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**The Need for Legal Reform of the  
For-Profit Educational Industry**

**IHELG Monograph**

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**THE NEED FOR LEGAL REFORM OF  
THE FOR-PROFIT EDUCATIONAL INDUSTRY**  
(TENNESSEE LAW REVIEW (FORTHCOMING 2012))

AMANDA HARMON COOLEY\*

“*I feel like I got nowhere.*”<sup>1</sup>

I. INTRODUCTION

For Denise Parnell, a twenty-year-old single mother, enrolling in the Patient Care Technician program of the for-profit educational institution, Illinois School of Health Careers, Inc. (ISHC), was the means to accomplish her dream of becoming a certified nursing assistant.<sup>2</sup> However, after enrolling in and almost completing this eight-month program,<sup>3</sup> Parnell and other students were informed by the school that the program lacked state Department of Health approval, barring its graduates from taking Illinois’ certified nursing assistant exam.<sup>4</sup> In this notification, “the school admitted it made an error[;] attributed it to ‘unauthorized and wrong’ information disseminated by some of its staff; [and] . . . detailed the school’s offer to pay for students to attend an approved certified nursing assistant program in the Chicago area, plus another \$1,500 to defray any unexpected costs.”<sup>5</sup> On June 11, 2010, Parnell and three other current and former students of ISHC filed a class action complaint in the Circuit Court of Cook County, Illinois, alleging that their enrollment was based upon the school’s misrepresentations.<sup>6</sup> Parnell remains responsible for student loans that total over \$13,000.<sup>7</sup>

This recent situation is not the only example of questionable accountability within the for-profit postsecondary educational sector. Similar notions permeate the lives of many students who have been left with substantial loan debts, marginal educational credentials, and uncertain job prospects after attending some for-profit schools.<sup>8</sup> Given, too, that, in 2010, they “spent \$25

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<sup>1</sup> Cynthia Dizikes, *A Lesson They Won’t Forget: For-Profit School’s Error Costs Students Certification*, CHI. TRIB. (June 22, 2010), available at [http://articles.chicagotribune.com/2010-06-22/news/ct-met-for-profit-schools-20100622\\_1\\_for-profit-health-careers-illinois-school/2](http://articles.chicagotribune.com/2010-06-22/news/ct-met-for-profit-schools-20100622_1_for-profit-health-careers-illinois-school/2) (quoting Denise Parnell, an *Allen v. Illinois School of Health Careers, Inc.* plaintiff).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *Allen v. Ill. Sch. Of Health Careers, Inc.*, No. 10CH25098, 2010 WL 2483821, at \*1 (Ill. Cir. Ct. June 11, 2010).

<sup>5</sup> Dizikes, *supra* note 1.

<sup>6</sup> See *Allen*, 2010 WL 2483821, at \*1.

<sup>7</sup> See Dizikes, *supra* note 1.

<sup>8</sup> See Editorial, *An Industry in Need of Accountability*, N.Y. TIMES, Aug. 16, 2011, at A20 (describing “the unscrupulous conduct that appears to be all too common in the [for-profit educational] industry”).

billion for loans to students attending for-profit institutions,”<sup>9</sup> many taxpayers also question the efficacy of these institutions. Although some for-profit colleges and universities work diligently to provide quality educational programs that give students an opportunity at better economic prospects,<sup>10</sup> these other problematic issues indicate that substantial legal reform of this industry is necessary. This reform is especially critical as for-profit institutions have become components of President Barack Obama’s plan for the United States to have the highest proportion of college graduates in the world by 2020<sup>11</sup> and as they grow in popularity among students, many of whom became unemployed during the Great Recession.<sup>12</sup>

As more public attention has become focused on these displaced workers and their new educational opportunities, for-profit educational institutions have faced increased scrutiny.<sup>13</sup> Ironically, several of the targets of this scrutiny have substantial connections with some of the financial institutions that were investigated after the recent recession.<sup>14</sup> So, similar to the roles they played in the governmental inquiries related to the financial crisis, Congress, federal administrative agencies, and state authorities have begun to demonstrate a renewed interest in the exercise of their oversight powers over the practices of for-profit schools.<sup>15</sup> In particular,

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<sup>9</sup> Jack Conway, *The ‘Pain Funnel,’* N.Y. TIMES (June 5, 2011), <http://www.nytimes.com/roomfordebate/2011/06/05/how-to-regulate-for-profit-colleges/for-profit-recruiters-and-the-pain-funnel>.

<sup>10</sup> See Andrea Fuller, *Duncan Says For-Profit Colleges Are Important to Obama’s 2020 Goal*, CHRON. HIGHER EDUC. (May 11, 2010), <http://chronicle.com/article/Duncan-Says-For-Profit/65477/> (characterizing the Department of Education’s viewpoint as recognizing “that there are a ‘few bad apples’ among actors in the for-profit college sector, but [emphasizing] the ‘vital role’ for-profit institutions play in job training”).

<sup>11</sup> See *U.S. Education Secretary Arne Duncan Keynotes DeVry Policy Forum*, BLOOMBERG (May 11, 2010), <http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=DV:US&sid=aloTQ.iS0JvE> (quoting Secretary Duncan: “‘Let me be crystal clear: for-profit institutions play a vital role in training young people and adults for jobs. They are critical to helping America meet the President’s 2020 goal. They are helping us meet the explosive demand for skills that public institutions cannot always meet.’”). President Obama announced this 2020 goal in an address to the joint session of Congress in February 2009. See President Barack Obama, *Address to Joint Session of Congress* (Feb. 24, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress>.

<sup>12</sup> See Doug Lederman, *3 Million and Counting*, INSIDE HIGHER ED (Aug. 26, 2010), <http://www.insidehighered.com/news/2010/08/26/enroll> (discussing data that demonstrates a correlation between increased enrollment in for-profit schools and “the upturn in recession-driven enrollments by job seekers”).

<sup>13</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-948T, *FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES* (2010), <http://www.gao.gov/new.items/d10948t.pdf> (discussing the GAO’s undercover investigation of for-profit schools in six states and the District of Columbia); Chris Kirkham, *Attorneys General In 10 States Launch Joint Investigation Into For-Profit Colleges*, HUFFINGTON POST (May 4, 2011, 11:25 AM), [http://www.huffingtonpost.com/2011/05/03/for-profit-colleges-10-state-investigation\\_n\\_857199.html](http://www.huffingtonpost.com/2011/05/03/for-profit-colleges-10-state-investigation_n_857199.html) (discussing how the “multi-state probe is the latest sign that rapidly rising enrollments and an increased reliance on federal student aid dollars by for-profit colleges are attracting greater scrutiny of the industry”).

<sup>14</sup> See John Hechinger, *Stripper Finds Degree Profitable for Goldman Wasn’t Worth It*, BLOOMBERG (Aug. 6, 2010, 3:09 PM), <http://www.bloomberg.com/news/2010-08-05/stripplier-s-college-degree-profitable-for-goldman-finds-70-000-was-wasted.html> (discussing Goldman Sach’s thirty-eight percent ownership stake in EDMC, which is the operator of a for-profit college investigated by the GAO and discussed in the GAO’s testimony during an August 4, 2010 Senate hearing). As of November 6, 2011, EDMC continues to be a defendant in an FCA lawsuit that alleges illegal practices related to student recruiting. See *Joint Complaint in Intervention by the United States of America and the States of California, Florida, Illinois, and Indiana, United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Aug. 8, 2011) [hereinafter *Washington Complaint in Intervention*].

<sup>15</sup> See Tamar Lewin, *U.S. to Join Suit Against For-Profit College Chain*, N.Y. TIMES, May 2, 2011, at A10 (discussing federal and state involvement in for-profit college regulation and litigation).

significant investigation has been dedicated to the ways in which these institutions comply with the federal financial aid system, the methods they use to recruit students, the amount of loan debts the students accrue, and future career prospects for former students and graduates.<sup>16</sup> Some of these practices have caused many observers to question the integrity of the entire industry,<sup>17</sup> and they have provided the impetus for the promulgation of new regulations by the United States Department of Education.<sup>18</sup>

Due to this problematic conduct, for-profit educational institutions have also been subject to a marked increase in litigation, with lawsuits being filed against them by former employees,<sup>19</sup> federal and state governments,<sup>20</sup> and students.<sup>21</sup> At the same time, the industry's main lobbying organization, the Association of Private Sector Colleges and Universities (APSCU), formerly the Career College Association,<sup>22</sup> has pushed back against increased controls for the industry.<sup>23</sup> Specifically, APSCU filed two lawsuits in January and July 2011, challenging the Department of Education's new regulations of for-profit schools.<sup>24</sup>

This Article examines these recent attempts at increased governmental oversight, on both federal and state levels, as well as the trends within the litigation involving for-profit colleges

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<sup>16</sup> See, e.g., Stacy Finz, *For-Profit Colleges Face Lawsuits, U.S. Scrutiny*, S.F. CHRON., May 1, 2011, at A1 (describing the lawsuits, Department of Education regulations, and Senate hearings examining these issues).

<sup>17</sup> See Jennifer Epstein, *'Bad Apples' or Something More?*, INSIDE HIGHER EDUC. (June 24, 2010), <http://www.insidehighered.com/news/2010/06/24/forprofit> (characterizing some responses to the 2010 Senate hearings on for-profit higher education as a belief that these problems are indicative, not of a few "bad apples," but instead of a "rotten orchard").

<sup>18</sup> See generally *Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs: Gives Programs Every Chance to Improve While Holding Them Accountable*, U.S. DEP'T OF EDUC. (June 2, 2011), <http://www.ed.gov/news/press-releases/gainful-employment-regulations> (discussing the new gainful employment regulations, which will become effective on July 1, 2012).

<sup>19</sup> See, e.g., John Hechinger, *U.S. Joins Whistleblower Suit Against Education Management*, BLOOMBERG (May 2, 2011, 3:25 PM), <http://www.bloomberg.com/news/2011-05-02/u-s-joins-whistleblower-suit-against-education-management.html> (discussing how "[a]t least 27 whistleblower cases have been filed against for-profit colleges under the U.S. [FCA] since the 1990s").

<sup>20</sup> See, e.g., Lewin, *supra* note 15, at A10 (describing the intervention of the United States and several states in a *qui tam* lawsuit based on illegal recruiting practices against for-profit educational provider EDMC).

<sup>21</sup> See, e.g., *Montgomery v. Corinthian Colls., Inc.*, No. 1:11-cv-365, 2011 WL 1118942, at \*1 (N.D. Ill. Mar. 25, 2011) (discussing a class action lawsuit brought by former students against for-profit institution Corinthian Colleges, alleging a deceptive marketing scheme).

<sup>22</sup> See *Career College Association Announces Name Change*, ASS'N OF PRIVATE SECTOR COLLEGES & U. (APSCU) (June 9, 2010),

<http://www.career.org/iMISPublic/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=20622> (explaining the name change as "to better represent students, institutions and the sector overall"). Some critics suggest APSCU changed its name as an effort to rebrand itself given the negative attention it has received. See, e.g., Stephen Burd, *A Name Change That George Orwell Could Have Dreamed Up*, HIGHER ED WATCH (Sept. 23, 2010), <http://higheredwatch.newamerica.net/node/37304>.

<sup>23</sup> See *Association of Private Sector Colleges and Universities Files Lawsuit to Block Gainful Employment Regulations*, APSCU (July 20, 2011),

[http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press\\_Releases1&CONTENTID=24031&TEMPLATE=/CM/ContentDisplay.cfm](http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press_Releases1&CONTENTID=24031&TEMPLATE=/CM/ContentDisplay.cfm); *Association of Private Sector Colleges and Universities Files Suit Against US Dept. of Ed to STOP Unlawful Regulations*, APSCU (Jan. 21, 2011), <http://www.career.org/iMISPublic/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22541>.

<sup>24</sup> See *Complaint and Prayer for Declaratory and Injunctive Relief*, *Career Coll. Ass'n v. Duncan*, No. 1:11-cv-138 (D.D.C. Jan. 21, 2011) [hereinafter *Career Coll. Ass'n I* Complaint]; *Career Coll. Ass'n I*, No. 1:11-cv-138, 2011 WL 2690406 (D.D.C. July 12, 2011); *Complaint and Prayer for Declaratory and Injunctive Relief*, *Career Coll. Ass'n v. Duncan*, No. 1:11-cv-1314 (D.D.C. July 20, 2011) [hereinafter *Career Coll. Ass'n II* Complaint].

and universities, in a comprehensive analysis of the regulatory environment of these educational institutions. As a result of this analysis, this Article argues for more effective control measures for these for-profit institutions. The for-profit educational sector, as a whole, needs substantially more transparency in order to address concerns, both real and imagined, of unscrupulous conduct. Stronger federal and state legislation and regulation, increased accreditation associations reforms, and improved internal self-regulation are the solutions for obtaining this transparency. These solutions will benefit both the students who attend these schools and the taxpayers who guarantee the student loans without which such institutions would struggle to function.<sup>25</sup> These solutions have become necessary, given that these institutions may lawfully receive as much as ninety percent of their revenue from federal, Title IV financial aid;<sup>26</sup> revenues from “federal assistance payments for military personnel and veterans” are not included within the ninety percent revenue calculation;<sup>27</sup> and “[m]ore than a quarter of for-profit institutions receive [eighty] percent of their revenues from taxpayer-financed [f]ederal student aid.”<sup>28</sup> This enhanced regulatory environment would also benefit the institutions and their shareholders as it would limit future litigation by students, employees, and governmental authorities.<sup>29</sup> Additionally, it would provide a tangible solution to ameliorate the negative media coverage that has accompanied the investigations of these enterprises<sup>30</sup> and that has recently resulted in decreased new-student enrollments for many institutions.<sup>31</sup>

The next three parts of this Article describe the current status of for-profit educational institutions. Specifically, Part Two focuses on the growth of for-profit schools and the reasons for this expansion.<sup>32</sup> This provides a prelude to the discussion of the practices that have brought

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<sup>25</sup> See Julia Love, *For-Profit Colleges May be a Bust for Taxpayers*, L.A. TIMES (July 25, 2010), <http://articles.latimes.com/2010/jul/25/nation/la-na-colleges-profit-20100725> (describing federal governmental opinions that for-profit educational institutions are harming taxpayers and exploiting students).

<sup>26</sup> See 90/10 Rule, 34 C.F.R. § 668.14(b)(16) (2011) (providing that a proprietary institution is eligible for Title IV federal assistance so long as it “will derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds”); 90/10 Calculation and Sanctions Rule, 34 C.F.R. § 668.28 (2011) (providing the calculation method for the 90/10 rule and the sanctions for the violation of the rule).

<sup>27</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-4, FOR-PROFIT SCHOOLS: LARGE SCHOOLS AND SCHOOLS THAT SPECIALIZE IN HEALTHCARE ARE MORE LIKELY TO RELY HEAVILY ON FEDERAL STUDENT AID 14 (2010), *available at* <http://www.gao.gov/new.items/d114.pdf>.

<sup>28</sup> See *Obama Administration Announces New Steps*, *supra* note 18.

<sup>29</sup> See, e.g., Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 598 (2010) (discussing the trend for some “industries [to] use[] some form of ‘preemptive self-regulation’ to react to concern from the public and policy-makers—expressed either through potential lawsuits or the threat of increased regulation—by announcing that they will do the job of regulation themselves.”).

<sup>30</sup> See Alan Scher Zagier, *For-Profit Colleges Respond to Increased Scrutiny*, HUFFINGTON POST (Aug. 6, 2011, 5:20 PM), [http://www.huffingtonpost.com/2011/08/06/for-profit-colleges-respo\\_n\\_920307.html](http://www.huffingtonpost.com/2011/08/06/for-profit-colleges-respo_n_920307.html) (discussing how some for-profit educational institutions have started self-regulatory programs in order to improve their public images).

<sup>31</sup> See Melissa Korn, *Party Ends at For-Profit Schools*, WALL ST. J. (Aug. 23, 2011), [http://online.wsj.com/article/SB10001424053111904279004576524660236401644.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424053111904279004576524660236401644.html?mod=googlenews_wsj) (“New-student enrollments have plunged—in some cases by more than 45%—in recent months, reflecting two factors: Companies have pulled back on aggressive recruiting practices amid criticism over their high student-loan default rates. And many would-be students are questioning the potential pay-off for degrees that can cost considerably more than what’s available at local community colleges.”).

<sup>32</sup> See Scott Carlson, *Carnegie Classification Update Shows Boom in For-Profit and Professional Education*, CHRON. HIGHER EDUC. (Jan. 18, 2011), <http://chronicle.com/article/Carnegie-Classification-Update/125982/>

the industry increased negative attention from multiple sectors.<sup>33</sup> Part Three examines the areas of concern that have become the most problematic for the for-profit educational industry: 1) the student recruitment methods of the institutions;<sup>34</sup> 2) the amount of loan debts their students accrue;<sup>35</sup> and 3) future career prospects for former students and graduates.<sup>36</sup> Part Four analyzes the recent litigation involving for-profit schools that has been based upon these areas of concern.

The penultimate section of the Article, Part Five, considers the ways in which the regulatory framework that oversees these institutions can be made more effective. It is divided into four subsections: A) federal regulation and oversight, B) state regulation and oversight, C) accreditation association regulation and review, and D) industrial and institutional regulation. The first subsection focuses on the federal regulations promulgated by the Department of Education, some of which became effective on July 1, 2011 and some of which will become effective on July 1, 2012, including the recruiter compensation regulations,<sup>37</sup> the misrepresentation regulations,<sup>38</sup> and the gainful employment regulations.<sup>39</sup> It highlights the differences between the final regulations and the proposed regulations, which were much more stringent,<sup>40</sup> and it discusses the potential reasons for this pullback from creating a tighter regulatory environment. Further, it discusses other avenues for reform at the federal level. The second subsection explores state efforts to oversee for-profit colleges and universities.<sup>41</sup> The third subsection analyzes the processes of accreditation associations, which are recognized by the Department of Education but which often do not have enough control over the institutions they accredit.<sup>42</sup> The final subsection endorses increased self-regulation within the for-profit educational sector.<sup>43</sup> Throughout each of these normative subsections, Part Five argues for

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(discussing the cumulative, significant increases in the number of for-profit institutions and in their enrollment figures).

<sup>33</sup> See, e.g., David Hawkins & Amanda Modar, *Career College Group's Lawsuit Shows an Industry Defiantly Unwilling to Own Up to its Abuses*, HIGHER ED WATCH (Apr. 14, 2011), <http://higheredwatch.newamerica.net/node/48522> (deeming the for-profit educational industry “unregenerate”); Carol Iannone, *Caution on For-Profits*, NAT'L REV. ONLINE (Feb. 14, 2011, 1:04 PM), <http://www.nationalreview.com/phi-beta-cons/259694/caution-profits-carol-iannone> (casting a critical eye on the for-profit educational industry).

<sup>34</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING, *supra* note 13 (discussing findings that certain for-profit institutions engage in deceptive student recruitment methods).

<sup>35</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. 34,386, 34,386 (June 13, 2011) (to be codified at 7 C.F.R. pt. 668) (“[S]tudents on average assume more debt to enroll in a program than do their peers who attend public or private, nonprofit institutions.”).

<sup>36</sup> See *id.* (“For-profit institutions offer many quality programs, but in some instances, these programs leave large numbers of students with unaffordable debts and poor employment prospects.”).

<sup>37</sup> See Recruiter Compensation Regulations, 34 C.F.R. § 668.14 (2010).

<sup>38</sup> See Misrepresentation Regulations, 34 C.F.R. § 668.71 (2010).

<sup>39</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,386.

<sup>40</sup> See Larry Abramson, *Softened' Regulations Issued For For-Profit Schools*, NPR (June 2, 2011), <http://www.npr.org/2011/06/02/136876216/softened-regulations-issued-for-for-profit-schools>.

<sup>41</sup> See generally David Harrison, *For-Profit Colleges Face More State Scrutiny*, STATELINE (Apr. 19, 2011) <http://www.stateline.org/live/details/story?contentId=568664> (stating that “lawmakers in 17 states have introduced bills on for-profit colleges [in 2011], many of them designed to tighten regulation of the schools”).

<sup>42</sup> See *infra* text accompanying notes 357-72.

<sup>43</sup> See, e.g., Aaron N. Taylor, *“Your Results May Vary”: Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 780 (2010) (stating that the for-profit sector’s self-regulation with respect to advertising representations “would improve [its] credibility with the public while encouraging healthy competition”).

enhanced oversight of for-profit colleges and universities. Without improvements in the regulation of this industry, these harms will only intensify for the students who attend these institutions and for the taxpayers who subsidize these private companies.

## II. THE RISE OF FOR-PROFIT POSTSECONDARY INSTITUTIONS AS ALTERNATIVES TO THE STATUS QUO OF TRADITIONAL HIGHER EDUCATION

Colleges and universities have implemented significant changes to their overall models of education to meet the shifting expectations of students. However, despite these changes, traditional, non-profit postsecondary institutions have been at the center of recent criticism for failing to adequately prepare their students or to meet their students' needs.<sup>44</sup> These alleged gaps have led some students to seek out other educational providers, like for-profit colleges and universities. This Part of the Article outlines how the for-profit sector has acquired increased attention as an alternative form of postsecondary education. It concludes by focusing on how the recent recession has significantly shaped the rise of for-profit schools.

