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### HEALTH LAW: PEER-REVIEWED ARTICLE

## Does Regulating Dietary Supplements as Food in a World of Social Media Influencers Promote Public Safety?

Joshua J. Klein and Scott J. Schweikart, JD, MBE

### Abstract

Social media influencers promote a wide variety of products, including dietary supplements. Dietary supplements are regulated as foods, not drugs, by the US Food and Drug Administration and the Federal Trade Commission. This article details weaknesses in administrative and common law regulatory approaches to addressing some influencers' negligent misrepresentation claims about dietary supplements.

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### Paid Influence

Recent years have seen the rise of influencers—“social media personalities paid to leverage their popularity to market products”<sup>1</sup>—marketing dietary supplements. These supplements, often created and marketed to stimulate weight loss,<sup>2</sup> include “vitamins, essential minerals, protein, amino acids, and herbs.”<sup>3</sup> Influencers' foray into the realm of dietary supplements has had a significant impact on the marketing industry, as demonstrated by their enormous advertising revenue, with estimates that influencer marketing would reach “\$10-20 billion in 2020, with close to 80% of brands participating.”<sup>1</sup> With regard to the regulation of this industry, the federal government plays a role via both the US Food and Drug Administration (FDA) and the Federal Trade Commission (FTC), which “both serve to protect consumers by ensuring safe, effective products and accurate marketing to consumers.”<sup>2</sup> However, the regulatory environment for dietary supplements, which has been criticized as being inadequate in the face of hazards,<sup>4</sup> has serious pitfalls when confronting promotion of these supplements by social media influencers. This article explores the federal regulatory mechanisms in place to govern dietary supplements and proposes strategies for how US law—both administrative regulation and common law—can strengthen the regulation of dietary supplements in the new era of influencers.

### FDA and FTC Liaison Agreement

In the United States, the 2 agencies responsible for regulating dietary supplements, the FDA and FTC, are subject to a “liaison agreement” to divide enforcement duties. The

FDA focuses on food and drug safety and accurate labeling, while the FTC is charged with regulating advertising and promotional claims.<sup>2</sup>

*FDA.* FDA authority to regulate dietary supplements stems from the Dietary Supplement Health and Education Act (DSHEA) of 1994,<sup>2,5</sup> passed in direct response to a supplement industry boom.<sup>2</sup> The act categorizes supplements as food, not drugs, and defines supplements as follows:

The term “dietary supplement” (1) means a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

- (A) a vitamin;
- (B) a mineral;
- (C) an herb or other botanical;
- (D) an amino acid;
- (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
- (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).<sup>5</sup>

The DSHEA specifies requirements about dietary supplements’ labeling, including that “manufacturers must have substantiation at the time the claim is made, establishing that the statement is truthful and non-misleading,” and labels must include the phrase, “This product is not intended to diagnose, treat, cure or prevent any disease.”<sup>2</sup>

A key weakness in the enforcement structure created by the DSHEA is that “manufacturers are not required to submit safety information before marketing ‘dietary supplements.’”<sup>4</sup> This leaves the FDA, as Stephen Barrett notes, “unable to monitor and regulate thousands of individual products,” and the public “virtually unprotected against supplements and herbs that are unsafe.”<sup>4</sup> The FDA can act against unsafe supplements only when it “proves the supplement poses an imminent health hazard,”<sup>2</sup> a high burden, satisfied for the first time in 2004 with the ban on ephedra—a supplement promoted for “weight loss and sports performance enhancement”—due to a number of consumer deaths associated with its use.<sup>2</sup>

*FTC.* The FTC is charged with regulating advertising—a broad array of media that may include “print, broadcast, infomercials, catalogues, direct marketing, and Internet promotions”<sup>2</sup>—of dietary supplements. The FTC analyzes 2 key issues when considering advertising claims: “(1) whether the advertisement is truthful and non-misleading, and (2) whether the advertiser has adequate substantiation for all objective product claims before the advertisement is disseminated.”<sup>2</sup> Because the FDA does not approve dietary supplements before they are marketed, as it does drugs, “the sole regulation of dietary supplements is post-market regulation in the form of false advertising claims,” and the FTC remains “skeptical of most claims that appear too good to be true and do not receive sufficient scientific substantiation.”<sup>2</sup> Yet, as Alexandra Roberts notes, the FTC “lacks the resources and perhaps the authority to force industry-wide change,” and because private parties do not “have standing to challenge competitors’ practices based on violations” of FTC regulations,<sup>1</sup> they are left with few regulatory remedies if the FTC is not able to take action.

### **Social Media**

Exacerbating current regulatory limitations is the proliferation of influencer marketing (ie, giving or receiving compensation in exchange for product endorsement via social media),<sup>1</sup> which has made it easier to use false or misleading claims about dietary supplements to promote their purchase and use and to shape consumer trends.

Influencer marketing has exploded over the past several years, increasing in value from \$1.7 billion in 2016 to an estimated \$13.8 billion in 2021.<sup>6</sup> The monetary value of influencer marketing derives from 3 characteristics: (1) consumers perceive influencers as being authentic, which drives more engagement; (2) **social media posts** can turn engagement directly into sales by providing a link to the product in the post; and (3) the lower cost of influencer marketing compared to traditional advertising allows for more varied advertisements.<sup>4,7</sup> The practice is so effective that some brands have forgone traditional advertising completely, and, as of 2020, “74% of consumers report relying on social media content when making purchasing decisions.”<sup>7</sup>

