



United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

November 13, 2023

Via Federal Express and E-mail

Mr. Kevin Keane
President & CEO
American Beverage Association
1275 Pennsylvania Ave. NW
Suite 1100
Washington, DC 20004



Dear Mr. Keane:

The Federal Trade Commission (“FTC”) is an independent federal agency whose mission is to protect consumers by enforcing laws and rules that promote truth in advertising and fair business practices, and by educating consumers and businesses about their rights and responsibilities. We are writing to express concerns that your marketing practices on Instagram and TikTok may be deceptive or unfair in violation of the FTC Act.

We have reviewed posts by registered dietitians or other providers of dietary advice, including Valerie Agyeman, Nichole Andrews, Leslie Bonci, Keri Gans, Stephanie Grasso, Cara Harbstreet, Andrea Miller, Idrees Mughal, Adam Pecoraro, and Mary Ellen Phipps (“the dietitians”), who posted advice on TikTok and Instagram endorsing the safety of aspartame. It appears that the American Beverage Association paid the dietitians to do so.

The FTC’s Endorsement Guides state that if there is a “material connection” between an endorser and the marketer of a product – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement. Material connections could consist of a business or family relationship, monetary payment, or the provision of free products to the endorser. “Clear and conspicuous” means that a disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers. If the representation is made through both visual and audible means, the disclosure should be made in the communication’s visual and audible portions. Consumers should be able to notice the disclosure easily, and not have to look for it.

We have a number of concerns about the adequacy of disclosures by the dieticians regarding their apparent connections to the ABA.

First, some of the posts we reviewed included no disclosures or any other indication of the dieticians' apparent material connection to the ABA.

Second, none of the videos that we reviewed included any disclosures in the video itself. Viewers can easily watch a video without reading disclosures in a post's text description. There should be clear and conspicuous disclosures in the videos themselves, for example, by superimposing much larger text over the videos. In videos in which endorsements are only made audibly, the disclosures should be audible. Likewise, if the endorsements are made through both visual and audible means, the disclosure should be both in the respective video's visual and audible portions.

Third, some of the dieticians had disclosures like “#sponsored” or “#ad” further down in the text descriptions of their posts, making them insufficiently conspicuous. When people view TikTok and Instagram posts, longer descriptions are generally truncated, with only the first two or three lines displayed unless viewers click on the text description. In addition, the TikTok and Instagram Reels text description is in small print, at the bottom of the screen, sometimes poorly contrasting, and doesn't stand out. Videos have many competing elements. We therefore do not think that disclosure in a TikTok or Instagram Reels post's text description is clear and conspicuous.

Fourth, some of the dieticians relied upon the “Paid partnership” disclosure tool in making their disclosures. The Commission has previously expressed concerns about the conspicuousness of such built-in disclosure tools alone. We think it is too easy for viewers to miss seeing the “Paid partnership” disclosure in these posts. (That does not mean that you should not use such tools in addition to other disclosures).

Fifth, we are concerned that even if viewers read the “Paid partnership,” “#sponsored,” and “#ad” disclosures, they may be inadequate in the context of the posts, because some of the dieticians did not identify the sponsor of the posts. Viewers might not understand that the sponsor is promoting the sale of aspartame or products containing it. Without knowing that, viewers could not properly evaluate the weight and credibility to give the endorsement. Some dieticians identified “ameribev” as the partner – but many viewers may not understand what “ameribev” is.

Finally, we note that a news article quoted the ABA as saying that the presence of the terms “safetyofaspartame.com” or “#safetyofaspartame” in some paid posts was an adequate disclosure of a dietician's paid relationship with ABA.¹ We disagree with that assertion. Even if the terms were displayed in a clear and conspicuous manner, they are insufficiently clear to communicate the paid relationship between the dietician and the American Beverage Association.

¹ Anahad O'Connor, Caitlin Gilbert, and Sasha Chavkin, *The food industry pays 'influencer' dieticians to shape your eating habits*, Wash. Post (Sept. 13, 2023), <https://www.washingtonpost.com/wellness/2023/09/13/dietitian-instagram-tiktok-paid-food-industry/>.

