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# "Your Results May Vary": Protecting Students and Taxpayers through Tighter Regulation of Proprietary School Representations

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“YOUR RESULTS MAY VARY”: PROTECTING STUDENTS AND TAXPAYERS THROUGH TIGHTER REGULATION OF PROPRIETARY SCHOOL REPRESENTATIONS

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## ABSTRACT

This article argues for stricter regulation of proprietary (for-profit) school advertising and recruitment practices and proffers specific proposals for effectuating this regulation. Proprietary schools play an important role in broadening access to higher education. They enroll a large number of students who are underserved by traditional, non-profit institutions. These students tend to be poorer, less educated, and older than students at traditional schools, and they tend to undertake higher education for very practical reasons. These characteristics make them particularly susceptible to deceptive marketing and unfounded promises of higher education providers. Unfortunately, some proprietary schools exploit the susceptibilities of their target markets by making misrepresentations when marketing their programs and recruiting students. These unscrupulous behaviors contribute to low completion rates and high loan default rates among proprietary school students—outcomes that cost students and taxpayers billions of dollars. Therefore, tighter regulation of proprietary school marketing and recruitment practices are needed.

INTRODUCTION

Graduate with a career!

Make more cash!

Change your life!

It's easy! Just pick up the phone!

These were likely some of the exhortations Trina Thompson heard (between episodes of *Jerry* and *Maury*) before deciding to enroll at Monroe College—a career-focused proprietary (for-profit) college with campuses in New York and the Caribbean.[1] Trina likely wanted to start a career, make more money, and change her life when she enrolled in Monroe's bachelor of business administration program in April 2008.[2] But after graduating without a job in April 2009,[3] Trina realized that achieving her objectives was not as easy as she had been led to believe. According to Trina, her 2.7 GPA and her "good" attendance record should have resulted in job interviews and eventually employment.[4] Shortly thereafter, she filed a lawsuit against Monroe alleging inadequate career-placement assistance and seeking a "reimbursement" of $70,000.[5]

Trina's lawsuit, while laughable in some respects, is nonetheless reflective of the commoditization of higher education—a trend that promotes the endeavor simply as a means to an end instead of a complicated undertaking. In that vein, the lawsuit is also instructive of risks associated with the aggressive and often deceptive promotion of future benefits by colleges hawking their wares.

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[1] Monroe College, About Monroe, available at http://www.monroecollege.edu/aboutmonroe

[2] Trina also earned an Associate's degree from Monroe in December 2006. Complaint at 3, Thompson v. Monroe College, No. 251896-2009 (filed July 24, 2009).

[3] See *id.*

[4] Jason Kessler, *Alumna Sues College Because She Hasn't Found A Job,* CNN, August 4, 2009, http://www.cnn.com/2009/US/08/03/new.york.jobless.graduate/index.html

[5] Trina is also seeking $2,000 for stress induced by her failed job search. *Id.*

Representations made by some colleges rival the most optimistic—and often unfounded—diet pill claims. The end result is thousands of "Trinas" entering higher education full of misguided optimism and leaving bitter, unfulfilled, and, most of all, in debt. Trina is lucky—at least she earned a degree. Most others in her position do not.[6]

Individuals who are induced to enroll in an institution based on misrepresentations are allowed little recourse to recoup damages they may incur.[7] The courts have been very reluctant to recognize certain causes of action against higher education institutions.[8] And regulatory safeguards are principally focused on protecting public, rather than individual, interests. As a result, these individuals are left to bear the brunt of the improper actions of others. And in spite of regulatory safeguards, taxpayers pay a heavy price as well.

This article argues that there is an urgent need for tighter regulation of higher education recruitment and marketing, particularly among colleges in the proprietary sector. Specifically, colleges that promote future employment and financial benefits in order to induce enrollment should be subject to heightened disclosure requirements. Akin to the "triad" that monitors institutions' Title IV financial aid eligibility,[9] federal, state, and non-governmental entities should monitor disclosures. The goal of such oversight would be to prevent misrepresentations from being made to prospective students.

People who lack in-depth knowledge of higher education are frequent targets of higher education misrepresentations. They tend to be poor,[10] thus rendering the idea of escaping poverty in a matter of

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[6] See, e.g., LAURA G. KNAPP, JANICE E. KELLY-REID & SCOTT A GINDER, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP'T. OF EDUC., ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2007; GRADUATION RATES, 2001 & 2004 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2007 12 (2009), http://nces.ed.gov/pubs2009/2009155.pdf.

[7] Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 Geo. L.J. 753, 754 (2001) ("Unfortunately, existing legal doctrine and regulatory regimes are ill-suited to protect proprietary school students from such predatory marketing practices.").

[8] *Id.*

[9] *Id.* at 783. ("Federal law envisions a highly complex and comprehensive bureaucratic "triad," with state licensing systems and accrediting agencies playing a significant complementary role alongside federal eligibility and certification requirements.").

[10] See *Enforcement of Federal Anti-Fraud Laws in For-Profit Education: Hearings Before the H. Comm. on Education and the Workforce*, 109th Cong. 109-2 (2005) [hereinafter *Anti-Fraud Hearings*].

months very appealing. They also tend to be poorly educated,[11] coming from families with little, if any, higher education experience.[12] Lastly, they tend to be older and further removed from their last educational experience than traditional students,[13] and they are more likely to have experienced past educational difficulty.[14] These characteristics make these individuals particularly susceptible to deceptive marketing and unfounded promises.[15] Similarly, these characteristics put these individuals at higher risks of dropping out prior to program completion and eventually defaulting on student loans.[16] The costs of higher education failure are high; therefore, the costs of higher education misrepresentations are high. And in addition to the victim, the taxpayers are often saddled with these costs.[17] As a result, effective oversight of higher education marketing and recruitment would not only protect individual students, but also contribute to the country's fiscal health.

In making its case, this article describes, in Part I, the multifaceted nature of higher education misrepresentations and fraud. Part II discusses the commoditization of higher education. Part III chronicles the rise of proprietary colleges and describes their aggressive marketing and recruitment practices. Part IV argues that an imperative exists for tighter regulation of higher education marketing and recruitment. Part V asserts that current safeguards are inadequate in protecting students and taxpayers from misrepresentations. Lastly, Part VI presents proposals for regulating higher education

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[11] *Id*. at 8. (providing a quote from an admissions counselor stating that her former employer enrolled students who were ill-prepared to complete the program).

[12] *Id*. at 46 (statement of Nick Glakas). ("[Seventy percent of proprietary school students] are the first in their families to attend college.").

[13] U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, H. SUBCOMM. ON HIGHER EDUCATION, LIFELONG LEARNING AND COMPETITIVENESS, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID (2009) [hereinafter GAO, STRONGER OVERSIGHT]. ("[O]ver half of the student population at proprietary schools is comprised of "non-traditional" students, such as students who are 25 years old and older.").

[14] Linehan, *supra* note 7, at 756. ("Most [proprietary school] enrollees…have previously experienced educational failure.")

[15] *Id*. at 22 (statement of Hon. Maxine Waters). (arguing that victims of proprietary schools misrepresentations "are less likely to complain, and when they do they are less effective, because they don't know where to complain, or how to articulate their complaint, as they do not know the requirements of the law").

[16] GAO, STRONGER OVERSIGHT, *supra* note 13.

[17] *Id*. at 12. ("When students do not make payments on their federal loans and the loans are in default, the federal government and taxpayers assume nearly all the risk and are left with the costs.").

representations in a manner that protects the public from misrepresentations without unduly restricting competition and protected speech.

