

FTC'S INITIATIVE ON INSTITUTIONAL MARKETING PRACTICES — What You Need to Know

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MAYNARD
COOPER GALE



 COBBS ALLEN

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Brandon Sherman's Background

PRACTICE AND EXPERIENCE



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- Member of Maynard Cooper & Gale'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

Scott Casanover's Background

PRACTICE AND EXPERIENCE



- Scott Casanover oversees the global legal and government affairs functions for West Coast University and American Career College. In this capacity he provides advanced litigation strategy, regulatory interpretation and guidance, and key corporate legal support to the schools he serves
- Prior to joining WCU and ACC, Casanover was the General Counsel and Chief Administrative Officer for Vatterott College in St. Louis, Missouri. In addition to these positions, Casanover was an Associate in the St. Louis office of Husch Blackwell
- Casanover earned his Bachelor's Degree in Political Science from Baylor University, and a Juris Doctor from Washington University

Daniel Kusmin's Background

PRACTICE AND EXPERIENCE



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- SVP & Education Practice Group Co-Lead
- Works almost exclusively with for-profit higher education institutions. Where he specializes in helping them manage their unique risk profile
- Graduated with a Bachelor of Science Degree in Finance from the University of Kansas and holds his Associate in Risk Management (ARM) designation
- Daniel was named to the 2018 class of Ingram's 20 in their Twenties

Tres Cleveland's Background

PRACTICE AND EXPERIENCE



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- Tres serves as Chair of the Education Practice at Maynard
- Represents educational institutions, third-party servicers, and financial investors in dozens of reported cases in courts throughout the country
- Advises institutions, investors and financiers in higher education mergers and acquisitions, and in other complex corporate restructuring matters, including bankruptcies and receiverships

HIGHER EDUCATION PRACTICE

Maynard's Higher Education Practice Group is deeply experienced and entrenched in all facets of regulatory issues that are important to institutions, investors, third-party servicers and accrediting agencies

Title IV

Accreditation

State
Licensure

Cybersecurity

False Claims
Act

Title IX

Transactions

Government
Relations

Government
Investigations

HIGHER EDUCATION ACTIVITY

ABOUT THE EDUCATION PRACTICE GROUP



Insurance programs specifically tailored for education



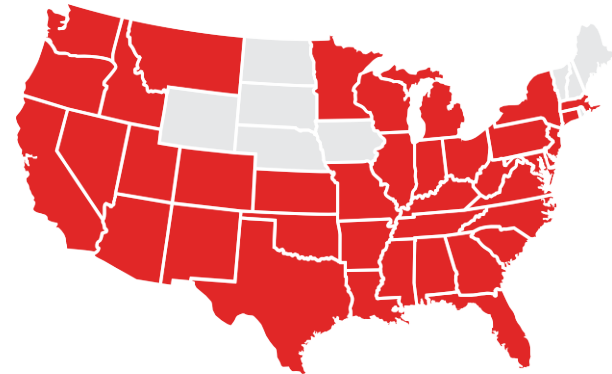
Marketplace expertise allows for placement of difficult coverages



\$30M+ in student claims paid



100+ schools and several hundred thousand students represented annually



*Institutions represented in **39** of **50** states*

INNOVATIVE SOLUTIONS FOR EDUCATION & BEYOND



Insurance Supported Letter of Credit



HEERF Insurance Program



Contractual Risk Transfer



Parametric Derivatives



Borrowers Defense to Repayment Coverage



Cybeta Cyber Assessment

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 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
- 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:

- 
- “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”



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



School catalog



Call scripts



Vendor contracts



School website



Partnership agreements



Television/radio ads



Social media

ACTIONS TO TAKE NOW (CONT.)



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

ACTIONS TO TAKE NOW (CONT.)



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.

ACTIONS TO TAKE NOW (CONT.)



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.

TRANSFERRING FTC RISK TO THE INSURANCE MARKETPLACE

Insurance Policies to Consider:

- **Privately Held Companies:**
Combined Directors & Officers/Educator's Legal Liability Policy
- **Publicly Traded Companies:**
Professional (Educators' Legal Liability)

DIRECTORS & OFFICERS (D&O) CONSIDERATIONS

- Professional Services Carve back
 - Ideally the policy is written as a combined D&O/E&O policy
- Antitrust Exclusion & Coverage
- False Advertising & Consumer Protection Exclusions
- Manuscript Language
- Choice of Counsel Provisions

INSURANCE MARKETPLACE DYNAMICS

- Limited marketplace for proprietary education
- Currently ~4-5 markets that are willing to provide the correct terms on the primary policy
- More carriers are willing to consider risk on an excess basis

LIMITS, RETENTIONS, PREMIUM & SIDE-A

- There is market capacity for high limit towers
- No crystal ball for correct level of limit
 - Ask your broker for benchmarking
 - Consult with counsel
- Retentions for this type of coverage can run high - \$100k+ typically. Not uncommon to see \$500k+
- Premiums are a function of size, financial stability, marketing practices, overall market conditions – underwriting process can be involved
- Side-A DIC policies should be considered

GLBA- Safeguards Rule

- Gramm-Leach-Bliley Act, Safeguards Rule (GLBA)
 - GLBA requires financial institutions to protect customer financial information. (e.g. FAFSA information)
 - Colleges are considered “financial institutions”
 - GLBA is enforced by the Federal Trade Commission and is required under **Program Participation Agreements**.
 - Non-compliance can result in a find of a lack of **Administrative Capability, placement on Heightened Cash Monitoring**, and a loss of access to FSA systems.

REVISED SAFEGUARDS RULE

- Requires financial institutions to design and implement **safeguards to control risks**, including by:
 - Access controls
 - Encryption
 - Change management
 - Multi-factor authentication
 - Disposal of customer information
 - Monitoring



REVISED SAFEGUARDS RULE

- Financial institutions:
 - Must prepare a **written risk assessment**.
 - Must develop and implement an **incident response plan**.
 - Must “periodically assess” their **service providers** on an ongoing basis.



REVISED SAFEGUARDS RULE

- Financial institutions:
 - Must designate a “**Qualified Individual**” responsible for overseeing and implementing a financial institution’s information security program and enforcing its information security program.
 - The qualified individual must submit an **information security report** in writing and at least annually to the institution’s board of directors or equivalent governing body.



REVISED SAFEGUARDS RULE

- **Training requirements:**
 - Provide all personnel with security awareness training; and
 - Verify that key information security personnel take steps to maintain current knowledge of changing information security threats and countermeasures.



REVISED SAFEGUARDS RULE

- Small business exemption: Financial institutions that collect information about fewer than **5,000 consumers from certain requirements.**
- This Final Rule became effective on **January 10, 2022.**
 - However, certain new requirements will become effective on **December 9, 2022.**



CFPB CYBERSECURITY

- Consumer Financial Protection Circular 2022-04 (August 11, 2022)
 - “[F]inancial companies are at risk of violating the Consumer Financial Protection Act if they **fail to have adequate measures to protect against data security incidents.**”
 - “Actual injury is not required to satisfy this prong in every case.”
 - “Where companies forgo reasonable cost-efficient measures to protect consumer data, [] the CFPB expects the risk of substantial injury to consumers will outweigh any purported countervailing benefits to consumers or competition.”
 - The circular notes some examples where the failure to implement the following data security measures might increase the risk that a firm’s conduct triggers liability under the Consumer Financial Protection Act, including:
 - Multi-factor authentication
 - Adequate password management
 - Timely software updates

ADDITIONAL RESOURCES

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

QUESTIONS?



Thank you!

MAYNARD
COOPER GALE



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