

# **STETSON BUSINESS LAW REVIEW**

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## **LOOKING BEYOND THE INFLUENCER: TRANSPARENCY AND PRECISION IN DIETARY SUPPLEMENTS**

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## **I. Introduction**

Every day consumers are bombarded with information from many sources: television, billboards, flyers, and websites. One particular area where advertisements are especially acute is the ever-growing social media realm. The issue surrounding social-media-based advertisements stems from a consumer's perspective of questioning what they have read and seen online: can this product deliver those results?

For example, a largely followed fitness celebrity endorses a health product where he or she has claimed they have seen a rise in their energy levels, hair growth, and muscle maintenance just two weeks after using it. With just a few clicks, the consumer purchases the product having done little to no research into the veracity of the influencer's claims. Social media influencing of health supplement products has become so prevalent that the FTC has issued multiple statements addressing unproven health and fitness claims.<sup>2</sup> So, what does the consumer do?

Consumers are being preyed upon by large companies that use social media influencers as bait. Consequently, as health supplements and social media influencer endorsements soar to new heights, the need for consumer protection is critical. This protection begins with additional oversight from administrative bodies such as the Food & Drug Administration and the Federal Trade Commission.

## **II. Historical Overview**

### **A. Influencer Marketing**

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<sup>2</sup> *Health and Fitness Claims*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/health-claims> (last visited Oct. 14, 2024).

Digital communication has provided an efficient way for people to share information. The 1990s saw the creation of blogs, and shortly thereafter, social media platforms such as Myspace and Facebook excelled.<sup>3</sup> Companies sought to use this digital space as a way to market and advertise their products to consumers. Now, when children are asked what they want to be when they grow up, you might get answers such as “doctor”, “teacher”, and even “social media influencer.”<sup>4</sup>

The influencer marketing industry is set to grow to \$24 billion dollars by the end of 2024, up from \$1.7 billion in 2016.<sup>5</sup> In the United States, sixty-nine percent of vitamin and supplement ads

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<sup>3</sup> *The Evolution of Social Media: How Did it Begin, and Where Could it Go Next?* MARYVILLE UNIV. (May 28, 2020), <https://online.maryville.edu/blog/evolution-social-media/>.

<sup>4</sup> Sylvie Douglass, *Gen Z's Dream Job in the Influencer Industry*, NPR (April 26, 2023, 5:01 PM), <https://www.npr.org/transcripts/1170524085>; Jennifer Liu, *More Than Half of Gen Zers Think They 'Can Easily Make a Career in Influencing,' Says Branding Expert*, CNBC (Sept. 20, 2023, 9:25 AM), <https://www.cnbc.com/2023/09/20/more-than-half-of-gen-zers-think-they-can-easily-make-a-career-in-influencing.html>.

<sup>5</sup> *The State of Influencer Marketing 2024: Benchmark Report*, 10, INFLUENCER MARKETING HUB, <https://influencemarketinghub.com/influencer-marketing-benchmark-report/> (last updated Aug. 8, 2024).

are advertised through social media.<sup>6</sup> In response to a survey conducted by Influencer Marketing Hub with 3,000 individuals from various companies, 59.4 percent are planning to increase their marketing budget in 2024.<sup>7</sup>

This increase in marketing budgets is attributable to their effectiveness<sup>8</sup>; especially when celebrities like Joe Rogan,<sup>9</sup> Hugh Jackman,<sup>10</sup> and Cindy Crawford advertise for and invest in a product like AG1, an athletic greens company.<sup>11</sup> Joe Rogan has amassed nearly twenty million followers on Instagram with most of his popularity coming from his Spotify Podcast, The Joe

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<sup>6</sup> *The State of Health & Wellness Ads*, PATHMATICS, INC., 7 (2022),

<https://www.vicimediainc.com/wp-content/uploads/2022/06/state-of-health-wellness-ads-report-2022.pdf>.

<sup>7</sup> *Supra* note 4, at 14.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Joe Rogan Experience Podcast Sponsors & Promo codes*, JRE LIBRARY, (Updated Aug. 1, 2024), <https://jrelibrary.com/articles/joe-rogan-experience-podcast-sponsors-promo-codes/#athletic-greens>.

<sup>10</sup> Jeff Beer, *Athletic Greens is now a unicorn. Its unicorn Goal: Be this Generation's Cool Beverage*, FAST COMPANY. (Jan. 25, 2022), <https://www.fastcompany.com/90715484/athletic-greens-unicorn-cool-beverage-next-gatorade-red-bull>. (“Over the last decade-plus, the nutritional supplement beverage company Athletic Greens has been quietly amassing a crew of entrepreneurs, athletes, and influencers who swear by its AG1 powder as liquid multivitamin/probiotic/prebiotic/functional greens blend/immune support complex and more.”).

<sup>11</sup> *Id.*

Rogan Experience at fourteen and a half million followers.<sup>12</sup> As a result, Joe Rogan has become prime target for companies like AG1.<sup>13</sup> Through the voice of Rogan himself, in a less than sixty second endorsement, consumers are encouraged to purchase greens supplement at a discounted price. Rogan's endorsement begins with the disclaimer that no supplement can replace a diet, but later on he explains, "AG1 has taken a scientific approach to creating a single powder that can replace your entire supplement cabinet."<sup>14</sup> Indeed, even paying for Spotify's whopping twelve dollars per month premium plan does not allow a consumer to evade advertisements.

A brisk walk enjoying the sounds of singing birds, or rushing water has become a walk with earbuds stuffed into your ears as an ad-riddled podcast informs you of the latest news and trends expanding across the world. Even as you stop at a gas station, what used to be the busy sound of traffic or the overhead radio music is now mixed with the loud voice selling you a Wawa "French Toast Sizzlie" for just \$3.99.<sup>15</sup> Snapchat, a cost-free photo sharing app, is now inundated with ads as users tap through Snap stories or filter through their inbox.<sup>16</sup> But the most alarming of a once ad-free daily life, is how face-to-face interactions are now a text or direct message through apps

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<sup>12</sup> Ashley Carman, *Spotify Reveals Joe Rogan's Podcast Numbers*, BLOOMBERG (March 21, 2024, 1:48 PM), <https://www.bloomberg.com/news/newsletters/2024-03-21/spotify-reveals-podcast-numbers-for-joe-rogan-alex-cooper-travis-kelce>.

<sup>13</sup> *Supra* note 8.