## PART I: HIGHER EDUCATION MISREPRESENTATIONS AND FRAUD

When *60 Minutes* visited campuses of the Katharine Gibbs School[18] and Brooks College[19] to investigate proprietary school business practices, the producers found a virtual treasure trove of corruption. In its feature, *For-Profit College: Costly Lesson,* the newsmagazine documented recruiter misrepresentations and entrance exam improprieties. The feature also provided insider views into the high pressure world of proprietary school recruiting[20] and the debilitating effects of unscrupulous recruitment tactics.[21] It is these tactics that have drawn the ire of former students, policymakers, governmental regulators, and consumer watchdogs and have formed the bases of lawsuits, investigations, and Congressional hearings. Proprietary schools, for all of their virtues,[22] have a checkered collective

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[18] Katherine Gibbs College consisted of two campuses in New York State that were owned by Career Education Corporation (CEC). Career Education Corporation, *Career Education Corporation Announces Plans For Strategic Divestitures Of Selected Schools*, Nov. 15, 2006, http://media.corporate-ir.net/media_files/irol/87/87390/CECSchoolSalesandClosingPressReleasewithExhibits111506.pdf. After an unsuccessful attempt to sell the campuses, CEC announced on February 15, 2008 that it would close one of its Katharine Gibbs campuses and convert the other to another brand within its corporation. Career Education Corporation, *Career Education Corporation Announces Plans to Teach-Out Programs at Selected Schools Held for Sale*, Feb 15, 2008, http://phx.corporate-ir.net/phoenix.zhtml?c=87390&p=irol-newsArticle_print&ID=1108811&highlight=.

[19] Brooks College consisted of two campuses in New York State that were owned by Career Education Corporation (CEC). Career Education Corporation, *Career Education Corporation Announces Plans for Strategic Divestitures of Selected Schools*, Nov. 15, 2006, http://media.corporate-ir.net/media_files/irol/87/87390/CECSchoolSalesandClosingPressReleasewithExhibits111506.pdf. After an unsuccessful attempt to sell the campuses, CEC announced on June 28, 2007 that it would be closing both Brooks campuses. Career Education Corporation, Brooks College Announces Plan to Teach Out Programs At Long Beach and SunnyVale Campuses, June 28, 2007, http://phx.corporate-ir.net/phoenix.zhtml?c=87390&p=irol-newsArticle_print&ID=1021611&highlight=

[20] Rebecca Lang, *For-Profit College: Costly Lesson*, Jan. 30, 2005, http://www.cbsnews.com/stories/2005/01/31/60minutes/main670479.shtml. ("The admission counselors told *60 Minutes* they were expected to enroll three high school graduates a week, regardless of their ability to complete the coursework. And if they didn't meet those quotas, they were out of a job…They all say the pressure produced some very aggressive sales tactics.").

[21] *Id.* (interviewing unemployed and underemployed graduates of Brooks College who stated that admission counselors induced their enrollment with promises of prestigious employment in the fashion industry upon graduation).

[22] See U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, H. SUBCOMM. ON HUMAN RESOURCES, PROPRIETARY SCHOOLS: MILLIONS SPENT TO TRAIN STUDENTS FOR OVERSUPPLIED

past.[23] The rate of investigations and sanctioning among the sector exceeds that of the non-profit sector.[24] And even though corruption has been greatly reduced since the 1980s and early 1990s, proprietary schools are still tainted by improprieties that many believe are the direct result of their tuition-driven, profit-generating motives.[25]

## A. INFLATED PLACEMENT AND COMPLETION RATES

Proprietary school misrepresentations and other improprieties cost individual students and the taxpayers. Misrepresentations typically pertain to placement rates, a benchmark upon which proprietary schools market themselves.[26] These rates can be misrepresented in terms of the number of students placed, the average salary offered by those placements, and the overall availability of quality placements.[27] A prerequisite to placement, completion rates are often misrepresented[28] or not disclosed as

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OCCUPATIONS (1997) [hereinafter GAO, OVERSUPPLIED OCCUPATIONS]. ("Proprietary schools contribute to the nation's competitiveness by providing occupational training to traditionally noncollege-bound individuals.")

[23] LISA K. FOSTER, FOR-PROFIT EDUCATIONAL INSTITUTIONS: OVERVIEW OF ACCREDITATION AND STATE AND FEDERAL OVERSIGHT, CRB 04-010, at 14 (Ca. 2004) ("During the 1970s and 80s, institutions operated with little or no oversight and few constraints in recruiting and training students. A large number of institutions did not provide the training advertised, did not comply with fair consumer practices, and mismanaged finances.").

[24] Linehan, *supra* note 7, at 760 ("[A]lthough proprietary schools compose one-third of the approximately 6,000 schools eligible for federal student grants and loans, they recently accounted for three-fourths of the Department's student loan fraud and abuse investigations.").

[25] Catherine Elton, Degrees of Difficulty: The Truth About Online Universities, Consumers Digest, Apr. 2009, at 20. ("When the pressure to make profits creates a pressure for recruiters to enroll as many students as possible, it creates an atmosphere where an 'anything-goes' approach by individual recruiters—at the very least—easy to overlook by the schools themselves.").

[26] Linehan, *supra* note 7, at 757 (discussing how proprietary schools place "advertisements on daytime and late night television to reach the unemployed and those seeking new jobs"); *See also,* FOSTER, *supra* note 23, at 12. (describing placement rates as "The ultimate outcome measure").

[27] *Anti-Fraud Hearings, supra* note 10, at 15 (statement of Hon. Maxine Waters) ("The biggest misrepresentations made to students that convince them to enroll are anticipated starting salary… and the placement rate…The starting salaries that prospective students are told are seldom true. Many schools tout a 90 percent plus placement rate. But these are self reported rates and not necessarily accurate."); *see also* Linehan, *supra* note 7, at 759 (discussing the pressure that oversupplied labor markets place on proprietary schools); *see also* U.S. GEN. ACCOUNTING OFFICE, TESTIMONY BEFORE THE H. SUBCOMM. ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS, HIGHER EDUCATION: ENSURING QUALITY EDUCATION FROM PROPRIETARY INSTITUTIONS (1996) [hereinafter GAO, ENSURING QUALITY] (statement of Cornelia M. Blanchette) (discussing the financial ramifications of students incurring debt in order to train for jobs for which little demand exists); *But cf.,* GAO, OVERSUPPLIED OCCUPATIONS, *supra* note 22, at 11 (discussing benefits conferred upon students who trained in oversupplied fields).

