



Prohibition on Unfair and Deceptive Marketing Practices

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PRACTICE AND EXPERIENCE

- Member of Maynard Nexen's Higher Education Practice Group with more than 17 years of experience
- Previously served as Senior Counsel to the Deputy Secretary, U.S. Dept. of Education
- Counsels clients on the rules and procedures related to federal financial aid, cybersecurity, marketing & advertising practices, accreditation, Title IX, and transactional issues

JESSICA HIGH'S BACKGROUND



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PRACTICE AND EXPERIENCE

- Member of Duane Morris Higher Education Practice Group
- Previous Campus Director and operations experience in financial aid, admissions, accounting, student services, and human resources departments
- Practice focuses on counseling private sector colleges and universities in matters of state and federal regulation, accreditation compliance, student complaints and employee disputes

AGENDA

1. Background
2. FTC prohibition on unfair and deceptive marketing practices
3. States and Accreditors
4. Takeaways
5. Best practices
6. Questions

FEDERAL TRADE COMMISSION



- The Federal Trade Commission (“FTC”) is an independent federal agency whose principal mission is the enforcement of civil U.S. antitrust law and the promotion of consumer protection
- The FTC is governed by a Commission
- The Commission is composed of five Commissioners, who each serve seven-year terms

FEDERAL TRADE COMMISSION



- The FTC enforces **section 5(a) of the FTC Act**, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce
- “Deceptive” practices are defined in the *FTC’s Policy Statement on Deception* as involving a **material representation, omission or practice** that is likely to **mislead a consumer** acting reasonably in the circumstances
- “The FTC has broad authority to target unfair and deceptive practices in the for-profit school sector, but its approach has varied over the years.”
(former FTC Commissioner Rohit Chopra)

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

PRIOR FTC ACT ENFORCEMENT



- Under **Section 13(b)**, FTC could seek injunctive and monetary relief (restitution and disgorgement)
- *AMG Capital Management, LLC v. Federal Trade Commission*
 - FTC's prior approach was challenged at the Supreme Court
 - Supreme Court found FTC was applying law/regulations incorrectly
 - Result: FTC to use Section 5 Penalty Offense Authority

PRIOR APPROACH

- Few enforcement actions were taken by the FTC against for-profit colleges.
- The FTC did not utilize section 5 authority.
- During the Trump administration, the FTC ended its coordination with the U.S. Department of Education.

ENFORCEMENT ACTIONS

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



WHY THE CHANGE IN APPROACH?

REASONS CITED BY THE FTC

- *AMG v. FTC*, 141 S. Ct. 1341, 1344 (2021)
- Perception
 - “For too long, unscrupulous for-profit schools have preyed on students with impunity, facing no penalties when they defraud their students and drive them into debt,” said FTC Chair Lina M. Khan
- Political

WHY THE CHANGE IN APPROACH?

REASONS CITED BY THE FTC (continued)

- Student debt and loan default
- Increase in complaints to the FTC
 - Complaints to the FTC around education-related issues surged roughly 70 percent between 2018 and 2020

NEW APPROACH

- In October 2021, the FTC announced that it is making a number of critical changes to its approach to address “the rampant abuse of students, veterans, their families, and taxpayers” by for-profit colleges

CHANGES INCLUDE:

- The FTC is resurrecting its **Penalty Offense Authority**, found in section 5 of the FTC Act.
- “FTC will be enhancing its enforcement cooperation with other oversight agencies.”
 - “FTC investigations can assist the Department of Education in taking additional administrative actions against those that violate the law”

NOTICE OF PENALTY OFFENSES

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

In order to exercise the Penalty Offense Authority, the FTC also must show that the alleged violator (School B) had “actual knowledge that such act or practice is unfair or deceptive and is unlawful” under the law. Thus, 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.

