# Fix This Now or I Sue You Later

## The Marketing Mistakes Class Action Lawyers Are Looking For — and How to Avoid Them

**Todd A. Harrison, Esq.**
Partner | 202.344.4724 | taharrison@Venable.com

**Shahin Rothermel, Esq.**
Partner | 202.344.4550 | sorothermel@Venable.com

VENABLE LLP

# It usually starts with five words

## NOTICE OF INTENT TO SUE

Your label and website state that the product is:

**"ALL NATURAL"**
**"CLINICALLY PROVEN"**
**"AMERICA'S #1 DOCTOR RECOMMENDED"**
**"MADE IN USA"**

***Fix this now - or we will seek relief on behalf of a nationwide class.***



**By the time this arrives…**

- the screenshots exist
- the purchase has been made
- the theory has been standardized
- the settlement demand is leverage

VENABLE LLP

# The hour: follow the consumer journey

1



## See it

Label, search result, social post

2



## Believe it

Claims, proof, authority, reviews

3



## Buy it

Price, checkout, subscription

4



## Sue over it

Screenshot, purchase, demand, class

**The audit must connect every claim surface—not merely approve the label.**

VENABLE LLP

# The plaintiff's playbook is operational, not academic



**SCAN**

Search products and categories for repeatable words



**CAPTURE**

Save labels, PDPs, ads, reviews, and checkout screens



**PURCHASE**

Create standing and preserve the transaction



**COMPARE**

Test against ingredients, evidence, price, or origin



**DEMAND**

Frame a scalable theory and settlement leverage

**Your best defense is a better pre-launch workflow.**

VENABLE LLP

# What makes a marketing issue an attractive case?

- **OBJECTIVE** — A word that can be tested: 100%, natural, USA, proven
- **MATERIAL** — A reason a consumer might choose to pay more
- **SCALABLE** — The same representation reaches many purchasers
- **PERSISTENT** — Repeated on labels, web pages, marketplaces, and ads
- **CHEAP TO PROVE** — Screenshots, a purchase, a study, a ruler, or a bill

VENABLE LLP

**The common denominator: proof is easier than defense.**

# One sentence can create three different problems



## FDA

**What is the product and what may the label say?**

- classification
- misbranding
- disease vs. structure/function
- mandatory label content



## FTC

**What net impression does the advertising convey?**

- express and implied claims
- reasonable basis before dissemination
- endorsements and disclosures
- digital and social advertising



## PRIVATE PLAINTIFF

**Could a consumer plausibly allege deception and loss?**

- reasonable-consumer theory
- price premium or purchase injury
- state-law variation
- classwide leverage

VENABLE LLP

# The master rule: evaluate the net impression

**WORDS** + **IMAGES** + **CONTEXT** + **OMISSIONS** =

**WHAT A REASONABLE CONSUMER TAKES AWAY**

**A disclosure can qualify a claim. It cannot reliably contradict the headline that got the consumer to buy.**

VENABLE LLP

# Audit the journey, not the document




**Every handoff is a chance for the message to drift.**

VENABLE LLP

# Audience exercise: spot the lawsuit

*How many issues can you find in 60 seconds?*







VENABLE LLP

# The answer: at least 16 separate audit questions

## COMPOSITION

- "All natural" scope
- synthetic or highly processed inputs
- 60 capsules vs. 30-day use
- net quantity and fill

## PROOF + AUTHORITY

- finished product vs. ingredient study
- "clinically proven" level of proof
- fat-burning and immunity claims
- doctor survey and #1 universe

## ORIGIN + SOCIAL PROOF

- unqualified U.S.-origin claim
- global sourcing conflict
- verified-review process
- incentives, insiders, or suppression

## PRICE + SUBSCRIPTION

- bona fide former price
- false urgency
- material renewal terms
- consent and cancellation path

VENABLE LLP

# Absolute words turn nuance into a binary test

**100%**

What exactly does it modify?

**ALL**

What exactly does it modify?

**ONLY**

What exactly does it modify?

**PURE**

What exactly does it modify?

