

FDA & FTC GUIDELINES

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SOCIAL/DIGITAL MEDIA FOR EMERGING NATURAL OR ORGANIC COMPANIES

FTC & FDA Guidelines for Advertising on Social Media

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Speaker:

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REGULATING CLAIMS



- FTC regulates advertising; focuses on format, truthfulness and substantiation of claims



- FDA regulates labeling; focuses on the content of claims and whether the claims are legally permissible

FTC ENFORCEMENT

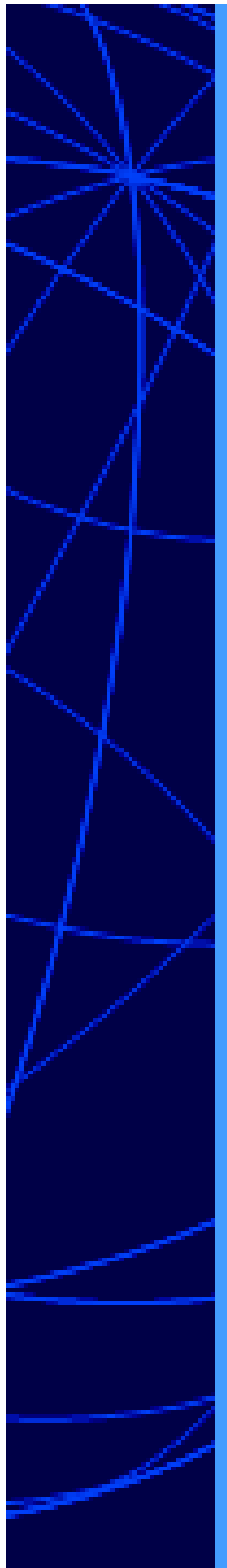


- FTC is primary federal agency that monitors advertising
- FTC is charged with enforcing Section 5 of the FTC Act which prohibits deceptive and unfair acts or practices
- Truth-in-Advertising Principles

All advertising must be:

- Truthful
- Not misleading
- Adequate substantiation





FTC ENFORCEMENT



- FTC has significantly increased attention on social media
- FTC revised the “Guides Concerning the Use of Endorsements and Testimonials in Advertising” in 2009, in part, due to increase in social media advertising
- FTC held workshop in May of 2012 to consider need for new guidance concerning advertising and privacy disclosures in online and mobile environments
- FTC’s regulation of advertising on social media focuses on two areas (outside of truthfulness)

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4

FTC ENFORCEMENT



■ Material Connections

- Material connections between an endorser and the seller of the product that are not reasonably expected by the audience must be disclosed
- Material connections are those connections that might affect the weight or credibility of the endorsement
- Material connections may be connections of a personal, financial, or business nature, among others



FTC ENFORCEMENT



■ Material Connections

□ March 2011 speech by FTC Commissioner Julie Brill

- 50 Cent tweeted about a penny stock and the stock price shot up 240 percent
- 50 Cent had an interest in a line of headphones made by the company
- 50 Cent followed up several hours later with tweets that he owned stock in the company; of course, by then, the stock price had soared
- Must identify connections, even on Twitter, by using identifiers such as #endorser, #paid, #ad or #promo



FTC ENFORCEMENT



■ Material Connections

- Blogging
 - Bloggers must follow rules regarding material connections
 - If the blogger is being paid to tout a product, the relationship must be disclosed
 - No specific requirement on disclosure; it could be as simple as "Company X gave me this product to try..."



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■ Material Connections

- Example of Disclosure of Material Connection in a Blog



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8

FTC ENFORCEMENT



■ Consumer Testimonials

- Consumer testimonials used in advertising are essentially adopted by the company as its own statements; as such, a company may not use a testimonial that says something that the company could not say itself
- Consumer testimonials also must be substantiated in the same manner as representations made directly by the advertiser
- Testimonials themselves are not “competent and reliable scientific evidence”
- The fact that the consumer really believes the testimonial to be true is sufficient to substantiate the claim



FTC ENFORCEMENT



■ Consumer Testimonials

- Testimonials touting personal experiences are likely to be interpreted as representative of what consumers will generally achieve with the advertised product
- If testimonial is not representative, the advertiser must clearly and conspicuously disclose the generally expected results
- Big focus on “weight-loss” testimonials
- Often difficult to do on medium like Twitter with only 140 characters
- “Results not Typical” is not sufficient

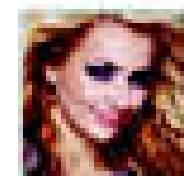


FTC ENFORCEMENT



■ Consumer Testimonials

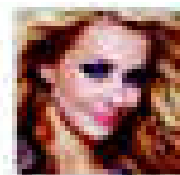
- Example of Disclosure of Expected Results on Twitter



