

**PREPARED STATEMENT OF
TRUTH IN ADVERTISING, INC.**

On

**Curbing COVID Cons: Warning Consumers about
Pandemic Frauds, Scams, and Swindles**

Before the

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

**SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND DATA SECURITY**

UNITED STATES SENATE

WASHINGTON, DC

APRIL 27, 2021

I. INTRODUCTION

Chairman Blumenthal, Ranking Member Blackburn, and Members of the Subcommittee, on behalf of Truth in Advertising (TINA.org), I welcome the opportunity to appear before you to highlight fraudulent and deceptive marketing schemes that have arisen during this unprecedented crisis, and to sound the alarm that the worst is yet to come as the Federal Trade Commission is now powerless to claw back ill-gotten gains from wrongdoers under Section 13(b) of the FTC Act.¹

My organization, TINA.org, is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; we work with businesses and government agencies on behalf of consumers to effectively prevent and stop deception in our economy.

The central premise of modern consumer protection laws is that marketplace dishonesty causes harm to consumers and businesses alike; and, if left unchecked, such behavior impairs the efficient allocation of resources in our economy.² There can be no doubt that the ongoing

¹ See *AMG Capital Mgmt., LLC, et al. v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021) , https://www.supremecourt.gov/opinions/20pdf/19-508_16gn.pdf. Moreover, it is important to note that even the most rigorous of laws are of little value if the agency responsible for enforcing them does not have the means or resources to properly police the marketplace. Given the FTC's limited resources, its current ability to oversee a multitrillion-dollar marketplace and protect more than 320 million consumers is clearly hampered. And while Congress recently appropriated additional funds to the FTC, the Commission still remains significantly under-resourced and over-leveraged, as Acting Chairwoman Rebecca Slaughter noted in her April 20, 2021 testimony before the United States Senate Committee on Commerce, Science, and Transportation Hearing on Strengthening the FTC's Authority to Protect Consumers. As she noted, "[e]ven before the recent merger wave, we were averaging twice as many annual merger filings as we had been ten years ago, while our employee count remained flat. In fact, we had 50% more employees at the beginning of the Reagan administration as we do today. And our filing rates keep going up. On the consumer protection side, there is similar growth in both breadth and depth of problems in the markets, especially digital markets, that require enforcement. But our ability to keep up with this volume of work against large, sophisticated companies without substantial increases in resources will be limited." Strengthening the Federal Trade Commission's Authority to Protect Consumers: Hearing Before the Comm. on Commerce, Science, and Transp., 117th Cong. 2-3 (2021) (statement of Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm.), https://www.ftc.gov/system/files/documents/public_statements/1589184/opening_statement_april_20_senate_oversight_hearing_420_final.pdf. In short, unless more funding is allocated, it is impractical to think that the FTC can do more.

² Jeff Sovern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, St. John's Legal Studies Research Paper No. 21-0001 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=

pandemic has exacerbated the ever-present dangers of deceptive and unfair acts and practices in the marketplace. TINA.org has heard from countless consumers – senior citizens, military veterans and struggling parents – whose experiences illustrate the fact that deceptive marketing is putting the health, financial well-being and safety of our most susceptible populations at risk. And compounding these issues is the fact that communities of color and lower income communities have been disproportionately impacted by fraudulent marketing and misinformation concerning COVID-19.³

The list of deceptively marketed products and services exploiting this pandemic is extensive. CBD products marketed to military veterans as a coronavirus treatment;⁴ bleach advertised as a liquid cure-all;⁵ wellness centers targeting first responders with IV vitamin drips to protect against COVID-19;⁶ Amazon and eBay sellers falsely claiming that their personal protective

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³ See, e.g., Ryan Zamarripa and Lorena Roque, *Latinos Face Disproportionate Health and Economic Impacts From COVID-19*, Center for American Progress (Mar. 5, 2021), <https://www.americanprogress.org/issues/economy/reports/2021/03/05/496733/latinos-face-disproportionate-health-economic-impacts-covid-19/>; *Poll: 61% of U.S. households with children report facing serious financial problems during the coronavirus outbreak*, Harvard T.H. Chan School of Public Health (Sept. 30, 2020), <https://www.hsph.harvard.edu/news/press-releases/poll-61-of-u-s-households-with-children-report-facing-serious-financial-problems-during-the-coronavirus-outbreak/> (“Many of these problems are concentrated among Black and Latino households with children, households with children that have annual incomes below \$100,000, and households with children that have experienced job or wage losses since the start of the outbreak.”); Margery Austin Turner and Monique King-Viehland, *Economic Hardships from COVID-19 Are Hitting Black and Latinx People Hardest. Here Are Five Actions Local Leaders Can Take*, Urban Institute (Aug. 12, 2020), <https://www.urban.org/urban-wire/economic-hardships-covid-19-are-hitting-black-and-latinx-people-hardest-here-are-five-actions-local-leaders-can-take>; Brandi Collins-Dexter, *Canaries in the Coal Mine: COVID-19 Misinformation and Black Communities*, Shorenstein Center on Media, Politics and Public Policy, John F. Kennedy School of Government, Harvard University (June 24, 2020), <https://shorensteincenter.org/canaries-in-the-coal-mine/> (“Even as Black people are disproportionately dying from the virus due to systemic racism, harmful inaccuracies about how to keep from contracting COVID-19, how to treat it, and where it comes from are metastasizing in Black online spaces, putting people at even greater risk.”).

⁴ Fed. Food & Drug Admin. and Fed. Trade Comm’n Warning Letter to Patriot Supreme (Oct. 16, 2020), https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

⁵ Press Release, The U.S. Dep’t of Justice, Justice Dep’t Seeks to End Illegal Online Sale of Industrial Bleach Marketed as “Miracle” Treatment for COVID-19 (Apr. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>; Fed. Food & Drug Admin. Warning Letter to Genesis 2 Church (Apr. 8, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/genesis-2-church-606459-04082020>.