**FREE**

What exactly does it modify?

**REAL**

What exactly does it modify?

**#1**

What exactly does it modify?

**GUARANTEED**

What exactly does it modify?

**Before approval, rewrite the claim as a testable proposition. Then ask whether every reasonable reading is true.**

VENABLE LLP

# Can the back panel cure the front?

**BELL V. PUBLIX / ALBERTSONS**

## "100% Grated Parmesan Cheese"

An ingredient list identifying cellulose and preservatives did not foreclose the front-label deception claim at the pleading stage.

**Front statement alleged to be affirmatively misleading**

**MCGINITY V. P&G**

## "Nature Fusion"

Where the front was ambiguous rather than misleading, the back label could clarify that avocado oil was the natural ingredient being highlighted.

**Back panel used to resolve genuine ambiguity**

**Practical rule: clarification may work; contradiction usually does not.**

VENABLE LLP

# "Natural": undefined does not mean defensible

**NATURAL**



A single word can be read as an ingredient, processing, sourcing, safety, or whole-product claim.

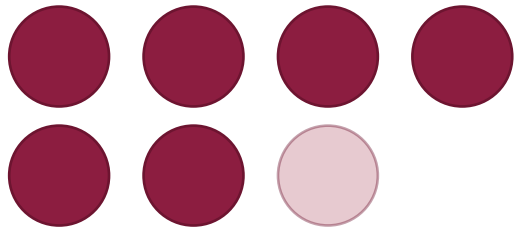
- ⚠ What noun does "natural" modify?
- ⚠ Are any ingredients synthetic or highly processed?
- ⚠ Do images imply more than the words say?
- ⚠ Would a narrower claim be clearer: flavor, color, source, or ingredient?

**Do not let the absence of a comprehensive FDA definition substitute for a consumer-impression analysis.**

VENABLE LLP

# "Made with real...": true can still be misleading

**MADE WITH REAL BERRIES**



**2% berry puree**

The issue is not merely presence. It is what the words, pictures, flavor name, placement, and amount collectively communicate.

**PRESENCE** — Is the highlighted ingredient actually present?

**PROMINENCE** — Do words or images imply it is a meaningful portion?

**IDENTITY** — Does the product taste come mainly from flavoring or another ingredient?

**QUALIFICATION** — Would a percentage or more precise phrase change the takeaway?

VENABLE LLP

# Count, fill, serving size, and "30-day supply"



## COUNT

Does the stated count match the units a consumer can actually use?



## SERVING

Is the serving size consistent across label, directions, ads, and subscription cadence?



## DURATION

Does "30-day supply" require the consumer to use less than the promoted regimen?



## FILL

Does the container create a false visual impression of quantity?

**Reconcile the arithmetic before the consumer does.**

VENABLE LLP

# Slack-fill: the empty space needs a real function




**Would a reasonable consumer expect materially more product?**

## Six recognized functional categories

1. product protection
2. machinery requirements
3. unavoidable settling
4. package function
5. reusable container
6. **inability to reduce package size due to labeling, tamper resistance, or theft prevention**

**Document the function, the fill study, and why a smaller package was not reasonably used.**

VENABLE LLP

# "Made in USA": map the supply chain before printing the flag



## UNQUALIFIED CLAIM

Final assembly in the U.S.
All significant processing in the U.S.
All or virtually all ingredients and components made and sourced in the U.S.

## Audit the claim in four layers

| | | |
|---|---|---|
| 1 | **FINAL ASSEMBLY** | Where is the finished product actually made? |
| 2 | **SIGNIFICANT PROCESSING** | Where do the meaningful manufacturing steps occur? |
| 3 | **INPUTS** | What are the origin and cost/significance of ingredients and components? |
| 4 | **IMPLIED CLAIMS** | Flags, maps, names, seals, and "American" imagery can communicate origin. |