<sup>14</sup> The Joe Rogan Experience, #2212 – *Jelly Roll* (Oct. 11, 2024) (accessed using Spotify).

<sup>15</sup> WAWA, <https://order.wawa.com/web> (last visited April 14, 2025).

<sup>16</sup> Reach Gen Z and Millennials with Snapchat Ads, Snapchat: Business, <https://forbusiness.snapchat.com/> (last visited Feb. 26, 2025).

like Instagram. Despite its tremendous growth in the last decade, Instagram had only one-hundred and ten million users in 2013.<sup>17</sup> It is now expected to reach 2.4 billion in 2024.<sup>18</sup> This growth can be attributed to many features, but most commonly known amongst social media users is “Reels”, similar to Tik-Tok, which introduced a new way for users to record and post short-form videos.<sup>19</sup> With one finger movement, users go from one video to the next. This feature quickly became an advertisement goldmine. The user does not know what video it will see next, only that he or she is shown videos from what Instagram calls its “algorithm” tailored to the users’ personal preferences.<sup>20</sup> Thus, if a user is interested in health and fitness videos, that user may see more health supplement advertisements. Such ads have been continuously addressed by the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) as seen in the later sections.

#### B. What is a Health or Dietary Supplement?

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<sup>17</sup> Oskar Mortensen, *How Many Users on Instagram? Statistics & Facts (2024)*, SEO.AI (April 24, 2024), <https://seo.ai/blog/how-many-users-on-instagram#:~:text=Instagram%20User%20Growth%20from%202013%20to%20Present&text=The%20table%20above%20clearly%20demonstrates,2.4%20billion%20users%20by%202024.>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Adam Mosseri, *Shedding More Light on How Instagram Works*, INSTAGRAM, <https://about.instagram.com/blog/announcements/shedding-more-light-on-how-instagram-works> (last updated May 31, 2023, 9 AM).

Dietary supplements are products “intended to supplement the diet” that bear or contain vitamins, minerals, herbs, amino acids, concentrates, metabolites, constituents, extracts, or any combination thereof.<sup>21</sup> Interestingly, about one third of Americans take supplements.<sup>22</sup> Their popularity stems from the demand for health and wellness changes.<sup>23</sup> Logically, if one eats better, one can feel better, thus potentially increasing overall productivity. This mindset creates the ideal target audience for large organizations in the dietary supplement industry. Looking for quicker hair growth? Try collagen. Looking for muscle maintenance? Try creatine. This consumer behavior has skyrocketed the demand for supplements, reshaping the entire market and breathing life into a new era for health and wellness.

The law surrounding dietary supplements is convoluted, but there is evidence proving they may work.<sup>24</sup> Dietary and health supplements often contain dietary ingredients essential to our

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<sup>21</sup> 21 U.S.C. § 321 (ff).

<sup>22</sup> Doctors say supplements can benefit your overall well-being with minimal risk. *See The Truth About Supplements: 5 Things You Should Know*, PENN MEDICINE (March 31, 2022), <https://www.pennmedicine.org/updates/blogs/health-and-wellness/2020/february/the-truth-about-supplements>.

<sup>23</sup> *Supplements: A Scorecard*, HARVARD HEALTH PUBLISHING (Sept. 22, 2021), [https://www.health.harvard.edu/newsletter\\_article/supplements-a-scorecard](https://www.health.harvard.edu/newsletter_article/supplements-a-scorecard). (“Many people take supplements in the belief that they will preserve health or ward off illness; many others use supplements in an attempt to treat specific conditions that have already developed.”).

<sup>24</sup> Doctors say supplements can benefit your overall well-being with minimal risk. *See The Truth About Supplements: 5 Things You Should Know*, PENN MEDICINE (March 31, 2022),



bodily functions such as vitamins, calcium, and iron.<sup>25</sup> The ability to combine all of these ingredients in the form of a pill or powder makes it convenient when one is looking to supplement their diet with a specific nutrient. This is especially evident in older age groups. For instance, research has shown that folic acid and B-complex vitamins may help reduce the risk of stroke.<sup>26</sup> Instead of trying to incorporate various foods within a diet, a person can simply take a pill, chew a vitamin, or mix a powder in a beverage.

Many large companies selling dietary supplements have tremendous revenue numbers.<sup>27</sup> They are distinct from actual drugs because they do not undergo FDA review for safety and effectiveness before they are sold.<sup>28</sup> Well-known examples of supplement brand names include Olly Nutrition, Liquid I.V., and Emergen-C. The reason for using dietary supplements will vary from consumer to consumer, but the main goal is often the same: “to supplement [one’s] diet to get enough nutrients and enhance health.”<sup>29</sup>

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<https://www.pennmedicine.org/updates/blogs/health-and-wellness/2020/february/the-truth-about-supplements>.

<sup>25</sup> *Id.*

<sup>26</sup> *Do You Need a Daily Supplement?*, HARVARD HEALTH PUBLISHING (Feb. 12, 2021), <https://www.health.harvard.edu/staying-healthy/do-you-need-a-daily-supplement>.

<sup>27</sup> Sean Moloughney, *Top Dietary Supplement Companies and Brands*, NUTRACEUTICALS WORLD (Oct. 10, 2023), <https://www.nutraceuticalsworld.com/heaps/view/11940/>.

<sup>28</sup> *Consumer Advice, Dietary Supplements*, FED. TRADE COMM’N, <https://consumer.ftc.gov/articles/0261-dietary-supplements>.

<sup>29</sup> *The Truth About Supplements: 5 Things You Should Know*, *supra* note 22.

### C. Health Supplement Legislation

With congress' passage of the Nutrition Labeling and Education Act (NLEA) of 1990, tensions were heightened for manufacturers who, before, had little governance, but now had to comply with specific food labeling requirements.<sup>30</sup> The goal was to clear confusion surrounding nutrition labeling, better inform consumers, and incentivize food companies to improve the nutritional qualities of their products.<sup>31</sup> However, in 1990, the growth of social media marketing was likely *not* on the forefront of the lawmakers' minds. Instead, social media advertising was a topic later acknowledged by the FTC. Before delving into the FTC's approach to social media marketing and advertising, understanding the FDCA's purpose is tantamount to the overarching importance of consumer transparency in health supplement labeling and advertising.

