

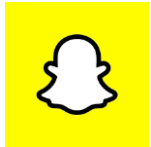
# Rules of the Road for Marketing and Advertising on Social Media

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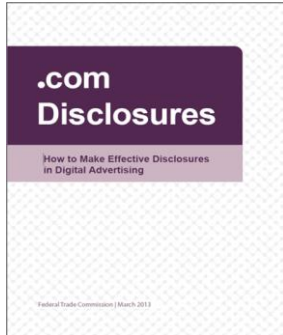
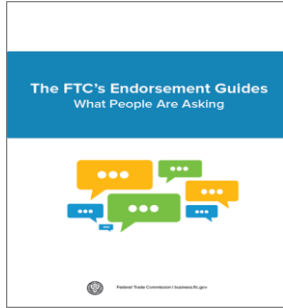
- Moderator:
  - Ronald Y. Rothstein, Partner, Winston & Strawn LLP
- Panelists:
  - Nury H. Yoo, Counsel, Keller and Heckman LLP
  - Jason W. Gordon, Partner, Reed Smith LLP
  - Holly A. Melton, Partner, Crowell & Moring LLP

**Food Advertising, Labeling, and Litigation Conference: For the Food and Dietary Supplement Industries**

**September 26-27, 2019 | Washington, DC**



# Endorsements and Testimonials



- FTC Testimonial & Endorsement Guides require advertiser to disclose all material connections not reasonably anticipated by the consumer
  - Compensation
    - Sweepstakes entry
    - Free product
    - Coupon
  - Employee/Business Associate of Advertiser
  - Related to Advertiser

# Endorsements and Testimonials Must be Substantiated

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- Must reflect the honest beliefs, opinions and experiences of the endorser
  - Advertiser can only disseminate where it has a reasonable basis to believe endorser still holds the opinion
- Cannot make claims through endorsers that the advertiser cannot make itself
  - “Reasonable basis”
  - “Competent and reliable scientific evidence”
- Express and implied claims must be substantiated
- Impermissible drug claim: stating or implying the product is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of a disease

## FTC's Prescriptive Guidance on Disclosures

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- Do not rely on a platform's disclosure tool and assume that it is adequate
- Do not simply disclose in the description box of a YouTube video.  
The disclosure should be included in the video itself
- On Twitter, Instagram, the hashtag should be at the beginning of the post
  - On Instagram, the disclosure should be made in first 3 lines.  
No “click more.”
- On Snapchat, InstaStories, superimpose the disclosure. No audio only
- No blanket disclosures
- No hyperlink or button stating “Disclosure” or “Legal”

# FTC's Prescriptive Guidance on Disclosures

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## What's OK:

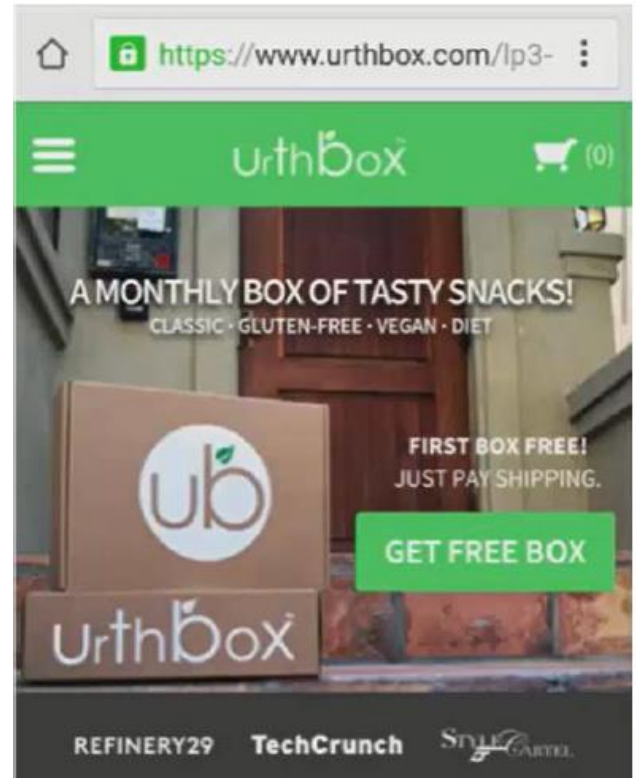
- #ad
- #advertisement
- #sponsored
- #paid

## What's not OK:

- Don't mix "ad" with a company name
- The FTC recommends against "#client" "#advisor" and "#consultant" to disclose that the poster is a paid consultant for a brand
- No abbreviations that consumers may not understand – no #spon, no #amb
- #ambassador is not sufficiently clear. #[BRAND] ambassador is better
- A thank you to a company without explaining that the influencer got something for free is not enough

