

Use of Influencers in Promotional Advertising

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FDLI

**Advertising and Promotion for Medical Products
Conference**

October 18, 2019

Washington D.C



My comments reflect my own views, and not necessarily those of the Commission or any individual Commissioner

The Basics

- Material connections not otherwise obvious to viewers must be clearly and conspicuous disclosed.
- Influencers' statements must be truthful and the brand must be able to substantiate any performance claims the influencer makes.

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Disclosures Must Standout

- Don't mix your disclosure into a group of hashtags or links.
- If your endorsement is in a picture on a platform like Snapchat and Instagram Stories, superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it.
- If making an endorsement in a video, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video.
- If making an endorsement in a live stream, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.

Use Simple & Clear Language

- “Thanks to Acme brand for the free product”
-
- “Advertisement,” “ad,” and “sponsored.”
- “AcmePartner” or “Acme Ambassador” are also options.
- Not “sp,” “spon,” or “collab,” or stand-alone terms like “thanks” or “ambassador.”

Enforcement Letters

- FTC staff sent over 90 letters to brands and influencers re Instagram posts appearing to promote a brand with no disclosure or inadequate disclosure of sponsorship. Our letters urged:
 - Using unambiguous terminology
 - Placing disclosure within the first 3 lines of text so it's not under the “more” button
 - Not placing the disclosure in a clutter of hashtags



giulianarancic

Follow

9,729 likes

1w

giulianarancic Can you spot my latest obsession? (Hint: it's on my heel but you can barely see it!!!) Love high heels. Hate Blisters. Not leaving the house without #CompeedUS in my bag this summer. Check it out @Walgreens #musthave #partner #gsessions 🐾

