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FTC Holds For-Profit Higher Education Provider Accountable for Vendors' Lead Generation, Privacy, and TSR Violations

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On August 27, 2019, the Federal Trade Commission (FTC) announced a \$30M settlement to resolve charges of deceptive marketing activities by more than 70 third-party lead generators engaged by Career Education Corp (Career Education). The FTC's decision to hold Career Education responsible for the conduct of their marketers marks the first time the FTC has gone upstream to hold an education-industry purchaser of personal information liable for the lead generator's misconduct, even though Career Education did not carry out the deceptive practices used to generate the original leads. The FTC held Career Education financially accountable on the basis that it was ultimately responsible for the conduct of its contracted lead generators.

Career Education is an operator of several online post-secondary degree programs, operating under two primary online university brands.[1] According to the FTC, Career Education purchased contact information from lead generators, some of which falsely told consumers they were affiliated with the United States military and used other unlawful tactics to generate the leads. The FTC alleged that the lead generators used by Career Education violated its "clear and conspicuous" disclosure requirements for advertising materials [2] by falsely representing that the schools were affiliated with or recommended by the military. These false representations induced consumers to submit their personal information under the impression that they were going to obtain job or benefits assistance.

The FTC also charged that the lead generators told consumers that the information they collected would not be shared. Further, the FTC found that both Career Education and the lead generators called consumers that were registered on the National Do Not Call Registry.

As part of the investigation, the FTC considered the contractual requirements between the parties and determined that Career Education had established control over the deceptive marketing materials used by the lead generators. The FTC was able to find proof that Career Education had reviewed marketing collateral in the form of a call script that required lead generators to falsely identify themselves as having a military affiliation.

Andrew Smith, Director of the FTC's Bureau of Consumer Protection, is quoted in the FTC's August 27, 2019 press release, stating "You can't skirt the law by outsourcing illegal conduct to your service providers. This case demonstrates that the FTC will seek to hold advertisers liable for the deceptive or illegal practices of their affiliates, publishers, or other lead generators. We expect companies purchasing leads to implement strong vendor management programs and stay on the right side of the law."

In addition to the \$30M in consumer redress, the stipulated order requires Career Education Corp. to implement a system to review all materials that lead generators use to market its schools, to investigate consumer complaints about the lead generators, and to not use or purchase leads obtained deceptively or in violation of the Telemarketing Sales Rule (TMR). The order also prohibits any misrepresentations about any other benefits of any post-secondary school or any other products or services of the defendant.

This settlement is a reminder for higher education programs, which purchase leads, to have risk management controls in place to ensure that their marketers comply with the law and collect the personal information they sell responsibly. Although the terms of this settlement focused primarily on the higher education program's accountability for a vendor's violation of lead disclosure standards, the FTC might also expand accountability of colleges and universities for a vendor's sloppy data sharing practices. The settlement proves that the FTC will hold higher education programs, that utilize lead generators, accountable for their failures, which – in the future - might also include a vendor's privacy and security violations under Section 5 of the FTC Act .

To minimize the risk of these complaints and allegations, we recommend that higher education programs, that buy consumer information from third-party vendors, should: i) establish mechanisms to monitor and review lead sources; ii) have appropriate contractual language in agreements that covers compliance with the FTC standards on "clear and conspicuous" lead generation disclosures; iii) perform appropriate supplier due diligence, including supplier audits where required; and iv) have a mechanism in place to investigate any complaints from consumers that they receive about their privacy.

Michael Best has seasoned attorneys with substantial experience providing marketing and privacy guidance to higher education institutions. Our attorneys can help colleges and universities navigate the FTC Act and other regulations (including data privacy and security standards), and review marketing collateral (including creative and required disclosures), supplier contracting and design due diligence programs for third-party marketing and media agencies, in support of other data-driven marketing activities.

[1] At one point, Career Education also provided post-secondary degree programs at 50 on-campus locations which it owned and operated under ten separate college and university brands, but it has closed most of these locations.

[2] Some FTC advertising and marketing rules and guides, as well as some FTC cases, use the phrase “clearly and prominently” instead of “clearly and conspicuously.” As used in FTC rules, guides, and cases, these two phrases are synonymous. They may have different meanings under other statutes.

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