# UrthBox Inc.

- Offered a free snack box or store credits box for positive reviews on BBB website, Facebook, Instagram, Twitter
- Reviewers failed to disclose that they in fact had been offered incentives for submitting positive reviews
- No procedures or policies in place to monitor reviewers' posts
- Consent order + \$100k consumer redress



# FTC v. Cure Encapsulations, Inc.; No. 1:19-cv-00982 (E.D.N.Y. June 4, 2019)

amazon 1st Choice | quality life essentials fire ~~\$49.99~~ \$39.99 Limited-time offer


Departments - Your Amazon.com Today's Deals Gift Cards & Registry Sell Help Web: Sign in Account & Lists Orders Try Prime Cart

Health & Personal Care Household Supplies Vitamins & Diet Supplements Baby & Child Care Health Care Sports Nutrition Personal Care Sexual Wellness Prime Pantry Subscribe & Save New Arrivals Sales & Special Offers

Back to search results for "quality life essentials"

### Garcinia Cambogia \*\*\* 100% Pure Garcinia Cambogia Extract with HCA, Extra Strength, 180 Capsules, All Natural Appetite Suppressant, carb blocker, Weight Loss Supplement. Quality Encapsulations

★★★★☆ 8,268 customer reviews | 167 answered questions [Buy Now](#) in Appetite Control & Suppressants



Price: ~~\$19.99~~ (\$0.11 / Count) with Prime | Fast, FREE Shipping with Amazon Prime

In stock on February 13, 2017. Order it now. Sold by Quality Life Essentials and Fulfilled by Amazon. Gift-wrap available.

Ship to: WASHINGTON, DC 20001 -


Qty: 1 Turn on 1-click ordering

[Add to Cart](#)


[Add to List](#)

Other Sellers on Amazon 2 new from \$19.99

Share [Email](#) [Facebook](#) [Twitter](#) [5K+ Shares](#)

 **POTENT**  
**Garcinia Cambogia Extract - 95% HCA**  
Pure Garcinia Cambogia Extract - 95% HCA Capsules - Best Weight...  
8,268 customer reviews | 1,580  
~~\$17.97~~ with Prime

Ad feedback

 **USDA Organic, Non-GMO**  
vitamins from Garden of Life  
[Learn more](#)

**About the Product**

- "Garcinia Cambogia Premium Extract 100% Pure"; The only brand that is 60% HCA GUARANTEED; 180 Capsules per bottle, MADE IN THE USA; Free of fillers; Free of binders; Free of artificial ingredients and other compounds; The most reputable brand on the market;
- Block fat cells; Block the formation of new fat cells; Block carbs from turning into unhealthy fat, weight loss pill, weight loss supplement;
- Powerful appetite suppressant; Reduces cravings; Diet pill; Diet Supplement;
- Boost your mood; Improves serotonin levels in the brain;
- Designed for maximum absorption;

#### Frequently Bought Together

 + 

Total price: ~~\$24.68~~

[Add both to Cart](#)

[Add both to List](#)

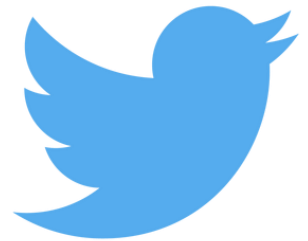
These items are shipped from and sold by different sellers. Show details

- This Item:** Garcinia Cambogia \*\*\* 100% Pure Garcinia Cambogia Extract with HCA, Extra Strength, 180 Capsules... ~~\$19.99~~ (\$0.11 / Count)
- Bragg Organic Raw Apple Cider Vinegar, 16 Ounce - 1 Pack \$4.69 (~~\$5.29~~ / Fluid Ounce)

## Retweeting and Sharing Content

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- Only retweet, share content if you can substantiate the underlying claims
- Retweeting and sharing on the same platform typically requires consent
  - Sharing on same platform can be lower risk if consumer tags you, tweets at you and otherwise engages with you using platform tools
  - However, always ask permission before re-sharing, retweeting photographs
    - Consider risks of sharing images with more than one person
- Always get permission before sharing on a different platform





# Claims Attributed to Company by “Likes,” Reposts, Retweets

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- FDA Warning Letter (Dec. 2012)
  - Consumer post on Facebook: “[Product] has done wonders for me. I take it intravenously 2x a week and it has helped me tremendously. It enabled me to keep cancer at bay without the use of chemo and radiation . . . Thank you [Company].”
  - Company “liked” the comment (among other things)
  - FDA: Company endorsed the underlying claim content (which constituted impermissible and unsubstantiated drug claims)
- FDA Warning Letter (June 2014)
  - Website, Twitter, and Facebook page for Company (producer of dietary supplements for babies and children) contained impermissible and unsubstantiated drug claims, including via testimonials
  - Company “liked” testimonials on Facebook
  - FDA: Company endorsed and promoted the underlying claim content (which constituted impermissible and unsubstantiated drug claims)

