

## The FTC's Heightened Scrutiny of Direct Sellers Continues During the COVID-19 Pandemic

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COVID-19 continues to impact much about our daily lives – from the way business is conducted to how we communicate with friends and family. As a result of COVID-19, companies must adapt to and remain mindful of the shifting environment in which they conduct business. Indeed, the COVID-19 pandemic has created a complicated and risky compliance environment for companies. That is certainly true for direct selling companies, who remain on the radar of the Federal Trade Commission (FTC).

Continuing their focus on direct-sellers, the FTC has sent letters – including one as recently as June 5 – to multiple direct-selling companies regarding alleged improper conduct. These letters highlight the FTC's ongoing scrutiny of statements about the efficacy of a direct-selling company's products and income claims about that company's business opportunity. These letters, coupled with recent public statements from the FTC, make clear that it is closely monitoring the marketplace for companies and individuals that it believes may be capitalizing on the anxiety, fears and uncertainty caused by the coronavirus pandemic.

The FTC's recent statements also illustrate that when it comes to companies' representations about the business opportunity or their products' ability to treat or cure coronavirus, the FTC pays close attention to the “net impression” of any representations. But this is nothing new. In granting the FTC's request for a preliminary injunction in *FTC v. Vemma Nutrition Company*, the court explained that under long-standing precedent, the “common-sense net impression” of representations in promotional materials is what controls.<sup>[1]</sup> This means, for instance, that representations may be misleading despite the use of a disclaimer if a consumer reasonably believes that a statement about earning potential represents typical earnings. And that means we have to take into consideration the “fragility” of the consumer at the time they are digesting the content.

Below, we consider the “net impression” of business opportunity and product representations during the COVID-19 pandemic—a time when consumers are particularly susceptible to misrepresentations regarding the business opportunity and the efficacy of a company's products.

## Income Claims and Marketing the Business Opportunity in an Economic Downturn

In a time when many individuals are facing economic uncertainty, promoting the business opportunities available to direct-selling companies' participants seems like a natural response. But, the FTC's letters to direct sellers and its remarks to the Direct Selling Association make clear that the FTC is closely scrutinizing the income and business opportunity claims made by direct sellers and their independent distributors.

In fact, the FTC's letters to various direct sellers call particular attention to claims that appear to capitalize on the economic crisis by highlighting the ability to replace income, achieve financial independence or achieve a prosperous lifestyle. The FTC has previously explained that companies must have reasonable bases for the claims those companies – and their representatives – disseminate to prospective participants about the business opportunity, and that claims must represent the typical earning prospects of the companies' distributors. In a recent letter to Melaleuca, Inc., the FTC warned “[e]ven truthful testimonials from participants who do earn significant income or more will likely be misleading unless the advertising also makes clear the amount earned or lost by most participants.”<sup>[2]</sup> The FTC's stance illustrates that disclaimers are unlikely to be sufficient unless they are extremely robust and explain precisely what typical results are for the majority of distributors in the company.

As the COVID-19 crisis continues, the FTC will likely closely monitor earnings claims in direct sellers' marketing materials and claims made by their sales force. In recent remarks to the Direct Selling Association, Lois Griesman of the FTC made clear that income claims can be express and implied, meaning that statements like “financial freedom” or “career income” can be as problematic as specific dollar amounts, particularly when those claims do not accurately reflect typical results. Further, Ms. Griesman emphasized that when the FTC reviews the “net impression” of marketing and advertising material, the FTC reviews not just the words, but the sounds, images, emojis, hashtags, and other graphic data used to present the message to the consumer.

Accordingly, direct sellers should directly contact their field and make clear that promotional material, including social media posts, must accurately describe the earning opportunities available to participants, be based on objective evidence, and reflect the typical earning capabilities of distributors. Direct sellers should provide their field with specific guidance on permissible and impermissible claims, as well as specific disclaimers that **must** be used when making permissible claims. Special care should be taken around instructing participants about testimonials regarding their personal experience with the business opportunity, as the FTC has emphasized that non-misleading testimonials from participants must make crystal clear the typical results of participants, such as the amount earned or lost by most participants. Further, reminding participants that the “net impression” of their promotional materials is critical, and they should pay careful attention to not just the words used in their post, but the overall impression generated by the words, images, and hashtags they use to promote the business opportunity.

Finally, direct sellers must engage in robust auditing and monitoring to ensure participant claims regarding the business opportunity comply with the FTC's guidance, including monitoring for at least the following business opportunity key words that we know the FTC is looking for: unemployment, unemployed, quarantine, economic collapse, uncertainty, shutdown, financial independence, financial safety, financial crisis, forever income, residual income, extra income, recession, recession-proof, rebuild your savings, work from home, stimulus, or stimulus checks. Any hits on such keywords should be addressed immediately and appropriate corrective action should be taken to deter any further misconduct by distributors.

## Accurate Marketing of Your Company's Products During a Crisis

As in any crisis, consumers are rushing to find solutions to keep their family and friends safe. Because many direct sellers offer consumer products like supplements and nutritional products, there can be a temptation by marketers to meet the consumers' desires with the company's products. However, federal regulators have warned companies to refrain from making deceptive or unsubstantiated claims about a product's ability to treat or prevent COVID-19, and the FTC warning letters serve to remind companies that it is unlawful under the FTC Act “to advertise that a product can prevent, treat, or cure human disease unless you possess competent and reliable scientific evidence . . . substantiating that the claims are true at the time they are made.”

The FTC has pointed specifically to claims made by direct sellers regarding the efficacy and supposed abilities of products to treat or prevent various diseases or ailments such as COVID-19. Like claims regarding the income

opportunity, the FTC has also instructed that expressed and implied claims regarding products' preventative or treatment abilities can also be problematic. For instance, implied product claims may take the form of promotional product claims that highlight things like "the times we are in" or "the importance of a strong immune system." According to the FTC, such promotions can create the "net impression" that the products being offered treat or prevent COVID-19. Direct sellers can count on the FTC being hyper-focused on claims concerning COVID-19 – whether express or implied.

As with claims regarding the business opportunity, direct sellers should take concrete and specific steps to ensure their representatives are not making unsupported claims about products and their ability to prevent or treat COVID-19. Companies should directly contact all distributors to remind them that unsupported product claims are not permissible and against company policy. Companies should also consider hosting a training to drive home the importance of participants using evidence-based messaging regarding products' abilities. Additionally, companies should instruct participants to be sure that any promotional materials refrain from making a "net impression" that the companies' products can prevent or treat the coronavirus.

And, of course, a robust compliance team that monitors social media posts of company representatives and promptly demands removal of all improper product claims is also important to ensure compliance with the FTC's directive. Direct sellers should be monitoring for at least the following keywords that we know the FTC is looking for: Coronavirus, immune system, immune health, immunity support, immunity boosters, outbreak, COVID-19, COVID, respiratory function, and prevention.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

Please contact John Sanders or Katrina Eash or your relationship attorney for further information.

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[1] See *Fed. Trade Comm'n v. Vemma Nutrition Co.*, No. CV-15-01578-PHX-JJT, 2015 WL 1118111, at \*6 (D. Ariz. Sept. 18, 2015).

[2] See Letter from Federal Trade Commission to Melaleuca, Inc. (June 5, 2020), *available at* [https://www.ftc.gov/system/files/warning-letters/covid-19-letter\\_to\\_melaleuca.pdf](https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_melaleuca.pdf).

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