Postsecondary institutions have undergone significant transformations to meet the changing attitudinal expectations of students, prospective applicants, and society.<sup>45</sup> Due to the increasingly competitive job market, many students now view higher education as a direct path to career opportunities, rather than as a way to attain a holistic liberal arts education.<sup>46</sup> In reaction to this perspective, many colleges and universities have adopted a consumer model, where "customer (student) satisfaction has become paramount."<sup>47</sup> Consequently, to accommodate a range of student schedules, schools now offer evening and weekend courses.<sup>48</sup> Institutions of higher education have also increased their online offerings in order to meet student expectations<sup>49</sup> and as a way to cope with extreme cuts to their budgets.<sup>50</sup>

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<sup>44</sup> See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 1 (2011) (discussing the increased scrutiny that higher education has received in recent years).

<sup>45</sup> See R. George Wright, *The Law of Education: Educational Rights and the Roles of Virtues, Perfectionism, and Cultural Progress*, 31 N. ILL. U. L. REV. 385, 397-98 (2011) ("[M]any educational institutions have explicitly embraced a market-focused understanding of their relationship with their current students, prospective students, and the broader society.").

<sup>46</sup> See DEREK BOK, *OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE* 26 (2005) (discussing the number of students who equate college attendance with "the competence they need to secure a new job" and "who look upon making money and succeeding in one's career as primary motivations for going to college").

<sup>47</sup> Peter Katopes, *The 'Business Model' Is the Wrong Model*, INSIDE HIGHER ED (Feb. 16, 2009), <http://www.insidehighered.com/views/2009/02/16/katopes>.

<sup>48</sup> See, e.g., Donna Marie Owens, *College Holds Classes At Midnight To Meet Demand*, NPR (Nov. 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=130911603>.

<sup>49</sup> See Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 OHIO ST. L.J. 783, 784 (2001) (discussing the growth of distance learning in higher education).

<sup>50</sup> See Paige Chapman, *Report Calls for Distance Learning to Improve College Access and Efficiency in California*, CHRON. HIGHER EDUC. (Oct. 29, 2010, 5:39 PM), <http://chronicle.com/blogs/wiredcampus/distance-learning-can-improve-higher-education-access-and-efficiency-in-california/27978> (discussing a California report calling for the use of online education as a tool to increase efficiency in higher education that was released during a significant state "financial crunch").

Despite these strides to improve educational opportunities, traditional institutions of higher education have incurred significant criticism in recent years.<sup>51</sup> Some commentators have focused on the problems of admitting students who must take developmental courses before they can begin college level work in their programs.<sup>52</sup> Other recent studies that explored dropout rates in higher education have questioned these institutions' abilities to retain and to graduate students.<sup>53</sup> Further criticism has been levied upon colleges and universities for their failures to facilitate adequate learning gains in "critical thinking, complex reasoning, and written communication" for those students who actually do graduate.<sup>54</sup> For many of these observers, the current system of higher education has resulted in the admission of too many students, the graduation of too few of those students, and the lack of career preparation for those graduates.<sup>55</sup>

Consequently, many scholars and policymakers have advocated for substantial reforms in higher education.<sup>56</sup> Attempting to capitalize on these calls for reforms, for-profit educational institutions have marketed themselves as contrasting alternatives from the status quo of traditional higher education in attempts to capture increased applications and enrollments.<sup>57</sup> These institutions assert that they meet the needs of underserved populations—prospective students who might not otherwise have been able to attend college.<sup>58</sup> Some providers of for-

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<sup>51</sup> See, e.g., ANDREW HACKER & CLAUDIA DREIFUS, HIGHER EDUCATION?: HOW COLLEGES ARE WASTING OUR MONEY AND FAILING OUR KIDS—AND WHAT WE CAN DO ABOUT IT 239 (2010) (comparing traditional higher education to an "overpriced and undernourished diet").

<sup>52</sup> See Paul Attewell et al., *New Evidence on College Remediation*, 77 J. HIGHER EDUC. 886, 886 (2006) ("[T]he existence of remedial or developmental courses [are] evidence that many of today's college students are not academically strong enough to manage college-level work and should not have been admitted into college in the first place").

<sup>53</sup> See, e.g., WILLIAM G. BOWEN ET AL., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES 8 (2009) (discussing the varying rates of success for graduating students from a multitude of demographic backgrounds).

<sup>54</sup> ARUM & ROKSA, *supra* note 44, at 121 ("Growing numbers of students are sent to college at increasingly higher costs, but for a large proportion of them the gains in critical thinking, complex reasoning and written communication are either exceedingly small or empirically nonexistent.").

<sup>55</sup> See Catherine Rampell, *Many With New College Degree Find the Job Market Humbling*, N.Y. TIMES, May 19, 2011, at A1 ("Employment rates for new college graduates have fallen sharply in the last two years, as have starting salaries for those who can find work. What's more, only half of the jobs landed by these new graduates even require a college degree, reviving debates about whether higher education is 'worth it' after all.")

<sup>56</sup> See Holiday Hart McKiernan & Tim Birtwistle, *Making the Implicit Explicit: Demonstrating the Value Added of Higher Education by A Qualifications Framework*, 36 J.C. & U.L. 511, 526 (2010) (calling for increased assurances of quality in higher education to meet societal demands for college graduates who have attained "real skills and knowledge").

<sup>57</sup> See, e.g., *Campaign*, KAPLAN U., <http://talent.kaplan.edu/Campaign.aspx> ("A different kind of university for a different kind of future. . . . It's how we're rewriting the rules of education to put an end to wasted talent."); *Online and Local Campus Learning Formats*, U. PHOENIX, <http://www.phoenix.edu/students/how-it-works/how-learning-formats.html> ("If You Think University of Phoenix is Different, You're Right. If you've seen our campuses or have read student testimonials, you know we're not your typical university. We've transformed the way you learn by shedding the ivy covered buildings and crowded lecture halls. We know that things change—especially education and enterprise.").

<sup>58</sup> See Daniel de Vise, *College Inc.: For-Profits, Frontline and College Inc.*, WASH. POST (May 7, 2010, 11:17 AM), [http://voices.washingtonpost.com/college-inc/2010/05/for-profits\\_frontline\\_and\\_coll.html](http://voices.washingtonpost.com/college-inc/2010/05/for-profits_frontline_and_coll.html) (quoting Harris Miller, president of the Career College Association, as stating that for-profit educational institutions are "serving a group of students who have been abandoned by the higher education system.").

profits education have also sought to capture niche markets, like Christian students<sup>59</sup> or military service members.<sup>60</sup> In fact, twenty-two percent of post-9/11 GI Bill veterans attend for-profit colleges and universities.<sup>61</sup> Supporters of the for-profit sector of higher education claim that, in addition to their flexibilities in meeting student needs, these institutions stand at the forefront of the innovation that is so desperately needed in American higher education.<sup>62</sup> So, although for-profit educational institutions have historical roots dating back to the seventeenth-century in America,<sup>63</sup> they have tried to leverage themselves as the “new” way to pursue postsecondary education.

For-profit colleges and universities have especially acquired significant attention and boosted their enrollments throughout the financial crisis of the late 2000s and the resulting recession.<sup>64</sup> This longest recession since the Great Depression<sup>65</sup> has devastated nearly all of the sectors of the economy.<sup>66</sup> Due in large part to the deregulation of the financial services

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<sup>59</sup> See Bob Smietana & Rebecca Barnes, *Christian Ed That Pays Off: Grand Canyon University Becomes the First For-Profit Christian College*, CHRISTIANITY TODAY MAG. (Feb. 2, 2005, 12:00 AM), <http://www.christianitytoday.com/ct/2005/february/27.24.html>.

<sup>60</sup> See *Enrollment Trends In For-Profit Education - Robert Wetenhall - RBC Capital Markets*, YAHOO! FINANCE (Sept. 15, 2011, 1:55 PM), <http://finance.yahoo.com/news/Enrollment-Trends-In-twst-911089254.html?x=0&.v=1> (“American Public Education focuses primarily on providing the U.S. military with online distance learning, and that’s central to their business model. . . . In the niche verticals where they are active, APEI is very competitive, and we feel that they have been able to capture a segment of the market that’s overlooked by the mainstream for-profit operators.”).

<sup>61</sup> See *Interview with Daniel Golden*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/educating-sergeant-pantzke/dan-golden/> (discussing the postsecondary attendance data for post-9/11 GI Bill veterans and providing that of “the tuition paid to colleges under the GI Bill, 35 percent of that money is going to for-profit colleges.”).

<sup>62</sup> See T. Vance McMahan and Mario Loyola, *College 2.0: Transforming Higher Education Through Greater Innovation and Smarter Regulation*, INST. FOR COMPETITIVE WORKFORCE, [http://icw.uschamber.com/sites/default/files/HigherEducationReport\\_final\\_high%20res.pdf](http://icw.uschamber.com/sites/default/files/HigherEducationReport_final_high%20res.pdf).

<sup>63</sup> See Vicente M. Lechuga, *The Paradox of For-Profit Higher Education*, in 2 THE BUSINESS OF HIGHER EDUCATION: MANAGEMENT AND FISCAL STRATEGIES 205, 206 (John C. Knapp & David J. Siegel eds., 2009) (tracing for-profit schools back to 1660, when early Dutch settlers, known as proprietors, “tutored individuals in English and mathematics for a fee”).

<sup>64</sup> See Peter S. Goodman, *In Hard Times, Lured Into Trade School and Debt*, N.Y. TIMES, Mar. 14, 2010, at A1 (“One fast-growing American industry has become a conspicuous beneficiary of the recession: for-profit colleges and trade schools.”).

<sup>65</sup> See Sara Murray et al., *Slump Over, Pain Persists*, WALL ST. J., Sept. 21, 2010, at A1-A2 (discussing the historic nature of the recession).

<sup>66</sup> See Gene R. Nichol, *Wages, Work, Privilege, and Legal Education*, 5 HARV. L. & POL’Y REV. 1, 2-5 (2011) (discussing the wide-ranging impact of the recession).

industry,<sup>67</sup> markets devolved into crisis,<sup>68</sup> housing values sharply declined,<sup>69</sup> and unemployment increased.<sup>70</sup> After decades of stagnant wages, workers have been especially harmed.<sup>71</sup>

Consequently, those working individuals who became unemployed as a result of the recession began to seek strategies for the resolution of their problems.<sup>72</sup> With diminishing 401(k) balances,<sup>73</sup> declining household incomes, and lost access to health insurance coverage,<sup>74</sup> most of these unemployed people felt like there were few viable paths for self-recovery.<sup>75</sup> However, one way out of these circumstances was to return to school for new job training in industries that were more in demand.<sup>76</sup> Touted during almost every recent economic downturn,<sup>77</sup> this idea of seeking additional education once again became the conventional wisdom of how recession-impacted workers could personally recover from the effects of the economic meltdown.<sup>78</sup> Many of these individuals followed this advice by enrolling in for-profit colleges or universities— institutions in an industry that has had a historically successful track record of enrollment.<sup>79</sup> By mid-2011, twelve percent of all higher education students attended a for-profit educational

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<sup>67</sup> See, e.g., John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have A Better Idea?*, 95 VA. L. REV. 707, 782 (2009) (concluding “that excessive deregulation was a principal cause of the 2008 financial crisis”); Saule T. Omarova, *Wall Street As Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 459-60 (2011) (“[T]he prevailing theoretical and ideological paradigm under which deregulation and unfettered financial innovation were viewed as unconditionally beneficial has been publicly discredited and has lost its precrisis intellectual dominance.”).

<sup>68</sup> See generally Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1376-78 (2011) (discussing the impact that the Great Recession has had upon American financial markets and institutions).

<sup>69</sup> See Jack Healy, *October Report Shows Home Prices Down 18% From Last Year*, N.Y. TIMES, Dec. 31, 2008, at B3 (discussing record declines in home prices throughout the country “as the fallout from the financial collapse”).

<sup>70</sup> See BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY TABLE, ANNUAL AVERAGES – HOUSEHOLD DATA: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1940S TO DATE, <http://www.bls.gov/cps/cpsaat1.pdf> (listing the unemployment rate increases from 4.6 percent in 2007 to 9.6 percent in 2010).

<sup>71</sup> See Richard B. Freeman, *Reforming the United States’ Economic Model After the Failure of Unfettered Financial Capitalism*, 85 CHI.-KENT L. REV. 685, 695 (2010) (“The 2008-2009 recession hurt working Americans more severely than did earlier post-Depression recessions.”).

<sup>72</sup> See Michael Luo, *99 Weeks Later, Jobless Have Only Desperation*, N.Y. TIMES, Aug. 2, 2010, at A1 (discussing unemployed workers who have exhausted the maximum time limits on unemployment benefits).

<sup>73</sup> See E.S. Browning, *Retiring Boomers Find 401(k) Plans Fall Short*, WALL ST. J. (Feb. 19, 2011), <http://online.wsj.com/article/SB10001424052748703959604576152792748707356.html>.

<sup>74</sup> See Robert Pear, *Health Spending Rose in ‘09, but at Low Rate*, N.Y. TIMES, Jan. 5, 2011, at A19 (citing a governmental report that provided that the recession had a “profound influence” on health care spending in 2009).

<sup>75</sup> See, e.g., *60 Minutes: Unemployment Benefits: The 99ers* (CBS television broadcast Oct. 24, 2010), available at <http://www.cbsnews.com/video/watch/?id=6987699n> (discussing the economic quandaries of these unemployed workers).

<sup>76</sup> See, e.g., Paul Davidson, *Second Careers - Pushed by the Recession, Millions are Making Dramatic Job Changes*, USA TODAY, Jul. 31, 2009, at 1A (discussing the decisions of unemployed workers to attend vocational classes to receive training in other industries with higher potentials of job growth but with lower median salaries).

<sup>77</sup> See, e.g., Steven Greenhouse, *More White-Collar Workers Turn to Community Colleges*, N.Y. TIMES, Aug. 20, 2009, at Education 8 (discussing the broad range of unemployed workers who have been encouraged to obtain more education as a way to improve their economic conditions).

<sup>78</sup> See, e.g., Barack Obama, Remarks at Macomb Community College in Warren, MI (July 14, 2009), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=86422&st=community+college&st1=unemployment#ixzz1VWJGFfXZ> (“Even as this painful restructuring takes place in our auto industry, workers are seeking out training for new auto jobs.”).

<sup>79</sup> See Usha Rodrigues, *Entropy and Identity*, 60 EMORY L.J. 1257, 1308-09 (2011) (discussing the success that for-profit colleges and universities have had in student enrollment).

institution.<sup>80</sup> “In 2007 and 2008, 93.6% of full-time students at private, for-profit institutions, 56.6% at public institutions, and 70.0% at private, non-profit institutions received federal aid.”<sup>81</sup> These changes in the economic climate, alongside the shifting environment of higher education and the rise of the for-profit industry, are especially relevant in the analysis of the problems that the for-profit sector now faces.

### III. PROBLEMATIC AREAS FOR FOR-PROFIT COLLEGES AND UNIVERSITIES: STUDENT RECRUITMENT, STUDENT DEBT BURDENS, AND FUTURE EMPLOYMENT PROSPECTS

Hearings held in 2010 and 2011 before the Senate Committee on Health, Education, Labor, and Pensions (HELP)<sup>82</sup> revealed the exploitive ideology of some actors within the for-profit educational industry.<sup>83</sup> These hearings examined a 2010 Government Accountability Office (GAO) investigation of multiple institutions within the for-profit educational sector and produced extensive information regarding the internal workings of for-profit colleges and universities.<sup>84</sup> They highlighted how federal financial aid “provide[s] more than \$20 billion to for-profit higher education companies every year.”<sup>85</sup> Further, aggressive tactics and the hard sell<sup>86</sup> were revealed to be prominent features within many of these institutions’ marketing, recruitment, financial aid, and future employment practices.<sup>87</sup> This part of the Article will address these most prevalent problems.<sup>88</sup>

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<sup>80</sup> See *Obama Administration Announces New Steps*, *supra* note 18.

<sup>81</sup> See *Career Coll. Ass’n v. Duncan*, No. 1:11-cv-138, 2011 WL 2690406, at \*1 (D.D.C. July 12, 2011).

<sup>82</sup> See *Improving For-Profit Higher Education: A Roundtable Discussion of Policy Solutions: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions (HELP)* (July 21, 2011), available at <http://help.senate.gov/hearings/hearing/?id=28fa4b62-5056-9502-5d71-198cd2223f7a>; *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. on HELP* (June 7, 2011), available at <http://help.senate.gov/hearings/hearing/?id=2c199df0-5056-9502-5df0-feb236792b52>; *The Federal Investment in For-Profit Education: Are Students Succeeding?: Hearing Before the S. Comm. on HELP* (Sept. 30, 2010), available at <http://help.senate.gov/hearings/hearing/?id=3e235bb6-5056-9502-5df5-5d5b0f000e01>; *For-Profit Schools: The Student Recruitment Experience: Hearing Before the S. Comm. on HELP* (Aug. 4, 2010), available at <http://help.senate.gov/hearings/hearing/?id=19454102-5056-9502-5d44-e2aa8233ba5a>.

<sup>83</sup> See *Harkin Calls on For-Profit Colleges to End Deceptive Recruiting Practices*, TOM HARKIN (Feb. 8, 2011) <http://harkin.senate.gov/press/release.cfm?i=330975> (discussing the recruiting documents used by certain for-profit schools that emphasize “exploiting emotional vulnerabilities to convince students to enroll, to prey on their ‘pain’ and sign them up at any cost”).

<sup>84</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING, *supra* note 13. Although minor changes were made to the report after its initial issuance, its conclusions remained unchanged. See *Original vs. Revised Sections of GAO Report on For-Profit Colleges*, WASH. POST (Dec. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/graphic/2010/12/07/GR2010120707604.html>.

<sup>85</sup> *Chairman Harkin Announces HELP Oversight Hearings of Federal Education Dollars at For-Profit Colleges*, S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS (June 10, 2010), <http://help.senate.gov/newsroom/press/release/?id=e49a510f-f74e-4478-89cc-ecad039e8922&groups=Chair>.

<sup>86</sup> See Liaquat Ali Khan, *Advocacy Under Islam and Common Law God Means No Injustice to Any of His Creatures*, 45 SAN DIEGO L. REV. 547, 607 (2008) (“[H]ard selling is aggressive marketing that overstates a product’s merits, its bargain value, and creates a false sense of urgency to pressure consumers to not only buy the product but also the high margin add-on features.”).

<sup>87</sup> See *infra* text accompanying notes 91-96.

<sup>88</sup> See, e.g., Chris Cuomo, *ABC News Investigates For-Profit Education: Recruiters at the University of Phoenix*, ABC NEWS (Aug. 19, 2010), <http://abcnews.go.com/TheLaw/profit-education-abc-news-undercover-investigate-recruiters-university/story?id=11411379> (discussing the aggressive recruiting practices of many for-profit schools).

As students' options for higher education have expanded and as the recent financial crisis has wreaked havoc on the economy, both public and private colleges and universities have sought to maintain, if not increase, their enrollments.<sup>89</sup> Although this growth is important for state-supported, public institutions and non-profit, private schools, it is an even more vital priority at for-profit institutions, given "shareholder pressure to expand."<sup>90</sup> This pressure has resulted in the use of markedly, aggressive student recruiting tactics by many of these entities over the last decades.<sup>91</sup> These tactics have run the gamut from targeting vulnerable individuals, like people living in homeless shelters and veteran Marines with brain injuries,<sup>92</sup> to emphasizing the uses of pain and fear in recruitment.<sup>93</sup>

In addition to the industry's emphasis on increased market share, there are multiple reasons for the escalation of recruiting tactics in the for-profit educational industry. Many of these recruiters lack a professional background in higher education, student affairs, or counseling.<sup>94</sup> Further, the likelihood for abuses has intensified in light of the potential conflict of interest between recruiter compensation and students' best interests.<sup>95</sup> In short, "[t]he concern is that recruiters paid by the head are tempted to sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans."<sup>96</sup>

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<sup>89</sup> See Eric Hoover, *Recession Reshaped College Enrollment Patterns, but the Sky Didn't Fall*, CHRON. HIGHER EDUC. (July 14, 2011), <http://chronicle.com/article/Recession-Reshaped-College/128223/> (stating that, despite the recession, public institutions "saw modest increases in all but one year [and that] [p]rivate colleges appear to have maintained their 'market share' despite the many grave predictions about their ability to keep up their enrollments"). But see Audrey Williams June, *New Graduate-Student Enrollment Dips for First Time in 7 Years*, CHRON. HIGHER EDUC. (Sept. 22, 2011), <http://chronicle.com/article/New-Graduate-Student/129111/> (discussing a report by the Council of Graduate Schools that, between fall 2009 and fall 2010, graduate student enrollment decreased despite increased numbers of graduate school applications).