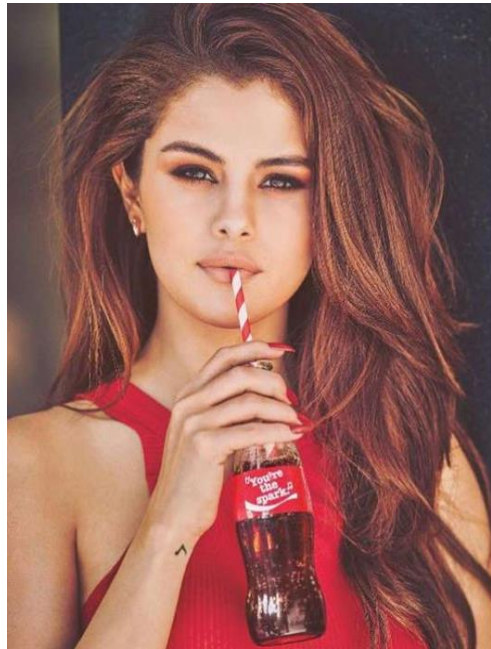



# Agreements with Influencers

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- A statement regarding ownership rights: Do you want to own the content? Reuse the content? Share the content on brand websites and social media pages?
- Clear statement regarding deliverables: What are the deliverables? What claims can they make?
- A clear statement of deadlines for creating the content and sharing the content
- Exclusivity clause/non-compete: What time frame? What brands?
- FTC compliance:
  - Clearly outline disclosure expectations, consider providing exact disclosure language
  - Prohibit influencer from making misrepresentations
  - Monitor influencers for compliance
  - Right to immediately terminate influencers who fail to comply
- Additional contract clauses: indemnification, non-disparagement, good behavior, termination rights

# Examples



 **selenagomez** Following

6m likes 26w

selenagomez when your lyrics are on the bottle 🤪 #ad

view all 242,088 comments

danydany5687 I ❤️

lucja333\_ I ❤️ it

sarcasm.queen22 I love you

tamimkhan12029 Sexy nails

unicornverlosungen Wow


nasserlraesa Love yaa 🤔🤔🤔


samuel\_froes\_ Wow

favorlena\_gomez Please like my last photo. ❤️ @samuel\_froes\_ @nasserlraesa @unicornverlosungen @tamimkhan12029 @sarcasm.queen22 @lucja333\_ @danydany5687 @chase.pdp @selenarevivalworld @slaymeselena

favorlena\_gomez Please like my last

❤️ Add a comment... ⋮



 **cocacola** Follow

33.4k likes 11w

cocacola Welcome to Atlanta, @selenagomez! Best of luck tonight. #ShareACoke

view all 326 comments

bek\_omar Coca yes

sofiacuenca\_ ♥♥♥

marianasarreta @val\_pmedeiros da para ser sexy tomando coca hahaha

val\_pmedeiros Nós só conseguimos ficar gordas tomando coca kkkkk @marianasarreta

marianasarreta @val\_pmedeiros jkkkkkkkkk

csmariet @edwinfantephoto

martuuh\_k Kiki manges tu maself 🤪

benny\_dv Love coca

llekevandevoort\_ 🤪

marceline 2003

❤️ Add a comment... ⋮

# Examples



kyliejenner

Following

775k likes

24w

kyliejenner #ad using @fittea before my shoots is my favorite 🍵

view all 37,063 comments

hala\_aldisi خلف زون 🍵🍵

hala\_aldisi @shahdoo16 انااا 🍵

\_maittha @fares\_12314 🍵

noahgalloway1983 Write this on 7 posts or your mom will die tomorrow.

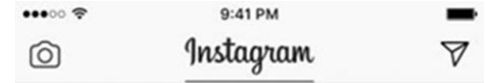
noahgalloway1983 This is not fake write this in 15 pictures and you will be missed tomorrow. Break this chain and you will see a demon in 53 minutes

kumru\_xxix @halawiteten

sydneyjordan24 If you stop reading this you might die my name is Teresa fildago if you don't post this on 20 photos I will sleep with you forever one girl ignored this and 29 days later her mom died don't believe this Google it

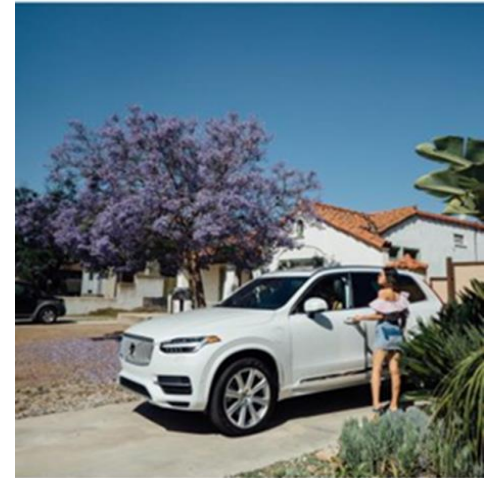


Add a comment...



songofstyle

Paid partnership with volvocarusa



songofstyle I've been carless for almost a year and I'm currently shopping for a new car so @volvocarusa let me borrow their #VolvoXC90 so I'm going to be taking it out for a drive.

