



# **Student Recruitment, Third-Party Vendors, and the Federal Trade Commission**

**June 6, 2013, 3:45 pm – 5 pm ET  
Rosen Shingle Creek Hotel, Orlando, Florida**

**Jonathan L. Pompan, Esq.  
Alexandra Megaris, Esq.  
Venable LLP, Washington, DC**

# INTRODUCTION



- **How did we get here?**
  - Student Recruitment Practices Are Under Scrutiny
  - Pressure from the Hill on the FTC
  - Presidential Executive Order on G.I. Bill
- **The FTC and the New Sheriff from DC: The CFPB**
  - **How the TCPA fits into all of this.**
- **Increased Enforcement Activity by Federal and State Regulators; and Private Lawsuits**
- **Compliance Tips**
- **How Can Self Regulation Help?**
- **Questions and Answers**

## HOW DID WE GET HERE?

# STUDENT RECRUITMENT PRACTICES ARE UNDER SCRUTINY...



INSIDE HIGHER ED

Get Daily E-mail | Follow us:

HOME NEWS VIEWS TECHNOLOGY BLOG U AUDIO CALENDAR

Home > News

**End of the Beginning**  
July 31, 2012 - 3:00am  
By Paul Fain  
WASHINGTON -- Sen. Tom Harkin's two-year investigation of for-profit

**Merkel Says Germany Backs Draghi on Conditions for ECB Help**

15 Central Park Ultra-Luxury Condo

**For-Profit Colleges Get Scathing Indictment In Senate Report**  
Posted: 07/30/2012 6:02 pm Updated: 07/30/2012 8:04 pm

411 85 3 133 673  
GET BUSINESS ALERTS: Enter email SIGN UP

Google

**'GI Bill' Site Called Misleading Closed Settlement**  
By Carter Dougherty - Jun 27

ft. Apollo Group, Sen. Tom Harkin, Student Loans, Tom Harkin.

The New York Times  
**The Opinion Pages**

WORLD U.S. N.Y. / REGION BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS OPINION

Full coverage

Harkin report issues scathing claim  
Clinton Herald - Aug 1, 2012  
Instead of contributing to the conversation is condemning schools and universities to the nation's students. The Association of Private Schools from APSCU President and form focus on the for-profit education industry.

How for-profit colleges are ripping  
Florida Times-Union (blog) - Aug 1, 2012  
The schools, which rely on federal financial aid in tuition and in 2008-2010, according marketing than on instruction. Think about Sector Colleges and Universities, which re 3.8 million students, including working adult.

Congress Mercilessly

Print Close

**Senate committee report blasts for-profit colleges**  
Published July 30, 2012 | Associated Press

A Senate Democratic committee report says for-profit colleges place revenues above education and charge students high tuition and excessive loan rates. It says that top officials running the schools enrich themselves.

The report found students often leave these schools after four months, deeply in debt from loans and unable to find a job.

The report said veterans are especially vulnerable to encountering these problems, since for-profit colleges receive the largest share of military educational benefit programs.

Eight of the top 10 recipients of GI bill money since the Sept. 11, 2001 attacks are for-profit education companies. The report said reaching an enrollment quota was the highest priority for recruiters.

Student performance was found to be poor. In 2008-2009, an estimated 54 percent left without a degree or certificate.

Print Close

**False Promises**  
Published: July 30, 2012

It has long been clear that an oily subgroup of for-profit schools were doing very well for themselves by recruiting students who had no real chance of graduating, pocketing their federal financial aid and leaving the students with valueless credentials — or none at all — and crippling debt.

A dismaying study released this week by Senator Tom Harkin, a Democrat of Iowa, suggests that this predatory behavior — which costs taxpayers tens of billions of dollars a year — may extend well beyond the unscrupulous few to the industry as a whole. The study reveals a disturbing pattern in which companies use misleading tactics to lure poorly informed students into certificate and associate degree programs that average about four times the cost of similar programs in comparable community colleges.

According to the study, taxpayers poured about \$32 billion into for-profit colleges in the most recent year — much of it spent on marketing or pocketed as profit. Meanwhile, 96 percent of their students were forced to take out loans, as opposed to about 13 percent in community colleges and 48 percent in four-year public colleges. A majority leave without degrees. And while the for-profit sector accounts for only about 13 percent of enrollment nationally, it accounts for nearly half the loan defaults.