<sup>90</sup> Robin Wilson, *For-Profit Colleges Change Higher Education's Landscape*, CHRON. HIGHER EDUC. (Feb. 7, 2010), <http://chronicle.com/article/For-Profit-Colleges-Change/64012/>.

<sup>91</sup> See Daniel Golden, *The Homeless at College*, BLOOMBERG BUSINESSWEEK (Apr. 30, 2010, 11:00 AM), [http://www.businessweek.com/magazine/content/10\\_19/b4177064219731.htm?chan=magazine+channel\\_features](http://www.businessweek.com/magazine/content/10_19/b4177064219731.htm?chan=magazine+channel_features) (discussing an investigation that revealed that multiple for-profit schools have recruited students at homeless shelters and halfway houses as a way to increase enrollment and student loan funding).

<sup>92</sup> See *id.*; *Interview with Daniel Golden, supra* note 61 ("I found that one of the for-profit colleges was sending a recruiter to the Wounded Warriors Barracks, where she was signing up brain-injured marines, who even had difficulty remembering what courses they were taking.").

<sup>93</sup> See Chris Kirkham, *For-Profit College Recruiters Taught To Use "Pain," "Fear," Internal Documents Show*, HUFFINGTON POST (Mar. 23, 2011, 9:09 AM), [http://www.huffingtonpost.com/2011/02/08/for-profit-college-recruiters-documents\\_n\\_820337.html](http://www.huffingtonpost.com/2011/02/08/for-profit-college-recruiters-documents_n_820337.html) (describing ITT training documents that "laid out a 'Pain Funnel and Pain Puzzle' that describes a series of questions recruiters should ask prospective students in order to 'poke the pain' and convince them to sign up for classes").

<sup>94</sup> See, e.g., *For-Profit Schools: The Student Recruitment Experience: Hearing Before the S. Comm. on HELP* (Aug. 4, 2010) (statement of Joshua Pruyn, former Admissions Representative, Alta College, Inc., at 1), available at <http://help.senate.gov/imo/media/doc/Pruyn.pdf> [hereinafter Pruyn Statement] (stating that he had "applied for the admissions representative position at Westwood [College Online] because of [his] experience with [his] college hockey team"); Anya Kamenetz, *\$830 Billion in Student Loans: The New Mortgage Bubble*, DIY U (Aug. 11, 2010), <http://diyubook.com/2010/08/830-billion-in-student-loans-the-new-mortgage-bubble/> ("Someone with experience in the for-profit college marketing business told me that the same online sales geniuses who used to work for mortgage brokers are now employed by for-profit colleges.").

<sup>95</sup> See Pruyn Statement, *supra* note 94, at 2 (discussing recruiters' perspectives that "students [were] just another target to nail to help meet their quotas" and that "[w]ith high numbers [of student enrollments], the most successful representatives could earn about three times their starting salary").

<sup>96</sup> *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005).

In 1992, to attempt to avoid this conflict, Congress changed the way in which recruiters for schools participating in federal student aid programs could be compensated by decoupling financial incentive compensation with the number of students who were recruited or who secured financial aid.<sup>97</sup> “Congress instituted this incentive compensation ban to eliminate deceptive recruiting practices and to protect federal student aid funds from fraud and abuse.”<sup>98</sup> However, this ban was weakened substantially by the Department of Education’s establishment in 2002 of twelve, expansive safe harbors, within which schools could lawfully compensate recruiters for certain student enrollments.<sup>99</sup> The ban was further weakened by a memo sent by then Under-Secretary of Education William Hansen to the head of the Federal Student Aid Office that provided for less stringent consequences for violations of the compensation ban.<sup>100</sup> “In the memo, the Deputy Secretary said that in most cases ‘the appropriate sanction’ should ‘be the imposition of a fine,’ rather than the limitation, suspension, or termination of Title IV student aid eligibility.”<sup>101</sup> As a result, many bad actors within for-profit colleges and universities exploited these safe harbors “to circumvent the intent of the [Higher Education Act (HEA)’s compensation ban],”<sup>102</sup> which led the Department of Education to “determine[] that these safe harbors do substantially more harm than good.”<sup>103</sup> Because of these negative actions related to recruiting, the Department of Education implemented new rules in 2010 on recruiter compensation that eliminated the safe harbors.<sup>104</sup> However, prior to (and since) the implementation of these new regulations, multiple lawsuits have been brought against these entities based on their recruitment practices.<sup>105</sup>

Another one of the most significant allegations levied against for-profit educational institutions is that they leave their graduates and former students who did not complete their programs with substantial debt loads.<sup>106</sup> Student loans have become a reality for modern college

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<sup>97</sup> See Higher Education Amendments of 1992, Pub. L. No. 102-325 § 490(a)(3) (codified at 20 U.S.C. §1094(a)(20) (“The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.”).

<sup>98</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-10, HIGHER EDUCATION: STRONGER FEDERAL OVERSIGHT NEEDED TO ENFORCE BAN ON INCENTIVE PAYMENTS TO SCHOOL RECRUITERS 1 (2010), available at <http://www.gao.gov/new.items/d11110.pdf>.

<sup>99</sup> See 34 C.F.R. § 668.14(b)(22)(ii)(A)-(L) (effective until July 1, 2011) (providing the safe harbors to the compensation ban).

<sup>100</sup> See Stephen Burd, *The Art of Spin Career-College Style*, HIGHER ED WATCH (May 18, 2010), <http://higheredwatch.newamerica.net/node/31942> (describing the Hansen memo).

<sup>101</sup> *Id.*

<sup>102</sup> Program Integrity Issues, 75 Fed. Reg. 66,832, 66,872 (Oct. 29, 2010) (codified in scattered sections of 34 C.F.R.).

<sup>103</sup> Program Integrity Issues; Proposed Rule, 75 Fed. Reg. 34,806, 34,818 (June 18, 2010).

<sup>104</sup> See *infra* text accompanying notes 288-94.

<sup>105</sup> See ANYA KAMENETZ, *DIY U: EDUPUNKS, EDUPRENEURS, AND THE COMING TRANSFORMATION OF HIGHER EDUCATION* 72 (2010) (discussing the connections between the recruiting practices examined by the regulations and lawsuits premised upon these practices).

<sup>106</sup> See, e.g., *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. on HELP* (June 7, 2011) (statement of Wade Henderson, President and CEO, Leadership Conference on Civil and Human Rights, at 2), available at <http://help.senate.gov/imo/media/doc/Henderson4.pdf> (“We are alarmed, however, about mounting evidence that the for-profit sector is engaging in predatory lending practices, overcharging for their product, failing to deliver on programs leading to ‘gainful employment,’ leaving large numbers of students saddled with enormous debt, and leaving taxpayers holding the bag.”); Sandy Baum & Patricia Steele, *Who Borrows Most? Bachelor’s Degree Recipients with High Levels of Student Debt* 10 (2010),

students,<sup>107</sup> with tuition and fees far outpacing the rate of inflation.<sup>108</sup> In 2011, the total student loan debt in the United States was “greater than the total volume of credit card debt,”<sup>109</sup> and it will soon exceed \$1,000,000,000,000.<sup>110</sup> However, the students who attend for-profit colleges and universities constitute “[twenty-six] percent of all student loans and [forty-six] percent of all student loan dollars in default.”<sup>111</sup> These defaults on student loans, which generally are not dischargeable in bankruptcy,<sup>112</sup> can have disastrous consequences for these students.<sup>113</sup> Like the issues related to student recruiting, concerns over the debt burden for students who attend for-profit colleges and universities led to the recent implementation of new regulations by the Department of Education.<sup>114</sup>

Finally, for-profit colleges and universities have incurred a substantial amount of criticism for their alleged failures to provide their students with viable employment prospects.<sup>115</sup> These claims are ironic, given that many of these institutions stress that they provide a direct path to jobs,<sup>116</sup> rather than a liberal arts curriculum.<sup>117</sup> Although some institutions have had success in placing some graduates into the fields in which they were trained,<sup>118</sup> there have been widespread concerns that a retention-at-all-costs ethos has led to an educational system that does

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<http://advocacy.collegeboard.org/sites/default/files/Trends-Who-Borrows-Most-Brief.pdf> (“Students who graduated from for-profit institutions are much more likely than similar students in other sectors to have high debt levels.”).

<sup>107</sup> See *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. On HELP* (June 7, 2011) (statement of Martha Kanter, Under-Secretary, U.S. Department of Education, at 1), available at <http://help.senate.gov/imo/media/doc/Kanter4.pdf> [hereinafter Kanter Statement] (“Currently, 36.1 million Americans hold over \$740 billion in outstanding Federal student loans.”).

<sup>108</sup> See Daniel Indiviglio, *Chart of the Day: Student Loans Have Grown 511% Since 1999*, ATLANTIC (Aug. 18, 2011, 2:15 PM), <http://www.theatlantic.com/business/archive/2011/08/chart-of-the-day-student-loans-have-grown-511-since-1999/243821/> (“Student loan debt has grown by 511% [since 1999]. In the first quarter of 1999, just \$90 billion in student loans were outstanding. As of the second quarter of 2011, that balance had ballooned to \$550 billion.”).

<sup>109</sup> Kanter Statement, *supra* note 107, at 1.

<sup>110</sup> See Tamar Lewin, *Burden of College Loans on Graduates Grows*, N.Y. TIMES, Apr. 12, 2011, at A1.

<sup>111</sup> See *Obama Administration Announces New Steps*, *supra* note 18.

<sup>112</sup> See 11 U.S.C. § 523(a)(8) (2006).

<sup>113</sup> See Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225, 270 (2011) (discussing the consequences of defaulting on student loans from barred access to future Title IV funds to ruined credit reports).

<sup>114</sup> See Program Integrity Issues, 75 Fed. Reg. 66,832, 66,968 (Oct. 29, 2010) (codified in scattered sections of 34 C.F.R.) (providing that the Department of Education had a need for regulatory action regarding institutions of higher education that obtain Title IV funding, because “[s]tudent debt is more prevalent and individual borrowers are incurring more debt than ever before.”).

<sup>115</sup> See Christopher R. Beha, *Leveling the Field: What I Learned from For-Profit Education*, 323 HARPER’S MAG. 51, 52 (Oct. 2011) (“[E]nrolling at for-profit colleges turns out to be a terrible deal for most students. Almost three fifths drop out without a degree within a year, and virtually all take on debt to help pay for their education. . . . Those who graduate often wind up in low-paying jobs, doing tasks with minimal connection to their degrees.”).

<sup>116</sup> See, e.g., *Why Everest?*, EVEREST: CAREER EDUC. NETWORK, <http://www.everest.edu/why> (“At Everest, you’re here because you want to be. You’re here for career training and to get on with your life. It’s a decision that deserves respect.”).

<sup>117</sup> See Stanley Fish, *The Last Professor*, N.Y. TIMES (Jan. 18, 2009, 10:00 PM), <http://opinionator.blogs.nytimes.com/2009/01/18/the-last-professor/> (“[F]or-profit universities . . . make no pretense of valuing what used to be called the ‘higher learning.’ John Sperling, founder of the group that gave us Phoenix University, is refreshingly blunt: ‘Coming here is not a rite of passage. We are not trying to develop value systems or go in for that ‘expand their minds’ nonsense.”).

<sup>118</sup> See Julia Edwards, *For-Profit College Grads Tell Congress Federal Investment Worthwhile*, MEDILL WASH. (Sept. 29, 2010), <http://medilldc.net/2010/09/for-profit-college-grads-tell-congress-federal-investment-worthwhile/>.

not provide adequate career preparation for these for-profit schools' students.<sup>119</sup> Consequently, like student recruiting and debt burdens, the lack of viable career prospects is another issue that has been at the center of a multitude of lawsuits and recently implemented Department of Education regulations.

#### IV. RECENT LITIGATION INVOLVING FOR-PROFIT COLLEGES AND UNIVERSITIES

This part of the Article reviews recent cases involving for-profit educational institutions. It provides an analysis of the recent litigation asserted against these colleges and universities regarding student recruitment, student loans, and future employment prospects, which have composed the bulk of criticism against these enterprises and which were the subject matter of the 2010 and 2011 Department of Education promulgated regulations. Thereafter, this part of the Article analyzes the two 2011 lawsuits filed by APSCU against Secretary Arne Duncan and the Department that challenged these new federal regulations. Ultimately, the discussion of these lawsuits provides a foundation for the normative section's call for reform in order to strengthen the regulatory environment in which for-profit institutions operate.

##### A. *Recent Litigation Filed Against For-Profit Educational Institutions*

One of the crucial reasons the for-profit sector of education requires a greater degree of regulation than presently exists is the stream of litigation involving these institutions.<sup>120</sup> Overall, the lack of transparency in operations is a significant basis for many of these lawsuits.<sup>121</sup> The culmination of the lack of proper regulation, alongside this lack of transparency, has resulted in the for-profit educational industry's current entanglement in problems similar to other industries, like that of the financial services industry<sup>122</sup> or the tobacco industry,<sup>123</sup> that have had successive cycles of scandal.<sup>124</sup> A range of lawsuits, from *qui tam*, whistleblower lawsuits to class actions, have been filed against for-profit educational institutions for problems related to student

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<sup>119</sup> See Kelly Field, *Faculty at For-Profits Allege Constant Pressure to Keep Students Enrolled*, CHRON. HIGHER EDUC. (May 8, 2011), <http://chronicle.com/article/Pawns-in-the-For-Profit/127424/> (describing the for-profit educational industry as "a system in which expectations are low, cheating is tolerated, and faculty are under tremendous pressure to keep students enrolled.").

<sup>120</sup> See *Frontline: College, Inc.* (PBS television broadcast May 4, 2010) ("In the early '90s, a congressional investigation accused a number of for-profit schools of employing false or misleading advertising and using illegal recruitment efforts. While some of those schools were shut down, allegations, negative press and lawsuits continue to dog the industry.").

<sup>121</sup> See Nathan Ranns, *Education Panel Discusses Future of For-Profit Colleges*, MICH. DAILY, (Mar. 3, 2011, 5:31 PM), <http://www.michigandaily.com/content/education-panel-discusses-future-profit-colleges> (depicting the "crucial problem[] [of] for-profit institutions . . . as a 'lack of transparency.'").

<sup>122</sup> See ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* 534 (2009) (discussing how "the deregulation of the banks in the late 1990s" was one "seed[] of disaster" for the financial crisis of the late 2000s).

<sup>123</sup> See Tom McNichol, *Learning the Hard Way: For-Profit Colleges Pay Dearly for Their Students' Discontent*, CAL. LAWYER (Oct. 2011), <http://www.callawyer.com/story.cfm?eid=918229&evd=1> (quoting the lead counsel in a class action lawsuit against a for-profit educational institution: "I feel this is analogous to where tobacco litigation was a few years ago").

<sup>124</sup> See Robert Kuttner, *The Bubble Economy*, AM. PROSPECT (Sept. 24, 2007), [http://prospect.org/cs/articles?article=the\\_bubble\\_economy](http://prospect.org/cs/articles?article=the_bubble_economy) ("The sub-prime mess, the huge risks taken by hedge funds, and the conflicts of interest that led to Enron and kindred scandals, are all the consequences of serial bouts of financial deregulation.")

recruitment, student debt burdens, and future employment prospects.<sup>125</sup> A review of recent cases from each representative group serves to effectively frame the importance of improving the regulatory environment of these institutions.

### 1. False Claims Act *Qui Tam* Lawsuits

Since 1999, over twenty False Claims Act (FCA),<sup>126</sup> *qui tam* lawsuits have been filed against for-profit postsecondary schools that have involved allegations of illegal recruiter compensation, the provision of subpar educational offerings, or violations of other regulations.<sup>127</sup>

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<sup>125</sup> See, e.g., *Washington Complaint in Intervention*, *supra* note 14 (detailing the claims of the complaint); *Corinthian Colls., Inc., Annual Report (Form 10-K) 68-73* (Aug. 24, 2011) (detailing the eleven class action lawsuits asserted against Corinthian Colleges, Inc. that are either pending or in arbitration).

<sup>126</sup> False Claims Act, 31 U.S.C. § 3729.

<sup>127</sup> See, e.g., *United States ex rel. Lee v. Corinthian Colls.*, No. 10-55037, 2011 WL 3524208, at \*11 (9th Cir. Aug. 12, 2011) (reversing the district court's order of dismissal of a FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Bott v. Silicon Valley Colls.*, 262 F. App'x. 810, 811 (9th Cir. 2008) (affirming the dismissal of an FCA, *qui tam* lawsuit alleging violations of the recruiter compensation ban for failure to plead with sufficient particularity); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1168 (9th Cir. 2006) (reversing the district court's dismissal of the FCA, *qui tam* lawsuit alleging violations of the recruiter compensation ban); *United States ex rel. Gay v. Lincoln Technical Inst., Inc.*, 111 F. App'x 286, 286-87 (5th Cir. 2004) (affirming the dismissal of an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Bowan v. Educ. Am.*, 116 F. App'x 531, 531 (5th Cir. 2004) (affirming the dismissal of an FCA, *qui tam* action against a for-profit educational institution); *United States ex rel. Bowman v. Computer Learning Ctrs.*, 73 F. App'x. 735, 736 (5th Cir. 2003) (discussing an FCA, *qui tam* action against a for-profit educational institution that eventually filed for bankruptcy); *Washington Complaint in Intervention*, *supra* note 14, at 1 (detailing the claims in the intervention of an FCA, *qui tam* lawsuit against a for-profit educational institution that alleges improper recruiter compensation); *United States ex rel. Leveski v. ITT Educ. Servs., Inc.*, No. 1:07-cv-867, 2011 WL 3471071, at \*1, 3 (S.D. Ind. Aug. 8, 2011) (dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); Notice by United States of Intervention for Purposes of Settlement, Ex. A, Settlement Agreement at 2, 4, *United States ex rel. Goodstein v. Kaplan, Inc.*, No. 2:07-cv-1491 (E.D. Pa. July 22, 2011) (settling an FCA, *qui tam* lawsuit that alleged a for-profit educational institution misled its students in a surgical technology program about the availability of externships); *United States ex rel. Jajdelski v. Kaplan, Inc.*, No. 2:05-cv-1054, 2011 WL 2669485, at \*4 (D. Nev. July 7, 2011) (dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged the filing of fraudulent student financial aid requests for failure to plead with specific particularity); *United States ex rel. Lopez v. Strayer Educ., Inc.*, 698 F. Supp. 2d 633, 644 (E. D. Va. 2010) (dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Powell v. Am. InterContinental Univ., Inc.*, 756 F. Supp. 2d 1374 (N.D. Ga. 2010) (denying defendant for-profit educational institution's motion to reconsider the court's denial of a motion to dismiss an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); Transfer Order at 4, In re: *Kaplan Higher Educ. Corp. Qui Tam Litigation*, No. 1:09-md-2057 (S.D. Fla. June 10, 2009) (transferring *United States ex rel. Urquilla-Diaz v. Kaplan Univ.*, No. 1:09-cv-20756 (S.D. Fla.), *United States ex rel. Torres v. Kaplan Higher Educ. Corp.*, No. 1:07-cv-5643 (N.D. Ill.), and *United States ex rel. Gatsiopoulos v. ICM Sch. of Bus. & Med. Careers*, No. 2:06-cv-1452 (W.D. Pa.), all of which shared the commonality of being FCA, *qui tam* lawsuits that alleged against a for-profit educational institution engaged in a variety of problematic conduct relating to student recruitment, retention, debt loads, and employment preparation)); *Schultz v. DeVry Inc.*, No. 07-cv-5425, 2009 WL 562286, at \*4 (N.D. Ill. Mar. 4, 2009) (dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Irwin v. Significant Educ., Inc.*, No. 07-cv-1771, 2009 WL 322875, at \*1 (D. Ariz. Feb. 10, 2009) (denying the defendant's motion to dismiss the FCA, *qui tam* lawsuit alleging violations of the recruiter compensation ban); Complaint at 4-10, *United States ex rel. Buchanan v. South Univ. Online*, No. 2:07-cv-971 (W.D. Pa. July 12, 2007) (detailing the claims in an FCA, *qui tam* lawsuit against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Olson v. ITT Educ. Servs., Inc.*, No. 1:04-cv-647, 2006 WL 64597, at \*1-2, 7 (S.D. Ind. Jan. 9, 2006)

The lawsuits allege that, because of their participation in this unlawful conduct, these institutions falsely certify compliance with federal law in order to remain eligible to receive Title IV funds.<sup>128</sup> Although some of these lawsuits have been dismissed,<sup>129</sup> several have resulted in substantial settlements.<sup>130</sup> In 2009, the Apollo Group, owner of the largest for-profit institution in the United States, the University of Phoenix, settled a recruiter compensation, *qui tam* lawsuit filed against it for \$78,500,000,<sup>131</sup> after the Ninth Circuit reversed the district court's dismissal of the original action.<sup>132</sup> This settlement constituted "the second-largest settlement in [an FCA] case where the government declined to intervene" and made "the top 100 biggest federal [FCA] settlements of any kind."<sup>133</sup> A year later, Grand Canyon Education Inc., the parent company of for-profit educational institution Grand Canyon University, settled a similar *qui tam* lawsuit for \$5,200,000,<sup>134</sup> after the federal district court in Arizona denied the institution's motion to dismiss.<sup>135</sup> As recently as June 2011, a former admissions employee of South University Online, an EDMC subsidiary, settled his FCA lawsuit for an undisclosed sum.<sup>136</sup>

Despite the substantial number of whistleblower FCA actions that have been asserted against for-profit educational institutions, the United States has opted to intervene, based specifically on allegations of illegal recruiter compensation, in only one such lawsuit.<sup>137</sup> On August 8, 2011, the United States, along with California, Florida, Illinois, and Indiana, filed its complaint in intervention in *United States ex rel. Washington v. Education Management Corp.*, an FCA, *qui tam* lawsuit based on unlawful recruiter compensation against the second-largest

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(dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged a variety of misrepresentations and that alleged the defendant was a "diploma mill" for a failure to plead with sufficient particularity); Order Granting Motion to Dismiss at 1, *United States ex rel. Payne v. Whitman Educ. Grp.*, No. 4:03-cv-3089 (S.D. Tex. June 20, 2005) (granting joint motion to dismiss an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 489 (S.D. Tex. 2003) (dismissing an FCA, *qui tam* action against a for-profit educational institution that alleged improper recruiter compensation), *aff'd*, 111 F. App'x 296 (5th Cir. 2004).