view all 133 comments

teresakiryakoza @chanel509

melis_henry @jen_mir not sure how it works

brig_mo @marykate_no_ashley_

rosellaloduca @akrzewski heeeee giultyyy

kat_hamilton @laneborgida

4vrmygrlz I need this 🐾

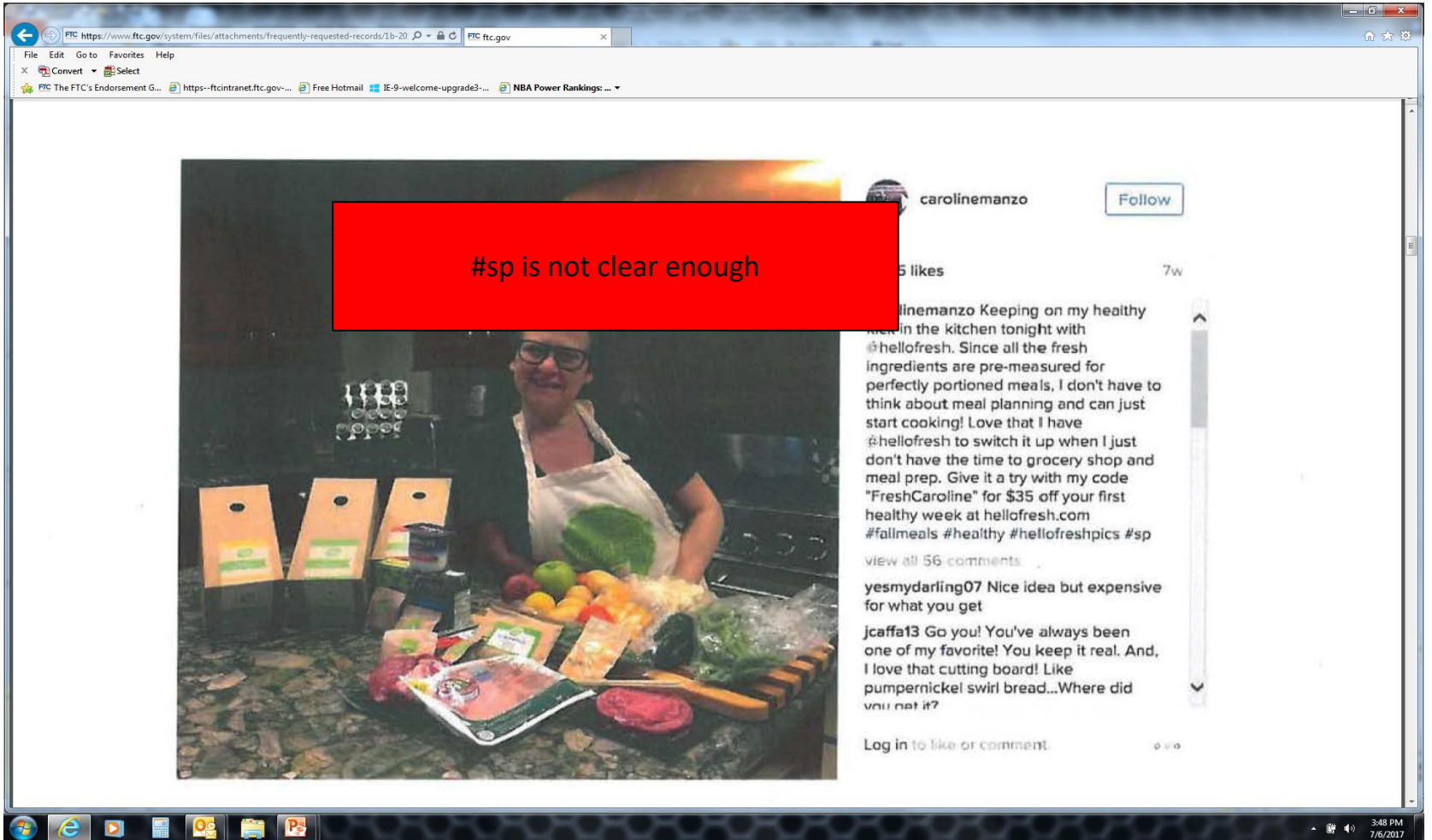
mapy0110 Me too! 🐾🐾🐾

tammycruz47 Cute shoes



Add a comment...





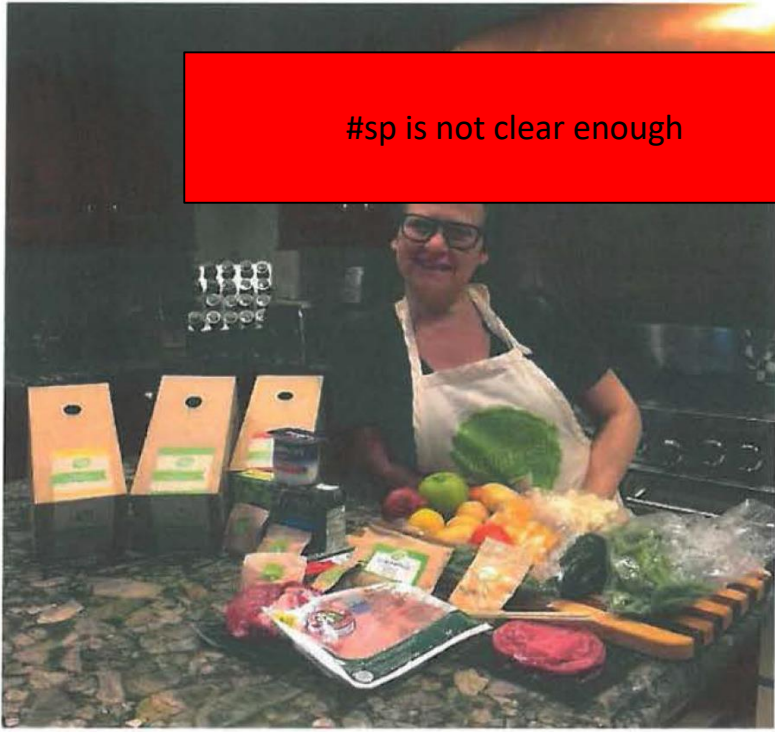
FTC <https://www.ftc.gov/system/files/attachments/frequently-requested-records/1b-20>

File Edit Go to Favorites Help

Convert Select

FTC The FTC's Endorsement G... <https://ftcincranet.ftc.gov...> Free Hotmail IE-9-welcome-upgrade3... NBA Power Rankings: ...

