Subcommittee on Consumer Protection and Commerce
Hearing on
"Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic"
February 4, 2021

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The Honorable Jan Schakowsky (D-IL)

1. What can the FTC do to make it easier for consumers to confirm the authenticity of PPE online, especially claims of CDC or FDA "certification"?

   Answer: While PPE covers a broad range of protective equipment,[1] this answer focuses on facemasks, which, when universally worn, slow the spread of COVID-19 according to the CDC.[2] There is no doubt that U.S. consumers are struggling to purchase authentic facemasks online.[3] In order to ensure that consumers are not being exploited by fraudulent PPE sellers, the FTC should take a two-pronged approach. First, the FTC should amplify the messaging of the FDA[4] and the CDC[5] that these agencies do not "certify" facemasks and that claims of certification or approval are false.[6] Consumers should focus on fit, filtration and number of layers in the mask as opposed to alleged CDC or FDA "certifications" and the like when making purchasing decisions.[7] Second, the Commission should make use of the recently enacted COVID-19 Consumer Protection Act, which, among other things, provides for civil penalties up

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[1] According to the FDA, "Personal protective equipment (PPE) refers to protective clothing, helmets, gloves, face shields, goggles, facemasks and/or respirators or other equipment designed to protect the wearer from injury or the spread of infection or illness." Personal Protective Equipment for Infection Control, https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/personal-protective-equipment-infection-control (last visited March 8, 2021).

[2] Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html (last visited March 8, 2021).

[3] According to the CDC, " many counterfeit (fake) KN95 masks are commercially available, and sometimes it is hard to tell if they meet the right requirements just by looking at them. At least 60% of the KN95 masks evaluated by NIOSH did not meet the requirements that they claim to meet." Improve the Fit and Filtration of Your Mask to Reduce the Spread of COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/mask-fit-and-filtration.html (last visited March 8, 2021). *See also,* Colleen Long, *U.S. Seizes Over 10 Million Phony N95 Masks in COVID-19 Probe*, Los Angeles Times, Feb. 17, 2021, https://www.latimes.com/world-nation/story/2021-02-17/us-govt-seizes-over-10m-phony-n95-masks-in-covid-19-probe; A.C. Shilton, *How to Be Sure Your Face Mask Isn't a Counterfeit*, Popular Mechanics, March 3, 2021, https://www.popularmechanics.com/technology/a35716090/avoid-counterfeit-masks-kf94-n95-kn95/; and Kate Cox, *Why N95 Masks Are Still Hard To Get, Even Though Production Is Up*, ARS Technica, March 1, 2021, https://arstechnica.com/tech-policy/2021/03/why-n95-masks-are-still-hard-to-get-even-though-production-is-up/.

[4] Face Masks, Including Surgical Masks, and Respirators for COVID-19, https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/face-masks-including-surgical-masks-and-respirators-covid-19 (last visited March 8, 2021).

[5] Improve the Fit and Filtration of Your Mask to Reduce the Spread of COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/mask-fit-and-filtration.html (last visited March 8, 2021).

[6] Are there "FDA Registered" or "FDA Certified" Medical Devices? How Do I Know What Is FDA Approved?, https://www.fda.gov/medical-devices/consumers-medical-devices/are-there-fda-registered-or-fda-certified-medical-devices-how-do-i-know-what-fda-approved?utm_medium=email&utm_source=govdelivery (last visited March 8, 2021).

[7] Ideally, the FTC (or other appropriate agency(s)) could also extract from the FDA and CDC websites, information on authentic facemasks and provide links to websites where consumers could purchase those masks that meet their marketed specifications. *See, e.g.,* Top 10 Ways to Protect Yourself From Counterfeiting and Piracy, https://www.stopfakes.gov/article?id=Top-10-Ways-to-Protect-Yourself (last visited March 8, 2021).

to almost $44,000 for deceptive practices associated with the prevention of COVID–19.[8] Using this law to halt those selling fraudulent PPE will not only protect consumers but it may also deter other wrongdoers from exploiting consumers seeking to purchase PPE online during the pandemic. Additionally, Congress should enact the *Integrity, Notification and Fairness in Online Retail Marketplaces for Consumers* (INFORM Consumers) Act to further combat the sale of fake and counterfeit PPE on online retail marketplaces.[9]

2. How can the FTC better inform consumers about how they can verify claims of PPE "certification" by the CDC and FDA?

   Answer: It is important to note that neither the CDC nor the FDA issues PPE "certifications."[10] And while both agencies do review certain PPE, navigating the CDC and FDA websites to determine which specific batches of serial numbered PPE from various companies have obtained and currently possess positive assessment results and/or emergency use authorization is incredibly difficult for even the most sophisticated of consumers. Ideally, the CDC, FDA and/or the FTC would publish a single, easily accessible webpage that would inform consumers how to purchase authentic PPE online and could provide links to legitimate sellers of such PPE thereby eliminating the ability of fraudsters to take advantage of U.S. consumers.

