

**PREPARED STATEMENT OF
TRUTH IN ADVERTISING, INC.**

**Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE
HOUSE OF REPRESENTATIVES**

**WASHINGTON, DC
(via video conference)**

FEBRUARY 4, 2021

I. INTRODUCTION

Chairman Schakowsky, Ranking Member Bilirakis, and members of the Subcommittee, on behalf of Truth in Advertising (TINA.org), I am pleased to appear before you to highlight fraudulent and deceptive marketing schemes that have arisen during this unprecedented crisis, and to sound the alarm that the worst may be yet to come if the Federal Trade Commission is not equipped with the legislative tools it needs to effectively eradicate deceptive and unfair acts and practices, including, but not limited to, clawing back ill-gotten gains from wrongdoers under Section 13(b) of the FTC Act.¹

My organization, TINA.org, is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; we work with businesses and government agencies on behalf of consumers to effectively prevent and stop deception in our economy.

The central premise of modern consumer protection laws is that marketplace dishonesty causes harm to consumers and businesses alike; and, if left unchecked, such behavior impairs the efficient allocation of resources in our economy.² There can be no doubt that the ongoing pandemic has exacerbated the ever-present dangers of deceptive and unfair acts and practices in the marketplace. TINA.org has heard from countless consumers – senior citizens, military veterans and struggling parents – whose experiences illustrate the fact that deceptive marketing is putting the health, financial well-being and safety of our most susceptible populations at risk.

¹ It is important to note that 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, it is impractical to think that the FTC can do more.

² Jeff Sovern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, St. John's Legal Studies Research Paper No. 21-0001 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765745.

The list of deceptively marketed products and services exploiting this pandemic is extensive. CBD products marketed to military veterans as a coronavirus treatment;³ bleach advertised as a liquid cure-all;⁴ wellness centers targeting first responders with IV vitamin drips to protect against COVID-19;⁵ Amazon and eBay sellers falsely claiming that their personal protective equipment (PPE) is FDA approved;⁶ scammers simply failing to deliver paid-for PPE;⁷ hand sanitizers marketed as providing 24-hour protection against COVID-19;⁸ alleged immunity-boosting supplements targeted at children;⁹ risky colloidal silver solutions advertised as having the ability to kill the virus from within;¹⁰ toothpastes and teeth-whitening products claiming to prevent COVID-19;¹¹ and sham wellness kits targeting seniors.¹²

³ Fed. Food & Drug Admin. and Fed. Trade Comm'n Warning Letter to Patriot Supreme (Oct. 16, 2020), available at https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

⁴ Press Release, The U.S. Dep't of Justice, Justice Dep't Seeks to End Illegal Online Sale of Industrial Bleach Marketed as "Miracle" Treatment for COVID-19 (Apr. 17, 2020), available at <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>; Fed. Food & Drug Admin. Warning Letter to Genesis 2 Church (Apr. 8, 2020), available at <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/genesis-2-church-606459-04082020>.

⁵ *IV Therapies and COVID-19: The Drip, Drip, Drip of Deceptive Claims*, Truth in Advertising, Inc., June 3, 2020, <https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

⁶ *Face Mask Sellers on eBay Falsely Claim Products Are 'FDA Approved'*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>. It is often the case that products listed for sale in online marketplaces are deceptively advertised. When presented with such findings, companies typically point the finger at third-party vendors, deny liability, and use Section 230 of the Communications Decency Act as a shield. Removing the 230 shield from online commercial speech would allow the FTC to hold third-party vendor sites accountable.

⁷ Press Release, The U.S. Dep't of Justice, Michigan Man Charged With COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), available at <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

⁸ *Prompted by TINA.org, Hand Sanitizer Maker Removes COVID-19 Claims*, Truth In Advertising, Inc., May 20, 2020, <https://www.truthinadvertising.org/prompted-tina-org-hand-sanitizer-maker-removes-covid19-claims/>; *CATrends: Hand Sanitizers Marketed to Prevent Disease*, Truth In Advertising, Inc., Apr. 9, 2020, <https://www.truthinadvertising.org/catrends-hand-sanitizers-marketed-to-prevent-disease/>.

⁹ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020, <https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>.

¹⁰ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020, <https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

¹¹ Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), available at <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

¹² Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

Unfortunately, the deception does not stop with outrageous health claims; many are also exploiting the economic desperation wrought by this pandemic: multilevel marketing companies claiming people can earn full-time pay working part-time;¹³ lending companies deceptively using the CARES Act to exploit college students;¹⁴ investment scams claiming to have patented COVID cures;¹⁵ and financial entities pretending to be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed.¹⁶

And, to make matters worse, the agency primarily charged with policing these deceptive acts, the FTC, is now at risk of losing a mainstay of its enforcement authority – the ability to make victims whole under Section 13(b) of the FTC Act.¹⁷ Because Section 13(b) does not specifically say anything about equitable relief when a permanent injunction is issued, the Supreme Court is now deciding the remedial scope (if any) of 13(b) in the case *AMG v. FTC*.¹⁸

AMG was a payday lending scheme that extracted money from people in desperate circumstances.¹⁹ In its appeal, the company does not dispute that it violated the law. Instead, it

¹³ *How MLMs Exploit Consumers During A Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>. MLM companies and their distributors are also taking advantage of the pandemic to make inappropriate health claims. *Mixed Messaging in the MLM Industry Regarding Coronavirus Claims*, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

¹⁴ Fed. Trade Comm'n Warning Letter to Frank Financial Aid (Nov. 10, 2020), available at https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

¹⁵ Press Release, Fed. Trade Comm'n, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), available at <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

¹⁶ Fed. Trade Comm'n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), available at https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor_financial.pdf, Fed. Trade Comm'n Warning Letter to sbaddisasterloan.org (June 22, 2020), available at https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sbadisasterloan.org_.pdf.

