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Please contact any of the attorneys in our Advertising and Marketing group if you have any questions regarding this alert.

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Online Marketer Will Pay FTC $250,000 for Misleading Product Reviews by Affiliates

The Federal Trade Commission (FTC) has announced that Legacy Learning Systems, Inc., and its owner have signed a consent agreement and agreed to pay $250,000 for deceptively representing that endorsements of its instructional DVDs that were posted on blogs or other websites created by Legacy's affiliates reflected the views of ordinary consumers or “independent” reviewers.

In fact, the affiliates who posted those reviews had signed up for Legacy's "Review Ad" program and were paid commissions ranging from 20% to 45% every time a customer ordered a product after clicking on the hyperlink to Legacy's order page that appeared on the affiliate's website. According to the FTC, some affiliates did not disclose their business relationship with Legacy at all, while others disclosed it only through inconspicuous links located at the bottom of the affiliates' websites.

The FTC complaint says that Legacy "disseminated or caused to be disseminated" advertisements that represented "that reviews of their instructional videos were independent reviews reflecting the opinions of ordinary consumers" when they were not. It goes on to allege that Legacy "failed to disclose, or disclose adequately, that the endorser receives financial compensation from the sale of Legacy's products."

But Legacy didn't disseminate any ads. The allegedly misleading representations were the result of the affiliates' online advertising, not Legacy's advertising.

And Legacy didn't really cause those ads to be disseminated directly. Legacy's affiliate marketing program certainly encouraged the dissemination of advertising, but not these particular advertisements.

The FTC's real problem with Legacy wasn't about what Legacy did as much as what Legacy failed to do. According to the agency, the company "failed to implement a reasonable monitoring program to ensure that [Legacy] affiliates clearly and prominently disclose their relationship to Legacy."

Legacy's affiliate marketing agreement required affiliates to comply with the FTC's testimonial and endorsement guides. But the FTC charged Legacy with failing to enforce that provision by severing ties to those affiliates who failed to do so.

Legacy's real sin was to make a lot of money as a result of its affiliates' deceptive endorsements. According to the FTC, Legacy's 25 best affiliates generated at least $5 million in sales of Legacy's "Learn and Master Guitar" DVDs.

Why did the FTC challenge only Legacy rather than taking action against any of the offending affiliates who were the real guilty parties? For the same reason that some people believe the best way to reduce crimes committed with handguns is to make the manufacturers of handguns liable rather than just locking up the people who pulled the trigger. It's much more convenient for the FTC to go after Legacy than the dozens or even hundreds of Legacy affiliates.

It's worth noting that there's no indication that anyone thinks that Legacy's instructional DVDs are not good products that are worth every penny that the company charges for them. This is not an ad for a miracle weight-loss pill or other bogus product. And the sample endorsements that are attached to the FTC's complaints don't sound phony or exaggerated.

The FTC consent order requires Legacy to institute an affiliate monitoring program with teeth. Every six months, Legacy must determine who its 50 top revenue-generating affiliates are, and then monitor them on a monthly basis to make sure their advertising is up to snuff. Legacy must pick another 50 affiliates at random and monitor their advertising on a monthly basis as well.

Legacy must immediately terminate any affiliate who misrepresents that he or she is an independent user or ordinary customer, or fails to disclose any material connection (e.g., the payment of commissions) between the affiliate and Legacy. Apparently there are no second chances here: an affiliate who is found to be misbehaving must be treated like Luca Brasi, who sleeps with the fishes.

The Legacy settlement is the latest in a series of FTC actions involving misleading online product endorsements, but the first one to hold a marketer liable for misleading representations of affiliates, and also the first to require a monetary payment by a marketer. But we're still waiting for a much larger endorsement and testimonial guides shoe to drop.

When the FTC issued its revised guides in 2009, the repeal of the "safe harbor" provision that allowed advertisers to use atypical testimonials as long as they were accompanied by "results not typical"-type disclaimers got most of the attention. To date – almost 16 months after the revised guides went into effect -- the FTC has yet to take action against a marketer of a weight-loss or money-making product who used best-case testimonials but failed to disclose the typical results achieved by customers.

As the FTC continues to step up its enforcement efforts, marketers should monitor all online or other advertising by affiliates or other third parties on their behalf. While the FTC action against Legacy was directed at nondisclosure of a financial relationship between Legacy and its affiliates, false or unsubstantiated claims for the product can also attract the attention of regulators. Adding a provision to your affiliate marketing agreement that requires new affiliates to comply with FTC rules and regulations is a good starting point, but marketers must enforce such provisions or risk ending up in the FTC's sights just like Legacy. As far as the FTC is concerned, marketers are (to paraphrase Cain) their affiliates' keepers.

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