[Link to announcement](#)



NOTICE OF PENALTY OFFENSES



- Future findings of violations by any of the noticed institutions can lead to civil penalties up to **\$43,792 per violation**
- No immediate action or investigation was announced, but this portends an intention by the FTC to take future action against some or all of the noticed institutions

FTC ADVANCED NOTICE OF PROPOSED RULEMAKING



- On March 11, 2022, the FTC announced that it is considering proposing a rule to address deceptive or unfair marketing using earnings claims.
<https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-462-trade-regulation-rule-use-earnings-claims>.
- Such a rule would allow the FTC to (1) move quickly to stop illegal conduct; (2) clarify for businesses what constitutes a deceptive earnings claim and what it means to have substantiation for an earnings claim; and (3) enable the FTC to seek monetary relief for consumers harmed by deceptive earnings claims, as well as civil penalties against those who make the deceptive claim.
- The FTC cites an enforcement action taken against a for-profit school for “false [] claim[s] that its graduates averaged 15 percent higher incomes one year after graduation than graduates of other schools”

FTC ADVANCED NOTICE OF PROPOSED RULEMAKING



- The **FTC requested comments** from the public about a wide variety of issues, including:
 - Whether earnings claims are prevalent among all or only some industries;
 - How a rule addressing earnings claims should be drafted, the benefits to consumers from such a rule and the costs to businesses; and
 - Whether the potential rule should address disclaimers, lifestyle claims, or liability for agents' claims.
- If the FTC decides to proceed after reviewing public comments, its next step would be to issue an **NPRM**.

PROHIBITED PRACTICES:

- To misrepresent the **number or percentage** of people attending any course or completing any program or degree who **have obtained employment**, or the field or nature of that employment;
 - To misrepresent how much grads will or may **earn**;
 - To misrepresent the **qualifications necessary** to get jobs in the fields for which an institution offers training, including whether experience or additional **education is required** or advantageous; and
 - To misrepresent the institution's capabilities for **helping students find employment** or the assistance actually given to grads, including the existence of job placement services



PROHIBITED PRACTICE: MISREPRESENTING DEMAND FOR GRADUATES

Advertisements, sales brochures, representations by a University's agents:

- “Opportunities for trained decorators are increasing each year. It used to be that only the wealthy employed decorators. That's no longer true. Large numbers of average homemakers now rely on the services of decorators. . . .”
- “Decorators today are busy in many areas besides homes. Their talents are employed in decorating hotel rooms, business offices, building lobbies, hospitals and many other interesting places. Some decorators operate their own businesses; others work in major stores, showrooms and design studios.”
- “I have now opened a studio . . . and I am already getting demands for interior decorating services”



PROHIBITED PRACTICE: MISREPRESENTING DEMAND FOR GRADUATES

Claims:

- ““The impression was created in the first few pages of the brochure that there was a demand for interior decorators”
- “The combination in LaSalle's advertisements of the success stories featured in the testimonials, the claims of complete, up-to-date training, and the representations to the effect that you, the reader, would be able to turn your love for decorating into a dream career conveyed the impression that a graduate of LaSalle's interior decorating course would be qualified to obtain employment in the field of interior decorating without further training”




Expert Testimony Did Not Support Claims:

- “Expert testimony showed that while LaSalle offered training in the basics of interior decorating, it did not adequately prepare the ordinary and typical individual to be an advanced level interior decorator”

PROHIBITED PRACTICE: MISREPRESENTING GRADUATE INCOME

Brochure included testimonials:

- 
- A red, rectangular stamp with the word "PROHIBITED" in white, slanted text, positioned to the left of the testimonials.
- “My interior decorating course enabled me to get a terrific new position in a furniture showroom and most importantly, my salary has doubled.”
 - “My salary has doubled.”
 - “My salary has more than doubled since I started my new career.”

Unsubstantiated:

- Since the ordinary and typical interior decorating graduate would be unable to open his/her own decorating service or obtain employment beyond the basic level, representations regarding income growth were deceptive

PROHIBITED PRACTICE: MISREPRESENTING QUALIFICATIONS IN THE FIELD

Claims in Advertisements:

- “For a prestige career why not get into computer programming.”
- “You'll find learning Basic Computer Programming with LaSalle an ideal way to prepare for the computer age.”