¹⁷ 15 U.S.C. § 53.

¹⁸ *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, 2020 U.S. LEXIS 5378 (2020), available at <https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00508qp.pdf>.

¹⁹ Press Release, The U.S. Dep't of Justice, Scott Tucker Sentenced To More Than 16 Years in Prison for Running \$3.5 Billion Unlawful Internet Payday Lending Enterprise (Jan. 5, 2018), available at <https://www.justice.gov/usao-sdny/pr/scott-tucker-sentenced-more-16-years-prison-running-35-billion-unlawful-internet-payday> ("For more than

argues that the \$1.3 billion it stole should be its to keep. AMG asserts that it was never Congress's intention for the FTC to return money to the victims of fraud under Section 13(b). Quite to the contrary, AMG argues that this legislative body fully endorsed the notion that wrongdoers should pocket the money they've illegally taken when it drafted 13(b).²⁰

If the Supreme Court rules in AMG's favor and this Congress does not act to empower the FTC to seek restitution under Section 13(b), then the deceptive marketing practices I have enumerated will only multiply. Allowing wrongdoers an absolute right to retain funds under Section 13(b) will make consumers and our economy more vulnerable to harm, especially during these unprecedented times.

Moreover, if Congress truly wants to eradicate the deception that is plaguing our economy, it must add to the FTC's toolkit penalty authority over first-time offenders; a civil penalty fund for victims; as well as enhancement of some tools that the FTC already has at its disposal, including mandating that funeral homes disclose their pricing lists on their websites, requiring companies that use negative-option offers to simplify cancelations and provide clearer renewal information, and exclude the protection of commercial speech from Section 230 of the Communications Decency Act of 1996.²¹ At present, businesses find it economically advantageous to ignore first-round FTC orders and settlements. Only when the calculus changes such that it becomes

15 years, [AMG's] Scott Tucker ... made billions of dollars exploiting struggling, everyday Americans through payday loans carrying interest rates as high as 1,000 percent.")

²⁰ Brief for Petitioners at 44, *AMG Capital Mgmt, LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Sept. 2020), available at https://www.supremecourt.gov/DocketPDF/19/19-508/154981/20200925174040692_19-508%20ts%20AMG%20Capital%20Mgmt.%20LLC%20merits%20brief%20PDF-A.pdf ("As an 'agenc[y] charged with administering [a] congressional statute[],' both the Commission's 'power to act and how [it is] to act are authoritatively prescribed by Congress.' ... The Commission 'possess[es] only such powers as are granted by' the FTC Act. ... The Commission thus has been acting 'ultra vires' by 'improperly' extracting billions of dollars from defendants under §13(b), a provision that authorizes only 'injunction[s].' ... That overreach should end now.") (internal citations omitted)

²¹ 47 U.S.C. § 230.

economically disadvantageous to engage in deceptive marketing and fraud from the outset will there be an impetus for all to champion truth in advertising.

II. Truth in Advertising, Inc.

Truth in Advertising (TINA.org) is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

At the center of TINA.org's efforts is its website, www.tina.org, which aims to re-boot the consumer movement for the 21st century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad,²² and pillows and essential oils falsely marketed as able to treat chronic disease.²³ The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates, and, when appropriate, takes up with businesses and regulatory authorities. The website is a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud.

TINA.org regularly draws on this expertise to advocate for consumer interests before the FTC

²² Sprinter Summary of Action, <https://www.truthinadvertising.org/sprinter-summary-of-action/> (last visited Feb. 1, 2021).

²³ MyPillow Summary of Action, <https://www.truthinadvertising.org/mypillow-summary-of-action/> (last visited Feb. 1, 2021); doTerra Summary of Action, <https://www.truthinadvertising.org/doterra-summary-action/> (last visited Feb. 1, 2021); Young Living Summary of Action, <https://www.truthinadvertising.org/young-living-summary-action/> (last visited Feb. 1, 2021).

and other governmental bodies and appear as *amicus curiae* in cases raising important questions of consumer protection law.²⁴

III. Fraud, deception and scams during the COVID-19 crisis

During this pandemic, consumers nationwide have been inundated with deceptive marketing campaigns seeking to exploit and capitalize on the global public-health crisis.²⁵ While some scams deplete bank accounts and retirement savings, others have drastic consequences for consumers' health and safety.

a. Deceptive health claims

Deceptive advertising peddling unapproved treatments, cures, and preventatives for a virus that has killed more than 400,000 people in the United States²⁶ flood the internet. Not only do many of these deceptive ads target particularly susceptible populations, including parents of young children, first responders, military veterans and senior citizens, many also promote products that are inherently dangerous – some can cause severe health consequences while others are advertised as negating the need to follow standard COVID-19 prevention and treatment recommendations, thereby increasing the risk that consumers contract and spread COVID-19 or fail to obtain medically necessary treatment.

²⁴ For example, TINA.org participated as *amicus* in *AMG Capital Management., LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), available at https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf. TINA.org also filed an *amici* brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), available at https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf.

²⁵ FTC COVID-19 and Stimulus Reports, available at <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map>.

