

VENABLE[®]_{LLP}

Avoiding Internet Advertising and Recruitment Pitfalls

Association of Private Sector Colleges and Universities
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Webinar

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IMPORTANT INFORMATION ABOUT THIS PRESENTATION

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Friday, November 18, 2011



Agenda

- Introduction
 - Legal framework for advertising and marketing
- DoE Misrepresentation Rule
- Additional Sources of Advertising Law & Regulation
- Complying with Advertising & Marketing Laws
- Sources of Additional Guidance
- Questions and Answers
- *This program is approved for MCLE in New York. Credit in Virginia is pending. Stay tuned for the CLE Code.*



How we got here...

- Postsecondary institutions must communicate full, accurate and complete information in their Internet advertising and other student recruitment efforts.
- A strong grasp of advertising and marketing law is critical in order to avoid pitfalls and costly missteps.

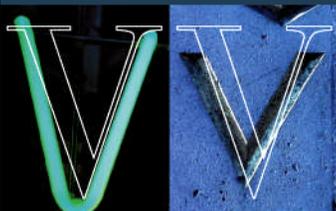
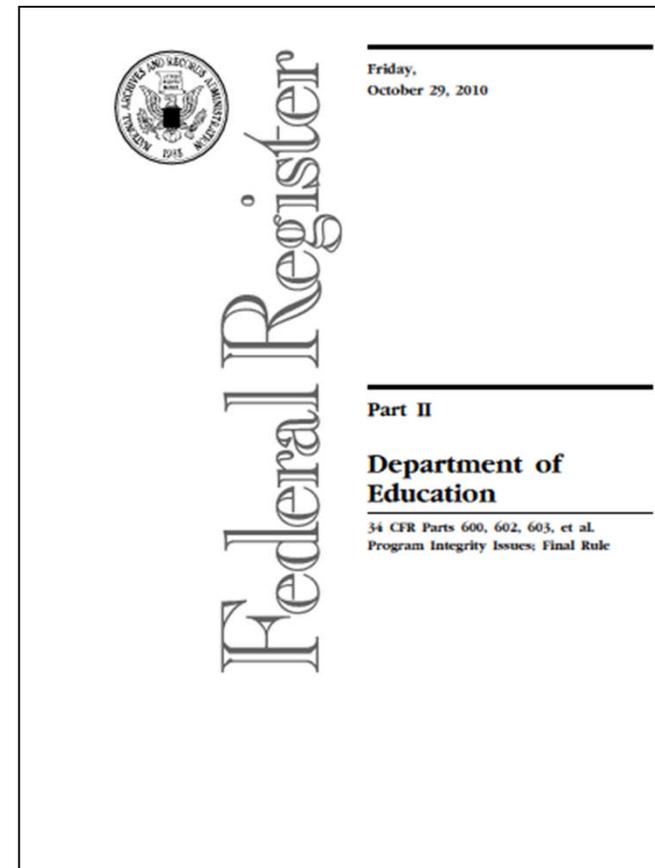


The Misrepresentation Rule



Background

- Section 487 of the HEA provides that institutions participating in the Title IV, HEA programs shall not engage in substantial misrepresentation of the nature of the institution's educational program, its financial charges, or the employability of its graduates.
- The DoE amended its Institutional Eligibility regulations, including the "Misrepresentation Rule" in 2010 (after more than 25 years)
- Effective: July 1, 2011



Background (cont'd)

- The HEA permits the DoE to suspend or terminate from participation in Title IV programs an institution that engages in “substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates.”
- Significant changes to the Misrepresentation Rule:
 - Broadened definition of misrepresentation
 - Codified policy of holding institution responsible for vendors
 - Expanded DoE’s remedies



What Does the Misrepresentation Rule Cover?

- The new Misrepresentation Rule makes the institution responsible for ***substantial misrepresentations*** by the institution itself, a representative of the institution, ***or any person or entity with whom the institution has an agreement to provide educational programs, marketing, advertising, recruiting or admissions services.***
- The rule prohibits ***substantial misrepresentations*** “in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.”
- The rule contains lengthy examples of misrepresentations relating to the nature of an educational program, the nature of an institution’s financial charges, and the employability of graduates.



What is the Definition of “Substantial Misrepresentation”?

- Misrepresentation means “[a]ny false, erroneous or misleading statement” that the institution, a representative of the institution, or a covered service provider makes “directly or indirectly” to a student, prospective student, a member of the public, an accrediting agency, a state agency, or DoE.
- “A misleading statement includes any statement that has the likelihood or tendency to deceive or confuse.”
- Substantial - If a person to whom the misrepresentation was made “could reasonably be expected to rely, or has reasonably relied,” on the misrepresentation.



A Closer Look - “*Substantial Misrepresentation*”

- Misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.
- Does not require proof that person actually relied on the misrepresentation.
- Does not require proof of actual injury.



The Consequences of Substantial Misrepresentations

- In the event of a substantial misrepresentation, the Misrepresentation Rule authorizes DoE to:
 1. Deny applications by the institution; for example, to add locations or programs;
 2. Initiate proceedings to fine an institution or limit, suspend, or terminate its participation in Title IV programs; or
 3. Revoke a provisionally certified institution's participation in Title IV programs.



Three Categories of Examples of Misrepresentations

Any false, erroneous or misleading statement related to...