<sup>128</sup> See, e.g., *Washington* Complaint in Intervention, *supra* note 14, at 6-7 (alleging that "EDMC's compensation system, as designed, violates Title IV of the HEA's incentive compensation ban" and "[d]espite knowing that its compensation system, as implemented, does not comply with Title IV of the HEA and its regulatory safe harbor, EDMC falsely represents and certifies to the federal government its compliance with Title IV of the HEA," in violation of the FCA).

<sup>129</sup> See, e.g., *Gay*, 111 F. App'x at 286-87 (affirming the dismissal of an FCA, *qui tam* action against a for-profit educational institution); *Bowan*, 116 F. App'x at 531 (same).

<sup>130</sup> See, e.g., *Hendow*, 461 F.3d at 1168; *Irwin*, 2009 WL 322875, at \*1.

<sup>131</sup> See Dawn Gilbertson, *Apollo Group Settles Suit for \$78.5 Mil*, ARIZ. REPUBLIC (Dec. 15, 2009, 12:00 AM), <http://www.azcentral.com/arizonarepublic/business/articles/2009/12/14/20091214biz-apollo1215.html>.

<sup>132</sup> See *Hendow*, 461 F.3d at 1168 (reversing the district court's dismissal of the FCA, *qui tam* lawsuit alleging violations of the recruiter compensation ban).

<sup>133</sup> Gilbertson, *supra* note 131.

<sup>134</sup> See Dawn Gilbertson, *Grand Canyon University Officially Settles \$5.2 Mil Lawsuit*, ARIZ. REPUBLIC (Aug. 18, 2010, 5:04 PM), <http://www.azcentral.com/business/articles/2010/08/18/20100818biz-grandcanyon0819.html>.

<sup>135</sup> See *Irwin*, 2009 WL 322875, at \*1 (denying the defendant's motion to dismiss the FCA, *qui tam* lawsuit alleging violations of the recruiter compensation ban).

<sup>136</sup> See Brian Bowling, *Ex-Employee Settles Lawsuit Against For-Profit University*, PITTSBURGH TRIB.-REV. (June 24, 2011), [http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s\\_743635.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_743635.html) (discussing the undisclosed settlement of the lawsuit that alleged the relator "observed the company illegally paying admissions representatives based on the number of students they signed up for courses"). See Complaint at 4-10, *United States ex rel. Buchanan v. South Univ. Online*, No. 2:07-cv-971 (W.D. Pa. July 12, 2007).

<sup>137</sup> See Tamar Lewin, *Citing Wide Fraud, U.S. Sues a For-Profit College Company*, N.Y. TIMES, Aug. 9, 2011, at A1 (discussing the *Washington* lawsuit).

for-profit educational institution in the United States, EDMC.<sup>138</sup> These governmental parties joined seven other states and the District of Columbia,<sup>139</sup> as well as the relator former employees,<sup>140</sup> in the action. In its complaint, the United States alleged that EDMC, “which is based in Pittsburgh[,] . . . is 41 percent owned by Goldman Sachs, [and] enrolls about 150,000 students in 105 schools,”<sup>141</sup> received over \$11,000,000,000 in Title IV federal funds based on its false certifications that it was complying with the HEA recruiter compensation ban.<sup>142</sup> Because the United States is seeking treble damages pursuant to the FCA,<sup>143</sup> the potential damages of \$33,000,000,000 just for the federal false claims counts asserted against EDMC would eclipse all of the money, \$25,000,000,000, that the United States has recovered in FCA cases since 1986.<sup>144</sup>

Interestingly, the United States also alleged links between the case against EDMC and EDMC’s competitor, the Apollo Group, stating that “EDMC’s compensation system is not materially different from the University of Phoenix’s system with respect to violation of Title IV of the HEA’s prohibition on incentive compensation.”<sup>145</sup> It noted that, in 2004, “then-Chairman and Chief Executive Officer of the Apollo Group,”<sup>146</sup> Todd S. Nelson signed a \$9,800,000 settlement agreement for the University of Phoenix with the Department of Education after the investigation revealed violations of the recruiter compensation ban.<sup>147</sup> Further, the United States pointed out that because Nelson, the current CEO of EDMC, and several other EDMC executives, were employed by the University of Phoenix at the time of the settlement, EDMC was aware that its compensation system violated the recruiter compensation ban.<sup>148</sup>

These allegations within *Washington*, which remains pending and which alludes to industry-wide problems related to student recruitment, student debt burdens, and prospective employment opportunities, appear to be supported by a brief review of other recent *qui tam* lawsuits and faculty allegations asserted against for-profit educational institutions.<sup>149</sup> Most of the major players in this industry have been or are currently subject to these types of lawsuits. Currently, Kaplan Higher Education is the subject of a multidistrict litigation in the United States District Court for the Southern District of Florida, which originally consisted of three FCA, *qui*

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<sup>138</sup> See *Washington* Complaint in Intervention, *supra* note 14, at 4-5; Lewin, *supra* note 137, at A1 (describing EDMC’s size ranking within America’s for-profit educational industry).

<sup>139</sup> *Washington* Complaint in Intervention, *supra* note 14, at 1 (listing the other governmental parties: Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Tennessee, and the District of Columbia). Tennessee has since filed an election not to proceed with the action. See Notice of Election Not to Proceed with Action at 1, *Washington*, No. 2:07-cv-461 (W.D. Pa. Aug. 23, 2011).

<sup>140</sup> *U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violations*, U.S. DEP’T OF JUSTICE (Aug. 8, 2011), <http://www.justice.gov/opa/pr/2011/August/11-civ-1026.html>.

<sup>141</sup> Lewin, *supra* note 137, at A1.

<sup>142</sup> See *Washington* Complaint in Intervention, *supra* note 14, at 6.

<sup>143</sup> See *id.* at 113.

<sup>144</sup> See *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 231 (Apr. 14, 2010) (statement of Eric Holder, Att’y Gen. of the United States) (“Since 1986, when the False Claims Act was substantially amended, the United States has recovered more than \$25 billion under the Act.”).

<sup>145</sup> *Washington* Complaint in Intervention, *supra* note 14, at 50.

<sup>146</sup> *Id.* at 51.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 51-52.

<sup>149</sup> See, e.g., Field, *supra* note 119 (“Faculty members at six of the seven largest publicly traded higher-education corporations—the Apollo Group, the Career Education Corporation, Corinthian Colleges Inc., the Education Management Corporation, ITT Educational Services Inc., and the Washington Post Company’s Kaplan Higher Education—say they were pressured to raise grades, tolerate plagiarism, and dumb down courses to keep federal student aid flowing.”).

*tam* lawsuits that alleged problematic conduct relating to student recruitment, retention, debt loads, and employment preparation.<sup>150</sup> The court has recommended that the cases that remain pending be remanded to their original district courts for final determinations.<sup>151</sup> Kaplan settled a similar lawsuit, which alleged that it “enroll[ed] students in [a surgical technology program] even though it did not have enough of the clinical placements the students needed to graduate,” in July 2011 for \$1,600,000.<sup>152</sup> Later in the summer, on August 12, 2011, the United States Court of Appeals for the Ninth Circuit reinstated an FCA, *qui tam* lawsuit that alleged violations of the compensation ban against Corinthian Colleges, after the district court had dismissed the original complaint for failure to state a claim.<sup>153</sup>

## 2. Class Action Lawsuits

In addition to the extensive whistleblower claims that have been asserted against for-profit colleges and universities, numerous class action lawsuits, composed of classes of current and former students, have been litigated against these institutions. The allegations of these actions have ranged from inadequate career preparation to misrepresentation.

Many of these class actions have been settled with a variety of the players within the for-profit educational industry. A prime example is the substantial settlement between the California Culinary Academy, owned by Career Education Corporation, and its former students who felt deceived about the training and opportunities that were available at the completion of the program.<sup>154</sup> Specifically, in consolidated class action lawsuits filed in San Francisco Superior Court in 2007, *Amador v. California Culinary Academy* and *Adams v. California Culinary Academy*,<sup>155</sup> “plaintiffs accused the school of misrepresenting its job placement rates, exaggerating its prestige, and falsely suggesting that it had a selective qualifying process when, in fact, it required of its entrants no more than a high school diploma or its equivalent, an interest in cooking, and the ability to pay \$46,000 in tuition and fees for the twelve-month program.”<sup>156</sup> The settlement of \$40,000,000, which includes an “offer [of] rebates up to \$20,000 to 8,500 students,” was reached, because the California Culinary Academy claimed that the lawsuits “were too expensive to litigate and distracting to employees.”<sup>157</sup> Similar settlements have also been reached in complaints filed on behalf of their states’ citizens by attorneys general. In 2007, the California Attorney General settled a lawsuit that alleged deceptive advertising and

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<sup>150</sup> See Transfer Order at 4, In re: Kaplan Higher Educ. Corp. *Qui Tam* Litigation, No. 1:09-md-2057 (S.D. Fla. June 10, 2009) (transferring United States *ex rel.* Urquilla-Diaz v. Kaplan Univ., No. 1:09-cv-20756 (S.D. Fla.), United States *ex rel.* Torres v. Kaplan Higher Educ. Corp., No. 1:07-cv-5643 (N.D. Ill.), and United States *ex rel.* Gatsiopoulos v. ICM Sch. of Bus. & Med. Careers, No. 2:06-cv-1452 (W.D. Pa.)).

<sup>151</sup> See Suggestion of Remand at 2, In re: Kaplan, No. 1:09-md-2057 (S.D. Fla. Sept. 16, 2011).

<sup>152</sup> Tamar Lewin, *For-Profit College Company Settles Whistle-Blower Suit*, N.Y. TIMES, July 23, 2001, at A10. See also Notice by United States of Intervention for Purposes of Settlement, Ex. A, Settlement Agreement, United States *ex rel.* Goodstein v. Kaplan, Inc., No. 2:07-cv-1491 (E.D. Pa. July 22, 2011).

<sup>153</sup> See United States *ex rel.* Lee v. Corinthian Colls., No. 10-55037, 2011 WL 3524208, at \*11 (9th Cir. Aug. 12, 2011) (reversing the district court’s decision on Corinthian Colleges’ motion to dismiss and remanding the case).

<sup>154</sup> See Terence Chea, *Culinary School Grads Claim They Were Ripped Off*, MSN (Sept. 4, 2011), [http://www.msnbc.msn.com/id/44393771/ns/us\\_news-life/t/culinary-school-grads-claim-they-were-ripped/#.Tnt-luyBzPY](http://www.msnbc.msn.com/id/44393771/ns/us_news-life/t/culinary-school-grads-claim-they-were-ripped/#.Tnt-luyBzPY) (discussing the class action lawsuits and the settlement).

<sup>155</sup> See Order Thereon Stipulation Re Consolidation of Actions at 1-2, *Amador v. Cal. Culinary Acad., Inc.*, No. CGC07-467710 (Cal. Super. Ct. Feb. 24, 2011).

<sup>156</sup> McNichol, *supra* note 123.

<sup>157</sup> Chea, *supra* note 154.

employment information misrepresentations by Corinthian Schools, Inc. and Titan Schools, Inc., for \$6,500,000.<sup>158</sup> In addition to the monetary amount, “the settlement require[d] that Corinthian cease offering a total of 11 substandard programs.”<sup>159</sup>

Despite the myriad examples of for-profit colleges and universities entering into settlement agreements in both *qui tam* and class action lawsuits, many of these institutions now “are fighting back vigorously” against this litigation.<sup>160</sup> One of the primary mechanisms of doing so is by moving to compel arbitration based on the arbitration clauses that are contained within many of these schools’ enrollment agreements.<sup>161</sup> This is not a new approach to defending against these lawsuits. For example, in 2009, the United States Circuit Court for the Eighth Circuit reversed a district court’s denial of a for-profit educational institution’s motion to compel arbitration in a lawsuit brought against it by thirty-eight current and former students for alleged misrepresentation.<sup>162</sup> In this case, *Fallo v. High-Tech Institute*, the Eighth Circuit determined that the arbitration clause was neither procedurally nor substantively unconscionable.<sup>163</sup>

Bolstered by the *Fallo* rationale, multiple for-profit colleges and universities have sought to foreclose the continuation of class action lawsuits through the enforcement of arbitration agreements.<sup>164</sup> Federal district courts have granted these motions in *Kimble v. Rhodes College, Inc.* in June 2011;<sup>165</sup> in *Bernal v. Burnett* in June 2011;<sup>166</sup> in *Montgomery v. Corinthian Colleges, Inc.* in March 2011;<sup>167</sup> and in *Miller v. Corinthian Colleges, Inc.* in February 2011.<sup>168</sup> Many of these courts, like *Fallo*, dismissed claims of both procedural and substantive unconscionability.<sup>169</sup> Additionally, several of these courts specifically upheld the validity of class action waiver provisions within these arbitration agreements.<sup>170</sup> Given these successes for for-profit schools and the Supreme Court’s sweeping decision in *AT&T Mobility LLC v.*

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<sup>158</sup> See *Brown Reaches Multi-Million Settlement With Corinthian Vocational School*, CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL (July 31, 2007), [http://oag.ca.gov/news/press\\_release?id=1444](http://oag.ca.gov/news/press_release?id=1444).

<sup>159</sup> *Id.*

<sup>160</sup> See McNichol, *supra* note 123 (describing the actions of Alta College, a for-profit educational institution, which is facing multiple class action lawsuits).

<sup>161</sup> See, e.g., Doug Lederman, *Protection for For-Profit Colleges*, INSIDE HIGHER ED (Mar. 25, 2009), <http://www.insidehighered.com/news/2009/03/25/arbitrate> (discussing how most for-profit colleges and universities use arbitration clauses in their enrollment agreements).

<sup>162</sup> See *Fallo v. High-Tech Inst.*, 559 F.3d 874, 876 (8th Cir. 2009).

<sup>163</sup> See *id.* at 878-79.

<sup>164</sup> See, e.g., *Kimble v. Rhodes College, Inc.*, No. 10-cv-5786, 2011 WL 2175249, at \*3-4 (N.D. Cal. June 2, 2011) (citing *Fallo* and granting a for-profit educational institution’s motion to compel arbitration in a class action lawsuit alleging misrepresentations to induce students to enroll at Everest College).

<sup>165</sup> See *id.*

<sup>166</sup> See *Bernal v. Burnett*, No. 10-cv-1917, 2011 WL 2182903, at \*1, 8 (D. Colo. June 6, 2011) (granting a for-profit educational institution’s motion to compel individual arbitration in a class action brought by its former students for alleged deceptive recruitment practices).

<sup>167</sup> See *Montgomery v. Corinthian Colls., Inc.*, No. 11-cv-365, 2011 WL 1118942, at \*1 (N.D. Ill. Mar. 25, 2011) (granting a for-profit educational institution’s motion to compel individual arbitration in a class action brought by its former students for an alleged “deceptive marketing scheme”).

<sup>168</sup> See Memorandum Decision and Order Granting Defendant’s Motion to Compel Individual Arbitration and Stay Proceedings Pending Arbitration at 2, 21, *Miller v. Corinthian Colls., Inc.*, No. 2:10-CV-999 (D. Utah Feb. 14, 2011) [hereinafter *Miller Arbitration Order*] (granting a for-profit educational institution’s motion to compel individual arbitration in a class action brought by its former students for a variety of alleged deceptive practices).

<sup>169</sup> See *Bernal*, 2011 WL 2182903, at \*7 (finding that the arbitration agreements were not unconscionable); *Montgomery*, 2011 WL 1118942, at \*5, 7 (same); *Miller Arbitration Order*, *supra* note 168, at 13, 19 (same).

<sup>170</sup> See *Montgomery*, 2011 WL 1118942, at \*5, 7 (finding that the class action waiver provisions were neither substantively nor procedurally unconscionable); *Miller Arbitration Order*, *supra* note 168, at 19 (same).

*Concepcion*,<sup>171</sup> which found that adhesion contracts are not per se unconscionable and that upheld the enforceability of class action waivers within arbitration agreements under a Federal Arbitration Act preemption analysis,<sup>172</sup> it seems very likely that for-profit educational institutions will continue to pursue this defensive maneuver to avoid class action lawsuits. In addition to aggressively defending against class action lawsuits through enforcing arbitration, for-profit educational institutions, primarily through their lobbying associations, have filed several prominent lawsuits regarding many of these issues in recent years.

#### B. *Recent Litigation Filed By For-Profit Educational Associations*

Although a multitude of lawsuits have been filed against for-profit colleges and universities in recent years, this litigation has not dissuaded the industry from lobbying Congress and the Department of Education for decreased regulation of its business practices.<sup>173</sup> Indeed, many of these institutions have allocated a substantial amount of the blame for these lawsuits, and potential risks of loss, on the negative media coverage associated with the Department's rulemaking process, the Senate HELP committee hearings, and the GAO's investigation of for-profit schools.<sup>174</sup> Consequently, the industry has redoubled its efforts for decreased oversight.<sup>175</sup>

Further, for-profit educational associations have brought their own lawsuits challenging the governmental entities that have proposed reform of the industry. On February 2, 2011, the Coalition for Educational Success (CES), an association that represents "many of the nation's leading career colleges, serving more than 350,000 students at 478 campuses in 41 states,"<sup>176</sup> filed a complaint against the United States based on the GAO's 2010 investigative report on for-profit colleges and universities.<sup>177</sup> In the complaint, CES claimed "that the GAO—an investigative agency that prides itself on being unbiased and apolitical—issued a negligently written, biased and distorted report that foreseeably caused substantial financial injury to . . . [CES] . . . and other career colleges."<sup>178</sup> CES asserted that the August 2010 report, which was later revised by a November 2010 report,<sup>179</sup> "contained inaccurate, incomplete, and out-of-

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<sup>171</sup> 131 S. Ct. 1740 (2011).

<sup>172</sup> See *id.* at 1750, 1753.

<sup>173</sup> See Hibah Yousuf, *For-Profit Colleges Fighting Back Hard*, CNN (Apr. 21, 2011, 5:52 PM), [http://money.cnn.com/2011/04/21/markets/profit\\_education\\_eisman/index.htm](http://money.cnn.com/2011/04/21/markets/profit_education_eisman/index.htm) (stating that APSCU has expended over \$1 million to lobby against the regulations).

<sup>174</sup> See Apollo Group, Inc., Quarterly Report (Form 10-Q) 63 (June 30, 2011) (listing as its first risk factor, "Rulemaking by the U.S. Department of Education [that] could materially and adversely affect our business."); Corinthian Colls., Inc., Annual Report (Form 10-K) 70 (Aug. 24, 2011) (placing blame for litigation largely upon "negative publicity . . . surrounding the Department of Education's ('ED') rulemaking efforts, the Senate HELP Committee hearings, [and] the Government Accountability Office ('GAO') report.")).

<sup>175</sup> See, e.g., *Coalition for Educational Success Highlights Inconsistencies between President Obama's Executive Order and Proposed Gainful Employment Regulation*, COALITION FOR EDUC. SUCCESS (CES) (Jan. 24, 2011), <http://ed-success.org/press-release-coalition-for-educational-success-highlights-inconsistencies-between-president-obamas-executive-order-and-proposed-gainful-employment-regulation.php>.

<sup>176</sup> *About Us*, CES, <http://www.ed-success.org/about-us.php>.

<sup>177</sup> Complaint at 1, *Coal. for Educ. Success v. United States*, No. 1:11-cv-287 (D.D.C. Feb. 2, 2011).

