



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

Proposed Regulatory Text for Issue Papers #6, 7, and 8: Borrower Defense to Repayment –
Misrepresentation
Session 2: November 1-5, 2021

Part 668: General Provisions

SUBPART F: Misrepresentation

§668.71 Scope and special definitions.

(a) If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may -

(1) Revoke the eligible institution's program participation agreement, if the institution is provisionally certified under § 668.13(c);

(2) Impose limitations on the institution's participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c);

(3) Deny participation applications made on behalf of the institution; or

(4) Initiate a proceeding against the eligible institution under subpart G of this part.

(b) This subpart establishes the types of activities that constitute substantial misrepresentation by an eligible institution. An eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, marketing, advertising, recruiting or admissions services, makes a substantial misrepresentation about the nature of its educational program, its financial charges, or the employability of its graduates. 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.

(c) The following definitions apply to this subpart:

Misrepresentation: Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes 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. A misleading statement includes any statement that has the likelihood or tendency to mislead under the circumstances. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading. Misrepresentation includes the dissemination of a student

Commented [A1]: The Department of Education is proposing to amend the items considered under misrepresentation and omissions in Subpart F so they can be cross referenced within borrower defense.

Definition of misrepresentation BD proposed regulatory text session two 2

endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program.

Misrepresentation also includes omission of facts as defined under section 668.75.

Prospective student: Any individual who has contacted an eligible institution for the purpose of requesting information about enrolling at the institution or who has been contacted directly by the institution or indirectly through advertising about enrolling at the institution.

Substantial misrepresentation: Any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

§668.72 Nature of educational program or institution.

Misrepresentation concerning the nature of an eligible institution's educational program includes, but is not limited to, false, erroneous or misleading statements, which may be included in the institution's marketing materials, website, or communications to students, concerning -

(a) The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation;

(b)(1) ~~Whether a student may transfer~~The general or specific transferability of course credits earned at the institution to ~~any~~ other institution(s); or

(2) ~~Conditions under which the institution will accept transfer~~Acceptance of credits earned through prior work or at another institution; toward the educational program at the institution.

_____ (c) Whether successful completion of a course of instruction qualifies a student -

(1) For acceptance to a labor union or similar organization; or

(2) To receive, to apply to take, or to take the examination required to receive, a local, State, or Federal license, or a nongovernmental certification required as a precondition for employment, or to perform certain functions in the States in which the educational program is offered, or to meet additional conditions that the institution knows or reasonably should know are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students;

(d) The requirements for successfully completing the course of study or program and the circumstances that would constitute grounds for terminating the student's enrollment;

(e) Whether its courses are recommended or have been the subject of unsolicited testimonials or endorsements by -

(1) Vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or others; or

(2) Governmental officials for governmental employment;

(f) Its size, location, facilities, or equipment; or institutionally provided equipment, books, or supplies;

Definition of misrepresentation BD proposed regulatory text session two 3

(g) The availability, frequency, and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet;

~~(h) The nature, age, and availability of its training devices or equipment and their appropriateness to the employment objectives that it states its programs and courses are designed to meet;~~

Commented [A2]: This element is now effectively incorporated into (f) of this section.

(~~h~~i) The number, availability, and qualifications, including the training and experience, of its faculty and other personnel;

~~(i) The availability of part-time employment or other forms of financial assistance;~~

Commented [A3]: This element is now incorporated into section 668.73 below.

(~~k~~i) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide its students before, during or after the completion of a course;

(~~h~~j) The nature or extent of any prerequisites established for enrollment in any course;

(~~k~~k) The subject matter, content of the course of study, or any other fact related to the degree, diploma, certificate of completion, or any similar document that the student is to be, or is, awarded upon completion of the course of study;

(~~k~~l) Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency. This type of misrepresentation includes, in the case of a degree that has not been authorized by the appropriate State educational agency or that requires specialized accreditation, any failure by an eligible institution to disclose these facts in any advertising or promotional materials that reference such degree; ~~or~~

(m) Actual institutional selectivity rates, rankings, or student admission profiles if they are materially different from those included in the institution's marketing materials, website, or other communications made to the student or from those provided by the institution to national ranking companies;

(n) A representation regarding the tax status of the institution that is different from the tax status as determined by the Secretary for purposes of administering the Title IV, HEA programs under the Higher Education Act of 1965, as amended;

(o) Specialized, programmatic, or institutional certifications, accreditation, or approvals that were not actually obtained, or that the institution fails to remove from marketing materials, websites, or other communications to students within a reasonable period of time after such certifications or approvals are revoked or withdrawn;

(p) Assistance that will be provided in securing required externships or the existence of contracts with specific externship sites; or

Commented [A4]: Note that this is a new element the Department seeks additional feedback on.

