

**“Stopping COVID-19 Fraud and Price Gouging”**

Prepared Statement of

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Before the

Committee on Commerce, Science, and Transportation

Consumer Protection, Product Safety, and Data Security Subcommittee

United States Senate

February 1, 2022

## **Introduction**

Chairman Blumenthal, Ranking Member Blackburn, and members of the Subcommittee, I am Mary Engle, Executive Vice President, Policy, at BBB National Programs, a non-profit organization where businesses go to enhance consumer trust and consumers are heard. I previously had the honor of working at the Federal Trade Commission for 30 years, with the last 18 spent directing the Division of Advertising Practices in the Bureau of Consumer Protection. Thank you for this opportunity to testify today on how independent industry self-regulation has helped to combat COVID-19 fraud.

After serving in government for three decades at the FTC, I was attracted to join BBB National Programs because of its status as a mission-driven non-profit organization that creates a fairer playing field for businesses and a better experience for consumers through the development and delivery of effective third-party accountability and dispute resolution programs. BBB National Programs was created in 2019 when the Council of Better Business Bureaus was re-organized into two separate entities, BBB National Programs and the International Association of Better Business Bureaus, or IABBB.

BBB National Programs operates more than a dozen national industry self-regulation programs, providing business guidance and fostering best practices in arenas such as advertising, child-directed marketing, dispute resolution, and privacy. IABBB is the umbrella organization for nearly 100 local Better Business Bureaus in the US and Canada, and among other things, rates businesses and resolves consumer complaints about them. Although we share with IABBB a

long history and common mission of increasing marketplace trust, we serve businesses and consumers differently and are no longer directly affiliated.

Before I explain how industry self-regulatory efforts have combatted COVID-19 fraud, I think it is important to distinguish between a company's own self-regulation and independent industry self-regulation, which is at the core of what we do at BBB National Programs. Self-regulation, as some are discussing it, is when companies monitor themselves without much guidance from regulators or the industry. By contrast, independent industry self-regulation, when done right, provides active collaboration between industry and regulators necessary for credible accountability. It is a system of three critical components: industry-wide accountability to agreed-upon guidelines, independent monitoring, and coordinating enforcement mechanisms.

Today I will focus on the work of two of our independent industry self-regulation programs, the Direct Selling Self-Regulatory Council, or DSSRC, and the National Advertising Division, or NAD, which have addressed COVID-19 scams since the pandemic began.

The Direct Selling Self-Regulatory Council was launched in 2019. Through extensive monitoring of product and business opportunity claims made by direct selling companies and their salesforce members, DSSRC's oversight facilitates the voluntary removal of misleading claims from the marketplace. Advertisers who disagree with a DSSRC decision can appeal to the DSSRC Appellate Board, consisting of three members drawn from the advertising and direct-selling industry. Although primarily funded by the Direct Selling Association (DSA), DSSRC operates as an independent "watchdog" and provides accountability for DSA members and non-members alike.

The National Advertising Division, also part of BBB National Programs, has a much longer history, having provided a voluntary, self-regulatory forum for challenging misleading advertising since 1971. The flagship of the U.S. advertising industry's system of self-regulation, NAD promotes fair competition and builds public trust in advertising by reviewing misleading advertising claims, based on competitor challenges and through its own monitoring program. Its decisions represent the single largest body of advertising decisions in the U.S. Although participating in NAD's review is voluntary, over 95% of companies participate and comply with NAD's recommendations. If an advertiser disagrees with NAD's recommendation to discontinue or change its advertising, the advertiser can appeal to BBB National Programs' National Advertising Review Board, or NARB. The National Advertising Review Board provides independent peer review for National Advertising Division cases, with appeals heard by five-person panels drawn from an 85-person panel pool, selected for their stature and experience, comprised of distinguished members representing national advertisers, advertising agencies, and public members (usually marketing academics). This layer of independent review further promotes credibility and voluntary compliance with the self-regulatory system.