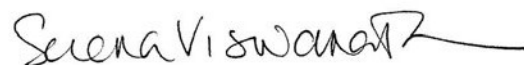
Mr. Kevin Keane
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I am enclosing the Federal Trade Commission's Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials. The notice of penalty offenses consists of Commission determinations in prior litigated cases that certain practices are deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act. As set forth in more detail in the notice, these acts and practices include failing to disclose a connection between an endorser and the seller of an advertised produce or service, if such a connection might materially affect the weight or credibility of the endorsement and if the connection would not be reasonably expected by consumers. Copies of the case decisions discussed in the notice are available on the Commission's website at www.ftc.gov/endorsement-notice-penalty-offenses. **In addition, receipt of the enclosed notice puts your company on notice that engaging in conduct described therein could subject the company to civil penalties of up to \$50,120 per violation.²**

We strongly urge you to review your social media policy. You should also review the Instagram, TikTok, and other social media posts made by your endorsers as to whether they contain sufficiently clear and conspicuous disclosures of any material connections to the American Beverage Association. To help guide your review, please see the Endorsement Guides³ and the staff publication *FTC's Endorsement Guides: What People Are Asking*.⁴ Violations of the FTC Act may result in legal action seeking a federal district court injunction or an administrative cease and desist order.

Please notify Cassandra Rasmussen, via electronic mail at crasmussen@ftc.gov, within fifteen working days of receipt of this letter of the specific actions you have taken or will be taking to address FTC staff's concerns. If you have any questions regarding compliance with the FTC Act, please contact Ms. Rasmussen by email or at 202-684-0175.

Very truly yours,



Serena Viswanathan
Associate Director
Division of Advertising Practices

Enclosure

cc (w/ encl.): Amy E. Hancock, Esq.
General Counsel, Executive Vice President, Legal & Regulatory Affairs
[REDACTED]

² See 15 U.S.C. § 45(m)(1)(B).

³ See 16 C.F.R. § 255 (Jul. 26, 2023), <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255>.

⁴ *FTC's Endorsement Guides: What People Are Asking*, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>.

Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials

The Federal Trade Commission has determined that the following acts or practices in the use of endorsements and testimonials are deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act.

- It is an unfair or deceptive trade practice to make claims which represent, expressly or by implication, that a third party has endorsed a product or its performance when such third party has not in fact endorsed such product or its performance.¹
- It is an unfair or deceptive trade practice for an advertiser to misrepresent that an endorsement represents the experience, views, or opinions of users or purported users of the product.²
- It is an unfair or deceptive trade practice to misrepresent an endorser as an actual user, a current user, or a recent user of a product or service.³
- It is an unfair or deceptive trade practice for an advertiser to continue to advertise an endorsement unless the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the endorsement.⁴
- It is an unfair or deceptive trade practice for an advertiser to use testimonials to make unsubstantiated or otherwise deceptive performance claims even if such testimonials are genuine.⁵
- It is an unfair or deceptive trade practice to fail to disclose a connection between an endorser and the seller of an advertised product or service, if such a connection might materially affect the weight or credibility of the endorsement and if the connection would not be reasonably expected by consumers.⁶
- It is an unfair or deceptive trade practice to misrepresent explicitly or implicitly through the use of testimonials that the experience described by endorsers of a product or service represents the typical or ordinary experience of users of the product or service.⁷

¹ *Mytinger & Casselberry, Inc.*, 57 F.T.C. 717 (1960); *Ar-Ex Cosms., Inc.*, 48 F.T.C. 800 (1952); *A. P. W. Paper Co., Inc.*, 38 F.T.C. 1 (1944); *Wilbert W. Haase Co., Inc.*, 33 F.T.C. 662 (1941).

² *R. J. Reynolds Tobacco Co.*, 46 F.T.C. 706 (1950).

³ *Id.*; *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

⁴ *Nat'l Dynamics Corp.*, 82 F.T.C. 488 (1973).

⁵ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110; *Macmillan, Inc.*, 96 F.T.C. 208 (1980); *Porter & Dietsch, Inc.*, 90 F.T.C. 770 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979).

⁶ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110.

⁷ *Id.*; *Porter & Dietsch, Inc.*, 90 F.T.C. 770; *Nat'l Dynamics Corp.*, 82 F.T.C. 488 (1973), *modified at* 85 F.T.C. 1052 (1975).