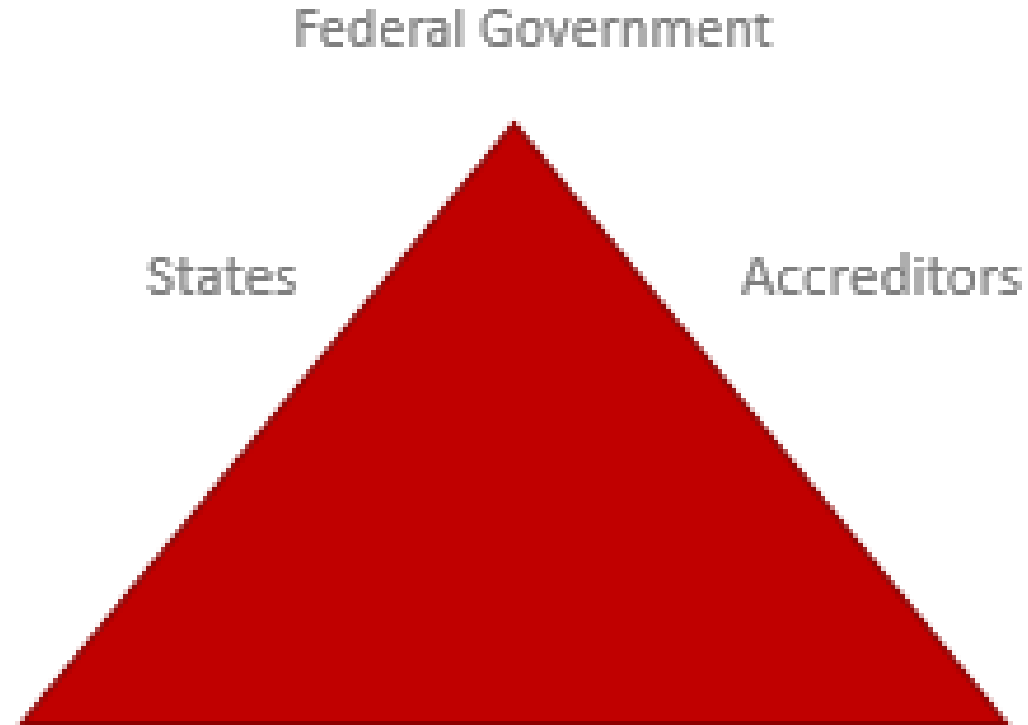
A LaSalle sales representative stated that “LaSalle's placement record was excellent and if [the student] did all the home work and like that and got good grades on it, [the student] should have no problem getting into the field.”

Deceptive Statement:

- “The ordinary and typical graduate of LaSalle's computer programming course would not qualify as a computer programming trainee. Respondents' representation that the graduates of its computer programming course would qualify as computer programming trainees was accordingly deceptive”



REGULATORY TRIAD



STATES

- “The **states’ role is consumer protection**, the federal government’s role is oversight of compliance to ensure the administrative and fiscal integrity of Title IV programs at IHEs, and the accrediting agencies’ role is to provide quality assurance of the education or training offered by IHEs.” (GAO)
- “Through registered complaints by students, independent investigations conducted by media outlets and federal-state government agencies, revelations have emerged detailing the misrepresentations and outright deceptive practices of these universities.” (Stateag.org)

EXAMPLES OF STATE ENFORCEMENT

- “The Minnesota Attorney General’s Office has led the fight for former students who were defrauded by the so-called “criminal-justice” degree programs at Globe University and for students who were charged illegal rates of interest on loans that the schools offered.”
- The California AG obtained a \$1.1 billion judgment against Corinthian for its misconduct relating to:
 - “False advertisements that misrepresented job placement rates and the value of its educational programs.”
 - “Legally us[ing] the seals of the armed forces in its advertisements to recruit veterans.”

ROLE OF ACCREDITATIONS

- Most accreditors include standards prohibit certain marketing & recruitment practices
 - MSCHE “An **accredited institution possesses and demonstrates the following attributes or activities**:...honesty and truthfulness in public relations announcements, advertisements, recruiting and admissions materials and practices, as well as in internal communications.” (Standard II)
 - ACCSC: “Student recruitment and admissions personnel will only provide truthful and accurate statements, descriptions, and explanations regarding the school and its personnel, training, facilities, equipment, services, and accredited status.” (RECRUITMENT AND ADMISSIONS PERSONNEL CODE OF CONDUCT)

U.S. DEPARTMENT OF EDUCATION

- Borrower Defense to Repayment Rule (effective July 1, 2023)
 - Grounds on which a borrower defense may be brought:
 - “Substantial” misrepresentation under the new uniform Federal standard; "substantial" omission of fact;
 - Breach of contract
 - Aggressive and deceptive recruitment tactics or conduct; or
 - A State or Federal judgment or final Department action against an institution that could give rise to a BD claim