When a company does not participate or comply with DSSRC, NAD, or NARB recommendations, we refer the advertiser to the appropriate regulatory authority, usually the Federal Trade Commission, but often other regulatory agencies as well, such as the Food and Drug Administration and state attorneys general. Recently, BBB National Programs also began reporting misleading advertising claims directly to platforms including Facebook and Instagram. Once received, the platforms will remove the claims that violate their terms of service.

BBB National Programs values the longtime support of federal and state regulatory agencies, particularly the FTC, that support its self-regulatory efforts to promote fair competition and truthful and accurate advertising to benefit consumers and businesses. The FTC’s website keeps a record of response to referrals from BBB National Programs, including DSSRC and NAD.<sup>1</sup> The FTC’s responses demonstrate a strong track record of following up on such referrals and getting the advertising claims removed from the marketplace.

### **How Independent Industry Self-Regulation Has Addressed COVID-19 Fraud**

When COVID-19 shut down the world and caused consumers to isolate fearing dire health consequences, unscrupulous advertisers began touting cures, treatments, and preventatives to the novel coronavirus. The FTC and FDA quickly issued letters warning companies to stop making false and misleading claims that a product could prevent, treat, or cure COVID-19. Similarly, as described below, the DSSRC and NAD promptly took action as well.

The response of DSSRC and NAD to the misleading advertising that flooded the marketplace demonstrates the value independent self-regulation can provide. Early in the pandemic, DSSRC released a statement to the direct selling industry, urging caution regarding misleading health-related product claims as well as misleading earnings claims, and both DSSRC and NAD opened multiple cases, resulting in the removal of advertising claims touting that products would prevent, treat, or cure COVID-19. In all cases, our self-regulatory programs uphold standards set forth in regulatory guidance issued by the FTC and FDA. Our case decisions, summaries of which are publicly available, have impact beyond the advertising at issue. The decisions educate

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<sup>1</sup><https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/resolution-of-referrals-from-nad>

companies on advertising law. To date the media has written more than 25 articles and blogs highlighting the industry self-regulatory guidance provided through DSSRC and NAD decisions on COVID-19 claims.

### *DSSRC Actions Against Misleading COVID-19 Claims*

Although the COVID-19 pandemic has significantly impacted all sectors of the business community, direct selling companies face the added responsibility of ensuring that their independent salesforce members are not seeking to boost sales by making unauthorized health-related or business opportunity claims related to the pandemic. DSSRC has focused its monitoring efforts on identifying false and misleading claims about a product's ability to treat or prevent COVID-19, and claims related to how the pandemic has presented an opportunity for company salesforce members to earn significant income.

In an action commended by FTC Commissioner Noah Phillips,<sup>2</sup> in April 2020, the Direct Selling Association and DSSRC issued a joint press release cautioning direct selling companies and their independent salesforces from making claims referencing COVID-19 in the context of product claims and business opportunity claims. More specifically, the statement called attention to claims suggesting that products can:

- Cure, treat, or alleviate the symptoms of COVID-19
- Boost or improve immune function that can prevent COVID-19; or

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<sup>2</sup> Noah Joshua Phillips, Commissioner, Federal Trade Comm'n, Keynote Address at the DSA Legal & Regulatory Summit (Oct. 15, 2020), *in* [https://www.ftc.gov/system/files/documents/public\\_statements/1581726/phillips\\_-\\_dsa\\_remarks\\_10-15-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581726/phillips_-_dsa_remarks_10-15-20.pdf)

- Eliminate or remove viruses.

In addition, because product claims made by salesforce members are attributable to direct selling companies themselves, DSSRC reminded all direct selling companies to educate their salesforce members about best practices with respect to health-related product claims.

Since the onset of the pandemic, DSSRC has commenced 139 inquiries that involved claims pertaining to COVID-19. In those inquiries, DSSRC has reviewed 309 product performance claims that referenced COVID-19 and 33 claims that discussed the pandemic as an earnings opportunity for direct selling company salesforce members.