⁶ *IV Therapies and COVID-19: The Drip, Drip, Drip of Deceptive Claims*, Truth in Advertising, Inc., June 3, 2020, <https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

equipment (PPE) is FDA approved;⁷ scammers simply failing to deliver paid-for PPE;⁸ hand sanitizers marketed as providing 24-hour protection against COVID-19;⁹ alleged immunity-boosting supplements targeted at children;¹⁰ risky colloidal silver solutions advertised as having the ability to kill the virus from within;¹¹ toothpastes and teeth-whitening products claiming to prevent COVID-19;¹² and sham wellness kits targeting seniors.¹³ The number of scams has been so prolific that the FDA and the FTC have had to issue numerous warnings pertaining to fraudulent coronavirus tests, treatments and vaccines.¹⁴

Unfortunately, the deception does not stop with outrageous health claims; many are also exploiting the economic desperation wrought by this pandemic: multilevel marketing companies claiming people can earn full-time pay working part-time;¹⁵ lending companies deceptively using

⁷ *Face Mask Sellers on eBay Falsely Claim Products Are 'FDA Approved'*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>. It is often the case that products listed for sale in online marketplaces are deceptively advertised. When presented with such findings, companies typically point the finger at third-party vendors, deny liability, and use Section 230 of the Communications Decency Act as a shield. Removing the 230 shield from online commercial speech would allow the FTC to hold third-party vendor sites accountable.

⁸ Press Release, The U.S. Dep't of Justice, Michigan Man Charged With COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

⁹ *Prompted by TINA.org, Hand Sanitizer Maker Removes COVID-19 Claims*, Truth In Advertising, Inc., May 20, 2020, <https://www.truthinadvertising.org/prompted-tina-org-hand-sanitizer-maker-removes-covid-19-claims/>; *CATrends: Hand Sanitizers Marketed to Prevent Disease*, Truth In Advertising, Inc., Apr. 9, 2020, <https://www.truthinadvertising.org/catrends-hand-sanitizers-marketed-to-prevent-disease/>.

¹⁰ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020, <https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>.

¹¹ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020, <https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

¹² Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

¹³ Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

¹⁴ *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, U.S. Food & Drug Admin., www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments (last visited Apr. 23, 2021).

¹⁵ *How MLMs Exploit Consumers During A Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>. MLM companies and their distributors are also taking advantage of the pandemic to make inappropriate health claims. *Mixed Messaging in the*

the CARES Act to exploit college students;¹⁶ investment scams claiming to have patented COVID cures;¹⁷ financial entities pretending to be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed;¹⁸ vaccine survey scams stealing personal information and money;¹⁹ and imposter scams where fraudsters contact grieving families under the auspices of the FEMA Funeral Assistance Program to steal personal data.²⁰

And, to make matters worse, the agency primarily charged with policing these deceptive acts, the FTC, has now lost a mainstay of its enforcement authority – the ability to make victims whole under Section 13(b) of the FTC Act.²¹ Because Section 13(b) does not specifically mention the right to equitable relief when a permanent injunction is issued, the Supreme Court has held in *AMG Capital Management, LLC, et. al. v. Federal Trade Commission* that the FTC may not seek restitution or disgorgement in any case brought under Section 13(b).²²

It is important to remember the facts of *AMG* and appreciate the devastating impact this decision will have on the company's victims. AMG was a payday lending scheme that extracted

MLM Industry Regarding Coronavirus Claims, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

¹⁶ Fed. Trade Comm'n Warning Letter to Frank Financial Aid (Nov. 10, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

¹⁷ Press Release, Fed. Trade Comm'n, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

¹⁸ Fed. Trade Comm'n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor_financial.pdf, Fed. Trade Comm'n Warning Letter to sbaddisasterloan.org (June 22, 2020), https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sbadisasterloan.org_.pdf.

¹⁹ *Watch Out for New Vaccine Survey Scams*, AARP, <https://states.aarp.org/montana/vaccinesurveyscams> (last visited Apr. 23, 2021).

²⁰ Funeral Assistance FAQ, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

²¹ 15 U.S.C. § 53.

²² See *AMG Capital Mgmt., LLC, et al. v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

money from people in desperate circumstances.²³ In its appeal, the company did not dispute that it violated the law. Instead, it argued that the \$1.3 billion it stole should be its to keep and the Supreme Court has agreed with AMG. The Supreme Court has held that this legislative body fully endorsed the notion that wrongdoers should pocket the money they've illegally taken when it drafted 13(b).²⁴

Because the Supreme Court has ruled in AMG's favor, there is an urgent need for this Congress to empower the FTC to be able to seek equitable relief under Section 13(b). If Congress fails to act, then the deceptive marketing practices I have enumerated will only multiply. Allowing wrongdoers an absolute right to retain funds under Section 13(b) is going to make consumers and our economy more vulnerable to harm, especially during these unprecedented times.

Moreover, if Congress truly wants to eradicate the deception that is plaguing our economy, it must add to the FTC's toolkit by permitting penalty authority over first-time offenders; independent litigation authority to obtain civil penalties; a civil penalty fund for victims; as well as enhancement of some tools that the FTC already has at its disposal, including Administrative Procedure Act (APA) rulemaking authority, mandating that funeral homes disclose their pricing lists on their websites, requiring companies that use negative-option offers to simplify cancelations and provide clearer renewal information, and exclude the protection of commercial speech from Section 230 of the Communications Decency Act of 1996.²⁵

²³ Press Release, The U.S. Dep't of Justice, Scott Tucker Sentenced To More Than 16 Years in Prison for Running \$3.5 Billion Unlawful Internet Payday Lending Enterprise (Jan. 5, 2018), <https://www.justice.gov/usao-sdny/pr/scott-tucker-sentenced-more-16-years-prison-running-35-billion-unlawful-internet-payday> ("For more than 15 years, [AMG's] Scott Tucker ... made billions of dollars exploiting struggling, everyday Americans through payday loans carrying interest rates as high as 1,000 percent.")

²⁴ See *AMG Capital Mgmt., LLC, et al. v. Fed. Trade Comm'n*, No. 19-508, slip op. at 14 (U.S. Apr. 22, 2021) ("We must conclude, however, that §13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief."), https://www.supremecourt.gov/opinions/20pdf/19-508_16gn.pdf.

²⁵ 47 U.S.C. § 230.

At present, first-time offenders find it economically advantageous to ignore initial FTC orders and settlements.²⁶ Only when the calculus changes such that it becomes economically disadvantageous to engage in deceptive marketing and fraud from the outset will there be an impetus for all to champion truth in advertising.

II. Truth in Advertising, Inc.

Truth in Advertising (TINA.org) is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

At the center of TINA.org's efforts is its website, www.tina.org, which aims to re-boot the consumer movement for the 21st century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad,²⁷ and pillows and essential oils falsely marketed as able to treat chronic disease.²⁸ The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates, and, when appropriate, takes up with businesses and regulatory

²⁶ Funeral Assistance FAQ, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

²⁷ Sprinter Summary of Action, <https://www.truthinadvertising.org/sprinter-summary-of-action/> (last visited Feb. 1, 2021).

