

## DICKSTEINSHAPIRO<sub>LLP</sub>

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October 11, 2013

### Via Hand Delivery

The Honorable Edward J. Markey  
United States Senator  
218 Russell Senate Office Building  
Washington, DC 20510

The Honorable John D. Rockefeller IV  
United States Senator  
531 Hart Senate Office Building  
Washington, DC 20510

The Honorable Richard J. Durbin  
United States Senator  
711 Hart Senate Building  
Washington, DC 20510

The Honorable Richard Blumenthal  
United States Senator  
724 Hart Senate Office Building  
Washington, DC 20510

Re: Inquiry to Living Essentials dated September 25, 2013

Dear Senators Markey, Rockefeller, Durbin, and Blumenthal:

On behalf of our client, Living Essentials, LLC (“LE”), we are providing this response to your letter dated September 25, 2013 to LE’s president Scott Henderson. LE’s marketing and advertising practices promote appropriate use of its products, and LE appreciates the Senators’ efforts to educate the public about the responsible consumption of caffeinated and energy products.

As demonstrated in LE’s previous correspondence with the Senate dated July 8, 2013, LE does not market 5-hour ENERGY® to children or teenagers under 18. Since the company’s inception, LE has maintained a brand image that is appealing to adults, particularly members of the work force, as evidenced in its well-known commercials about the “2:30 feeling” in the middle of a work day. Its target demographic is adults ages 18-34, although adults of all ages use and enjoy 5-hour ENERGY®. LE engages older adult spokespersons to promote 5-hour ENERGY®, such as golfer Jim Furyk and multi-sport athlete Bo Jackson. LE does not promote its products for use by children or teenagers under 18, and it also has made a conscious decision not to promote 5-hour ENERGY® with consumption of alcohol. LE also instructs marketing representatives not to promote 5-hour ENERGY® at events appealing primarily to children or teens, or events that focus on alcohol consumption. LE does not associate its product with extreme sports or activities that appeal directly to young teenagers or children. LE declines sponsorship requests by individuals or groups that target minors, and it does not permit its logos to be affiliated with merchandise intended for children.

LE’s marketing and advertising practices are designed to reach an adult audience, and they do so effectively. Bright line restrictions that do not examine the causal connections between

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marketing practices and consumer behavior will not serve the intended purpose of reducing consumption of energy products by children and young teenagers. LE maintains that the industry must exercise common sense in determining, and modifying, the advertising and marketing behaviors that appeal to younger audiences and that promote irresponsible behavior. For example, traditional media such as television and radio are substantially less appealing to the younger generation than to adults – in fact, as Senator Markey noted during the July 31, 2013 hearing, many energy drink companies do not advertise in these media at all.<sup>1</sup> Likewise, exposure to advertising does not equate to impact. In today’s media-saturated environment, it is inevitable that persons of all ages will be incidental viewers of most advertisements. However, if neither the content, nor the delivery method, of the advertisement appeals to a youthful viewer, its message will not register. This is further shown in the Yale University’s Rudd Center for Food Policy and Obesity study regarding sugary drink marketing to youth, which indicated that LE’s advertising was not considered cool/hip or fun.<sup>2</sup>

With respect to the commitments you have requested in your letter, LE does not engage in the conduct you have described. As discussed earlier, LE’s advertising strategy neither targets nor appeals to children or teenagers under 18. Nor does LE’s advertising promote the use of 5-hour ENERGY® with alcohol or drugs. LE conducts the majority of its advertising on television, and it tailors the content of its advertisements to its intended adult audience. Indeed, its advertising is generally unappealing to young viewers. LE consciously avoids advertising during programs that are intended primarily for a young audience. As noted above, LE does not associate its products with youth-oriented sporting and recreational activities such as extreme sports and skateboarding. LE intentionally restricts in-person marketing efforts from events targeted towards children or young teenagers, or those that focus on alcohol.

Further, many of the requested commitments outlined in your letter are simply inapplicable to 5-hour ENERGY®. For example, you have requested that LE commit to report voluntarily to the FDA any serious adverse events associated with its products. As a dietary supplement, LE is already under a legal obligation to do so, and it follows rigorous policies to ensure strict compliance with FDA requirements.

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<sup>1</sup> Referring to the findings of the report *What’s All the Buzz About*, which surveyed the advertising practices of energy drink companies, Senator Markey noted that “while many of these products do not engage in traditional marketing through TV, print, and radio, they are very active in social media and sponsorship of sporting, music, and gaming events that promote brand recognition in a way that clearly appeals to young people and often promotes unhealthy and quick consumption.” *Energy Drinks: Exploring Concerns About Marketing to Youth: Hearing Before the Commerce, Science, and Transportation Committee* (July 31, 2013) (statement of Senator Edward Markey). Unlike these companies, LE advertises heavily in traditional media, particularly television.

<sup>2</sup> See Harris, et al., *Sugary Drink F.A.C.T.S: Evaluating Sugary Drink Nutrition and Marketing to Youth*, Yale Rudd Center for Food Policy and Obesity (Oct. 2011), Appendix, Table D2 at 202, 204, available at [http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS\\_Report.pdf](http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf).

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LE will continue to promote responsible practices for consumption of energy products. As Senator Thune observed at the July 31, 2013 hearing, it is important “to rely on good science, careful investigation, and accurate evaluations” in order to protect all consumers. If you or your staff have additional questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "B Van Gelder /mc". The signature is fluid and cursive.

Barbara Van Gelder

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