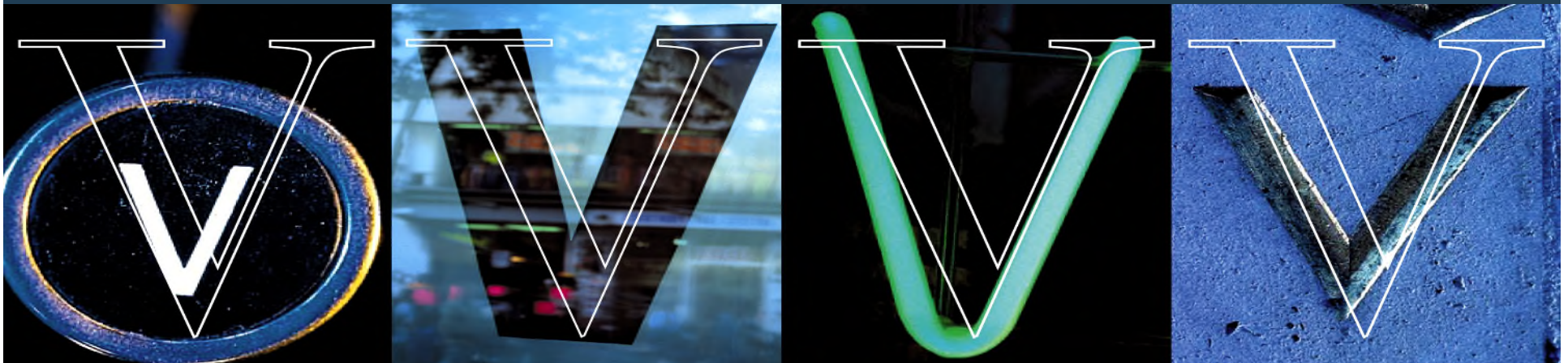


# VENABLE<sup>®</sup><sub>LLP</sub>

## Current Legal and Regulatory Issues Facing Lead Generation Advertising and Marketing

LeadsCouncil  
October 23, 2012, 3 pm – 4 pm ET  
Webinar

*Jonathan L. Pompan, Esq.*  
*Alexandra Megaris, Esq.*  
Venable LLP, Washington, DC



## Agenda

- Recent Developments
  - Advertising and Marketing Practices Are Under Attack
  - Pressure from the Hill
  - Presidential Executive Order on G.I. Bill
- New Sheriff in Town: The CFPB
- Increased Enforcement Activity by Federal and State Regulators
- Compliance Tips
- How Can Self Regulation Help
- Questions and Answers



# Recent Developments





# The News Accounts Are Piling Up

Tuesday, October 23, 2012

**THE CHRONICLE**  
of Higher Education

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October 22, 2012

**For-Profit Colleges' Marketers Generate Leads, and Controversy**



Attendees at a conference of lead generators are part of an industry that drives enrollment in the for-profit higher-education sector. The industry's practices have been getting more scrutiny from lawmakers and federal regulators.

*By Michael Stratford*

It was a corporate sales gathering like any other, with the requisite swapping of business cards and hawking of products in the vendor hall. But LeadsCon, a conference held in New York in July, served a growing ecosystem of companies that fuel the marketing of for-profit education. Like for-profit education itself, these companies increasingly find themselves the target of criticism of their activities.

The conference was a meeting of "lead generators": marketing companies that provide to their clients batches of prospective customers—or, at this conference, potential students. The education sector of this industry has grown significantly over the past decade, just as online and for-profit colleges have expanded. Some nonprofit colleges, especially those with online offerings, use lead generators as well, but the bulk of the industry supports operations at for-profit



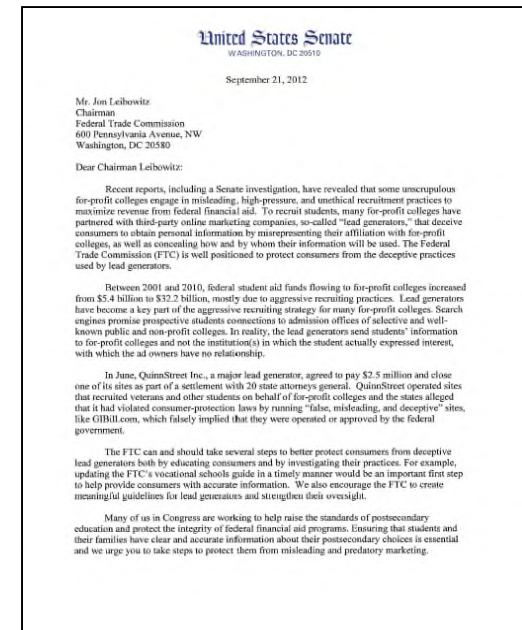
# Advertising & Marketing Scrutiny is a Sector Wide Issue: What Others Are Saying...