# FDA's Comprehensive Plan to Modernize Oversight of Dietary Supplements (Feb. 2019)

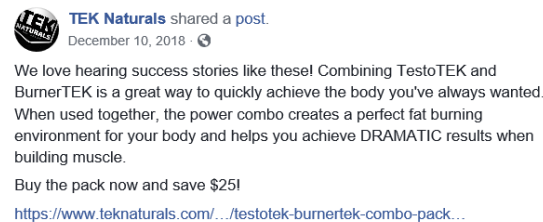
- Several initiatives, including focus on enforcement against “bad actors” who market dietary supplements with unlawful ingredients, or unsubstantiated disease claims.
- FDA sent 12 warning letters and 5 online advisory letters to companies whose products, many marketed as dietary supplements, were deemed unapproved new drugs
- FDA and FTC sent Joint Warning Letters to supplement companies (including TEK Naturals) that reference claims found on company websites/blogs, social media posts (Twitter, Facebook, and Instagram), in articles endorsed by company, and personal testimonials



**TEK Naturals** @TEKNaturals Follow

We love hearing success stories like these! Combining TestoTEK and BurnerTEK is a great way to quickly achieve the body you've always wanted. When used together, the power combo creates a perfect fat burning... [facebook.com/TEKNaturals/po...](https://www.facebook.com/TEKNaturals/po...)

2:57 PM · 10 Dec 2018



**TEK Naturals** shared a post. December 10, 2018 · 🌐

We love hearing success stories like these! Combining TestoTEK and BurnerTEK is a great way to quickly achieve the body you've always wanted. When used together, the power combo creates a perfect fat burning environment for your body and helps you achieve DRAMATIC results when building muscle.

Buy the pack now and save \$25!

<https://www.teknaturals.com/.../testotek-burnertek-combo-pack...>



**Jonny Schaeffer** recommends TEK Naturals. December 10, 2018 · 🌐

I stacked the testotek with the fat burner and I was shocked my the results. I took 1 bottle of each before a vacation, I've tried other products that claim to have noticeable results as well but I've yet to find any that have given me the results TEK Naturals did. I ordered 2 more bottles of each when I got back!


3

# Examples



teknaturals • [Follow](#)



teknaturals Big thanks to [@flemshow](#) for the awesome testimonial! BurnerTEK is ranked as the #1 fat burner on the market by multiple supplement review websites. Look into it yourself, we've gotten some amazing feedback! Click the link in our bio or go to [burnertek.com](#) today to get yours 

85w



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1,386 views

JANUARY 30, 2018

# New California Privacy Law (California Consumer Privacy Act - CCPA)

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- Any for-profit business doing business in California, that:
  - Has \$25 million+ in revenue;
  - Annually buys, receives for the business's commercial purposes, sells or shares for commercial purposes the Personal Information of 50,000 or more Consumers' households or devices; or
  - Derives at least 50% of its annual revenues from selling Consumers' Personal Information.
- Personal information: includes information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household
- Consumer: includes any "natural person who is a California resident . . . however identified, including by unique identifier."
- Effective: January 1, 2020 with one-year look back
- Amendments still being made, including as early as last week



# Safety Disclosures

- FTC and FDA sent warning letters to sellers of e-liquid products in June 2019
  - FTC claimed social media posts failed to disclose material health or safety risks (and failed to disclose material connections between an endorser and the product marketer)
  - FDA claimed posts were misbranded because they did not include mandatory nicotine warnings
- Consider mandatory or voluntary health and safety disclosures for products containing alcohol (alcoholic beverages w/less than 7% ABV, kombucha, specialty beer, etc.), caffeine, etc.
- Vulnerable populations





# Considerations for Managing Risk

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- Carefully consider the terms of your written agreement with influencers and the level of detail and specificity that is appropriate
- Review and approve draft social media posts or initial “treatments” and rough cuts of video content
- Substantiation
- Regularly monitor posts of influencers for content identifying the company or product
- Educate influencers regarding substantiation requirements and regulatory and litigation risks
- Caution when “liking,” reposting, or retweeting, etc.
- Qualify posts and provide disclosure language where appropriate
- Consider other regulatory frameworks (IP, securities, other agencies, etc.), international issues, state law concerns