These companies are clearly doing far better than the students. Publicly traded companies that operate for-profit colleges had an average profit margin of 19.7 percent, while paying an average of \$7.3 million to their chief executives in 2009, the report says.

This is a politically charged issue, with the Democrats generally favoring tougher regulation and the Republicans favoring the for-profits as a useful alternative to

FACEBOOK  
TWITTER  
GOOGLE+  
E-MAIL  
SHARE  
PRINT  
REPRINTS

**RUBY SPARKS NOW PLAYING**

INSIDE HIGHER ED  
**Conflicted Faculty and Online Education 2012**  
Free webinar now available for download!  
Inside Higher Ed editor Scott Jase and others discuss survey results  
DOWNLOAD HERE

**Related**  
Times Topic: For-Profit Schools

**Related in Opinion**  
Editorial: False Promises (July 30, 2012)  
Times Topic: Education

**Connect With Us on Twitter**  
For Op-Ed, follow @nytopinion and to hear from the editorial page editor, Andrew Rosenthal, follow @andyrNYT.

Opinion

# THE NEWS ACCOUNTS ARE PILING UP

THE CHRONICLE  
of Higher Education

Tuesday, October 23, 2012

HOME NEWS OPINION & IDEAS FACTS & FIGURES BLOGS JOBS

Faculty | Administration | Technology | Community Colleges | Global | Special Reports | People

## Government

Home > News > Administration > Government

think<<<

E-mail Print Comment (0) Share

October 22, 2012

### For-Profit Colleges' Marketers Generate Leads, and Controversy



Attendees at a conference of lead generators are part of an industry that drives enrollment in the for-profit higher-education sector. The industry's practices have been getting more scrutiny from lawmakers and federal regulators.

*By Michael Stratford*

It was a corporate sales gathering like any other, with the requisite swapping of business cards and hawking of products in the vendor hall. But LeadsCon, a conference held in New York in July, served a growing ecosystem of companies that fuel the marketing of for-profit education. Like for-profit education itself, these companies increasingly find themselves the target of criticism of their activities.

The conference was a meeting of "lead generators": marketing companies that provide to their clients batches of prospective customers—or, at this conference, potential students. The education sector of this industry has grown significantly over the past decade, just as online and for-profit colleges have expanded. Some nonprofit colleges, especially those with online offerings, use lead generators as well, but the bulk of the industry supports operations at for-profit

# SCRUTINY IS A SECTOR WIDE ISSUE: WHAT OTHERS ARE SAYING...



**“The Department of Education should implement an effective enforcement plan to ensure that colleges are not misleading students or misrepresenting their programs.” *(HELP Committee Report, July 20, 2012)***

**“The for-profit sector is growing rapidly loans and grants. It is essential that the federal government tighten its rules to make sure that taxpayers — not to mention the students themselves — get their money’s worth.” *(NY Times Editorial, Aug. 3, 2012)***

**Various Legislative proposals introduced in Congress would prohibit or restrict funding for educational advertising**

# SENATORS URGE FTC TO INVESTIGATE ONLINE LEAD GENERATORS



- On September 21, 2012, a group of Democratic senators sent the FTC a letter requesting that it investigate third-party online marketing companies used by private sector schools
- According to the letter, an updating by the FTC of its Guides for Private Vocational and Distance Education Schools in a “timely manner would be an important first step to help provide consumers with accurate information.”
- The senators also “encourage the FTC to create meaningful guidelines for lead generators and strengthen their oversight.”

United States Senate  
WASHINGTON, DC 20510

September 21, 2012

Mr. Jon Leibowitz  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Leibowitz:

Recent reports, including a Senate investigation, have revealed that some unscrupulous for-profit colleges engage in misleading, high-pressure, and unethical recruitment practices to maximize revenue from federal financial aid. To recruit students, many for-profit colleges have partnered with third-party online marketing companies, so-called “lead generators,” that deceive consumers to obtain personal information by misrepresenting their affiliation with for-profit colleges, as well as concealing how and by whom their information will be used. The Federal Trade Commission (FTC) is well positioned to protect consumers from the deceptive practices used by lead generators.

Between 2001 and 2010, federal student aid funds flowing to for-profit colleges increased from \$5.4 billion to \$32.2 billion, mostly due to aggressive recruiting practices. Lead generators have become a key part of the aggressive recruiting strategy for many for-profit colleges. Search engines promise prospective students connections to admission offices of selective and well-known public and non-profit colleges. In reality, the lead generators send students’ information to for-profit colleges and not the institution(s) in which the student actually expressed interest, with which the ad owners have no relationship.

