UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Cannabidiol (CBD) Enforcement Actions
Commission File Nos. 2023047, 2023064, 2023065,
2023080, 2023094, 2023114 [1]

December 17, 2020

Summary

- When companies lie about the effectiveness of their treatments for serious conditions, this harms patients and diverts sales away from firms that tell the truth.
- Congress gave the FTC a new authority to crack down on abuses in the opioid treatment industry, but the agency has not prioritized this issue. This should change.
- The FTC can increase its effectiveness when it comes to health claims by shifting resources away from small businesses and by deploying the unused Penalty Offense Authority.

Today, the Federal Trade Commission is taking action against several outfits regarding their outlandish – and unlawful – claims about cannabidiol (CBD). While CBD is currently the subject of considerable scientific research, there is no evidence yet that CBD can treat or cure cancer, Alzheimer's, or other serious diseases. Baseless claims give patients false hope, improperly increase or divert their medical spending, and undermine "a competitor's ability to compete" on honest attributes.[2]

I support these actions and congratulate those who made them a reality. Going forward, however, the FTC will need to refocus its efforts on health claims by targeting abuses in the substance use disorder treatment industry, shifting attention toward large businesses, and making more effective use of the FTC's Penalty Offense Authority.

First, COVID-19 and the resulting economic and social distress are fueling new concerns about substance use disorders. In particular, there are signs that the pandemic is leading to greater dependence on opioids.[3] It is critical that the FTC take steps to prevent exploitation of patients seeking treatment for substance use disorders.

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[1] *In the Matter of EasyButter, LLC et al.*, Comm'n File No. 2023047; *In the Matter of Reef Industries, Inc. et al.*, Comm'n File No. 2023064; *In the Mater of Steves Distributing, LLC et al.*, Comm'n File No. 2023065; *In the Matter of CBD Meds, Inc. et al.*, Comm'n File No. 2023080; *In the Matter of Epichouse, LLC et al.*, Comm'n File No. 2023094; *In the Matter of Bionatrol Health, LLC et al.*, Comm'n File No. 2023114.

[2] *In re Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972).

[3] *See, e.g.,* Jon Kamp & Arian Campo-Flores, *The Opioid Crisis, Already Serious, Has Intensified During Coronavirus Pandemic*, WALL STREET J. (Sept. 8, 2020), https://www.wsj.com/articles/the-opioid-crisis-already-serious-has-intensified-during-coronavirus-pandemic-11599557401; *Issue brief: Reports of increases in opioid- and*

I am particularly concerned about abusive practices in the for-profit opioid treatment industry, and believe this should be a high priority. This industry has grown exponentially by profiting off those suffering from addiction. Many of these outfits use lead generators to steer Americans into high-cost, subpar treatment centers, and some even hire intermediaries – so-called "body brokers" – who collect kickbacks from this harmful practice.[4]

More than two years ago, Congress passed the SUPPORT for Patients and Communities Act. Among other provisions, the Act authorized the Commission to seek civil penalties, restitution, damages, and other relief against outfits that engage in misconduct related to substance use disorder treatment.[5] The Commission is well positioned to help shut down these abuses, ensure they are not profitable, and hold predatory actors and their enablers to account.[6]

Unfortunately, the Commission has brought zero cases under this new authority. While I have supported actions like this one that challenge baseless CBD claims, as well as previous actions charging that pain relief devices and similar products were sold deceptively,[7] I am concerned that we have largely ignored Congressional concerns about unlawful opioid treatment practices. I urge my fellow Commissioners to change course on our enforcement priorities, especially given our limited resources.

Second, the FTC should focus more of its enforcement efforts on larger firms rather than small businesses. Today's actions focus on very small players, some of which are defunct. While I appreciate that small businesses can also harm honest competitors and families, they are often judgment-proof, making it unlikely victims will see any relief.[8] I am confident that FTC staff can successfully challenge powerful, well-financed defendants that break the law.

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other drug-related overdose and other concerns during COVID pandemic, AMERICAN MEDICAL ASSOCIATION (last updated on Oct. 31, 2020), https://www.ama-assn.org/delivering-care/opioids/covid-19-may-be-worsening-opioid-crisis-states-can-take-action.

