

MEMORANDUM

From: Steven B. Steinborn
Mary B. Lancaster

Date: February 4, 2020

Re: **National Advertising Division Refers Supplement Advertising to FTC**

A recent action by the National Advertising Division (NAD), a self-regulatory arm of the Better Business Bureau, illustrates that advertisers who participate but decline to be bound by an NAD Decision can expect to be referred to the Federal Trade Commission (FTC). The NAD recently announced that it referred advertising claims made by dietary supplement company Creekside Natural Therapeutics (Creekside) to the FTC for further review, following a challenge by the Council for Responsible Nutrition (CRN). ^{1/}

Voluntary Process Backed by Prospect of FTC Referral

The NAD is a voluntary industry dispute resolution body and a division of the Better Business Bureau. NAD provides a forum by which competitors or others can challenge advertising largely on the question of what claims are conveyed and if the advertiser has appropriate substantiation.

Once a dispute is initiated at NAD, should the challenged advertiser choose to participate, both parties submit briefs in writing and meet with the NAD before it issues a formal written decision. ^{2/} If recommendations for changes to advertising are made by NAD, the advertiser must state whether it “(1) agrees to comply with NAD[’s] recommendations, or (2) will appeal all or part of NAD[’s] decision to the [National Advertising Review Board (NARB)].” ^{3/} Indeed, NAD procedures require that the Advertiser’s Statement (that appears with the final Decision) initially state whether the Advertiser accepts NAD’s recommendations or will file an appeal. Advertisers who fail to submit an Advertiser’s Statement are treated as having declined to comply and may be referred to the FTC for

^{1/} Press Release, “National Advertising Division Refers Advertising Claims Made by Creekside Natural Therapeutics to Federal Trade Commission” (January 15, 2020), available at <https://bbbprograms.org/media/details/nad-refers-advertising-claims-made-by-creekside-natural-therapeutics-to-ftc>.

^{2/} While any person or legal entity may submit a complaint to NAD, not all complaints submitted to NAD will be accepted for self-regulatory proceedings. See NAD/NARB Procedures § 2.2(B)-(E). When NAD determines a complaint is appropriate for self-regulatory proceedings but the advertiser “elects not to participate in the self-regulatory process,” NAD will forward the facts and relevant exhibits to the appropriate federal or state law enforcement agency. NAD/NARB Procedures § 2.1(F)(3).

^{3/} NAD/NARB Procedures § 2.9(B).

further review and potential enforcement. Several FTC enforcement actions were initiated from an NAD referral.

Creekside Natural Therapeutics Case

The claims challenged by CRN in this instance appeared in online advertising for the company's dietary supplement for children, Focused Mind, Jr., which contains DMAE, inositol, and phosphatidylserine. At the outset, Creekside agreed to discontinue certain express claims, including a consumer testimonial. ^{4/}

The NAD requested substantiation for "clinically proven" claims, comparative claims, and performance claims such as "Pediatrician created and approved to improve memory concentration and attention," among others. Creekside did not submit any clinical testing on the Focused Mind Jr. product as a whole, but submitted studies on the ingredients in Focused Mind Jr., specifically, DMAE, inositol, and phosphatidylserine. The NAD found the ingredient studies were "not a good fit for the advertiser's claims" and recommended Creekside permanently discontinue various claims that the product improves memory and focus in children.

Creekside agreed to permanently discontinue several challenged claims; however, Creekside failed to file an Advertiser's Statement either agreeing to comply with NAD's recommendations or appealing the decision. On the basis of Creekside's inaction, NAD referred the matter to FTC for possible enforcement action.

*

*

*

We will continue to monitor NAD and FTC regulation of advertising claims. Should you have any questions, please contact us.

^{4/} CRN routinely files challenges with the NAD regarding dietary supplement advertising in an effort to encourage manufacturers to assure that claims being promoted to consumers are truthful, not misleading and are substantiated with credible scientific evidence.