Product advertising and marketing in the time of COVID-19

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The COVID-19 pandemic has created unprecedented demand for certain health products, most notably personal protective equipment, diagnostic tests and hand sanitizer. Health products are subject to regulatory oversight by Health Canada and the regulator has implemented a number of interim measures to facilitate expedited access to them in response to the pandemic. More information on such interim measures are available online. Health Canada is also monitoring the marketplace for products claiming to prevent, treat or cure COVID-19.

We highlight some of the measures taken by Health Canada as well as the advertising obligations that product manufacturers, importers and distributors should keep in mind as the pandemic continues.

Advertising health products

The term “health products” includes drugs, vaccines, natural health products (*e.g.*, certain hand sanitizers), medical devices (*e.g.*, certain face masks, such as surgical masks and N95 respirators), and other similar products advertised for the prevention, mitigation or treatment of a disease, disorder or other medical condition.
Generally, only health products that meet applicable manufacturing, labelling and packaging requirements and that have been authorized for sale by Health Canada may be legally advertised and sold in Canada. This applies to advertising in any medium, including print, internet, broadcast or social media.

The Canadian *Food and Drugs Act* and its associated regulations (collectively, the FDA) prohibit:

- the advertising of any drug or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.1 (which includes acute infectious respiratory syndromes); and
- the advertising, labelling, packaging or selling of any health product in a manner that is false, misleading or deceptive or that is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

In addition, the FDA prohibits the following drug and device marketing practices:

- omitting or downplaying risks;
- overstating effectiveness;
- promoting unauthorized (off-label) use;
- promoting an unauthorized product; and
- making misleading endorsements and comparative claims.

More information on illegal marketing of drugs and devices is available online.

Health Canada has stated that “there is no vaccine or therapeutic product for COVID-19 that is authorized to treat or prevent the disease.” Accordingly, any health product advertisement that claims to prevent or cure COVID-19 will be deemed non-compliant with the FDA.

Health Canada recently published a list of over 100 health product advertising incidents where businesses made false, misleading or deceptive claims related to COVID-19 in advertisements. These advertisements involved a wide range of products claiming, directly and indirectly, to control, sterilize, treat, prevent, protect against, or reduce the risks of COVID-19, including face coverings, colloidal silver, plant-based elixirs and formulas, oregano oil, and ultraviolet lamps. Health Canada took compliance and enforcement action against these companies. It is worth noting that a number of lawsuits, including class actions, have also been commenced with respect to COVID-19 false advertising claims, notably in the U.S.

Advertising other products

There are a number of other Canadian federal and provincial laws that prohibit merchants from making false or misleading claims. Among them, the Canadian *Competition Act* prohibits false or misleading claims about any product, service or business interest offered for sale in Canada. It also prohibits performance claims that are not based on adequate and proper testing. The Competition Bureau is actively monitoring the market and has issued a number of compliance warnings to stop false or misleading claims related to COVID-19. These warnings concerned claims about various non-health products, including masks, food, natural products as well as ventilation and air purification products.

Businesses that sell non-health products that may be associated with or resemble health products, such as non-medical face masks/coverings, must be careful to avoid holding these products out as health products. In fact, in many instances, companies should consider including a disclaimer in their advertising and/or on product labelling and packaging expressly stating that their products are not intended to protect against, mitigate, prevent, treat, diagnose or cure COVID-19 or any other disease, as applicable.

Businesses making product claims related to COVID-19 should ensure that those claims can be substantiated with supporting data. They should also carefully consider whether their claims may be considered false, misleading or deceptive to consumers, such as to mitigate against regulatory and litigation risks associated with the sale of the product in the marketplace.

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