FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

THE CHAIRMAN

January 2, 2013

The Honorable Edward J. Markey
United States House of Representatives
Washington, DC 20515

Dear Representative Markey:

Thank you for your November 30, 2012 letter regarding the marketing of energy drinks. You express concern about safety and efficacy claims made for these products, especially given what you note is an increase in advertising targeted to children and teenagers. Let me assure you that FTC staff will carefully consider the information you provided.

In determining whether to take enforcement or other action in any particular situation, the Commission may consider a number of factors, including the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; and the likelihood of preventing future unlawful conduct and securing redress or other relief. Of course, issues that involve serious health concerns – especially those potentially affecting children and young adults – are always a high priority for the Commission.

As you know, the Commission acts in the interest of all consumers to prevent deceptive or unfair acts or practices, pursuant to the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. An act or practice is *deceptive* if it is likely to mislead consumers acting reasonably under the circumstances and if it is material – that is, likely to affect a consumer's purchasing decision.[1] An act or practice is *unfair* if it causes or is likely to cause a substantial consumer injury that consumers cannot reasonably avoid, and that is not outweighed by benefits to consumers or to competition.[2]

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[1] *See, e.g.*, *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *In the Matter of Telebrands, Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *see also Federal Trade Commission Policy Statement on Deception, appended to In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-83 (1984).

[2] 15 U.S.C. § 45(n); *see also Federal Trade Commission Policy Statement on Unfairness, appended to In the Matter of Int'l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

Let me turn now to the three specific questions in your letter.

1. *Does the FTC believe that the varied health, function, and safety claims made by manufacturers of energy supplements constitute a violation of Section 5 of the FTC Act, which outlaws unfair or deceptive trade acts or practices? If yes, how? If not, why not?*

Response

Although a determination of whether any particular advertising claims disseminated for these products violate Section 5 would require an investigation, in general, performance or safety claims that are false or unsubstantiated would violate Section 5 of the FTC Act.

With respect to the energy drinks with which you are concerned, an investigation would likely include research into the effects of, and any potential safety issues relating to, the consumption of caffeine and any other active ingredients in these products.

2. *If the Commission does believe that such trade practices may constitute potential violations of the Act, what actions, if any, is the FTC taking in response to this matter?*

Response

Under Commission Rules of Practice, we can neither confirm nor deny the existence of a specific investigation. However, as noted above, advertising directed to youth, particularly advertising that raises safety concerns, is an FTC priority. You have raised serious concerns and we will determine what action by this agency is appropriate.[3]

In cases where the FTC determines that there has been a violation of Section 5 and the public interest would be served by a formal action, the Commission can seek to impose a cease and desist order enjoining the marketer from engaging in similar conduct. The FTC does not have authority to seek civil penalties for violation of the FTC Act. However, any violation of a Commission cease and desist order can lead to the imposition of civil penalties. Moreover, in appropriate cases, the FTC may request a federal district court to order consumer redress or disgorgement of profits. In some

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[3] *See, e.g., In the Matter of Dynamic Health of Florida, LLC.*, FTC Dkt. No. 9317 (2006) (consent order involving weight loss product for children); *Global World Media Corp.*, 124 F.T.C. 426 (1997) (consent order involving false and misleading safety claims for "Herbal Ecstacy," a street drug alternative containing the herbal stimulant ephedra); *R.J. Reynolds Tobacco Co.*, Dkt. No. 9285 (1997) (challenging "Joe Camel" campaign for Camel brand cigarettes).

instances, the Commission may obtain quick voluntary changes to advertising practices without the need for formal action.

In other instances, the FTC has sent advertisers warning letters informing them of our concern about claims made in their marketing materials. For example, we sent letters last month to nearly 20 sports equipment manufacturers telling them about the Commission's recent settlement with a mouth guard manufacturer that made concussion protection claims for its product, *Brain-Pad, Inc.*, FTC Dkt. No. C-4375 (consent) (2012), identifying claims of concern in their own marketing materials, and advising them to ensure that they were not making performance or health benefit claims without competent and reliable scientific evidence to support those claims.

3. *Please describe the manner in which the FTC coordinates its efforts with the FDA or other federal agencies that share jurisdiction or responsibilities in this area. To the extent that such coordination efforts are formalized, please also provide copies of any relevant memoranda of understanding or other similar documents.*

Response

The FTC and FDA have concurrent jurisdiction over food, dietary supplements, and other health and nutrition products, and the two agencies work closely to police the marketplace for deceptive and unsubstantiated claims and for marketing that presents safety concerns. Under a longstanding Memorandum of Understanding (a copy of which is attached), the FTC has primary responsibility over the advertising of food, including dietary supplements, while the FDA has primary responsibility for the labeling of those products. The staffs of the two agencies have always coordinated closely on enforcement matters. Coordination enhances the ability of the two agencies to identify the worst offenders, share information about the marketers and their products, and formulate a more effective plan to stop fraud and deception, using the strongest tools available to each agency.

Traditionally, the Commission defers to FDA, as the agency with the scientific expertise and statutory authority, to address issues relating to food product content and ingredient safety. The Commission does, however, actively patrol the market for products that may present a safety concern for young people.

We hope that these responses provide the information you are seeking. If you should have any additional questions or concerns or wish to provide additional information, please feel free to contact me or have your staff contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326- 2946.

Sincerely,

Jon Leibowitz
Chairman