Of those 139 inquiries, 127 have been administratively closed while seven resulted in referrals to the FTC and/or the appropriate state attorney general office for enforcement. DSSRC will administratively close an inquiry if a direct selling company takes immediate action to remove an identified problematic claim or social media post. DSSRC currently has five cases pending that involve COVID-19 claims. In almost all the inquiries in which DSSRC identified COVID-19 claims to direct selling companies, the parties took prompt and immediate action to remove references to the coronavirus.

Following warning letters issued by the FTC to several direct selling companies regarding claims that they or their salesforce members were making about their products' ability to treat or prevent COVID-19 or about the earnings that salesforce members can earn, DSSRC released a public statement applauding the actions taken by the FTC and reiterated its call to direct selling companies to fulfill their commitment to industry self-regulation. In its statement, DSSRC noted that the actions taken by the FTC were consistent with recent guidance issued by both DSSRC

and the DSA cautioning direct selling companies against expressly claiming or implying that their products can prevent, treat, alleviate, or cure COVID-19 and its symptoms.

With the FTC's heightened scrutiny of the direct selling channel, direct sellers can ill afford the reputational damage (and certain adverse regulatory enforcement action) that would result if a company (or its independent salespeople) seeks to capitalize on the current pandemic by making unsubstantiated health claims. Accordingly, through its case work and its direct engagement with the industry through educational initiatives such as the DSSRC Direct Selling Summit and DSA's Compliance Certification Program, DSSRC will continue to provide guidance to the direct selling industry with respect to earnings claims and representations pertaining to health and safety.

DSSRC will continue to monitor direct selling advertising messages to make sure they adhere to appropriate and ethical advertising standards throughout this pandemic and remains committed to helping ensure that inappropriate claims disseminated by direct selling companies and their salesforce members referencing COVID-19 are expeditiously removed from the marketplace.

#### *National Advertising Division Actions Against Misleading COVID-19 Cases*

BBB National Programs' National Advertising Division case decisions have often expanded on the guidance provided by the FTC and FDA letters by providing specific examples of advertising that conveys implied messages that a product prevents, treats, or cures COVID-19.



A good example is the NAD case involving advertising claims for Your Superfoods Immunity Boosting Bundle dietary supplements. In that matter, following an NAD inquiry, the advertiser immediately agreed to remove the following claim from the marketplace:<sup>3</sup>

“[W]ith all that’s going on, with the coronavirus...there is a piece that we can control and that is our own health and building our immune system because it depends on what we eat.... It’s super important to have a lot of micronutrients now, so Superfoods can help. We have this amazing immunity bundle – Super Greens to up your green, Mellow Yellow which really reduces your stress because [stress] actually reduces your immunity, and then we also have immunity boosting mushrooms in our Magic Mushroom mix.”

A case concerning an Elderberry supplement advertised to support the immune system provides another example.<sup>4</sup> NAD reviewed the claim: “[a]s restrictions are gradually lifting, it’s more important than ever to keep your immune system strong. Our Elderberry Immune Support keeps you protected with vitamin C, zinc, elderberries, garlic and echinacea; a powerful immune-boosting combo.”

NAD found that this claim conveyed the implied message that Vitamin Bounty Elderberry Immune Support IV Drips protect users against the novel coronavirus or COVID-19.

NAD initially referred the advertiser to the FTC for failing to respond to the inquiry but, after referral, the advertiser agreed to participate and voluntarily discontinued the claim, removing the

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<sup>3</sup> Your Superfoods, Inc. (Your Superfoods Immunity Bundle), Report #6371, *NAD/CARU Case Reports* (May 2020).