<sup>178</sup> *Id.*

<sup>179</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING, *supra* note 13, at cover (2010), <http://www.gao.gov/new.items/d10948t.pdf> ("On November 30, 2010, GAO reissued this testimony to clarify and add more precise wording on pages 9 and 12 and to some of the examples cited in Table 1 on page 8 and Appendix I, pages 19-27.").

context information, and drew unsubstantiated, erroneous and unfair conclusions.”<sup>180</sup> Based on these premises, CES argued that GAO engaged in professional malpractice, which was actionable pursuant to the Federal Tort Claims Act.<sup>181</sup> Despite these pointed allegations, CES voluntarily dismissed its action against the United States on April 4, 2011.<sup>182</sup> After the dismissal, though, CES has continued to criticize the GAO for its report, lobbying for its retraction.<sup>183</sup>

Many observers have concluded that these types of lobbying and litigative efforts were successful in tempering the strength of the new regulations adopted by the Department of Education that applied to the for-profit educational industry.<sup>184</sup> Specifically, in October 2010<sup>185</sup> and June 2011,<sup>186</sup> the Department of Education promulgated regulations regarding the eligibility requirements for postsecondary schools to receive financial aid under Title IV of the HEA.<sup>187</sup> These regulations addressed some of the most problematic areas within the for-profit educational sector—student recruitment, student loan debt, and employment—which have been at the heart of many of the lawsuits asserted against these enterprises. The for-profit educational industry was not satisfied with the regulations,<sup>188</sup> and its main lobbying organization, APSCU, brought two lawsuits challenging them.

### 1. *Career College Association v. Duncan I*

On January 21, 2011, APSCU, formerly the Career College Association, filed its complaint against the Department of Education and Secretary Duncan, challenging the regulations adopted by the Department on October 29, 2010, regarding the eligibility requirements for institutions of higher education to receive Title IV funds.<sup>189</sup> Specifically, APSCU challenged the compensation regulations for individuals involved in student recruiting, admissions, or financial aid for institutions of higher education,<sup>190</sup> which removed all of the twelve safe harbor provisions that allowed schools the ability to compensate these individuals

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<sup>180</sup> Complaint at 2, *Coal. for Educ. Success*, No. 1:11-cv-287.

<sup>181</sup> See *id.* at 19.

<sup>182</sup> Notice of Voluntary Dismissal at 1, *Coal. for Educ. Success*, No. 1:11-cv-287 (D.D.C. Apr. 4, 2011).

<sup>183</sup> See, e.g., *Coalition Renews Call for GAO to Retract Fatally Flawed and Biased Report on Career Colleges*, CES (June 30, 2011), <http://www.ed-success.org/press-release-coalition-renews-call-for-gao-to-retract-report-on-career-colleges.php>.

<sup>184</sup> See, e.g., Chris Kirkham, *For-Profit College Regulations: Obama Administration Issues Rules*, HUFFINGTON POST (June 2, 2011, 12:01 AM), [http://www.huffingtonpost.com/2011/06/02/for-profit-college-regulations-obama-administration\\_n\\_870085.html](http://www.huffingtonpost.com/2011/06/02/for-profit-college-regulations-obama-administration_n_870085.html) (“The final rules issued by the Department of Education, however, are significantly less stringent than a draft version . . . The changes come after an unprecedented lobbying and campaign finance offensive over the past year by the for-profit college industry, which derives a vast majority of revenues from federal student loan and grant programs and has sought to protect that income by gaining influence in Washington.”).

<sup>185</sup> See Program Integrity Issues, 75 Fed. Reg. 66,832 (Oct. 29, 2010) (codified in scattered sections of 34 C.F.R.).

<sup>186</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

<sup>187</sup> See Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099E (2006).

<sup>188</sup> See, e.g., *Career Coll. Ass’n I* Complaint, *supra* note 24, at 2-3 (“Over the past year and a half—including the negotiated rulemaking sessions and the public comment period that preceded the final regulations—APSCU and its member schools have attempted to engage the Department to work toward regulations that serve Title IV program integrity goals in a lawful manner, without harming students and the law-abiding private sector schools that serve them. Instead of responding meaningfully to those efforts, the Department chose to proceed with a regulatory process that was rushed, unfair, and structured from the beginning to implement a desired result irrespective of the concerns of stakeholders and the public.”).

<sup>189</sup> See *id.* at 1-2.

<sup>190</sup> Compensation Regulations, 34 C.F.R. § 668.14 (2011).

based on certain student enrollments without sanctions.<sup>191</sup> It also challenged the misrepresentation regulations related to these processes,<sup>192</sup> which “strengthen[ed] the Department’s authority to take action against institutions engaging in deceptive advertising, marketing, and sales practices.”<sup>193</sup> Finally, it challenged the State authorization regulations that dealt with the state prerequisites for Title IV participation<sup>194</sup> and that outlined the minimum requirements for state approval and monitoring of postsecondary programs.<sup>195</sup> Further, under this regulation, any school that provided distance education services would be required to obtain state authorization in the state of the school’s location and the states of residence of all of its distance students.<sup>196</sup> Each of these regulations was designated to become effective on July 1, 2011.<sup>197</sup>

In its complaint, APSCU integrated many of its marketing strategies, like branding its member organizations as “private sector colleges and universities,”<sup>198</sup> rather than for-profit colleges and universities. Further, it emphasized that its members “educate both traditional and nontraditional students—such as working adults and single parents—who are underserved by conventional public and non-profit schools.”<sup>199</sup> APSCU further asserted that the basis of its lawsuit was “to prevent these unlawful regulations from harming students and the schools that serve them.”<sup>200</sup> Finally, it referenced President Obama’s 2020 goal of having the world’s highest percentage of college graduates,<sup>201</sup> claiming that “[w]ithout private sector schools—which are increasing their capacity at higher rates than their public sector counterparts—to help meet rising demand, it would be exceedingly difficult, and perhaps impossible, to meet that goal.”<sup>202</sup> Each of these points undergirded APSCU’s claims for relief.

Specifically, APSCU asserted that the misrepresentation regulations violated its members’ due process and First Amendment rights.<sup>203</sup> Next, it claimed that all of the regulations exceeded the Department of Education’s statutory authority under the HEA.<sup>204</sup> Further, APSCU asserted that the defendants violated the procedural requirements of the Administrative Procedure Act (APA) in promulgating the regulations.<sup>205</sup> Finally, the plaintiff asserted that the regulations were arbitrary, capricious, and violative of the APA.<sup>206</sup> Consequently, APSCU

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<sup>191</sup> See *Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers*, U.S. DEP’T OF EDUC. (Oct. 28, 2010), <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax> (describing the effect of the compensation regulations).

<sup>192</sup> Misrepresentation Regulations, 34 C.F.R. § 668 (2011).

<sup>193</sup> *Department of Education Establishes New Student Aid Rules*, *supra* note 191.

<sup>194</sup> State Authorization Regulations, 34 C.F.R. § 600.9 (2011).

<sup>195</sup> See *Department of Education Establishes New Student Aid Rules*, *supra* note 191 (describing the State authorization regulations).

<sup>196</sup> See 34 C.F.R. § 600.9(c).

<sup>197</sup> See Program Integrity Issues, 75 Fed. Reg. 66,832, 66,832 (Oct. 29, 2010) (codified in scattered sections of 34 C.F.R.).

<sup>198</sup> See, e.g., *Career Coll. Ass’n I Complaint*, *supra* note 24, at 2.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* at 11.

<sup>202</sup> *Id.*

<sup>203</sup> See *id.* at 35.

<sup>204</sup> See *id.* at 35-36.

<sup>205</sup> See *id.* at 36-37 (claiming that the defendants did not adhere to the Administrative Procedure Act, 5 U.S.C. § 553(c) (2006)).

<sup>206</sup> See *id.* at 37.

requested declaratory relief; an injunction against the implementation of the regulations; and a vacation of the regulations.<sup>207</sup>

On a court-ordered expedited briefing schedule,<sup>208</sup> the parties filed cross-motions for summary judgment.<sup>209</sup> Thereafter, on July 12, 2011, the United States District Court for the District of Columbia issued its order granting in part and denying in part the parties' motions.<sup>210</sup> Utilizing the *Chevron* analysis with its deference to administrative agency action,<sup>211</sup> the court granted the defendants' motion for summary judgment (and denied the plaintiff's cross-motion for summary judgment) with respect to the challenges to the compensation regulations and the misrepresentation regulations.<sup>212</sup> It granted the plaintiff's motion for summary judgment (and denied the defendants' cross-motion for summary judgment) with respect to the "one aspect of the new regulations that would require distance educators to obtain authorization from every State in which they have students, [as] the Secretary gave no prior notice and its adoption in the final regulations violated the APA."<sup>213</sup> Consequently, the court vacated this specific state authorization regulation.<sup>214</sup> Finally, the court denied APSCU's motion for injunctive relief pending appeal, as it found "that there is too little likelihood of success and too much harm to the public good to issue such an injunction, even if the harm to APSCU's members could be said to be great."<sup>215</sup>

At the outset of its decision, the court denied the defendant's claim that APSCU lacked standing to bring the action, because "without any enforcement record, [the claims were] not ripe."<sup>216</sup> The court found that the publication of the final regulations required APSCU members to transform their marketing, recruiting, compensation, misrepresentation oversight, and state authorization programs.<sup>217</sup> Consequently, the court proceeded to address the "high hurdle" of a facial challenge to the regulations.<sup>218</sup>

With respect to the compensation regulations, the court discarded APSCU's challenge that these regulations "violate the HEA by regulating salaries and merit-based increases to salaries."<sup>219</sup> The court was not swayed by APSCU's attempts to parse the meaning within the HEA of bonus, commission, or incentive payments, stating that "[t]he Department contends that nothing in the prior regulations 'prevent[ed] education institutions from making commission-and-bonus-like payments and calling them salaries or salary adjustments.' It is this sleight-of-hand that its new definitions are meant to prevent."<sup>220</sup> Although the court sympathized with some

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<sup>207</sup> See *id.* at 39.

<sup>208</sup> See Docket Report Minute Order, *Career Coll. Ass'n v. Duncan*, No. 1:11-cv-138 (D.D.C. Feb. 4, 2011).

<sup>209</sup> See Motion for Summary Judgment, *Career Coll. Ass'n I*, No. 1:11-cv-138 (D.D.C. Feb. 25, 2011); Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Summary Judgment, *Career Coll. Ass'n I*, No. 1:11-cv-138 (D.D.C. Mar. 18, 2011).

<sup>210</sup> See *Career Coll. Ass'n I*, No. 1:11-cv-138, 2011 WL 2690406, at \*1 (D.D.C. July 12, 2011).

<sup>211</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

<sup>212</sup> See *Career Coll. Ass'n I*, 2011 WL 2690406, at \*1.

<sup>213</sup> *Id.*

<sup>214</sup> See *id.* at \*21 (vacating 34 C.F.R. § 600.9(c)).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at \*7.

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> *Id.* (citing 34 C.F.R. § 668.14(b)(22)(ii)(A)).

<sup>220</sup> *Id.* at \*8 (internal citations omitted).

of the logistics of the payment structure of student recruiters, this sympathy did not vacate the regulations.<sup>221</sup>

The court similarly rejected APSCU's claims that the elimination of the safe harbors constituted arbitrary and capricious action under the APA, finding that the Department provided a reasoned explanation for its action.<sup>222</sup> Further, the court dismissed APSCU's challenges to the regulations that prohibited the student enrollment or financial aid-based incentive payments to senior management,<sup>223</sup> finding that the "approach [was not] contrary to the statute or arbitrary and capricious."<sup>224</sup>

Like its treatment of the compensation regulation challenges, the court also denied APSCU's "attacks [on] the newly implemented misrepresentation regulations which purport to carry out HEA's command that schools not engage in a 'substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates'"<sup>225</sup> as the "Secretary may fine or suspend/terminate a school's participation in Title IV program funding for any substantial misrepresentation."<sup>226</sup> The court determined that these new regulations provided the HEA-required "notice and opportunity to be heard prior to suspending or terminating a school's eligibility status for Title IV funding or prior to imposing a fine."<sup>227</sup> Further, the court upheld the regulation's definitions of a substantial misrepresentation as a "false, erroneous or misleading statement,"<sup>228</sup> with the latter term meaning "any statement that has the likelihood or tendency to deceive or confuse."<sup>229</sup> It found "that the Secretary did not act in a manner that was arbitrary and capricious or *ultra vires* in his definition of substantial misrepresentation within the context of the HEA."<sup>230</sup>

With respect to the First Amendment challenges to the misrepresentation regulations, the court also denied APSCU's motion for summary judgment. The court determined that the portions of these regulations that "target 'false, erroneous or misleading' statements . . . squarely fall within the ambit of commercial speech not protected by the First Amendment."<sup>231</sup> Further, the court deemed APSCU's argument that the definition of misleading statements as "any statement that has the likelihood or tendency to deceive or confuse"<sup>232</sup> was violative of the First Amendment "premature because Plaintiff's complaint presents a facial, not an as applied, challenge."<sup>233</sup> Finally, the court dismissed APSCU's claim that the regulations were impermissible "content-based bans directed only at schools,"<sup>234</sup> as commercial speech may be constitutionally regulated for its content.<sup>235</sup> In sum, the court determined "that the discussion of

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<sup>221</sup> See *id.* at \*9.

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* at \*10-11 (citing 34 C.F.R. § 668.14(b)(22)(iii)(C)(2)).

<sup>224</sup> See *id.* at \*11.

<sup>225</sup> *Id.* at \*11 (citing 20 U.S.C. § 1094(c)(3)(A)).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at \*13.

<sup>228</sup> *Id.* at \*14-15 (citing 34 C.F.R. § 668.71(c)).

<sup>229</sup> *Id.* (citing 34 C.F.R. § 668.71(c)).

<sup>230</sup> *Id.* at \*15.

<sup>231</sup> *Id.* at \*17 (citing 34 C.F.R. § 668.71(c)).

<sup>232</sup> 34 C.F.R. § 668.71(c).

<sup>233</sup> *Career Coll. Ass'n I*, 2011 WL 2690406, at \*17.

<sup>234</sup> *Id.* at \*18.

<sup>235</sup> See *id.*

public issues by a school participating in HEA funding will not extend full constitutional protections to a commercial statement fundamentally concerned with the nature of its educational program, its financial charges, or the employability of its graduates.”<sup>236</sup>

Although the court found in the defendants’ favor on the compensation and misrepresentation regulations, it did provide a measure of relief for APSCU on the challenged state authorization regulations that “require those schools providing distance or online education programs to obtain authorization from the State(s) in which they are physically located as well as those State(s) in which their students are located if such latter State(s) require approval.”<sup>237</sup> Here, the court granted APSCU’s motion for summary judgment as it found “that the Department failed to provide notice and opportunity for comment on [this subsection of] the State authorization regulations, as this subsection, or any variation thereof, was not included in the notice of proposed rulemaking.”<sup>238</sup> The court noted that the Department failed to expressly ask for comments on these authorization obligations or to clearly indicate its contemplation of the change,<sup>239</sup> thus failing to meet the APA’s notice requirement.<sup>240</sup> Therefore, the court vacated this portion of the state authorization regulation.<sup>241</sup>

After the district court’s decision, APSCU declared that the resolution of the State authorization regulation challenge in its favor was “a major victory for innovation in higher education and an important answer to the Department’s obvious over-reach in this area.”<sup>242</sup> In discussing the court’s rulings on the compensation and misrepresentation regulations, APSCU claimed that the “order leaves in place regulations that are harming the students served by APSCU’s members and that are causing changes in the ways that schools can reward outstanding job performance and inform students about their programs.”<sup>243</sup> Subsequently, APSCU filed its notice of appeal of the trial court’s decision with the United States Court of Appeals for the District of Columbia on July 20, 2011.<sup>244</sup> Thereafter, Duncan and the Department of Education filed their notice of appeal of the decision on September 12, 2011.<sup>245</sup> On September 19, 2011, the court, on its own motion, consolidated the cross-appeals.<sup>246</sup>

## 2. *Career College Association v. Duncan II*

On July 20, 2011, just eight days after the district court’s ruling on the cross-motions for summary judgment in the first *Career College Ass’n v. Duncan* case<sup>247</sup> and five days after filing

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at \*19 (citing C.F.R. § 600.9(c)).

<sup>238</sup> *Id.*

<sup>239</sup> *See id.* at \*20.

<sup>240</sup> *See id.* at \*21.

<sup>241</sup> *See id.* (vacating 34 C.F.R. § 600.9(c)).

<sup>242</sup> *Association of Private Sector Colleges and Universities Cheers Court Ruling on State Authorization; Vows to Continue Fighting to Put Students First*, APSCU (July 12, 2011), [http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press\\_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23995](http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23995).

<sup>243</sup> *Id.*

<sup>244</sup> *See* Notice of Appeal at 1, *Ass’n of Private Sector Colls. & Univs. v. Duncan*, No. 11-5174 (D.C. Cir. July 20, 2011).

<sup>245</sup> *See* Notice of Appeal at 1, *Ass’n of Private Sector Colls. & Univs. v. Duncan*, No. 11-5230 (D.C. Cir. Sept. 12, 2011).

<sup>246</sup> *See* Clerk’s Order at 1, *Ass’n of Private Sector Colls. & Univs.*, No. 11-5174 (D.C. Cir. Sept. 19, 2011).

<sup>247</sup> *See* *Career Coll. Ass’n v. Duncan*, No. 1:11-cv-0138, 2011 WL 2690406 (D.D.C. July 12, 2011).

its notice of appeal of that decision,<sup>248</sup> APSCU filed another complaint against Secretary Duncan and the Department of Education.<sup>249</sup> In this complaint, APSCU focused its challenge on the “sweeping regulatory regime given full force and effect through the . . . Gainful Employment regulations,”<sup>250</sup> which were adopted on June 13, 2011.<sup>251</sup> The gainful employment regulations, which are scheduled to become effective on July 1, 2012,<sup>252</sup> were implemented to provide clarification to the HEA’s allowance “for the extension of financial aid to students attending postsecondary programs that ‘lead to gainful employment in a recognized occupation.’”<sup>253</sup> The Department characterized these regulations as providing that “a program would be considered to lead to gainful employment if it meets at least one of the following three metrics: at least 35 percent of former students are repaying their loans (defined as reducing the loan balance by at least \$1); the estimated annual loan payment of a typical graduate does not exceed 30 percent of his or her discretionary income; or the estimated annual loan payment of a typical graduate does not exceed 12 percent of his or her total earnings.”<sup>254</sup> In its complaint, APSCU alleged that the gainful employment,<sup>255</sup> program approval,<sup>256</sup> and reporting and disclosure regulations<sup>257</sup> “are contrary to Title IV of the [HEA] . . . ; arbitrary and capricious and otherwise in violation of the APA; and, in certain respects, unconstitutional.”<sup>258</sup> Consequently, the plaintiff requested declaratory and injunctive relief, as well as the vacation of these regulations.<sup>259</sup>

Specifically, APSCU claimed that the gainful employment regulations violated its members’ First Amendment<sup>260</sup> and due process rights;<sup>261</sup> were not authorized under the HEA, and exceeded the Department’s statutory authority;<sup>262</sup> and were arbitrary, capricious, and promulgated without sufficient notice or an adequate comment period, thereby violating the APA.<sup>263</sup> It also asserted that the program approval and reporting and disclosure regulations conflicted with the HEA and were beyond the bounds of the Department’s statutory authority;<sup>264</sup> that they were arbitrary, capricious, and violative of the APA,<sup>265</sup> and that the Department failed

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<sup>248</sup> See Notice of Appeal at 1, *Ass’n of Private Sector Colls. & Univs.*, No. 11-5174 (D.C. Cir. July 20, 2011).

<sup>249</sup> See *Career Coll. Ass’n II* Complaint, *supra* note 24, at 1.

<sup>250</sup> *Id.* at 2.

<sup>251</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

<sup>252</sup> See *id.*

<sup>253</sup> *Id.* at 34,386. See also Higher Education Act of 1965, 20 U.S.C. § 1002(c)(1)(A) (discussing the provision of federal student assistance programs for a “postsecondary vocational institution” [which] means a school that—provides an eligible program of training to prepare students for gainful employment in a recognized occupation”).

<sup>254</sup> See *Obama Administration Announces New Steps*, *supra* note 18.

<sup>255</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,386.

<sup>256</sup> See Program Integrity: Gainful Employment-New Programs Rules, 34 C.F.R. §§ 600.10, 600.20 (2011).

<sup>257</sup> See Reporting and Disclosure Requirements for Programs that Prepare Students for Gainful Employment in a Recognized Occupation Rule, 34 C.F.R. § 668.6 (2011).

<sup>258</sup> *Career Coll. Ass’n II* Complaint, *supra* note 24, at 2.

<sup>259</sup> See *id.* at 54.

<sup>260</sup> See *id.* at 47.

<sup>261</sup> See *id.* at 48.

<sup>262</sup> See *id.*

<sup>263</sup> See *id.* at 49-50.

<sup>264</sup> See *id.* at 50, 52-53.