U.S. DEPARTMENT OF EDUCATION

- Borrower Defense to Repayment Rule (effective July 1, 2023)
(cont'd)
 - BDR rule would permit certain borrowers to seek reconsideration of a claim under a State law standard if their initial claim is denied or approved only for a partial discharge. the Secretary may create a group based upon Federal or State law enforcement activity
 - The revised rule permits a State Requestor to bring a group-based claim and defines State Requestor to include State Attorneys Generals or State oversight or regulatory agencies with authority from the State

U.S. DEPARTMENT OF EDUCATION

- Secret Shoppers
 - On March 14, 2023, the Department announced that “FSA will use secret shoppers as an additional tool to monitor postsecondary institutions’ compliance with the laws and regulations governing their participation in the federal student aid programs.”
 - “Secret shoppers will evaluate recruitment, enrollment, financial aid, and other practices of postsecondary institutions to help identify potentially deceptive or predatory practices used to recruit and enroll students.”
 - “Where appropriate and permitted, FSA will refer findings from its secret shopping efforts to other Department offices, including the Office of Inspector General, and share findings with other law enforcement partners at the state and federal levels.”

<https://www.ed.gov/news/press-releases/education-department-announces-use-secret-shopping-protect-students-crack-down-institutions-lure-students-lies%E2%80%AF%E2%80%AF>

TAKEAWAYS (FTC Cases)

- Proof of Actual Deception or Intent Not Required.
 - “possess a tendency to deceive” in the eyes of the FTC.
- Consumer Testimony Not Required.
 - FTC permitted to “draw its own inferences.”
- Overall Impression Test - overall impression advertisements are likely to make on the buying public.
- Student Body
 - FTC relied on unsophisticated and historically inexperienced student body in EDA to find that institution had a higher duty to be accurate.
 - *Macmillan* – Sophisticated student not a defense

TAKEAWAYS (FTC Cases)

- Typical Graduate Experience – advertisements should focus on the average graduate and not rely upon “outliers.”
- “Pervasive Theme” of advertisements
 - FTC looked to the “total scheme” to market the institution to find a “pervasive theme.”
- Deception can be created by “implication and innuendo without affirmative misrepresentation or misstating a single fact.”

EXAMPLE #1

- Advertisement: success stories, student testimonials, claims of training and representations that student could “turn love for decorating into a dream career.”
 - FTC has rules about paid endorsements (clear and conspicuous disclosure)

EXAMPLE #2

- College brochure represents that graduates could establish their own business.

EXAMPLE #3

- Advertisement targeted at low-income, unsophisticated students that promises exciting, glamorous, and action-filled work with high pay.

ACTIONS TO TAKE NOW

- Gather and evaluate any materials in which claims are made about demand for, or outcomes of, graduates.
- Focus is on publicly available information.
- Don't forget **lead aggregators** and **marketing agencies!**



Internet ads/search engine optimization



Call scripts



School website



Television/radio ads



School catalog



Vendor contracts



Partnership agreements



Social media

BEST PRACTICES

A yellow sticky note with a white border and a drop shadow, containing the text "Do it NOW!" in a black, handwritten-style font. The word "NOW!" is underlined with two horizontal lines.

Do it
NOW!

- Evaluate the **overall impression** conveyed by advertisements from the standpoint of a reasonable consumer.
- Evaluate individual statements from the standpoint of a **reasonable consumer**.
- Ensure **clear and conspicuous disclaimers** are offered; consider placement, prominence, and clarity of the disclaimer.

BEST PRACTICES

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Do it
NOW!

- Evaluate **training materials** provided to representatives to ensure that the representatives are trained not to make claims that the FTC might consider deceptive.
- Consider **emailing the representatives** a short memo explaining that the institution wants to remind the representatives that it is the institution's practice **to provide true and accurate information** to prospective students and graduates, and that representatives should ensure that they continue to provide truthful information and refrain from making claims that the FTC would consider deceptive

BEST PRACTICES

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Do it
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.

BEST PRACTICES – BDR

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Do it
NOW!

- Substantial Misrepresentation or Omission
 - Expansion of subpart F (34 CFR 668)
- Aggressive and Deceptive Recruiting
 - New subpart R (34 CFR 668)

ADDITIONAL RESOURCES

- [FTC Vocational School Guides](#)
- [FTC.com Disclosures](#)
- [Consumer Financial Protection Circular 2022-04](#)



Questions?

2023 NASASPS Annual Conference

April 30 – May 3 | Phoenix, Arizona



Thank you!

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