[28] *See e.g.*, Lang, *supra* note 20.

required.[29] A common scenario is one experienced by the *60 Minutes* producer who posed as a prospective student. She was told by a Katharine Gibbs representative that the school's placement rate was 89 percent; however, Department of Education (DOE) data put the rate at 29 percent.[30] A former Brooks recruiter captured the integrated nature of placement and completion rate misrepresentations when she summarized the essential elements of her deceptive sales pitch: "We are telling you that you are going to have a 95 percent chance [of getting] a job paying $35,000 to $40,000 a year by the time you are done in 18 months."[31] Proprietary schools have also been accused of misrepresenting the transferability of credits,[32] programmatic content,[33] and accreditation status.[34] In addition, shareholders of publicly-traded schools have filed lawsuits alleging misrepresentations and omissions in annual reports and other required disclosures.[35]

B. INAPPROPRIATE COMPENSATION ARRANGEMENTS

Improprieties also involve the fraudulent obtaining of Title IV financial aid funds.[36] This fraud tends to be systematic in nature and often concerns the manner in which recruiters are compensated, the process by which students are enrolled and matriculated, and the manipulation of regulatory safeguards. Recruiter compensation is a frequent basis of lawsuits against proprietary schools. Title IV forbids

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[29] DEANNE LOONIN & JULIA DEVANTHERY, NAT'L CONSUMER LAW CTR, MAKING THE NUMBERS COUNT: WHY PROPRIETARY SCHOOL PERFORMANCE DATA DOESN'T ADD UP AND WHAT CAN BE DONE ABOUT IT (2005), http://www.consumerlaw.org/action_agenda/student_loans/content/ProprietarySchoolsReport.pdf (describing the difficulty of obtaining completion data directly from proprietary schools included in its investigation).
[30] Lang, *supra* note 20.
[31] *Anti-Fraud Hearings, supra* note 10, at 8.
[32] *See e.g.,* Till v. Delta School of Commerce, Inc., No. 85-185, 1986 La. App. LEXIS 6697 (Apr. 23, 1986).
[33] *See e.g.,* Phillips Colleges of Ala., Inc. v. Lester, 1993 Ala. LEXIS 428 (Apr. 30, 1993).
[34] *See e.g.,* Malone v. Academy of Court Reporting, 582 N.E.2d 54 (1990).
[35] See e.g., Doug Lederman, *Jury Orders U. of Phoenix Parent to Pay $277 Million,* INSIDE HIGHER ED, Jan. 17, 2008, http://www.insidehighered.com/news/2008/01/17/apollo#.
[36] Title IV of the Higher Education Act governs the provision of federal financial aid funds for higher education. The statute governs mostly need-based programs, such as Federal Pell Grants, supplemental educational opportunity grants, payments to the States and institutions for need-based financial aid, and other special programs and projects. 20 USCS § 1070.

schools from compensating recruiters based solely on the number of students they induce to enroll.[37] This ban on "incentive compensation" is intended to protect students by lessening the pressure on recruiters to induce enrollment at all costs.[38] The National Association for College Admission Counseling (NACAC) argues that "reducing the basis for compensation to the number of students enrolled in any circumstances introduces an incentive for recruiters to actively ignore the student interest in the transition to postsecondary education."[39] In spite of this ban, accusations against proprietary school compensation structures abound.[40] In a 2003 audit, the DOE found that the University of Phoenix (UOP)[41] had violated the ban.[42] The audit described a system under which recruiter compensation was tied to "asses in classes"[43] and a culture where a recruiter's enrollment numbers could mean the difference between lucrative employment[44] and unemployment.[45] According to the DOE, the high pressure environment fostered by UOP's compensation structure led to the very dangers that the ban is intended to prevent. Unqualified students and those facing unfavorable family or financial circumstances were pressured to

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[37] 34 CFR 668.14 ("An institution agrees that…[i]t will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities…"); But see also, *id.* (listing exceptions to this prohibition).

[38] DEP'T OF EDUC., STATEMENT BEFORE THE H. SUBCOMM. ON 21ST CENTURY COMPETITIVENESS COMM. (2001) (statement of Lorraine Lewis) ("The prohibition was designed to protect students from the high pressure tactics used by recruiters to enroll students in programs for which they may not have been prepared or did not want. The students were saddled with unwanted debt, at increased cost to the taxpayers.").

[39] Transcript of Testimony of the National Association for College Admission Counseling (NACAC): Higher Education Act Statutory Ban on Incentive Compensation for Admission and Financial Aid Officers, U.S. Department of Education Public Hearing, Philadelphia, PA (Presented June 22, 2009) [hereinafter NACAC Testimony]; See also *id.* at 2 (discussing the ban in terms of the "information asymmetry" that exists between recruiters and prospective students).

[40] *See e.g.,* LOONIN & DEVANTHERY, *supra* note 28 (summarizing accusations).

[41] "University of Phoenix is the nation's largest private university, offering a variety of degree programs at more than 200 locations, as well as online in most countries around the world." University of Phoenix, *History: More Than 200 Locations Strong,* http://www.phoenix.edu/about_us/media_relations/history.html.

[42] University of Phoenix, OPEID 020988 00, PRCN 200340922254 (Dep't of Education Jan. 5, 2004) (program review report) [hereinafter UOP Program Review Report].

[43] The audit also referenced "butts in seats". *Id.* at 10.

[44] See e.g., *id.* at 8 (listing a salary schedule showing that UOP recruiters could make upwards of $120,000 per year); See also *id.* (discussing how the potential for high salaries often prompted employees in other departments to seek recruiter positions).

[45] *Id.* at 12. ("My job is on the line…I need you guys to perform…If you're not doing your job, you're going to lose your job. And if you're not hitting your goals, that's how we're going to measure if you're doing your job. And…I don't mean applications in. I mean starts.").

enroll.[46] Recruiters also pressured students to take out loans to pay tuition,[47] and recruiters were encouraged to cease providing support to these students once their enrollment was credited for salary purposes.[48] UOP ended up paying $9.8 million to settle the investigation but admitted no wrongdoing.[49]

The issue of incentive compensation has spawned a spate of lawsuits filed pursuant to the federal False Claims Act (FCA).[50] The qui tam[51] provisions of the Act permit private citizens to bring lawsuits alleging fraud against the government on behalf of the government.[52] If the plaintiffs, referred to as relators, are successful in winning damages on behalf of the government, they share in the recovery.[53] The law is intended to incentivize whistleblowing by individuals with first-hand knowledge of fraud against the government.[54] Proprietary schools are particularly susceptible to FCA lawsuits;[55] plaintiffs have filed many lawsuits alleging fraud in the obtainment of Title IV funds, primarily arising from

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[46] Even when recruiters felt other educational options, such as community colleges, would be better for individual prospects, they were forbidden from making such recommendations. *Id.* at 24.

[47] Recruiters were expected to complete financial aid documentation for students and the forging of signatures by recruiters was commonplace. *Id.* at 24; See also *Anti-Fraud Hearings, supra* note 10, at 41 (statement of Paula L. Dorsey). (discussing recruiters pressuring students to "improperly obtain social security numbers and signatures of other family members by whatever means necessary for the hopes of getting a 'better' financial aid package").

[48] *UOP Program Review Report, supra* note 41, at 24. (To be considered enrolled for purposes of recruiter salary, students had to "attend three nights of the first five-week course of a bachelors' program or, for graduate students, attend two nights…and be scheduled to attend a second class…After the student has met these criteria…UOP requires [recruiters] to pursue new enrollments…").

[49] Apollo Group, *The February 2004 Program Review Report Relating To The University Of Phoenix Was Fundamentally Flawed,* http://www.apollolegal.com/prrCritique.html. ("[W]e believe that the terms of the Settlement Agreement between UOP and [the DOE] constitute a clear, albeit implicit, rejection of the [audit] and its alleged findings. The simple fact is that if the alleged findings in the [audit] had any merit – which they do not – [the DOE] would not and could not have settled the issues raised in the [audit] on the terms that it did. The terms of the Settlement Agreement are very favorable to UOP.")

[50] *See, e.g.,* Timothy J. Hatch & Bryan Arnold, *The Growing Threat of False-Claims Lawsuits,* CHRON. OF HIGHER EDUC., Jul. 14, 2006, http://chronicle.com/article/The-Growing-Threat-of-False/10310/.