#sp is not clear enough



carolinemanzo Follow

5 likes 7w

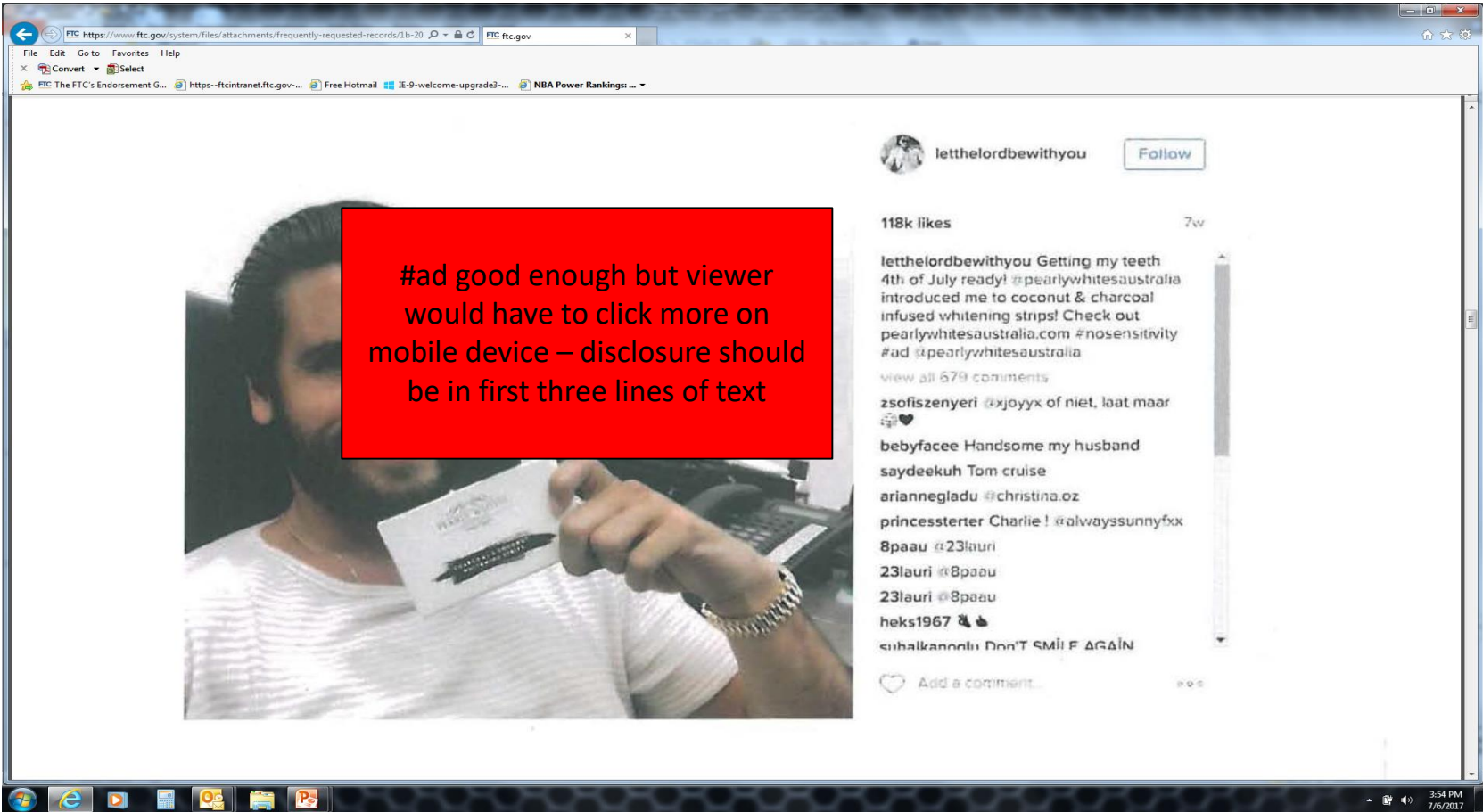
carolinemanzo Keeping on my healthy streak in the kitchen tonight with @hellofresh. Since all the fresh ingredients are pre-measured for perfectly portioned meals, I don't have to think about meal planning and can just start cooking! Love that I have @hellofresh to switch it up when I just don't have the time to grocery shop and meal prep. Give it a try with my code "FreshCaroline" for \$35 off your first healthy week at hellofresh.com #fallmeals #healthy #hellofreshpics #sp

