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An Update on Telemarketing Laws and Agency Rules

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- Full-service law firm with over 400 attorneys.
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- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.

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Syllabus

- Telephone Consumer Protection Act (TCPA)
- Federal Communications Commission (FCC) New Rule re One-to-One Consent
- FCC New Rule re: Revocation of Consent
- Federal Trade Commission (FTC) New Recordkeeping Requirements
- TC Extra Credit

Telemarketing Regulations

Telephone Consumer Protection Act (TCPA)	Enforced by Federal Communications Commission Regulates telephone calls, text messages and faxes
Telemarketing Sales Rule (TSR)	Enforced by Federal Trade Commission Regulates calls and text messages
CAN-SPAM Act	Enforced by FTC Regulates commercial emails
Do Not Call	Jointly administered by FCC and FTC

Telephone Consumer Protection Act (TCPA)

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Telephone Consumer Protection Act

- TCPA is a 1991 federal law that is enforced by FCC
- Designed to limit unwanted automated calls
- Requires consent before calling/texting using autodialer or an artificial or prerecorded voice
- Level of consent depends on purpose of contact
  - Marketing, informational, emergency calls/texts
- $500 minimum penalty for each unlawful call or text
- Over 400 reported TCPA opinions in 2023 alone
- Class action TCPA litigation is extremely costly

Autodialer and Artificial or Prerecorded Voice

- *Consent* needed for calls/texts using "automatic telephone dialing system" (autodialer) or "artificial or prerecorded voice"
- Autodialer:
  - A device that has the capacity to store or dial phone numbers using a random or sequential number generator
  - Many modern dialing platforms can be considered autodialers
  - **Best practice**: assume platform is autodialer and get consent!
- Artificial or Prerecorded Voice
  - AI-generated voice – "artificial"
  - Soundboard technology – prerecorded
  - Recorded voicemails left by live agent – prerecorded

Marketing Calls/Texts – Prior Express Written Consent

- Schools need *prior express written consent* to place automated calls/texts that constitute "**telemarketing**"
- "Telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services"
- Examples: School wants to call/text:
  - Prospective student about interest in enrollment
  - Current student about advanced degree program
  - Alumni about sale at campus bookstore

Marketing Calls/Texts – Written Agreement

- *Prior express written consent* means a **written agreement** that:
  - Clearly authorizes call/text to be placed using autodialer or artificial or prerecorded voice;
  - Includes signature of person to be called;
  - Identifies number to be called/texted;
  - Contains *clear and conspicuous* disclosure informing consumer:
    - that she is authorizing automated marketing calls/texts; and
    - that she is not required to agree to receive calls/texts as condition of purchasing good or service

Marketing Calls/Texts – Signature

- FCC guidance says that a "written agreement" may be "obtained via an email, website form, text message, telephone keypress, or **voice recording**"
- However, Federal Trade Commission, which regulates telemarketing under the Telemarketing Sales Rule ("TSR"), takes a different position:
  - FTC: "The Commission reiterates that a seller or telemarketer may not use an **oral recording of consent** for any provision of the TSR that requires consent to be provided in writing"
- Schools **should not** rely on "voice recording" or oral consent and instead should obtain **written** consent for marketing calls/texts

Marketing Calls/Texts – Webform Agreement

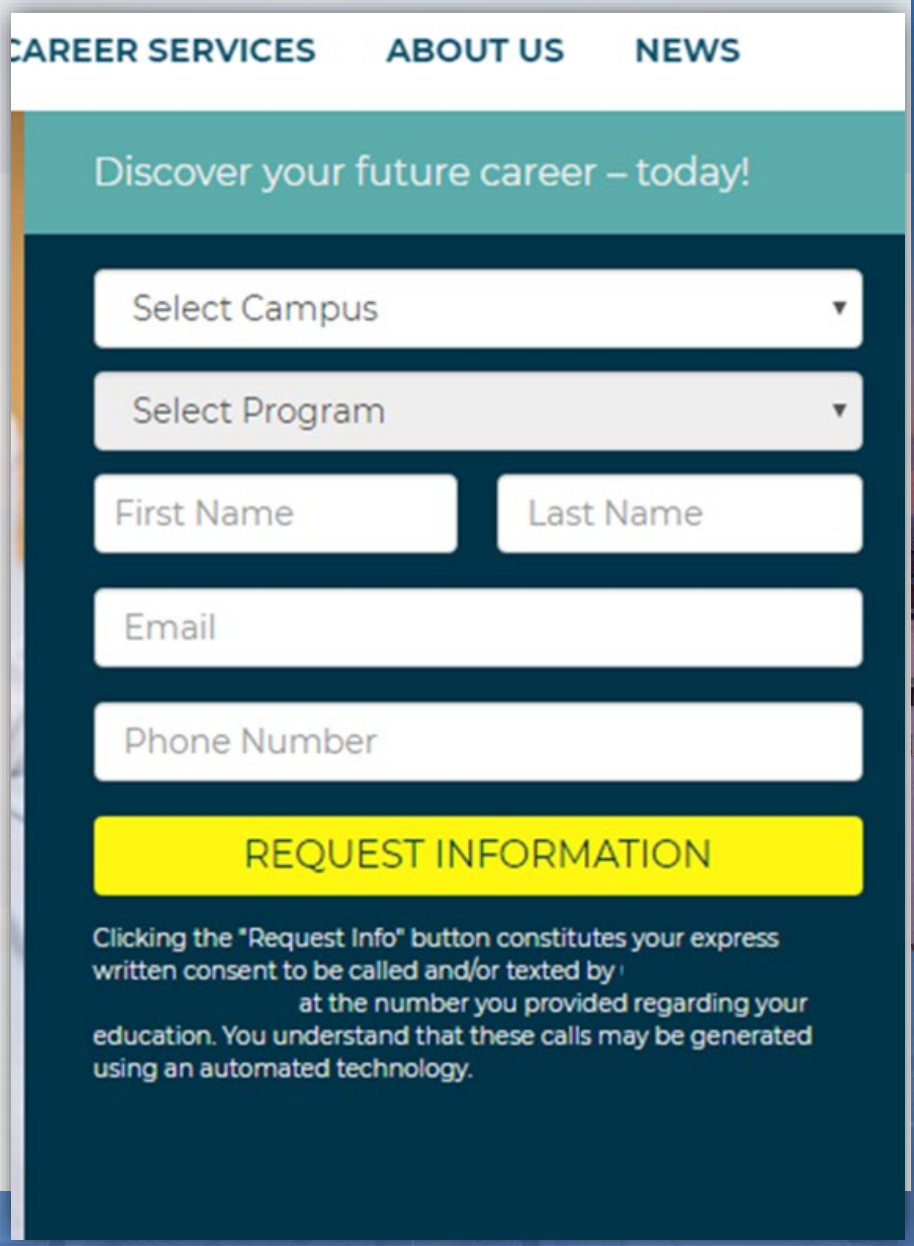
- "Courts have found that a person can provide prior express [consent] by submitting a web form with personal information when the web form includes a notice that the person agrees to be contacted." *Barton v. Delfgauw*, 2023 WL 1818134, at *3 (W.D. Wash. Feb. 7, 2023)
- "Prior express consent may be obtained via a website form." *Chladni v. Univ. of Phoenix, Inc.*, 2016 WL 6600045, at *2 (E.D. Pa. Nov. 7, 2016)