[51] "Qui tam is short for the Latin phrase…'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Natural Resources v. U. S. ex rel. Stevens, 529 U.S. 765, 769 (2000).

[52] 31 USCS § 3730. ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.").

[53] Defendants found to have committed fraud under the FCA are assessed a fine ranging from $5,000 to $10,000 and must pay three times the government's damages arising from the fraud. Plaintiffs can recover up to 30 percent of the latter assessment. 31 USCS § 3729 and 3730.

[54] *See e.g.,* Op. Att'y Gen. (1989), 1989 OLC LEXIS 109 (stating that the 1986 Amendments to the FCA were the result of Congress being "dissatisfied with the way the executive branch was enforcing government procuring laws" and therefore desiring to "deputize private citizens to ensure effective law enforcement").

[55] *See* Sara Hebel, *Supreme Court Blocks Suits Against Public Colleges Under U.S. Whistle-Blower Law,* CHRON. OF HIGHER EDUC., June 2, 2000, http://chronicle.com/article/Supreme-Court-Blocks-Suits-/35130/.

recruiter compensation arrangements.[56] FCA actions of this type have proved fruitful. In 2007, Oakland City University paid $5.3 million to settle such a lawsuit.[57] In late 2009, UOP settled an FCA suit for almost $80 million.[58] In both cases, the whistleblowers received millions of dollars for their efforts.

## C. ENTRANCE TEST IMPROPRIETIES

Proprietary schools have also faced accusations of improprieties relating to the enrollment of ineligible students for financial aid purposes. Entrance test improprieties and the falsifying of attendance records commonly form the bases of these accusations. For federal financial aid purposes, students not possessing a high school diploma or GED must take and pass "an independently administered test of basic math and English skills, called an 'ability-to-benefit' or ATB test. The intent of the test is to measure whether students have the basic skills needed to benefit from higher education and succeed in school."[59] An investigation by the Government Accountability Office (GAO) documented test administrators giving out answers and changing answers to ensure passing scores.[60] At the Katharine Gibbs School, the *60 Minutes* producer intentionally failed the entrance exam, but was allowed to retake it and was told her second score was sufficient for admission purposes.[61] Additionally, recruiters allege that schools forced them to enroll students even without required exam scores.[62] A federal raid in 2004 of the headquarters of ITT Educational Services (ITT)[63] and ten of its campuses is believed to have been related

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[56] See *Growing Threat*, *supra* note 49 (providing an overview of FCA brought against educational institutions).
[57] Elizabeth Quill, *University Will Pay $5.3-Million to Settle Whistle-Blower's Lawsuit,* CHRON. OF HIGHER EDUC., Aug. 10, 2007, http://chronicle.com/article/University-Will-Pay-53-Mi/5344/
[58] Apollo Group, *Apollo Group, Inc. Resolves University of Phoenix False Claims Act Case,* http://phx.corporate-ir.net/phoenix.zhtml?c=79624&p=irol-newsArticle&ID=1365655&highlight=. ("Under the terms of the agreement, the Company will pay $67.5 million to the United States. A separate agreement provides for the payment by the Company of $11 million in attorneys fees to the plaintiffs, as required by the False Claims Act.").
[59] GAO, STRONGER OVERSIGHT, *supra* note 13, at 9.
[60] *Id*. at 22.
[61] Her initial score was 7 out of 50. Upon retaking the test, the admissions recruiter said she got 14 out 50 answers correct, which was sufficient for enrollment. Lang, *supra* note 20.
[62] *Anti-Fraud Hearings, supra* note 10, at 41 (statement of Paula L. Dorsey) ("There were students that had never taken the exams or who had failed the exams, sitting in class. I was instructed to clean up the files by whatever means necessary even if it meant backdating things.").
[63] ITT Educational Services, Inc., *Overview,* http://www.ittesi.com/phoenix.zhtml?c=94519&p=irol-IRHome ("ITT Educational Services, Inc….is a leading provider of technology-oriented postsecondary degree programs. [ITT]

to allegations that the proprietary educational provider was overstating student enrollment in order to increase its federal financial aid revenue.[64] The investigation found no wrongdoing among executives within the company;[65] however, investigations of individual campuses remained open.[66]

## D. COHORT DEFAULT RATE MANIPULATION

Schools are commonly accused of manipulating is cohort default rates.[67] Cohort default rates provide schools with incentives to minimize defaults among their student-borrowers and protect taxpayers from the costs of excessive defaults.[68] Schools with default rates that exceed certain thresholds can have their federal financial aid eligibility stripped.[69] Historically, proprietary schools have recorded higher default rates than non-profit institutions,[70] and numerous proprietary schools have been closed due to

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operates more than 105 Technical Institutes in 37 states, which predominantly provide career-focused degree programs of study in fields involving technology to approximately 65,000 students.").

[64] ITT Educational Services, Inc., *ITT Educational Services, Inc. Reports That It Has Been Served with a Search Warrant and Related Subpoenas from the U.S. District Court of Texas,* Feb. 25, 2004, http://www.ittesi.com/phoenix.zhtml?c=94519&p=irol-newsArticle&ID=498922&highlight= (According to ITT, agents sought information pertaining to "placement figures and rates, retention figures and rates, graduation figures and rates, attendance figures and rates, recruitment and admissions materials, student grades, graduate salaries and transferability of credits to other institutions.").

[65] ITT Educational Services, Inc., *ITT Educational Services, Inc. No Longer Subject of U.S. Department of Justice Investigation,* June 24, 2005, http://www.ittesi.com/phoenix.zhtml?c=94519&p=irol-newsArticle&ID=723775&highlight=. *See also,* Letter from Chuck Rosenberg, United States Attorney, to Thomas E. Holliday & Lawrence D. Finder (June 24, 2005), http://media.corporate-ir.net/media_files/NYS/ESI/DOJLet.pdf (informing counsel for ITT that the U.S. Attorney's investigation "has not revealed evidence sufficient" to find wrongdoing on the parts of company executives).

[66] John L. Pulley, *Justice Department Ends Inquiry Into ITT Educational Services,* CHRON. OF HIGHER EDUC., Jul. 8, 2005, http://chronicle.com/article/Justice-Department-Ends-Inq/7707/.

[67] GAO, STRONGER OVERSIGHT, *supra* note 13, at 10. (DOE "computes default rates for all schools with students who receive Title IV loans…[by] tracking whether borrowers in a cohort—a group of students who begin repaying their loans in a given fiscal year—at each school default on their federal student loans over a 2-year period.").

[68] "Defaulted federal student loans cost taxpayers money. Cohort default rate sanctions and benefits provide an incentive to schools to work with their borrowers to reduce default…[C]ohort default rates help save taxpayers money." U.S. DEP'T OF EDUC., COHORT DEFAULT RATE GUIDE, 2.4-1 (2006) http://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideMasterSept06.pdf.

[69] Schools with default rates of 25 percent or above for three years or above 40 percent for one year lose federal student loan eligibility for the remainder of the year after notification and the following two years, pending appeals and adjustments. *Id.* at 2.4-3. See also, *id.* at 2.4-2 (discussing benefits conferred upon schools with default rates of less than 5 percent or 10 percent).