### D. The FDCA

Dietary supplements are not reviewed for safety and effectiveness before they are sold. Consequently, consumers can be misled to believe in a dietary supplements efficacy for treating things such as anxiety, breathing difficulties, or low energy levels.<sup>32</sup> However, the United States has legislation to prevent this exact type of misconception by manufacturers. Under the Federal Food, Drug and Cosmetic Act (FDCA) a dietary supplement statement may not claim to

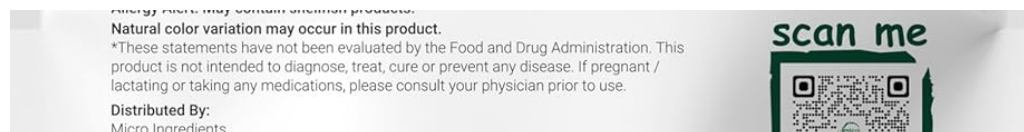
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<sup>30</sup> *History of Nutrition Labeling*, NATIONAL INSTITUTES OF HEALTH,  
<https://www.ncbi.nlm.nih.gov/books/NBK209859/> (last visited Oct. 1, 2024).

<sup>31</sup> *Id.*

<sup>32</sup> Alexandra J. Roberts, *False Influencing*, 109 THE GEORGETOWN LAW JOURNAL 81, 116  
[https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/11/Roberts\\_False-Influencing.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/11/Roberts_False-Influencing.pdf).

diagnose, mitigate, treat, cure or prevent any specific disease,<sup>33</sup> but a statement may claim a benefit related nutrient deficiency disease so long as it (1) discloses the prevalence of the disease, (2) describes the role of the nutrient or dietary ingredient, and (3) characterizes the mechanism by which the nutrient is beneficial.<sup>34</sup> The manufacturer is not required to have their claims pre-approved by the FDA, but it must have *substantiation* that the statement or claim is truthful and not misleading.<sup>35</sup> Additionally, the product with the claim must contain the following: “This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.”<sup>36</sup> The statement should be prominently displayed and look something like this<sup>37</sup>:



Even though pre-approval of dietary supplement claims is not mandated, the FDA requires dietary supplement marketers to notify the FDA of what are called “structure/function” claims that

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<sup>33</sup> 21 U.S.C. § 343(r)(6).

<sup>34</sup> 21 U.S.C. § 343(r)(6)(A).

<sup>35</sup> 21 U.S.C. § 343(r)(6)(B) – (C) (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> Photograph of Organic Spirulina label in AMAZON PRIME, *Micro Ingredients Organic Spirulina Powder, 16 Ounce, Raw Spirulina (Arthrospira Platensis), The Richest Sources of 70% Vegan Protein, Containers Minerals, Vitamins, Non-GMO & Non-Irradiation*, <https://www.amazon.com/Micro-Ingredients-Antioxidant-Non-Irradiated-Non-Contaminated/dp/B01DPW5FWW?th=1>.

appear in labeling.<sup>38</sup> Structure/function claims are regulated by the Dietary Supplement Health and Education Act of 1994 (DSHEA), which established additional special regulatory requirements and procedures for these specific claims.<sup>39</sup> These claims describe the role of a nutrient or dietary ingredient and how it may affect the human body, or what exactly the ingredient is intended to target. They may also specify how an ingredient within the product acts to maintain the structure or function being claimed.<sup>40</sup> To illustrate, “Organic spirulina is great boosting cell growth and daily energy levels.” The FDA’s requirements certainly create hurdles for manufacturers, but they strive to be in the best interest of the consumer. Although dietary supplements lack oversight from the FDA, specific statutory labeling laws that still remain and must be complied with in order to not be considered a “misbranded food”. Notably, 21 U.S.C. section 343 (1) states that a dietary supplement is mislabeled if (1) it fails to list the ingredients described in section 321 (ff), the quantity of each ingredient, or the total quantity of all ingredients in the blend, (2) the label fails to contain the term “dietary supplement”, (3) the label fails to identify the plant from which the ingredient is derived if it contains such an ingredient, (4) does not meet specification requirements

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<sup>38</sup> FED. TRADE COMM’N, HEALTH PRODUCTS COMPLIANCE GUIDANCE, 3 (Dec. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Health-Products-Compliance-Guidance.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf)

<sup>39</sup> *Structure/Function Claims*, U.S. FOOD & DRUG ADMINISTRATION (last visited April 19, 2025), <https://www.fda.gov/food/food-labeling-nutrition/structurefunction-claims>.

<sup>40</sup> *Id.* (“General well-being claims describe general well-being from consumption of a nutrient or dietary ingredient. Nutrient deficiency disease claims describe a benefit related to a nutrient deficiency disease (like vitamin C or scurvy), but such claims are allowed **only** if they also say how widespread such a disease is in the United State.”).

if the product is covered by an official compendium, and (5) it misrepresents the identity, strength, and quality it purports to have.

#### E. The FTC's Approach to Dietary Supplements

The FDCA plays an important role in the oversight of what foods and beverages make it from a farm to a manufacturing facility, to the grocery store, and ultimately, to a consumer's pantry. On the other hand, the Federal Trade Commission addresses the consumer protection and antitrust laws related to health and fitness claims. In fact, presumably due to the increase in their widespread consumption, it has granted health and dietary supplements their own website section.<sup>41</sup> It links to cases, press releases, blog posts, events, public statements, advisory opinions, reports, advocacy filings, business education, testimony and videos.<sup>42</sup> The FTC and the FDA share jurisdiction over the marketing of dietary supplements.<sup>43</sup> Although, more specifically, the FTC's broad mandate is to prevent unfair or deceptive acts or practices.<sup>44</sup> Over the last decade, 120 cases challenging health claims made for supplements have been filed by the FTC.<sup>45</sup> Many of these cases were filed with respect to claims to cure or prevent the COVID-19 virus, as seen in this Article later on.<sup>46</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *supra* note 39, at 3.

<sup>44</sup> *Id.*

<sup>45</sup> *Health and Fitness Claims*, *supra* note 2.