- “The Department of Education should implement an effective enforcement plan to ensure that colleges are not misleading students or misrepresenting their programs.” (*HELP Committee Report, July 20, 2012*)
- “The for-profit sector is growing rapidly loans and grants. It is essential that the federal government tighten its rules to make sure that taxpayers — not to mention the students themselves — get their money’s worth.” (*NY Times Editorial, Aug. 3, 2012*)
- Various Legislative proposals introduced in Congress would prohibit or restrict funding for educational advertising



# Senators Urge FTC to Investigate Online Lead Generators

- On September 21, 2012, a group of Democratic senators sent the FTC a letter **requesting that it investigate third-party online marketing companies** used by private sector schools
- According to the letter, an **updating by the FTC of its Guides for Private Vocational and Distance Education Schools** in a “timely manner would be an important first step to help provide consumers with accurate information.”
- The senators also **“encourage the FTC to create meaningful guidelines for lead generators and strengthen their oversight.”**



## Presidential Executive Order on G.I. Bill

- In April 2012, the President signed an executive order forcing colleges to disclose more information about financial aid and graduation rates
- Also restricted the use of the term “G.I. Bill” in marketing and recruitment
- Applies to the post-9/11 G.I. Bill and to tuition assistance for active-duty members of the military and the Military Spouse Career Advancement program



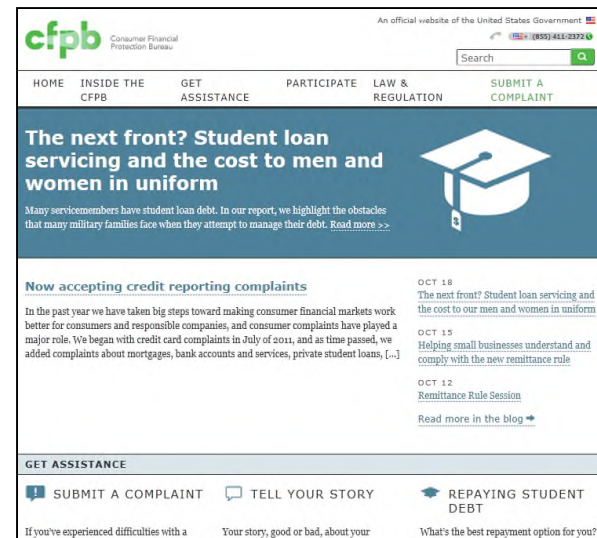
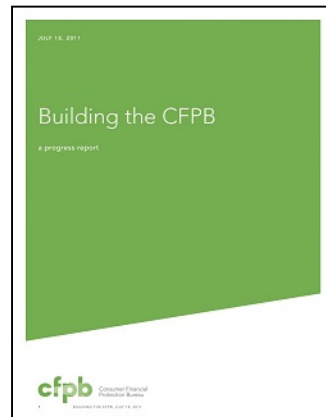


# New Sherriff in Town: The CFPB



# Consumer Financial Protection Bureau

- Created by Title X of the Dodd-Frank Act
- Consolidates and duplicates various supervisory and program authority areas related to nonbank financial products and services, including private student loans, and many banks.