<sup>265</sup> See *id.* at 51, 53-54.

to provide adequate notice and opportunity for comment on the program approval regulations.<sup>266</sup> The case remains pending.<sup>267</sup>

Interestingly, while this case progressed, on September 27, 2011, the Department of Education issued a notice of proposed rulemaking that would ease the approval of new programs that are subject to the gainful employment regulations.<sup>268</sup> In its proposal, the Department offered regulations that would “[l]imit the new gainful employment programs for which an institution must apply to the Department to those programs that are (1) the same as, or substantially similar to, failing programs that the institution voluntarily discontinued or programs that became ineligible under the debt measures for gainful employment programs, and (2) programs that are substantially similar to failing programs.”<sup>269</sup> Characterized as a “narrowing” of the rules,<sup>270</sup> this “considerably less stringent” rule was met with generally positive feedback by for-profit educational institutions.<sup>271</sup>

However, this rare agreement with regulatory action does not indicate that the for-profit educational industry’s offensive measures to stop increased regulation have ended. Given that the *Career College Ass’n v. Duncan* actions are not the first lawsuits brought by APSCU fighting government regulations,<sup>272</sup> it is likely that the for-profit educational institution association, as well as its member institutions, will continue to vigorously challenge the provisions on recruiter compensation, misrepresentation, and gainful employment.<sup>273</sup> Further, other associations that represent for-profit colleges and universities will likely continue to challenge these regulations in courtrooms and in the public eye.<sup>274</sup> While continued judicial examination and public scrutiny of these regulatory and investigative actions will be important steps towards remedying the problems within most for-profit colleges and universities, much more needs to be done in order to effectively regulate the for-profit educational industry.

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<sup>266</sup> See *id.* at 52.

<sup>267</sup> See Docket Report, *Career Coll. Ass’n II*, No. 1:11-cv-1314 (D.D.C.).

<sup>268</sup> See Application and Approval Process for New Programs, 76 Fed. Reg. 59,864, 59,866 (proposed Sept. 27, 2011) (to be codified at 34 C.F.R. § 600) (“Compared to the current regulations for new programs, this performance-based approach would decrease the burden for institutions and the Department by eliminating the notice and approval process for many new gainful employment programs.”).

<sup>269</sup> *Id.* at 59,865.

<sup>270</sup> See *Education Dept. Proposes Narrowing Parts of “Gainful Employment” Regulation*, CHRON. HIGHER EDUC. (Sept. 27, 2011, 12:25 PM), <http://chronicle.com/blogs/ticker/education-dept-proposes-narrowing-parts-of-gainful-employment-regulation/36726>.

<sup>271</sup> Libby A. Nelson, *Another Change to “Gainful Employment” Regs*, INSIDE HIGHER ED (Sept. 28, 2011), [http://www.insidehighered.com/news/2011/09/28/another\\_gainful\\_employment\\_rule\\_rolled\\_back](http://www.insidehighered.com/news/2011/09/28/another_gainful_employment_rule_rolled_back).

<sup>272</sup> See, e.g., *Career Coll. Ass’n v. Riley*, 74 F.3d 1265, 1276 (D.C. Cir. 1996) (affirming the district court’s summary judgment in favor of Department of Education Secretary Richard Riley on five claims brought by CCA that challenged multiple regulations implemented pursuant to the HEA); *Career Coll. Ass’n v. U.S. Dep’t. of Educ.*, No. 92-1345, 1992 WL 233837, at \*6 (D.D.C. Aug. 31, 1992) (granting in part and denying in part CCA’s motion for summary judgment that challenged regulations regarding student loan default rates).

<sup>273</sup> See, e.g., *Association of Private Sector Colleges and Universities Cheers Court Ruling on State Authorization*, *supra* note 242 (“APSCU and its members are fully committed to serving their educational missions and training a skilled and educated workforce and will take the appropriate steps to help ensure that the challenged regulations do not impede those efforts.”).

<sup>274</sup> See Doug Lederman, *For-Profit Colleges Open Another Front*, INSIDE HIGHER ED (Jan. 24, 2011), [http://www.insidehighered.com/news/2011/01/24/for\\_profit\\_college\\_group\\_sues\\_education\\_department\\_over\\_new\\_rules](http://www.insidehighered.com/news/2011/01/24/for_profit_college_group_sues_education_department_over_new_rules) (discussing the industry’s “vows to take legal actions” to fight Department of Education regulations and use of “expensive and highly visible marketing campaigns aimed at undercutting the government’s strategy with politicians and the public.”).

V. NECESSARY MEASURES TO REFORM THE FOR-PROFIT EDUCATIONAL INDUSTRY

Given the partisan political environment,<sup>275</sup> advocacy for stronger regulation of for-profit higher education can be polarizing,<sup>276</sup> especially when for-profit educational associations equate increased regulation with “job-killing.”<sup>277</sup> The for-profit educational industry has capitalized on this rhetoric, lobbying and litigating to reduce the extent of control that government can exert over its practices.<sup>278</sup> Although these institutions may claim that they have the ability to govern themselves,<sup>279</sup> and that this is the proper alternative to governmental regulation,<sup>280</sup> the extent of recent litigation involving these entities demonstrates that increased external regulation is a necessity to protect the interests of the students, applicants, and employees of these schools, as well as the taxpayers who provide the funding for Title IV assistance. Simply, the current, realized state of the for-profit educational industry demonstrates that, without increased regulatory controls, higher education and higher profits cannot coexist.

This part of the Article provides measures that will allow the for-profit educational sector to thrive and to meet the needs of all of its stakeholders. It examines the policy windows that may exist for the implementation of more effective federal regulations in the future. Further, it addresses the need for continued efforts to reform the for-profit educational industry at the state level, through the actions of accreditation organizations, and via internal regulation by the industry and its institutions. The improvement of regulation at each of these levels of governance will allow for increased profits and increased learning opportunities, as well as the protection of students, taxpayers, and legitimate for-profit institutions from further harm.

A. *Federal Regulation and Oversight*

In an era of continued deregulation<sup>281</sup> and increasing agency capture,<sup>282</sup> advocates for reform of the regulatory environment of the for-profit educational industry face considerable

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<sup>275</sup> See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 275 (2011).

<sup>276</sup> See RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* 13 (2007) (“[E]xtreme partisanship has produced a toxic environment that empowers the most adversarial and shrill voices in each party and disenfranchises the millions of Americans more attracted to pragmatic compromise than to ideological crusades.”).

<sup>277</sup> See, e.g., *Coalition for Educational Success Calls for Job Creation Through Workforce Training and an End to Job-Killing Regulations*, CES (Sept. 2, 2011), <http://www.ed-success.org/press-release-coalition-calls-for-job-creation-through-workforce-training.php>.

<sup>278</sup> See Bennett Roth, *For-Profit Colleges Field Team of Top Lobbyists*, ROLL CALL (May 2, 2011), [http://www.rollcall.com/issues/56\\_114/-205206-1.html](http://www.rollcall.com/issues/56_114/-205206-1.html).

<sup>279</sup> See A. Ananthakshmi, *For-Profit Colleges Adopt New Self-Regulation Standards*, REUTERS (Sept. 13, 2011, 9:16 AM), <http://www.reuters.com/article/2011/09/13/us-education-selfregulation-idUSTRE78C3F020110913> (framing the adoption of self-regulatory standards by about 17% of the for-profit educational industry as “an effort by the [industry] to redeem itself”).

<sup>280</sup> See Goldie Blumenstyk, *At Closed-Door Summit, For-Profit Colleges Discuss How to Make the Sector More Accountable*, CHRON. HIGHER EDUC. (Feb. 10, 2011) <http://chronicle.com/article/At-Closed-Door-Summit/126331/>.

<sup>281</sup> See PHILLIP J. COOPER, *THE WAR AGAINST REGULATION: FROM JIMMY CARTER TO GEORGE W. BUSH* 3-4 (2009) (outlining the attacks on regulation over the last thirty years).

<sup>282</sup> See Michael D. Sant’Ambrogio, *Agency Delays: How A Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1393-94 (2011) (defining “agency capture”).

opposition.<sup>283</sup> In addition to encountering pushback from the industry, critics of for-profit schools have been disillusioned with the acquiescence of the Department of Education to the industry's lobbying efforts through campaign donations to influential Congress members.<sup>284</sup> Specifically, many organizations view the final gainful employment regulations, especially when compared with the more demanding, proposed regulations,<sup>285</sup> as a tepid attempt to truly cure the substantial problems within this sector.<sup>286</sup> This section of Part Five will analyze the 2010 and 2011 Department of Education regulations regarding student recruitment, misrepresentation, student loan debts, and future employment opportunities in the for-profit educational industry. It will highlight the differences between the proposed gainful employment rules and the implemented regulations. This section will then shift to a discussion of the additional, federal regulatory controls that are still needed to effectively regulate for-profit schools.

### 1. 2010 and 2011 Department of Education Regulations

The recruiter compensation regulations, which became effective in July 2011, constitute a moderate improvement in reforming the for-profit educational industry.<sup>287</sup> Specifically, one area in which the Department has been successful in improving the regulatory environment of for-profit schools is the elimination of the twelve safe harbor provisions that had given for-profit institutions cover in compensating recruiters and financial aid employees in ways that were not supportive of student interests.<sup>288</sup> However, this elimination of these broad safe harbors does not advance a new structure of regulation; rather, it eliminates an ineffective set of rules created in 2002 and returns the for-profit educational recruiting regulations to a pre-safe harbor environment.<sup>289</sup> So, essentially, for these regulations, a seeming step forward is simply a return to past practices.

Indeed, this issue of incentivizing recruitment has been a reoccurring problem for for-profit institutions throughout the last thirty years.<sup>290</sup> The real concern, then, is that for-profit

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<sup>283</sup> See, e.g., Erica Perez, *This Bird Has Fangs: For-Profit Colleges Counter-Attack on Twitter*, CAL. WATCH (Jan. 19, 2010), <http://californiawatch.org/dailyreport/bird-has-fangs-profit-colleges-counter-attack-twitter-869> (describing CCA's tweets and blogs as the equivalent "of a Web 2.0 attack against the media" that has reported critically on for-profit educational institutions).

<sup>284</sup> See Sharona Coutts, *For-Profit Schools Donate to Lawmakers Opposing New Financial Aid Rules*, PROPUBLICA (Sept. 17, 2010), <http://www.propublica.org/article/for-profit-schools-donate-to-lawmakers-opposing-new-financial-aid-rules>.

<sup>285</sup> See, e.g., Stephen Burd, *The Gainful Employment Rule's Potentially Fatal Flaw*, HIGHER ED WATCH (June 3, 2011), [http://higheredwatch.newamerica.net/blogposts/2011/the\\_gainful\\_employment\\_rules\\_potentially\\_fatal\\_flaw-52382](http://higheredwatch.newamerica.net/blogposts/2011/the_gainful_employment_rules_potentially_fatal_flaw-52382) (describing the differences between the more stringent proposed rules and the final regulations).

<sup>286</sup> See, e.g., Pauline Abernathy, Statement on Final Gainful Employment Rule (June 2, 2011), available at [http://ticas.org/files/pub/TICAS\\_\\_GE\\_final\\_\\_Reg\\_STA.pdf](http://ticas.org/files/pub/TICAS__GE_final__Reg_STA.pdf) ("While the final rule is a step in the right direction, it is substantially weaker than the draft rule and it will take longer to protect student and taxpayers for the worst of the worst programs.").

<sup>287</sup> See Recruiter Compensation Regulations, 34 C.F.R. § 668.14 (2010).

<sup>288</sup> See *Hearing on Marketing and Recruitment in For-Profit Education Before the S. Comm. on HELP* (Aug. 4, 2010) (statement of David Hawkins, Director of Public Policy and Research, National Association for College Admission Counseling), available at <http://help.senate.gov/imo/media/doc/Hawkins1.pdf> ("[R]educing the basis for compensation to the number of students enrolled in any circumstance introduces an incentive for recruiters to ignore the student interest in the transition to postsecondary education.").

<sup>289</sup> See *supra* text accompanying notes 190-91.

<sup>290</sup> See Stephen Burd, *The Subprime Student Loan Racket*, WASH. MONTHLY (Nov./Dec. 2009), <http://www.washingtonmonthly.com/features/2009/0911.burd.html> ("In the 1980s and early '90s, it came to light

colleges and universities might attempt to adapt to these regulations by compensating recruiters and marketers in “creative” ways for their efforts. Although an incentive-based approach is the norm for many sales positions in private industry,<sup>291</sup> this type of compensation in the area of higher education can lead to an inequitable balance between enrollees and graduates.<sup>292</sup> Aggressive enrollment strategies can also lead for-profit “schools to devote very large shares of Title IV dollars and other Federal financial aid to marketing activities, not education.”<sup>293</sup> Consequently, the recent recruiter compensation regulations promulgated by the Department of Education are an important measure to help to eliminate abuses within the student recruiting practices of for-profit colleges and universities. However, it will be incumbent upon the Department to continue to pursue an active agenda of enforcement of these regulations for the maintenance of Title IV loan eligibility.

Unlike the recruiter compensation regulations, the misrepresentation regulations, which became effective in July 2011, constitute a significant improvement in the efforts to curb misrepresentations related to programming, financial charges, and graduate employment prospects in the for-profit educational industry.<sup>294</sup> Specifically, these rules clarify the meaning of a “substantial misrepresentation”<sup>295</sup> and expand the scope of institutional accountability for these types of misrepresentations to include institutional actors or third parties acting on behalf of the institution.<sup>296</sup> These regulations also enhance the Department’s “enforcement authority against institutions that engage in substantial misrepresentation,”<sup>297</sup> granting the Secretary of Education the power to revoke program participation agreements; impose conditions on Title IV funding; deny participation applications; or initiate other administrative proceedings.<sup>298</sup>

Of course, while these final misrepresentation rules are an improvement to the regulatory structure of for-profit colleges and universities, they could have been even stronger.<sup>299</sup> Given that

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that hundreds of fly-by-night schools had been set up solely to reap profits from the federal student loan programs, in part by preying on poor people and minorities. The most unscrupulous of them enrolled people straight off the welfare lines, and got them to sign up for the maximum amount of federal student loans available.”)

<sup>291</sup> See, e.g., Samuel J. Samaro, *The Case for Fiduciary Duty as a Restraint on Employer Opportunism under Sales Commission Agreements*, 8 U. PA. J. LAB. & EMP. L. 441, 442 (2006) (discussing how the vast majority of employees in the sales industry “are compensated on an incentive basis”).

<sup>292</sup> See Taylor, *supra* note 43, at 737-38 (stating that the recruiter compensation structure at the University of Phoenix led to “[u]nqualified students and those facing unfavorable family or financial circumstances [being] pressured to enroll . . . and recruiters [being] encouraged to cease providing support to these students once their enrollment was credited for salary purposes”).

<sup>293</sup> S. COMM. ON HELP, REP. ON EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION (June 24, 2010), *available at* <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>.

<sup>294</sup> See Misrepresentation Regulations, 34 C.F.R. § 668.71 (2010).

<sup>295</sup> See 34 C.F.R. § 668.71(c) (defining “substantial misrepresentation” as “[a]ny 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”).

<sup>296</sup> See 34 C.F.R. § 668.71(b) (“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 regarding the eligible institution, including about the nature of its educational program, its financial charges, or the employability of its graduates.”).

<sup>297</sup> Program Integrity Issues, 75 Fed. Reg. 66,832-01, 66,914 (Oct. 29, 2010) (codified in scattered sections of 34 C.F.R.).

<sup>298</sup> See 34 C.F.R. § 668.71(a) (2010).

<sup>299</sup> See Letter from Eduardo M. Ochoa, Assistant Secretary of the United States Department of Education Office of Postsecondary Education to Colleague, GEN-11-05, at 15 (Mar. 17, 2011), *available at*

there is still a potential for future workarounds of these regulations by some institutions or affiliated organizations within the for-profit educational industry, this is another area that will continue to be an important one for vigilant monitoring and enforcement by the Department of Education.

The final gainful employment regulations, which will become effective on July 1, 2012,<sup>300</sup> faced considerable opposition and were only “adopted after the most extensive public input in the Department [of Education]’s history, including three rounds of public hearings and discussions, over 90,000 written comments, and nearly 100 additional meetings with interested parties.”<sup>301</sup> As a result of this extensive feedback, the gainful employment rules are the weakest of the recent regulations promulgated by the federal government regarding the for-profit educational industry.<sup>302</sup> Although the intent of these regulations, which is to protect against for-profit “programs that leave large numbers of students with unaffordable debts and poor employment prospects,”<sup>303</sup> is a valiant one, the final rules, when compared to the proposed rules, demonstrate acquiescence by the Department to congressional and industrial pressure.<sup>304</sup>

Under the draft gainful employment regulations, the Department proposed a three-tiered approach “that would establish upper and lower thresholds for the debt measures,”<sup>305</sup> as well as a warning zone for institutions that fell between these thresholds.<sup>306</sup> Under this original proposal, a program would be entitled to full eligibility for federal financial aid if it maintained at least a forty-five percent debt repayment rate among all former students or if its graduates had a debt to total income earnings ratio of eight percent or less or a debt to discretionary income earnings ratio of twenty percent or less.<sup>307</sup> Those programs that failed to meet at least one of the following thresholds would lose eligibility to Title IV funds: maintenance of less than a thirty-five percent debt repayment rate among all former students or a debt to total income earnings ratio for its graduates over twelve percent or a debt to discretionary income earnings ratio over thirty percent.<sup>308</sup> All programs that fell between these thresholds would have restricted eligibility.<sup>309</sup> This restricted eligibility would require the institution “to provide debt warning disclosures to current and prospective students that they may have difficulty repaying loans obtained for attending the program,”<sup>310</sup> and it would place enrollment limits on that institution’s Title IV program.<sup>311</sup> The proposed gainful employment regulations “provide[d] that a program [would]

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<http://ifap.ed.gov/dpcletters/attachments/GEN1105.pdf> (discussing the limited nature of the July 2011 misrepresentation regulations).

<sup>300</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,386.

<sup>301</sup> *Obama Administration Announces New Steps*, supra note 18.

<sup>302</sup> See, e.g., Daniel Luzer, *Department of Education Issues Rules for For-Profit Colleges*, WASH. MONTHLY (June 2, 2011, 2:39 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/department\\_of\\_education\\_issues.php](http://www.washingtonmonthly.com/college_guide/blog/department_of_education_issues.php) (describing the gainful employment regulations as “pretty lenient on for-profit schools”).

<sup>303</sup> Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,386.

<sup>304</sup> See H.R. 1, 112th Cong. (2011) (barring the Department of Education from using federal funds to implement or enforce the gainful employment regulations); Kelly Field, *For-Profit Colleges Win Major Concessions in Final ‘Gainful Employment’ Rule*, CHRON. HIGHER EDUC. (June 2, 2011), <http://chronicle.com/article/For-Profit-Colleges-Win-Major/127744/> (providing that “[f]or-profit colleges, which have spent millions fighting the Education Department’s proposed ‘gainful employment’ regulations, have won some major concessions in the final rule”).

<sup>305</sup> Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,395.

<sup>306</sup> See *id.* at 34,388.

<sup>307</sup> See *id.* at 34,389.

<sup>308</sup> See *id.* at 34,400.

<sup>309</sup> See *id.* at 34,388.

<sup>310</sup> *Id.*

<sup>311</sup> See *id.*

become ineligible if it [did] not meet at least one of the debt thresholds for one award year.”<sup>312</sup> Finally, the proposed rules were to take effect upon the implementation date of July 1, 2012.<sup>313</sup>

The final gainful employment regulations provided significantly more leeway to for-profit educational institutions with respect to threshold measures, timelines for eligibility evaluation, and the implementation date. The rules eliminated all threshold limitations, except for the formally minimal threshold measures.<sup>314</sup> Essentially, “a program is now considered to lead to gainful employment if it has a repayment rate of at least thirty-five percent or its annual loan payment under the debt-to-earnings ratio is twelve percent or less of annual earnings or thirty percent or less of discretionary income.”<sup>315</sup> Further, the final rules “permit[] an institution to maintain a program’s [T]itle IV, HEA program eligibility until the program fails both the debt-to-earnings ratios and repayment rate measures for *three of out of four [fiscal years]*, similar to the multi-year measures used to assess cohort default rates (CDRs) at an institution.”<sup>316</sup> Rather than implementing an immediate effective date, the final rules also “give all programs *three years to improve* their performance.”<sup>317</sup>

In commenting on these final rules, Secretary Duncan stated, “‘We’re asking companies that get up to 90 percent of their profits from taxpayer dollars to be at least 35 percent effective . . . This is a perfectly reasonable bar and one that every for-profit program should be able to reach. We’re also giving poor performing for-profit programs every chance to improve. But if you get three strikes in four years, you’re out.’”<sup>318</sup> What is disheartening about this measure is that while being thirty-five percent effective may be excellent for a hitter in the major leagues,<sup>319</sup> a thirty-five percent effectiveness rating in nearly every other sports or professional field is an incredibly deficient performance.<sup>320</sup> The Department of Education, itself, has advanced more than a thirty-five percent effectiveness rating in other collegiate contexts.<sup>321</sup> Consequently, the

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<sup>312</sup> *Id.*

<sup>313</sup> See Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,639 (proposed July 26, 2010).