view all 56 comments

yesmydarling07 Nice idea but expensive for what you get

jcaffa13 Go you! You've always been one of my favorite! You keep it real. And, I love that cutting board! Like pumpernickel swirl bread...Where did you get it?

Log in to like or comment



#ad good enough but viewer would have to click more on mobile device – disclosure should be in first three lines of text

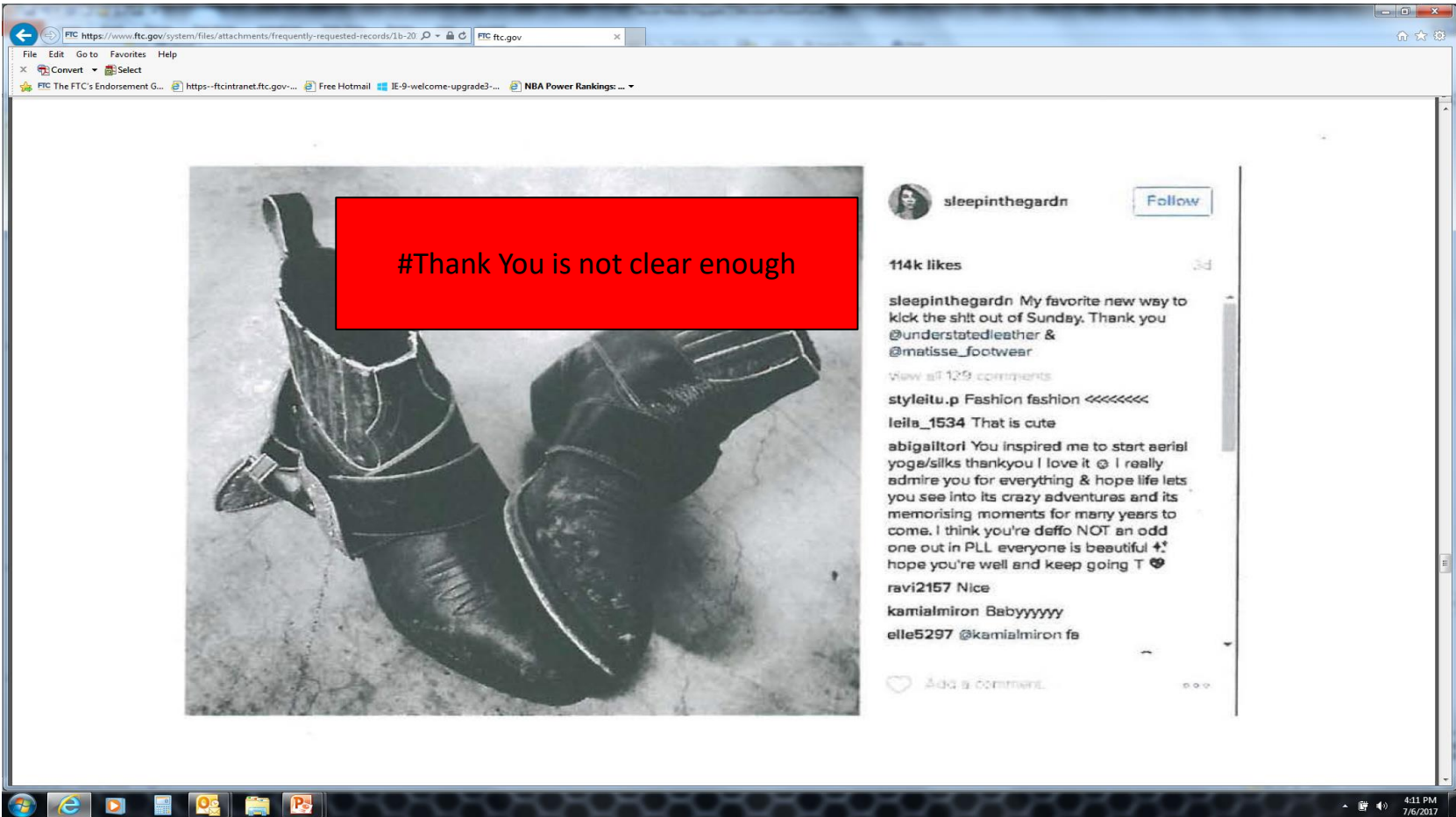
letthelordbewithyou [Follow](#)