²⁶ Will Stone, *As Death Rate Accelerates, U.S. Records 400,000 Lives Lost to the Coronavirus*, NPR, Jan. 19, 2021, <https://www.npr.org/sections/health-shots/2021/01/19/957488613/as-death-rate-accelerates-u-s-records-400-000-lives-lost-to-the-coronavirus>.

Since the initial coronavirus outbreak, TINA.org has invested considerable resources to investigate and track such scams.²⁷ In February 2020, TINA.org wrote about an ingestible silver solution falsely marketed as able to kill the coronavirus from within. Not only was the treatment claim false, but the marketers also failed to disclose the possible risks of consuming silver, which include cancer and birth defects.²⁸ A few months later, TINA.org outed more than 40 wellness centers across the country deceptively promoting intravenous supplement/vitamin therapies as a way to prevent and treat COVID-19, several of which specifically targeted first responders.²⁹ Following this investigation, TINA.org exposed a multilevel marketing company misleadingly marketing supplements as able to boost children’s immune systems and keep them “virus free,” at a time when parents across the country were grappling with whether or not to send their children back to school.³⁰

TINA.org has also tracked reports of industrial bleach advertised under the name “Miracle Mineral Solution” as a treatment for COVID-19,³¹ accounts of CBD products marketed to

²⁷ *A Growing List of Coronavirus Scams*, Truth In Advertising, Inc., Mar. 16, 2020,

<https://www.truthinadvertising.org/a-growing-list-of-coronavirus-scams/>.

²⁸ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020,

<https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

²⁹ *IV Therapies and COVID-19: The Drip, Drip, Drip of Deceptive Claims*, Truth In Advertising, Inc., June 3, 2020,

<https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

³⁰ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020,

<https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>. Several

other MLM companies and their distributors have touted their products as a way to prevent getting COVID-19. See, e.g., Herbalife Summary of Action, <https://www.truthinadvertising.org/herbalife-2020-summary-of-action/> (last visited Feb. 1, 2021) and *Mixed Messaging in the MLM Industry Regarding Coronavirus Claims*, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

³¹ Press Release, The U.S. Dep’t of Justice, Justice Dep’t Seeks to End Illegal Online Sale of Indus. Bleach

Marketed as “Miracle” Treatment for COVID-19 (Apr. 17, 2020), available at <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>.

military veterans as a coronavirus treatment,³² and Department of Justice cases and civil lawsuits regarding toothpastes and teeth-whitening products claiming to prevent COVID-19.³³

It is critical to note that while silver shards suspended in liquid, bleach, CBD, and toothpaste may sound like suspect COVID-19 treatments and cure-alls, one must remember that our country – and the world – is living through a time of unprecedented uncertainty and fear, one that has prompted panic, heightened stress and anxiety levels, and exacerbated mental health issues.³⁴ Consequently, consumers, desperate to care for themselves and their loved ones, are more susceptible to the compelling and persuasive marketing tactics used to sell these bogus products.

The pandemic has also spurred ads deceptively promoting products aimed at protecting consumers from the virus. TINA.org stopped the maker of alcohol-free hand sanitizers from deceptively claiming that its products “kill” the coronavirus for up to 24 hours.³⁵ Consumers have also complained of scammers advertising and selling – but never delivering – N95 masks and other PPE.³⁶ And a TINA.org investigation revealed more than two dozen eBay sellers falsely claiming their face masks were “FDA approved” or illegally using the FDA’s logo on

³² Fed. Food & Drug Admin. and Fed. Trade Comm’n Warning Letter to Patriot Supreme (Oct. 16, 2020), available at https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

³³ Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), available at <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

³⁴ *Emotional Well-Being and Coping During COVID-19*, Univ. of California Weill Institute for Neurosciences Dept. of Psychiatry and Behavioral Sciences, <https://psychiatry.ucsf.edu/copingresources/covid19> (last visited Feb. 1, 2021); Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, Henry J. Kaiser Family Foundation, Aug. 21, 2020, <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>; Bilal Javed et al., *The Coronavirus (COVID-19) Pandemic’s Impact on Mental Health*, Int. J. Health Plann Mgmt., June 22, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7361582/>.

³⁵ TINA.org’s Letter to Everest Microbial Defense, available at https://www.truthinadvertising.org/wp-content/uploads/2020/05/4_30_20-TINA-warning-ltr-to-Everest-Microbial-Defense_Redacted.pdf.

³⁶ Press Release, The U.S. Dep’t of Justice, Michigan Man Charged with COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), available at <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

product packaging or other marketing to boost sales.³⁷ There have also been numerous reports of schemes targeting older Americans, including the offering of sham “COVID Wellness Kits” containing hand sanitizer and/or face masks to Medicare beneficiaries in order to steal their Medicare numbers and other personal identifying information.³⁸

These deceptive advertising tactics not only scam consumers out of their hard-earned money, but may leave consumers unnecessarily vulnerable to the COVID-19 virus. In short, the surge in exploitative health schemes employed during this pandemic have risked, and continue to risk, the health and safety of consumers across the country.

b. Fraudulent economic claims

Unfortunately, pandemic-related deception does not stop with outrageous health claims; many are also exploiting the economic desperation brought on by this pandemic. TINA.org has exposed – in news stories,³⁹ regulatory complaints⁴⁰ and a warning letter⁴¹ – numerous MLM companies taking advantage of the pandemic to promote what they claim to be lucrative business opportunities despite the fact that most people who get involved in multilevel marketing make little to no money.⁴²

³⁷ *Face Mask Sellers on eBay Falsely Claim Products Are ‘FDA Approved’*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/> (last visited Feb. 1, 2021).