**When the unqualified standard is not met, use a precise qualified claim—not a vague workaround.**

VENABLE LLP

# "FDA approved" and "FDA registered" are not interchangeable

| | |
|---|---|
| **FDA APPROVED** | Use only where the specific product or claim has the relevant approval. |
| **FDA REGISTERED FACILITY** | Registration identifies a facility; it is not an endorsement of the product. |
| **FDA COMPLIANT** | Often too broad to verify and may imply agency review that never occurred. |
| **MADE IN AN FDA-INSPECTED FACILITY** | Technically accurate wording can still imply approval or superior quality. |

VENABLE LLP

# Enforcement Discretion: Friend or Foe?

## FDA may stand down. Plaintiffs' lawyers do not have to.

**FRIEND**
FDA MAY STAND DOWN

**ENFORCEMENT DISCRETION**
*policy—not rulemaking*

**FOE**
PLAINTIFFS MAY PRESS AHEAD

1. **Practical path while rulemaking lags**
2. Reflects FDA's current science and priorities
3. Can materially reduce federal enforcement risk

1. **The written rule remains in force**
2. Guidance does not bind courts or private plaintiffs
3. State claims may invoke the unchanged rule

**CASE IN POINT** ***FRANCO v. CHOBANI* (7th Cir. 2026)**
FDA announced allulose enforcement discretion, but the court treated the written sugar rule as controlling and allowed the state-law case to proceed.