118k likes 7w

letthelordbewithyou Getting my teeth 4th of July ready! @pearlywhitesaustralia introduced me to coconut & charcoal infused whitening strips! Check out pearlywhitesaustralia.com #nosensitivity #ad @pearlywhitesaustralia

- [view all 679 comments](#)
- zsofiszenyeri @xjoyyx of niet, laat maar
 - bebyfacee Handsome my husband saydeekuh Tom cruise
 - ariannegladu @christina.oz
 - princessterter Charlie! @alwayssunnyfxx
 - 8pau @23lauri
 - 23lauri @8pau
 - 23lauri @8pau
 - heks1967
 - subalkanodli Don'T SMİ F AGAIN

Add a comment...



#Thank You is not clear enough



sleepinthegardn

Follow

114k likes

3d

sleepinthegardn My favorite new way to kick the sht out of Sunday. Thank you @understatedleather & @matisse_footwear

View all 129 comments

stylelitu.p Fashion fashion <<<<<<<

leila_1534 That is cute

abigailtori You inspired me to start aerial yoga/silks thank you I love it @ I really admire you for everything & hope life lets you see into its crazy adventures and its memorising moments for many years to come. I think you're deffo NOT an odd one out in PLL everyone is beautiful <3 hope you're well and keep going T <3

ravi2157 Nice

kamialmiron Babyyyyyy

elle5297 @kamialmiron fa

Add a comment...

...

Lord & Taylor, LLC

No. C-4576, May 20, 2016 (Consent)



Creaxion/Inside Publications

No. 4668, Jan. 31, 2019 (Consent)



Jake Dalton



Getting Rio Ready! Not worried about Zika. Fit Organic has my back and body covered. Love the Fit mosquito repellent



social | scene

PROTECTION

caring for carly
FIT ORGANIC STEPS UP TO PROTECT FORMER OLYMPIC GOLD MEDALIST FROM MOSQUITOS THAT COULD TRANSMIT ZIKA VIRUS

2004 Olympic Gold Medalist Carly Patterson-Caldwell was looking forward to joining her Olympic family in Rio for the 2016 summer Games. However, because she is focused on starting a family of her own, Patterson-Caldwell made the difficult decision not to attend the Games. "I just couldn't risk our future with the threat of the Zika virus," she said. So instead of Rio, Carly and her husband Mark will be spending the summer at home, just outside of Dallas. There's just one problem. The Texas State Health Department is preparing for what could be a large scale outbreak of the Zika virus. Patterson-Caldwell could be just as much at risk for Zika in her own backyard as she would have been in Rio.