Marketing Calls/Texts – Clear and Conspicuous Disclosure in Webform

- FCC: "Clear and conspicuous" means "notice that would be **apparent to a reasonable consumer**"
- "The mere presence of this disclosure on the webpage is insufficient to establish that the website 'reasonably notified the user' of the terms." *Gaker v. Citizens Disability*, 654 F. Supp. 3d 66, 76 (D. Mass. 2023)
- Disclosures "must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it." *Berman v. Freedom Financial Network*, 30 F.4th 849 (9th Cir. 2022)

Not Clear and Conspicuous

- The notice that clicking constitutes express written consent is **below** the “Request Information” button
- “A consumer is less likely to be bound to terms agreed to on the internet where the terms were located below the ‘accept’ or ‘submit’ button or were otherwise hidden or difficult to access.” *Gaker v. Citizens Disability*, 654 F. Supp. 3d 66, 75 (D. Mass. 2023)
- Because English speakers read left-to-right and top-to-bottom, the notice is not “unavoidable” prior to clicking the button



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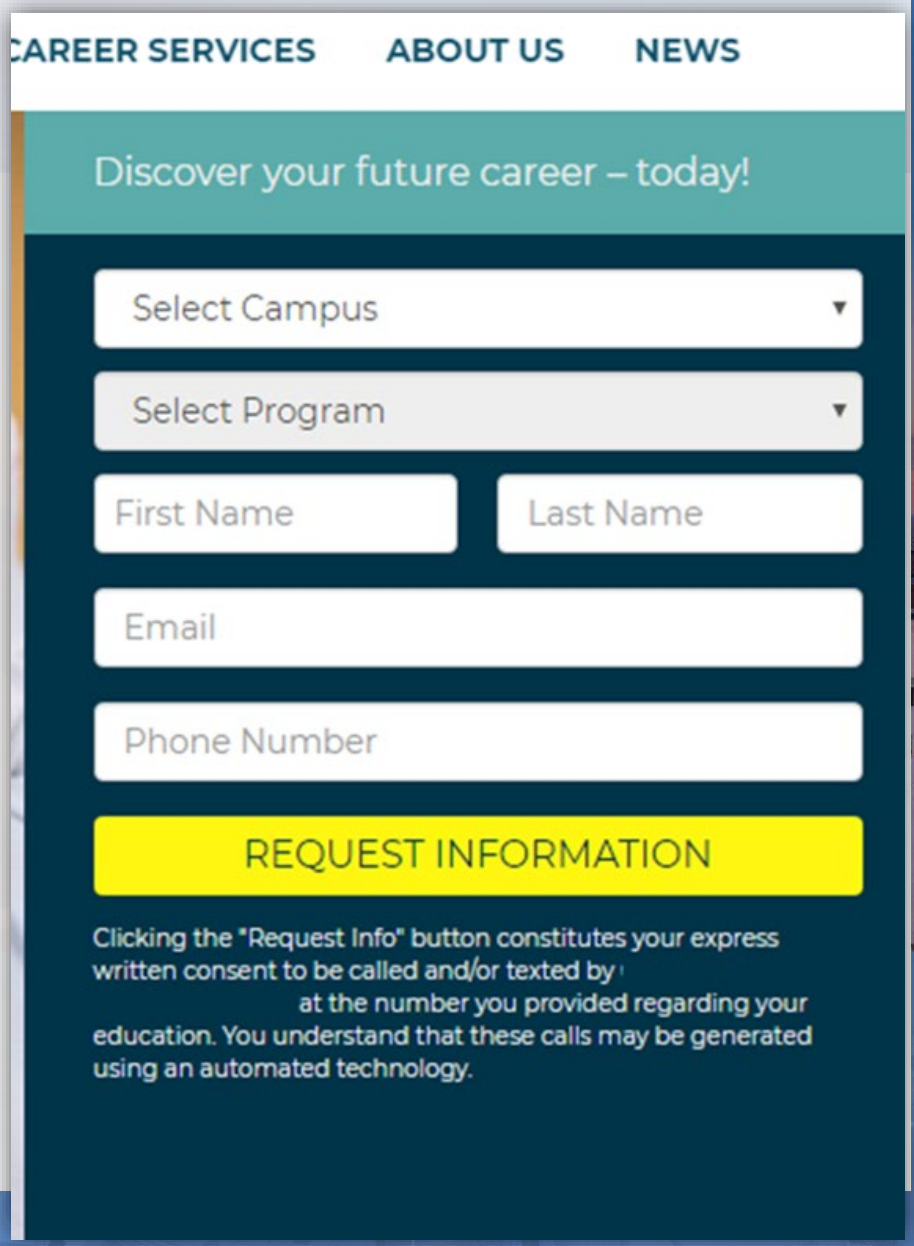
What Else Is Missing?