<sup>314</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. at 34,389 (discussing the revisions to the threshold limits).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* (emphasis in original).

<sup>317</sup> *Id.* (emphasis in original).

<sup>318</sup> *Obama Administration Announces New Steps*, *supra* note 18.

<sup>319</sup> Only three major league baseball players have had lifetime batting averages of over .350: Ty Cobb, Rogers Hornsby, and “Shoeless” Joe Jackson. *MLB Career Batting Leaders*, ESPN MLB, <http://espn.go.com/mlb/history/leaders> (last visited Nov. 4, 2011). Although records are incomplete outside of the major league, Josh Gibson has also been estimated as having a “lifetime batting average over .350.” Robert T. Bowen, Jr., *Joshua “Josh” Gibson*, in *BIOGRAPHICAL DICTIONARY OF AMERICAN SPORTS: BASEBALL G-P 550* (David L. Porter ed., 2000).

<sup>320</sup> For example, Shaquille O’Neal, who has the reputation of having a “poor free-throw shooting ability,” Nick Coman, *Gregg Popovich Calls for Hack-A-Shaq in First Five Seconds of Playoff Game*, NESN (Sept. 11, 2010, 11:27 AM), <http://www.nesn.com/2010/09/gregg-popovich-calls-for-hack-a-shaq-in-first-five-seconds-of-playoff-game.html>, has a .504 postseason career free throw average. See *Shaquille O’Neal Stats*, ESPN NBA, [http://espn.go.com/nba/player/stats/\\_id/614/seasontype/3/shaquille-oneal](http://espn.go.com/nba/player/stats/_id/614/seasontype/3/shaquille-oneal) (last visited Nov. 4, 2011). Also, under the 2011-2012 American Bar Association standards for the approval of law schools, one of the tests for a sufficient bar passage rate is premised upon a seventy-five percent standard. See ABA Standards for Approval of Law Schools 2011-2012, Standard 301, Interpretation 301-6, *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_aba\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.authcheckdam.pdf).

<sup>321</sup> See Bradley Blackburn, *Education Secretary Asks NCAA Basketball Teams to Improve Academics*, ABC WORLD NEWS (Mar. 19, 2010), <http://abcnews.go.com/WN/education-secretary-arne-duncan-graduates-game-college-basketball/story?id=10148573#.TrQ6ebKP-So> (“Duncan has proposed that the NCAA bar any team from

gainful employment rulemaking process appears to be a significant concession to the demands of the industry the federal government is statutorily mandated to oversee.

Another significant aspect of the final rules that weakens protections for students and taxpayers was the elimination of the restricted program eligibility zone.<sup>322</sup> Under the proposed regulations, the Department of Education estimated that approximately forty percent of proprietary institutions would fall below the full eligibility threshold.<sup>323</sup> With the implementation of the final rules, the Department estimated “that 18 percent of for-profit programs are expected to fail the thresholds at some point, with 5 percent of them failing to improve and ultimately losing eligibility.”<sup>324</sup> This statement also reflects the increased leniency in terms of the change from the one year consideration to the three out of four years consideration for eligibility.<sup>325</sup>

Although this is positive news for the for-profit educational industry, substantive reform with respect to gainful employment has not been achieved by the final regulations. Essentially, instead of requiring improvements in the educational practices of these institutions, the eligibility and determination categories have simply been altered. Overall, a more robust policy aimed at why these institutions struggle would be of greater benefit to the industry and would help institutions and their students succeed, instead of a mere change to the metrics of failure.<sup>326</sup> However, the Department of Education has indicated that it is not currently willing to provide this type of policy, even recently releasing additional proposals on the gainful employment rules that would further reduce the burden on for-profit institutions.<sup>327</sup> Given the intense industry pressure on the Department in this arena, as evidenced by APSCU’s lawsuit based on the *weaker* final regulations,<sup>328</sup> it is unsurprising that the proposed regulations were significantly revised.

In sum, the final gainful employment rules, when compared to the proposed regulations, demonstrate the clearest amount of acquiescence to the for-profit educational industry. Although the recruiter compensation and misrepresentation rules are steps in the right direction for reform of this industry, the relatively weak gainful employment regulations demonstrate that there is a need for continued controls over for-profit colleges and universities. Given the success of the industry in lobbying for less stringent regulation, the question remains regarding the best paths for legal reform of the industry.

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participating in the post-season tournament if they fail to graduate at least 40 percent of their players. Duncan called 40 percent ‘a low bar’ that should be easy for athletic programs to achieve.”).

<sup>322</sup> See *supra* text accompanying note 314.

<sup>323</sup> See Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,634 (proposed July 26, 2010).

<sup>324</sup> *Obama Administration Announces New Steps*, *supra* note 18.

<sup>325</sup> See *supra* text accompanying note 316-17.

<sup>326</sup> See, e.g., ‘Gainful Employment’ Regulation is a Disappointment, EDUC. TRUST, <http://www.edtrust.org/dc/press-room/news/%E2%80%98gainful-employment%E2%80%99-regulation-is-a-disappointment> (“[T]he final, watered-down rule does not do nearly enough to curb these abuses. . . . In the end, the 436-page document is little more than an a la carte menu of ways these institutions can game the system.”).

<sup>327</sup> See Application and Approval Process for New Programs, 76 Fed. Reg. 59,864, 59,865 (Sept. 27, 2011)

(“propos[ing] to eliminate the notification process for new gainful employment programs by amending the Gainful Employment—New Programs final regulations to establish a smaller group of gainful employment programs for which an institution must obtain approval from the Department [as] [w]e believe that with these changes, these proposed regulations will significantly reduce [the] burden on institutions”).

<sup>328</sup> See *supra* text accompanying notes 247-67.

## 2. *Better Paths for Reform*

Although some of the recent regulations promulgated by the Department of Education have been helpful in shining light on the most problematic practices within the for-profit educational industry, these regulations do not provide a comprehensive, federal structure to truly fix these issues. This section provides a series of needed, federal, legal reforms in order to more adequately address the abuses regarding student recruitment, debt burdens, and employment prospects within these institutions. These recommendations include: 1) the implementation of the originally proposed gainful employment rules; 2) a reformation of the 90-10 rule to improve the treatment of military service members and veterans; 3) the creation of for-profit educational institution programs at the Department of Education; 4) the extension of cohort default rate (CDR) reporting terms; and 5) statutory clarification and strengthening of regulatory enforcement mechanisms.

One of the best ways that the federal government could exercise control over the errant actors within the for-profit educational industry is through the implementation of the originally proposed gainful employment regulations. This would be a substantial step in ensuring that students are being provided with educational programs of value and would require institutions to become very serious about addressing the issues that lead to negative student outcomes.

Another vital area for federal reform of for-profit higher education involves a change to the 90-10 rule regarding military service members and veterans who attend for-profit schools. While these institutions may lawfully receive as much as ninety percent of their revenue from federal financial aid,<sup>329</sup> revenues from “federal assistance payments for military personnel and veterans” are not included within the ninety percent revenue calculation.<sup>330</sup> The scale of federal money coming to these institutions is substantial,<sup>331</sup> which has led many for-profit educational institutions to make even bigger strides to recruit military personnel and veterans.<sup>332</sup> However, the non-inclusion of federal money from military assistance and incentive programs within the ninety percent federal revenue calculation for for-profit institutions distorts the spirit of the rule. This massive loophole should be eliminated in order to adequately serve veterans’ educational interests.

Another step towards better regulation would be the creation of a specific program for the regulation of for-profit schools in the Office of Postsecondary Education (OPE) for the Department of Education.<sup>333</sup> Similarly, creating a team in the Office of Inspector General for the

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<sup>329</sup> See 90/10 Rule, 34 C.F.R. § 668.14(b)(16) (2011) (providing that a proprietary institution is eligible for Title IV federal assistance so long as it “will derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds”); 90/10 Calculation and Sanctions Rule, 34 C.F.R. § 668.28 (2011) (providing the calculation method for the 90/10 rule and the sanctions for the violation of the rule).

<sup>330</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-4, FOR-PROFIT SCHOOLS: LARGE SCHOOLS, *supra* note 27, at 14.

<sup>331</sup> See Hollister K. Petraeus, *For-Profit Colleges, Vulnerable G.I.’s*, N.Y. TIMES, Sept. 22, 2011, at A31 (“[B]etween 2006 and 2010, the money received in military education benefits by just 20 for-profit companies soared to an estimated \$521.2 million from \$66.6 million”).

<sup>332</sup> See Kelly Field, *Highlighting Flow of Military Benefits to For-Profits, Senators Seek Changes in Key Rule*, CHRON. HIGHER EDUC. (Sept. 22, 2011), <http://chronicle.com/article/Senators-Put-Spotlight-on/129127/> (stating that “some colleges have courted veterans as a way to ensure their compliance with the [90/10] rule”).

<sup>333</sup> See *Office of Postsecondary Education*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ope/index.html?src=oc> (describing the office structure). Although it maintains an informational page about career colleges and technical schools, <http://www2.ed.gov/students/prep/college/consumerinfo/index.html>, it does not yet have a formal program for for-profit educational institutions.

Department<sup>334</sup> that is centered on for-profit institutions would show a commitment to protecting the students who attend the institutions and the taxpayers who support the substantial amount of loan funding the institutions receive.<sup>335</sup> Either of these measures would address the special characteristics in for-profit higher education, provide a more efficient means of correcting rule violative conduct, and establish a specific contact within the Department of Education.

The next area in need of federal reform involves student CDRs. Under the Higher Education Opportunity Act (HEOA), institutions with high CDRs can lose student loan assistance program eligibility.<sup>336</sup> In changes made to HEOA in 2008, starting in fiscal year 2012, CDRs cannot equal or exceed thirty percent for three consecutive years.<sup>337</sup> This statutory amendment expanded the CDR calculation window from two years to three years.<sup>338</sup> Although this change is an improvement to the prior law, the continued limited window of calculation has allowed some institutions to attempt to manipulate the system through their version of “default management.”<sup>339</sup> Based on projections of Department of Education data, the changes to the CDR calculation window will have an impact on all institutions of higher education and an especially significant impact on for-profit institutions of higher education, with “the average rate . . . nearly doubl[ing] for for-profit colleges.”<sup>340</sup> While individuals have the primary responsibility of paying their loans, the institutions that are providing them with educational credentials should have a level of accountability due to the nature of the federal loan program and their duties to their students. As such, expanding the CDR to four years or more would provide an increased level of transparency and keep institutions from taking advantage of students and the federal government. In the next reauthorization of the HEA, the expansion of the CDR reporting requirements, coupled with a focus on default reduction strategies, would be an effective tool to continue to chart the effectiveness of for-profit institutions and to reduce their defaults.<sup>341</sup>

Finally, the reauthorization of the HEA would be an appropriate time to find legislative solutions to any of the presently challenged regulations and to increase the strength of these measures through explicit statutory dictates. Statutory measures that bolster the Department of

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<sup>334</sup> See *Office of Inspector General*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/oig/index.html> (providing the current organizational structure of the office).

<sup>335</sup> The increased regulation of the use of student financial assistance funds by for-profit schools is a goal of the Office of Inspector General. See U.S. DEPARTMENT OF EDUCATION OFFICE OF INSPECTOR GENERAL FY 2011 ANNUAL PLAN 6 <http://www2.ed.gov/about/offices/list/oig/misc/wp2011.pdf> (stating that “[p]riority work to be performed in FY 2011 will include . . . determin[ation of] how [programs funds delivered to students attending proprietary schools] are used and if schools are providing students training that results in placement in that field”).

<sup>336</sup> See 20 U.S.C. § 1085(a)(2) (providing that institutions of higher education with high CDRs will lose their eligibility to participate in certain federal student aid programs).

<sup>337</sup> See *id.*

<sup>338</sup> See *Cohort Default Rate Jumps 25 Percent*, NAT’L ASS’N OF STUDENT FIN. AID ADMIN., [http://www.nasfaa.org/advocacy/misc/Cohort\\_Default\\_Rate\\_Jumps\\_25\\_Percent.aspx](http://www.nasfaa.org/advocacy/misc/Cohort_Default_Rate_Jumps_25_Percent.aspx) (discussing the changes to the CDR requirements).

<sup>339</sup> See Herb Greenberg, *For-Profit Colleges Make Business Out of Managing Debt*, CNBC (Dec. 22, 2010, 6:05 AM), [http://www.cnbc.com/id/40680897/For\\_Profit\\_Colleges\\_Make\\_Business\\_Out\\_of\\_Managing\\_Debt](http://www.cnbc.com/id/40680897/For_Profit_Colleges_Make_Business_Out_of_Managing_Debt) (“To make sure they don’t exceed those [CDR] limits, the schools contract with companies that specialize in ‘default management,’ which is encouraged by the Education Department as a way to help students. To many schools, however, it appears ‘default management’ is really a euphemism for making sure default rates don’t exceed those statutory limits in the first two (and now three) years after a student gets a loan.”).

<sup>340</sup> Doug Lederman, *Default Rates Projected to Soar*, INSIDE HIGHER ED (Jan. 21, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/01/21/defaults>.

<sup>341</sup> See Erin Dillon & Robin V. Smiles, *Lowering Student Loan Default Rates* (Feb. 19, 2010), <http://www.educationsector.org/publications/lowering-student-loan-default-rates>.

Education's enforcement mechanisms with respect to the loss of federal loan eligibility by institutions that have violated federal regulations would help to curb problematic conduct within the for-profit educational industry. The adoption of stronger statutory controls could convey the message that for-profit schools are not too big to fail.

Given the possible changes in Congress and the Presidency in 2012, more attention in the coming years may be focused on undoing the existing federal regulations or deregulating the for-profit education industry when the HEA is reauthorized. However, to properly protect students and taxpayers, increased federal measures are needed to regulate for-profit institutions. A comprehensive reform strategy, like the one advanced here, could achieve the necessary federal oversight and regulation of the for-profit sector of higher education.

### B. State Regulation and Oversight

Although increased federal regulation is a required component of a comprehensive reform strategy for the most problematic conduct within the for-profit educational industry, states also play an essential role in this process.<sup>342</sup> Given the vast differences in the composition of state governments, though, legislatures may or may not have increased regulation of for-profit colleges and universities, or higher education in general, at the top of their agendas.<sup>343</sup> To complicate potential regulatory matters further, many for-profit educational institutions may provide programming for a state's citizens without a traditional brick-and-mortar campus, which can make oversight of these institutions difficult.<sup>344</sup> Still, an effective solution for the preservation of the interests of all stakeholders of the for-profit educational industry is incumbent upon active state regulation.

As of September 2011, at least twenty-five states have introduced bills concerning the regulation of for-profit educational institutions.<sup>345</sup> For example, there is a bill currently under consideration in the Illinois General Assembly, which would remove state grant aid from students who attend for-profit institutions of higher education.<sup>346</sup> Conversely, in North Dakota, an attempt to increase regulation of for-profit schools and to penalize false academic degrees and accreditation mills failed to pass.<sup>347</sup>

In 2011, Maryland succeeded in the passage of a robust piece of legislation geared at curbing the harmful practices within the for-profit educational industry,<sup>348</sup> Senate Bill 695.<sup>349</sup>

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<sup>342</sup> See, e.g., Kirkham, *supra* note 13 (discussing state officials who have begun to scrutinize for-profit colleges and universities).

<sup>343</sup> See Eric Kelderman, *At the U. of Arizona, Goals Collide With Reality*, CHRON. HIGHER EDUC. (Mar. 27, 2009), <http://chronicle.com/article/At-the-U-of-Arizona-Goals/17016> ("Other university advocates said lawmakers' negative views of higher education are the result of some members' limited college experiences. A number of key legislators, including the Senate president and majority leader, do not hold bachelor's degrees.").

<sup>344</sup> See Brian Burnsed, *Online Education May Transform Higher Ed*, U.S. NEWS & WORLD REP. (Apr. 20, 2011) (discussing the expansive growth of online education within the for-profit educational industry).

<sup>345</sup> See National Conference of State Legislatures, *2011 Introduced Bills: For-Profit Colleges and Universities*, available at [http://www.ncsl.org/documents/educ/2011\\_Introduced\\_Bills\\_For-profits.pdf](http://www.ncsl.org/documents/educ/2011_Introduced_Bills_For-profits.pdf).

<sup>346</sup> See S.B. 1773, 97th Gen. Assemb. (Ill. 2011) (providing, via House amendment, that "[t]he Commission may not make grants to applicants enrolled at for-profit institutions").

<sup>347</sup> See H.B. 1129, 62nd Leg. Assemb. (N.D. 2011).

<sup>348</sup> See generally Sara Beladi, *Maryland Moves to Regulate For-Profit Colleges*, NBC WASHINGTON (Apr. 8, 2011, 6:51 AM), <http://www.nbcwashington.com/news/local/Md-Moves-to-Regulate-For-Profit-Colleges-119434844.html> (discussing the passage of Maryland Senate Bill 695).

<sup>349</sup> See S.B. 695, Reg. Session (Md. 2011).

This legislation addresses student recruitment practices, as well as penalties for misrepresentation or other forms of failure to faithfully perform agreements with students.<sup>350</sup> Specifically, Maryland Senate Bill 695 provides a direct prohibition on the recruiter compensation that was the target of the recent Department of Education regulations and has been at the center of the multitude of FCA suits.<sup>351</sup> This piece of state legislation also provides a range of penalties for the violation of the recruiter compensation ban or any other state education regulation, which include a reprimand, the suspension or revocation of the school's state approval, and a penalty of up to \$5,000 for each violation of the Maryland Higher Education Commission's regulations.<sup>352</sup> Further, this law requires for-profit educational institutions to pay into a fund that "shall be used to reimburse any student at a for-profit institution of higher education who is entitled to a refund of tuition and fees because the institution has failed to perform faithfully any agreement or contract with the student or failed to comply with any provision" of the legislation.<sup>353</sup>

Maryland's recent legislation with its significant protection of students should serve as a model for future state regulation of for-profit colleges and universities. Including a range of penalties and actively enforcing these penalties against institutions that perpetrate violative behavior will provide a strong disincentive to these harmful practices.<sup>354</sup> Consequently, other state legislation that shares the same purpose, prohibitions, and penalties will be important parts of a unified reform strategy for the for-profit educational industry. Consistent state legislation would also help to curb any attempts by for-profit colleges and universities, especially those which heavily rely upon online and distance education models, to relocate their physical headquarters to those states with less stringent regulatory regimes. Of course, this very possibility highlights the importance of the Department of Education state authorization regulations, the validity of which are currently under review by the District of Columbia Circuit Court of Appeals.<sup>355</sup>

### C. Accreditation Association Regulation

In addition to increased regulation on the federal and state levels, the regional bodies that accredit for-profit colleges and universities need to strengthen their controls over these institutions. Given the inherent regulatory nature of the accreditation process,<sup>356</sup> these bodies sit in a unique position to help to curb some of the most prevalent abuses related to student recruitment, debt burdens, and employment prospects within the for-profit educational industry. Specifically, these private organizations should ensure that they stringently apply their standards in the review of for-profit colleges and universities, even if that results in a loss of accreditation

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<sup>350</sup> *See id.*

<sup>351</sup> *Id.* ("An institution of higher education may not pay a commission, a bonus, or any other incentive payment based on success in securing enrollments or the award of financial aid to a person or entity engaged in student recruitment or admission activity.").

<sup>352</sup> *See id.*

<sup>353</sup> *Id.*

<sup>354</sup> *See* Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 3 961, 989 (2011) ("Over the last few decades, social scientists have demonstrated that the perceived certainty of punishment . . . is the single most important variable in deterring misconduct.").

<sup>355</sup> *See supra* text accompanying note 246.

<sup>356</sup> *See* Jay Conison, *The Architecture of Accreditation*, 96 IOWA L. REV. 1515, 1518 (2011) ("Accreditation is a species of regulation.").

or a grant of probationary status, and that they eliminate any opportunities for “accreditation shopping” by for-profit educational institutions.

Often, students who attend for-profit schools are confused by the variety and meaning of accreditations that an institution can receive.<sup>357</sup> This confusion could be clarified through a national set of standards administered by a single accrediting agency. However, this is not the model for postsecondary accreditation in the United States.<sup>358</sup> Instead, multiple, nongovernmental regional accrediting bodies, each with its own set of standards, evaluate those institutions that choose to participate in this review process.<sup>359</sup> The federal government does not accredit institutions of higher education.<sup>360</sup> Further, the Department of Education does not accredit the accrediting agencies; rather, it provides recognition, through a published list, “of accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit.”<sup>361</sup> In order to be included on this list, “[t]he agency must demonstrate that it has standards for accreditation . . . that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits.”<sup>362</sup> The criteria that are provided for in this accreditation standards regulation and its authorizing statute,<sup>363</sup> allows for variability among the standards of different regional accrediting bodies,<sup>364</sup> as well as varying standards for different institutions.<sup>365</sup>

Despite this variation in standards, accrediting bodies could be a part of the remedy for many of the problems that are plaguing the for-profit educational industry. To effectively regulate for-profit educational institutions, the evaluation processes of regional accrediting bodies must ensure that the public and concerned stakeholders can assess how they make decisions about the quality of educational institutions. Accreditation procedures need to be reformed to ensure that for-profit educational institutions that do not attain the requisite, high standard for review are put on probationary status or do not receive accreditation. While some accrediting bodies have begun to provide more scrutiny for these types of educational institutions,<sup>366</sup> a key measure for reform of this industry will be the uniform, stringent

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<sup>357</sup> See Mary Beth Marklein, *For-Profit Colleges Under Fire Over Value, Accreditation*, USA TODAY (Sept. 29, 2010, 11:56 AM), [http://www.usatoday.com/news/education/2010-09-29-1Aforprofit29\\_CV\\_N.htm](http://www.usatoday.com/news/education/2010-09-29-1Aforprofit29_CV_N.htm).