**AUDIT RULE: Treat discretion as a risk factor—not a private safe harbor.**

VENABLE LLP

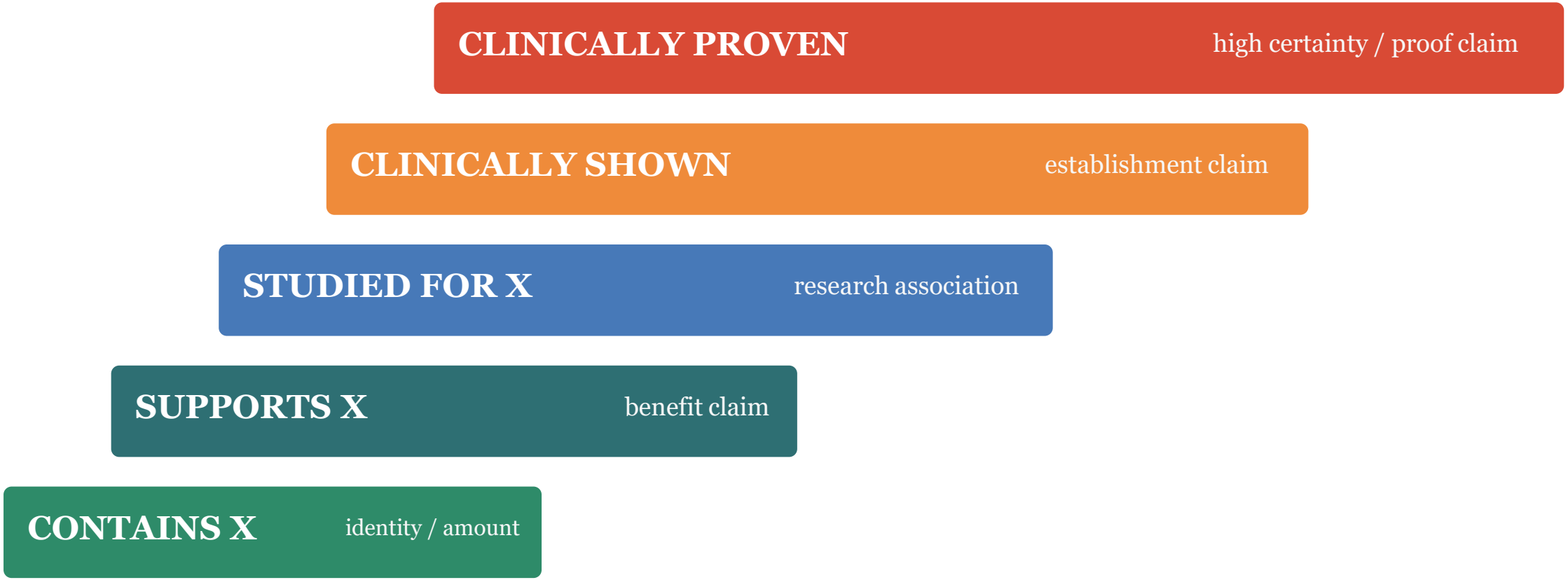
# Part 2 – Slides 21-28

## The stronger the message of certainty, the stronger the evidence and fit must be.



VENABLE LLP

# The claim ladder: each rung adds implied certainty




**Wording is not a safe harbor: context can move the claim up the ladder.**

VENABLE LLP

# Five bridges from the study to the advertisement

**1**

### IDENTITY

Same ingredient, strain, form, formulation, and relevant matrix?

**2**

### DOSE + USE

Same dose, route, timing, frequency, and duration?

**3**

### POPULATION

Same age, health status, baseline, and use setting?

**4**

### ENDPOINT

Same outcome, magnitude, timing, and consumer relevance?

**5**

### TOTALITY

Consistent with the full evidence, including null or contrary results?

**A positive study is the start of the analysis – not the end.**

VENABLE LLP

# An ingredient study is not automatically a finished-product study

THE STUDY

## Ingredient X

- 500 mg
- specific standardized extract
- 8 weeks
- adults with defined baseline



THE AD

## Finished Product Y

- 200 mg in a proprietary blend
- different delivery system
- "works in 7 days"
- claims for everyone

**The gap must be bridged – not wished away.**

VENABLE LLP

# Before saying "clinically proven," answer all seven

1. Was the advertised product – not merely one ingredient – tested?
2. Was the study randomized, controlled, well conducted, and appropriately analyzed?
3. Were the advertised dose, regimen, population, and duration tested?
4. Was the advertised endpoint prespecified and clinically meaningful?
5. Were the magnitude and timing represented accurately?
6. Does the totality of evidence support the result?
7. **Would a qualified expert call the ad an accurate description of the evidence?**

**One failed bridge often changes the right claim from "clinically proven" to a narrower, accurate statement about what was studied.**

VENABLE LLP

# "Doctor recommended": define every word



**#1 DOCTOR RECOMMENDED**

A survey claim is only as strong as its universe, question, sample, product identity, and date.

| | |
|---|---|
| **WHO?** | Physicians, specialists, pharmacists, dentists, or another group? |
| **WHAT?** | Exact product, brand, ingredient, or product category? |
| **COMPARED TO?** | All competitors, surveyed brands, or a limited set? |
| **HOW?** | Representative sample, neutral question, verified respondents? |
| **WHEN + WHERE?** | Current data and the geography actually claimed? |
| **CONNECTION?** | Any compensation, sponsorship, or material relationship? |

**"Doctor formulated" is not "doctor recommended" – and neither is automatically "#1."**

VENABLE LLP

# Testimonials do not outsource the claim

***"I lost 18 pounds in 30 days and stopped taking my medication."***

*- Actual customer*

*"Results not typical"*

## The ad may still imply:

- the depicted result is achievable
- the result is typical or expected
- the product treats a disease
- the advertiser has proof for the implied claim

VENABLE LLP

# Reviews are now a regulated marketing system

### FAKE OR FALSE

No invented reviewers, experiences, or AI-generated customer personas.

### SENTIMENT-CONDITIONED

Do not condition incentives on positive or 5-star content.

### INSIDERS

Disclose material relationships for employees, officers, agents, and relatives.

### CONTROLLED SITES

Do not present a company-controlled review site as independent.

### SUPPRESSION

Do not use unfounded threats or selective display to distort sentiment.

### FAKE INFLUENCE

Do not buy fake followers, views, or other indicators for commercial use.