<sup>46</sup> *Id.* (“[T]he supplement industry reported an estimated \$25 billion in sales in 2009 – a six percent increase over the previous year – market analysts suggest that the downturn in the

In 2022, the FTC issued a Health Products Compliance Guidance; the first revision of the issue since 1998.<sup>47</sup> The revision aspires to “provide guidance from FTC staff on how to ensure that claims about the benefits and safety of health-related products are truthful, not misleading, and supported by science.”<sup>48</sup> It states that sections five and twelve of the FTC Act can be narrowed down to “two common-sense principles: (1) Advertising must be truthful and not misleading; and (2) before disseminating an ad, advertisers must have adequate **substantiation** for all objective product claims conveyed, expressly or by implication, to consumers acting reasonably.”<sup>49</sup> As noted earlier, the substantiation requirement is found in both the FDA and FTC legislation, giving rise to its value in consumer health supplement regulation. Having substantiation means the advertiser had a “reasonable basis” for asserting that a message was true.<sup>50</sup> “The FTC requires advertising claims that pertain to a health benefit to be substantiated by competent and reliable scientific

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economy has led to increased spending on these products, as consumers attempt to manage their own healthcare and avoid expensive doctor visits and prescription medications.”).

<sup>47</sup> *FTC Announces New Business Guidance for Marketers and Sellers of Health Products*, FED. TRADE COMM’N (Dec. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-announces-new-business-guidance-marketers-sellers-health-products>.

<sup>48</sup> *Id.*

<sup>49</sup> HEALTH PRODUCTS COMPLIANCE GUIDANCE, *supra* note 39, at 2.

<sup>50</sup> *F.T.C. v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1177 (N.D. Ga. 2008), *aff’d*, 356 Fed. Appx. 358 (11th Cir. 2009).

evidence,”<sup>51</sup> i.e. “tests, analyses, research, studies, or other evidence.”<sup>52</sup> But, this begs the question, how does such legislation affect the social media influencer with 500,000 followers claiming their energy levels increased after taking AG1?

### **III. Analysis**

#### **A. Addressing the Influencers**

The FTC strives to manage the application of section five of the FTC Act with its “Guides Concerning Use of Endorsements and Testimonials in Advertising.”<sup>53</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 16 C.F.R. § 255 (2022).



Originally published in 1972, the Guide has seen copious edits as the FTC has worked to include points mentioned by various public comments.<sup>54</sup> Overall, the “guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles.”<sup>55</sup>

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<sup>54</sup> Federal Trade Commission, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 44288 Fed. Reg. 44288, 87 (July 26, 2022) (to be codified at 16 C.F.R. pt. 255).

<sup>55</sup> 16 C.F.R. § 255 (2022).



While the FTC's Health Products Compliance Guidance serves as an informative tool for marketers, sections five and twelve of the FTC Act contain the applicable law.

Section five states, in pertinent part, that it prohibits "unfair or deceptive acts or practices in or affecting commerce."<sup>56</sup>

Section twelve states as follows<sup>57</sup>:

(a) Unlawfulness

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement--

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of [section 45](#) of this title.

While the statute outlines the legal bounds for health supplement manufacturing companies and *their own* advertisements, it does not address how this is to be applied to social media advertisers. Hence, the FTC's creation of the Guides Concerning Use of Endorsements and Testimonials in Advertising.

## B. The Disconnect

The FDA requires manufacturers to monitor what claims are made on their labels so it does not become a mislabeled product.<sup>58</sup> However, the purpose behind these requirements is

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<sup>56</sup> 15 U.S.C. § 45.

<sup>57</sup> 15 U.S.C. § 52.

<sup>58</sup> 21 U.S.C. § 343(r)(6)(A).

undermined because (1) the FDA does not require manufacturers to submit safety information before marketing supplements,<sup>59</sup> and (2) the two key issues addressed by the FTC including “whether the advertisement is truthful and non-misleading, and whether the advertiser has adequate substantiation for all objective product claims” are not adequately enforced.<sup>60</sup> As a result, thousands of individual supplement products are released without undergoing sufficient safety testing, leaving the public susceptible and unprotected. The ease of supplements makes them appealing, but their lack of regulation has the opposite effect. There lies the disconnect between the FDA and the FTC further exacerbating the space for consumer misconception.

### C. Cures for COVID-19?

This disconnect is exhibited by cases where a marketer has claimed they have obtained the cure to certain diseases or viruses. Take, for instance, the herbal tea marketer who advertised that his earth tea could “prevent” or “treat” COVID-19. Stating that his tea went through clinical trials that proved its effectiveness, the marketer even went as far as to offer money back if after drinking

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<sup>59</sup> Stephen Barrett, M.D., *How the Dietary Supplement Health and Education Act of 1994 Weakened the FDA*, QUACKWATCH (Sept. 30, 2020), <https://quackwatch.org/consumer-protection/dshea/>.

<sup>60</sup> Joshua J. Klein and Scott J. Schweikart, *Does Regulating Dietary Supplements as Food in a World of Social Media Influencers Promote Public Safety?*, 24 AMA JOURNAL OF ETHICS 396, 396-401 (2022) (discussing the importance of the FDA and the FTC keeping a tight grip on social media marketing and advertising as influencers work to promote trends including health supplements).

two of the bottles, the consumer did not test negative COVID-19.<sup>61</sup> The advertisement, posted through numerous social media sites, stated, “[n]o one who was [COVID] positive and used Earth Tea went to the hospital.”<sup>62</sup> This bold, unsupported claim was advertised to desperate consumers despite the teas lack of supportive scientific evidence.<sup>63</sup> Together, the FTC, Department of Justice, and FDA unsuccessfully sought to find the evidence the marketer said collaborated his claims.<sup>64</sup> Ultimately, as would be predicted, the administrative bodies concluded there were no published reports or well-controlled scientific studies indicating the tea could treat COVID-19.<sup>65</sup>

The Coronavirus pandemic was a new and dangerous phenomenon that created a space for marketers to take advantage of desperate individuals and the United States’ lack of effective health supplement oversight. It is with scenarios like these that dietary supplement manufacturers, or even small business owners, use the disconnect in health supplement legislation to fill their pockets with the money from vulnerable consumers. Such scenarios highlight the trend where health and dietary supplement organizations use the gaps in legislation to prey on people’s fears and anxieties.

