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Australian Teeth Whitener Marketer Frowns On Industry Self-Regulation Referencing US Laws

International Standards In Play When Foreign Firms Promote Consumer Health Products In US?

by [Malcolm Spicer](#)

HiSmile appeals NAD recommendation following review on P&G challenge to discontinue ad claims on its website and in social media videos stating peroxide-containing whitening products are “painful” or cause pain, break down and impact gums and teeth, or “damage” gums.

An Australian firm marketing teeth whiteners argues that online advertising’s global footprint demands evaluating ad claims on international standards, but an industry self-regulation organization says domestic laws are the standard for its reviews of claims made to US consumers.

HiSmile PTY Ltd. is appealing a recommendation by BBB National Programs Inc.’s National Advertising Division following a review on a [Procter & Gamble](#) challenge that it discontinue using ad claims on its website and in videos on social media platforms stating that peroxide-containing whitening products are “painful” or cause pain, break down and impact gums and teeth, or “damage” gums.

NAD attorneys also recommended the firm discontinue claims that its hismile brand PAP+ Strips and V34 Color Correcting Serum provide “an at-home whitening treatment that’s just as effective as hydrogen peroxide” and that Phthalimidoperoxycaproic acid “similarly reacts with tooth stains.”

However, HiSmile, which previously failed to convince UK ad regulators about teeth whitening

claims, will appeal the NAD's non-binding recommendations to BBB National Programs' National Advertising Review Board. It says the decision "highlights a need for international alignment on the adjudication of self-regulatory advertising codes."

"This is particularly important given the emergence of digital advertising and the global reach of social media platforms. We endeavor to collaborate with self-regulatory advertising bodies internationally to achieve this alignment, which we feel will promote impartial and fair decisions needed in global advertising. We remain committed to complying with the respective advertising laws and regulations of the countries in which we advertise," the firm added in its statement included in the NAD report published on 11 April.



HISMILE MARKETS WHITENING STRIPS AND COLOR CORRECTING SERUM AS WELL AS TOOTHPASTES. Source: Shutterstock

The NAD, however, bases its decisions on Federal Trade Commission rules, to which all advertising to consumers in the US is subject. Moreover, FTC rules largely align with rules in other countries which regulate advertising.

"NAD decisions apply US advertising law, set by Section 5 of the FTC Act, that advertisers must have a reasonable basis for all messages reasonably conveyed by their advertising claims. This standard is consistent with most, if not all, advertising codes across many jurisdictions internationally," said Laura Brett, BBB National Programs' vice president for the BAD.

In an email, Brett pointed out many international advertising regulations align with the International Chamber of Commerce Advertising and Marketing's code.

The ICCAM's code states that "all marketing communication should be legal, decent, honest and truthful," and "more specifically states, 'All forms of claims relating to verifiable facts should be capable of substantiation at the time of publication,'" Brett said.

The FTC commonly warns or files complaints against firms making unsubstantiated claims for consumer health products, including dietary supplements as well as OTC drugs such as teeth whiteners. The agency typically includes businesses operating in foreign countries when it warns multiple firms about emerging questionable health claims, such as products advertised to prevent or treat COVID-19 during the pandemic.

However, a single international firm marketing products in the US with health claims which

potentially don't meet the FTC's standard for support – results of reliable and competent scientific research, which it links to randomized, controlled clinical trials – likely won't prompt an investigation by the agency.

That's one reason FTC officials laud industry self-regulation against false and misleading advertising. Should HiSmile not prevail in its appeal to the NARB and decline to follow the NAD's recommendations, the organization almost certainly would send its questions about the firm's claims to the FTC.

The FTC has said it considers questions forwarded by the NAD as important regulatory items, but it also expects that firms linked to questioned advertising will reconsider and decide to comply with recommendations NAD attorneys made following claim reviews or submit information to the group supporting challenged claims.

The agency is not compelled to investigate NAD's referrals and expects firms will reconsider and opt to cooperate in the industry self-regulation process; it also might find that challenged advertising doesn't warrant an investigation.

Additionally, while HiSmile's products are available in the US as OTC drug products regulated by the Food and Drug Administration, the challenged advertising isn't claims the FDA would investigate because they don't promote the formulations as providing benefits not recognized by the agency.

General, Not Comparison Claims; But Comparison Still Accurate?

HiSmile, based in Gold Coast, Queensland, submitted pages from its website that it argued provided the full

Australia Advertising Regulation Similar To UK

In Australia, the Ad Standards organization conducts industry self-regulation based on [codes](#) developed by parent group Australian Association of National Advertisers designed to ensure advertising meets community standards and regularly reviewed with input from industry and the community.

