



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

November 13, 2023

Via Federal Express and E-mail

Ms. Andrea Miller



Dear Ms. Miller:

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.

You posted dietary advice on Instagram and TikTok endorsing the safety of aspartame. In one video posted to Instagram and TikTok on June 19, 2023, you stated, “Sweeteners are still safe, and a great way to reduce your sugar intake, and if you want more research, visit safetyofaspartame.com.” In a second video posted to Instagram on June 29, 2023, you disparaged guidelines released by the International Agency for Research on Cancer (“IARC”) and stated that IARC’s cancer classifications do not “have any quantifiable significance” and that “research shows that consumption [of aspartame] does not increase risk of cancer mortality.” In a third video posted to Instagram and TikTok on July 13, 2023, you disparaged the IARC guidelines and also stated that “the WHO and the FDA both reaffirmed aspartame safety. If this isn’t your thing, these safe products should be available to those who want to reduce their sugar intake.” Also on July 13, 2023 you posted a video to Instagram and TikTok in which you stated that “you could consume twelve or more diet drinks a day without any serious risks to your health” and “unless you’re a rodent given a mega dose, aspartame is likely not a large health risk.” Each Instagram post is available as both an Instagram Video and as a Reel. It appears that you were paid by the American Beverage Association (“ABA”) to make those posts.

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. 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 your disclosures regarding your apparent connection to the ABA.

First, the disclosures for your posts were not included in the videos themselves. 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 your videos, you made endorsements through both visual and audible means, so the disclosure should have been made both in the video’s visual and audible portions.

Second, you relied upon the “Paid partnership” disclosure tool for making disclosures in your posts. 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 your posts. (That does not mean that you should not use such tools in addition to other disclosures)

Third, the words “#ad” or “#AD” appear on or below the 20th line of the text description of each of your posts, making them insufficiently conspicuous. When people view Instagram or TikTok posts, longer descriptions are generally truncated, with only the first two or three lines displayed unless viewers click to see the rest of the description. Any required disclosure should be presented without having to click. We note that a TikTok or Instagram Reel post’s text description is in small print, at the bottom of the screen, sometimes poorly contrasting, and doesn’t stand out. The accompanying video usually has many competing elements. Therefore, we do not think that a disclosure in the text description of Reels or TikToks is clear and conspicuous.

Finally, even if viewers of your posts read the “Paid partnership” or “#AD” disclosures, they may be inadequate in the context of your posts because you may not have adequately identified the sponsor of the posts. Viewers might not understand that the sponsor is promoting the sale of aspartame or products containing it. Without knowing who the sponsor of the post is, viewers might not be able to adequately evaluate the weight and credibility to give your endorsement. Even the language of your “Paid partnership with ameribev” disclosures may be inadequate, as many viewers may not understand what “ameribev” is.

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

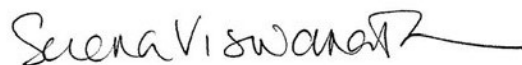
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deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act. As set forth in more detail in the notice, these acts and practices include failing to disclose a connection between an endorser and the seller of an advertised 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. 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 you on notice that engaging in conduct described therein could subject you to civil penalties of up to \$50,120 per violation.**¹

We strongly urge you to review your Instagram, TikTok, and other social media posts as to whether they contain sufficiently clear and conspicuous disclosures of any material connections. To help guide your review, please see the Endorsement Guides² and the staff publication *FTC's Endorsement Guides: What People Are Asking*.³ 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

¹ See 15 U.S.C. § 45(m)(1)(B).

² See 16 C.F.R. § 255 (Jul. 26, 2023), <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-B/part-255>.

³ *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).