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<sup>61</sup> FED. TRADE COMM’N, *FTC, DOJ, and FDA Take Action to Stop Marketer of Herbal Tea from Making False COVID-19 Treatment Claims* 3 (Mar. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-fda-take-action-stop-marketer-herbal-tea-making-false-covid-19-treatment-claims>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

#### D. Cures for Cancer?

Fear and anxiety are also created by the very dreaded diagnosis of cancer. Another case highlights how a husband and wife began advertising their cancer treating dietary supplements known as Daniel Chapter One.<sup>66</sup> Despite a preliminary injunction filed by the FTC, Daniel Chapter One encouraged consumers to stop their conventional cancer treatments because their product had the “cure.”<sup>67</sup> Amongst their alleged “cancer cure,” the Daniel Chapter One group “made widely disseminated efficacy claims for a multitude of products without possessing reliable scientific evidence to substantiate those representations.”<sup>68</sup> The court held that the public was significantly harmed because they purchased products based on unsubstantiated claims and deceptive

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<sup>66</sup> United States Dep't of Justice v. Daniel Chapter One, 89 F. Supp. 3d 132, 145 (D.D.C. 2015), *aff'd*, 650 Fed. Appx. 20, 22 (D.C. Cir. 2016).

<sup>67</sup> *Id.* (explaining how Daniel Chapter One product advertisements stated “this gentle and nourishing fiber also helps support healthy cholesterol levels and a healthy heart and gallbladder . . . Carniplex can help support healthy liver, heart, and blood triglyceride levels . . . assist in fat loss and muscle health and enhance the effectiveness of antioxidants C and E.”).

<sup>68</sup> *Id.*

information without receiving any corrective notice.<sup>69</sup> At last, a final judgment was entered against Daniel Chapter One group four dreadful years after the initial start of the litigation.<sup>70</sup>

#### E. The Consumer's Responsibility

Don't trust the internet, do your own research, and just read the label are all common responses to cases involving the vulnerable health supplement purchaser. Indeed, ingredient lists provide the consumer with exactly they are putting in their body.<sup>71</sup> But according to a study done by the National Library of Medicine, 52.5% of consumers worldwide do not read the food label ingredient list.<sup>72</sup> Not only that, but when consumers do read them, the ingredients likely look like a foreign language.<sup>73</sup> For example, the ingredient list on a can of Celsius, a popular caffeinated beverage, contains ingredients such as Citric Acid, Taurine, Guarana Seed Extract, Ascorbic Acid, Glucuronolactone, and Calcium Pantothenate. Without proper education, the average consumer

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Raksha Goyal and Neeta Deshmukh, *Food Label Reading: Read Before You Eat*, NATIONAL LIBRARY OF MEDICINE, (April 3, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5903167/>.

<sup>72</sup> *Id.* (“A nutrition labeling education strategy should, therefore, be integrated into broader behavior change strategies related to nutrition education and health to assist consumers in bridging the gap between current dietary practices and dietary recommendations.”).

<sup>73</sup> *Id.*

will see a pretty can, a trendy beverage, and hardly take a glance at the fine print ingredient list.<sup>74</sup> A quick google search could remedy the problem, but it likely will not tell the user what role that specific ingredient plays in the product. A counterargument is that, for many, the internet is at the tips of our fingers, or more realistically, in the palm of our hand, so why not utilize the five seconds it takes to type the words “ascorbic Acid” into Google? A problem with this logic remains: it shifts the burden from the organization to the naive product purchaser, further diminishing the purpose of consumer protection.

#### F. How to Manage the Rapid Social Media Advertising Expansion

The disconnect between consumer protection and social media advertising is highlighted by the FTC and the FDA’s inability to “monitor and regulate thousands of individual products.”<sup>75</sup> Simply put, information is being spread faster than the time it takes to form a thought, making it nearly impossible to monitor every advertisement.

Health supplement companies are able to circumvent the FTC and FDA regulations by striking deals with influencers, who then make claims the company would otherwise not be able to make.<sup>76</sup>

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<sup>74</sup> *Id.* (“The underlying problems include lack of adequate nutrition education and knowledge and poor communication to end users.”).

<sup>75</sup> Stephen Barrett, M.D., *How the Dietary Supplement Health and Education Act of 1994 Weakened the FDA*, QUACKWATCH (Sept. 30, 2020), <https://quackwatch.org/consumer-protection/dshea/>.

<sup>76</sup> 21 U.S.C. § 343(r)(6)(A); see Suzanne Zuppello, *The Latest Instagram Influencer Frontier? Medical Promotions.*, VOX (Feb. 15, 2019, at 8:00 AM), <https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical>.

Such deals may even be formed as quickly and simply as sending a direct message to the influencer or, in some cases, the company messaging the influencer.<sup>77</sup> A report from Influencer Marketing Hub explained that of the brands they surveyed, 14.5% spend more than \$500,000 on influencer marketing.<sup>78</sup> The image below depicts the results<sup>79</sup>:

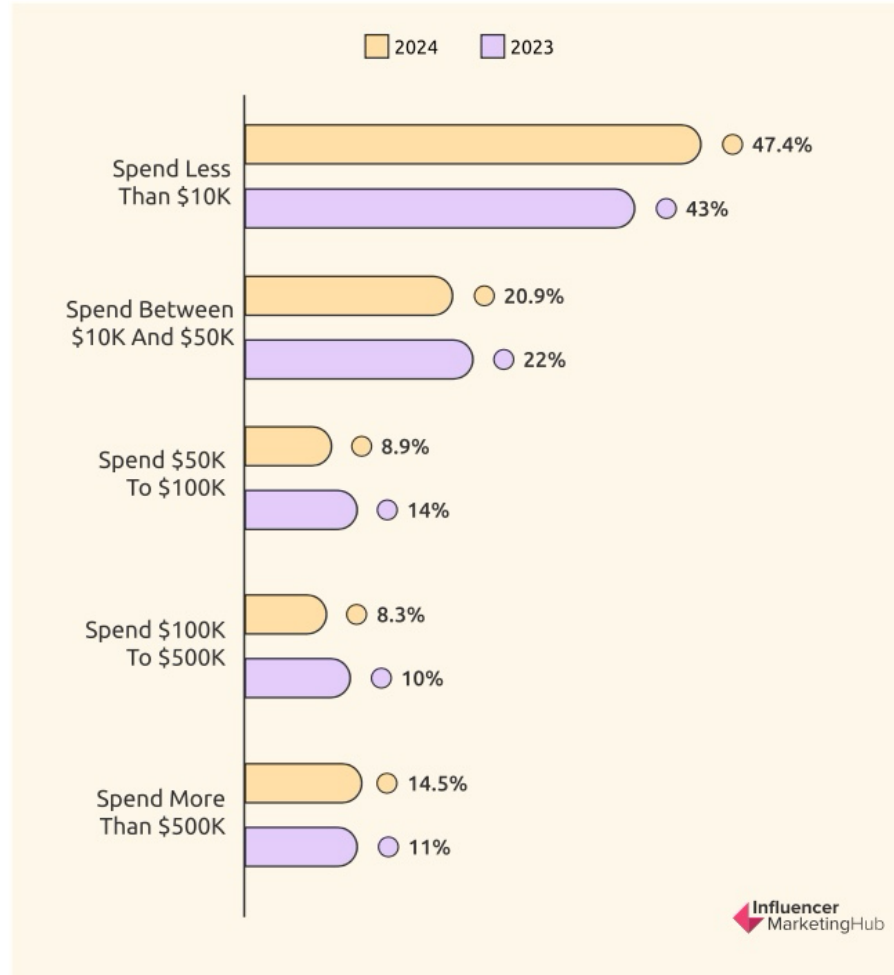
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<sup>77</sup> *When it Comes to Influencers, Smaller Can Be Better*, HARV. BUS. REV. (Oct. 2024), <https://hbr.org/2024/09/when-it-comes-to-influencers-smaller-can-be-better>.