- No disclosure that consent to receive calls/texts is not a condition of purchasing any goods or services
- No disclosure that individual may receive calls placing using “artificial or prerecorded voice”



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Clear and Conspicuous – An Example

By clicking **Agree** below I am providing my electronic signature and express written consent agreement to permit School Name, and parties calling on its behalf, to call and text me at the number provided below for marketing purposes, including through the use of automated technology and prerecorded and/or artificial voice messages. I acknowledge my consent is not required to obtain any good or service. I can opt-out **here** or by contacting School Name at 987-654-3210.

My phone number at which I agree to be contacted is: 123-456-7890.

Agree

Informational Calls/Texts

- Schools need "*prior express consent*" to place **informational** calls/texts to students using autodialer or artificial/prerecorded voice
  - Consent can be **oral or written**
  - Can be obtained when student enrolls and provides contact information
- Calls/texts must be "closely related" to student's education
  - Examples: Student surveys, class assignments, tuition/fee charges, school activities
  - Do not send "dual purpose" marketing and informational calls/texts

Informational Calls/Texts

- FCC “encourages schools to disclose the full range of all potential calls and messages that student should expect to receive when requesting consent from students”
- Informational calls/texts are rarely litigated

Emergency Calls/Texts

- Schools can always place automated calls/texts in emergencies without consent
- FCC guidance:

  "We confirm that autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose. In such situations, autodialed calls made by school callers do not require consent pursuant to the TCPA's 'emergency purpose' exception"
- Examples: Weather closures, unexcused student absences, danger or threat due to fire, dangerous persons, health risks

National Do-Not-Call Registry and EBR

- Students who place phone number on **national** do-not-call list may still be contacted by school based on the existence of:
- "Prior express invitation or permission"; or
- "Established business relationship" ("EBR")
- EBR can be formed by:
  - "A voluntary two-way communication between a person or entity ... on the basis of a purchase or transaction with the entity within the 18 months prior to date of call"; or
  - An individual's "prior inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call"

FCC – New Rule on One-to-One Consent

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New FCC Rule re "One-to-One Consent"

- FCC new rule requires "*one-to-one consent*"
  - For "prior express written consent" to be valid under new rule, an individual may only provide consent to receiving a call or text from **one seller at a time**
- FCC is seeking to "close lead generator loophole"
  - "Lead-generated communications are a large percentage of unwanted calls and texts and often rely on **flimsy claims of consent** to bombard consumers with unwanted robocalls and robotexts"
- One-to-one consent rule is effective **January 26, 2025**

What is the “Lead Generator Loophole”

- Lead Generator Website:
  - Operates website where consumers consent to receive calls and emails about job opportunities – e.g., www.findmydreamjob.com
  - Consumers consent to be contacted by “Marketing Affiliates”
  - Marketing Affiliates are listed on separate page via hyperlink
- Consent Transfer:
  - Lead generator “transfers” consent to Marketing Affiliates, often through or one more intermediaries
- Calls: Dozens of Marketing Affiliates contact individual about interest in educational programs, resulting in hundreds of calls about topic individual did not agree to be contacted about

Closing the Loophole

- FCC: “With this requirement we make it clear that sharing lead information with a daisy-chain of ‘partners’ is not permitted”
  - “If the comparison-shopping website seeks to obtain prior express written consent from multiple sellers, the webpage must obtain prior express written consent separately for each seller”

Closing the Loophole

- Example of what is prohibited under new rule:
  - I agree to be contacted by Marketing Partners
  - Cannot hyperlink to separate page listing the Marketing Partners
- Example of what is allowed under new rule:
  - I agree to be contacted by each of the individual entities:
    - Thompson Coburn Institute
    - CAPPS Cosmetology School
    - Palm Springs Art Academy