³⁸ Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

³⁹ *MLMs Continue to Break the Law Despite FTC Warning*, Truth In Advertising, Inc., Dec. 15, 2020, <https://www.truthinadvertising.org/mlms-continue-to-break-the-law-despite-ftc-warning/>.

⁴⁰ Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021).

⁴¹ Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021).

⁴² *How MLMs Exploit Consumers During a Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021); Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021). *See also* Press Release, Fed. Trade Comm’n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>; Press Release, Fed. Trade Comm’n, FTC Sends Second Round of Warning Letters to

TINA.org also sounded the alarm regarding investment news publisher Agora, Inc. for exploiting financial uncertainties during the pandemic to lure consumers – predominantly senior citizens – into pricey newsletter subscriptions with automatic renewals.⁴³ There have also been reports of lending companies deceptively using the CARES Act to exploit debt-laden college students;⁴⁴ financial entities pretending to be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed;⁴⁵ and investment scams claiming to have patented COVID cures.⁴⁶

As with the onslaught of deceptive health claims, marketers making unsubstantiated financial claims have similarly targeted vulnerable populations including retirees, students in debt, and small businesses struggling to stay afloat during this pandemic.

IV. The need for equitable relief under section 13(b) of the FTC Act

During these unprecedented times, it is imperative that the FTC not only stop deceptive marketing as quickly as possible but also expeditiously return ill-gotten gains to victims struggling to make ends meet. At present, the Commission’s only resource for accomplishing such twin objectives is Section 13(b).

Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims (June 5, 2020), *available at* <https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus>.

⁴³ *Agora Coronavirus Emails*, Truth In Advertising, Inc., Mar. 27, 2020, <https://www.truthinadvertising.org/agora-coronavirus-emails/>. See also, *Fed. Trade Comm’n v. Agora Financial, LLC*, No. 19-cv-3100 (D. Md.), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/182-3116/agora-financial-llc>.

⁴⁴ Fed. Trade Comm’n Warning Letter to Frank Financial Aid (Nov. 10, 2020), *available at* https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

⁴⁵ Fed. Trade Comm’n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), *available at* https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor_financial.pdf, https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sbadisasterloan.org_.pdf.

⁴⁶ Press Release, The U.S. Dep’t of Justice, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), *available at* <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

Congress, realizing that the FTC’s slow-moving administrative regime did not protect consumers from imminent harm and deception, added Section 13(b) to the FTC Act in 1973 to provide the Agency with a fast and effective means to halt illegal conduct.⁴⁷ Section 13(b) provides, in pertinent part, that the FTC “may seek, and after proper proof, the court may issue, a permanent injunction.”⁴⁸

Though the statute does not specifically reference equitable relief, until the Seventh Circuit’s decision in *FTC v. Credit Bureau Center*,⁴⁹ every circuit court to consider the issue (including the Seventh Circuit 30 years ago) had held that Section 13(b) implicitly authorizes a wide range of equitable remedies, including restitution, rescission and disgorgement.⁵⁰ The rationale for equitable relief was first articulated in the 18th century when courts recognized that the authority to issue an injunction carried with it the right to make victims whole because, as they reasoned, “the wrong-doer should not profit ‘by his own wrong.’” While the issue of whether 13(b) provides for equitable relief is now pending before the U.S. Supreme Court in the *AMG v. FTC* case,⁵¹ the scope of 13(b) could – and should – be resolved legislatively.

The FTC brought its first case for a 13(b) permanent injunction in 1979. Since then, 13(b) has become a mainstay of the FTC’s enforcement program with dozens of cases brought under

⁴⁷ See *Fed. Trade Comm’n v. Shire*, 917 F.3d 147, 155 (3d Cir. 2019), available at <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>. (“Section 13(b) thus empowers the FTC to speedily address ongoing or impending illegal conduct, rather than wait for an administrative proceeding to conclude.”)

⁴⁸ 15 U.S.C. § 53.

⁴⁹ *Fed. Trade Comm’n v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D08-21/C:18-2847:J:Sykes:aut:T:fnOp:N:2387210:S:0>.

⁵⁰ After *Credit Bureau*, the Third Circuit held that Section 13(b) of the FTC Act does not permit equitable relief. See *Fed. Trade Comm’n v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020), available at <https://www2.ca3.uscourts.gov/opinarch/182621p.pdf> (“If Congress contemplated the FTC could sue for disgorgement under Section 13(b), it probably would not have required the FTC to show an imminent or ongoing violation. That requirement suggests Section 13(b) does not empower district courts to order disgorgement.”).

⁵¹ *AMG Capital Mgmt. v. Fed. Trade Comm’n*, No. 19-508 (U.S.), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html>.

this section every year – among them Volkswagen,⁵² Herbalife,⁵³ DeVry University,⁵⁴ Office Depot⁵⁵ and Uber.⁵⁶ In fact, from 2016 to 2020, the FTC returned approximately \$1.1 billion to consumers using 13(b).⁵⁷ As the coronavirus pandemic continues to ravage our nation, the need for Section 13(b)'s swift and equitable authority is greater than ever.

