

ICYMI: The FTC Has Civil Penalty Authority Relative To COVID-Related Advertising

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As 2020 drew to a close and Congress scrambled to reach a deal to continue funding the federal government, tucked in amidst the 2124 pages of the 2021 Appropriations Bill is a new power for the FTC: civil penalty authority for deceptive COVID-related acts and practices. Titled the COVID-19 Consumer Protection Act (see page 2094 [here](#)), the law states as follows:

(b) For the duration of a public health emergency declared pursuant to section 319 of the Public Health Service Act (42 U.S.C. 247d) as a result of confirmed cases of the 2019 novel coronavirus (COVID-19), including any renewal thereof, it shall be unlawful for any person, partnership, or corporation to engage in a deceptive act or practice in or affecting commerce in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C.45(a)) that is associated with—

(1) the treatment, cure, prevention, mitigation, or diagnosis of COVID-19; or

(2) a government benefit related to COVID-19.

(c) ENFORCEMENT BY THE FEDERAL TRADE COMMISSION.—

(1) VIOLATION.—A violation of subsection (b) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

The civil penalty authority is granted through the duration of the current public health emergency. The [current](#) maximum civil penalty amount *per violation* is \$43,280.

Here's why this is significant: The FTC generally does not have authority to seek civil penalties for a first violation of the FTC Act. However, if a company or individual is subject to an order and then violates that order or where the FTC has obtained a final cease and desist order via litigation and subsequently put a non-party on notice of a violation, the FTC can seek civil penalties. With the authority granted in the COVID-19 Consumer Protection Act, though, the FTC can identify practices relating to COVID-19 treatment, cure, prevention, mitigation, diagnosis, or a government benefit that the agency considers deceptive per Section 5 of the FTC Act and seek civil penalties for that violation.

The law does not specify how each violation will be calculated. However, at a recent webinar, the [Rose Sheet](#) reports that Richard Cleland, FTC Assistant Director for Advertising Practices, indicated that "Every ad is a separate violation and every day that that ad runs or is disseminated to the public is a separate violation."

As we chronicled, the FTC issued [hundreds](#) of COVID-related warning letters relating to deceptive COVID claims during 2020. And yet, the agency faced [criticism](#) from members of Congress who questioned why the FTC did not pursue financial remedies on consumers' behalf. With the rollout of the vaccines, potentially more financial assistance in the works, and the virus raging on, the FTC has a larger hammer than it did just a year ago and advertisers of COVID-related products should expect them to use it.

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