

# Advertising self-regulation in the U.S. and cosmetics cases

**KEYWORDS:** Advertising, self-regulation, cosmetics, anti-aging.

**Abstract** This article focuses on the U.S. advertising self-regulation and its review of cosmetics claims. The article also explores hot topics in this area and provides guidance to advertisers on what to do and not to do when crafting advertising claims in this area.

Cosmetics advertising promises beauty. Whether its longer lashes, fuller lips, more youthful skin, advertising sells by telling consumers what products will do. Consumers will only buy the products if they believe the advertising claims are true. As a result, advertisers should substantiate their advertising claims to insure that they are truthful, accurate and not misleading. To protect consumers, many countries have governmental bodies that prohibit deceptive advertising as well as self-regulatory mechanisms to resolve disputes about the truthfulness and accuracy of advertising claims. In the United States, both governmental regulation and self-regulation together provide guidance to industry to create a level playing field for all companies and ensure that consumers make better purchasing decision by receiving truthful and accurate information about the goods they wish to purchase. This article will discuss advertising self-regulation in the United States and its guidance in cosmetics cases that insures that consumers receive truthful information about the cosmetics products they are purchasing and, ultimately, boosts the credibility of brands that follow self-regulatory guidance. Advertising self-regulation in the U.S. began in 1971 in response to government interest in regulating advertising. Advertising trade association groups formed The Advertising Self-Regulatory Council (ASRC) which has established policies and procedures for the advertising industry's self-regulatory programs, including the National Advertising Division (NAD), which will be the focus of this article (1).

The NAD monitors and evaluates truth and accuracy in national advertising (in any medium, whether directed to consumers ages 12 and over, businesses, or other service professionals). Most of NAD's cases result from formal competitor complaints filed through a "challenge" process and the remainder of its cases result from its own monitoring practices. The review process follows a detailed set of procedures available on the NAD's Web site. (2) Once final, all NAD decisions are made public but the underlying NAD proceedings and any evidence submitted in support of advertising claims remain confidential. Although participation in an NAD proceeding is voluntary, the failure to participate in the NAD process or failure to implement NAD-recommended changes at the conclusion of the process results in automatic, public referral to the appropriate federal or state

regulatory agency. The self-regulatory system is bolstered by the long-time support of the Federal Trade Commission ("FTC"), a government agency whose Division of Advertising Practices reviews advertising claims to see if they are deceptive (3). Despite the voluntary nature of advertising self-regulation, NAD is proud of the 95 percent compliance rate with the more than 6000 decisions it has issued since its inception. NAD reviews advertising claims in the context in which they appear. It first determines what messages are reasonably conveyed by the advertising. It then assesses whether the advertiser has provided a "reasonable basis" for its claims. What constitutes a reasonable basis depends on the claim being made. The FTC articulated factors to consider in making a reasonable basis determination in its 1972 Pfizer case which was reinforced in its 1983 Advertising Substantiation Policy Statement (4). Those factors include the following: (1) the type of claim; (2) the product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the cost of developing substantiation for the claim; and (6) the amount of substantiation experts in the field believe is reasonable (5). While NAD does not consider each of these factors in every decision, what is "reasonable basis" depends on the claim that is at issue. NAD relies on this policy statement as well as other relevant regulatory guidance when assessing the truthfulness and accuracy of advertising claims. After determining whether or not the advertiser has provided a reasonable basis for its claims, NAD issues a decision in which it makes recommendations-either the claims are supported or, if they are not, that they be modified or discontinued.

## Cosmetics Advertising

Cosmetics advertising featuring anti-aging claims has been an important area of focus for NAD cases (6). NAD initiated nearly all of these inquiries in the last 14 years (7). During this time, some manufacturers have made very strong performance claims promising dramatic reductions in wrinkles and other unwanted signs of aging or postured their products as equivalent to, or substitutes for, cosmetic procedures. The U.S. Food and Drug Administration ("FDA") has issued numerous warning letters since 2012 against cosmetics manufacturers making unauthorized "structure/function" (or drug-like) claims

for their products and the FTC has entered into settlements with cosmetics manufacturers for making deceptive claims about the performance benefit of their products (e.g., the ability to alter one's DNA by using certain products) (8).

Science is the foundation of claim substantiation, answering questions such as how a product works and what impact it will have on the target audience. Ideally, product claims match the underlying testing for the product, but that is sometimes not the case. The strength of the claim dictates the level of support. Having many studies does not necessarily mean that those studies are a good fit for the claims you are making. In Olay Regenerist Eye lifting serum, NAD challenged claims made by The Procter & Gamble Company ("P&G" or "the advertiser") which included "dramatically younger looking eyes" and the implied claim that Olay Regenerist Eye Lifting Serum can produce results comparable to an eyelift, a cosmetics procedure. In support of the claims, the advertiser provided the following: 1) long-term, independent, double-blind studies consisting of image analysis and dermatological assessments; 2) dansyl chloride testing; 3) corneometer testing; 4) transepidermal water loss studies; 5) a visual attribute test (which included expert and self assessments on many relevant anti-aging parameters); and 6) a three-week single product use study.