JuliStarz @JuliStarz

3h

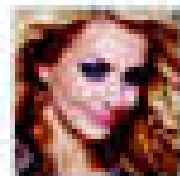
Shooting movie beach scene. Had to lose 30lbs in 6 wks. Thanks Fat-away Pills for making it easy. Typical loss: 1-2lbs/wk. #Spon



JuliStarz @JuliStarz

2h

Shooting movie beach scene. Had to lose 30lbs in 6 wks. Thanks Fat-away Pills for making it easy. Typical loss: 1-2lbs/wk bit.ly/156 #Spon



JuliStarz @JuliStarz

2h

Shooting movie beach scene. Had to lose 30lbs in 6 wks. Thanks Fat-away Pills for making it easy. [bit.ly/156/disclose\[6\]](http://bit.ly/156/disclose[6])

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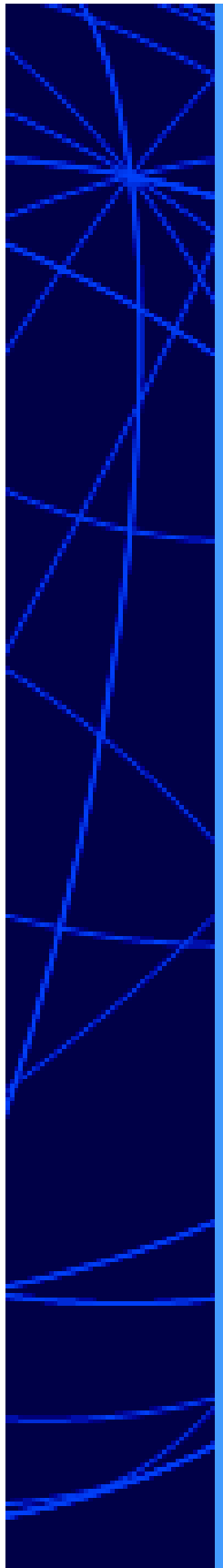
11

FDA ENFORCEMENT



- While FTC regulates ads, FDA regulates labeling
Labeling is defined in the FDCA as labels and other written, printed or graphic material accompanying a product
- Labeling includes:
 - Brochures
 - Infomercials
 - Web sites
 - Social media? Probably not, but...
- Even if item doesn't meet definition of labeling, FDA may review for evidence of intended use





FDA ENFORCEMENT



■ Intended Use

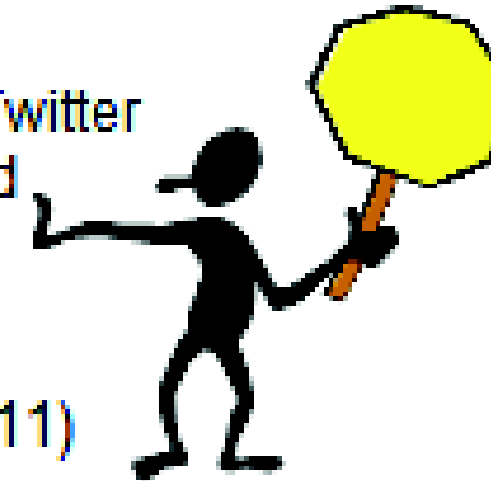
- Pursuant to 201.128, the intended use refers to the objective intent of the persons selling a products. Objective intent may be shown by labeling claims, advertising matter, or oral or written statements.
- Thus, websites, brochures, scientific articles, and all advertising, including social media, can be used to show intended use
- THE #1 RULE TO LIVE BY -- A FOOD, BEVERAGE OR SUPPLEMENT PRODUCT MAY NOT BE INTENDED TO DIAGNOSE, TREAT, CURE, OR PREVENT A DISEASE
- If it does, it will be considered a drug by the FDA
- It doesn't matter if the statements are true; you cannot make disease claims for non-drug products

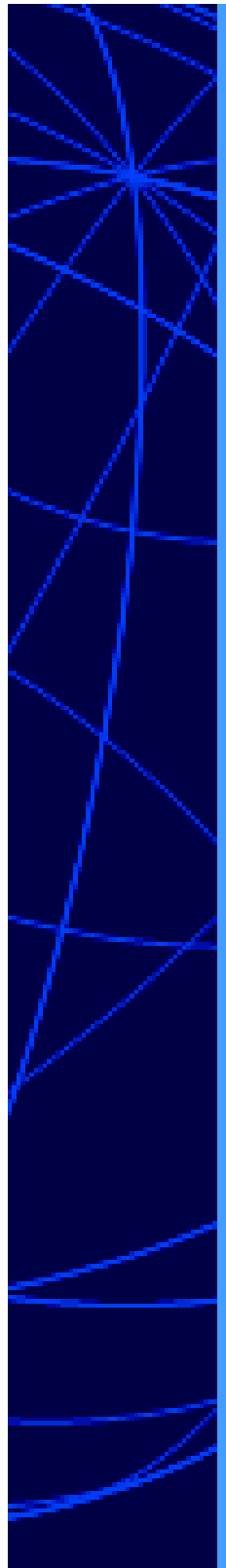
FDA ENFORCEMENT



▪ FDA Warning Letters

- Vitality Distributing (April 24, 2012)
 - References and links on Facebook and Twitter to an article with claims about caffeinated and lowering the risks of depression, and Alzheimer's
- Nenningers Naturals (December 14, 2011)
 - Claims on Facebook and Twitter about flu prevention
- For Earth (August 19, 2011)
 - Claims on Facebook and Twitter regarding cancer prevention





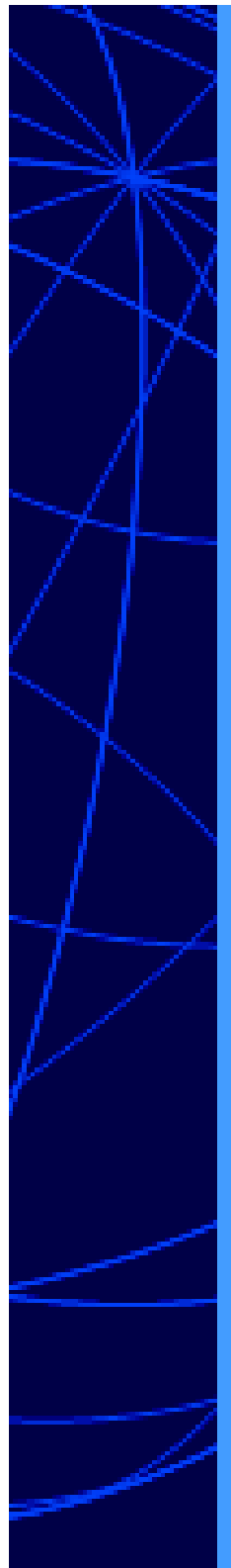
FOOD FOR THOUGHT



- **ALL ADS MUST BE TRUTHFUL, NOT MISLEADING, AND SUBSTANTIATED**
- **ENDORSEMENTS ARE ADOPTED BY ADVERTISER**
- **MATERIAL CONNECTIONS MUST BE DISCLOSED**
- **TESTIMONIALS IMPLY RESULTS**
- **DISCLOSURES MUST BE CLEAR AND CONSPICUOUS**
- **EVERYONE MAY BE LIABLE FOR ENDORSEMENTS**
- **FOOD, BEVERAGES AND SUPPLMENTS MAY NOT BE SOLD TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE**

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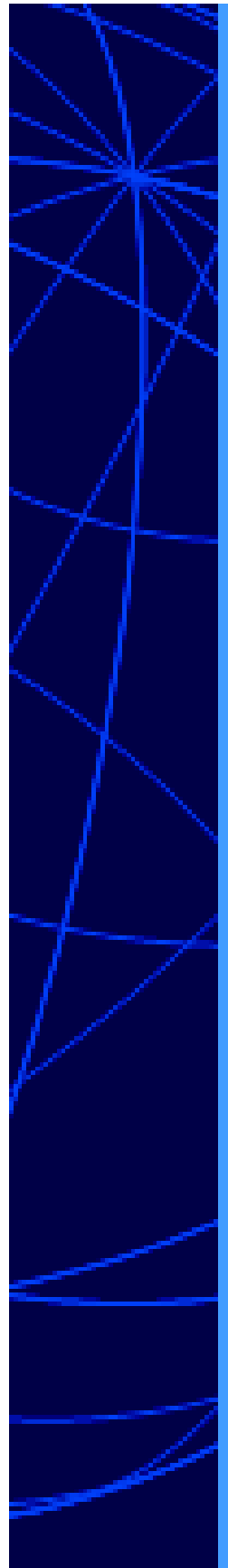
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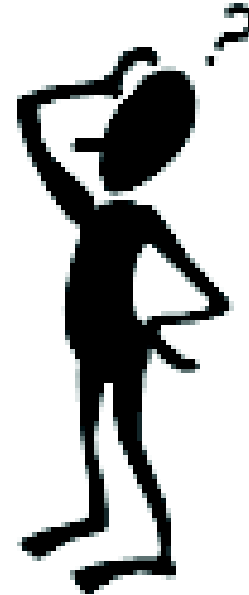
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QUESTIONS?



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