



Office of Commissioner
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WASHINGTON, D.C. 20580

Regarding the Issuance of a Notice of Penalty Offenses on Substantiation of Product Claims

March 31, 2023

There is much the Commission agrees about underlying today's issuance of a Notice of Penalty Offenses on Substantiation of Product Claims. We appreciate the dedication of the FTC's staff to use every available tool to protect consumers from unlawful conduct and to obtain civil penalties—especially in the wake of the loss of our ability to seek equitable monetary relief under Section 13(b) of the FTC Act. This is the fourth time the Commission has issued an NPO since that decision, revitalizing a long-underused tool.

even worse, they can cause serious health problems requiring acute medical attention.³ ² and,

¹ A Notice of Penalty Offenses puts firms on clear notice about deceptive or unfair acts or practices the FTC has fully litigated. The agency may then seek civil penalties from anyone who, having received the Notice, violates the prohibitions against those acts or ~~practices~~ <https://www.ftc.gov/pressroom/20230321-ftc-issues-notice-penalty-offenses-substantiation-product-claims>

³ See Andrew I. Geller, M.D., Nadine Shehab, Pharm.D., M.P.H, *et al*, Emergency Department Visits for Adverse Events Related to Dietary Supplements, *New England Journal of Medicine*, (October 15, 2015), <https://www.nejm.org/doi/full/10.1056/nejmsa1504267>

Unreliable claims also distort the health-product market in ways that favor cavalier or unscrupulous companies. It is impossible to evaluate competing products in a market with no baseline level of accuracy or truthfulness about the effectiveness of those claims. Scrupulous companies with effective products can get crowded out of a market when compared to snake oil that promises the same benefits but better, faster, and cheaper. People suffer real physical, financial, and emotional harm when purported cures and treatments do not live up to their marketing promises. These harms may be different but are no less pernicious than those resulting from the types of fraud we have targeted with other NPOs.

Obtaining access to civil penalties for first-time offenders through this Notice is essential to changing the dynamics of the marketplace. Injunctive relief alone cannot, and will not, remediate the harm from these practices, but monetary penalties can send a strong message to potential violators.

Civil penalties large enough to change market behavior must be part of the equation when it comes to substantiation cases. Both the COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act (CCPA) and the Opioid Addiction Recovery Fraud Prevention Act of 2018 (OARFPA) authorize the FTC to obtain civil penalties for unsubstantiated claims about COVID-19 cures or addiction treatment, respectively.⁴

In addition, we would like to address any concerns regarding the question of the efficient allocation of our resources in pursuing an NPO on substantiation. First, providing firms with an explicit notice of their legal responsibilities facilitates their compliance. The notice is legally binding and enhances general deterrence in the market. Second, the notice no doubt enables staff to allocate more efficiently their investigatory resources. The staff time required to identify firms, transmit notices, and monitor firm conduct for the deceptive or unfair practices we've identified, although not negligible, is nevertheless more efficient than attempting to deter those abuses without making companies' legal responsibilities explicit and having the possibility of civil penalties for violations of the law.

Some also have argued that, despite longstanding precedent, the FTC should have limited its application of our Section 13(b) authority lest we draw the ire of those who have sought to challenge this agency's fundamental ability to function.⁵

Limiting the application of Section 13(b), or any forthcoming legislative fix, to some narrow category of "super frauds" would not only fundamentally undermine our mission, leaving millions of consumers vulnerable to scams and unfair or deceptive practices, but also flies in the face of over 40 years of prudent application of this authority. It also lacks any statutory basis.

⁴ See, FTC, In First Action Under COVID-19 Consumer Protection Act, FTC Seeks Monetary Penalties for Deceptive Marketing of Purported Coronavirus Treatments, (April 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/first-action-under-covid-19-consumer-protection-act-ftc-seeks-monetary-penalties-deceptive-marketing> The FTC sought monetary penalties for a failure to substantiate health-claims in its first case under the COVID-19 Consumer Protection Act (CCPA).

⁵ See J. Howard Beales and Timothy J. Muris, Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground, George Mason University Law & Economics Research Paper Series, 20-34 (Dec. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3750787.
