

United States Senate

January 19, 2022

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Dear Chair Khan:

We write to urge the Federal Trade Commission (FTC) to investigate — and take all necessary action to prevent — price gouging and scams related to at-home COVID-19 test kits.

As the world confronts another surge in this long pandemic and the rise of the Omicron variant, at-home testing kits are vital for identifying illness and stopping the spread of COVID-19. The demand for these test kits by Americans concerned about their health, trying to protect friends and family from infection, or in need of a negative test for work, travel, or child care, has led to supply shortages and empty shelves across the country.¹ These conditions are unfortunately ideal for predatory and profiteering behavior, including the sale of fraudulent test kits or charging exorbitant prices for those that are available. In light of these realities, the FTC must be vigilant and respond immediately to any such illicit activity.

The Biden administration recently announced a plan to rapidly increase the availability and affordability of at-home COVID-19 test kits.² We applaud these initial steps, and believe we must continue ramping up our efforts to produce as many test kits as possible while making them free across the country. In the interim, however, we must respond when bad actors seek to exploit the current gap between supply and demand. According to reports from multiple state attorneys general and the media, consumers have recently experienced price gouging when attempting to purchase at-home test kits, including being charged double or triple the regular retail price of the product.³ Meanwhile, the U.S. Food and Drug Administration continues to warn consumers about the risk of buying fraudulent diagnostic tools as they seek to protect their

¹ Rebecca Heilweil, *How omicron broke Covid-19 testing*, Vox (Dec. 21, 2021),

<https://www.vox.com/recode/2021/12/21/22848286/omicron-rapid-test-covid-19-antigen>.

² Shannon Pettypiece, *Biden administration to make 500 million at-home Covid tests available for free*, NBC News

(Dec. 21, 2021), <https://www.nbcnews.com/politics/white-house/biden-administration-make-500-million-home-covid-tests-available-free-n1286356>; White House Briefing Room, *President Biden Announces New Actions to*

Protect Americans Against the Delta and Omicron Variants as We Battle COVID-19 this Winter (Dec. 2, 2021),

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/>.

³ Nadine El-Bawab, *NY AG warns against price gouging, 'misrepresenting' COVID test turnaround time*, ABC

News (Dec. 21, 2021), <https://abcnews.go.com/amp/Health/ny-ag-warns-price-gouging-misrepresenting-covid-test/story?id=81875984>; FOX 5 Atlanta Digital Team, *Officials warn of COVID-19 testing scams, price gouging in*

Georgia, Fox 5 Atlanta (Dec. 27, 2021), <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments>; Kelsey Butler, *Rapid Covid Tests Are Reselling for Triple the Retail*

Price, Bloomberg (Jan. 5, 2022), <https://www.bloomberg.com/news/articles/2022-01-05/scarce-at-home-covid-tests-leave-some-consumers-paying-40-a-pop>.

<https://www.bloomberg.com/news/articles/2022-01-05/scarce-at-home-covid-tests-leave-some-consumers-paying-40-a-pop>.

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families from the coronavirus.⁴ This is particularly concerning because unreliable information from unapproved test kits could result in people unknowingly spreading the virus even further during this challenging time.

The FTC is authorized to investigate, take enforcement actions, and issue rules to address “unfair or deceptive acts or practices” across much of the nation’s commerce.⁵ Additionally, the *COVID-19 Consumer Protection Act*, passed in December 2020, prohibited deceptive marketing related to treatment, cure, prevention, mitigation, or diagnosis of COVID-19.⁶ The law also allows the FTC to obtain civil penalties for first-time violations. We can think of nothing more unfair, deceptive, and harmful than the exploitation of public health concerns for profit during a global emergency. We are encouraged to see FTC’s recent consumer notice on avoiding counterfeit tests,⁷ and as media reports continue to reveal price gouging and scams related to at-home test kits, we strongly urge the FTC to act as necessary and use its full authority to investigate the situation and hold bad actors accountable without delay. No one should be allowed to reap a windfall and fraudulently exploit fear and human suffering.

Thank you for your attention to this important matter.

Sincerely,



Edward J. Markey
United States Senator



Richard Blumenthal
United States Senator

CC: The Honorable Merrick Garland, Attorney General, Department of Justice

⁴ U.S. Food and Drug Admin., *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments> (last visited Jan. 10, 2022).

⁵ 15 U.S.C. § 45.

⁶ Pub. L. No. 116-260, Division FF, Title XIV, § 1401.

⁷ Colleen Tressler, Division of Consumer and Business Education, Fed. Trade Comm’n, *How to avoid buying fake COVID tests online* (Jan. 4, 2022), <https://www.consumer.ftc.gov/blog/2022/01/how-avoid-buying-fake-covid-tests-online>.