"Logically and Topically" Related

- FCC: "The content of the ensuing robotexts and robocalls must be **logically and topically** associated with the website where the consumer gave consent"
- Example: Schools cannot rely on consent obtained via lead generator's website that provides consumers with information about potential employment opportunities
- Institutions can obtain valid consent via lead generator website providing information about educational programs

Vicarious Liability for Invalid Consent

- Courts routinely hold sellers and telemarketers liable for calls/texts if consent obtained through lead generator is invalid
- Theories of vicarious liability:
  - Express agency relationship
  - Apparent authority
  - Ratification
- "A subagency theory has been recognized as a valid basis for imposing vicarious liability in TCPA litigation." *Hossfield v. Allstate*, 2024 WL 1328651 (N.D. Ill. March 28, 2024)
- Best practice: Have contracts clearly defining relationship and respective obligations with telemarketers and any lead generators

FCC – New Rule on Revocation of Consent

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FCC New Rule – Revocation of Consent

- New FCC rule means schools cannot limit the method by which students can revoke consent to receive automated calls or texts
- Example: If a caller "requires the consumer to fax his or her revocation," it "**materially diminishes** the consumer's ability to revoke" consent
- FCC: "Allowing callers to limit revocation requests only to the specific means that they have designated potentially places a **significant obstacle** in the way of consumers who no longer wish to receive such calls by limiting the methods available to revoke consent"

Revocation via “Any Reasonable Method”

- Consumer can revoke consent via “any reasonable method” that “clearly expresses a desire to not receive further calls or texts”
- Certain methods are “per se” reasonable:
  - Phone call with live operator
  - Automated, interactive voice or key press-activated opt-out
  - Website
  - Text message – Automatic revocation when certain words texted:
    - STOP, END, QUIT, REVOKE, OPT-OUT, CANCEL, UNSUBSCRIBE
- “Callers may not infringe on [revocation] right by designating an exclusive means to revoke consent that precludes the use of any other reasonable method”

Timing to Honor Revocation Request

- Current rule requires callers honor revocation request within 30 days
  - Must place them on internal do-not-call list
  - Cannot contact them for 5 years from date of request
- New rule requires honoring request within 10 business days
  - Same 5-year do-not-call period applies
- Best practice: FCC says stop contacting them "as soon as practicable"

Scope of Revocation Request

A consumer's revocation request does not necessarily apply to all automated calls and texts

Consumers often consent to receive different categories of automated calls/texts – marketing and informational

Nuances in new rule requires careful review of facts

Scope of Revocation Request - Example 1

- School obtains prospective or current student's consent to send marketing calls and texts
- School sends marketing **text**
- Student replies "STOP"
- Can school continue to **call** the student for marketing purposes?
  - No!
  - FCC: "When consent is revoked in any reasonable manner, that revocation extends to **both** robocalls and robotexts **regardless of the medium used to communicate the revocation of consent**"

Scope of Revocation Request - Example 2

- School obtains consent to place marketing and informational calls/texts
- School places **marketing call/text** to current student
- Student revokes consent to marketing call/text
- Can school still place **informational** calls/texts?
  - Yes
  - FCC: “The rule that we codify here that requires callers to honor a revocation consent request made by any reasonable means applies only to robocalls and robotexts that the called party has received”
  - FCC: “When a consumer revokes consent with regard to telemarketing robocalls or robotexts, the caller can continue to ... [place] an informational call” or text

Scope of Revocation Request - Example 3

- School obtains consent to place marketing and informational calls/texts to student
- School places **informational call/text** to student
- Student replies "STOP" and revokes consent
- Can school still place marketing calls/texts?
  - No!
  - FCC: "If the revocation request is made **directly in response to a ... informational call or text** ... this constitutes an opt-out request from the consumer and **all further non-emergency robocalls and robotexts must stop**"
- Note: Even emergency calls/texts must stop upon request

Scope of Revocation Request - Example 4

- School obtains consent to place marketing calls/texts
- School sends marketing text about Campaign A
- Student replies “STOP” to text about Campaign A
- Can school still place marketing call/text about Campaign B?
  - Maybe
  - FCC: Permits school to send a one-time confirmatory text within 5 minutes to clarify the scope of the revocation
  - Absent affirmative response, all marketing calls/texts must stop

Email Revocation - Example 5

- School obtains consent to place marketing calls/texts
- Student revokes consent by sending **text** to school
- Can school still send marketing emails to student?
  - Yes. Emails are not subject to TCPA
  - Commercial emails governed by federal CAN-SPAM Act
  - No consent required to send marketing email
- Exceptions:
  - If student's call/text explicitly requests to not be contacted via email, school must stop emails
  - If student **emails** revocation request, stop emails too

Effective Date

- Further review of new rule is being performed by Office of Management and Budget
- Effective date of new rule is no sooner than 6 months from completion of OMB review
- Exception: one-time confirmatory text message amendment became effective in April 2024
- Schools can take advantage of one-time confirmatory text now without risking violating consent rules

FTC – New Recordkeeping Requirements

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FTC New Rule for Recordkeeping under Telemarketing Sales Rule

- FTC enforces the Telemarketing Sales Rule ("TSR")
- New FTC rule updates recordkeeping requirements that apply to telemarketing calls under 34 CFR § 310.5
  - Current rule requires sellers and telemarketers to retain certain records for 2 years
  - Under new rule, records now must be retained for **5 years**
- Sellers and telemarketers can agree to allocate responsibility for recordkeeping