²⁸ MyPillow Summary of Action, <https://www.truthinadvertising.org/mypillow-summary-of-action/> (last visited Feb. 1, 2021); doTerra Summary of Action, <https://www.truthinadvertising.org/doterra-summary-action/> (last visited Feb. 1, 2021); Young Living Summary of Action, <https://www.truthinadvertising.org/young-living-summary-action/> (last visited Feb. 1, 2021).

authorities. The website is a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud. TINA.org regularly draws on this expertise to advocate for consumer interests before the FTC and other governmental bodies and appear as *amicus curiae* in cases raising important questions of consumer protection law.²⁹

Since its inception, TINA.org has filed more than 200 legal actions, published more than 1,000 ad alerts, written over 800 news articles, and tracked more than 2,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

III. Fraud, deception and scams during the COVID-19 crisis

During this pandemic, consumers nationwide have been inundated with deceptive marketing campaigns seeking to exploit and capitalize on the global public-health crisis.³⁰ While some scams deplete bank accounts and retirement savings, others have drastic consequences for consumers' health and safety. Undoubtedly the COVID-19 Consumer Protection Act of the 2021

²⁹ For example, TINA.org participated as *amicus* in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf. TINA.org also filed an *amici* brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf.

³⁰ FTC COVID-19 and Stimulus Reports, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map>.

Consolidated Appropriations Act, which authorizes the FTC to seek civil monetary penalties for deceptive COVID-19 health claims and government benefit scams during the pandemic, will help to bring select wrongdoers to justice.³¹ But, the Act is severely limited in time and scope – failing to capture broad-based economic scams, among other things.

a. Deceptive health claims

Deceptive advertising peddling unapproved treatments, cures, and preventatives for a virus that has killed more than a half million people in the United States³² flood the internet. The number of scams has been so prolific that the FDA and the FTC have had to issue numerous warnings pertaining to fraudulent coronavirus tests, treatments and vaccines.³³ Not only do many of the deceptive ads target particularly susceptible populations, including parents of young children, first responders, military veterans, senior citizens and communities of color, many also promote products that are inherently dangerous – some can cause severe health consequences while others are advertised as negating the need to follow standard COVID-19 prevention and treatment recommendations, thereby increasing the risk that consumers contract and spread COVID-19 or fail to obtain medically necessary treatment.

Since the initial coronavirus outbreak, TINA.org has invested considerable resources to investigate and track such scams.³⁴ In February 2020, TINA.org wrote about an ingestible silver solution falsely marketed as able to kill the coronavirus from within. Not only was the treatment

³¹ COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

³² *Coronavirus Cases Are Rising Again. See How Your State is Doing*, NPR, Apr. 22, 2021, <https://www.npr.org/sections/health-shots/2020/09/01/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>.

³³ *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, U.S. Food & Drug Admin., www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments (last visited Apr. 23, 2021).

³⁴ *A Growing List of Coronavirus Scams*, Truth In Advertising, Inc., Mar. 16, 2020, <https://www.truthinadvertising.org/a-growing-list-of-coronavirus-scams/>.

claim false, but the marketers also failed to disclose the possible risks of consuming silver, which include cancer and birth defects.³⁵ A few months later, TINA.org outed more than 40 wellness centers across the country deceptively promoting intravenous supplement/vitamin therapies as a way to prevent and treat COVID-19, several of which specifically targeted first responders.³⁶ Following this investigation, TINA.org exposed a multilevel marketing company misleadingly marketing supplements as able to boost children’s immune systems and keep them “virus free,” at a time when parents across the country were grappling with whether or not to send their children back to school.³⁷

TINA.org has also tracked reports of industrial bleach advertised under the name “Miracle Mineral Solution” as a treatment for COVID-19,³⁸ accounts of CBD products marketed to military veterans as a coronavirus treatment,³⁹ and Department of Justice cases and civil lawsuits regarding toothpastes and teeth-whitening products claiming to prevent COVID-19.⁴⁰

It is critical to note that while silver shards suspended in liquid, bleach, CBD, and toothpaste may sound like suspect COVID-19 treatments and cure-alls, one must remember that our country

³⁵ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020, <https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

³⁶ *IV Therapies and COVID-19: The Drip, Drip, Drip of Deceptive Claims*, Truth In Advertising, Inc., June 3, 2020, <https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

³⁷ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020, <https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>. Several other MLM companies and their distributors have touted their products as a way to prevent getting COVID-19. See, e.g., Herbalife Summary of Action, <https://www.truthinadvertising.org/herbalife-2020-summary-of-action/> (last visited Feb. 1, 2021) and *Mixed Messaging in the MLM Industry Regarding Coronavirus Claims*, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

³⁸ Press Release, The U.S. Dep’t of Justice, Justice Dep’t Seeks to End Illegal Online Sale of Indus. Bleach Marketed as “Miracle” Treatment for COVID-19 (Apr. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>.

³⁹ Fed. Food & Drug Admin. and Fed. Trade Comm’n Warning Letter to Patriot Supreme (Oct. 16, 2020), https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

⁴⁰ Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

– and the world – is living through a time of unprecedented uncertainty and fear, one that has prompted panic, heightened stress and anxiety levels, and exacerbated mental health issues.⁴¹ Moreover, as a result of historic and systemic racism, among other things, communities of color are vulnerable targets for fraud and deceptive marketing during this pandemic.⁴² Consequently, consumers, desperate to care for themselves and their loved ones, are more susceptible to the compelling and persuasive marketing tactics used to sell these bogus products.

The pandemic has also spurred ads deceptively promoting products aimed at protecting consumers from the virus. TINA.org stopped the maker of alcohol-free hand sanitizers from deceptively claiming that its products “kill” the coronavirus for up to 24 hours.⁴³ Consumers have also complained of scammers advertising and selling – but never delivering – N95 masks and other PPE.⁴⁴ And a TINA.org investigation revealed more than two dozen eBay sellers falsely claiming their face masks were “FDA approved” or illegally using the FDA’s logo on product packaging or other marketing to boost sales.⁴⁵ There have also been numerous reports of schemes targeting older Americans, including the offering of sham “COVID Wellness Kits”

⁴¹ *Emotional Well-Being and Coping During COVID-19*, Univ. of California Weill Institute for Neurosciences Dept. of Psychiatry and Behavioral Sciences, <https://psychiatry.ucsf.edu/copingresources/covid19> (last visited Feb. 1, 2021); Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, Henry J. Kaiser Family Foundation, Aug. 21, 2020, <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>; Bilal Javed et al., *The Coronavirus (COVID-19) Pandemic’s Impact on Mental Health*, Int. J. Health Plann Mgmt., June 22, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7361582/>.