<sup>78</sup> INFLUENCER MARKETING HUB, *supra* note 5, section titled “Although Most Brands Spend Less Than \$50K on Influencer Marketing, Nearly 15% Spend Over \$500K.”

<sup>79</sup> *Id.* at 17.

### How Much Do Brands Spend on Influencer Marketing



In other words, a large sum of money is spent to convince a consumer to buy a product, while consumers are being told to be skeptical of the advertisements they see online. Even more disturbing for the dietary supplement industry is the statistic that 42% percent of brands now pay influencers a percentage based on how well the influencer markets the products.<sup>80</sup> This creates a sales-driven approach for the influencer, meaning the more they sell, the more money they make. Accordingly, the influencer may feel the need to inflate the benefits they experienced from the

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<sup>80</sup> *Id.* section titled “Major Change in Payment System This Year: Half of the Payments to Influencers are Made as a Percentage of Sale.”



product. This results in the consumer being motivated by a desire to maintain a well-balanced diet, while the influencer and company are motivated by sales. A parallel can be drawn between sales motivated influencers and the fact that influencer fraud has risen to nearly 60%.<sup>81</sup>

Because of this, the health supplement regulations have even been nicknamed the “Wild West” as “numerous companies blatantly disregard consumer safety, honesty, and integrity.”<sup>82</sup> The motivation is seen by food and drug manufacturers’ profit that comes from creating products indirectly claiming to boost or enhance certain bodily functions.<sup>83</sup> With health supplement products being so heavily marketed through social media, concerns arise when consumers start trusting the social media influencer over other, more educated professionals, such as their doctor.<sup>84</sup>

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<sup>81</sup> *Id.* section titled “Increase in Respondents Who Have Experienced Influencer Fraud.”

<sup>82</sup> C. Michael White, *Dietary Supplements Pose Real Dangers to Patients*, 54(8) ANNALS OF PHARMACOTHERAPY 815, 817, (2020), <https://journals.sagepub.com/doi/full/10.1177/1060028019900504>.

<sup>83</sup> *See Health and Fitness Claims*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/health-claims> (last visited Oct. 14, 2024).

<sup>84</sup> *See* FED. TRADE COMM’N, *FTC, DOJ, and FDA Take Action to Stop Marketer of Herbal Tea from Making False COVID-19 Treatment Claims* 3 (Mar. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-doj-fda-take-action-stop-marketer-herbal-tea-making-false-covid-19-treatment-claims>.

As shown in the case with the herbal tea marketer, companies can take advantage of the freedom allowed by the lack of effective regulation.<sup>85</sup> To address the problem, the FTC recommends: (1) consider what messages consumers are likely to take from the ad, and (2) carefully analyze the claim being made and check that it is relevant to the product and corroborated by scientific evidence.<sup>86</sup> Unfortunately, this is neither sufficient nor effective. The FTC considers itself the “nation’s consumer protection agency,”<sup>87</sup> and if this is to remain true, there is a severe need for additional or amended legislation in the realm of health supplement products with social media influence.

The FTC conveys that its primary focus is on a reasonable consumer’s understanding of what the advertising or marketing material is communicating about the product.<sup>88</sup> However, the FTC contradicts itself by not requiring dietary supplement marketers, e.g. social media influencers, to notify the FTC of “structure/function” claims the advertiser makes, unlike the FDA.<sup>89</sup> It would appear that manufacturers of the supplement are restrained by strict labeling laws to ensure product packaging mirrors substantiated information. Contrastingly, advertisers are able to operate with some leniency allowing them to make bold, exaggerated claims and only suffer consequences after

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<sup>85</sup> *Id.*

<sup>86</sup> FED. TRADE COMM’N, *supra* note 38, at 34.

<sup>87</sup> *Protecting Consumers from Fraud and Deception*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/protecting-consumers> (last visited Apr. 27, 2025).

<sup>88</sup> FED. TRADE COMM’N, *Health Products Compliance Guidance*, *Supra* note 38 at 3-4.

<sup>89</sup> *Id.*

the statement has convinced a vulnerable consumer to purchase the supplement for a cure that does not exist.

As a result, the product itself cannot contain claims that have not been pre-approved by the FDA, but the advertisements can. The repercussions of such unsubstantiated claims can come much later on down the road.

Even though influencer marketing often misleads consumers, accountability is the exception, not the rule.<sup>90</sup> The FTC lacks the necessary resources to manage and review every social media advertisement or endorsement<sup>91</sup> – that feat would require a certain level of censorship pushing this subject into the realm of first amendment issues. The guidelines provided by the FTC are beneficial, but the reality is this – they are just what their title says, guidelines.

#### **IV. The Solution**

In order to hold advertisers, endorsers, and manufacturers accountable, a change in the legislation is dire. The purpose of dietary supplements is to encourage individuals to focus on their health and well-being, which is arguably a very important objective. This is consistent with messages from the FTC and FDA; therefore, the FDA should expand the substantiation standard by requiring manufacturers to disclose relevant information about product sourcing, production methods, and ingredient specificity due to the fact that these products are continually marketed across social media platforms under false pretenses. This can be accomplished by the FTC and

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<sup>90</sup> Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 86 (2020)

[https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/11/Roberts\\_False-Influencing.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/11/Roberts_False-Influencing.pdf).