Updated Recordkeeping Requirements

- Sellers/telemarketers must retain following records for 5 years:
  - Each **unique** telemarketing script, brochure, advertising, promotional material, and prerecorded message used
  - Call detail records for each telemarketing call under 16 CFR 310.5(a)(2)
    - Name of telemarketer
    - Name of seller on whose behalf call is placed
    - Good or service that is subject of call
    - Whether call is outbound call and uses prerecorded message
    - Scripts and prerecorded messages used during calls
    - Number called, date/time of call, duration of call, disposition of call
    - Caller ID information

Updated Recordkeeping Requirements

- Record of consent obtained in same format presented to consumer
- Do-not-call records
- Version of national DNC registry accessed and used by sellers and telemarketers
- Contract between sellers and telemarketers

Effective Dates

- Certain parts of new FTC rule effective **May 16, 2024**
  - Unique telemarketing scripts, advertising materials, prerecorded messages
  - Consent and do-not-call records
  - Contracts with telemarketers
  - Version of national DNC registry accessed
- Other parts do not require compliance until **October 15, 2024**
  - "Compliance with 16 CFR 310.5(a)(2) is not required until October 15, 2024"
  - 16 CFR 310.5(a)(2): Call detail records

Summary

Telephone Consumer Protection Act (TCPA)

- Consent required before calling or texting using autodialer or artificial or prerecorded voice
- Type of consent depends on purpose of contact:
  - Marketing – prior express written consent
  - Informational – express consent (oral or written)
  - Emergency – no consent required

Federal Communications Commission (FCC) New Rule re One-to-One Consent

- New rule means consumers can provide consent to receive automated calls/texts from only one seller at a time
- Implications for schools that obtain consent through lead generators
- Effective January 26, 2025

FCC New Rule re Revocation of Consent

- New rule means schools cannot limit methods by which students can revoke consent
- Effective no sooner than six months from today following OMB review

Federal Trade Commission (FTC) New Recordkeeping Requirements

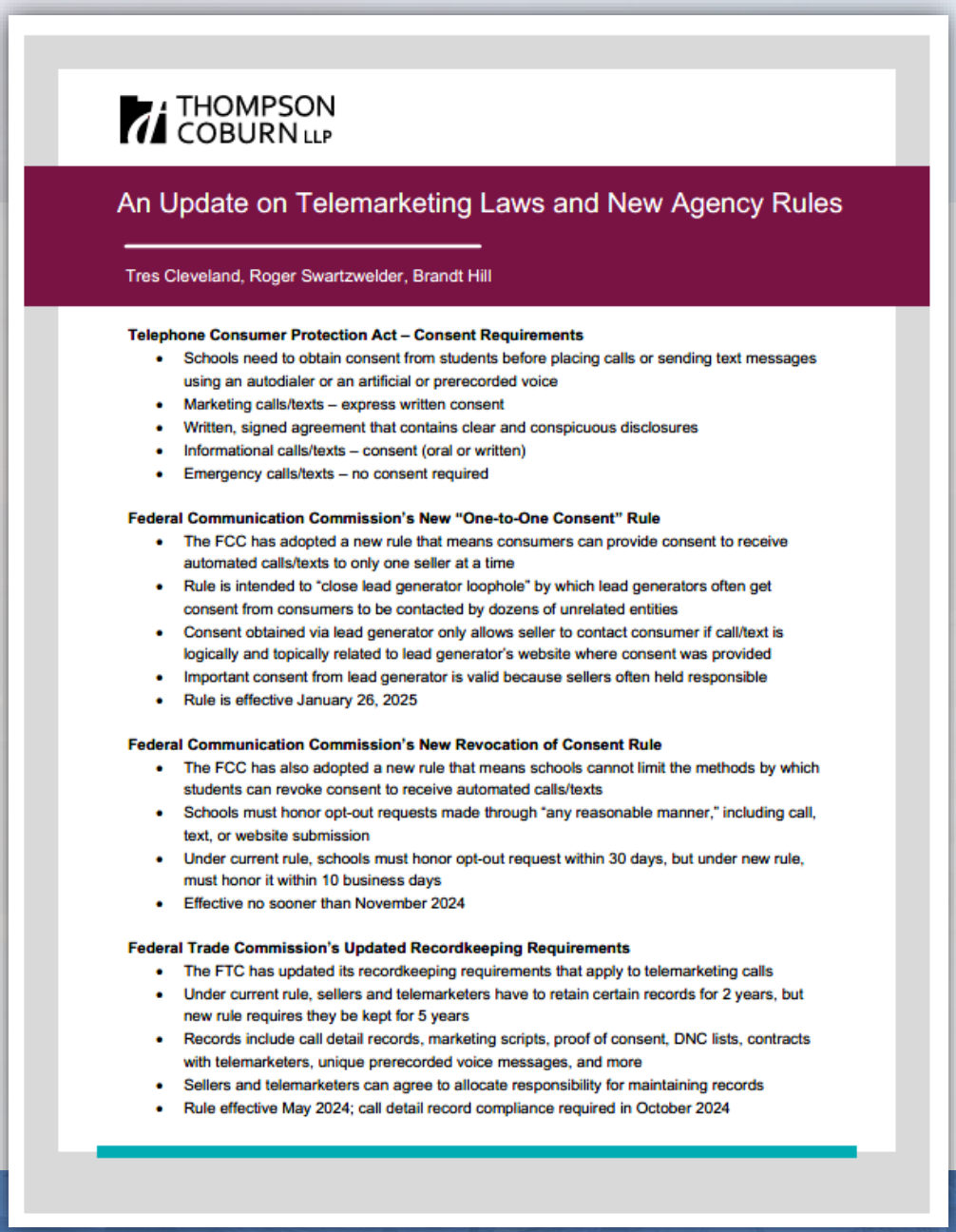
- New rule requires certain records be maintained for 5 years, up from 2 years
- Part of rule effective May 2024, other parts effective October 2024