In June, QuinnStreet Inc., a major lead generator, agreed to pay \$2.5 million and close one of its sites as part of a settlement with 20 state attorneys general. QuinnStreet operated sites that recruited veterans and other students on behalf of for-profit colleges and the states alleged that it had violated consumer-protection laws by running “false, misleading, and deceptive” sites, like GIBill.com, which falsely implied that they were operated or approved by the federal government.

The FTC can and should take several steps to better protect consumers from deceptive lead generators both by educating consumers and by investigating their practices. For example, updating the FTC’s vocational schools guide in a timely manner would be an important first step to help provide consumers with accurate information. We also encourage the FTC to create meaningful guidelines for lead generators and strengthen their oversight.

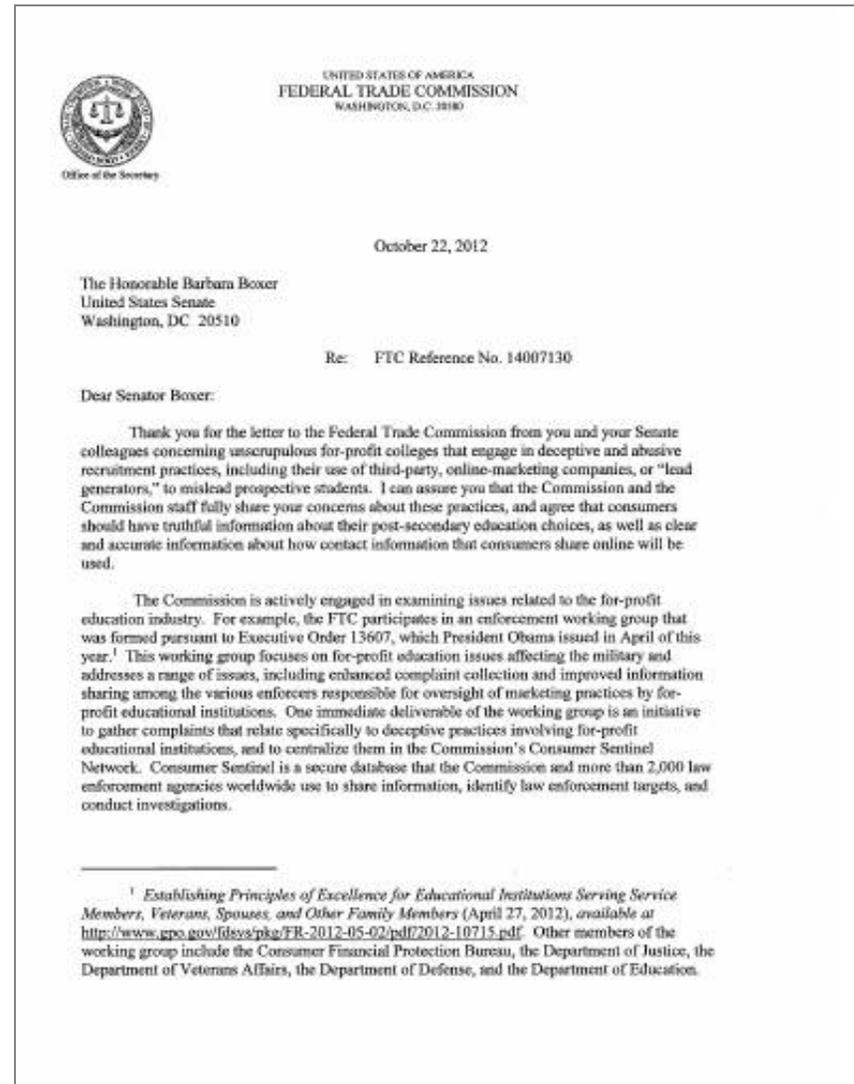
Many of us in Congress are working to help raise the standards of postsecondary education and protect the integrity of federal financial aid programs. Ensuring that students and their families have clear and accurate information about their postsecondary choices is essential and we urge you to take steps to protect them from misleading and predatory marketing.

# FTC RESPONSE TO SENATORS LETTER



**“I can assure you that the Commission and the Commission staff fully share your concerns about these practices, and agree that consumers should have truthful information about their post-secondary education choices, as well as clear and accurate information about how contact information that consumers share online will be used. The Commission is actively engaged in examining issues related to the for-profit education industry.”**

(Emphasis added)(Letter from FTC Commission Secretary, dated Oct. 22, 2012).