Although P&G provided extensive testing on its product, NAD determined the test results did not support the strong "dramatically younger looking eyes" performance claim. For example, dansyl chloride testing revealed statistically significant results which show that the product makes skin smoother and softer, but NAD found these results do not support the "dramatically younger looking" claim. Similarly, the three-week single product use test submitted by P&G asked questions about skin appearance, particularly around the eye (e.g., "makes eye area feel soft"). NAD observed that the highest marks (excellent, very good, good) were reported for "makes eye area look smoother." None of the responses demonstrated that participants perceived that they had achieved "dramatically younger looking eyes" after using the products. In sum, NAD recommended that this claim be modified to reflect the performance results of the testing provided and the advertiser agreed to change the claims. The way in which images and words appear can convey unintended messages. Advertisers are responsible for both express and implied claims. In this case, the print advertisement features the headline claim "Three Zones. Two Eyes. One Total Eye Turnaround." Various parts of the woman's eye were highlighted and the text at the bottom of the advertisement discussed the serious nature of eyelifts and Regenerist's performance benefits. NAD determined that the references to a "total eye turnaround" and "dramatically younger looking eyes" along with statements that eyelifts are "serious business" and that women can use Regenerist without having to resort to "drastic measures," taken together, conveyed the message consumers who use Olay Regenerist Eye Lifting Serum can get results comparable to those of an eyelift. P&G's evidence did not support this message and NAD recommended that the advertiser modify future advertising to avoid communicating this message. The advertiser agreed to comply with NAD's recommendations.

## HOT TOPICS

### Natural and Organic Claims

"Natural" and "organic" claims are increasingly prevalent in cosmetics advertising in response to increased consumer

demand for such products. When evaluating such claims, NAD will, as always, look at the challenged claims in the context of the advertising at issue to determine the messages that are conveyed. There is no regulatory definition of "natural" or "organic" in the non-food space. NAD instead considers industry usage, consumer expectation and any testing and other scientific evidence that relate to the source and amount of each ingredient in the product. NAD tries, whenever possible, to harmonize its decisions with relevant regulatory authority but, in the absence of regulatory guidance, seeks to ensure that these terms are used consistently with consumer understanding. In the Tom's of Maine "Naturally Dry" Antiperspirant case, Unilever United States, Inc. ("Unilever") challenged some of the following claims made by The Colgate Palmolive Company ("Colgate") for its product: 1) "Naturally Dry"; 2) "It really works. Naturally," and 3) implied claims that Naturally Dry contains no aluminum and is manufactured through natural processing. Tom's of Maine has a long-standing reputation for creating natural personal care products so consumers have a certain expectation as to the "naturalness" of a Tom's of Maine product. It is also the only company marketing an antiperspirant as "natural," and even though the advertiser makes no claim that its product is "100% natural," its active ingredient aluminum chlorohydrate, a non-natural ingredient.

During NAD's inquiry, Colgate informed NAD that it would modify its packaging to add the claim "contains recycled aluminum" on the cap of each product so that consumers understood that the product's active ingredient was aluminum. While NAD appreciated the advertiser's willingness to more clearly inform consumers about the ingredients in its product, NAD determined that consumer confusion is still possible given that most consumers may not know that highly processed aluminum salts are the active ingredients in all antiperspirants. NAD recommended that the claims (including the product name) be discontinued (9).

### Influencers

Influencers are individuals who may or may not be celebrities who have a significant social media following and, as a result, are sometimes hired by companies to promote their products. They are widely used in the cosmetics industry. Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser, and may not convey any express or implied representation that would be deceptive if made directly by the advertiser (10).

Both the FTC and NAD have made clear that influencers and advertisers must clearly and conspicuously disclose any unexpected material connection between themselves because consumers may believe that influencers are expressing their independent reaction to a product when, in fact, there is a paid relationship between themselves and the advertiser (11). In April of 2017, the FTC issued more than 90 letters to advertisers and influencers, including celebrities and athletes, after reviewing their Instagram posts which failed to disclose the material connection between themselves which the FTC deemed to be misleading to consumers (12).

### Native Advertising

While native advertising is not a new concept, its use has skyrocketed over the last few years. Native advertising is defined by the Interactive Advertising Bureau as "paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong." (13) No one wants to be tricked into thinking they are reading a news piece that is really advertising, so both

the FTC and NAD have made clear that consumers should be able to distinguish between what is a paid native advertising unit versus what is a publisher's editorial content (14).

In Joyus, Inc. (Dr. Brandt's Needles No More Wrinkle Relaxing Cream) (15), consumers who view People Magazine online and read "Style Watch" can click on a tab labeled "Stuff We Love" where they would see eye-catching videos for products, including a video for Dr. Brandt's Needles No More Wrinkle Relaxing Cream. The video featuring claims including "Botox in a bottle," "Younger looking skin in just 60 seconds" and "100% of people report diminished lines and wrinkles after 4 weeks." However, "Stuff We Love" is not an editorial piece. Rather, it is a paid partnership between People and Joyus to promote products that can be purchased. NAD found it was an advertisement. NAD recommended that Joyus, along with People Magazine, revise the link or the content around it to make it clear that consumers are linking to an advertisement, and the advertiser agreed to do so. As for the advertising claims, the advertiser informed NAD that they had been permanently discontinued. NAD did not review these claims on their merits, but did treat the advertising claims as though NAD recommended their discontinuance and the advertiser agreed to comply. In sum, native advertising, like all advertising, must be truthful, accurate and not misleading.

1) Things to consider when substantiating cosmetics claims

## CONCLUSION

In conclusion, NAD's goal in its cosmetics cases is, as in any case, to ensure that advertising claims are truthful, accurate and substantiated by competent and reliable scientific evidence before they are disseminated. Truthful advertising enhances the credibility of brands, encourages product innovation and improves consumer confidence in advertising. NAD has encouraged increased competitor challenges with respect to anti-aging claims—the more information NAD has about the underlying science, the more informed decisions it can make. This will help ensure that consumers receive truthful and accurate advertising messages.

Do's	Don'ts
If you don't have product performance testing, do make ingredient claims provided there are reliable studies that link the ingredient to a claimed product benefit, that the amount tested was the same amount as is found in the product and that the claims accurately reflect the studies' results.	Do not liken the results obtained by topical cosmetics products to invasive medical procedures.
Do make sure that performance claims based on self-assessments from consumer use testing mirror the wording of the specific questions upon which the claims are based to avoid overstating product performance.	Do not overstate the efficacy of cosmetics products.
Do use photographs and product demonstrations, but make sure that they accurately reflect what consumers can reasonably expect to achieve when using the product as directed.	Do not use subjective testing (i.e., home use testing) to support objectively provable claims (e.g., "reduce wrinkles by 30%," which requires instrumental testing) (16). <sup>2</sup>
Do use a disclosure to qualify a claim if it is accurate but make sure that the disclosure is clear, conspicuous and in close proximity to the claim it is qualifying.	Do not use a disclosure to make an inaccurate claim accurate.
	Do not rely on supplier data to substantiate product performance claims—testing must be conducted on the final product.

## REFERENCES AND NOTES

1. The self-regulatory system is administered by the Council of Better Business Bureaus (CBBB), the network hub for Better Business Bureaus (BBBs) in the US and Canada which is dedicated to fostering honest and responsive relationships between businesses and consumers. See <https://www.bbb.org/council/about/>.
2. <http://www.ascreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-Effective-2-1-16.pdf>
3. See, e.g., Robert Pitofsky, Chairman, Fed. Trade Comm's, Remarks at the D.C. Bar Association Symposium: Self-Regulation and Antitrust (Feb. 18, 1998), available at <http://www.ftc.gov/speeches/pitofsky/self4.htm>, cited in John. E. Villafranco and Katherine E. Riley, So You Want to Self-Regulate? The National Advertising Division As Standard Bearer, *ANTITRUST*, Vol. 27, No. 2 (Spring 2013), at 79.
4. In re Pfizer, Inc., 81 F.T.C. at 64 (1972); <https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation>.
5. *Id.*
6. These cases include dietary supplements promising anti-aging benefits.
7. NAD has reviewed nearly 60 cosmetics cases since 1987 which include cases that are not focused on anti-aging claims and some of those cases are initiated by cosmetics companies.
8. <https://www.ftc.gov/news-events/press-releases/2014/06/loreal-settles-ftc-charges-alleging-deceptive-advertising-anti> (settling claims with L'Oréal USA, Inc. about false and unsubstantiated claims that its Génifique and Youth Code products provided anti-aging benefits by targeting users' genes).
9. NAD does not take product name changes lightly. While extrinsic evidence on consumer confusion or deception is typically required to change a product name, this evidence is not required if the product name itself conveys a message that is false or misleading, and that is the case here.
10. Section 255.1 (a) of the FTC's Endorsements and Testimonials Guides, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisendendorsementguides.pdf>.
11. FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>; Kardashian, Kourtney, et. al. (FitTea), Report #6046, NAD/CARU Case Reports (January 2017).
12. *Id.* at 9.
13. The Native Advertising Playbook, Interactive Advertising Bureau, <https://www.iab.com/wp-content/uploads/2015/06/IAB-Native-Advertising-Playbook2.pdf>, at 3.
14. Enforcement Policy Statement on Deceptively Formatted Advertisements, Federal Trade Commission, [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf). Taboola, Inc. (Online Advertising), Report #5708, NAD/CARU Case Reports (May 2014).
15. Joyus, Inc. (Dr. Brandt's Needles No More Wrinkle Relaxing Cream), Report #5956, NAD/CARU Case Reports (May 2016).
16. Objective measurements in addition to subjective measurements are, however, acceptable because they corroborate the subjective assessments. ☐

## About the author

Annie Ugurlayan is a Senior Staff Attorney at the National Advertising Division. Annie is also a frequent lecturer at conferences nationwide and abroad, particularly on cosmetics and anti-aging claims. Annie has authored or co-authored seven publications during her time at NAD. Annie is a graduate of Hamilton College (B.A., magna cum laude -- French and World Politics) and Hofstra University School of Law.



