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April 21, 2011

### FTC's Smackdown on Affiliate Marketing

*DMConfidential.com*

Just days after ad:tech San Francisco, digital marketers that were riding high with justified optimism are now faced with a jolting reminder of the importance of legal compliance. On April 19, 2011, the Federal Trade Commission (the "FTC") moved to stop operators of websites from making allegedly deceptive claims about acai berry weight loss products. The enforcement actions announced by the FTC in their press conference target affiliate marketers who made allegedly deceptive advertising claims by posting online fake news stories about the weight loss benefits of acai berry. The FTC filed 10 federal cases in a total of 6 courts. Also, the Illinois Attorney General has filed one suit in Illinois.

#### FTC Targets Allegedly Deceptive Websites

The FTC says the sites used logos of legitimate news websites, but were in actuality advertisements aimed at consumers to entice them to buy weight loss products from other merchants. The FTC will ask the courts to permanently bar the allegedly deceptive claims, and to require the companies to provide money for refunds to consumers who purchased the supplements and other products.

The FTC charges that the defendants:

- make false and unsupported claims that acai berry supplements will cause rapid and substantial weight loss;
- deceptively represent that:
  - their websites are objective news reports;
  - independent tests demonstrate the effectiveness of the product, and
  - comments following the "articles" on their websites reflect the views of independent consumers;and
- fail to disclose their financial relationships to the merchants selling the products.

#### FTC's Next Steps

The FTC decided to pursue acai advertising because it was prominent and the FTC had prior enforcement experience with acai berry products. But, the FTC will look at other areas promoted by affiliate marketers. During the press conference, one FTC speaker noted that one defendant ran other affiliate advertising operations promoting teeth whitening and government grant programs. Work-from-home offers also were mentioned and have been the focus of ongoing enforcement actions. The FTC will actively explore the role of product marketers in the affiliates' claims. The FTC will use investigatory methods to determine how much participation product marketers may have had in the development of affiliates' claims.

The FTC is sending a clear message that it will be using its enforcement authority against product marketers, affiliate networks and affiliates that allegedly imitate news sites, make unsubstantiated advertising claims, and engage in deceptive advertising. While this announcement is about weight-loss claims and allegedly deceptive websites, what makes this announcement significant is that it sends a message that scrutiny being placed on affiliate networks and affiliate marketers is at an all time high. When an industry is the target of coordinated FTC and state attorney general lawsuits it is critical for individual companies to review their own legal compliance program and to ask how they can help the entire industry avoid major enforcement sweeps and retaliatory regulation.

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