FTC Enlists Surprising Watchdogs to Police Marketers' Practices

January 20, 2012

The FTC is building up its army of watchdogs to police online marketing content and practices. Who those watchdogs are – and their relationship to the industry – might surprise you.

Earlier this month, the agency entered into a settlement agreement with Central Coast Nutraceuticals, an Internet marketer of weight-loss and health products. The agreement settles charges that were initiated against the company in 2010. The company is one of the many marketers targeted by the FTC for its tactics in selling acai berry diet products. Like more recent FTC targets, Central Coast was charged with deceptive advertising and unfair billing. The deceptive advertising allegations were based on (1) the marketer's use of phony endorsements by Rachael Ray and Oprah Winfrey and (2) the marketer's unsubstantiated claims about the benefits of its products. The unfair billing allegations were based on the marketer's "free trial" scheme that baited consumers into pricy negative continuity programs.

Those tracking the FTC's enforcement actions against online diet marketers are familiar with these allegations. Last spring, the FTC halted the sites of 10 operators who marketed acai berry diet pills for alleged fake endorsements from major media networks and unsubstantiated claims about the pills' efficacy. An eleventh operator was slapped with an action last December for the same issues, including the use of negative continuity programs.

Since Central Coast was the first of these marketers to come under the agency's fire, and the first to enter into a settlement agreement (the actions of the other 12 operators are still pending), it is likely that the Central Coast settlement agreement will be the template for the suits to follow. (The FTC uses its settlement agreements to establish its legal standards.)

A term in the settlement agreement that caught our attention is a requirement that the company monitor affiliate marketers it does business with in the future. This obligation includes reviewing marketing materials to make sure that those materials comply with the provisions of the settlement agreement. Again, the Central Coast agreement likely will be the standard for subsequent enforcement actions, so these monitoring duties likely will be included in future agreements with other companies.

There have been a few FTC actions in the past that have imposed monitoring duties on companies who find themselves in hot water with the agency. In March of last year, a seller of instructional DVDs entered into an agreement with the FTC that requires the company to periodically monitor and review affiliates' representations and disclosures. That includes monthly visits to top affiliate websites "done in a way designed not to disclose to the affiliates that they're being monitored."

What does this mean? Corporate spying has taken on new meaning, thanks to FTC sanctions. Affiliate marketers have their business partners as their proverbial Gladys Kravitz. It is likely that this type of government-imposed self-regulation will become increasingly the norm. The FTC doesn't like affiliate marketers or the layers of puffery they create between advertiser and consumer. Policing for free through private companies is a win-win for the agency.

FTC Beat is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. We look forward to hearing your thoughts and comments!