⁴² Brandi Collins-Dexter, *Canaries in the Coal Mine: COVID-19 Misinformation and Black Communities*, Harvard Kennedy School Shorenstein Center on Media, Politics and Public Policy (2020), <https://shorensteincenter.org/wp-content/uploads/2020/06/Canaries-in-the-Coal-Mine-Shorenstein-Center-June-2020.pdf>. (“Even as Black people are disproportionately dying from the virus due to systemic racism, harmful inaccuracies about how to keep from contracting COVID-19, how to treat it, and where it comes from are metastasizing in Black online spaces, putting people at even greater risk.”)

⁴³ TINA.org’s Letter to Everest Microbial Defense, https://www.truthinadvertising.org/wp-content/uploads/2020/05/4_30_20-TINA-warning-ltr-to-Everest-Microbial-Defense_Redacted.pdf.

⁴⁴ Press Release, The U.S. Dep’t of Justice, Michigan Man Charged with COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

⁴⁵ *Face Mask Sellers on eBay Falsely Claim Products Are ‘FDA Approved’*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/> (last visited Feb. 1, 2021).

containing hand sanitizer and/or face masks to Medicare beneficiaries in order to steal their Medicare numbers and other personal identifying information.⁴⁶

These deceptive advertising tactics not only scam consumers out of their hard-earned money, but may leave consumers unnecessarily vulnerable to the COVID-19 virus. In short, the surge in exploitative health schemes employed during this pandemic has risked, and continues to risk, the health and safety of consumers across the country.

b. Fraudulent economic claims and imposter scams

Unfortunately, pandemic-related deception does not stop with outrageous health claims; many are also exploiting the economic desperation brought on by this pandemic. TINA.org has exposed – in news stories,⁴⁷ regulatory complaints⁴⁸ and a warning letter⁴⁹ – numerous MLM companies taking advantage of the pandemic to promote what they claim to be lucrative business opportunities despite the fact that most people who get involved in multilevel marketing make little to no money.⁵⁰

TINA.org also sounded the alarm regarding investment news publisher Agora, Inc. for exploiting financial uncertainties during the pandemic to lure consumers – predominantly senior

⁴⁶ Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

⁴⁷ *MLMs Continue to Break the Law Despite FTC Warning*, Truth In Advertising, Inc., Dec. 15, 2020, <https://www.truthinadvertising.org/mlms-continue-to-break-the-law-despite-ftc-warning/>.

⁴⁸ Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021).

⁴⁹ Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021).

⁵⁰ *How MLMs Exploit Consumers During a Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021); Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021). *See also* Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>; Press Release, Fed. Trade Comm'n, FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims (June 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus>.

citizens – into pricey newsletter subscriptions with automatic renewals.⁵¹ There have also been reports of lending companies deceptively using the CARES Act to exploit debt-laden college students;⁵² financial entities pretending to be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed;⁵³ and investment scams claiming to have patented COVID cures.⁵⁴

As with the onslaught of deceptive health claims, marketers making unsubstantiated financial claims have similarly targeted vulnerable populations including retirees, students in debt, and small businesses struggling to stay afloat during this pandemic. There have also been reports of vaccine survey scams stealing personal identifying information and money,⁵⁵ and impost scams where fraudsters contact grieving families under the auspices of the FEMA Funeral Assistance Program to steal personal data.⁵⁶

IV. The need for equitable relief under section 13(b) of the FTC Act

During these extraordinary times, it is imperative that the FTC not only stop deceptive marketing as quickly as possible but also expeditiously return ill-gotten gains to victims and

⁵¹ *Agora Coronavirus Emails*, Truth In Advertising, Inc., Mar. 27, 2020, <https://www.truthinadvertising.org/agora-coronavirus-emails/>. See also, *Fed. Trade Comm'n v. Agora Financial, LLC*, No. 19-cv-3100 (D. Md.), <https://www.ftc.gov/enforcement/cases-proceedings/182-3116/agora-financial-llc>.

⁵² Fed. Trade Comm'n Warning Letter to Frank Financial Aid (Nov. 10, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

⁵³ Fed. Trade Comm'n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor_financial.pdf, https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sbadisasterloan.org_pdf.

⁵⁴ Press Release, The U.S. Dep't of Justice, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

⁵⁵ *Watch Out for New Vaccine Survey Scams*, AARP, <https://states.aarp.org/montana/vaccinesurveyscams> (last visited Apr. 23, 2021).

⁵⁶ *Funeral Assistance FAQ*, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, *A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity*, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

honest businesses struggling to make ends meet. At present, the Commission lacks authority to accomplish these twin objectives.

In 1973, Congress, realizing that the FTC’s slow-moving administrative regime did not protect consumers from imminent harm and deception, added Section 13(b) to the FTC Act to provide the Agency with a fast and effective means to halt illegal conduct.⁵⁷ Section 13(b) provides, in pertinent part, that the FTC “may seek, and after proper proof, the court may issue, a permanent injunction.”⁵⁸ Though the statute does not specifically reference equitable relief, up until the Supreme Court’s ruling in *AMG* last week, the majority of circuit courts to consider the issue (including the Seventh Circuit 30 years ago) had held that Section 13(b) implicitly authorized a wide range of equitable remedies, including restitution, rescission and disgorgement.⁵⁹

The FTC brought its first case for a 13(b) permanent injunction in 1979. Thereafter, 13(b) became a mainstay of the FTC’s enforcement program with dozens of cases brought under this section each year – among them Volkswagen,⁶⁰ Herbalife,⁶¹ DeVry University,⁶² Office

⁵⁷ See *Fed. Trade Comm’n v. Shire*, 917 F.3d 147, 155 (3d Cir. 2019), <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>. (“Section 13(b) thus empowers the FTC to speedily address ongoing or impending illegal conduct, rather than wait for an administrative proceeding to conclude.”)

⁵⁸ 15 U.S.C. § 53.

⁵⁹ After *Credit Bureau*, the Third Circuit held that Section 13(b) of the FTC Act does not permit equitable relief. See *Fed. Trade Comm’n v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020), <https://www2.ca3.uscourts.gov/opinarch/182621p.pdf> (“If Congress contemplated the FTC could sue for disgorgement under Section 13(b), it probably would not have required the FTC to show an imminent or ongoing violation. That requirement suggests Section 13(b) does not empower district courts to order disgorgement.”).

⁶⁰ Press Release, Fed. Trade Comm’n, Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁶¹ Press Release, Fed. Trade Comm’n, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

⁶² Lesley Fair, *FTC Case Against DeVry Yields \$100 Million Settlement*, Fed. Trade Comm’n, <https://www.ftc.gov/news-events/blogs/business-blog/2016/12/ftc-case-against-devry-yields-100-million-settlement>.

