Affiliate E-Mail Marketing Faces Scrutiny

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Direct marketers increasingly rely on affiliate marketers to drive traffic to their Web sites and generate orders. Though affiliates generally have not been scrutinized as heavily as the actual marketers, the Federal Trade Commission's recent settlements in the Global Net Solutions action and other cases signal a change in regulatory enforcement. This settlement seeks to hold the business whose products or services are being sold liable for the content of the affiliate marketer.

What is affiliate marketing? It is the use by one Web site of other Web sites or e-mailers, called affiliates, to help market the first site's products. Typically, revenue is shared by the affiliate merchant — the Web site or e-mail marketer featuring an ad or content designed to drive traffic to another site (the advertiser's) — with the affiliate receiving a fee based on the amount of traffic generated or orders received. It is thought that Amazon.com created the first large-scale affiliate program. Today, DMers worldwide rely on affiliates to drive traffic and generate orders, largely because advertising is usually paid for only upon generating results.

Global Net settlement. The FTC recently announced a $621,000 settlement with a group of defendants, including Global Net Solutions, involving allegations of violations of the CAN-SPAM Act, the Adult Labeling Rule and other charges. According to the FTC, defendants improperly marketed their sexually explicit Web sites through unsolicited bulk e-mail. The messages contained misleading header information and subject lines, failed to have appropriate opt-out mechanisms or a proper postal address and omitted the required labels for the sexual content in the messages.

Though many may dismiss the relevancy of this settlement because of its focus on "adult" businesses, those who use affiliate marketing would be making a grave mistake. The settlement includes direct references to and requirements for the defendants' affiliate partners that may be a sign of things to come.

The FTC said the defendants used affiliate programs to send their improper solicitations, and one of the defendants was itself an affiliate. According to the FTC, "While the affiliate sent many of the e-mails that allegedly violated federal law, under the CAN-SPAM Act all of the defendants are responsible for the e-mails, including the defendants who paid others to send the e-mails on their behalf."

Under the settlement, not only must affiliates provide much information about themselves and their sub-affiliates and agree in writing to comply with the settlement before being accepted into the defendants' program, but the defendants must survey every 10th subscriber as to whether the subscriber came in through a commercial e-mail and, if so, whether any laws were violated. These burdens make it tremendously difficult for the defendants, should they remain in business, to use affiliate programs to gain new customers.

The Global Net action is not an isolated case. There is a growing number of regulatory investigations and actions in which the actions of an affiliate, such as violating CAN-SPAM, has led to a suit or an investigation with respect to the product or service being marketed.

The effect. The effect of the Global Net case has yet to be fully seen but it is likely to be felt throughout the online world. Though companies using affiliates already faced potential legal and reputational risks based on how the affiliates marketed the merchants' products, this new FTC settlement raises the stakes for any company planning a direct e-mail campaign using affiliates, as well as for the affiliates themselves.

For marketers seeking to boost their audience through affiliate programs, the tactics of the affiliates will be a major point of discussion. On the affiliates' part, they will have to pay close attention to the legal issues surrounding their clients' programs or risk being drawn into an enforcement action that could be embarrassing and costly.

For both sides, appropriate representations and indemnification provisions in affiliate agreements remain critical. The case also shows the increasing detail with which regulators and enforcement agencies analyze and respond to the techniques used to market products and services online.

A marketer using affiliates to send e-mail pieces needs to look closely at how those affiliates operate on its behalf. Beyond the "official discussions," a marketer should seed the lists to see how and to whom its messages get out. If improper marketing pieces are discovered, a marketer should take aggressive, affirmative steps to stop their use.

Above all, remember that as e-mail becomes even more of a major channel of communication, issues of e-mail marketing are on the front burner for officials worldwide and that compliance with the ever-shifting laws and rules is a must.