



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

November 13, 2023

Via Federal Express and E-mail

Ms. Keri Gans



Dear Ms. Gans:

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 may be deceptive or unfair in violation of the FTC Act.

You posted dietary advice on Instagram endorsing the safety of aspartame. In a July 13, 2023 post available as both an Instagram Video and a Reel, you stated, “As you know, I’ve always been a fan of no and low calories sweeteners as part of an overall healthy diet, so I thought I’d share with you that there’s new info up on the FDA’s website reaffirming the safety of aspartame and other no and low calories sweeteners.” You stated in the text description of the post that, “According to the FDA ‘aspartame is one of the most studied food additives in the human food supply,’ with more than 100 studies supporting its safety.” You also stated in the text description of the post: “Check out the FDA’s website for new info,” and linked to an FDA.gov site regarding aspartame. It appears that you were paid by the American Beverage Association (“ABA”) to make the post.

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 post were not 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 video, you made endorsements through both visual and audible means, and 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 in making your 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 your posts. (That does not mean that you should not use such tools in addition to other disclosures).

Third, while you used the word “#ad” at the beginning of the text description of your Reel, we note that an Instagram Reel post’s 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. Therefore, we do not think that a disclosure in the text description of Reels is clear and conspicuous.

Finally, even if viewers read the words “Paid partnership” and “#ad” disclosure, they may be inadequate in the context of your post, because you did not identify the sponsor of the post. 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. Viewers may be particularly confused because, in your video, you discussed FDA.gov and directed viewers to “check out the site.”

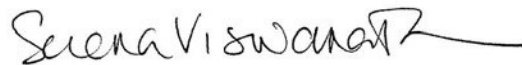
I am enclosing the Federal Trade Commission’s Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials. The notice of penalty offenses consists of Commission determinations in prior litigated cases that certain practices are deceptive or unfair and are unlawful 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 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](http://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.<sup>1</sup>**

We strongly urge you to review your Instagram 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 Guides<sup>2</sup> and the staff publication *FTC's Endorsement Guides: What People Are Asking*.<sup>3</sup> 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](mailto: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

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<sup>1</sup> See 15 U.S.C. § 45(m)(1)(B).

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

<sup>3</sup> *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.<sup>1</sup>
- 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.<sup>2</sup>
- 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.<sup>3</sup>
- 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.<sup>4</sup>
- 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.<sup>5</sup>
- 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.<sup>6</sup>
- 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.<sup>7</sup>

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<sup>1</sup> *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).

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

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

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

<sup>5</sup> *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).

<sup>6</sup> *Cliffdale Assocs., Inc.*, 103 F.T.C. 110.

<sup>7</sup> *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).