**Audit the platform settings, vendor contract, solicitation email, moderation rules, and employee practices.**

VENABLE LLP

# You may be responsible for claims you did not personally write



## INFLUENCERS

Train | Contract | Monitor | Correct



## AFFILIATES

Train | Contract | Monitor | Correct



## RETAILERS

Train | Contract | Monitor | Correct



## SALES REPS

Train | Contract | Monitor | Correct



## PRACTITIONERS

Train | Contract | Monitor | Correct

**Authority to control + knowledge + benefit = a serious governance question.**

VENABLE LLP

# Part 3 – Slides 30-35

## The transaction flow is advertising. Every click can strengthen or contradict the original promise.



VENABLE LLP

# Price claims: the baseline is the claim

**WAS $79.99**
**NOW $39.99**

Was the former price bona fide and offered for a substantial period?

**SAVE 50%**

Fifty percent compared with what actual price?

**FREE SHIPPING**

Are mandatory handling, service, or protection fees added later?

**TODAY ONLY**

Does the offer actually end, or does the timer reset?

**Preserve price history, promotion dates, comparator methodology, and offer logic.**

VENABLE LLP

# Checkout is part of the advertisement

## ORDER SUMMARY

| | |
|---|---|
| Product | $39.99 |
| Shipping | FREE |
| Taxes & fees | $37.84 |
| Order protection | $4.99 |
| **TOTAL** | **$82.82** |



**Before the consumer commits, make clear:**

- total mandatory price
- nature of each charge
- subscription status
- renewal amount and cadence
- how and when to cancel

VENABLE LLP

# Subscriptions: the federal rule changed; the core risk did not

## ROSCA CORE

**DISCLOSE** — All material terms clearly and conspicuously before billing information

**CONSENT** — Express informed consent before charging

**STOP** — A simple mechanism to stop recurring charges

## Current landscape

### 2024 FTC click-to-cancel amendments

Vacated by the Eighth Circuit in July 2025

### FTC rule text

Withdrawn in February 2026 to conform to the decision

### Federal law

ROSCA and FTC Act enforcement remain

### State law

A growing patchwork can impose stricter consent, notice, and online cancellation duties

**Design to the strictest material market – not the lowest federal floor.**

VENABLE LLP

# A disclosure fails when it is...

### TOO LATE

After the purchase decision or below the order button

### TOO FAR

Separated from the claim by scrolling, tabs, or another page

### TOO SMALL

Low contrast, tiny type, brief display, or mobile-hidden

### CONTRADICTORY

Fine print says the opposite of the headline

### TOO VAGUE

"Terms apply" without the material term

### UNAVOIDABLE?

The consumer can proceed without seeing or understanding it

**Test disclosures on the device, screen, and path the consumer actually uses.**

VENABLE LLP

# The website is not one ad - it is a claim network

**PDP**
headlines + bullets

**BLOG**
education that sells

**SOCIAL**
posts + comments

**SEARCH**
title + snippets

**CORE PRODUCT CLAIM**

**E-TAILER**
A+ content + Q&A

**EMAIL**
subject + offer copy

**FAQ**
answers + comparisons

**CHATBOT**
generated answers

**Inventory claims by proposition, not merely by URL.**

VENABLE LLP

# The website is not one ad – it is a claim network

FTC FINAL ORDER – JULY 2026

## TRUHEIGHT

- height-growth claims including "clinically proven"
- alleged lack of competent and reliable scientific evidence
- employee/vendor and sentiment-conditioned reviews
- $750,000 payment; $4 million judgment partially suspended

FTC + STATES COMPLAINT – OCTOBER 2026

## LENS.COM

- alleged artificially low advertised prices
- mandatory "Taxes & fees" allegedly revealed late and often doubling price
- AutoRefill disclosures and cancellation allegations
- case pending – allegations not adjudicated

**The same consumer journey can generate multiple independent claims.**

VENABLE LLP

# The first 48 hours: triage the easy targets

1. **SEARCH**
   Run the obvious words across labels, sites, marketplaces, ads, email, and social.

2. **PAUSE**
   Stop new printing, paid amplification, and automated syndication of red claims.

3. **PRESERVE**
   Capture what ran, when, where, and who approved it.

4. **QUALIFY**
   Replace absolutes with accurate scope, object, and limitations.

5. **TEST**
   Rerun mobile checkout, renewal, cancellation, and review solicitation.