- **Nature of educational program**
 - Transferability of course credits
 - Size, location, facilities
 - Number, availability and qualifications of faculty
 - Whether completion of course qualifies student for acceptance to a labor union or to receive a license or certification
 - Availability, frequency, appropriateness of courses to the employment objectives that program designed to meet
- **Nature of financial charges**
 - Scholarship offers
 - Refund policy
 - Availability or nature of financial assistance
- **Employability of graduates**
 - Institution's relationship with any organization or employment agency
 - Current or future conditions, compensation or employment opportunities
 - Government job market statistics



Other Sources of Advertising and Marketing Law and Regulation



Enforcement of Advertising and Marketing Laws

Other agencies, entities, and consumers also can enforce various laws and standards that guard against misrepresentation.



Federal Trade Commission Act

- **FTC pursues deceptive practices under Federal Trade Commission Act (“FTC Act”), 15 U.S.C. 45 *et seq.*:**
 - Section 5 gives the FTC broad authority to prohibit “unfair or deceptive acts or practices”
 - Section 13(b) authorizes FTC to file suit in United States District Court to enjoin any act or practice that is in violation of any provision of law enforced by the FTC
- **Enforcement against unfair or deceptive practices**
 - Not required to prove actual deception
 - Wide array of remedies: civil penalties, injunctions, restitution, corrective advertising



Back To Basics

- 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



Claims Substantiation

- Need a reasonable basis for claims made in advertisements concerning characteristics or efficacy of a service
- Claims purporting to provide a quantifiable result held to higher standard



Disclosures & The “Four P’s”

- Disclosures must be “*clear and conspicuous*”
 - Prominence
 - Presentation
 - Placement
 - Proximity
- What is the overall net impression?



Endorsements & Testimonials

- FTC Guides Governing Endorsements & Testimonials
 - 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 Guides for Private Vocational and Distance Educational Schools

- Target privately owned schools that offer courses, training or instruction purporting to prepare or qualify individuals for employment.
- Do not apply to institutions of higher education offering at least a 2-year program of accredited college level studies.
- Prohibit following practices
 - Use of deceptive name or designation
 - Misrepresentation of extent or nature of accreditation of school or course
 - Misrepresentation of facilities, services, qualifications of staff and employment prospects
 - Misrepresentation of enrollment qualifications or limits
 - Failure to disclose prior to enrollment total cost of the program and refund policy
 - Failure to disclose all requirements for completing program



Email Marketing & Complying with the 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.



State Regulation of Advertising & Marketing

- Consumer Protection Acts (Mini-FTC Acts).
 - States have adopted mini- “FTC Acts” that prohibit unfair and deceptive practices
 - States typically follow FTC precedent
 - Frequently Broader Jurisdiction
 - Enforcement by State Attorneys General and Private Litigants (most states)



Private Litigation

- Mini-FTC Acts/Unfair & Deceptive Acts or Practices (UDAP)
- Federal Lanham Act
- State mini-Lanham Acts
- CAN SPAM
- *Qui tam* action under False Claims Act
- Common Law



Complying with Advertising & Marketing Laws



General Best Practices

- Legal Audit.
- Establish and implement an internal compliance policy.
- Design recruiting and marketing materials to comply with FTC and State laws governing deceptive practice and DoE's. Misrepresentation Rule.
- Require recruiting and marketing materials 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.



Know Your Lead Source

- Qualifications of Vendors/Customers
 - Who are you buying from?
 - Who are they selling to?
 - Where did the lead originate from?
 - What was said to solicit the lead?
- Qualification Procedures
 - Develop a qualification program
 - Develop standard operating procedures
 - Reporting and audit processes
 - Legal protections in your contracts



FTC Crackdown on Affiliate Advertising and Lead Generation

- *Against the advertiser:* In March, a company selling guitar-lesson DVDs agreed to pay \$250,000 to settle FTC charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers.
- *Against affiliates:* In April, the FTC filed 10 lawsuits in federal district court for using fake news websites to market acai berry weight-loss products. FTC asked the courts to permanently bar the allegedly deceptive claims, and to require the companies to provide money for refunds to consumers who purchased the supplements and other products.



Recommendations for Contract Provisions

- Right to pre-approve all publicly-disseminated recruiting and marketing materials (including modifications to such materials).
- Legal compliance with all laws, specifically consumer protection laws and the DoE misrepresentation rule.
- Prohibition of compensation of employees and subcontractors based on the number of students enrolled.
- Indemnification provisions.
- Pre-approval of subcontractors and affiliates.
- List of prohibited traffic sources.
- Monitoring and review.



Additional Sources of Information



Selected Sources for Additional Information

- The Misrepresentation Rule, 34 C.F.R. § § 668.71-75.
- U.S. Department of Education, *Dear Colleague Letter re Implementation of Program Integrity Regulations*, GEN 11-105 (Mar. 17, 2011).
- APSCU *Guidance for Association of Private Sector Colleges and Universities Members – The Misrepresentation Rule and Third-Party Vendors*.
- The FTC has published a number of guidance documents on various areas of advertising and marketing law and regulation. These guides are available on the FTC website.



Questions and Answers

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**For additional information on this and related
advertising and marketing topics, see
www.Venable.com/leads/publications.**