## Third-Party Advertising and the CFPB

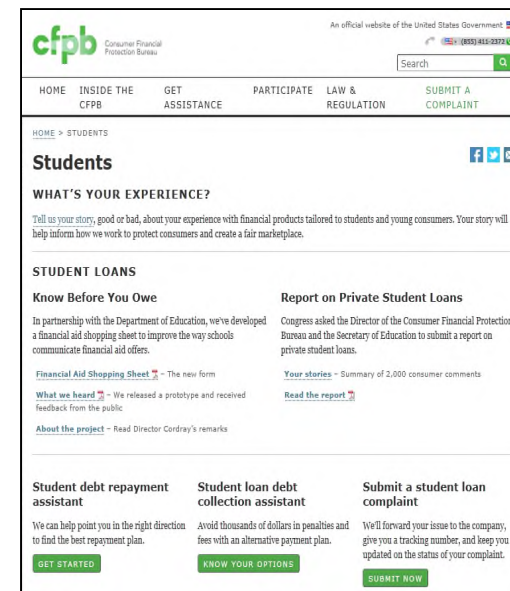
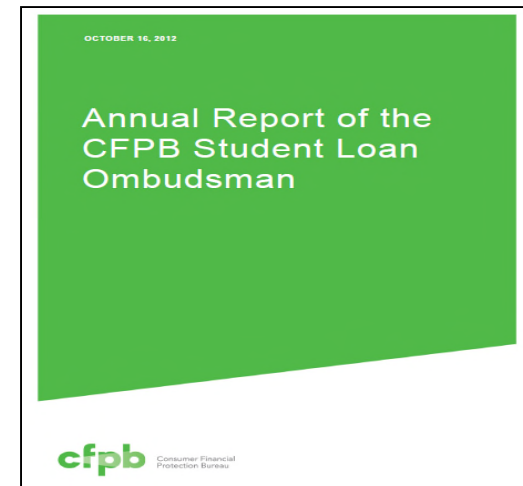
- CFPB has authority over consumer financial products and services, includes
  - Private Student Loans
  - Small-Dollar Loans (i.e., payday)
  - Debt Relief Services
  - Automotive Vehicle Loans
  - Mortgages
  - Credit Cards
  - Money Transmission
  - Prepaid Cards
  - and more

CFPB supervision and enforcement efforts focus on primary providers and service providers, including “lead generators”



# CFPB Focus on Private Student Loans

1. Private Student Loan Ombudsman
2. General Consumer Response Initiative
3. Know Before You Owe: Student Loans and Student Debt Repayment Assistant
4. Private Student Loan Market Study
5. Servicemember Outreach and Education
6. Rulemaking
7. Supervision and Examination Authority over Private Student Loans
8. Investigation and Enforcement Authority



# Unfair, Deceptive or Abusive Practices

- Under the Consumer Financial Protection Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.
- The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with **any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.**
- In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services



## CFPB Enforcement Authority

- CFPB is authorized to conduct investigations to determine whether any person is, or has, engaged in conduct that violates Federal consumer financial law.
- Investigations may be conducted jointly with other regulators, and may include:
  - subpoenas or civil investigative demands for testimony,
  - responses to written questions,
  - documents, or
  - other materials



## CFPB Enforcement Authority (cont'd)

- Rescission or reformation of contracts.
- Refund of money or return of real property.
- Restitution.
- Disgorgement or compensation for unjust enrichment.
- Payment of damages or other monetary relief.
- Public notification regarding the violation.
- Limits on the activities or functions of the person against whom the action is brought.
- Civil monetary penalties (which can go either to victims or to financial education).



## CFPB and Lead Generation: What Will the CFPB Examine

- Identify whether the provider is a third-party or provider
- Review advertising (e.g., TV, radio, print, Internet, scripts, recordings, etc.)
- Determine whether relationship is appropriately disclosed
- Review statements and representations for accuracy and non-deception
- Review for disclosure of fees and other terms and conditions
- Privacy, online data pass, and other sharing of consumer data







# Enforcement of Advertising & Marketing Laws



# FTC Crackdown & Related Initiatives

- Last week, FTC announced settlement with United Debt Associates, a Ohio-based debt settlement lead generator, which allegedly used deceptive claims and fake consumer testimonials to entice consumers to contact them.
  
- In July, FTC settled with Christopher Mallet, a lead generator for mortgage, tax, and debt relief services, who operated websites designed to look like government websites.
  
- **FTC Continued Scrutiny on Robocalls** – The FTC held a Summit on Robocalls on October 18, 2012.
  - Caller ID Spoofing and Call Authentication
  - Data mining and anomaly detection
  - Call blocking
  - Contest - \$50,000 cash prize, see [www.ftc.gov](http://www.ftc.gov) for details.
  