Depot⁶³ and Uber.⁶⁴ In fact, from 2016 to 2020, the FTC returned approximately \$1.1 billion to consumers using 13(b).⁶⁵ But now that the Supreme Court has held that 13(b) permits wrongdoers the right to pocket the monies they have stolen.⁶⁶ As such, the FTC will no longer be able to make victims of fraud and deception whole using 13(b).

Consequently, as the coronavirus pandemic continues to ravage our nation, the FTC will be powerless to provide consumers and honest businesses with swift and equitable remedies and wrongdoers will no doubt be emboldened to exploit this national crisis for their own financial gains. Moreover, the Supreme Court decision in AMG's favor will have dramatic and dire consequences for the dozens of Section 13(b) cases the FTC currently has pending.⁶⁷ The FTC's docket currently includes its antitrust complaint against Facebook,⁶⁸ pyramid scheme cases against Neora⁶⁹ and Success By Health,⁷⁰ its case against the makers of the deceptively marketed memory supplement Prevagen,⁷¹ and the action it filed against a house-flipping scam, which

⁶³ Press Release, Fed. Trade Comm'n, FTC Sending More Than \$34 Million in Refunds to Office Depot Customers (Feb. 20, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-sending-more-34-million-refunds-office-depot-customers>.

⁶⁴ Press Release, Fed. Trade Comm'n, FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement (July 16, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement>.

⁶⁵ Recent FTC Cases Resulting in Refunds, <https://www.ftc.gov/enforcement/cases-proceedings/refunds> (last visited Feb. 1, 2021).

⁶⁶ See *AMG Capital Mgmt., LLC, et al. v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

⁶⁷ As of mid-2020, the FTC was a party to 56 Section 13(b) cases pending in federal district court. Brief for the Federal Trade Commission, *AMG Capital Mgmt. LLC, et al. v. Fed. Trade Comm'n*, No. 19-508 (U.S. Nov. 30, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162011/20201130120930570_19-508bs.pdf.

⁶⁸ *Fed. Trade Comm'n v. Facebook, Inc.*, No 191-0134 (D.D.C.), <https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v>.

⁶⁹ Press Release, Fed. Trade Comm'n, FTC Sues Multi-Level Marketer Neora, formerly known as Nerium, Alleging it Operates as an Illegal Pyramid Scheme (Nov. 1, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-sues-multi-level-marketer-neora-formerly-known-nerium>.

⁷⁰ Press Release, Fed. Trade Comm'n, FTC Acts to Shut Down 'Success by Health' Instant Coffee Pyramid Scheme (Jan. 16, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-acts-shut-down-success-health-instant-coffee-pyramid-scheme>.

⁷¹ Press Release, Fed. Trade Comm'n, FTC, New York State Charge the Marketers of Prevagen With Making Deceptive Memory, Cognitive Improvement Claims (Jan. 9, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-new-york-state-charge-marketers-prevagen-making-deceptive>.

includes real estate celebrities Dean Graziosi and Scott Yancey as defendants.⁷² In all of these 13(b) cases the FTC is now foreclosed from seeking monetary relief, even if it prevails.

And to make matters worse, in 2019, the Third Circuit Court of Appeals ruled in *FTC v. Shire ViroPharma, Inc.* that the FTC cannot seek equitable relief under Section 13(b) if the alleged violation occurred in the past and the defendant was not “violating” or “about to violate” the law.⁷³ As a result, wrongdoers that line their pockets with money they have illegally obtained can now sail off into the sunset with immunity just as long as they retire their scams before the FTC catches up with them.

In order to effectively police wrongdoers and protect consumers and honest businesses, legislative action must be immediately taken to give the FTC the authority it needs to obtain monetary remedies for past acts as well as present ones. The glaring reality is that until Congress acts, wrongdoers will be free to steal, lie and cheat their way to riches and they will have an absolute right to retain all funds they steal from their victims. Every day that goes by without a 13(b) legislative fix will undoubtedly negatively impact our economy and have a devastating impact on U.S. consumers.

V. Equipping the FTC with independent penalty authority

The common thread that runs through all scams is the wrongdoers’ desire for financial gain. While the COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act authorizes the FTC to seek civil monetary penalties for first-time violations, it is limited in time

⁷² Press Release, Fed. Trade Comm’n, FTC Seeks to Add Real Estate Inv. Celebrities Dean Graziosi and Scott Yancey as Defendants in Real Estate Training Case (Aug. 31, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-seeks-add-real-estate-investment-celebrities-dean-graziosi>.

⁷³ *Fed. Trade Comm’n v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>.

and only addresses deceptive COVID-19 health claims and government benefit scams.⁷⁴ The Act fails to cover frauds and deceptions that take advantage of the economic devastation wrought by this pandemic such as work-from-home scams, phony job offers, pyramid schemes, and investment scams.⁷⁵ Equipping the FTC with broad independent penalty authority would serve as a valuable deterrent against deliberate, egregious violators that are using this pandemic to take advantage of some of the most vulnerable populations in our society.

The FTC has nationwide jurisdiction and an unparalleled view of the landscape. It maintains data on millions of consumer complaints and has unique statutory authority to operate across national borders.⁷⁶ Even with its finite resources, the FTC is able to undertake investigations and develop facts necessary to prove cases against sophisticated corporate wrongdoers for large illegalities. But this is where the agency's efficacy ends. The FTC's ability to hold offenders accountable for their transgressions is sorely lacking.

Time and again, the FTC is forced to bring a second action against a lawbreaker because the company found it economically advantageous to ignore the initial consent agreement⁷⁷ or closing

⁷⁴ COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

⁷⁵ See Emma Fletcher, *Income Scams: Big Promises, Big Losses*, Consumer Protection Data Spotlight, Dec. 10, 2020, <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses>.

⁷⁶ Since January 2020, the FTC has received more than 450,000 pandemic-related consumer reports. See *FTC COVID-19 and Stimulus Reports*, Consumer Sentinel Network Reports, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map> (last visited Apr. 23, 2021).

