

## **Notice of Temporary Order and Statement of Need and Justification**

Effective Date: 04/17/2020-10/14/2020

Agency Approved Date: 04/16/2020

**NEED FOR THE RULE:** The Oregon Department of Justice is temporarily adopting OAR 137-020-0260 in light of the Governor's declaration of an emergency due to the serious public health threat posed by the novel infectious coronavirus (COVID-19): "State agencies shall develop and implement procedures, including waiving rules or adopting temporary rules within the agency's authority, consistent with recommendations from the state Public Health Director, designed to prevent or alleviate the public health threat." Executive Order 20-03, at 2. This temporary rule protects consumers from unsubstantiated claims that a good is effective against COVID-19, by requiring sellers and advertisers to substantiate any health claims they make related to COVID-19.

**JUSTIFICATION OF TEMPORARY FILING:** The Oregon Department of Justice finds that failure to act promptly will result in serious prejudice to consumers who might be induced to buy goods based on unsubstantiated claims that the goods prevent, treat, diagnose, mitigate, or cure coronavirus, COVID-19 or a related condition and will result in serious harm to the public health of all Oregonians. Consumers who are induced to believe that a good protects them from COVID-19 might not take the necessary precautions to protect against infection to themselves or others. If they are led to believe that a good cures or treats the effects of COVID-19 they might not seek medical advice or proper treatment. Oregonians are at risk of purchasing goods with the anticipation of addressing COVID-19, when the goods do not address COVID-19. Relying on unproven prevention claims would create a false sense of security and result in unsafe behaviors. This poses a serious public health risk, especially to those suffering from or caring for those suffering from COVID-19 and related conditions, and to the community as a whole.

The Department of Justice is already receiving consumer complaints and finding retailers selling products claiming to treat COVID-19. Examples include: a Portland Cannabidiol retailer selling "COVID Lung Support Immunity Tinctures," a Bend Chiropractor misrepresenting that a nutritional supplement promoted on her web site could prevent, cure, or mitigate the effects of Covid-19, and a Portland online retailer advertising silk socks that provide "protection against COVID."

This temporary rule is needed to make clear that any claims that a good prevents, treats, diagnoses, mitigates, or cures coronavirus, COVID-19 or a related condition must have competent and reliable scientific evidence, also known as "substantiation," to support the claim. While the Federal Trade Commission, and most states, have been enforcing and guiding businesses regarding substantiation for decades, Oregon does not have a specific administrative rule affirmatively requiring substantiation. Failure to take immediate action would allow the entities to make these health claims without scientific support as to the truth of the claims. As a result, consumers would be induced to buy these goods based on those unsubstantiated claims, which may cause harm to their health, the health of those caring for them, and to Oregonians who come in contact with them. During this period of emergency due to worldwide pandemic, the Department of Justice needs to act immediately to combat unsubstantiated claims in order protect the public health of Oregonians by enacting this rule.

The Department of Justice obtained public input on the structure, timing, and language of the rule from various businesses entities and organizations, both local to Oregon and national in scope.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE: Office of the Governor, State of Oregon. Executive Order No. 20-03. Available online at: [https://www.oregon.gov/gov/admin/Pages/eo\\_20-03.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-03.aspx). “DOJ: Bend Chiropractor Made False Claims About Coronavirus,” *Bend Bulletin*, March 23, 2020. Available online at: [https://www.bendbulletin.com/coronavirus/doj-bend-chiropractor-made-false-claims-about-coronavirus/article\\_53c69df4-6d5e-11ea-bb80-33fa0953f9c1.html](https://www.bendbulletin.com/coronavirus/doj-bend-chiropractor-made-false-claims-about-coronavirus/article_53c69df4-6d5e-11ea-bb80-33fa0953f9c1.html). See also generally: “I Have the Cure: Slew of US Scammers Seek to Capitalize on Coronavirus Fears,” *The Guardian*, April 8, 2020. Available online at: <https://www.theguardian.com/world/2020/apr/08/coronavirus-scammers-cures-keith-middlebrook>. “FTC Policy Statement Regarding Advertising Substantiation,” November 23, 1984. Available online at: <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation>. “FTC Coronavirus Warning Letters to Companies: FTC and FDA Warning Letters,” April 14, 2020. Available online at: <https://www.ftc.gov/coronavirus/warning-letters>.

RULES: 137-020-0260

ADOPT: 137-020-0260

RULE TITLE: Temporary Rule for Novel-Infectious-Coronavirus-Related Representations Regarding Health Benefits of Goods

RULE SUMMARY: This temporary rule provides protection to consumers seeking treatments for COVID-19, by requiring sellers and advertisers to substantiate any claims they make related to goods related to COVID-19.

RULE TEXT: It is unfair and deceptive for an advertiser or seller to represent that a good that is or may be obtained primarily for personal, family or household purposes will prevent, treat, diagnose, mitigate, or cure coronavirus, COVID-19 or a related condition, without first having competent and reliable scientific evidence upon which to base a reasonable belief in the truth of the representation. It is the intent of the rule that in construing the meaning of the term “competent and reliable scientific evidence,” the courts may be guided by decisions of federal courts and final orders of the Federal Trade Commission. It is also presumed that any specific good with approval or emergency use authorization by the United States Food and Drug Administration has competent and reliable scientific evidence upon which to base a reasonable belief in the truth of the representation.

STATUTORY/OTHER AUTHORITY: ORS 646.608(1)(u); ORS 646.608(4)

STATUTES/OTHER IMPLEMENTED: ORS 646.608(1)(u)