Moreover, a decision in *AMG*'s favor will have dramatic and dire consequences for the dozens of Section 13(b) cases the FTC currently has pending.⁵⁸ The FTC's docket includes its antitrust complaint against Facebook,⁵⁹ pyramid scheme cases against Neora⁶⁰ and Success By Health,⁶¹ its case against the makers of the deceptively marketed memory supplement PrevaGen,⁶² and the action it filed against a house-flipping scam, which includes real estate

⁵² Press Release, Fed. Trade Comm'n, Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁵³ Press Release, Fed. Trade Comm'n, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

⁵⁴ Lesley Fair, *FTC Case Against DeVry Yields \$100 Million Settlement*, Fed. Trade Comm'n, available at <https://www.ftc.gov/news-events/blogs/business-blog/2016/12/ftc-case-against-devry-yields-100-million-settlement>.

⁵⁵ Press Release, Fed. Trade Comm'n, FTC Sending More Than \$34 Million in Refunds to Office Depot Customers (Feb. 20, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-sending-more-34-million-refunds-office-depot-customers>.

⁵⁶ Press Release, Fed. Trade Comm'n, FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement (July 16, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement>.

⁵⁷ Recent FTC Cases Resulting in Refunds, <https://www.ftc.gov/enforcement/cases-proceedings/refunds> (last visited Feb. 1, 2021).

⁵⁸ As of mid-2020, the FTC was a party to 56 Section 13(b) cases pending in federal district court. Brief for the Federal Trade Commission, *AMG Capital Mgmt. LLC, et al. v. Fed. Trade Comm'n*, No. 19-508 (U.S. Nov. 30, 2020), available at https://www.supremecourt.gov/DocketPDF/19/19-508/162011/20201130120930570_19-508bs.pdf.

⁵⁹ *Fed. Trade Comm'n v. Facebook, Inc.*, No 191-0134 (D.D.C.), available at <https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v>.

⁶⁰ Press Release, Fed. Trade Comm'n, FTC Sues Multi-Level Marketer Neora, formerly known as Nerium, Alleging it Operates as an Illegal Pyramid Scheme (Nov. 1, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-sues-multi-level-marketer-neora-formerly-known-nerium>.

⁶¹ Press Release, Fed. Trade Comm'n, FTC Acts to Shut Down 'Success by Health' Instant Coffee Pyramid Scheme (Jan. 16, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-acts-shut-down-success-health-instant-coffee-pyramid-scheme>.

⁶² Press Release, Fed. Trade Comm'n, FTC, New York State Charge the Marketers of PrevaGen With Making Deceptive Memory, Cognitive Improvement Claims (Jan. 9, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-new-york-state-charge-marketers-prevagen-making-deceptive>.

celebrities Dean Graziosi and Scott Yancey as defendants.⁶³ In all of these 13(b) cases the FTC will be foreclosed from seeking monetary relief, even if it prevails, if the Supreme Court rules in *AMG*'s favor.

And to make matters worse, in 2019, the Third Circuit Court of Appeals ruled in *FTC v. Shire ViroPharma, Inc.* that the FTC could not seek equitable relief under Section 13(b) if the alleged violation occurred in the past and the defendant was not “violating” or “about to violate” the law.⁶⁴ As a result, wrongdoers that line their pockets with money they have illegally obtained can sail off into the sunset just as long as they retire their scams before the FTC catches up with them.

In order to effectively police wrongdoers and protect consumers, legislative action must be taken to give the FTC the authority it needs to obtain monetary remedies for past acts as well as present ones. The glaring reality is that unless Congress acts, the FTC may be left with a law giving the worst wrongdoers an absolute right to retain funds they took from unwitting victims, which will undoubtedly make consumers and the economy more vulnerable to harm.

V. Equipping the FTC with penalty authority

The common thread that runs through all COVID-19 scams is the wrongdoers' desire for financial gain. At the same time, the FTC is powerless to issue penalties for first-time violations of the FTC Act regardless of how outrageous and harmful the scam may be. Equipping the FTC with the ability to issue civil penalties would serve as a valuable deterrent against deliberate,

⁶³ Press Release, Fed. Trade Comm'n, FTC Seeks to Add Real Estate Inv. Celebrities Dean Graziosi and Scott Yancey as Defendants in Real Estate Training Case (Aug. 31, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-seeks-add-real-estate-investment-celebrities-dean-graziosi>.

⁶⁴ *Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), available at <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>.

egregious violators that are using this pandemic to take advantage of some of the most vulnerable populations in our society.

The FTC has nationwide jurisdiction and an unparalleled view of the landscape. It maintains data on millions of consumer complaints and has unique statutory authority to operate across national borders. Even with its finite resources, the FTC is able to undertake investigations and develop facts necessary to prove cases against sophisticated corporate wrongdoers for large illegalities. But this is where the agency's efficacy ends. The FTC's ability to hold offenders accountable for their transgressions is sorely lacking.

Time and again, the FTC is forced to bring a second action against a lawbreaker because the company found it economically advantageous to ignore the initial consent agreement⁶⁵ or closing letter.⁶⁶ Not only does this waste the FTC's limited resources but it ensures that illegal behavior continues to exploit consumers for longer than is necessary. Until the FTC has the authority to

⁶⁵ Facebook entered into a consent agreement with the FTC in 2012 requiring the social media platform to stop its illegal practice of disclosing unauthorized private, identifying user information. See Decision and Order, *In the Matter of Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 27, 2012), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>. Unable to penalize Facebook for its transgressions, the FTC only obtained a promise that Facebook would abide by the law going forward. As this reprimand was effectively toothless, Facebook reverted to its deceptive privacy practices, requiring the FTC to file a complaint in federal court in 2019 to hold the platform accountable yet again for its failure to follow the law and protect consumers' privacy. See Complaint for Civil Penalties, Injunction, and Other Relief, *U.S.A. v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), available at https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf. Only at this point, was the FTC able to punish Facebook with a \$5 billion penalty. Had the FTC been able to penalize Facebook initially, it is likely that consumer privacy rights would have been better protected years earlier and Facebook less likely to flout the law.

