


APSCU
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PRIVATE SECTOR COLLEGES
AND UNIVERSITIES

“Student Protection: The Institutional Role in Avoiding Pitfalls in Internet Advertising and Recruitment”
presented at
2012 NASASPS Annual Conference

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OVERVIEW




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- Higher education institutions of all types – traditional and for-profit - increasingly rely on the Internet to identify potential students whose interests and career goals match the educational services offered by the institution. There are many good and valuable reasons for this and the practice is here to stay.
- However, as use of on-line advertising and recruitment activity has grown, so have allegations by consumer advocates, regulators and some policymakers that some institutions are engaged in misleading advertising and over-aggressive recruitment.
- APSCU and its members are committed to the importance of having the strongest possible institutional self-regulation systems designed to reduce the risk of problems and protect students from being misled or pressured in their choice of the right school.

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OVERVIEW




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This presentation will discuss:


- The important role of self-regulation in the on-line advertising and recruitment space
- The challenges resulting from the growth of on-line postsecondary advertising and recruitment
- The current legal and regulatory environment
- APSCU's recent recommendations to institutions about reducing risk in this area

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THE VALUE OF SELF REGULATION 

- In the interest of student protection - particularly at a time of intense pressure on state and federal budgets - institutions have an obligation to perform their self-regulatory function in a strong and effective manner to reduce the need for active regulatory enforcement.
- The public's perception of the value of higher education is tied, at least in part, to whether there is public trust in the integrity and accountability of institutions serving students.
- Colleges and universities rely on loyal alumni and a positive local, regional or national reputation to continue to attract students.
- The credibility of the existing triad of state/accrediting body/Department of Education oversight of colleges and universities is enhanced through the strongest possible institutional ownership of its own self-regulation.

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POSTSECONDARY RECRUITMENT AND THE INTERNET 


- Sound reasons for reliance on the internet to reach students include:
 - Today's student, just like today's consumer, obtains most of their information on the internet and "comparison shops" using that medium
 - The need of the adult and non-traditional learner to be informed of all postsecondary options available – both local brick & mortar and on-line
 - Private sector colleges do not generally have football teams, the national brand recognition that comes with a winning team, or centuries of brand history
- Internet recruitment and advertising is increasing at all types of higher education institutions, not just for-profit, with correlating increased scrutiny:
 - Example: University of Maryland University College (UMUC)

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CHALLENGES FROM GROWTH 

- Many institutions often contract for on-line marketing and recruitment services through use of on-line "lead generators" and call centers.
- These companies provide a valuable service of promoting an educational brand and educational services to students who benefit from being aware of all their postsecondary options. We need more postsecondary training, not less.
- However, delegating consumer contacts to a third-party increases regulatory risk:
 - It is a challenge for a school to keep up with the technology used by these third parties and consequently be able to monitor, control and police the conduct of third parties interacting with consumers on the Wild West of the Internet


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Current Regulatory Framework 

On-line advertising and recruitment by schools and third parties is subject to:

- State Unfair and Deceptive Practices/Consumer Protection Laws
 - enforced by State Attorneys General
- Federal Trade Commission
 - Section 5 of the Federal Trade Commission Act applies to advertisers engaged in unfair or deceptive advertising
 - An advertisement or trade practice is unfair or deceptive under the Act if it causes, or is likely to cause, substantial customer injury which is not reasonably avoidable by consumers and which is not outweighed by countervailing benefits to consumers or market competition ("reasonable person" test)
 - FTC is not required to prove that the public has actually been deceived
 - FTC is permitted to file suit in federal court to stop conduct in violation of the Act, require corrective action or consumer education, and seek disgorgement of profits or civil penalties

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CURRENT REGULATORY FRAMEWORK 

- Telemarketing Sales Laws: Federal (FCC) and State may apply to certain online conduct
- Federal and State privacy laws: CAN-SPAM Act (e-mail marketing and opt-out requirement) for example
- Lanham Act (trademark and copyright)
- Private action where right of action exists (False Claims Act *qui tam* actions where federal funds are involved, for example)

AND


- **The Department of Education Misrepresentation Rule**
one of the 14 new rules issued by the Department of Education out of the Title IV Program Integrity Rulemaking Process

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The Previous Misrepresentation Regulation 

- Existing language in Section 487 of the Higher Education Act provides that institutions participating in Title IV programs are prohibited from engaging in "substantial misrepresentation"
- The previous regulations implementing this statutory prohibition defined "misrepresentation" as "a false, erroneous or misleading statement" limited to:
 - The nature of the institution's educational program
 - Its financial charges
 - The employability of its graduates
- Under the HEA, a school can only be pushed for making a substantial misrepresentation after "reasonable notice and opportunity for a hearing" according to procedures set forth in regulation.