Hearing about her story through the team at *Inside Gymnastics* magazine—and knowing of the potential Zika virus outbreak in Texas, Fit Organic CEO Todd Wichmann springs into action. His marketing team contacted Patterson-Caldwell, offering her and her family a lifetime supply of his new USDA-Certified organic mosquito repellent. Scientists have proven to repel mosquitoes that might transmit the Zika virus. More importantly, the company says it's safe for pregnant women and children.

"I was so touched and thankful that Fit Organic reached out to me," said Patterson-Caldwell. "I've been looking for an organic product that would repel mosquitoes and keep my family safe from the Zika virus. Fit Organic Mosquito Repellent is exactly what I was looking for. Fit Organic's CEO said it was the least he could do, especially when he learned that Patterson-Caldwell was planning on becoming a mom. "I'm a parent before anything else," said Wichmann. The goal is to protect them - like Carly and her family—from the Zika virus.

Fit Organic Mosquito Repellent can be purchased online at Amazon.com or at FitOrganic.com.

Reference Material

- Dot Com Disclosures: Information About Online Disclosures
 - <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>
- Guides Concerning the Use of Endorsements and Testimonials in Advertising
 - <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>
- The Revised Endorsement Guides: What People Are Asking (FAQs)
 - <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>
- endorsements@ftc.gov

Contact Information

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* Feel free to contact me for a copy of my slides.



Influencers and the National Advertising Division

Lauren Myers

Kelley Drye & Warren LLP

October 18, 2019



What is the NAD?



The Advertising Self-Regulatory Council (ASRC)
has merged into **BBB National Programs, Inc.**

NAD's Focus Is Substantiation

“NAD does not make distinctions across product or regulatory categories. For example, **whether a product is an OTC drug, a dietary supplement, or even a homeopathic remedy, NAD's analysis remains the same: identify the messages reasonably conveyed by the advertising, examine the reliability of the evidence, and if reliable, determine whether the evidence is a good fit for the reasonably conveyed messages.** The strength of the messages drive the level of support required to support the claim.” – NAD Case #6257, Mommy's Bliss

NAD's Jurisdiction Over FDA-Regulated Products



NAD Review of FDA-Cleared Medical Devices

Case #6107: Capillus 82

- ✘ Clinically Proven to Regrow Hair
- ✓ Wear our cap for thirty minutes, every other day.
- ✓ Capillus 82 is FDA-Cleared and has no known adverse side-effects so you can use it with confidence.



Who is an influencer?

Celebrity

**Social Media
Influencer**

CEO

Employee

Consumer

Influencers



Case #6042: FitTea

- ✘ No material connection disclosures
- ✘ No substantiation for influencer claims
- ✓ Reviews were representative and not cherry-picked

Online Reviews

Case #6265R: NutriChef Vacuum Sealers

- ✘ Did not disclose incentives
- ✘ Implied only positive reviewers would get a free gift



Crowd-Sourced Reviews

Case #5971: My PurMist Handheld Steam Inhaler

- ✘ Could not ensure reviews were only counted once
- ✘ Some reviews were too old to be verified
- ✘ No indication for why consumers gave 5-star reviews



Crowd-Sourced Substantiation

Case #6286: TaxSlayer Tax Preparation Software



**HIGHEST
RATED**



**IN THE
TAX PREP
SOFTWARE
CATEGORY
ON TRUSTPILOT**

- ✘ Survey population not representative
- ✘ No disclosure regarding survey population
- ✘ No mechanism to verify reviews
- ✘ Reviews not representative of 85% of marketplace
- ✘ Not clear how “Trustscore” was used

Best Practices

Follow FTC Guidance



Disclose, Disclose, Disclose



Be Careful with Incentives



Be Careful When Crowdsourcing

Questions?



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The logo for Hogan Lovells, consisting of the name "Hogan Lovells" in a black serif font, positioned inside a solid lime green square.