⁶⁶ In June 2018, the FTC sent a closing letter to Williams-Sonoma following an investigation into the company's marketing of certain Chinese-made products as "Crafted in America." Fed. Trade Comm'n Closing Letter to Williams-Sonoma, Inc. (June 13, 2018), available at https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf. The FTC did not pursue its investigation due to the company's corrective actions and assurances that it was an isolated error. This representation was false. Between April and May 2019, TINA.org collected more than 800 examples of products that were marketed as made in the USA but were either imported or made with imported materials. (Examples collected were drawn from seven of Williams-Sonoma's sites — Williams-Sonoma, Williams-Sonoma Home, Rejuvenation, Pottery Barn, PBteen, Pottery Barn Kids and West Elm.) As a result of these findings, the FTC filed an administrative action against Williams-Sonoma, which settled the charges for \$1 million. Decision, *In the Matter of Williams-Sonoma, Inc.*, No. C-4724 (F.T.C. July 13, 2020), available at <https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf>. See also, TINA.org's Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims, https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

turn on the penalty switch in appropriate cases, companies will find it highly profitable to flout FTC laws.

Further, penalties are a vital necessity in cases in which the precise economic harm to consumers is difficult to measure. For example, penalty authority could have a major impact on social media influencer marketing where influencers frequently do not disclose their material connections to the brands they promote. TINA.org's investigations of the Kardashians,⁶⁷ Ciroc,⁶⁸ and influencers on Instagram who received FTC warning letters⁶⁹ are illustrative of the problem. If companies and influencers were exposed to monetary penalties each time a promotional post failed to adequately disclose the material connection at issue, social media marketers would be less likely to deceive consumers, many of who are children and young adults.⁷⁰

VI. The need for a civil penalty fund

The benefits of imposing penalties do not need to stop at deterring wrongdoers from repeating illegal acts. If authorized, the FTC could use penalty funds to make consumers, who have been economically harmed, monetarily whole again.

At present, FTC redress is limited to the amount of money it can obtain directly from the wrongdoer(s). But because many defendants have the means and inclination to dissipate assets through lavish spending, bankruptcy protection, hiding funds in inaccessible accounts/locations, or are otherwise insolvent, it is often the case that consumers who have a right to redress receive

⁶⁷ Kardashian/Jenner et al. Summary of Action, <https://www.truthinadvertising.org/kardashian-summary-action/> (last visited Feb. 1, 2021).

⁶⁸ Ciroc Summary of Action, <https://www.truthinadvertising.org/ciroc-summary-action/> (last visited Feb. 1, 2021).

⁶⁹ Instagram Influencers Summary of Action, <https://www.truthinadvertising.org/influencers-ftc-complaint-summary-action/> (last visited Feb. 1, 2021).

⁷⁰ Of course, any such legislation should give the FTC discretion so that nano-influencers and micro-influencers with smaller followings are not treated the same as sophisticated, career influencers who know their legal responsibilities.

pennies on the dollar, if they receive anything.⁷¹ It is for this exact reason that other federal agencies use collected penalty funds to compensate victims, including the Consumer Financial Protection Bureau's Civil Penalty Fund⁷² and the SEC's Fair Fund.⁷³

For the sake of providing complete and timely consumer redress, particularly now when many in our country are in an economic freefall and consumers do not have the luxury of time, the FTC should be authorized to establish such a consumer reimbursement fund, rather than being required to arbitrarily deposit penalties in the U.S. Treasury, as is the current practice.⁷⁴

VII. Additional considerations to better protect consumers during the pandemic

TINA.org would also like to highlight areas of law that may be strengthened to better protect consumers with respect to online marketing during this pandemic.

⁷¹ See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Carey G. Howe, Anna C. Howe, Shunmin Hsu, Ruddy Palacios, and Oliver Pomazi, *Fed. Trade Comm'n v. Arete Financial Group, et al.*, No. 19-cv-2109 (C.D. Cal. Sept. 9, 2020), available at https://www.ftc.gov/system/files/documents/cases/145_order_for_perm_inj_as_to_arete_defs_anna_howe_2020-09-10.pdf (monetary judgment of \$43.3 million partially suspended upon surrender of at least \$835,000 and additional assets). See also, Press Release, Operators of Student Debt Relief Scheme Agrees to Pay at Least \$835,000 to Settle FTC Allegations (Sept. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/operators-student-debt-relief-scheme-agree-pay-least-835000>; Redacted Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Mark Gelvan, Outreach Calling, Inc., Outsource 3000, Inc., and Production Consulting Corp., *Fed. Trade Comm'n v. Outreach Calling Inc., et al.*, No. 20-cv-7505 (S.D.N.Y. Oct. 26, 2020), available at https://www.ftc.gov/system/files/documents/cases/de_42_-_redacted_order_as_to_gelvan_and_corporations_entered.pdf (monetary judgment of \$56,023,481, which is partially suspended based on inability to pay.). See also, Press Release, FTC Joins Four States in Action to Shut Down Alleged Sham Charity Funding Operation That Bilked Millions from Consumers (Sept. 16, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-joins-four-states-to-shut-down-alleged-sham-charity-operation>; Stipulated Order for Permanent Injunction and Monetary Judgment Against Vemma Nutrition Co. Vemma International Holdings, Inc. and Benson K. Boreyko, *Fed. Trade Comm'n v. Vemma*, No. 15-cv-1578 (D. Ariz. Dec. 20, 2016), available at https://www.ftc.gov/system/files/documents/cases/161222_vemma_273-stipulated_final_order_redacted.pdf (\$238 million judgment partially suspended upon payment of \$470,136). See also, Press Release, Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges (Dec. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges>.