<sup>91</sup> *Id.*

FDA collaborating to create legislation requiring manufacturers to have their dietary supplement products independently tested by a third-party. The independent testing certification or seal would be placed conspicuously on the label. Ideally, consumers would be encouraged to look for the seal before purchasing the product, ensuring that even if the consumer was told the product does a specific thing, they can confirm whether the product has met a certain criteria establishing its effectiveness. This would facilitate educated purchasing amongst consumers so as to prevent fraud and misconception. An example of how this works is illustrated below with Olympic beach volleyball player, Sarah Hughes.

#### A. Using Third-Party Independent Testing

Sara Hughes has risen to fame in recent years by making appearances and medaling at some of the largest beach volleyball tournaments in the world, including the Olympics. Hughes has partnered with numerous companies and brands that aim to take advantage of her athletic platform.<sup>92</sup> During the anticipation of the summer 2024 Olympic games, she partnered with Optimum Nutrition, a sports nutrition brand which sells products such as whey protein, vitamins, and pre-workout.<sup>93</sup> Hughes, with over 150,000 Instagram followers, states the following<sup>94</sup>:

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<sup>92</sup> Sara Hughes (@sarahughesbeach), INSTAGRAM, (Jun. 18, 2024)

<https://www.instagram.com/sarahughesbeach?igsh=MXQ5cG1mbnJmODBlbg==> (last visited Aug. 11, 2024).

<sup>93</sup> *Id.*; see also OPTIMUM NUTRITION, <https://www.optimumnutrition.com/en-us/Products/c/1000> (last visited Aug. 11, 2024).

<sup>94</sup> Hughes, *supra* note 92 (June 18, 2024, post).



Posts like these are common amongst famous athletes for many reasons. Some may be looking to boost their name or simply benefit from free products. The correlation between athletes and health supplements stems from an athlete's desire to be properly fueled by trustworthy ingredients. Athletes are focused on areas such muscle maintenance and quick recovery, aiming to enhance performance and prevent injury. As a result, they seek products from brands like Optimum Nutrition. Specifically, their Gold Standard protein is highly praised for its quality and effectiveness.<sup>95</sup> The praise is due to many of its products being tested and certified by an independent third-party known as Informed Choice, thereby increasing consumer confidence in the ingredients and marketing of its dietary supplements.<sup>96</sup> Other popular laboratories include the

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<sup>95</sup> Ultimate Sup Staff, *Optimum Nutrition Whey Protein: Understanding Side Effects*, ULTIMATE SUP (Jan. 3, 2024), <https://ultimatesupsg.com/blogs/nutrition/optimum-nutrition-whey-protein-side-effects>.

<sup>96</sup> *Id.*; see also INFORMED CHOICE, *Informed Choice Certification Process*, <https://choice.wetestyoutrust.com/about/certification-process>.

United States Pharmacopeia (USP), the National Sanitation Foundation (NSF), and ConsumerLabs.com.<sup>97</sup>

Informed Choice is transparent with its testing process and lists a four-stage testing process on its website.<sup>98</sup> Stage one includes product and manufacturing and review.<sup>99</sup> At this stage they assess quality systems and audits, staff training in regard to cross-contamination prevention, raw materials, raw material supplier assessment procedures, and traceability and recall procedures.<sup>100</sup>

Step two involves sample testing. They will take three samples spanning over different production runs to determine whether the product contains prohibited substances.<sup>101</sup>

If the product passes the prohibited substance test, it goes to stage three where Informed Choice outlines the process for product certification, logo use, and web listing.<sup>102</sup> This part of the process is especially important for marketing and advertising.<sup>103</sup> Here, the manufacturer is given “Informed Choice brand standards” which delineate how the Informed Choice seal may be used and marketed.<sup>104</sup>

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<sup>97</sup> C. Michael White, *supra* note 82 at 818.

<sup>98</sup> INFORMED CHOICE, *supra* note 96.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

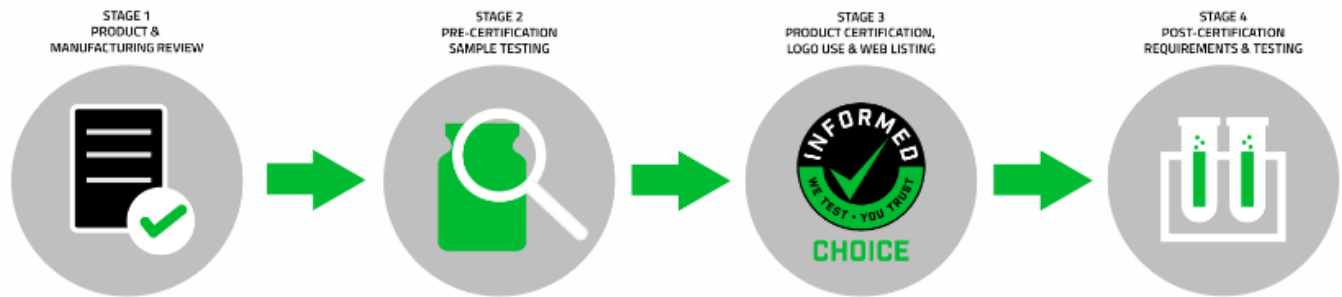
<sup>101</sup> *Id.* (For more information, see their certification process guide available for download on their website.)

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Lastly, stage four requires monthly blind testing to “independently ensure the integrity of the product.”<sup>105</sup> This testing procedure is thorough and more importantly, not obscured from the public eye.<sup>106</sup>



Similarly, for ConsumerLabs.com, the process includes testing the product for identity, strength, purity, and disintegration.<sup>107</sup> If the manufacturer seeks to use the seal of approval, the product must be tested once per year.<sup>108</sup> A license to use the seal can be purchased by the

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> These types of tests are not currently required by the FDA or FTC. ConsumerLab.com even posts its results and reviews. *About ConsumerLab.com*, CONSUMERLAB.COM, Consumer <https://www.consumerlab.com/about/> (last visited Mar. 24, 2025).