# PRESIDENTIAL EXECUTIVE ORDER ON G.I. BILL



- **In April 2012, the President signed an executive order forcing colleges to disclose more information about financial aid and graduation rates**
- **Also restricted the use of the term “G.I. Bill” in marketing and recruitment**
- **Applies to the post-9/11 G.I. Bill and to tuition assistance for active-duty members of the military and the Military Spouse Career Advancement program**

# COMPLYING WITH ADVERTISING & MARKETING LAWS

# FEDERAL TRADE COMMISSION BASICS



- **The FTC Act’s prohibition on “unfair or deceptive acts or practices” broadly covers advertising claims, marketing and promotional activities.**
  - Covers online advertising, marketing, and sales online
  - “Online” includes advertising and marketing through the Internet and on mobile devices, including smartphones and tablets
- **FTC issues rules and guides:**
  - Rules prohibit specific acts or practices
  - Guides help businesses in their efforts to comply with the law by providing examples or direction.
- **Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the FTC might bring an enforcement action alleging an unfair or deceptive practice in violation of the FTC Act.**

- **Advertising must be truthful and not misleading.**

Literally false claims are actionable without additional proof.

- **Advertisers must have evidence to back up their claims (“substantiation”).**

Substantiation is required for any objective, provable claims (express or implied) made about a product or service in the ad.

- **Advertisements cannot be unfair**

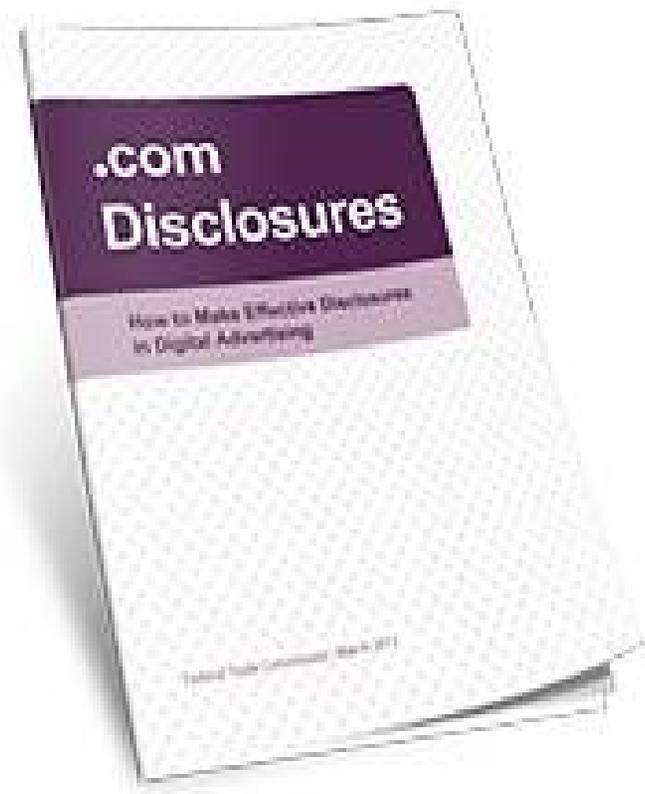
An ad is unfair if it causes harm to consumer that is not outweighed by overall benefit to consumers or competition

# ENDORSEMENTS & TESTIMONIALS



- **FTC Guides Governing Endorsements & Testimonials (Updated)**
  - No longer can simply include a typicality disclaimer on testimonials that report extraordinary results
    - Need substantiation that the endorser's experience is typical
    - Otherwise, must disclose generally expected results
  - Utilize actual customers or clearly disclose otherwise
  - Disclose material connections between advertisers and endorsers

# FTC .COM DISCLOSURES GUIDE



A copy of the guide is available at [www.ftc.gov](http://www.ftc.gov).

- First published in May 2000, discussed applicability of FTC rules and guides to online activity
- Revised staff guidance issued March 2013, addresses changes in the marketplace, growth of mobile and social media
- Guides are not law, and do not provide safe harbor from potential liability
- Serve as guidance on best practices for clear and conspicuous disclosures pursuant to the laws the FTC enforces

# BACKGROUND ON DISCLOSURES



- **When is a disclosure required:**
  - If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed.
- **A disclosure cannot cure a false claim; it can only qualify or limit a claim to avoid a misleading impression.**
- **If a disclosure is required, it must be clear and conspicuous**
  - FTC rules and guides often spell out information that must be disclosed; or specify material information that must be provided.