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Categories of Misrepresentations 

ANY false, erroneous or misleading statement about:

The **nature of an educational program**, including:

1. Transferability of course credits
2. Size, location and facilities
3. Number, availability and qualifications of faculty
4. Whether completion of a course qualifies a student for acceptance into a labor union or to sit for a license or certification exam
5. Availability, frequency, and appropriateness of courses to the employment objectives that the program is designed to meet

The **nature of financial charges**: scholarship offers, refund policy or availability or nature of financial assistance

The **employability of graduates**: institution's relationship with any employer or employment agency; current or future conditions, compensation or employment opportunities; and government job market statistics


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The Amended Misrepresentation Rule 

After 25 years, the Department issued an amended Misrepresentation Rule effective July 1, 2011 that:

- Broadens the scope and potentially the categories (beyond the 3 categories listed in the HEA) of punishable communications that could be considered "substantial misrepresentation"
- Explicitly states that postsecondary institutions are liable for the misrepresentations of third parties providing marketing, advertising and similar services
- Expands the Department's remedies for violations

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The Amended Misrepresentation Rule 

The new regulation expands the definition of "misrepresentation" to include:

- Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or **directly or indirectly** to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency or to the Secretary.
 - This change makes schools responsible for how their statements are interpreted by ED or prospective students
- A "misleading statement" includes any statement that has the likelihood or tendency to deceive or confuse
 - This change from the prior regulation punishes statements that are not untrue or deceptive, but confusing = lack of materiality
- A "statement" is any communication made in writing, visually, orally, or through other means.
- A misrepresentation is "substantial" if the person to whom the misrepresentation was made "could reasonably be expected to rely, or has reasonably relied" on the misrepresentation to that person's detriment.

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THE AMENDED MISREPRESENTATION RULE




APSCU believes the amended misrepresentation rule exceeds the Department's statutory authority and constitutional authority. APSCU has sued the Department of Education challenging the rule. That lawsuit is pending in the D.C. Circuit – final decision expected by June 30, 2012.

Our concerns:

- The rule empowers the Department to revoke a school's Title IV eligibility without due process procedural protections
 - An ED Dear Colleague Letter (DCL) indicates that hearing rights are applicable, but DCLs do not have the force of law
- The rule punishes speech that is not "inherently deceptive" but that only has a "tendency to confuse" – i.e., true but confusing statements
- The rule imposes sanctions for types of misrepresentation not covered by the Higher Education Act
 - The rule potentially goes beyond statements about: nature of educational program, financial charges, or employability of graduates, as contained in HEA
 - ED tries to do by regulation what the statute does not permit

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Coverage of the New Rule



- The Institution is 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.**
 - Includes lead generators and call centers
- "Substantial misrepresentations" are prohibited "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."
- Makes optional the Department's adherence to the notice and opportunity to be heard provisions of the Higher Education Act, while threatening punishment for nearly everything a school says about its programs, including true statements, minor misrepresentations, and innocent misrepresentations without deceptive intent.


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Penalties




- For substantial misrepresentations, ED may:
 - Deny applications by an institution to add new programs or locations;
 - Initiate proceedings to fine an institution or limit, suspend, or terminate an institution's participation in Title IV programs; or
 - Revoke a provisionally certified institution's participation in Title IV programs
- The new rule does not create a private right of action but compliance with HEA required under the Program Participation Agreement creates a "hook" for potential qui tam actions under the False Claims Act

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APSCU Recommendations 

- APSCU's October 2011 "Guidance for the APSCU Members – the Misrepresentation Rule and Third Party Vendors" – available at www.apscu.org
 - Establish strong internal compliance standards and internal compliance audit procedures that define the Institution's standards and establish procedures for preventing, identifying and remediating noncompliance with those standards or audit procedures
 - Exercise due diligence in selecting marketing partners with a strong compliance history
 - Conduct vendor compliance training and education
 - Negotiate with vendors contract terms that allow for additional content pre-approval and oversight
 - Provide strong institutional customer-focused service and complaint resolution
 - Institute regular monitoring programs of internet conduct by vendors
 - Legal advice

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CONCERNS - FUTURE 

- Department of Education using state actions regarding marketing/advertising as a basis for Title IV action under the misrepresentation rule: e.g., Westwood settlement and Colorado
- Shoehorning ED action based on state law means that state actions on marketing/advertising issues will not be isolated to the state/institution but could be used as a foundation for more extreme Title IV action by ED against an multi-state institution
- Private sector colleges are the "canary in the coal mine" – free speech concerns and concerns about over-aggressive or over-broad enforcement of the misrepresentation rule

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CONTACT INFO 

Thank you!

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