⁷² *Civil Penalty Fund*, Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/> (last visited Feb. 1, 2021).

⁷³ 15 U.S.C § 7246.

⁷⁴ See, e.g., Press Release, Fed. Trade Comm'n, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-brings-first-ever-cases-under-bots-act>.

a. Require funeral homes to disclose their pricing online

More than 400,000 individuals have died of COVID-19.⁷⁵ And the overwhelming grief of family members forced to put their loved ones to rest during this pandemic is exacerbated by the fact that funeral service providers are not required to post their price lists on their websites. Funeral service providers who advertise online should be required by law to post their price lists on their websites in order to conform to consumers' shopping behavior and allow consumers to meaningfully price-shop from the comfort of their own homes before committing to a purchase.⁷⁶

Not only are transactions in the funeral industry inherently fraught with emotion and stress, they are also ones with which consumers tend to have little experience or familiarity and ones that require making important and costly decisions under tight time constraints. Moreover, such a law would also allow the FTC to more easily review funeral homes' sales and business practices without imposing any significant burden on the funeral service providers.⁷⁷

b. Require companies that use negative-option offers to simplify cancellation and provide clearer renewal information

As U.S. consumers shelter at home during this pandemic, many are turning to online shopping for their purchasing needs – from PPE to toilet paper to grocery items and medication. Inevitably, some are also unintentionally enrolling in unwanted negative-option offers that siphon money off of already strained budgets.⁷⁸ Unfortunately, deceptive negative-option offers have become a multibillion-dollar industry. On a regular basis, consumers find that they have

⁷⁵ Patricia Mazzei, *Coronavirus Death Toll in the U.S. Passes 400,000*, N.Y. Times, Jan. 19, 2021, <https://www.nytimes.com/2021/01/19/us/coronavirus-deaths-usa-400000.html>.

⁷⁶ Such a rule would also align with stay-at-home recommendations during the COVID-19 outbreak. *See also* TINA.org's Funeral Rule Comment, <https://www.truthinadvertising.org/wp-content/uploads/2020/06/TINA-Funeral-Rule-Comment.pdf>.

⁷⁷ *See* FTC's Media Resources for the Funeral Rule, <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> (last visited Feb. 1, 2021).

⁷⁸ Consumer complaints (very often from senior citizens) concerning negative-option offers are one of the most common types of complaints that TINA.org receives. Consumers generally complain about unwittingly being enrolled in a negative-option plan and then finding it impossible to cancel the subscription.

been charged for long-forgotten subscriptions,⁷⁹ or that they are unable to cancel a trial before being charged. Indeed, losses relating to such offers in just 14 cases the FTC pursued over the past decade have totaled more than \$1 billion.⁸⁰

Companies that use negative-option offers should be required to (1) permit consumer cancellation of negation options in an easy and specific manner – at minimum, if the subscription was entered into online, then it should be able to be canceled online,⁸¹ (2) provide timely reminders to consumers before recurring charges are initiated,⁸² and (3) notify consumers of any material changes to the terms of a subscription and provide an opportunity to cancel the subscription before the terms go into effect.⁸³

Recognizing the multitude of consumer vulnerabilities associated with negative-option offers, two bills were introduced in the 116th U.S. House of Representatives – the Unsubscribe Act (116 H.R. 2683) and TRUE Fees Act (116 H.R. 1220) – which sought to address various aspects of negative-option offers. The passage of such bills would provide significant and meaningful protection to consumers unwittingly enrolled in negative-option offers.

⁷⁹ This issue is likely exacerbated, in part, by increasing rates of digitization: without a physical item, like a book, arriving in the mail, or paying by writing a check, the only indication a consumer may have of a long-forgotten, converted subscription is an ambiguously labelled, recurring charge on their credit card. See Sophia Wang, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 Cornell J. L. & Pub. Pol’y 197, 200 (Fall 2016).

⁸⁰ See *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, Better Business Bureau, 2 (Dec. 2018), available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>.

⁸¹ ROSCA mandates only that, for goods and services offered on the internet, there be “simple mechanisms for a consumer to stop recurring charges,” but provides no specifics and no requirement that cancellation be online. See 15 U.S.C. §8403(3).

⁸² When consumers relinquish control, they incur the additional burden of tracking their various subscriptions. If a consumer forgets about an expiring trial or a recurring charge, it can result in an inefficient allocation of consumer resources. Indeed, 48 percent of consumers have had a free trial convert to a paid subscription without realizing it. See Brady Porche, *Poll: Recurring charges are easy to start, hard to get out of*, Creditcards.com (Aug. 22, 2017), available at <https://www.creditcards.com/credit-card-news/autopay-poll.php>.

