

July 01, 2020

# CBD, the FDA, the FTC, and Your Business: Smart Advertising During COVID-19

With the Federal Trade Commission (FTC) and the U.S. Food and Drug Administration (FDA) on high alert for unsubstantiated COVID-19 prevention or treatment claims, companies need to practice smart advertising now more than ever. Which companies have faced FTC and FDA regulatory action? What types of claims did they make? And how can your company market your products (CBD-based or otherwise) to avoid claims that could be alleged to deceive your consumers and cause you to face similar regulatory repercussions, especially during the COVID-19 pandemic? The below summary answers your pressing questions about advertising products during this period of heightened scrutiny and uncertainty.

## 1. FTC and FDA Warnings to Marketers of Unapproved COVID-19 Products

Between March and mid-June of 2020, the FTC, both individually and jointly with the FDA, issued letters to over 250 companies and individuals warning them “to stop making unsubstantiated claims that their products and therapies [could] treat or prevent COVID-19.”<sup>[i]</sup> The companies receiving warning letters offered a range of treatments and products that supposedly could prevent, treat, or cure COVID-19, including CBD and herbal supplements, acupuncture, ozone therapy treatments, Vitamin C and Zinc intravenous infusions, and even freeze-dried horse milk.<sup>[ii]</sup> (See an up-to-date list of the companies that have received joint FTC/FDA warning letters, FTC warning letters, and robocall warning letters for their fraudulent and unapproved COVID-19 treatment claims [here](#).)

In early March, the FTC and the FDA jointly issued their first warning letters “for unapproved products intended to prevent or treat...COVID-19” to seven companies.<sup>[iii]</sup> The agencies announced that they would monitor the companies’ “social media, online marketplaces and incoming complaints to help ensure that the companies [did] not continue to sell fraudulent products under a different company name or on another

## Related Industries

Agribusiness

Cannabis

Food & Beverage

## Related Practices

COVID-19 Resource Center

Regulatory

website.”<sup>[iv]</sup> Furthermore, the FDA established a cross-agency task force working with major retailers and online marketplaces to monitor the marketplace for fraudulent COVID-19 treatment products.

Since those first letters were issued, each warning letter has followed a similar structure. It informs the recipient company that “one or more of [its product] efficacy claims...are unsubstantiated because they are not supported by scientific evidence, and therefore violate the FTC Act”; instructs the company “to immediately stop making all claims that [its] products can treat or cure COVID-19”; and directs it “to notify the Commission within 48 hours about the specific actions they have taken to address the agency’s concerns.”<sup>[v]</sup> Furthermore, each letter notes that the FTC may seek a federal court injunction if the recipient company does not stop making its false COVID-19 treatment claims – an action the agency took in *FTC v. Marc Ching*.

## **2. FTC v. Marc Ching: The FTC’s First Case Against A COVID-19 Product Marketer**

In April 2020, the FTC announced its first COVID-19 product case against a California-based manufacturer alleged to have made unsubstantiated and false claims that his company’s herbal and CBD supplements could prevent, treat, or cure serious diseases like cancer and COVID-19. The agency issued a federal district court complaint for a preliminary order enjoining Marc Ching, individually and doing business as Whole Leaf Organics, “from disseminating false or unsubstantiated advertisement claims in connection with the labeling, advertising, marketing, distribution, and sale” of two different herbal supplement product lines.<sup>[vi]</sup>

First, beginning in or around March 2020, Whole Leaf Organics allegedly marketed its “Thrive” herbal supplement, a capsule comprised mainly of Vitamin C and herbal extracts, as a product that “treats, prevents or reduces the risk of COVID-19.”<sup>[vii]</sup> The company allegedly “represented that the benefits of Thrive [were] clinically or scientifically proven,” despite the lack of “competent and reliable scientific evidence” supporting such a claim about Thrive or its component ingredients.<sup>[viii]</sup>

Second, since December 2018, Whole Leaf Organics had marketed three CBD-based products (CBD-EX, a capsule consisting mainly of CBD and herbal extracts, and CBD-RX and CBD-Max, oils consisting mainly of CBD and hemp extract) as effective cancer treatment products. According to the FTC’s complaint, Whole Leaf Organics claimed that CBD-EX, CBD-RX, and CBD-Max could treat cancer and represented that their benefits were “clinically or scientifically proven” despite the lack of “competent and reliable human clinical trials...to substantiate the advertised health claims for these products.”<sup>[ix]</sup>

Ching agreed to the preliminary order, which barred his company from continuing to claim that Thrive may effectively treat, prevent, or reduce the risk of COVID-19 and from “claiming that three CBD-based products he sells are effective cancer treatments,” pending the resolution of the parallel administrative complaint.<sup>[x]</sup>

## **3. Smart Product Marketing During COVID-19**

Amidst heightened scrutiny of disease treatment claims and CBD products, how can your business advertise your products (CBD-based or otherwise) truthfully, carefully, and effectively during the ongoing COVID-19 crisis.