[70] GAO, STRONGER OVERSIGHT, *supra* note 13.

unacceptably high rates.[71] Given the extent to which proprietary schools rely on Title IV aid, losing eligibility is akin to an institutional death sentence.[72]

In an effort to reduce cohort default rates, some proprietary schools unilaterally pay off loans obtained by students who later withdraw.[73] While this may seem altruistic on its face, the true motivation is thus: Students who take out loans to pay for school, but withdraw before completing an academic program are at high risk of defaulting on those loans;[74] therefore, schools settle the loans for these students as a means of protecting their Title IV eligibility from likely defaults.[75] The schools then engage in aggressive efforts to collect the debt from students, offering less favorable repayment terms than those available through Title IV.[76] As a result, former students have brought lawsuits alleging contracts-based causes of action.[77] The DOE has expressed disapproval of this behavior. In 2008, an inspector for the department found that a proprietary school in New York had improperly repaid Title IV loans or returned loan funds for 301 students who withdrew during their first semester of study.[78] School officials stated that this "default prevention policy" was implemented due to past problems with its default rate.[79] As a result of its findings, the DOE made various recommendations to the school, including ceasing the practice of repaying loans and ending pending collection efforts resulting from that practice.[80]

Proprietary school misrepresentations and improprieties are multifaceted and costly. However, for many of these institutions, their profit-generating motives make the allure of such behaviors

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[71] *See, e.g.,* Linehan, *supra* note 7.
[72] *Id.*; *But see,* Justin Pope, *AP IMPACT: For-Profit Colleges Boost Lending*, http://abcnews.go.com/US/wireStory?id=8330001 (last visited Nov. 21, 2009) (detailing increased loan making by proprietary schools to financially strapped students, many of whom would not qualify for traditional student loans).
[73] See, e.g., News, Unusual (and Improper) Way to Lower Default Rates, INSIDE HIGHER EDUC., May 21, 2008, http://www.insidehighered.com/layout/set/print/news/2008/05/21/default [hereinafter *Lower Default Rates*].
[74] See, e.g., GAO, STRONGER OVERSIGHT, *supra* note 13.
[75] *Lower Default Rates, supra* note 73.
[76] *Id*.
[77] See NACAC Testimony, *supra* note 38 at 1 (summarizing a lawsuit against UOP filed by former students whose loans were paid by UOP without their permission).
[78] Technical Career Institutes, Inc.'s Administration of the Federal Pell Grant and Federal Family Education Loan Programs, Control No. ED-OIG/A02H0007 (Dep't of Educ. May 19, 2008), http://www.ed.gov/about/offices/list/oig/auditreports/fy2008/a02h0007.doc
[79] *Id.*
[80] *Id.*

irresistible. These motives are part of a larger trend of commoditization of higher education. Commoditization has introduced a market ethos into higher education that has changed the way all institutions operate—for better and worse.

## PART II: THE COMMODITIZATION OF HIGHER EDUCATION

The United States has the most market-oriented system of higher education in the world.[81] Compared to its European counterparts, the American system has developed with little direct influence from the federal government.[82] This freedom has spawned a vast, entrepreneurial expansion of higher education within the United States.[83] Through much of the country's history, new colleges were established "without restraint",[84] and the result has been a proliferation and democratization of higher education that stand in contrast to the elitist systems in Europe and other parts of the world.[85] Historically, however, the higher education market has been largely protected from the sink-or-swim pressures that have characterized other industries. Higher education has enjoyed strong public support, and vast sums of public resources have flowed with virtually no strings attached.[86] However, various economic and social trends have led to a diminishment of higher education's protected market standing, and as a result, an academic capitalistic system has come to fore.[87]

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[81] See, e.g., David D. Dill, *Allowing the Market to Rule: The Case of the United States,* 57 Higher Educ. Quarterly 136 (2003).
[82] See, e.g., Martin Trow, *Federalism in American Higher Education, in* HIGHER LEARNING IN AMERICA 39 (Arthur Levine ed., The Johns Hopkins University Press, 1993); But see, e.g. Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government And Higher Education, in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 151 (Philip G. Altbach, Robert O. Berdahl, & Patricia J. Gumport, eds., The Johns Hopkins University Press, 1999) (arguing that federal influence has been pervasive).
[83] See, e.g., CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 116 (Palgrave Macmillan 2006).
[84] *Id.*
[85] *Id.*
[86] *See, e.g.,* Trow, *supra* note 82, at 57 (calling the federal government's approach to disbursing land grants under the Morrill Acts "extraordinarily permissive").
[87] DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 2 (Harvard University Press 2004) (2003) ("For better or worse—for better and worse, really—American higher education is being transformed by both the power and the ethic of the marketplace.").

The commoditization of higher education is a transcendent phenomenon. This multifaceted trend is the result of many interrelated factors, including demands of the knowledge-based economy; new technologies; increased globalization; neoliberal financial aid policies; changing student populations; rising tuition; demands for accountability; and the advent of new higher education providers. One result of commoditization is a higher education market rooted in capitalistic principles; thus any discussion of the factors contributing to commoditization must begin with a discussion of academic capitalism.

Like capitalism in general, academic capitalism is about competition—competition for funding, students, and, for some schools, prestige.[88] The primary competitors are institutions, which are embodied by the actors who operate therein: faculty, students, and administrators.[89] Networks are central to viability within the academic capitalist system.[90] As such, institutional actors seek to link institutions (and themselves) to the modern, knowledge-based economy.[91] These links most often take the form of "new circuits of knowledge"; partnerships with the private sector; investments in marketing, product development, and student services; and an expanded managerial core to handle these new demands.[92] Fundamentally, the goal of institutions competing in this environment is to generate income,[93] particularly from "alternative revenue streams",[94] with the assumption that robust, diversified funding will lead to greater prestige, better students, and increased viability.[95]

## A. KNOWLEDGE-BASED ECONOMY

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[88] See, e.g., SHEILA SLAUGHTER & GARY RHODES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE AND HIGHER EDUCATION (Johns Hopkins, 2004).
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 11 (defining academic capitalism as "the pursuit of market and marketlike activities [by colleges and universities] to generate external revenues").
[94] JAMES C. HEARN, DIVERSIFYING CAMPUS REVENUE STREAMS: OPPORTUNITIES AND RISKS 1 (American Council on Education Center for Policy Analysis, 2003) (identifying alternative revenue streams as those from sources other than state appropriations or tuition and fees).
[95] *Id*. at 5.

In a knowledge-based economy, knowledge is a commodity that when exploited can reap tangible benefits upon the possessor.[96] Higher education institutions are central to the knowledge economy because they are considered a "major source of alienable knowledge."[97] In other words, as creators, holders, and sellers of knowledge, these institutions hold the key to economic growth and the social cohesion that often accompanies such growth.[98] As a result, one of the most pressing issues concerning the nature and function of higher education is how it can ensure that citizens can be productive participants within this economy.[99] And just like the knowledge-based economy facilitates opportunity and success for possessors of vital knowledge, it "increasingly eliminates those without education and training beyond high school from employment opportunities that can support a middle-class standard of living."[100]

The relatively new emphasis on knowledge as a tool of economic vitality has created a market for education and has changed the motivations and mindsets of students. Students are increasingly viewing education as a product and themselves as consumers.[101] Academic capitalism dictates that "[s]tudent consumers choose…colleges and universities that they calculate are likely to bring a return on educational investment."[102] The traditional student motivation—learning for learning's sake—is making way for contemporary realities and pressures where education is increasingly seen as a private, rather than public,