[4] For example, recent reporting describes the "Florida Shuffle," where treatment facilities pay brokers to recruit patients through 12-step meetings, conferences, hotlines, and online groups, leading to serious harm. *See* German Lopez, *She wanted addiction treatment. She ended up in the relapse capital of America*, VOX (Mar. 2, 2020), https://www.vox.com/policy-and-politics/2020/3/2/21156327/florida-shuffle-drug-rehab-addiction-treatment-bri-jayne. *See also* Letter from Commissioner Chopra to Congress on Deceptive Marketing Practices in the Opioid Addiction Treatment Industry (July 28, 2018), https://www.ftc.gov/public-statements/2018/07/letter-commissioner-chopra-congress-deceptive-marketing-practices-opioid (calling on the FTC to do more to tackle this problem).

[5] Pub. L. No. 115-271 §§ 8021-8023 (codified in 15 U.S.C. § 45d). The Act also allows the Commission to prosecute deceptive marketing of opioid treatment products. Notably, a number of respondents in this sweep are alleged to have made claims that CBD could replace OxyContin.

[6] Given public reports regarding private equity rollups of smaller opioid treatment facilities, the Commission can also examine whether anticompetitive M&A strategies are leading to further patient harm. *See* Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), https://www.ftc.gov/public-statements/2020/07/statement-commissioner-rohit-chopra-regarding-private-equity-roll-ups-hart.

[7] Press Release, Fed. Trade Comm'n, Marketers of Pain Relief Device Settle FTC False Advertising Complaint (Mar. 4, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/marketers-pain-relief-device-settle-ftc-false-advertising.

[8] In one of these matters, the respondents are paying nothing.

Finally, the Commission should reduce the prevalence of unlawful health claims by triggering civil penalties under the FTC's Penalty Offense Authority.[9] Under the Penalty Offense Authority, firms that engage in conduct they know has been previously condemned by the Commission can face civil penalties, in addition to the relief that we typically seek.[10] For example, the Commission routinely issues warning letters to businesses regarding unsubstantiated health claims. Future warning letters can be more effective if they include penalty offense notifications.

The Commission has repeatedly found that objective claims require a reasonable basis,[11] and apprising firms of these findings – along with a warning that noncompliance can result in penalties – makes it significantly more likely they will come into compliance voluntarily. In fact, when the Commission employed this strategy four decades ago, it reportedly resulted in a "high level of voluntary compliance achieved quickly and at a low cost."[12] Going forward, we should pursue this strategy.[13]

I thank everyone who made today's actions possible, and look forward to future efforts that address emerging harms using the full range of our tools and authorities.

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[9] 15 U.S.C. § 45(m)(1)(b).

[10] *See* Rohit Chopra & Samuel A.A. Levine, The Case for Resurrecting the FTC Act's Penalty Offense Authority (Oct. 29, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256. Particularly given challenges to the FTC's 13(b) authority, incorporating a penalty offense strategy can safeguard the Commission's ability to seek strong remedies against lawbreakers.

[11] This requirement was first established in the Commission's 1972 *Pfizer* decision, and it has been affirmed repeatedly. *Pfizer, Inc.*, *supra* note 2 (finding that "[f]airness to the consumer, as well as fairness to competitors" compels the conclusion that affirmative claims require a reasonable basis); *In re Thompson Medical Co.*, 104 F.T.C. 648, 813 (1984) (collecting cases), aff'd, 791 F.2d 189 (D.C. Cir. 1986). Appended to *Thompson Medical* was the Commission's Policy Statement Regarding Advertising Substantiation, which states that "a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act." *Id.* at 839. This standard continues to govern the Commission's approach to substantiation, as recently reaffirmed in the Commission's final order against POM Wonderful. *In re POM Wonderful LLC et al.*, 155 F.T.C. 1, 6 (2013).

[12] Commissioner Bailey made this observation in the context of opposing industry efforts to repeal this authority, an authority she described as an "extremely effective and efficient way to enforce the law." Testimony of Commissioner Patricia P. Bailey Before the Subcomm. on Com., Tourism and Transp. of the Comm. on Energy and Com. of the H.R. Concerning the 1982 Reauthorization of the Fed. Trade Comm'n, at 11 (Apr. 1, 1982), https://www.ftc.gov/system/files/documents/public_statements/693551/19820401_bailey_testimony_before_the_subcorrmittee_on_commerce_subcommittee_on_commerce_touri.pdf.

[13] My colleague, Commissioner Christine S. Wilson, has issued a statement in this matter. I agree that the Commission should not prioritize close-call substantiation cases, especially those involving small businesses.