However, this method of marketing is difficult to regulate. Under the FTC Act,<sup>8</sup> the FTC requires the disclosure of a monetary relationship between a brand and the endorser in a manner that is “clear and conspicuous.”<sup>7</sup> Yet, in an effort to create the illusion of a genuine endorsement, influencers frequently hide the disclosure—typically signified by “#ad” or a mention of “paid partnership”—deep within other hashtags, putting the disclosure after multiple pages or forgoing the disclosure entirely.<sup>9</sup> This deception often goes unnoticed and may change how a consumer perceives the post, as the average consumer cannot differentiate content that is advertising from content that is not,<sup>7</sup> opening the door to harmful deception. One study conducted by the University of Glasgow found that of the 9 leading bloggers in the United Kingdom, 8 provided inaccurate health information or “present[ed] opinion as fact.”<sup>10</sup> Some companies using influencer marketing were found to disclose product dangers after presenting multiple images (ie, burying warnings after the entertaining content), and others presented claims in a way that would lead consumers to believe the product was FDA approved when it was not.<sup>11</sup> By failing to provide the whole picture, giving misleading information, or not including valid alternatives, influencers risk leading their followers to purchase potentially ineffective or dangerous products.<sup>11</sup>

### **Common Law Regulation**

Although there are no private rights of action under the FTC Act or DSHEA, common law offers a tool for consumers to reduce false and misleading claims in influencer marketing by holding individual influencers—and not the companies selling the products—liable for negligent misrepresentation. As Natasha Brison et al note, to prevail, a plaintiff typically must show:

(1) that the defendant supplied false information, (2) that the defendant failed to “exercise reasonable care or competence in obtaining or communicating the information,” (3) that the defendant intends for the information to influence the plaintiff and for the plaintiff to rely upon the misrepresentation, and (4) that the plaintiff was damaged as a result of his or her “justifiable reliance on the information.”<sup>12</sup>

The first and third elements of the claim can be met simply by looking to the nature of influencer marketing: the influencer is the person supplying the false information in the advertisement, and advertisements are used to induce consumers to buy a product. Further strengthening this assessment, most brands provide influencers with substantial creative freedom, giving up significant control over what is said in the advertisement.<sup>7</sup> Control is key in determining that the influencer—not the company—is the proper “defendant” who is actually supplying the false information. Hence, the control given to influencers over advertising may make establishing influencer liability for false or misleading claims easier, and doing so would not be without precedent. Under an FTC action similar to negligent misrepresentation, actor/singer Pat Boone’s control over the advertiser was used as justification for holding him liable for claims made while endorsing the ineffective product Acne-Statin in 1978.<sup>12</sup>

The second element may be more difficult for a plaintiff to sustain in negligent misrepresentation claims. In an action brought by the FTC in 1979, former astronaut Gordon Cooper “was ordered to cease and desist all endorsement activities [for an engine product] unless he relied on competent scientific evidence to substantiate any representation made in the endorsement.”<sup>12</sup> Although not part of a negligence action, the FTC’s order is consistent with the duties of those who supply information when there is a risk of physical harm—as is the case with supplements.<sup>13</sup> Thus, influencers would not be able to avoid liability by claiming they did not know their statements were false or misleading—failing to take reasonable actions to substantiate the claims is enough.<sup>12</sup> Therefore, a plaintiff could meet the second element by demonstrating that, with reasonable care, a prudent influencer would have discovered the claims made were false or misleading.

Regarding the fourth element of negligent misrepresentation, damages would vary with each case, but they would need to stem from the consumer’s relying on the influencer’s statements when making the purchase and the consumer’s reasonable belief the statements were true.<sup>12</sup> With one exception, for a consumer’s reliance to be reasonable, the false or misleading statement made by the influencer must be an assertion of fact and not merely opinion.<sup>12</sup> The exception to this rule, which allows for statements of opinion, applies “when the statement carries with it the implied assertion that the speaker knows of nothing that would preclude the opinion, and that he or she knows facts that would justify it. This is implied when the speaker is understood to have a special knowledge of the matter which is not available to the plaintiff.”<sup>13</sup> This exception might not often apply in the context of influencers, as some influencers lack “special knowledge” of the product. However, if a consumer can establish that the influencer made such a false statement and that it was relied upon to their detriment, even an opinion could potentially be used to hold an influencer liable.<sup>12</sup>

### Conclusion

Although it is unlikely to be as effective as a change in regulation or enforcement, there is reason to believe that using negligent representation to dissuade influencers from selling potentially ineffective or dangerous supplements would be beneficial for consumers. As influencers begin to face litigation for making **misleading and false claims** to sell dangerous or ineffective products, others will take note and make changes to protect their income.<sup>14</sup> Admittedly, there may be challenges to bringing such suits on a large scale, as doing so may require class-action torts, and many influencers may be bit players. Just as the FTC faces challenges in policing influencers, so difficulties will remain with private litigation. However, if claims come to fruition, it follows that, as influencers move to protect their income, they will be less likely to take on brands with unscrupulous marketing strategies or baseless claims, leading to a decrease of ineffective or dangerous supplements being advertised to consumers on social media.

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**Joshua J. Klein** is a JD candidate at DePaul University College of Law in Chicago, Illinois, where he is symposium editor for the *DePaul Journal for Social Justice*, public relations chair for OUTLaws, and a health law fellow with the Jaharis Health Law Institute. He earned his BM from Winona State University in Winona, Minnesota, with a focus on saxophone performance.

**Scott J. Schweikart, JD, MBE** is a senior research associate for the American Medical Association Council on Ethical and Judicial Affairs in Chicago, Illinois, where he is also the legal editor for the *AMA Journal of Ethics*. Previously, he worked as an attorney editor and reference attorney at Thomson Reuters and practiced law in Chicago. Mr Schweikart earned his MBE from the University of Pennsylvania, his JD from Case Western Reserve University, and his BA from Washington University in St Louis. He has research interests in health law, health policy, and bioethics.

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