⁷⁷ Facebook entered into a consent agreement with the FTC in 2012 requiring the social media platform to stop its illegal practice of disclosing unauthorized private, identifying user information. See Decision and Order, *In the Matter of Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>. Unable to penalize Facebook for its transgressions, the FTC only obtained a promise that Facebook would abide by the law going forward. As this reprimand was effectively toothless, Facebook reverted to its deceptive privacy practices, requiring the FTC to file a complaint in federal court in 2019 to hold the platform accountable yet again for its failure to follow the law and protect consumers' privacy. See Complaint for Civil Penalties, Injunction, and Other Relief, *U.S.A. v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), available at https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf. Only at this point, was the FTC able to punish Facebook with a \$5 billion penalty. Had the FTC been able to penalize Facebook initially, it is likely that consumer privacy rights would have been better protected years earlier and Facebook less likely to flout the law. See also Strengthening the Federal

letter.⁷⁸ Not only does this waste the FTC’s limited resources but it ensures that illegal behavior continues to exploit consumers for longer than is necessary. Until the FTC has broad, generic authority to turn on the penalty switch in appropriate cases, companies will find it highly profitable to flout FTC laws.

Further, penalties are a vital necessity in cases in which the precise economic harm to consumers is difficult to measure. For example, penalty authority could have a major impact on social media influencers, who are promoting false and dubious products and services during this pandemic and frequently do not disclose their material connections to the brands they promote.⁷⁹ TINA.org’s investigations of the Kardashians,⁸⁰ Ciroc,⁸¹ and influencers on Instagram who received FTC warning letters⁸² are illustrative of the problem. Additionally, Senator

Trade Commission’s Authority to Protect Consumers: Hearing Before the Comm. on Commerce, Science, and Transp., 117th Cong. 1-2 (2021) (statement of Rohit Chopra, Comm’n, Fed. Trade Comm.), https://www.ftc.gov/system/files/documents/public_statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf. (“[Google]’s repeated law violations over the last decade were frequently met with favorable treatment from the FTC. ... While the FTC is quick to bring down the hammer on small businesses, companies like Google know that the FTC is simply not serious about holding them accountable. Congress and Commissioners must turn the page on the FTC’s perceived powerlessness.”)

⁷⁸ In June 2018, the FTC sent a closing letter to Williams-Sonoma following an investigation into the company’s marketing of certain Chinese-made products as “Crafted in America.” Fed. Trade Comm’n Closing Letter to Williams-Sonoma, Inc. (June 13, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf. The FTC did not pursue its investigation due to the company’s corrective actions and assurances that it was an isolated error. This representation was false. Between April and May 2019, TINA.org collected more than 800 examples of products that were marketed as made in the USA but were either imported or made with imported materials. (Examples collected were drawn from seven of Williams-Sonoma’s sites — Williams-Sonoma, Williams-Sonoma Home, Rejuvenation, Pottery Barn, PBteen, Pottery Barn Kids and West Elm.) As a result of these findings, the FTC filed an administrative action against Williams-Sonoma, which settled the charges for \$1 million. Decision, *In the Matter of Williams-Sonoma, Inc.*, No. C-4724 (F.T.C. July 13, 2020), <https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf>. See also, TINA.org’s Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims, https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

⁷⁹ Laura Bradley, *How Influencers Are Milking the Coronavirus for Clout – and Money*, Daily Beast, Mar. 22, 2020 (updated June 23, 2020), <https://www.thedailybeast.com/how-influencers-are-milking-the-coronavirus-for-clout-and-money>.

⁸⁰ Kardashian/Jenner et al. Summary of Action, <https://www.truthinadvertising.org/kardashian-summary-action/> (last visited Feb. 1, 2021).

⁸¹ Ciroc Summary of Action, <https://www.truthinadvertising.org/ciroc-summary-action/> (last visited Feb. 1, 2021).

⁸² Instagram Influencers Summary of Action, <https://www.truthinadvertising.org/influencers-ftc-complaint-summary-action/> (last visited Feb. 1, 2021).

Blumenthal's efforts to curb dangerous and predatory social media marketing targeting children, such as ads promoting detox teas, would benefit from broad FTC penalty authority.⁸³ If companies and influencers were exposed to monetary penalties each time a promotional post failed to adequately disclose the material connection at issue, social media marketers would be less likely to deceive consumers, many of whom are children and young adults.⁸⁴

Additionally, even where civil penalties are available for knowing violations of trade regulation rules, the Commission is hamstrung in its efforts to pursue wrongdoers.⁸⁵ The requirement that the FTC refer a complaint for penalties to the Attorney General only leads to harmful delays and a misallocation of scarce resources. The current inefficient outsourcing of authority should be eliminated and the FTC authorized to independently litigate civil penalties.

VI. The need for a civil penalty fund

The benefits of imposing penalties do not need to stop at deterring wrongdoers from repeating illegal acts. If authorized, the FTC could use penalty funds to make consumers who have been economically harmed monetarily whole again.

At present, FTC redress is limited to the amount of money it can obtain directly from the wrongdoer(s). But because many defendants have the means and inclination to dissipate assets through lavish spending, bankruptcy protection, hiding funds in inaccessible accounts/locations, or are otherwise insolvent, it is often the case that consumers who have a right to redress receive pennies on the dollar, if they receive anything.⁸⁶ It is for this exact reason that other federal

⁸³ Letter from Sen. Richard Blumenthal to the Honorable Joseph Simons, Chairman, Fed. Trade Comm. (June 4, 2019), <https://twitter.com/SenBlumenthal/status/1136059843285061632>.

⁸⁴ Of course, any such legislation should give the FTC discretion so that nano-influencers and micro-influencers with smaller followings are not treated the same as sophisticated, career influencers who know their legal responsibilities.

⁸⁵ See 15 U.S.C. Sec. 45(m)(1)(A).

⁸⁶ See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Carey G. Howe, Anna C. Howe, Shunmin Hsu, Ruddy Palacios, and Oliver Pomazi, *Fed. Trade Comm'n v. Arete Financial Group, et al.*, No. 19-cv-2109 (C.D. Cal. Sept. 9, 2020), <https://www.ftc.gov/system/files/documents/cases/>

agencies use collected penalty funds to compensate victims, including the Consumer Financial Protection Bureau's Civil Penalty Fund⁸⁷ and the SEC's Fair Fund.⁸⁸

For the sake of providing complete and timely consumer redress, particularly now when many in our country are in an economic freefall and consumers do not have the luxury of time, the FTC should be authorized to establish such a consumer reimbursement fund, rather than being required to arbitrarily deposit penalties in the U.S. Treasury, as is the current practice.⁸⁹

VII. Additional considerations to better protect consumers during the pandemic

TINA.org would also like to highlight areas of law that may be strengthened to better protect consumers during this pandemic.

a. APA rulemaking authority

The FTC's Section 19 rulemaking authority is seriously hindered by unnecessary roadblocks and hurdles imposed by the Magnuson-Moss Warranty Federal Trade Commission