<sup>4</sup> Vitamin Bounty/Matherson Organics, LLC (Vitamin Bounty Elderberry Immune Support), Report #6397, *NAD/CARU Case Reports* (Sept. 2020).

misleading advertising from YouTube and elsewhere. NAD’s decision also alerted the dietary supplement industry that touting immune support together with reminders of the ongoing pandemic misleads consumers that the product could help prevent disease. A prominent publication that covers the dietary supplement industry, *Nutritional Outlook*, alerted the industry to the decision with the headline, “Minor reference to pandemic constitutes implied COVID-19 claim according to recent NAD case,” in an article that cautioned dietary supplement makers not to tie immune support to the pandemic. Other similar decisions looked at social media posts and other advertising tying dietary supplements that claim to support the immune system to the pandemic, generating guidance that spread across the dietary supplement industry.

NAD decisions further expanded on FTC and FDA guidance to other kinds of products that touted unsupported health benefits. In response to an NAD inquiry, an advertiser modified its claims that its air purifier was effective on the coronavirus:

“Remove airborne coronavirus by 99.999%\*<sup>5</sup>”.

NAD recommended that the advertiser prominently disclose that it tested only porcine respiratory coronavirus, a surrogate for SARS-CoV-2.

NAD decisions have reached a broad and disparate range of industries from cleaning products<sup>6</sup> to ultra-violet lights,<sup>7</sup> intravenous hydration therapy,<sup>8</sup> and even continuously self-cleaning

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<sup>5</sup> NuWave LLC’s OxyPure Air Purifier, Report #6432, *NAD/CARU Case Reports* (Mar. 2021).

<sup>6</sup> One Home Brands, Inc. d/b/a Blueland (Blueland Cleaning Products), Report #6416, *NAD/CARU Case Reports* (Sept. 2020).

<sup>7</sup> Ontel Products Corp. (Safe & Healthy™ UV-C Disinfecting Light), Report #6426, *NAD/CARU Case Reports* (Dec. 2020).

<sup>8</sup> IV Drips, Customized IV Hydration & Wellness (IV Hydration Therapy), Report #6389, *NAD/CARU Case Reports* (Oct. 2020).

surfaces,<sup>9</sup> removing misleading claims. These industries have been alerted that unsupported claims that a product prevents, treats, or cures COVID-19 violate the law. The self-regulatory response to the pandemic is a powerful example of how independent industry self-regulation can prevent misleading advertising and reduce harm to consumers. Former FTC Chairwomen Edith Ramirez praised the NAD program in 2016 as an example of “how impactful self-regulation can be,” further noting that it is “a valuable complement to the FTC’s own enforcement efforts to eliminate fraud.”<sup>10</sup>

## **Conclusion**

Thank you for the opportunity to appear before you today to explain how independent industry self-regulation has helped combat deceptive COVID-19 advertising claims in the marketplace. When regulatory guidance establishes standards or best practices for advertising particular products or claims, independent industry self-regulation is effective at spreading that guidance, holding companies accountable to those standards, advising additional industries about the guidance, and applying the standards in a wide array of settings. A broad range of industries, including the dietary supplements, healthcare, and direct-selling industries look to DSSRC and NAD for guidance. Although some companies will respond only to government enforcement, many other marketers respond quickly and voluntarily to remove misleading advertising when

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<sup>9</sup> NanoTouch Material, LLC (NanoSeptic Surfaces), Report #6390, *NAD/CARU Case Reports* (July 2020).

<sup>10</sup> Edith Ramirez, Chairwoman, Federal Trade Comm’n, Address at the CRN/ACI Fourth Annual Legal, Regulatory, and Compliance Forum on Dietary Supplements (June 2016), Press Release, <https://www.crnusa.org/newsroom/crn-nad-reflect-programs-ten-years-self-regulatory-excellence>.

given concrete guidance on appropriate claims. Independent industry self-regulation thereby amplifies the impact of government actions.

With our Direct Selling Self-Regulatory Council and National Advertising Division always on watch, BBB National Programs looks forward to working with this Subcommittee to address the problem of misleading COVID-19 marketing claims. Thank you again for this opportunity to testify, and I am happy to answer your questions.