<sup>358</sup> See generally Judith Aren, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1477-83 (2011) (describing the decentralized structure of nongovernmental, regional accrediting bodies in American higher education).

<sup>359</sup> See *id.*

<sup>360</sup> See *The Database of Accredited Postsecondary Institutions and Programs*, U.S. DEP’T EDUC. OFFICE OF POSTSECONDARY EDUC., <http://ope.ed.gov/accreditation/> (“The U.S. Department of Education does not accredit educational institutions and/or programs.”).

<sup>361</sup> *Id.*

<sup>362</sup> See 34 C.F.R. § 602.16(a) (2010) (describing the criteria for recognition of accrediting bodies).

<sup>363</sup> See *id.*; 20 U.S.C.A. § 1099b (West 2009).

<sup>364</sup> See, e.g., 34 C.F.R. §602.16(a)(1)(i) (“The agency meets [the published list] requirement if [t]he agency’s accreditation standards effectively address the quality of the institution or program in the following areas: Success with respect to student achievement in relation to the institution’s mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate consideration of State licensing examinations, course completion, and job placement rates.”).

<sup>365</sup> See *id.*

<sup>366</sup> See, e.g., Doug Lederman, *Accreditation at Risk*, INSIDE HIGHER ED (July 15, 2011, 3:00 AM), [http://www.insidehighered.com/news/2011/07/15/trident\\_university\\_international\\_faces\\_loss\\_of\\_accreditation\\_from\\_western\\_agency](http://www.insidehighered.com/news/2011/07/15/trident_university_international_faces_loss_of_accreditation_from_western_agency) (discussing how “[a]n online for-profit college in California that serves mostly military service members is on the verge of losing its regional accreditation, for failing to ensure that students transferring in had

enforcement of accreditation standards by their review bodies. Without the implementation of this type of effective, transparent accreditation procedure for each of the regional bodies, the entire arena of accreditation loses its perceived standard of legitimacy.<sup>367</sup>

Another accreditation area that is in need of reform is the elimination of “accreditation shopping,” a practice where for-profit educational institutions “purchase financially struggling nonprofit colleges, and then hold on to the regional accreditation that the nonprofit colleges had for years, even as the new owners expand or radically change the institutions’ missions.”<sup>368</sup> These purchases allow the for-profit school to attain accreditation without a coexisting review.<sup>369</sup> This can lead to abusive atmospheres that harm all of these institutions’ stakeholders.<sup>370</sup> Regional accrediting bodies should control this abusive practice through the implementation of enhanced internal regulations.<sup>371</sup>

These policy changes are important parts of strategic reformation of the for-profit educational industry. Accrediting agencies, by adopting similar proposals and by making strides to stringently enforce their standards in the evaluation of for-profit schools, are crucial players in protecting the interests of the stakeholders of for-profit education. By implementing these measures, accrediting bodies can provide private associational regulations that enhance governmental regulations and that encourage increased internal reformation of problematic practices within this sector.

#### D. *Industrial and Institutional Regulation*

Although increased federal, state, and accrediting controls are needed in order to address the problematic conduct that is prevalent within the for-profit educational industry, the long-term solution for an effective transformation of this sector is internal regulation. The for-profit educational industry is like many other industries in this regard, as “[p]rivate industry actors may be in the best position to identify and understand underlying trends in the increasingly complex . . . markets and to gather and analyze, in real time, information most relevant to systemic risk management.”<sup>372</sup> Further, internal regulation often comes at a much lower cost than the

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fulfilled their general education requirements and, more importantly, for failing to tell the accretor about the problem”).

<sup>367</sup> See, e.g., Kelly Field, *At a Senate Hearing, Tough Questions for a Fast-Growing For-Profit’s Accretor*, CHRON. HIGHER EDUC. (Mar. 10, 2011), <http://chronicle.com/article/At-a-Senate-Hearing-Tough/126688/> (discussing congressional scrutiny over regional accrediting bodies’ abilities to “evaluate billion-dollar multistate [for-profit] educational programs”).

<sup>368</sup> Scott Jaschik, *Standing Up to ‘Accreditation Shopping,’* INSIDE HIGHER ED (July 1, 2010, 3:00 AM), <http://www.insidehighered.com/news/2010/07/01/hlc>.

<sup>369</sup> See Amy Scott, *Officials Cracking Down on Accreditation Shopping*, MARKETPLACE MORNING REP. (July 2, 2010), <http://marketplace.publicradio.org/display/web/2010/07/02/am-officials-cracking-down-on-accreditation-shopping/> (stating that for-profit institutions obtain the “golden key” of accreditation by purchasing financially-strapped schools with existing accreditation).

<sup>370</sup> See Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS. 121, 135 (1994) (stating that accreditation shopping by proprietary institutions “may undermine the integrity of federal gatekeeping and drive accreditation standards to the lowest common denominator”).

<sup>371</sup> Fortunately, accrediting bodies, like the Higher Learning Commission (HLC), have already begun to adopt new rules to make accreditation shopping more difficult. See Higher Learning Commission Policies 3.3 (June 24, 2011), available at <https://content.springcm.com/content/DownloadDocuments.aspx?Selection=Document%2Cc6e6e0b3-4e91-df11-9372-001cc448da6a%3B&accountId=5968>.

<sup>372</sup> Omarova, *supra* note 67, at 418.

imposition of required external controls.<sup>373</sup> Given that for-profit colleges and universities have capitalized upon the self-descriptor of innovation,<sup>374</sup> these institutions should leverage this characteristic to increase transparency in their educational operations.<sup>375</sup> Consequently, for-profit schools are in a unique position to be educational leaders through the provision of clear, basic, and accurate consumer information about their programs, services, and student outcomes.<sup>376</sup>

Despite the resistance that most for-profit institutions have demonstrated in response to attempts at increased regulation, several schools are attempting to improve their practices.<sup>377</sup> In an effort to “increase transparency about the learning process,” the University of Phoenix now requires a three-week, pass/fail orientation for entering students who hold less than twenty-four credits.<sup>378</sup> Kaplan University has introduced a five-week introductory program, in which new students only<sup>379</sup> may attend classes with normal credit hours and decide whether or not to remain in the program; if the student chooses to withdraw during this time period, he or she is only financially responsible for the application fee.<sup>380</sup> While these are steps in the right direction, much more needs to be done by all for-profit institutions to clearly demonstrate a willingness to reform an environment that has been dominated by negative practices with respect to student recruitment, debt loads, and employment prospects.

In addition to these institutional attempts to increase the transparency of their operations, the two leading associations of for-profit colleges and universities, APSCU and CES, have formulated codes of conduct that focus on standards for their member institutions.<sup>381</sup> While these attempts at self-regulation are certainly positive ones, these associations, like the institutions they represent, have a considerable way to go to truly reform the industry. For example, APSCU’s code of conduct provides four focal points: integrity, accountability, excellence, and

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<sup>373</sup> See, e.g., Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 297 (1996) (“Often the problem with federal regulation is that the government lacks knowledge of the least expensive means of producing the preferred regulatory end.”).

<sup>374</sup> See, e.g., *Career Coll. Ass’n I Complaint*, *supra* note 24, at 10 (“Although their reasons vary, students are often attracted by private sector schools’ flexible, innovative, and hands-on programs.”).

<sup>375</sup> Timothy E. Lynch, *Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment*, 59 CASE W. RES. L. REV. 227, 304 (2009) (“[R]egulatory innovation . . . [is] necessary to facilitate transparency.”).

<sup>376</sup> Certain industry leaders have advocated for this innovation. See, e.g., Daniel Malloy, *DeVry CEO Backs Regulation, Breaks with For-Profit Colleges*, PITTSBURGH POST-GAZETTE (July 22, 2011), <http://www.post-gazette.com/pg/11203/1162045-28.stm> (“The CEO of one of the country’s biggest for-profit college companies [DeVry Inc.] told the Senate . . . that the industry should be regulated based on student outcomes. . . . [breaking] with the industrywide view.”).

<sup>377</sup> See, e.g., *Behind the News: The Increased Focus on Private-Sector Higher Education*, KAPLAN, <http://www.kaplan.com/BehindTheNews> (“We were embarrassed and disturbed to find any of our schools referenced [in the GAO investigation]. Upon learning of these allegations, Kaplan immediately began its own investigation. Further, we expanded our already robust compliance systems.”).

<sup>378</sup> See Bill Pepicello, *Introducing the New Student Orientation Program*, U. PHOENIX (Mar. 4, 2011), [https://www.phoenix.edu/colleges\\_divisions/office-of-the-president/communications/new-student-orientation-program.html](https://www.phoenix.edu/colleges_divisions/office-of-the-president/communications/new-student-orientation-program.html) (“This program will encourage prospective students to make informed decisions concerning whether this is the type of institution they wish to attend and if they are ready to do so.”).

<sup>379</sup> See KAPLAN U. (Oct. 18, 2011), <http://getinfo.kaplan.edu/index.aspx>.

<sup>380</sup> See *The Kaplan Commitment*, KAPLAN U., <http://getinfo.kaplan.edu/kaplancommitment.aspx> (describing the introductory period as providing a “right to make an educated decision about your education”).

<sup>381</sup> See Goldie Blumenstyk, *News Analysis: Codes of Conduct (All 3 of Them) for For-Profit Colleges Aim to Quell Skeptics*, CHRON. HIGHER EDUC. (Sept. 22, 2011), <http://chronicle.com/article/News-Analysis-/129126/> (discussing the three existing codes of conduct for the for-profit educational industry).

enforcement.<sup>382</sup> Although these are enviable goals, the code consists of broad generalities, like “[m]ember institutions agree . . . [t]o provide educational services according to standards of honesty and fairness and to render those services to students in a manner that, in the same circumstance, it would apply to or demand for itself.”<sup>383</sup> Further, its enforcement mechanism of removal of an institution from membership is based on extreme misconduct, such that the institution has lost or been denied its home state licensing, has had its accreditation terminated by an approved accrediting agency, or has lost its Title IV financial aid eligibility.<sup>384</sup> Finally, the code does not provide its member institutions any type of signatory ability to demonstrate their commitment to upholding these standards.<sup>385</sup> Given the nature of this code, it is little surprise that the public continues to need convincing that “for-profit colleges are serious about reform.”<sup>386</sup>

The CES foundation’s<sup>387</sup> code of standards is premised upon “five key pillars: Enrollment, Disclosure, Financial Aid, Student Readiness, and Career and Job Services.”<sup>388</sup> Unlike the APSCU code, the CES standards clearly lay out specific guidelines for for-profit schools to meet.<sup>389</sup> Like the Kaplan program, the standards require a twenty-one day trial period, within which students can withdraw “without incurring any tuition related expenses.”<sup>390</sup> Further, the enforcement clause for these standards requires its signatory institutions to “engage an independent audit firm to conduct an attestation examination of the controls to obtain reasonable assurance of compliance with the Standards.”<sup>391</sup> Only institutions with satisfactory audit reports “will be certified as members in good standing on the student protection website.”<sup>392</sup> Finally, the standards publicize the initial signers of the code, which “represent an estimated 17 percent of the career college sector.”<sup>393</sup> These signers include Kaplan Higher Education Corporation and Career Education Corporation.<sup>394</sup> However, other major players in the industry, like the Apollo Group, EDMC, Corinthian Colleges, DeVry, ITT Educational Services, and Strayer Education,

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<sup>382</sup> See APSCU Code of Conduct for Private Sector Colleges and Universities (Sept. 2010), available at [http://www.career.org/iMISPublic/AM/Template.cfm?Section=Ethics\\_Policies1&CONTENTID=21470&TEMPLATE=/CM/ContentDisplay.cfm](http://www.career.org/iMISPublic/AM/Template.cfm?Section=Ethics_Policies1&CONTENTID=21470&TEMPLATE=/CM/ContentDisplay.cfm).

<sup>383</sup> *Id.* at 3.

<sup>384</sup> See *id.* at 4.

<sup>385</sup> See *id.* (providing only the code of conduct itself in a pdf document, accessible through APSCU’s “Ethics Policies” link, which is under its “Compliance & Ethics Library” link, which is under its “Regulatory” link, which can be clicked from the main page).

<sup>386</sup> Blumenstyk, *supra* note 381.

<sup>387</sup> See *About the Foundation*, FOUND. EDUC. SUCCESS (Oct. 18, 2011), <http://www.edsuccessfoundation.org/about/>.

<sup>388</sup> *Foundation for Educational Success Releases Bold New Standards of Responsible Conduct and Transparency for Higher Education*, FOUND. FOR EDUC. SUCCESS (Sept. 13, 2011), <http://www.edsuccessfoundation.org/>.

<sup>389</sup> See, e.g., *Foundation for Educational Success Standards at 2-3*, available at <http://www.edsuccessfoundation.org/docs/fes-standards.pdf> (“1.06. Representations of compensation for a specific career after graduation must be supported by written or electronic disclosures based upon: (1) actual data; (2) data required or permitted by federal or state laws or accreditation standards; or (3) Bureau of Labor Statistics (‘BLS’) data.”).

<sup>390</sup> See *id.* at 4.

<sup>391</sup> *Id.* at 5.

<sup>392</sup> *Id.*

<sup>393</sup> *Foundation for Educational Success Releases Bold New Standards*, *supra* note 388.

<sup>394</sup> See *id.*

which in 2008-2009 represented over 40% of total for-profit enrollment numbers,<sup>395</sup> opted not to be initial signatories of the code.<sup>396</sup>

Although the CES standards are an improvement beyond the APSCU standards, they still do not do enough to meet the levels of transparency that are needed within this industry. For example, many of these standards are already required under federal regulations. The enrollment standard in the code that requires that admissions or financial aid officers cannot receive any incentive compensation based on the number of enrolled students<sup>397</sup> is the central component of the student recruitment regulations promulgated by the Department of Education in 2010.<sup>398</sup> Similarly, many of the career representation requirements of the Code mirror the same requirements in the gainful employment regulations implemented by the Department of Education in 2011.<sup>399</sup> Additionally, although the enforcement mechanism with its requirement of an audit participation appears, at face value, to be an important provision, the actual consequence for a school that fails to receive an unqualified report is that it will not “be certified as [a member] in good standing on the student protection website.”<sup>400</sup> The lack of inclusion on the CES standards’ website will not likely be a powerful and effective deterrent for noncompliance with these standards.

The central irony of these associational codes is that they are being advanced while these same entities continue to aggressively resist similar controls by federal and state governments. Essentially, “in signing on to the codes, some college companies are claiming credit for being willing to enforce some of the same regulations that their industry trade association is seeking to have gutted by suing in a federal court.”<sup>401</sup> So, while the implementation, marketing, and enforcement of these types of industrial standards are a helpful measure to improve the industry, they are only part of a much larger, needed solution to the problems in for-profit education.

The industry would benefit from the adoption of a comprehensive set of best practices in terms of the provision of information about institutions’ programs and services. This set should include measures that exceed, rather than just meet, the federally mandated reporting requirements on acceptance rates, graduation rates, median student debt, and employment statistics of students. Further, these institutions should provide straightforward consumer information to their applicants and students, similar to what is now required by credit card companies under the Federal Reserve Board regulations promulgated pursuant to the Credit Card Accountability, Responsibility and Disclosure Act of 2009,<sup>402</sup> on the graduating debt loads of students with basic calculations on how long students will have to work in their field at the median salary to pay off these loans based on a minimum payment. Additionally, all members of

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<sup>395</sup> See Daniel L. Bennett et al., *For-Profit Higher Education: Growth, Innovation and Regulation* 15, CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY (July 2010), [http://www.centerforcollegeaffordability.org/uploads/ForProfit\\_HigherEd.pdf](http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf) (providing a table of the “largest for-profit institutions”).

<sup>396</sup> See *Standards of Responsible Conduct and Transparency*, FOUND. FOR EDUC. SUCCESS, <http://www.edsuccessfoundation.org/standards/> (providing a list of the original code signers).

<sup>397</sup> See Foundation for Educational Success Standards at 2, available at <http://www.edsuccessfoundation.org/docs/fes-standards.pdf>.

<sup>398</sup> See Recruiter Compensation Regulations, 34 C.F.R. § 668.14 (2010).

<sup>399</sup> See Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

<sup>400</sup> See *supra* text accompanying note 392.

<sup>401</sup> Blumenstyk, *supra* note 381.

<sup>402</sup> See 12 C.F.R. § 226.7(b)(12) (2011) (providing the disclosure requirements regarding minimum payments and balance pay-off timelines for the periodic statement of credit cards).

the for-profit educational industry should provide clear information on their websites about the cohort default rates of their students.<sup>403</sup> Finally, all for-profit colleges and universities should display a complete list of their full-time and part-time faculty members with CVs and publications.<sup>404</sup> The public provision of such information would help ease the perception that these institutions are “hiding something.”<sup>405</sup>

The addition of these types of internal regulations, alongside the strengthening of the control measures that have begun to be adopted by the for-profit educational industry, will be an effective way to reform for-profit colleges and universities. The willingness of some of these institutions to provide better service, more data, and more transparency is a hopeful sign towards improving the future outcomes for students and taxpayers. However, it is important to note that many of these institutions are currently also dealing with sharp enrollment declines due to public, governmental, and media scrutiny of the industry and institutional responses to that scrutiny.<sup>406</sup> Consequently, given the pressure between the dual aims of achieving higher profits and providing higher education, it seems unlikely that the industry will voluntarily pursue the strong internal self-regulation that is needed to appropriately address the problems related to student recruitment, debt burdens, and employment prospects. Consequently, federal and state governmental regulations are currently necessary safeguards for the interests of all of the stakeholders in the for-profit educational industry.<sup>407</sup>

## VI. CONCLUSION

In the final analysis, the debate over the regulation of for-profit schools involves a careful balancing test. For-profit educational institutions have a difficult task of trying to maximize profits and shareholder value while providing quality, but often costly, educational services. How this balance can be accomplished is a complex question for these businesses. However, given the dependence of these institutions on access to federal funds to operate, this question is one that merits broader societal discussion in order to ensure that students and taxpayers can acquire an adequate return on their monetary investments in these institutions. The price of access to the substantial amount of Title IV funds by for-profit schools should be compliance with increased levels of regulation to minimize potential harm to all of their stakeholders.

Again, the key necessary reform for the for-profit educational industry is increased transparency of operations with more information access for students and oversight

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<sup>403</sup> See Collin Eaton, *Student-Loan Default-Rate Climbs as Economy Falters*, CHRON. HIGHER EDUC. (Sept. 12, 2011), <http://chronicle.com/article/Student-Loan-Default-Rate/128964/> (“The climb in the 2009 cohort default rate—which measures what proportion of students defaulted within two years of entering the repayment period—was highest at for-profit institutions, rising to 15 percent from 11.6 percent in 2008.”).

<sup>404</sup> See Jennifer Epstein, *Where Are Your Professors?*, INSIDE HIGHER ED (Sept. 20, 2010), <http://www.insidehighered.com/news/2010/09/20/rosters> (discussing how many for-profit schools do not provide information about their faculty members).

<sup>405</sup> *Id.* (quoting Bob Smith, Texas Tech University provost: “There’s a certain amount of transparency that comes with listing who your faculty are; it looks like you are hiding something if you won’t say who’s working for you.”).

<sup>406</sup> See Korn, *supra* note 31 (stating that DeVry’s new student enrollment declined 25.6% in the June 2011 quarter; that Corinthian Colleges “new-student enrollment declined 21.5% in the first calendar quarter” of 2011; that “Kaplan reported a 47% decline in new-student enrollment for the June quarter”; and that Capella’s “[n]ew-student enrollment dropped 35.8% in the first quarter”).

<sup>407</sup> See Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1374 (2009) (“Efficient markets do not self-organize: they need to be cued and maintained by regulatory oversight.”).

organizations. Although some for-profit schools have begun to make some accommodations in order to achieve this goal, the majority of the industry has continued to fight any attempts to require this type of transparency. Although these institutions have every right to advocate through legislative and judicial means, federal and state governments, as well as the American public, should continue to demand more before they allow many of these institutions to engage in problematic practices related to student recruitment, debt, and employment prospects as just a cost of doing federally subsidized business.