Ad Standards operates much like the UK's ASA by investigating complaints from consumers as well as from businesses. As well, like the ASA it focuses largely on whether advertising is offensive while also determining whether claims, including some made for health care products, are substantiated and on whether material connections influencers and other promoters have with advertised brands are disclosed.

Recent health product advertising decisions by Ad Standards include a determination that three Pierre Fabre Group social media posts for its Avene sunscreens featuring Australian Olympic swimmer and world-record holder Cate Campbell, who promotes the brand, were

context for the challenged claims, describing its foundational story and its decision to use PAP in its whiteners, and documents it “contended provide reliable evidence about the risk of pain, sensitivity or damage from peroxide tooth whitening,” the report states.

P&G submitted a safety assessment of its Crest 3DWhite Whitestrips; a summary of studies showing a whitening benefit of its product and change in color at 7- and 14-day periods; the results of clinical studies demonstrating whitening efficacy of hismile strips; and scientific and testing data for PAP.

HiSmile, which markets hismile brand toothpastes as well as whitening products, didn’t reference Crest Whitestrips or other whitening products containing hydrogen peroxide. It contended the challenged comparison and safety claims shouldn’t be viewed as comparative to P&G’s product.

However, even though it said its advertising is “general claims about the risks associated with peroxide containing teeth whitening products,” it also argued that “even if its claims are viewed as comparative in nature, such claims are truthful and accurate,” according to the report.

NAD attorneys reviewing the challenge said under US advertising standards, “a competitor does not have to be specifically named in order to trigger a comparative claim.”

They explained that express claims challenged included “traditional teeth whitening is painful”; “peroxide breaks down anything – impacts gums and tooth enamel”; and “typically, whitening toothpaste contains peroxide which will damage your teeth.”

clearly distinguishable as advertisements.

The Braddon-based organization said how the influencer held the product in two images “looked staged and gave the impression that the content was promotional rather than organic.” The third post featured only the product.

Text in the posts “read like an ad as it included a disclaimer about reading the label and following the product directions, as well as further comments on sun safety,” the Ad Standards report stated.

Also in February, Ad Standards, after responding to consumer complaints, published a finding that Hairmop Pty Ltd.’s advertisement for its Mosh Rx erectile dysfunction drug treated sex, sexuality and nudity with sensitivity to the relevant broad audience and did not breach AANA codes.

In December, the organization announced a partnership with Australian-owned advertising intelligence platform Bigdatr. Ad Standards has access to Bigdatr’s advertising creative database, allowing it to quickly identify ads which are subjects of community complaints.

P&G also challenged claims that HiSmile sought to “create an at-home whitening treatment that’s just as effective as hydrogen peroxide – without the nasty side effects” and that “PAP similarly reacts to tooth stains, without any risk of pain, sensitivity, or damage.”

Additionally, the report states P&G argued that HiSmile made “slight modifications and iterations of the express claims” it used in videos on social media, including that its “products, unlike peroxide products ‘do not painfully oxidize your teeth,’” and whitening strips are “notorious for being harsh on your teeth and often causing pain.”

HiSmile’s claims also have been reviewed in the UK by the Advertising Standards Authority, which in 2020 upheld a complaint about a social media post touting “whiter teeth in 10 minutes” as a woman places a tooth whitening device into her mouth and applies makeup to her face before she’s shown with whiter teeth. The ASA said the firm’s evidence didn’t support such rapid teeth whitening. (Also see [“Ad Claims For Tooth Whitening Speed Of Effect Lose Glow For SmileDirect In US, HiSmile In UK”](#) - HBW Insight, 27 Jul, 2020.)

‘Damage’ Deleted, But ‘Harm’ Message Remains

HiSmile informed NAD attorneys that prior to P&G’s challenge it had discontinued a claim made in a TikTok advertisement that “Typically, whitening toothpaste contains peroxide which will damage your teeth.”

P&G referenced the NAD’s 2023 decision in its challenge of Oral Essentials Inc.’s claims comparing the efficacy of its Lumineux teeth whitening strips and pens with its products and implying “harm” linked to its formulations. (Also see [“That Was Fast! ‘30 Minute’ Claim On Lumineux Whitening Strips Goes From NAD Forum To Federal Court”](#) - HBW Insight, 20 Dec, 2023.)