# EMAIL MARKETING & CAN SPAM ACT



- **Do not use false or misleading header information.**
- **Do not use deceptive subject lines.**
- **Identify the message as an ad.**
- **Provide a valid postal address.**
- **Tell recipients how to opt out of receiving future email.**
- **Honor opt-out requests promptly.**
  - opt-out mechanism must be able to process opt-out requests for at least 30 days after you send your message.
  - must honor a recipient's opt-out request within 10 business days.
- **Monitor what others are doing on your behalf. The law makes clear that even if you hire another company to handle your email marketing, both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.**

# TELEMARKETING LAW



- Under the FTC's Telemarketing Sales Rule ("TSR") National Do Not Call provisions, a company may call a consumer with whom it has an "established business relationship" even if the consumer's number is on the Registry.
- According to the FTC, **"telephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the established business relationship exception because, while the consumers may have a relationship with the lead generator, they do not have an established business relationship with the seller who has purchased the leads."**

# TELEPHONE CONSUMER PROTECTION ACT



- **TCPA is implemented and enforced by the FCC**
- **Regulates “robocalls,” text messages, and fax advertisements**
- **Elements:**
  - For calls and texts to cell phones:
    - “any call,” including texts
    - through an “automatic telephone dialing system”
    - without the “prior express consent of the called party”
  - For calls to residential phone lines:
    - “any telephone call”
    - using “an artificial or prerecorded voice”
    - without the “prior express consent” of the called party

## PRIOR EXPRESS (WRITTEN) CONSENT

- The FCC's recent rulemaking now requires prior express *written* consent for all telemarketing messages delivered using an autodialer or prerecorded voice (to wireless and residential lines, and likely landlines).
- Prior express written consent must:
  - Be in writing and bear the signature of the person called (E-Sign allowed)
  - List the phone number to which the person authorizes telemarketing messages to be delivered and
  - Contain a disclosure informing the person that
    - By signing the agreement he authorizes the seller to deliver telemarketing calls using an autodialer or prerecorded voice and
    - The person is not required to sign the agreement as a condition of purchasing the seller
- New rules go into effect on October 16, 2013.

# LIABILITY UNDER THE TCPA



- Direct liability: Persons or entities who physically make the calls in the method proscribed by the statute
- Vicarious liability: Persons or entities in an agency relationship with the party that made the calls
  - E.g., advertisers, affiliate networks, other intermediaries
  - Plaintiff must show that the entity that made the calls acted as an agent of the defendant.
- Damages: Actual monetary loss or \$500 per violation AND \$1500 if the party “willfully or knowingly violated” the TCPA

# CONSUMER FINANCIAL PROTECTION BUREAU



- Created by Title X of the Dodd-Frank Act
- Consolidates and duplicates various supervisory and program authority areas related to nonbank financial products and services, including private student loans, and many banks.



cfpb Consumer Financial Protection Bureau

An official website of the United States Government

Search

HOME INSIDE THE CFPB GET ASSISTANCE PARTICIPATE LAW & REGULATION SUBMIT A COMPLAINT

### The next front? Student loan servicing and the cost to men and women in uniform

Many servicemembers have student loan debt. In our report, we highlight the obstacles that many military families face when they attempt to manage their debt. [Read more >>](#)

**Now accepting credit reporting complaints**

In the past year we have taken big steps toward making consumer financial markets work better for consumers and responsible companies, and consumer complaints have played a major role. We began with credit card complaints in July of 2011, and as time passed, we added complaints about mortgages, bank accounts and services, private student loans, [...]

**OCT 18**  
[The next front? Student loan servicing and the cost to our men and women in uniform](#)

**OCT 15**  
[Helping small businesses understand and comply with the new remittance rule](#)

**OCT 12**  
[Remittance Rule Session](#)  
[Read more in the blog →](#)

**GET ASSISTANCE**

[SUBMIT A COMPLAINT](#) [TELL YOUR STORY](#) [REPAYING STUDENT DEBT](#)

If you've experienced difficulties with a... Your story, good or bad, about your... What's the best repayment option for you?