(q) Any matters required to be disclosed to prospective students under §§ 668.42, ~~and~~ 668.43, 668.45, and 668.50 of this part.

§668.73 Nature of financial charges or financial assistance.

Misrepresentation concerning the nature of an eligible institution's financial charges ~~includes, but is or~~ the financial assistance provided, including but not limited to, false, erroneous, or misleading statements concerning—

- (a) Offers of scholarships to pay all or part of a course charge;
- (b) Whether a particular charge is the customary charge at the institution for a course;
- (c) The cost of the program and the institution's refund policy if the student does not complete the program;
- (d) The availability, amount, or nature of any financial assistance ~~offered~~available to students ~~from the institution or any other entity to pay the costs of attendance at the institution,~~ including apart-time employment, housing, and transportation assistance.
- (e) A student's responsibility to repay any loans provided, regardless of whether the student is successful in completing the program and obtaining employment; ~~or~~
- (ef) The student's right to reject any particular type of financial aid or other assistance, or whether the student must apply for a particular type of financial aid, such as financing offered by the institution—~~;~~ or
- (g) The amount, method, or timing of payment of tuition and fees that the student would be charged for the program.

§668.74 Employability of graduates.

Misrepresentation regarding the employability of an eligible institution's graduates includes, but is not limited to, false, erroneous, or misleading statements concerning -

- (a) The institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;
- (b) The institution's plans to maintain a placement service for graduates or otherwise assist its graduates to obtain employment;
- (c) The institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared;
- (d) Whether employment is being offered by the institution or that a talent hunt or contest is being conducted, including, but not limited to, through the use of phrases such as “Men/women wanted to train for * * *,” “Help Wanted,” “Employment,” or “Business Opportunities”;
- (e) Government job market statistics in relation to the potential placement of its graduates; ~~or~~
- (f) Other requirements that are generally needed to be employed in the fields for which the training is provided, such as requirements related to commercial driving licenses or permits to carry firearms, and failing to disclose factors that would prevent an applicant from qualifying for such requirements, such as prior criminal records or preexisting medical conditions. Actual licensure passage rates if they are materially lower than those included in the institution's marketing materials, website, or other communications made to the student; or

Commented [A5]: This element is now incorporated into section 668.75 below.

Definition of misrepresentation BD proposed regulatory text session two 5

(g)(1) Actual employment rates if they are materially lower than those included in the institution's marketing materials, website, or other communications made to commercial driving licenses or permits the student including but not limited to carry firearms, and failing to:

(i) Actual rates that are calculated in a manner that is inconsistent with the calculation formula established by an accreditor, licensing body, or the institution; or

(ii) Actual rates that the institution does not disclose are inflated by means such as:

(A) Including individuals in an employment rate calculation who are not bona fide employees such as those individuals placed on a one-day job fair, an internship, externship, or employment subsidized by the institution;

(B) Including students in the employment rate calculation who were employed in the field prior to graduation;

(C) Excluding students from an employment rate calculation due to the difficulty of placing that student; or

(D) Excluding non-respondents to a survey for calculating an employment rate.

(iii) Upon request, the institution must furnish to the Secretary documentation and other information used to calculate the institution's employment rate calculations.

§668.75 Omission of fact

An omission of fact includes the knowing concealment, suppression, or absence of material information or statement with likelihood that others rely upon such concealment, suppression, or absence, in connection with the nature of the institution's educational programs, financial charges, or the employability of the institution's graduates. An omission of fact includes, but is not limited to, the knowing concealment, suppression, or absence of material information or statement concerning—

(a) The entity that is actually providing the educational instruction;

(b) The availability of slots, or requirements for obtaining admission, in a program where the institution places students in a pre-program at the time of enrollment;

(c) Factors that would prevent an applicant, for reasons such as prior criminal records or preexisting medical conditions, from qualifying to meet requirements that are generally needed to be employed in the field for which the training is provided;

(d) The nature of the institution's educational programs, the institution's financial charges, or the employability of the institution's graduates.

§668.79 Severability

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Commented [A6]: For negotiators: The Department seeks input as to whether this language will address known examples of job placement rate manipulations and how it will interact with existing rules for placement rates that accreditors and/or states may use.

Commented [A7]: This item was previously included under the above 668.74 section, and we are considering moving it to omissions with the addition of this section.

Commented [A8]: For negotiators: This language is NOT final from the Department. We offer this as an example of what this section could look like and would like feedback.

This language largely draws elements/terms from New Jersey's Consumer Fraud Act, including "concealment, suppression, or absence of material information," except that subparagraph (c) is drawn from language already in the federal regulations concerning misrepresentations.

We seek feedback on the appropriateness of this language, and are open to feedback and alternative suggestions for the best ways to define omissions.