any supporting evidence. Fee waivers can be submitted to the BBB national Programs Executive Vice President, Policy and Program Development pursuant to 2.2 (A)(4).
- D. Any reopened case will process as though a challenge was filed on the reopened claims in accordance with Sections 2.2-3.8 of these procedures, beginning with a submission from the challenger in the original case and concluding with a final case decision (as provided in Section 2.9) that may be appealed as set out in Sections 3.1-3.8 of these procedures. Should a challenger elect not to participate in the reopened case, the case will proceed as though CARU opened the matter on its own.

## 4.1 Compliance

**A.** After a CARU or NARB panel decision requesting that advertising be "Modified or Discontinued" is published, together with an Advertiser's Statement indicating the advertiser's willingness to comply with CARU or the NARB panel's recommendations, CARU or the NARB, either on its own or at the request of a challenger or a third party, may request that the advertiser report back, within ten business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision.

Any evidence that CARU or the NARB relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

In response to a request that the advertiser report on its compliance with an CARU or NARB decision, as described in the preceding paragraph, an advertiser may file a petition to reopen the case under Section 3.9 of these procedures and providing notice to any party in the case that a petition to reopen has been filed. If a petition to reopen is filed, the compliance inquiry will be suspended until the CARU Senior Vice President decides whether the case will be reopened. If the petition to reopen is denied, the compliance inquiry will

resume and a response to the compliance inquiry shall be provided within ten business days after the request to reopen is denied. If the petition to reopen is granted, the compliance inquiry will be terminated, and the termination will be reported in the CARU Case Reports.

- **C.** Compliance with CARU decisions. If, after reviewing the advertiser's response to a request for a status report on compliance with an CARU decision, and after reviewing the current advertising, CARU determines that:
  - (1) The advertising complies with CARU recommendations, CARU shall conclude that no further action is required and close the compliance inquiry and continue to monitor for compliance;
  - (2) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with CARU recommendations and/or the representations made in the Advertiser's Statement, or the advertiser fails to respond to the compliance inquiry, CARU will refer the file to the appropriate government agency, release information regarding the referral to the press and the public and report the referral in the Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;
  - (3) The advertiser has made a reasonable attempt to comply with a CARU decision, but CARU remains concerned about the truthfulness and accuracy of the advertising as modified, CARU will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.
    - (a) If /CARU finds that the advertiser has accepted and agreed to promptly implement the recommendations, CARU will determine that no further action is required, close the compliance inquiry, and report this in the Case Reports and continue to monitor for compliance;
    - (b) CARU finds that the advertiser has not agreed to promptly implement the recommendations, after notification to the advertiser, CARU will refer the file to the appropriate government agency, release information regarding the referral to the press and the public and report the referral in the Case Reports.
- **C. Compliance with NARB decisions.** After reviewing the advertiser's response to a request for a status report on compliance with an NARB decision, and after reviewing the current advertising, CARU will submit to the NARB Chair the file relating to compliance along with CARU's recommendations. If the NARB Chair determines that:
  - (1) The advertising complies with the NARB panel's recommendations, the NARB Chair will decide that no further action is required and close the compliance inquiry;
  - (2) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with the NARB panel's recommendations and/or the representations made in the Advertiser's Statement, or the advertiser fails to respond to the compliance inquiry, the NARB Chair will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the CARU Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;
  - (3) The advertiser has made a reasonable attempt to comply with an NARB panel decision, but the NARB Chair remains concerned about the truthfulness and accuracy of the advertising as modified,

the NARB Chair will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.

- (a) If the NARB Chair finds that the advertiser has accepted and agreed to promptly implement the NARB Chair's recommendations, the NARB Chair will determine that no further action is required, close the compliance inquiry, and report this in the CARU Case Reports.
- (b) If the NARB Chair finds that the advertiser has not agreed to promptly implement the NARB Chair's recommendations, after notification to the advertiser, the NARB Chair will refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the CARU Case Reports.