[145_order_for_perm_inj_as_to_arete_defs_anna_howe_2020-09-10.pdf](#) (monetary judgment of \$43.3 million partially suspended upon surrender of at least \$835,000 and additional assets). *See also*, Press Release, Operators of Student Debt Relief Scheme Agrees to Pay at Least \$835,000 to Settle FTC Allegations (Sept. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/operators-student-debt-relief-scheme-agree-pay-least-835000>; Redacted Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Mark Gelvan, Outreach Calling, Inc., Outsource 3000, Inc., and Production Consulting Corp., *Fed. Trade Comm'n v. Outreach Calling Inc., et al.*, No. 20-cv-7505 (S.D.N.Y. Oct. 26, 2020), https://www.ftc.gov/system/files/documents/cases/de_42_-_redacted_order_as_to_gelvan_and_corporations_entered.pdf (monetary judgment of \$56,023,481, which is partially suspended based on inability to pay.). *See also*, Press Release, FTC Joins Four States in Action to Shut Down Alleged Sham Charity Funding Operation That Bilked Millions from Consumers (Sept. 16, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-joins-four-states-to-shut-down-alleged-sham-charity-operation>; Stipulated Order for Permanent Injunction and Monetary Judgment Against Vemma Nutrition Co. Vemma International Holdings, Inc. and Benson K. Boreyko, *Fed. Trade Comm'n v. Vemma*, No. 15-cv-1578 (D. Ariz. Dec. 20, 2016), https://www.ftc.gov/system/files/documents/cases/161222_vemma_273-stipulated_final_order_redacted.pdf (\$238 million judgment partially suspended upon payment of \$470,136). *See also*, Press Release, Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges (Dec. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges>.

⁸⁷ *Civil Penalty Fund*, Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/> (last visited Feb. 1, 2021).

⁸⁸ 15 U.S.C § 7246.

⁸⁹ *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-brings-first-ever-cases-under-bots-act>.

Improvements Act.⁹⁰ As Jessica Rich, former Director of the FTC's Bureau of Consumer Protection, noted in testimony focused on safeguarding American consumers during this pandemic before the House Subcommittee on Consumer Protection and Commerce, "the rulemaking process set forth in Section 19 is highly complex and elongated... As a result, most rulemakings under these procedures have taken many years – nine in the case of both the Credit Practices and Used Car Rules. . . ." ⁹¹

Further, Commissioner Rohit Chopra has noted that establishing FTC rules through APA rulemaking authority would be much more efficient, and would be more effective than litigating multiple cases on a similar subject matter. "For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation."⁹² At the same time, APA rulemaking authority would enable the Commission to "establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it."⁹³

In short, the unnecessary hurdles imposed by Magnuson-Moss on the FTC's rulemaking ability should be eliminated and the FTC should be allowed to use the Administrative Procedure Act more broadly to establish necessary rules.

⁹⁰ Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

⁹¹ Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic: Hearing Before Subcomm. On Consumer Protection and Commerce of the Comm. on Energy and Commerce, 117th Cong. 6 (2021) (statement of Jessica L. Rich, Distinguished Fellow, Inst. Of Technology Law and Policy, Georgetown University Law Center), <https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-RichJ-20210204.pdf>.

⁹² Comment of Fed. Trade Comm'n Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf.

⁹³ *Id.*

b. Require funeral homes to disclose their pricing online

More than 565,000 individuals in the United States have died of COVID-19.⁹⁴ And the overwhelming grief of family members forced to lay their loved ones to rest during this pandemic is exacerbated by the fact that funeral service providers are not required to post their price lists on their websites. Funeral service providers who advertise online should be required by law to post their price lists on their websites in order to conform to consumers' shopping behavior and allow consumers to meaningfully price-shop from the comfort of their own homes before committing to a purchase during such a difficult time.⁹⁵

Not only are transactions in the funeral industry inherently fraught with emotion and stress, they are also ones with which consumers tend to have little experience or familiarity and ones that require making important and costly decisions under tight time constraints. Moreover, such a law would also allow the FTC to more easily review funeral homes' sales and business practices without imposing any significant burden on the funeral service providers.⁹⁶

c. Require companies that use negative-option offers to simplify cancellation and provide clearer renewal information

As U.S. consumers shelter at home during this pandemic, many are turning to online shopping for their purchasing needs – from PPE to toilet paper to grocery items and medication. Inevitably, some are also unintentionally enrolling in unwanted negative-option offers that

⁹⁴ *Coronavirus Cases Are Rising Again. See How Your State is Doing*, NPR, Apr. 22, 2021, <https://www.npr.org/sections/health-shots/2020/09/01/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>.

⁹⁵ Such a rule would also align with stay-at-home recommendations during the COVID-19 outbreak. *See also* TINA.org's Funeral Rule Comment, <https://www.truthinadvertising.org/wp-content/uploads/2020/06/TINA-Funeral-Rule-Comment.pdf>.

⁹⁶ *See* FTC's Media Resources for the Funeral Rule, <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> (last visited Feb. 1, 2021).

siphon money off of already strained budgets.⁹⁷ Unfortunately, deceptive negative-option offers have become a multibillion-dollar industry. On a regular basis, consumers find that they have been charged for long-forgotten subscriptions,⁹⁸ or that they are unable to cancel a trial before being charged. Indeed, losses relating to such offers in just 14 cases the FTC pursued over the past decade have totaled more than \$1 billion.⁹⁹

Companies that use negative-option offers should be required to (1) permit consumer cancellation of negation options in an easy and specific manner – at minimum, if the subscription was entered into online, then it should be able to be canceled online,¹⁰⁰ (2) provide timely reminders to consumers before recurring charges are initiated,¹⁰¹ and (3) notify consumers of any material changes to the terms of a subscription and provide an opportunity to cancel the subscription before the terms go into effect.¹⁰²

Moreover, legislation that prohibits marketers from surreptitiously tying “free” trial offers to future, ongoing charges would be beneficial. TINA.org continually receives complaints from consumers who report being charged repeatedly after signing up for what they thought was a free

⁹⁷ Consumer complaints (very often from senior citizens) concerning negative-option offers are one of the most common types of complaints that TINA.org receives. Consumers generally complain about unwittingly being enrolled in a negative-option plan and then finding it impossible to cancel the subscription.

⁹⁸ This issue is likely exacerbated, in part, by increasing rates of digitization: without a physical item, like a book, arriving in the mail, or paying by writing a check, the only indication a consumer may have of a long-forgotten, converted subscription is an ambiguously labelled, recurring charge on their credit card. See Sophia Wang, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 Cornell J. L. & Pub. Pol’y 197, 200 (Fall 2016).

⁹⁹ See *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, Better Business Bureau, 2 (Dec. 2018), <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>.