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[96] *See,* SLAUGHTER & RHOADES, *supra* note 88, at 15 ("Knowledge is a raw material to be converted to products, processes, or service.").
[97] *Id*.
[98] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION POLICY ANALYSIS: FOCUS ON HIGHER EDUCATION (2006) http://www.oecd.org/document/25/0,3343,en_2649_39263238_37693017_1_1_1_1,00.html [hereinafter OECD POLICY ANALYSIS]
[99] THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, GOOD POLICY, GOOD PRACTICE (2007) http://www.highereducation.org/reports/Policy_Practice/index.shtml
[100] THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, MEASURING UP: THE STATE REPORT CARD OF HIGHER EDUCATION 20 (2006) http://measuringup.highereducation.org/.
[101] See, e.g., SLAUGHTER & RHOADES, *supra* note 88, at 12 (Rising tuition "has heightened students' and parents' consumer consciousness about what they expect in terms of their educational experience…these changed expectations reshape student identity from that of learner to that of consumer.").
[102] *Id.* at 1; See also *id*. (discussing how students "increasingly choose majors linked to the new economy, such as business, communications, media arts").

good.[103] Therefore, as the value of a college education has "skyrocketed",[104] schools have been increasingly required to "reframe themselves as both education and business institutions."[105]

B. NEW TECHNOLOGIES

Technology has changed "how students learn, how professors teach and conduct research, and how administrators manage institutions."[106] Today, many schools offer courses via distance learning frameworks. Professors are now able to analyze large datasets in discovering knowledge and are able to collaborate with colleagues from all over the world.[107] Technology's practical effect within the academic capitalist system has been to widen learning options for students and to increase competition among institutions for both students and faculty members.[108] Technology has also led to greater institutional operating efficiencies, [109] a trend that has allowed some institutions to better harness the academic capitalist system to their advantage.[110]

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[103] See, e.g., *id.* at 42 ("By the 1980s and 1990s, higher education was construed less as a necessary public or social good and more as an individual or private good, justifying 'user pays' policies…").
[104] THOMAS J. KANE, THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE (The Brookings Institution Press 1999) (noting that the difference in earnings between a high school graduate and a college graduate increased from 19 percent in 1980 to 52 percent in 1995); But see, MICHAEL S. MCPHERSON & MORTON O. SCHAPIRO THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION (Princeton University Press 1998) (arguing that much of the increased economic differentiation between levels of education is mostly attributable to a decline in the value of a high school education, rather than an increase in the value of college).
[105] ERIC J. ANTCIL, SELLING HIGHER EDUCATION: MARKETING AND ADVERTISING AMERICA'S COLLEGES AND UNIVERSITIES, 34 The ASHE Higher Education Report (Jossey-Bass 2008).
[106] Patricia J. Gumport & Barbara Sporn, *Institutional Adaptation: Demands For Management Reform And University Administration*, *in* 14 HIGHER EDUCATION HANDBOOK OF THEORY AND RESEARCH (John Smart & William G. Tierney eds., Agathon Press, 1985).
[107] *See,* OECD POLICY ANALYSIS, *supra* note 98.
[108] Marvin W. Peterson & David D. Dill, *Understanding The Competitive Environment Of The Postsecondary Knowledge Industry, in* PLANNING AND MANAGEMENT FOR A CHANGING ENVIRONMENT: A HANDBOOK ON REDESIGNING POSTSECONDARY INSTITUTIONS (Marvin W. Peterson, David D. Dill & Lisa Mets, eds., Jossey-Bass, 1997).
[109] *See,* e.g., CAROL A. TWIGG, COURSE REDESIGN IMPROVES LEARNING AND REDUCES COST (National Center for Public Policy and Higher Education Policy Alert, 2005) http://www.highereducation.org/reports/pa_core/core.pdf (discussing a technology-based course redesign project that reduced the costs of offering these courses by an average of 40 percent for the participants).
[110] *See,* e.g., RICHARD S. RUCH, HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY (Johns Hopkins, 2001) (2003) (discussing the effect of proprietary schools' close attention to operational efficiencies).

C. GLOBALIZATION

Broadly, globalization is "the flow of technology, economy, knowledge, people, values and ideas…across borders."[111] The phenomenon encompasses virtually all aspects of modern society, and the extent to which nations embrace it varies.[112] As the world economies have become increasingly knowledge-based and integrated, demands for a globalized trade in higher education have become more vocal.[113] This trade embodies academic capitalism, as it "attract[s] foreign capital, invit[es] competition, and produc[es] a profit."[114] The globalized trade in higher education involves millions of people[115] and billions of dollars.[116]

Unsurprisingly, the principle motivation behind higher education globalization is economic.[117] Individuals possessing foreign credentials can broaden employment prospects and demand higher salaries.[118] Institutions can generate large sums of revenue by attracting foreign students.[119] Governments can exploit the globalized knowledge of their workforce in dealings with foreign counterparts.[120] In response, the World Trade Organization (WTO) formally commoditized education under the General Agreement on Trade in Services (GATS) in 1995.[121] Under GATS, education trade

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[111] UNESCO, HIGHER EDUCATION IN A GLOBALIZED SOCIETY 6 (2004) http://unesdoc.unesco.org/images/0013/001362/136247e.pdf [hereinafter UNESCO, GLOBALIZED].
[112] *Id.*
[113] *See,* OECD POLICY ANALYSIS, *supra* note 98.
[114] N.V. VARGHESE, GLOBALIZATION OF HIGHER EDUCATION AND CROSS-BORDER STUDENT MOBILITY 9 (UNESCO IIEP, 2008) http://www.unesco.org/iiep/PDF/pubs/2008/Globalization_HE.pdf.
[115] *Id.* at 11. ("In 2006, there were 2.7 million students studying abroad…projections indicate that the demand…will increase to 7.2 million by 2025.")
[116] UNESCO, MEETING OF HIGHER EDUCATION PARTNERS SYNTHESIS REPORT ON TRENDS AND DEVELOPMENTS IN HIGHER EDUCATION SINCE THE WORLD CONFERENCE ON HIGHER EDUCATION (1998-2003) 23 (2003) http://portal.unesco.org/education/en/files/20031/10561417481synthesis_report.pdf/synthesis_report.pdf [hereinafter UNESCO, MEETING] (estimating that in 2003 proprietary education generated $365 billion worldwide).
[117] See VARGHESE, *supra* note 114.
[118] See *id*.
[119] *See,* e.g., UNESCO, GLOBALIZED, *supra* note 111.
[120] *See,* e.g., OECD POLICY ANALYSIS, *supra* note 98.
[121] VARGHESE, *supra* note 114 at 7 ("GATS represents a set of multi–lateral rules governing international trade in services.")

encompasses cross-border supply and consumption, as well as the presence of commercial providers in foreign countries.[122]

Technology is the primary facilitator of globalization; as such, globalization has had many of the same effects on higher education as technology. Learning opportunities have been broadened, as have opportunities for academic collaboration.[123]

## D. NEOLIBERAL FINANCIAL AID POLICIES

Neoliberalism is premised on encouraging productivity through the empowerment of individuals as economic actors.[124] Salient characteristics of neoliberal policies are "privatization, commercialization, deregulation and reregulation."[125] The 1972 Amendments to the Higher Education Act are considered landmark pieces of legislation.[126] Among other things, the Amendments made federal student aid "portable," meaning, students could use their aid at the schools of their choice.[127] The Amendments also "broadened the definition of which institutions were eligible to receive federal aid."[128] Specifically, proprietary and non-degree granting institutions could now collect Title IV aid from students.[129] These shifts were classic neoliberal policies, in that they sought to encourage higher education efficiencies by empowering students and forcing institutions to engage in a "marketlike competition…for federally subsidized student tuition dollars."[130] The effects of neoliberal policies are apparent in other areas of higher education as well, including research.[131]

