



## Don't Be That Company: Advertising During a Crisis

June 4th, 2020

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There are two types of advertisers during a crisis. The first type knocks it out of the park by reaching consumers with empathy and graciousness through ads that generate feelings of hope, togetherness, and kindness. A perfect example is the Nike ad promoting social distancing and encouraging people to “play for the world.” The second type makes light or, even worse, takes advantage of the situation. The worst of this type prey on fear and uncertainty. Others are simply tone-deaf.

Regulators moved quickly to interrupt the worst of the worst during the current pandemic – bad actors that took immediate advantage of a crisis to confuse already stressed-out consumers with misleading and deceptive advertising.

### **FTC Activity**

The Federal Trade Commission has been busy. According to Andrew Smith, director of the FTC’s Bureau of Consumer Protection, the FTC has “prioritized stopping as many bad actors as we can, as quickly as we can” by releasing warning letters, which he said work and are fast. The FTC’s page tracking its COVID-19-related enforcement includes more than 200 warning letters sent to companies.

Alongside the U.S. Food and Drug Administration, the FTC issued warning letters to several companies advertising products claiming to treat or cure COVID-19. One letter was issued to a company named “Corona-Cure” that was selling unapproved nasal spray promising “instant protection” from COVID-19. Talk about low-hanging fruit.

The FTC sent warning letters to advertisers making deceptive or scientifically unsupported claims about their ability to prevent, treat, or cure COVID-19. Many nature-based remedies popped up almost immediately, and the FTC letters to those companies basically said, “Cut it out. There’s no way you can prove this. Just stop it right now.”

The FTC also issued warning letters to certain work-from-home businesses taking advantage of the government stay-at-home orders, including Rodan + Fields, a well-known skincare company that uses multi-level marketing. Social media posts by Rodan + Fields representatives made earnings claims such as “financial freedom,” “extra income,” and “no risk.” The FTC reminded Rodan + Fields of its responsibility for the claims of its representatives. It also stated that all earnings claims must be substantiated and not misleading.

Finally, the FTC issued warning letters to companies and service providers “assisting and facilitating” illegal COVID-19-related telemarketing calls. The FTC’s letters cautioned the companies to consider the consequences of assisting companies that participate in illegal COVID-19 promotions.

According to Smith, the warning letters are the FTC’s most efficient and effective tool. “In nearly all cases so far, those who get the letters have stopped making the false claims or selling the scammy thing – whether cures from a product or earnings from a work-at-home scheme.”

### **State Attorney General Activity**

In late April, the Georgia AG warned auto dealerships of problematic advertising related to COVID-19. In guidance sent via email, the Georgia AG admonished those capitalizing on the pandemic and exploiting consumers by running ads suggesting a consumer would receive a “stimulus check” or “stimulus relief” from the dealer. The Georgia AG also took issue with ads designating a dealership as “relief headquarters.” The Georgia AG noted that any ads using symbols, emblems, codes, or language suggesting they originated from someone other than the dealer are misleading. The Georgia AG stated, “[T]he government is actually in the process of disseminating Covid-19 related monetary relief. Dealers, however, have not been selected nor authorized by the government to provide assistance or aid in disseminating these funds. To suggest otherwise would be a violation of the Georgia Fair Business Practices Act.”

Similarly, the Florida AG’s Consumer Protection Division opened an investigation against an event promoter and an auto dealer supplying automobiles for a tent sale. The Florida AG’s investigation stemmed from car ads allegedly disguised as stimulus checks.

Again, these bad actors are the lowest of low-hanging fruit for regulators to target.

But, all dealers should remember that AGs from all states will *always* protect consumers from ads seeking to take advantage of or harm consumers. A global pandemic is no exception. In fact, AGs are likely to be even more focused on consumer harm during the crisis.

### **Bottom Line**

Regulators will not allow advertisers to take advantage of the pandemic. Plus, doing so is, well, gross (for lack of a better word) and may cause reputational harm as well as regulatory risk. So, it is time to shore up ads, including social media posts. Ensure that everyone responsible for dealer marketing (marketing departments, social media people, ad agencies) understands the game plan for marketing during the pandemic.

When counseling clients, I often encourage them to think how they would feel if someone they cared about a great deal (i.e., their mom, best friend, etc.) *received, believed, and acted on* a specific ad. I also ask them to consider how someone whose circumstances are different than their own would perceive the ad.

In short, don’t be *that* company that attempts to profit off a crisis. It won’t serve you in the long run.