Hogan
Lovells

Use of Influencers in Promotional Advertising

Danielle C. Humphrey

October 18, 2019

Influencer Marketing: FDA Regulated Products

lesleyannemurphy • Bali, Indonesia [View Profile](#)



[View More on Instagram](#)

11,501 likes
lesleyannemurphy

I've had implants inside my chest for over a year now and have zero regrets. The upside to all of this: I now have a 1% chance of being diagnosed with breast cancer. The downside? I lost all feeling in my breasts and, well, let's just say they aren't the most natural looking things all the time.

I wrote about it all today on Breast Reconstruction Awareness Day :) I also wrote about what no one talks about - what it's really like to be intimate after a double mastectomy. Lastly - I discuss a new technique designed to restore sensation in breasts after surgery (mine are completely numb). Science is so cool. Link in bio. @resensation #resensation #breastreconstructionawarenessday #breastcancerawareness #mastectomy #partner

view all 141 comments

Add a comment...



louiseroc • Follow
Paid partnership with celgene
Los Angeles, California

louiseroc • Ad I recently had a blast swapping worlds for a day with Alycia, a financial analyst who also lives with psoriasis. I learned a ton from her, and I hope she feels the same. www.psoerspective.com for more!
xoxo
.

#psoriasis #psoriasiswarrior
#dermatology

28w

3,114 likes
NOVEMBER 28, 2018

[Log in to like or comment.](#)

A Rival to Botox Invites Doctors to Party in Cancun, With Fireworks, Confetti and Social Media Posts

Plastic surgeons' Instagram accounts of the weekend trip didn't note the drug company's sponsorship, which some ethicists say should be disclosed.



[View More on Instagram](#)

107 likes
dermatology_of_boca

[its here](#) [#newtox](#) [#psoriasis](#) [#psoriasiswarrior](#) [#dermatology](#) [#psoriasisawareness](#) [#psoriasiswarrior](#) [#dermatology](#)

Pandora Blue @Pandora_PBlive · Apr 9

Start your day off right with solacevapor sea salt blueberry salt water taffy and tart blueberry flavors, refreshing your mind and thoughts [instagram.com/p/BWC_M_5WB7q/...](#)

4 likes

Legal Framework in Device and Pharma Industries

- Because pharma and health care are highly regulated and risk-averse spaces traditional social media and influencer marketing campaigns present unique challenges
- Campaigns must be adjusted to comply with strict legal/regulatory requirements placed on prescription drugs and medical devices
 - Include only claims that are adequately substantiated and consistent with product clearance or approval
 - Not promote products for uses not cleared or approved by FDA
 - Reveal material facts regarding product's use including risk factors
 - Not omit or minimize risk information or overstate efficacy
 - Not make a misleading representation with respect to another drug or device

Corporate Responsibilities

- Company is responsible for:
 - Interactive media sites and content that it owns, controls, creates, influences, or operates, even if limited in scope
 - Content generated by an employee or *agent* who is acting on behalf of the firm, i.e., if you hire an outside party to manage your marketing initiative, you would be responsible for their content
 - Promotion on third-party site if company has *any* control or influence (e.g., editorial, preview, or review privilege)
- Company is not responsible for:
 - User-generated content that is *truly independent* and was *not prompted* by the company, even if it occurs on company-owned or -controlled blogs, message boards, or chat rooms
 - Unclear where FDA will draw the line in terms of what constitutes “prompting”

Use of Influencers: FDA Enforcement

- 2015 Warning Letter to Duchesnay Inc. for Diclegis (doxylamine succinate and pyridoxine hydrochloride) delayed-release tablets
 - Kim Kardashian posted on Instagram and Facebook promoting Diclegis:
 - “OMG. Have you heard about this? As you guys know my #morning sickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, and I felt a lot better and most importantly, it’s been studied and there was no increased risk to the baby. I’m so excited and happy with my results that I’m partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.diclegisimportantsafetyinfo.com.”