Additional Resources

FCC New Rule re: One-to-One Consent	• 89 Fed. Reg. 5098 (Jan. 26, 2024)
FCC New Rule re: Revocation of Consent	• 89 Fed. Reg. 15756 (Mar. 5, 2024)
FTC New Rule re: Recordkeeping Requirements	• 89 Fed. Reg. 26760 (Apr. 16, 2024)
FCC Guidance re: Schools	• July 2016 Declaratory Ruling

Update on Telemarketing Laws

- Telemarketing Laws Update provides a quick glance at new agency rules and requirements
- The document is available on our Higher Education Resources page, and we are happy to provide a copy upon request (please email srichter@thompsoncoburn.com).



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An Update on Telemarketing Laws and New Agency Rules

Tres Cleveland, Roger Swartzwelder, Brandt Hill

Telephone Consumer Protection Act – Consent Requirements

- Schools need to obtain consent from students before placing calls or sending text messages using an autodialer or an artificial or prerecorded voice
- Marketing calls/texts – express written consent
- Written, signed agreement that contains clear and conspicuous disclosures
- Informational calls/texts – consent (oral or written)
- Emergency calls/texts – no consent required

Federal Communication Commission's New "One-to-One Consent" Rule

- The FCC has adopted a new rule that means consumers can provide consent to receive automated calls/texts to only one seller at a time
- Rule is intended to "close lead generator loophole" by which lead generators often get consent from consumers to be contacted by dozens of unrelated entities
- Consent obtained via lead generator only allows seller to contact consumer if call/text is logically and topically related to lead generator's website where consent was provided
- Important consent from lead generator is valid because sellers often held responsible
- Rule is effective January 26, 2025

Federal Communication Commission's New Revocation of Consent Rule

- The FCC has also adopted a new rule that means schools cannot limit the methods by which students can revoke consent to receive automated calls/texts
- Schools must honor opt-out requests made through "any reasonable manner," including call, text, or website submission
- Under current rule, schools must honor opt-out request within 30 days, but under new rule, must honor it within 10 business days
- Effective no sooner than November 2024

Federal Trade Commission's Updated Recordkeeping Requirements

- The FTC has updated its recordkeeping requirements that apply to telemarketing calls
- Under current rule, sellers and telemarketers have to retain certain records for 2 years, but new rule requires they be kept for 5 years
- Records include call detail records, marketing scripts, proof of consent, DNC lists, contracts with telemarketers, unique prerecorded voice messages, and more
- Sellers and telemarketers can agree to allocate responsibility for maintaining records
- Rule effective May 2024; call detail record compliance required in October 2024

Questions?

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TC Extra Credit

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TC Extra Credit | Resources Page

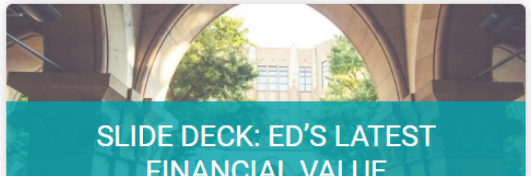
HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

WEBINARS/TRAINING RESOURCES

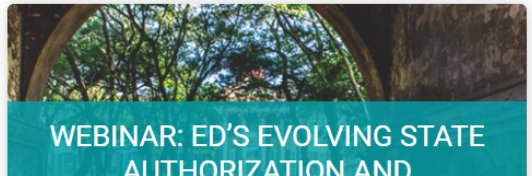
THE BIDEN ADMINISTRATION'S NEW TITLE IX RULE

In this slide deck, Scott



SLIDE DECK: ED'S LATEST FINANCIAL VALUE TRANSPARENCY/GAINFUL EMPLOYMENT GUIDANCE

In this slide deck, Aaron Lacey



WEBINAR: ED'S EVOLVING STATE AUTHORIZATION AND PROFESSIONAL LICENSURE REQUIREMENTS

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TC Extra Credit | REGucation Blog

U.S. Department of Education Issues New Guidance on Implementation of Program Length Regulations

Roger Swartzwelder April 23, 2024

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On April 15, 2024, the U.S. Department of Education ("Department") issued new guidance regarding the implementation of the program length restrictions for Gainful Employment ("GE") programs. These restrictions are included in the Department's Financial Responsibility, Administrative Capability, Certification Procedures and Ability to Benefit Final Rule ("Final Rule") published in the *Federal Register* on October 31, 2023. The Final Rule takes effect on July 1, 2024.