6. **ASSIGN**
   Give every remediation item an owner, deadline, and verification step.

**Do not quietly overwrite the evidence. Correct prospectively while preserving the record.**

VENABLE LLP

# The 30-day marketing-risk audit

**WEEK 1**

## INVENTORY

- claims + channels
- price + promotion history
- subscription flows
- review vendors

**WEEK 2**

## EVIDENCE

- study-to-claim matrix
- origin map
- fill and count support
- survey files

**WEEK 3**

## REMEDIATE

- rewrite red claims
- fix checkout + consent
- update scripts + assets
- correct review practices

**WEEK 4**

## GOVERN

- owners + approvals
- monitoring cadence
- vendor controls
- change management

VENABLE LLP

# Use a red-yellow-green scorecard that forces a decision

## RED

**STOP / REWRITE**

- absolute claim with a factual mismatch
- proof claim without direct evidence
- undisclosed mandatory fees
- negative option without informed consent
- fake or sentiment-conditioned reviews

## YELLOW

**QUALIFY / DOCUMENT**

- ambiguous scope
- reasonable but unrecorded extrapolation
- qualified origin claim
- functional slack-fill with weak records
- survey claim nearing expiration

## GREEN

**APPROVE / MONITOR**

- claim matches product and evidence
- consumer takeaway tested in context
- disclosure is clear and proximate
- records are current and reproducible
- channel controls are assigned

VENABLE LLP

# The Final Test

## Could we defend this exact consumer takeaway…



**with the product actually sold?**



**with the evidence actually possessed?**



**in every channel where it appears?**



**after the plaintiff puts it on one slide?**

# QUESTIONS

Todd A. Harrison, Esq. | Venable LLP

VENABLE LLP

# Appendix: label and packaging audit checklist

## IDENTITY + COMPOSITION

- product name and statement of identity
- absolute terms: 100%, all, pure, free
- natural, real, clean, fresh
- ingredient images and prominence

## QUANTITY + PACKAGE

- net quantity and count
- serving arithmetic and duration
- fill level and package function
- settling and slack-fill records

## ORIGIN + AUTHORITY

- Made in USA express and implied claims
- supplier and component origin support
- FDA approved/registered/inspected references
- certifications, seals, and awards

## CONSISTENCY

- front vs. back
- label vs. website
- directions vs. subscription cadence
- current formula vs. legacy assets

VENABLE LLP

# Appendix: website, price, subscription, and review checklist

| | |
|---|---|
| CLAIMS | PDP, search, FAQ, blog, email, social, marketplaces, affiliates, chatbot |
| PRICE | former price, savings baseline, free offers, mandatory fees, scarcity, countdowns |
| SUBSCRIPTION | material terms before billing, express consent, renewal notice, easy cancellation |
| DISCLOSURES | proximity, prominence, plain language, mobile rendering, no contradiction |
| REVIEWS | authenticity, incentives, insiders, moderation, suppression, vendor controls |
| RECORDS | screenshots, price history, consent logs, cancellation tests, review solicitation copy |

**Verify through an actual consumer path – not a staging screenshot or policy document.**

VENABLE LLP

# Appendix: selected authorities and current developments

### FTC Health Products Compliance Guidance

Health claims, net impression, substantiation

### FTC Endorsement Guides - 16 CFR Part 255

Testimonials and expert endorsements

### FTC Reviews Rule - 16 CFR Part 465

Fake, incentivized, insider, and suppressed reviews

### FTC Deceptive Pricing Guides - 16 CFR Part 233

Former prices and comparative price claims

### FTC Made in USA Rule - 16 CFR Part 323

Unqualified U.S.-origin claims

### 21 CFR 100.100

Nonfunctional slack-fill

### ROSCA - 15 U.S.C. 8403

Online negative-option disclosures, consent, and cancellation

### FTC Negative Option Rule docket

Current rulemaking status after 2025 vacatur

### Bell and McGinity

Front-label statements and clarifying context

### TruHeight and Lens.com (2026)

Current enforcement illustrations

VENABLE LLP

© 2026 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP