

# Prohibition on Unfair and Deceptive Marketing Practices:

What You Need to Know and How the New Administration May Impact Compliance

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# ABOUT SAUL EWING

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- Accreditation
- Marketing & Advertising
- Mergers & Acquisitions
- Cybersecurity

## **Related Services**

- Consumer Protection
- False Claims Act
- Litigation
- Government Investigations
- General Corporate

# AGENDA

1. Background
2. Prohibited Practices
3. Government Investigations
4. Case Studies
5. Impact of the New Administration
6. Best Practices
7. Q&A

# Recent News

- On July 1, the University agreed to pay \$9 million to settle a class action lawsuit brought by students who alleged that the University submitted false data to boost its U.S. News ranking.
- Lawsuit was brought on behalf of all students who enrolled as students at the University between 2016 and 2022.
- The lawsuit claims that the University reported false data, including:
  - The number of undergraduate classes that enrolled fewer than 20 students
  - The number of full-time faculty members holding terminal degrees
  - Student/faculty ratio



# Recent News

- Legal basis:
  - Breach of contract
  - Unjust enrichment
  - Violation of the state general business law
- The University said in a statement that it “deeply regrets deficiencies in prior reporting.”
- In a similar lawsuit, plaintiffs allege that the University failed to substantiate certain undergraduate data it had submitted in 2021.

# SECTION 5 AUTHORITY

- Under Section 5 of the Federal Trade Commission Act, the FTC can **seek civil penalties if it** proves that:
  - The **company knew** the conduct was unfair or deceptive in violation of the FTC Act; and
  - The **FTC had already issued a written decision** that such conduct is unfair or deceptive.



# NOTICE OF PENALTY OFFENSES

The **FTC** sent **notices to 70 for-profit institutions** on October 6, 2021:

In order to strengthen its position that the 70 institutions on the list are aware of and have “**actual knowledge**” of the kind of conduct prohibited under the law, the FTC sent the 70 institutions the notice, which details certain acts or practices that have **previously been found in litigated administrative decisions** to be deceptive or unfair. In other words, there was a very specific purpose to the notice: to strengthen the ability of the FTC to use its Penalty Offense Authority against the institutions on the list.

# PROHIBITED PRACTICES

- Under Section 5 of the FTC Act, it is an unfair or deceptive trade practice to misrepresent, directly or by implication:
  - The need or **demand for consumers** who have graduated from, or completed courses at, a specific institution.
  - The **ease** with which an institution's graduates will be able to obtain employment, or the **opportunities for employment** in any field in which a course of instruction is offered.
  - The **types of jobs available** to an institution's graduates or for which they would be qualified upon completion of an institution's courses or program.

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# PROHIBITED PRACTICES

- The **number or percentage of consumers** attending any course or completing any program or degree who have **obtained employment, or the field or nature of such employment.**
- The **amount of money consumers** who have graduated from, or have completed courses at, an institution will or may earn.

# PROHIBITED PRACTICES

- The **qualifications or requirements necessary to obtain employment** in the fields for which an institution offers training, including **whether experience or additional education is required or advantageous** for employment in any field or for any position.
- An **institution's capabilities or facilities for assisting graduates or students** of any course in finding employment, or the **assistance actually provided** to graduates in finding employment, including the existence of a job placement services.

# U.S. DEPARTMENT OF EDUCATION

- Under 34 C.F.R. § 668.71:
  - **Misrepresentation:**
    - “A misleading statement includes any statement that has the **likelihood or tendency to mislead** under the circumstances.”
    - “A misleading statement may be included in the institution's **marketing materials, website, or any other communication** to students or prospective students.”
    - “Misrepresentation includes any statement that omits information in such a way as to make the **statement false, erroneous, or misleading.**”
    - “Misrepresentation includes the dissemination of a student **endorsement or testimonial** that a student gives either under duress or because the institution required such an endorsement or testimonial to participate in a program.”
    - “Misrepresentation also includes the **omission of** facts as defined under § 668.75.”

# FSA Enforcement Bulletin

- GEN-24-115: [FSA Enforcement Bulletin- Conduct that Creates a Risk of Engaging in Substantial Misrepresentation](#) (September 2024)
- The bulletin lists “examples of instances observed by FSA in its oversight activities that could result in non-compliance.”
- Examples include:
  - Schools, or their agents or vendors, have published salary information that is **based upon broadly applicable data** (including from the BLS) but **presents that information as data reflecting salaries earned by the schools’ own graduates**.
  - Schools have **compared their job placement rates** to that of peer institutions without sufficient and demonstrable substantiation.
  - Schools have **stated or implied** that their degrees or certificates will help students become licensed in a **field that does not require licensure**.



# FSA Enforcement Bulletin

- Examples (cont'd)
  - Schools have made unsubstantiated claims about their **“ranking” compared to other schools**
  - Schools have marketed certain **characteristics of their faculty** that are inaccurate or unrepresentative.
  - Schools have made statements that may mislead prospective students into thinking they are a **public school or a non-profit school**.
  - Schools have advertised or published documents stating a program’s **cost of attendance or net price** that are inaccurate or pertain only to a **minority of students**.

# DCL ON TPS MISREPRESENTATION

- GEN-25-01: [Notice of interpretation regarding misrepresentations by third-party service providers engaged by an institution of higher education](#)
- “The Department highlights []types of statements that, if made by an eligible **institution and/or any external service provider**, under certain circumstances [], are **likely to qualify as a misrepresentation**:
  - Inaccurately identifying an individual **employed by an external servicer provider** as being employed by the eligible institution,
  - **Inaccurately presenting a sales representative or recruiter employed** by an eligible institution or an external service provider **as an academic advisor**, such as by referring to them as a “counselor,” and
  - Describing a program, or any of its components or resources, provided in substantial part by the external service provider as “**the same as**” a **corollary residential or campus-based version** of the program provided by the eligible institution.

# Artificial Intelligence

- Generative AI text content creation
- Chatbots
- Email campaigns
- Outbound calls
- Inquiry
- Student contact
- Scheduling
- Admissions decisions

# Artificial Intelligence

- Potential legal issues
  - Misrepresentation
  - Civil rights laws
  - Accreditation
  - Testimonials and endorsements
  - TCPA
  - Privacy and cybersecurity
  - Intellectual property

# INCOME SHARE AGREEMENTS

- [Electronic Announcement on \*Income Share Agreements and Private Education Loan Requirements\* \(GEN-22-12\)](#)
  - “Clarifies that such ISAs used to finance expenses for postsecondary education are private education loans under 34 C.F.R. 601.2(b).”
  - Reminds institutions “that they must comply with the private education loan requirements in 34 C.F.R. Part 601, including critical disclosure, consumer protection, and reporting requirements.”

# OTHER INTERESTED REGULATORS

- Consumer Financial Protection Bureau
- U.S. Department of Justice
- Accreditation Agencies
- State Attorneys General

# DECEPTIVE

- Likely to mislead – statements must be evaluated in context of the entire advertisement or transaction
- Reasonable consumer perspective – representation or practice must be considered from the perspective of a reasonable consumer under the circumstances
  - Based on the group targeted – i.e., if targeting lower socioeconomic group or lower education consumers, then standard will be adjusted accordingly
- Materiality – representation must be material
  - Likely to affect the consumer's choice or conduct

# FTC'S FOUR FACTORS - DECEPTION

- FTC considers four factors in determining whether a representation or practice is likely to mislead
  - Is the statement ***prominent*** enough for the consumer to notice?
  - Is the information ***presented*** in an easily understandable way?
  - Is the ***placement*** of the information as a consumer might expect?
  - Is the information in close ***proximity*** to the claim it qualifies?
- This is the test used for disclaimers or other disclosures



# COMMON EXAMPLES OF DECEPTIVE ACTS OR PRACTICES

- Bait and switch
- Omission of material limitations or conditions from an offer
- Failing to provide promised services
- Inadequate disclosure of material terms in marketing
- Misrepresentation of terms and conditions
- Allowing consumer to sign blank forms
- Advising consumers to disregard key information
- Cross-selling add-on products to consumers without their knowledge or consent

# ABUSIVE?

- Dodd-Frank Act introduced the concept of “abusive” to standard unfair and deceptive jurisprudence
- Defined in statute
  - Materially interferes with the ability of a consumer to understand a term or condition
  - Takes unnecessary advantage of:
    - A lack of understanding by the consumer
    - Inability of the consumer to protect its own interests
    - Reasonable reliance by a consumer of the provider to act in the consumer’s interest

# STATE CONSUMER FRAUD LAWS

- All 50 states have some version of a consumer protection statute that incorporates UDAP concepts
- These can overlap, but vary widely from state to state
- Subject to state court interpretations, can develop less uniformly than federal standards, but often track and adopt federal standards as guidance
- Can create significant liability through private rights of action, including attorney's fees and multiple damages

# TIPS FOR UDA(A)P COMPLIANCE

- Implement strong policies and procedures
  - Should include periodic review of marketing materials and sales/recruitment practices
- Provide periodic training for employees
  - Initial and ongoing – track attendance and maintain records of attendance and copies of training presentations
- Beware of structural and organizational incentives that may breed UDAP/UDAAP concerns
- Analyze consumer complaints for concerns
- Monitor third party service providers
- Take prompt corrective action as necessary

# GOVERNMENT INVESTIGATIONS

- Multiple agencies have concurrent jurisdiction over your business model
- FTC, CFPB, U.S. Dep't of Justice, U.S. Dep't of Education, State Attorneys General, State Agencies
  - All have a form of administrative subpoena power to conduct investigations within their jurisdiction
  - Often will be in the form of a Civil Investigative Demand (CID)

# CASE STUDIES

- In 2020, ED found that Temple University's Fox School of Business "had engaged in substantial misrepresentation of the nature of its educational program."
- Temple was fined \$700,000
- In addition, the Dean of the Business School was convicted of "fraud in connection with a scheme to artificially inflate the school's program rankings against other schools nationwide."

# CASE STUDIES

- Temple substantially misrepresented:
  - The mean undergraduate GPAs of students admitted to certain programs offered by the Fox School
  - The number of offers of admission extended by the Fox School to applicants
  - The debt levels of Fox School students who borrowed loans to pay tuition
  - The ratio of full-time technology support personnel to supported faculty members at the Fox School

# CASE STUDIES

## University of Phoenix

- Settled for a \$191 million to resolve charges that they used **deceptive advertisements** that falsely touted their relationships and job opportunities with companies such as AT&T, Microsoft, and The American Red Cross

## Career Education Corporation

- Ordered to pay \$30 million to settle charges that the operator used sales leads from lead generators that **falsely told consumers they were affiliated with the U.S. military**, and that used other unlawful tactics to generate leads



# CASE STUDIES

- DeVry University
  - The FTC alleged that DeVry University “misled prospective students with ads that touted high employment success rates and income levels upon graduation.”
  - In the complaint, the FTC alleged that:
    - DeVry counted graduates as **working “in their field” when they were not**, including:
      - “A graduate who majored in business administration with a specialization in health services management working as a **server at a restaurant.**”
      - “Multiple graduates with majors in technical management whose employment was listed as **unpaid volunteer** positions at medical centers.”
      - “A graduate who majored in business administration with a health care management specialization working as a car salesman.”

# CASE STUDIES

- DeVry University (cont'd):
  - “DeVry’s calculations included graduates who were working in jobs they **held prior to enrolling** at DeVry, as opposed to those they landed after graduating.”
  - “DeVry **excluded graduates** from their count of those “**seeking employment**” as inactive when they were in fact actively seeking employment.”
  - “DeVry had reason to question the **reliability of the conclusions and information contained in a third party survey** and report that DVU used as the basis for the income superiority claim.”

# CASE STUDIES

- DeVry University (cont'd):
  - DeVry agreed to a \$100 million settlement of the lawsuit.
    - In addition, DeVry agreed to:
      - **Submit an annual compliance report (10 years)**
      - **Establish and implement an employee training program (20 years)**
      - **Consent to the FTC to “communicate directly with employees” and to “use all other lawful means, including posing as consumers to DeVry or any individual or entity affiliated with DeVry, without the necessity of identification or prior notice.”**
  - **The FTC’s enforcement action led to the Department awarding approximately \$71.7 million in borrower defense discharges.**
    - The Department concluded that the school “repeatedly misled prospective students across the country with claims that 90 percent of DeVry graduates who actively seek employment obtained jobs in their field of study within six months of graduation.”

# CASE STUDIES

- BloomTech
  - The CFPB issued an order against BloomTech for deceiving students about the cost of loans and making false claims about graduates' hiring rates in violation of the Consumer Financial Protection Act.
  - The CFPB found that BloomTech falsely told students the school's "income share" agreement contracts were not loans, when in fact the agreements were loans carrying an average finance charge of around \$4,000.
  - CFPB also found that BloomTech violated the Truth in Lending Act and its implementing regulation, Regulation Z, by failing to disclose key facts about its financing agreements, such as the amount financed, finance charge, and annual percentage rate.

# NEW ADMINISTRATION

- Impact on Regulatory Policy & Enforcement
  - ED
  - CFPB
  - FTC
  - DOJ
- Congress
- States

# BEST PRACTICES

- Understand and Follow Regulatory Guidelines;
- Maintain Clear and Transparent Messaging (avoid vague, ambiguous language or puffery. Caution: these regulations do not only apply to traditional marketing efforts.
- Common compliance issues involve the use of subjective terms like “best,” “accelerated,” or “lucrative,” in marketing materials.
- Beware of statements related to tuition costs/fees.
- Substantiate any claims with verifiable evidence, particularly claims related to job placement.

# BEST PRACTICES

- Be careful about an reference to ability to earn a higher salary or salary outcomes.
- Where appropriate use clear and conspicuous disclosures.
- Monitor and update advertising material regularly.
- Train and educate advertising teams (including 3<sup>rd</sup> party advertisers or agencies).

# ACTIONS TO TAKE NOW

- Carefully evaluate whether the claims made in those materials are accurate and, in particular, whether they can be substantiated with facts or data in the institution's possession.
- If so, ensure that the information is retained in a secure manner so that the institution can quickly retrieve and produce it if needed.
- If any claims cannot be substantiated, the institution should consider revising advertising and related materials.



# RESOURCES

- *CECU Guide: "How Artificial Intelligence is Transforming Higher Education Marketing and Enrollment Management"*
  - <https://www.career.org/common/Uploaded%20files/AI%20Guide/CECU%20AI%20Task%20Force%20Guide%20Final.pdf>
- *CFPB's Expanding Scope Evident In Coding Bootcamp Fine (Law360)*
  - <https://www.law360.com/articles/1838073/cfpb-s-expanding-scope-evident-in-coding-bootcamp-fine>
- FTC Enforcement Guides
  - <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>
- Consumer Financial Protection Circular 2022-04
  - <https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/>
- FTC Vocational School Guides
  - [https://www.ftc.gov/sites/default/files/documents/federal\\_register\\_notices/2013/11/131118vocationalschools.pdf](https://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/11/131118vocationalschools.pdf)

# QUESTIONS?



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