The Final Rule impacts the operations of all types of schools, colleges and

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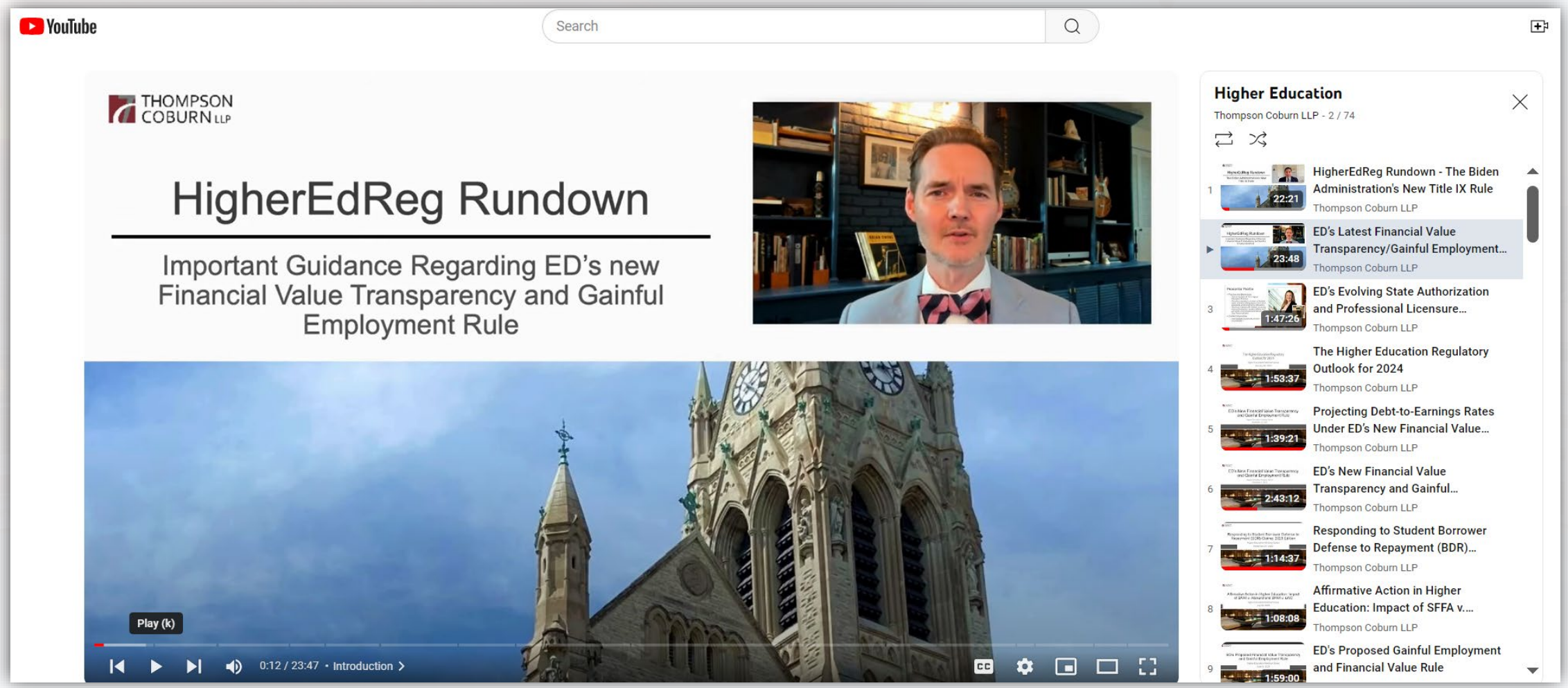
TC Extra Credit | Webinars & Training Series



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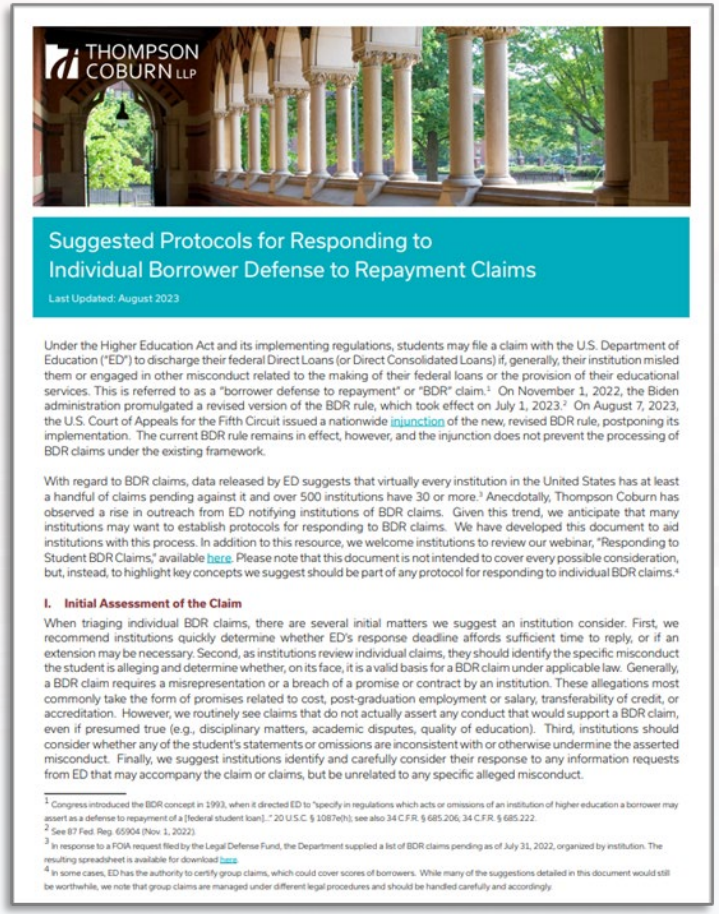
TC Extra Credit | Compliance Materials