First, do not use marketing language stating or suggesting that a product may prevent, cure, or treat any disease, from cancer to COVID-19, unless you have credible and reliable scientific evidence to substantiate that claim. As the FDA warns, “[p]roducts that claim to cure, mitigate, treat, diagnose or

prevent disease, but are not proven safe and effective for those purposes, defraud consumers of money and can place consumers at risk for serious harm. Using these products may lead to delays in getting proper diagnosis and treatment of COVID-19 and other potentially serious diseases and conditions.”<sup>[xi]</sup> Currently, the FDA has not received enough scientific evidence to support claims that CBD may prevent, treat, or cure COVID-19.

Second, know what specific states may require of your labelling. There is no federal label requirement for all CBD products, and some states recently have begun enacting and enforcing state-specific CBD product labelling requirements. Emerging best practices from several states include using a QR code on your label to link to specific batch testing information.

And finally, with e-commerce booming, educate yourself on which advertising platforms, such as Google AdWords or Amazon Advertising, restrict marketing of CBD products in their user agreements to avoid spending money on advertising campaigns that are removed by online platforms.

Do you have specific questions about marketing your CBD products during COVID-19? Consult with a member of Michael Best’s Cannabis Practice Group. Whether you’re looking to start, operate, grow, or invest in a CBD-related business line, we’ve got you covered.

*This article was co-authored by Magdalene M. Beck, Intern at Michael Best.*

## Footnotes

[i] “FTC Sends Letters Warning 50 More Marketers to Stop Making Unsupported Claims That Their Products and Therapies Can Effectively Prevent or Treat COVID-19,” *Federal Trade Commission*, 05/21/2020, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sends-letters-warning-50-more-marketers-stop-making>; “FTC Sends Letters Warning 30 More Marketers to Stop Making Unsupported Claims That Their Products and Therapies Can Effectively Prevent or Treat COVID-19,” *Federal Trade Commission*, 06/18/2020, <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-sends-letters-warning-30-more-marketers-stop-making>.

[ii] “50 more FTC warning letters say “Enough!” to questionable coronavirus claims,” *Federal Trade Commission*, Lesley Fair, 05/21/2020, [https://www.ftc.gov/news-events/blogs/business-blog/2020/05/50-more-ftc-warning-letters-say-enough-questionable?utm\\_source=govdelivery](https://www.ftc.gov/news-events/blogs/business-blog/2020/05/50-more-ftc-warning-letters-say-enough-questionable?utm_source=govdelivery); <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sends-letters-warning-50-more-marketers-stop-making>.

[iii] “Coronavirus Update: FDA and FTC Warn Seven Companies Selling Fraudulent Products that Claim to Treat or Prevent COVID-19,” *U.S. Food & Drug Administration*, 03/09/2020, <https://www.fda.gov/news-events/press-announcements/coronavirus-update-fda-and-ftc-warn-seven-companies-selling-fraudulent-products-claim-treat-or>.

[iv] *Ibid.*

[v] “FTC Sends Letters Warning 50.”

[vi] *Federal Trade Commission v. Marc Ching*, 2:20-cv-03775-JAK-MAA (2020), 1-2, [https://www.ftc.gov/system/files/documents/cases/whole\\_leaf\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/whole_leaf_complaint.pdf).

[vii] *Ibid.*, 5.

[viii] Ibid.

[ix] Ibid, 7.

[x] “‘Thrive’ Supplement Marketer Agrees to Preliminary Order Barring Him from Claiming It Can Treat, Prevent, or Reduce the Risks Associated with COVID-19,” *Federal Trade Commission*, 04/28/2020, <https://www.ftc.gov/news-events/press-releases/2020/04/thrive-supplement-marketer-agrees-preliminary-order-barring-him>.

[xi] “Coronavirus Update: FDA and FTC Warn Seven Companies.”

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