

FTC Is Scrutinizing COVID-19 Advertising As Consumer Complaints Soar

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The Federal Trade Commission (FTC) is devoting significant resources to combat deceptive COVID-19 advertising in a range of industries as consumer complaints to the FTC pick up steam. Companies are shifting marketing spend to cover COVID-19 messaging and should be mindful of the FTC's increased scrutiny.

Through April 9, 2020, the FTC has received 15,006 consumer complaints relating to COVID-19 advertising and business activities.¹ These consumer complaints primarily relate to travel and vacation fraud, online shopping fraud, and business and government imposters, but they cover a broad range of industries and activities. Nearly half of all fraud complaints have reported a monetary loss, and consumers have collectively reported a total fraud loss of \$11.95 million.

The FTC has not sat idly by while consumers are subjected to COVID-19 scams. Instead, it has partnered with other agencies to issue warnings to those who are violating consumer protection regulations. Earlier this month, the FTC joined with the FCC to send letters to VoIP service providers the Commissions found were routing and transmitting illegal robocalls, including COVID-19 related scam calls.² These letters come on the heels of the FTC's action in late March to warn nine VoIP providers that "assisting and facilitating" illegal telemarketing or robocalls related to the pandemic is against the law.³

The FTC has taken aim not just at the means of transmission, but also at the content of misleading COVID-19 advertising. Over the past month, the FTC has issued joint letters with the FDA to seven companies that were making claims their products treated and/or prevented COVID-19.⁴ These companies were primarily direct-to-consumer brands selling items like essential oils and aromatherapy products. The improper ad claims include: "it's actually widely acknowledged in both science and the medical industry that ionic silver kills coronaviruses"⁵ and "Silver Solution has been proven ... to kill every pathogen it has ever been tested on ... and it can kill any of these known viruses ..."⁶

While the FTC has indicated a desire to crack down on false and misleading advertising relating to COVID-19, it is also seeking to help those operating in good faith to provide needed goods and services. The Commission issued guidance outlining its approach to safeguarding consumers during the pandemic.⁷ That guidance specifically states that the FTC will "remain flexible and reasonable in enforcing compliance requirements on companies that may hinder the provision of important goods and services to consumers, and will consider good faith efforts to provide needed goods and services in making enforcement decision." The FTC stands "ready to assist businesses that may seek guidance about compliance obligations on consumer protection issues during this unprecedented time."

The FTC's primary focus will continue to be on advertising that poses a threat to public health, but it will not be limited to health claims. For example, advertisers should be wary of making claims that a product is "new" or "novel" when it is not, or touting a special like "Pandemic Sale" when the product's pricing does not actually constitute a sale as legally defined. Advertisers should also remember to evaluate all claims for truthfulness and substantiation, including implied claims.

The bottom line is simple: while much might have changed during the COVID-19 pandemic, the rules for advertising have not. All advertising must be truthful, not misleading, and all claims should be substantiated. Far from stepping back during this time, the FTC has signaled its intent to continue its mission of consumer protection, and advertisers should expect the FTC to remain active if they communicate false, misleading, deceptive, or fraudulent advertising related to COVID-19.

¹ <https://www.ftc.gov/system/files/attachments/coronavirus-covid-19-consumer-complaint-data/covid-19-daily-public-complaints.pdf>

² <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-fcc-send-joint-letters-voip-service-providers-warning-against>

³ <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-warns-nine-voip-service-providers-other-companies-against>

⁴ <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-fda-send-warning-letters-seven-companies-about-unsupported>

⁵ https://www.ftc.gov/system/files/attachments/press-releases/ftc/fda-covid-warning-letters/colloidal_vitality_llc_wl_fda_cleared_05march2020rq_.pdf

⁶ https://www.ftc.gov/system/files/attachments/press-releases/ftc/fda-covid-warning-letters/wl_to_jim_bakker_covid-19_occ_cleared_3-5-20_cleanversion_qtt_rq.pdf

⁷ <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-chairman-joe-simons-outlines-agencys-approach-safeguarding>