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Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.[1] On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.[2] On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide injunction of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.[3] Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available here. Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.[4]

I. Initial Assessment of the Claim

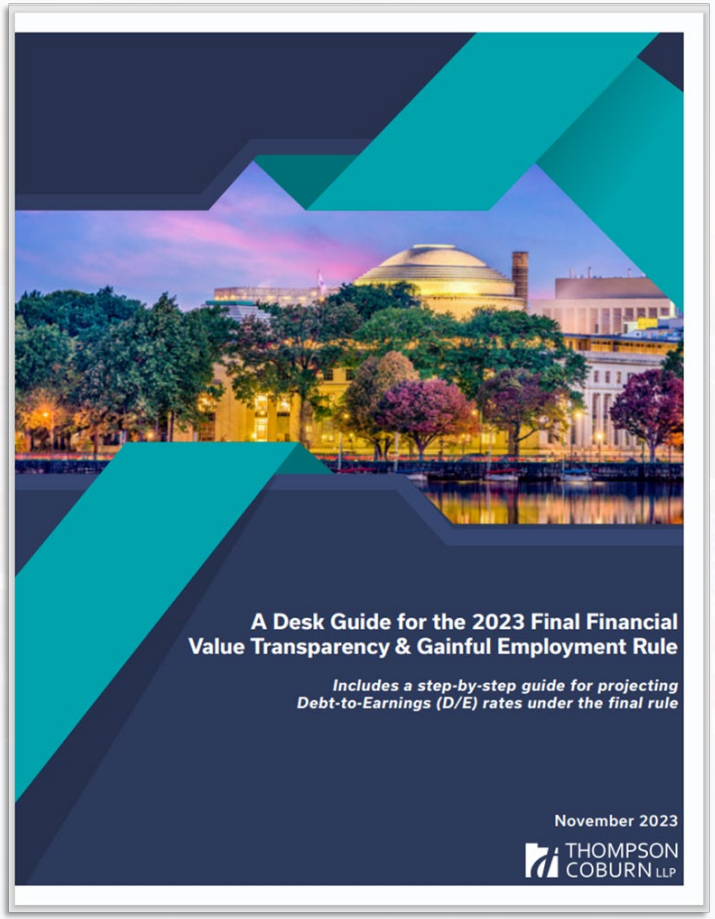
When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

[1] Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]..." 20 U.S.C. § 1087e(h); see also 34 C.F.R. § 685.206; 34 C.F.R. § 685.222.

[2] See 87 Fed. Reg. 65904 (Nov. 1, 2022).

[3] In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download here.

[4] In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.



A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule

Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the final rule

November 2023

THOMPSON COBURN LLP

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COMPLIANCE

Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (the "Act"), a $1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."[1] Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

1. 34 C.F.R. §668.14(a)(16); see also 20 U.S.C. §1094(a)(24).

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Case Example

"According to Franklin, DePaul sent a series of unsolicited text messages to his personal cell phone. On November 18, 2015, Franklin received an automated text message from short code #467467 to his cell phone. The text read,

> "Thanks for opting in! Watch for important news/deadlines from Depaul (maximum one per week). Message and data rates apply[.] Text OUTDP to opt out."

Franklin alleges that he never provided his cell phone number to DePaul, nor did he give prior express consent to be called. Upon receiving the initial message, he immediately responded by replying

> "Out."

DePaul's automated system responded with:

> "ShopText: Sorry we didn't understand your text. Or your session expired. Check the spelling and reply w/ the keyword. No quotes or spaces. For help, reply HELP."

Franklin states that he sent several subsequent text messages in an attempt to stop the messaging campaign. Nevertheless, he continued to receive at least seventeen unsolicited text messages after telling DePaul to stop contacting him. He also alleges that he continues to receive such text messages to the present day. Based on these facts, Franklin claims that DePaul violated the TCPA."

Case Example – Cont.

- DePaul argues that Franklin's allegations fail to state a claim because he gave prior express consent to receive the text messages in question. According to DePaul, it is clear from the fact that the initial text message read "Thanks for Opting In!" that "[Franklin's] phone number was 'opted in' to receiving text messages from DePaul."
  - But Franklin explicitly states in his complaint that he "has never provided his cellular phone number to the Defendant or given his prior express consent to be called."
- DePaul seeks to bolster its argument by including an exhibit of an online form from its website, as well as an exhibit of what seems to be a series of back-end system screenshots.
  - DePaul's exhibits appear to consist of screenshots of some unspecified computer program or Internet site whose accuracy has not been verified
- DePaul argues that Franklin's failure to opt out of subsequent text messages after receiving the first message shows continual express consent to receive the subsequent messages. Specifically, DePaul claims that Franklin failed to use a reasonable means available to opt out by replying with the word "Out" instead of with the keyword "OUTDP" as instructed
  - Drawing reasonable inferences in Franklin's favor, it is hardly clear from the face of the complaint that he intended to give his express consent to receive further text messages by texting "Out," instead of "OUTDP." In fact, texting "Out" may just as well support Franklin's opposing assertion that he intended to opt out of DePaul's text message
- *Franklin v. Depaul Univ.*, 2017 WL 3219253 (N.D. Ill. July 28, 2017)