<sup>108</sup> *Id.* (“For example, the amount of lead contamination that some U.S. companies and other third-party testing groups permit in supplements can be as much as forty times higher than what ConsumerLab.com would permit and what is allowed in the State of California without a warning label. Our standards can be found at [How Products Were Tested](#).”).

manufacturer which also includes permission to advertise and promote that the product has been independently tested.<sup>109</sup>

## B. Rebutting the Rumors

Although beneficial, third-party independent testing will not be an end all be all solution. Take a look at AG1 Greens. The product has undergone significant testing, and its ingredients are true to the label.<sup>110</sup> Tested by the National Science Foundation (NSF), AG1 is validated to be free from 280 banned substances.<sup>111</sup> However, the certification does not prevent the message that many celebrities are conveying to consumers which is: If your daily vegetable intake is not where you would like it, AG1 is the solution.<sup>112</sup> Created in 2010, the product has seen a boost in their valuation to \$1.2 billion dollars by increased marketing tactics.<sup>113</sup> Admittedly, the products rigorous testing makes it very appealing to the typical dietary supplement purchaser, but what AG1 does not do is

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<sup>109</sup> *Id.*

<sup>110</sup> *High-Quality Ingredients Optimized for Impact*, AG1, [https://drinkag1.com/about-ag1/ingredients/ctr?nbt=nb%3Aadwords%3Aag%3A17179429169%3A162310848392%3A698064804709&nb\\_adtype=&nb\\_kwd=ag1%20greens&nb\\_ti=kwd-](https://drinkag1.com/about-ag1/ingredients/ctr?nbt=nb%3Aadwords%3Aag%3A17179429169%3A162310848392%3A698064804709&nb_adtype=&nb_kwd=ag1%20greens&nb_ti=kwd-) (last visited Mar. 24, 2025).


<sup>111</sup> *Id.*

<sup>112</sup> The Joe Rogan Experience, *supra* note 14.

<sup>113</sup> The price of AG1 is high compared to similar dietary supplements. It costs \$99 for a 30-day supply and \$79 per month with a subscription. For more information, see Nikolett Lorincz, *Athletic Greens Marketing Breakdown: How They Achieved a \$1.2 Billion Valuation*, OPTIMONK (April 19, 2024) <https://www.optimonk.com/athletic-greens-marketing-breakdown/>.



replace real whole foods or a well-balanced diet.<sup>114</sup> A registered dietitian, Nicolette Star Maggiolo, RD, LDN, even went as far to say that AG1 is not the best option for average individuals looking



**AG1**

[SHOP AT DRINKAG1.COM](https://drinkag1.com)

[SHOP AT AMAZON](https://amazon.com/dp/B08L5N9K3T)

[SHOP AT MAGNETICME.COM](https://magneticme.com/ag1)

CREDIT: AG1

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<b>PROS</b>	<b>CONS</b>
⊕ Provides a comprehensive array of nutrients	⊗ Expensive
⊕ Includes pre and probiotics	⊗ No vitamin D or iron
⊕ NSF Certified for Sport	⊗ Contains soy
⊕ Strict quality control standards	
⊕ Better taste than other green powders we tested	
⊕ Appropriate for several dietary preferences and lifestyles	

to supplement their diet with greens.<sup>115</sup> Some specific pros and cons include<sup>116</sup>:

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<sup>114</sup>Actual produce contains fiber and water which cannot be replaced by AG1. More notably, many AG1 ingredients exceed the daily values recommended for the average person. While this is not necessarily detrimental, it is worth mentioning when considering AG1 as a whole. Stefani Sassos, M.S., R.D.N., C.D.N., NASM-CPT, *Is AG1 Worth the Hype? Our Nutritionist Tested the Greens Powder to Find Out*, GOOD HOUSEKEEPING (Feb. 27, 2024), <https://www.goodhousekeeping.com/health-products/a46883816/athletic-greens-review/>.

<sup>115</sup> Nicolette Star Maggiolo, *A Dietitian's Athletic Greens (AG1) Review: Nutrition, Taste, and More*, TOP NUTRITION COACHING, <https://www.topnutritioncoaching.com/blog/ag1-review> (last visited April 14, 2025).

Although laboratory certification and contamination testing are beneficial and marketable characteristics, the uneducated consumer may still be persuaded that such a product is sufficient to replace actual vegetable intake.

This issue can be remedied by the FDA and the FTC. As previously mentioned, the FTC's website issues statements, blogs, and updates about the health supplement industry.<sup>117</sup> The FTC could use its platform to educate consumers about popular dietary supplement brands. The administrative bodies would be acting similar to the third-party certifiers in that they debunk and make clear what the products ingredients actually represent. This would create a central hub for health supplement users thus preventing manufacturers hiding their ingredients behind an influencer's exaggerated claims. Additionally, the FDA should create more clear-cut regulation surrounding dietary supplement labels so as to require manufacturers to disclose facts that would be considered misleading or misrepresentative if not otherwise shared. As for AG1, this might look something like, "This product is not intended to replace whole food vegetables."

## **V. Conclusion**

Social media marketing is vastly expanding and will require more regulation as platforms continue to grow. Content spreads quickly, which means false advertisements do as well.

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<sup>116</sup> *Sassos*, *supra* note 116.

<sup>117</sup> *Health and Fitness Claims*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/health-claims> (last visited Oct. 14, 2024).

Advertisers are supposed to be liable for the misleading use of endorsements,<sup>118</sup> but in actuality, they are simply encouraged to make unavoidable disclosures and to refrain from making that would be deceptive or unsubstantiated.<sup>119</sup> This creates a need to prioritize consumer transparency so individuals can be fully informed. The sole objective is to avoid deception by the manufacturers and advertisers looking to convince social media users that their product actually produces the embellished results being represented.

Consumers deserve to be fully informed about the supplements they consume, but this cannot be achieved without additional FDA and FTC oversight.

Requiring health supplement manufacturers to use independent third-party testing would allow them to obtain a certification that can be effectively assessed by consumers. In an industry where a consumer has little control and is often deceived by money-hungry organizations, this gives the consumer the opportunity to maintain ultimate control over the health supplement products they choose to buy. The FTC's involvement is critical to safeguarding the consumer's health.

With increased regulation, false and misleading advertising can be reduced so the average consumer can make a well-informed decision based on their own wants and needs, rather than being swiftly influenced by a paid social media advertiser. Unchecked health supplements paired with exaggerated health and fitness claims is a recipe for consumer misconception. Subsequently, course of action should be taken by the FTC that addresses the need to educate consumers about

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<sup>118</sup> FED. TRADE COMM'N, HEALTH PRODUCTS COMPLIANCE GUIDANCE, 26 (Dec. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Health-Products-Compliance-Guidance.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf)

<sup>119</sup> *Id.* at 8.

dietary supplement labels to ensure the FTC represents exactly what it stands for: consumer protection.