## UNFAIR, DECEPTIVE OR ABUSIVE PRACTICES

- Under the Consumer Financial Protection Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.
- The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.
- In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services

**CFPB has authority over consumer financial products and services, includes**

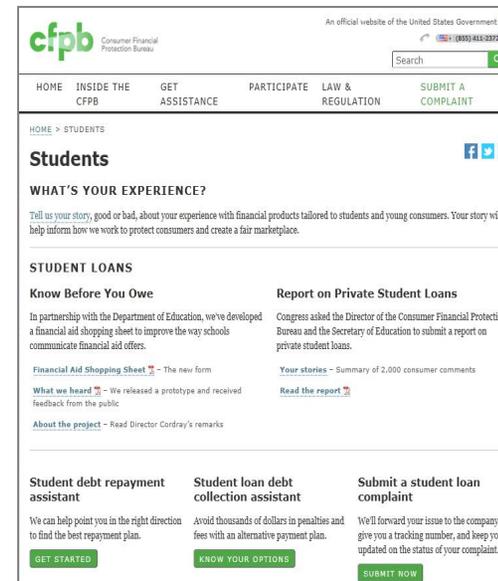
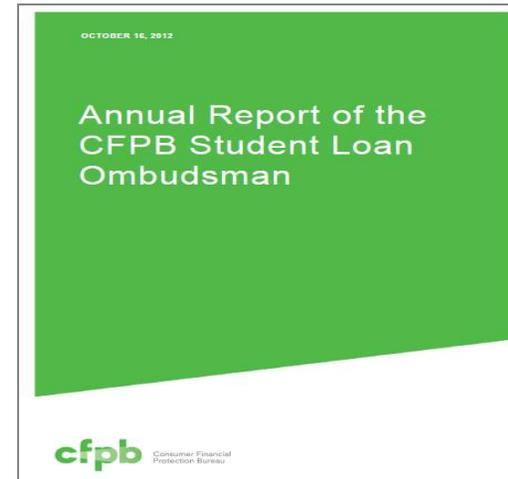
- **Private Student Loans**
- Small-Dollar Loans (i.e., payday)
- Debt Relief Services
- Automotive Vehicle Loans
- Mortgages
- Credit Cards
- Money Transmission
- Prepaid Cards
- and more

**CFPB supervision and enforcement efforts focus on primary providers and service providers, including “lead generators”**

# CFPB FOCUS ON PRIVATE STUDENT LOANS



1. Private Student Loan Ombudsman
2. General Consumer Response Initiative
3. Know Before You Owe: Student Loans and Student Debt Repayment Assistant
4. Private Student Loan Market Study
5. Servicemember Outreach and Education
6. Rulemaking
7. Supervision and Examination Authority over Student Loan Servicers
8. Investigation and Enforcement Authority



# CFPB ENFORCEMENT AUTHORITY



- **Rescission or reformation of contracts.**
- **Refund of money or return of real property.**
- **Restitution.**
- **Disgorgement or compensation for unjust enrichment.**
- **Payment of damages or other monetary relief.**
- **Public notification regarding the violation.**
- **Limits on the activities or functions of the person against whom the action is brought.**
- **Civil monetary penalties (which can go either to victims or to financial education).**

# CFPB AND STUDENT RECRUITMENT: WHAT WILL THE CFPB EXAMINE?



- **Identify whether the provider is a third-party or provider**
- **Review advertising (e.g., TV, radio, print, Internet, scripts, recordings, etc.)**
- **Determine whether relationship is appropriately disclosed**
- **Review statements and representations for accuracy and non-deception**
- **Review for disclosure of fees and other terms and conditions**
- **Privacy, online data pass, and other sharing of consumer data**

## **Substantive requirements for education and lending, for example:**

- Department of Education Regulations (and guidance)
- Truth-in-Lending Act
- Fair Credit Reporting Act
- Federal Privacy Law
- State Call Recording Statutes

## **Guidance materials from industry trade associations, for example:**

- Association of Private Sector Colleges and Universities
- Education Marketing Council

# INCREASED ENFORCEMENT ACTIVITY BY FEDERAL AND STATE REGULATORS

# FTC CRACKDOWN, CFPB INVESTIGATIONS, RELATED INITIATIVES



- **FTC - Within last year, several TSR, robocalling and related enforcement actions**
  - **FTC Continued Scrutiny on Robocalls** – The FTC held a Summit on Robocalls on October 18, 2012.
    - Caller ID Spoofing and Call Authentication
    - Data mining and anomaly detection
    - Call blocking
    - Contest – Awarded \$50,000 cash prize
- **FTC Nonpublic Investigations of advertisers and marketers**
- **CFPB Inquiry on Campus Advertising of Financial Products and Services**
- **CFPB Nonpublic Investigations of Private Student Lenders, including some educational institutions**
- **State Attorney General Investigations (KY, MN, more)**
- **FTC Presented on telemarketing and lead generation at LeadsCon NY and LeadsCon, Las Vegas, and other venues**