The image displays two social media posts side-by-side. On the left is an Instagram post from user 'kimkardashian' showing a close-up of her face holding a white bottle of Diclegis. The text of the post is visible below the image. On the right is a screenshot of her Facebook profile, showing a post with the same text and image. Blue arrows point from the Instagram post to the Facebook post, with labels: 'Condensed version posts to Twitter with a direct link back to Instagram post' and 'Full version is posted to Facebook page'. A note at the bottom right of the Facebook screenshot reads: 'Please note: image of Diclegis bottle will be prominent enough to read established name'. The date '2015-0069-01' is printed in the bottom right corner.

ORIGINAL POST

Instagram

kimkardashian FOLLOWING

OMG. Have you heard about this? As you guys know my #morning sickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, and I felt a lot better and most importantly, it’s been studied and there was no increased risk to the baby. I’m so excited and happy with my results that I’m partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.diclegisimportantsafetyinfo.com

Condensed version posts to Twitter with a direct link back to Instagram post

Full version is posted to Facebook page

Kim Kardashian West @KimKardashian · 3h
OMG. Have you heard about this? As you guys know my #morning sickness has been pretty bad. I tried .. <https://www.instagram.com/p/4B-W0sMoBO/>

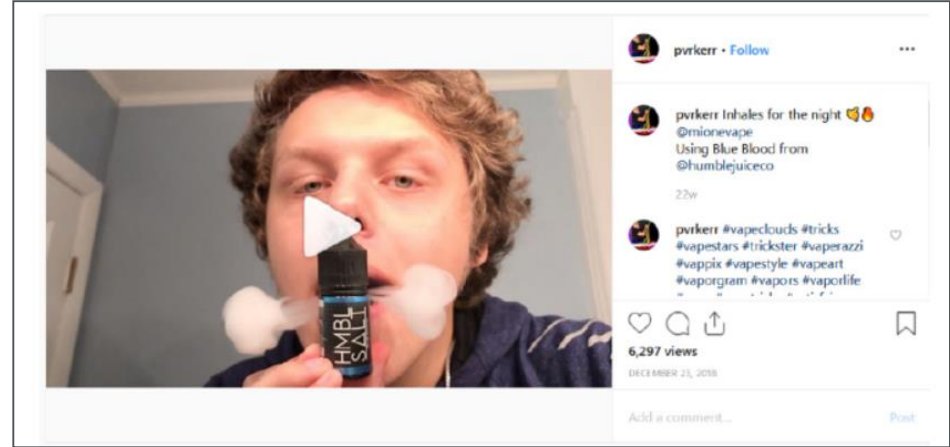
Kim Kardashian
Public Figure

OMG. Have you heard about this? As you guys know my #morning sickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, and I felt a lot better and most importantly, it’s been studied and there was no increased risk to the baby. I’m so excited and happy with my results that I’m partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.DiclegisImportantSafetyInfo.com

Please note: image of Diclegis bottle will be prominent enough to read established name

2015-0069-01

Use of Influencers: Joint FDA and FTC Enforcement



- June 2019 Warning Letters to vaping companies for e-liquid products
 - Humble Juice Co, Solace Technologies, Hype City Vapors, Artist Liquids Laboratories
 - FDA and FTC linked companies to influencers who encouraged their followers on Facebook, Instagram, and Twitter to try the companies' vaping liquids with no required disclosure that the products contain addictive nicotine

Best Practices

- **Written Policies.** Develop written policies and/or contracts that all social media influencers agree to follow
 - Standardized disclosures to ensure FTC and FDA compliance
 - Precleared claims/statements or “guardrails” documents to ensure FDA compliance
- **Trainings.** Conduct periodic trainings or other educational outreach to company employees and influencers to ensure they are up-to-date on company claims and substantiation
- **Ad copy review.** Review proposed posts for compliance with legal/regulatory requirements
- **Monitoring.** Develop a policy of monitoring endorsers’ social media content and activity