P&G HAS PREVIOUSLY CHALLENGED ORAL ESSENTIALS AND COLGATE ADVERTISING CLAIMING EFFICACY FOR THEIR PRODUCTS

It argued that the NAD Lumineux decision indicated consumers could reasonably understand a reference to harm as extending beyond sensitivity and that HiSmile had not effectively limited the harm message to sensitivity.

Noting that no evidence on consumer perception of HiSmile’s claims was available, NAD attorneys reported that the firm asserted the “message conveyed by the challenged claims is that peroxides used in teeth whitening products carry a ‘risk’ of adverse side effects, such as sensitivity, pain and damage to teeth.”

The firm also contended the NAD’s Lumineux

WITH ITS CREST 3DWHITE WHITESTRIPS FORMULATION. *Source: Shutterstock*

considered as side effects and risks of peroxide teeth whitening.”

NAD attorneys noted “there is a distinction between claims that underscore a product’s claimed benefit versus claims that state or reasonably imply that other products are unsafe or pose potential risks or dangers.” HiSmile’s claims are on the risk and danger side of the distinction.

They said the challenged safety claims convey the message that peroxide-containing whiteners, such as Crest Whitestrips, “are ‘painful,’ break down and impact gums and teeth, and thus may ‘damage’ gums and teeth.”

And those claims weren’t supported by HiSmile’s evidence. As far as the Lumineux decision, HiSmile didn’t find support there, either.

The attorneys pointed that decision stated that “neither the literature provided by [Oral Essentials] nor the expert declaration conclude that these side effects prove that peroxide-containing tooth whiteners are damaging or unsafe.”

Similarly, HiSmile’s evidence supports that peroxide-containing whiteners “may cause short-term tooth sensitivity and/or gingival irritation” and that a review “on the use of home-based whitening products found that tooth sensitivity and oral irritation were the most common adverse effects, which were more prevalent at higher concentrations but also considered mild and transient,” according to the report.

In addition to Oral Essentials’ Lumineux advertising, P&G twice has challenged [Colgate-Palmolive Co.](#) claims implying its Colgate Optic White toothpaste provided similar whitening efficacy to Crest Whitestrips. (Also see “[Colgate’s Second NAD Swing To Support Optic White Claim Lands At FTC](#)” - HBW Insight, 28 Jul, 2014.)

decision supported its argument. It said the precedent from that decision “confirms that, while such side effects are not ‘harm’ they must nonetheless be

‘Nasty’? Not Allowed Here

A “nasty side effects” claim on HiSmile’s website also caught P&G’s eye.

NAD attorneys explained the claim follows HiSmile’s “Create an at-home whitening treatment that’s just as effective as hydrogen peroxide” on its website.

They concluded even though HiSmile “does not define ‘nasty side effects,’” the statement is used directly after the statement “We knew there had to be a better way to whiten. So we did the research, talked to the experts, and learned a lot about traditional whitening methods. The cause of the trouble? Peroxide.”

‘Aspirational’ Claim

Needs Concrete Support

NAD attorneys also disagreed with HiSmile’s argument that claiming it would “create an at-home whitening treatment” as effective as hydrogen peroxide “should be viewed merely as an aspirational claim for why” the firm launched its first whitening kit in 2014 as stated on its website.

The firm, the attorneys wrote, is “responsible for all reasonable interpretations of its claims conveyed by advertising, not simply the messages it intended to convey.” They said the claim “just as effective” used on the “Our Story” page of HiSmile’s website “was not merely aspirational” and one message conveyed is “inherently comparative,” that HiSmile’s “at-home teeth whitening” products are just as effective as peroxide-containing whiteners, which wasn’t supported by the firm’s evidence.

Concerning P&G’s challenge that the claim “PAP similarly [to peroxide] reacts to tooth stains” is an unsupported parity claim, HiSmile argued the claim “should be interpreted as a basic explanation about oxidizing activity of PAP” and noted the claim appeared on its “how whitening works” webpage.

But NAD attorneys conclude the claim exceeds “merely stating the mechanism of action of the product” and one reasonable message conveyed is PAP and peroxide “have similar reactions to ‘stains’ and therefore similar efficacy.” Without evidence to support parity of efficacy, they recommended pulling the claim.

The “nasty” reference also was used below the claim that traditional teeth whitening is “painful.”

The attorneys determined one reasonable message conveyed is peroxide formulations are unsafe, damaging or painful, a claim HiSmile didn’t support. They recommended it discontinue the “nasty” claim on its website.