⁸³ See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

Moreover, legislation that prohibits marketers from surreptitiously tying “free” trial offers to future, ongoing charges would be beneficial. TINA.org continually receives complaints from consumers who report being charged repeatedly after signing up for what they thought was a free trial offer.⁸⁴ Unless further action is taken to protect consumers, the trend of consumers being unwittingly trapped in deceptive trial offers and automatically renewing subscriptions will only grow.

c. Exclude Section 230 of the Communications Decency Act protection for commercial speech

When Section 230 of the Communications Decency Act was enacted in 1996, neither Google nor Facebook existed and Amazon had just arrived on the scene as an online bookseller. The law was enacted to protect young internet service providers at a time when the world wide web was just beginning to gain popularity,⁸⁵ protecting multibillion-dollar companies from liability for deceptive marketing statements made about products sold on their websites and from which they profit was not on the agenda.

However, fast-forward 25 years, and that is exactly what Amazon and others argue – that Section 230 shields them from liability for the deceptive marketing statements that lure consumers to purchase bogus products sold on their websites by third parties and from which these shopping platforms turn a handsome profit. Such unfettered impunity has led to widespread

⁸⁴ Between 2015 and 2017, consumer complaints about free trials more than doubled in the U.S. Over that same span, the Better Business Bureau identified nearly 37,000 complaints – the average loss being \$186. The FBI’s Internet Crime Complaint Center also recorded a rise in complaints about free trial offers between 2015 and 2017, with losses totaling more than \$15 million over that time span. Corresponding with this consumer dissatisfaction, more than 100 federal class actions have been filed on behalf of U.S. consumers complaining about various negative option terms and conditions since 2014. And during this same time period, the FTC has brought 23 cases under ROSCA and pursued at least 5 cases against payment processors linked to deceptive negative option and free trial offers. See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

⁸⁵ U.S. Dep’t of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations* (June 2020), available at <https://www.justice.gov/file/1286331/download>.

deceptive marketing issues online, issues that will continue to multiply at an unprecedented rate as consumers pivot to online shopping as a result of the COVID-19 pandemic.⁸⁶

By way of example, Amazon actively promotes and profits from more than 100 deceptively marketed brain supplements primarily sold to senior citizens on its website.⁸⁷ Amazon is not just turning a blind eye to claims that these unproven products improve memory, among other purported health benefits, it is actively promoting these claims by independently publishing its own marketing content to amplify the deceptive marketing messages of third-parties.⁸⁸

Similarly, a TINA.org investigation found that the e-commerce website eBay was promoting more than two dozen eBay sellers spanning 45 listings that falsely claimed their face masks were “FDA approved” and/or illegally used the FDA’s logo to boost sales of their products.⁸⁹ eBay was not only allowing the sale of these falsely marketed face masks, it was also giving some items greater exposure by listing them as “sponsored” or “promoted products” in exchange for a fee.

To date, online department stores like Amazon and eBay have largely succeeded in fending off all attempts to hold them accountable for false and deceptive commercial speech on their

⁸⁶ United Nations Conference on Trade Dev., *COVID-19 has changed online shopping forever, survey shows* (Oct. 8, 2020), available at <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>; Press Release, Research and Mkts., *COVID-19 Impact on e-Commerce & Online Payments Worldwide, 2020 – Online Shopper Penetration Increases During the Pandemic* (May 29, 2020), available at <https://www.globenewswire.com/news-release/2020/05/29/2040716/0/en/COVID-19-Impact-on-e-Commerce-Online-Payments-Worldwide-2020-Online-Shopper-Penetration-Increases-During-the-Pandemic.html>.

⁸⁷ *How Amazon Promotes, Profits from Deceptively Marketed Brain Supplements*, Truth In Advertising, Inc., Jan. 16, 2020, <https://www.truthinadvertising.org/how-amazon-promotes-profits-from-deceptively-marketed-brain-supplements/>.

⁸⁸ Deceptive health claims are given increased visibility on the website through sponsored search results, designations such as “Amazon’s Choice” and “Editorial recommendations,” star ratings, and other Amazon-specific marketing materials. Amazon also plays an important role in the processing of many of these deceptively marketed brain supplements, collecting customer shipping information, fulfilling orders and even gift-wrapping some items when requested.

⁸⁹ *Face Mask Sellers on eBay Falsely Claim Products are ‘FDA Approved’*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>.

websites using Section 230 as their impenetrable defense shield.⁹⁰ Removing this bulwark from online commercial speech would allow the FTC to hold online stores to the same legal standards as brick and mortar stores, and ensure that online websites are held accountable for the deceptive marketing they promote and profit from.

VIII. CONCLUSION

Deceptive marketing and similar forms of commercial dishonesty are a scourge of the American economy, inflicting billions of dollars in losses to cheated consumers and distorting the efficient allocation of resources, rewarding those who hone ingenious frauds and punishing honest competitors. Many of the deceptive marketing schemes and frauds exploiting the COVID-19 pandemic go well beyond inflicting economic injuries – they result in physical harm and in some instances even death. Consumers are foregoing appropriate preventative measures and medically advantageous treatments for useless products that are falsely marketed. At this juncture, there is a real risk that the deceptive marketing practices enumerated today will only multiply as the agency primarily charged with policing these deceptive acts and practices, the FTC, lacks the necessary authority to claw back ill-gotten gains, punish egregious wrongdoers and fully reimburse victims of fraud.

TINA.org looks forward to working with the Subcommittee and Congress to address the issues articulated above, and I would be happy to answer your questions.

⁹⁰ A push has begun to remove certain elements of Section 230 protection from online commercial speech. For example, the Country Of Origin Labeling Online Act, or COOL Online Act (S. 3707), which sought to require clear disclosure of seller location and country-of-origin labeling for products advertised online, was introduced in the 116th Congress.