3. How can the FTC work more closely with the CDC and FDA to prevent fraudulent PPE sales online?

   Answer: The CDC and FDA both test PPE to varying degrees and have identified numerous items of alleged protective equipment that are fake or fail to perform as advertised.[11] These agencies could provide the underlying evidence of deceptive acts and practices to the FTC (to the extent they are not already doing so) for further investigation. The hope would be that the FTC could utilize the information supplied by the FDA and CDC to shut down online vendors of fraudulent PPE.

4. What, if any, additional resources and authorities does the FTC need in order to prevent and take enforcement actions against website domains that are clearly fraudulent (for example, coronavaccinefree[dot]com)?

   Answer: In order to effectively police wrongdoers and protect consumers against fraudulent website domains, legislative action must be taken to give the FTC the authority it needs to better deter wrongdoers. Congress should enact an imposter law that would provide the FTC with penalty authority to fine the creators of websites that deceptively mimic government entities and/or promote deceptive web addresses. Equipping the FTC with the ability to issue civil

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[8] COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401, 2094-2095 (2020).

[9] *See Integrity, Notification and Fairness in Online Retail Marketplaces for Consumers* (INFORM Consumers) Act, https://www.congress.gov/bill/116th-congress/house-bill/7756/text?r=1&s=1 (last visited March 8, 2021). *See also*, Schakowsky Introduces Legislation to Protect Consumers Online, https://schakowsky.house.gov/media/press-releases/schakowsky-introduces-legislation-protect-consumers-online (last visited March 8, 2021).

[10] Are There "FDA Registered" or "FDA Certified" Medical Devices? How Do I Know What Is FDA Approved?, https://www.fda.gov/medical-devices/consumers-medical-devices/are-there-fda-registered-or-fda-certified-medical-devices-how-do-i-know-what-fda-approved?utm_medium=email&utm_source=govdelivery (last visited March 8, 2021).

[11] *See, e.g.,* Personal Protective Equipment EUAs, https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/personal-protective-equipment-euas (last visited March 8, 2021) and NPPTL Respirator Assessments to Support the COVID-19 Response, https://www.cdc.gov/niosh/npptl/respirators/testing/NonNIOSHresults.html (last visited March 8, 2021).

penalties against the operators of such fraudulent website addresses would serve as a valuable deterrent against deliberate, egregious violators that are using this pandemic to take advantage of vulnerable consumers.

However**,** 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. Unless more funding is allocated to this agency, it is impractical to think that the FTC can do more.

5. How can the FTC partner with ICANN, the domain name industry, and other stakeholders to prevent fraudulent pandemic-related websites?

Answer: While ICANN and the domain name industry are primarily responsible for internet infrastructure services (and not content regulation), ICANN does provide a procedure to address domain abuse and illegal content in its contracts with accredited registrars, which the FTC should take full advantage of.[12] Specifically, pursuant to section 3.18.2 of the 2013 Registrar Accreditation Agreement,[13] government agencies such as the FTC can alert accredited registrars to "Illegal Activity," which then requires a "review[] within 24 hours by an individual who is empowered by Registrar to take necessary and appropriate actions in response to the report." By way of example, the FDA has effectively used this procedure to shut down two fraudulent COVID-related websites, corona-cure.com and covid19treatment.info.[14]

[12] As of June 2017, there were 2,894 ICANN accredited registrars managing 194,625,933 domain names or 99.5 percent of the market. Brenden Kuerbis et al, *In Search of Amoral Registrars: Content Regulation and Domain Name Policy*, Georgia Tech Internet Governance Project, *available at* https://www.internetgovernance.org/wp-content/uploads/AmoralReg-PAPER-final.pdf.

[13] *See* 2013 Registrar Accreditation Agreement, https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en (last visited March 8, 2021). ("3.18.2 Registrar shall establish and maintain a dedicated abuse point of contact, including a dedicated email address and telephone number that is monitored 24 hours a day, seven days a week, to receive reports of Illegal Activity by law enforcement, consumer protection, quasi-governmental or other similar authorities designated from time to time by the national or territorial government of the jurisdiction in which the Registrar is established or maintains a physical office. Well-founded reports of Illegal Activity submitted to these contacts must be reviewed within 24 hours by an individual who is empowered by Registrar to take necessary and appropriate actions in response to the report. In responding to any such reports, Registrar will not be required to take any action in contravention of applicable law.")

[14] *See* FDA's Registrar and Registry Abuse Complaints, https://www.fda.gov/consumers/health-fraud-scams/registrar-and-registry-abuse-complaints (last visited March 8, 2021).