- Lois Greisman, Associate Director of the FTC's Division of Marketing Practices, spoke on telemarketing and lead generation at LeadsCon NY.



## Enforcement by State Attorneys General

- QuinStreet Settlement (Multistate)
  - \$2.5 million to the states
  - Mandatory website disclosures
  - Relinquish control of domain GIBill.com to Department of Veterans Affairs
- Lowrate.com Settlement (Arizona)
  - Prohibited from collecting and transmitting consumer information in connection any type of consumer loan
  - Cannot collect or sell any consumer personal information without disclosing that it will not control how or to whom the information is used



# Complying with Advertising & Marketing Laws



## 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
- For third-party marketing - requires special consideration about the underlying product or service



## 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 (Updated)
  - 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.



# Telemarketing Law

- Under the FTC's Telemarketing Sales Rule ("TSR") National Do Not Call provisions, a company may call a consumer with whom it has an "established business relationship" even if the consumer's number is on the Registry. However, according to the FTC, "telephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the established business relationship exception because, while the consumers may have a relationship with the lead generator, they do not have an established business relationship with the seller who has purchased the leads."
- Stay tuned:
  - LeadsCouncil and Venable present:

"Telemarketing, Email and Text Message Marketing: Tips to Avoid Lawsuits"

December 11, 2012 at 2 pm ET

Jonathan L. Pompan, Ari Rothman, and Molly Cusson



## Other Sources of Regulation and Guidance Materials

- Substantive requirements for specific products and services, for example:
  - Fair Credit Reporting Act
  - Federal and State Mortgage Lending Laws and Regulations
  - Federal Mortgage Assistance Relief Services Rule
  - Department of Education Requirements
  - Truth-in-Lending Act
  - Federal and State Laws re Debt Relief Services
  - Attorney Rules of Professional Conduct
- Guidance materials from industry trade associations, for example:
  - Association of Private Sector Colleges and Universities
  - Education Marketing Council
  - National Reverse Mortgage Lenders Association
  - Online Lenders Alliance



# General Best Practices

- Legal Compliance Audit and Develop a Compliance Management Program
  - General due diligence of Purchasers / Vendors
  - Strong representations and
- Establish and implement an internal compliance program.
- Design advertising and marketing materials to comply with FTC, CFPB and State laws governing advertising and marketing.
- 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.
- Review contracts and purchase agreements.
  - Focus on representations and warranties



# How Can Self Regulation Help?

- **Purposes:**
  - As a substitute for government intervention
  - As a complement to government regulation
  
- **“The best self-regulatory programs carry several hallmarks.**
  - First, they clearly **address the problems** they seek to remedy.
  - Second, they are **flexible** and able to adapt to new developments within the industry.
  - Third, they are **widely followed** by affected industry members.
  - Fourth, they are **visible and accessible** to the public.
  - Fifth, they are administered in a fashion that **avoids conflicts of interest** between the regulated firms, on the one hand, and the body doing the regulating, on the other hand.
  - Finally, they **objectively measure member performance and impose sanctions for noncompliance.**”

(Speech by FTC Commissioner J. Thomas Rosch)



# What to Look for In a Self-Regulation Program

1. More **prompt, flexible, and responsive** than traditional statutes and regulations.
2. Process and outcomes are likely flexibly **adapted to the realities of the market**.
3. Compliance can be just as high, or higher, under a coordinated self-regulatory system as under government regulation, because the member firms participate in the construction of the system and will have “bought into” the regulatory process
  - **If sufficiently objective and transparent, it permits the public to judge the integrity of the program and participants**
4. The review system and increases **confidence in self-regulation**.
5. **Financial incentives** to ensure the success of industry self regulation.



## What's on the Horizon?

- 2012 Election – Presidential and Congressional Elections, as well as state elections
  - Legislative Proposals
- Continued Scrutiny and Non-Public Investigations by the FTC, CFPB, state Attorneys General
- Increase in private lawsuits:
  - Telephone Consumer Protection Act
  - Telephone Call Recording
  - Email Marketing
  - Spill over in other lawsuits
- Focus on Data Brokers, Behavioral Advertising, and Privacy Matters
- Potential for Increased Guidance (Will it be by enforcement or less aggressive action?)





# Questions and Answers

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