## **QuinStreet Settlement (Multistate)**

- \$2.5 million to the states
- Mandatory website disclosures
- Relinquish control of domain GIBill.com to Department of Veterans Affairs

## **Lowrate.com Settlement (Arizona)**

- Prohibited from collecting and transmitting consumer information in connection any type of consumer loan
- Cannot collect or sell any consumer personal information without disclosing that it will not control how or to whom the information is used

## COMPLIANCE TIPS

# GENERAL BEST PRACTICES



- **Legal Compliance Audit and Develop a Compliance Management Program**
  - General due diligence of purchasers / vendors
  - Strong representations and warranties
  - Monitoring and audit function
- **Establish and implement an internal compliance program.**
- **Design advertising and marketing materials to comply with FTC, CFPB and State laws governing advertising and marketing.**
- **Require recruiting and marketing materials (TV, Radio, Internet, Email, Mobile, Telephone) to undergo pre-publication review.**
- **Use due diligence and contracts with advertisers and marketing contractors and consultants.**
- **Require pre-approval of all recruiting and marketing materials.**
- **Monitor advertisements disseminated by marketing contractors.**
- **Review contracts and purchase agreements.**
  - Focus on representations and warranties
  - Incentives for compliance
  - Audit and Monitoring
  - Recordkeeping

# TCPA COMPLIANCE



- Confirm: landline or cell phone number?
- Have an immediate opt-out provision after January 14, 2013
- Obtain written consent after October 16, 2013
- Maintain records of all consents
- Make sure disclosures aren't false and misleading
- Clarifications regarding control over the method and means of marketing in affiliate contracts
- Quick response to violations
- Compliance with DNC

# HOW CAN SELF REGULATION HELP?



## Purposes:

As a substitute for government intervention

As a complement to government regulation

## “The best self-regulatory programs carry several hallmarks.

First, they clearly **address the problems** they seek to remedy.

Second, they are **flexible** and able to adapt to new developments within the industry.

Third, they are **widely followed** by affected industry members.

Fourth, they are **visible and accessible** to the public.

Fifth, they are administered in a fashion that **avoids conflicts of interest** between the regulated firms, on the one hand, and the body doing the regulating, on the other hand.

Finally, they **objectively measure member performance and impose sanctions for noncompliance.**”

(Speech by FTC Commissioner J. Thomas Rosch)

# WHAT TO LOOK FOR IN A SELF-REGULATION PROGRAM



- 1. More prompt, flexible, and responsive than traditional statutes and regulations.**
- 2. Process and outcomes are likely flexibly adapted to the realities of the market.**
- 3. Compliance can be just as high, or higher, under a coordinated self-regulatory system as under government regulation, because the member firms participate in the construction of the system and will have “bought into” the regulatory process**  
**If sufficiently objective and transparent, it permits the public to judge the integrity of the program and participants**
- 4. The review system and increases confidence in self-regulation.**
- 5. Financial incentives to ensure the success of industry self regulation.**

# WHAT'S ON THE HORIZON?



- **Continued Scrutiny and Non-Public Investigations by the FTC, CFPB, state Attorneys General**
- **Increase in private lawsuits:**
  - Telephone Consumer Protection Act
  - Telephone Call Recording
  - Email Marketing
  - Spill over in other lawsuits
- **Focus on Data Brokers, Behavioral Advertising, and Privacy Matters**
- **Potential for Increased Guidance (Will it be by enforcement or less aggressive action?)**

## FOR MORE INFORMATION



Jonathan L. Pompan, Esq.  
[jlpompan@Venable.com](mailto:jlpompan@Venable.com)  
202.344.4383

Alexandra Megaris, Esq.  
[amegaris@Venable.com](mailto:amegaris@Venable.com)  
212.370.6210

For additional information on this and related advertising and marketing topics, see [www.Venable.com/leads/publications](http://www.Venable.com/leads/publications).



Opportunity *forall*  
APSCU 2013

Opportunity for All