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[122] *Id*.
[123] *See,* UNESCO, GLOBALIZED, *supra* note 111.
[124] *See,* e.g., SLAUGHTER & RHOADES, *supra* note 88, at 20 ("The neoliberal state focuses not on social welfare for the citizenry as a whole but on enabling individuals as economic actors. To that end, neoliberal states move resources away from social welfare functions toward production functions.")
[125] *Id*. at 21.
[126] See, e.g., Trow, *supra* note 82, at 59 (asserts that the Education Amendments of 1972 "established higher education as a national priority in its own right").
[127] *Id*. (explaining that student aid had previously been awarded directly to institutions in the form of block grants).
[128] Marvin W. Peterson & David D. Dill, *supra* note 108, at 6.
[129] *Id*.
[130] SLAUGHTER & RHOADES, *supra* note 88, at 35.
[131] *Id*. at 21 (discussing the effects of the Bayh-Doyle Act, which allows institutions to claim ownership of patents that are based on research conducted with federal funds).

E. CHANGING STUDENT POPULATIONS

Broader access to higher education and the emergence of the knowledge-based economy have fueled higher education demand from new student markets. Students of color and non-traditional adult learners[132] are seeking higher education in increasing numbers. Affirmative action programs and the expansion of nonselective colleges and universities have helped spur this increased level of participation.[133] The number of students of color undertaking higher education increased almost 51 percent between 1993 and 2003.[134] Adult learners now comprise more than half of the college student population.[135] Their primary motivation for undertaking higher education is job skills training and professional development.[136] With these new consumers have come new needs and demands that vary from those of the "typical college student."[137] And institutions seeking to exploit these new markets have been forced to adjust accordingly.[138] Put simply, the academic capitalist system is prompting these institutions to respond to consumer demands.

F. RISING TUITION

[132] COUNCIL FOR ADULT AND EXPERIENTIAL LEARNING, SERVING ADULT LEARNERS IN HIGHER EDUCATION: FINDINGS FROM CAEL'S BENCHMARKING STUDY (1999) http://www.cael.org/pdf/publication_pdf/CAEL%20Benchmarking%20Findings%20Executive%20Summary.pdf (defining adult learner as being financially independent, with major responsibilities outside of school, and whose "principal identities have evolved beyond the role of full-time student").

[133] See Michael Kirst, *Secondary and Postsecondary Linkages, in* ECONOMIC INEQUALITY AND HIGHER EDUCATION (Stacy Dickert-Conlin & Ross Rubenstein, eds., Russell Sage Foundation, 2007).

[134] Bryan J. Cook & Diana I. Córdova, MINORITIES IN HIGHER EDUCATION, TWENTY SECOND ANNUAL STATUS REPORT: 2007 SUPPLEMENT (American Council on Education 2007) http://www.acenet.edu/AM/Template.cfm?Section=CAREE&Template=/CM/ContentDisplay.cfm&ContentID=23716.

[135] U.S. DEP'T OF LABOR, ADULT LEARNERS IN HIGHER EDUCATION: BARRIERS TO SUCCESS AND STRATEGIES TO IMPROVE RESULTS (2007). http://wdr.doleta.gov/research/FullText_Documents/Adult%20Learners%20in%20Higher%20Education1.pdf.

[136] *Id.* at 3 (discussing how economic volatility has fueled a "growing demand for continual learning and skill enhancement").

[137] *Id.* (identifying the "typical college student" as a "financially dependent, 18-year-old high school graduate who enrolls full time").

[138] *See, e.g.,* Peterson & Dill, *supra* note 108 (discussing how the rising popularity of non-degree and continuing education programs among adult learners has forced institutions to reassess their programmatic offerings).

State appropriations to higher education (as percentage of overall budgets) have declined steadily over the past three decades.[139] As a result, institutions have had to generate more "market income"[140] principally in the form of tuition.[141] Between 1976 and 2005, the average cost of a public 4-year institution increased 270 percent.[142] Compounding the effects of rising tuition has been a decline in federal funding of need-based student aid, particularly Pell Grants.[143] Twenty years ago, the maximum Pell Grant covered 60 percent of tuition at a typical public 4-year institution; in 2006, that purchasing power had declined to 33 percent.[144] The discretionary nature of higher education funding has made it an easy target for cuts, as entitled expenses such as health care increasingly strain state and federal budgets.[145]

Students now finance a higher proportion of their tuition using loans. Between 1990 and 2004, the percentage of full-time students with loans rose from 36 percent to 50 percent.[146] Between 1993 and 2004, cumulative debt levels for college students at public and private institutions rose 76 percent and 57 percent respectively.[147] This shift has largely privatized the cost of higher education, thereby, further entrenching the student-as-consumer mindset that has come to characterize academic capitalism.[148]

## G. DEMANDS FOR ACCOUNTABILITY

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[139] *See, e.g.,* SLAUGHTER & RHOADES, *supra* note 88.
[140] ANTCIL, *supra* note 105 at 4 ("[M]arket income has increasingly substituted for public appropriations in higher education.")
[141] *See, e.g.,* SLAUGHTER & RHOADES, *supra* note 88.
[142] *See, e.g.,* Bridget T. Long & Erin Riley, *Financial Aid: A Broken Bridge to College Access?,* 77 Harvard Educational Review (2007); See also, *id*. (adding that median family income only increased 23 percent during the same period).
[143] *See, e.g., id*.
[144] College Board, TOTAL PELL GRANT FUNDING DECLINES FOR FIRST TIME IN SIX YEARS, 2006 TRENDS IN HIGHER EDUCATION SERIES: PELL GRANTS (2006) http://www.collegeboard.com/prod_downloads/press/cost06/pell_grants_06.pdf
[145] *See, e.g.,* KANE, *supra* note 104 (illustrating an association between increases in state Medicare spending and increases in public four-year tuitions); See also *id*. (discussing the manner in which entitlement spending has affected federal spending on education, particularly grant programs such as Pell).
[146] Long & Riley, *supra* note 142.
[147] *Id*. at 47.
[148] *See, e.g.,* SLAUGHTER & RHOADES, *supra* note 88.

Against the backdrop of declining funding emerged the demand for educational accountability. Institutions are now being called upon to demonstrate their "value for money"—an expression used to denote an organization's economy, efficiency, and effectiveness.[149] In other words, institutions have had to provide evidence of successful outcomes, particularly as they relate to student learning.[150] Institutional assurances are no longer sufficient, and assumptions are no longer freely granted. Fundamentally, policymakers want colleges and universities to behave more like private industry. In fact, the "resurgence of productivity and performance in American business" has been cited as an impetus behind the increased calls for educational accountability.[151] Private sector watchwords such as "performance", "investment", and "efficiency" have become part of the higher education lexicon.[152] Accountability models first tested (and often discredited) in the private sector have found homes in higher education institutions.[153]

Demands for accountability have manifested in various ways that reflect the capitalistic nature of education. Most prominently, states and accreditation agencies have required institutions to develop performance indicators and methods for assessing them. Many states have also tied institutional funding to performance.[154] While performance indicators take many forms, they are most often expressed numerically,[155] similar to private sector indicators. They can be internal in nature (e.g. graduation rates, research funds obtained, and teaching quality); external (e.g. employment rates of graduate); and

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[149] Robert Ball & Jalil Halwachi, *Performance Indicators in Higher Education,* 16 Higher Education 393 (1987).