¹⁰⁰ ROSCA mandates only that, for goods and services offered on the internet, there be “simple mechanisms for a consumer to stop recurring charges,” but provides no specifics and no requirement that cancellation be online. See 15 U.S.C. §8403(3).

¹⁰¹ When consumers relinquish control, they incur the additional burden of tracking their various subscriptions. If a consumer forgets about an expiring trial or a recurring charge, it can result in an inefficient allocation of consumer resources. Indeed, 48 percent of consumers have had a free trial convert to a paid subscription without realizing it. See Brady Porche, *Poll: Recurring charges are easy to start, hard to get out of*, Creditcards.com (Aug. 22, 2017), <https://www.creditcards.com/credit-card-news/autopay-poll.php>.

¹⁰² See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

trial offer.¹⁰³ Unless further action is taken to protect consumers, the trend of consumers being unwittingly trapped in deceptive trial offers and automatically renewing subscriptions will only grow.

d. Exclude Section 230 of the Communications Decency Act protection for commercial speech

When Section 230 of the Communications Decency Act was enacted in 1996, neither Google nor Facebook existed and Amazon had just arrived on the scene as an online bookseller. The law was enacted to protect young internet service providers at a time when the internet was just beginning to gain popularity,¹⁰⁴ protecting multibillion-dollar companies from liability for deceptive marketing statements made about products sold on their websites and from which they profit was not on the agenda.

However, fast-forward 25 years, and that is exactly what Amazon, Google and others argue – that Section 230 shields them from liability for the deceptive marketing statements that lure consumers to purchase bogus products sold on their websites by third parties and from which these shopping platforms turn a handsome profit. Such unfettered impunity has led to widespread deceptive marketing issues online, issues that will continue to multiply at an unprecedented rate as consumers pivot to online shopping as a result of the COVID-19 pandemic.¹⁰⁵

¹⁰³ Between 2015 and 2017, consumer complaints about free trials more than doubled in the U.S. Over that same span, the Better Business Bureau identified nearly 37,000 complaints – the average loss being \$186. The FBI’s Internet Crime Complaint Center also recorded a rise in complaints about free trial offers between 2015 and 2017, with losses totaling more than \$15 million over that time span. Corresponding with this consumer dissatisfaction, more than 100 federal class actions have been filed on behalf of U.S. consumers complaining about various negative option terms and conditions since 2014. And during this same time period, the FTC has brought 23 cases under ROSCA and pursued at least 5 cases against payment processors linked to deceptive negative option and free trial offers. See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

¹⁰⁴ U.S. Dep’t of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations* (June 2020), <https://www.justice.gov/file/1286331/download>.

¹⁰⁵ United Nations Conference on Trade Dev., *COVID-19 has changed online shopping forever, survey shows* (Oct. 8, 2020), <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>; Press Release, Research and Mkts., *COVID-19 Impact on e-Commerce & Online Payments Worldwide, 2020 – Online Shopper Penetration Increases During the Pandemic* (May 29, 2020), <https://www.globenewswire.com/news->

By way of example, a TINA.org investigation found that Amazon actively promotes and profits from more than 100 deceptively marketed brain supplements primarily sold to senior citizens on its website.¹⁰⁶ Amazon is not just turning a blind eye to claims that these unproven products improve memory, among other purported health benefits, it is actively promoting these claims by independently publishing its own marketing content to amplify the deceptive marketing messages of third-parties.¹⁰⁷

Similarly, a TINA.org investigation found that eBay was promoting more than two dozen eBay sellers spanning 45 listings that falsely claimed their face masks were “FDA approved” and/or illegally used the FDA’s logo to boost sales of their products.¹⁰⁸ eBay was not only allowing the sale of these falsely marketed face masks, it was also giving some items greater exposure by listing them as “sponsored” or “promoted products” in exchange for a fee.

To date, online department stores like Amazon and eBay have largely succeeded in fending off all attempts to hold them accountable for false and deceptive commercial speech on their websites using Section 230 as their impenetrable defense shield.¹⁰⁹ Removing this bulwark from online commercial speech would allow the FTC to hold online stores to the same legal standards

[release/2020/05/29/2040716/0/en/COVID-19-Impact-on-e-Commerce-Online-Payments-Worldwide-2020-Online-Shopper-Penetration-Increases-During-the-Pandemic.html](https://www.truthinadvertising.org/release/2020/05/29/2040716/0/en/COVID-19-Impact-on-e-Commerce-Online-Payments-Worldwide-2020-Online-Shopper-Penetration-Increases-During-the-Pandemic.html).

¹⁰⁶ *How Amazon Promotes, Profits from Deceptively Marketed Brain Supplements*, Truth In Advertising, Inc., Jan. 16, 2020, <https://www.truthinadvertising.org/how-amazon-promotes-profits-from-deceptively-marketed-brain-supplements/>.

¹⁰⁷ Deceptive health claims are given increased visibility on the website through sponsored search results, designations such as “Amazon’s Choice” and “Editorial recommendations,” star ratings, and other Amazon-specific marketing materials. Amazon also plays an important role in the processing of many of these deceptively marketed brain supplements, collecting customer shipping information, fulfilling orders and even gift-wrapping some items when requested.

¹⁰⁸ *Face Mask Sellers on eBay Falsely Claim Products are ‘FDA Approved’*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>.

¹⁰⁹ A push has begun to remove certain elements of Section 230 protection from online commercial speech. For example, the Country of Origin Labeling Online Act, or COOL Act (S. 3707), which sought to require clear disclosure of seller location and country-of-origin labeling for products advertised online, was introduced in the 116th Congress.

as brick and mortar stores, and ensure that online websites are held accountable for the deceptive marketing they promote and profit from.

VIII. CONCLUSION

Deceptive marketing and similar forms of commercial dishonesty are a scourge of the American economy, inflicting billions of dollars in losses to cheated consumers and distorting the efficient allocation of resources, rewarding those who hone ingenious frauds and punishing honest competitors. Many of the deceptive marketing schemes and frauds exploiting the COVID-19 pandemic go well beyond inflicting economic injuries – they result in physical harm and, in some instances, even death. Consumers are foregoing appropriate preventative measures and medically advantageous treatments for useless products that are falsely marketed. At this juncture, there is a real risk that the deceptive marketing practices enumerated today will only multiply as the agency primarily charged with policing these deceptive acts and practices, the FTC, lacks the necessary authority to claw back ill-gotten gains, punish egregious wrongdoers and fully reimburse victims of fraud.

TINA.org looks forward to working with the Subcommittee and Congress to address the issues articulated above, and I would be happy to answer your questions.