[150] Marilyn C. Kameen & Manuel J. Justiz, *Using Assessment in Higher Education to Improve Success for Minority Students,* Peabody Journal of Education 47 (1988) (asserting that state assessment of student outcomes "emerged as a remarkable new feature in American higher education" as far back as 1985).

[151] Alicia C. Dowd, *From Access to Outcome Equity: Revitalizing the Democratic Mission of the Community College,* 586 Annals of the American Academy of Political and Social Science 92 (2003).

[152] JOSEPH D. CREECH, LINKING HIGHER EDUCATION PERFORMANCE INDICATORS TO GOALS: EDUCATIONAL BENCHMARKS 2000 SERIES (Southern Regional Education Board 2000) http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/f1/c9.pdf.

[153] Gary Rhoades & Barbara Sporn, *Quality Assurance in Europe and the U.S.: Professional and Political Economic Framing of Higher Education Policy*, 43 Higher Education 366 (2002) (explaining how accountability models "arrive at higher education's doorstep" after initial trials in business).

[154] Dowd, *supra* note 151, at 109 (noting that by 2000, almost three-quarters of the states had performance funding systems in place and that the shift away from input-based funding to funding based on outcomes betokened "a new emphasis on accountability").

[155] Robert Ball & Rob Wilkinson, *The Use and Abuse of Performance Indicators in UK Higher Education,* 27 Higher Education 418 (1994) (defining performance indicators as "[n]umerical values which provide a measurement for assessing the quantitative performance of a system").

operational (e.g. unit costs, class sizes, course options).[156] The accountability movement has also contributed to a shift in how institutions present themselves to potential consumers. It is no coincidence that schools now tout employment rates and outcome-based indicators in advertisements to prospective students. The accountability movement has played a considerable role in fostering the spread of academic capitalism within higher education, particularly in terms of how institutional effectiveness is viewed internally and externally.

## H. NEW HIGHER EDUCATION PROVIDERS

The advent of new providers exemplifies the interrelated nature of the trends contributing to the spread of academic capitalism. The knowledge-based economy has increased demand for higher education, which, along with neoliberal financial aid policies, has incentivized entry of new providers. Technological advancements and globalization have eased entry of these providers into the market. Changing student populations and rising tuition among traditional institutions have fostered new markets and enhanced preexisting ones. Demands for accountability have introduced outcomes-based parlance and practices into the higher education industry—a shift upon which new providers have been able to capitalize.

Proprietary schools are the most salient new higher education providers. These providers have entered the market and in many ways have adapted to new realities more effectively than their traditional peers. For starters, proprietary institutions have been successful at reframing themselves in response to the commoditization of education. In fact, it could be argued that they never needed to reframe in the first place. Their profit-generating motives already required them to respond to market demands in ways that non-profit institutions did not. They have also adapted through an evolution of their own. The

[156] Ball & Halwachi, *supra* note 149; *See also,* Bob Barnetson & Marc Cutright, *Performance Indicators as Conceptual Technologies,* 20 Higher Education 278-279 (2000) (classifying indicators in terms of five organizational elements to which performance indicators are applied: 1) Inputs [e.g. faculty, facilities]; 2) Processes [e.g. teaching]; 3) Products [e.g. courses completed]; 4) Outputs [e.g. degrees awarded, grants secured]; and 5) Outcomes [e.g. employment rates].)

conventional mom-and-pop operations are becoming relics of the past, as large, multi-campus corporations now dominate the industry.[157] In response to market demands, many of these institutions have also transcended their vocational moorings and now award degrees up to the doctoral level.[158] Proprietary schools are now among the largest and most successful education providers in the country,[159] validating their market-driven approach and exemplifying their superior adaptive ability.

## PART III: THE RISE OF PROPRIETARY COLLEGES

Much has been written about the recent "arrival" of proprietary schools into the higher education market; however, "reemergence" might be a better descriptor. The history of proprietary schools in the United States is surprisingly long—pre-dating the signing of the Declaration of Independence. They were fixtures during Colonial times as alternatives to apprenticeships and the colleges of the day.[160] The purpose of these early institutions evolved from teaching basic literacy to career training.[161] These institutions embodied the entrepreneurial spirit that would come to symbolize the founding of the United States and the spread of higher education.[162] These institutions also embraced the ideal of educational access,[163] an ethos that would hasten their reemergence in the early 1970s.

### A. TITLE IV EXPANSION

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[157] FOSTER, *supra* note 23, at 8 (referring to these schools as "super systems").
[158] *See, e.g.,* ANTCIL, *supra* note 105.
[159] The student enrollments of the five largest proprietary schools are as follows: University of Phoenix: 420,700; Education Management Corporation: 112,700; Kaplan Higher Education: 103,300; Career Education Corporation: 93,100; and Devry: 90,365. ERICA R. HENDRY, *For-Profit Colleges See Large Increases in Enrollment and Revenue,* CHRON. OF HIGHER EDUC., Aug. 25, 2009, http://chronicle.com /article/For-Profit-Colleges-See-Lar/48173/.
[160] FOSTER, *supra* note 23, at 13.
[161] RUCH, *supra* note 110, at 52 (chronicling how student interest prompted early proprietary schools to expand their curricula to include courses that taught "skills that were in high demand by employers").
[162] *Id.*
[163] *Id.* at 57 (discussing how proprietary schools were among the first institutions to educate former slaves and Native Americans).

The 1970s brought vast expansion of the proprietary school market.[164] The 1972 Amendments to the Higher Education Act sought to broaden higher education access by making proprietary institutions eligible to collect Title IV aid.[165] Anxious to tap Title IV, proprietary schools aggressively recruited students by touting programs that purported to provide job training; however, much of the promised training never materialized.[166] The lack of effective oversight provided an environment in which sham schools and diploma mills operated with virtual impunity.[167] As a result, student defaults on Title IV loans increased sharply.[168] The 1990s brought closer scrutiny on the proprietary sector, and between 1992 and 1997, almost 800 schools were shut down or stripped of their Title IV eligibility—effectively shutting most of them down.[169] But while the amount of documented improprieties among proprietary schools has fallen, the sector's disproportionate share of federal investigations shows that improprieties remain a problem.

B. STUDENTS

Proprietary schools serve students who are currently underserved by traditional institutions.[170] They tend to enroll the "other 75 percent"—students "who were not in the top 25 percent of their high school classes and who would be unlikely to enroll or be successful at other types of institutions."[171]

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[164] U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, HOUSE SUBCOMMITTEE ON HUMAN RESOURCES, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL STUDENT AID 3 (1997) [hereinafter POORER OUTCOMES]

[165] See e.g., GAO, OVERSUPPLIED OCCUPATIONS, *supra* note 22, at 7.

[166] *See, e.g.,* FOSTER, *supra* note 23, at 14.

[167] *Id*. ("During the 1970s and 80s, institutions operated with little or no oversight and few constraints in recruiting and training students. A large number of institutions did not provide the training advertised, did not comply with fair consumer practices, and mismanaged finances.")

[168] *See, e.g., id.*

[169] Linehan, *supra* note 7, at 760.

[170] See, e.g. *Anti-Fraud Hearings, supra* note 10, at 2 (statement of Congressman John Boehner) (Proprietary schools "are playing a critical role in providing college access for some of our Nation's most vulnerable students. And thus, they are playing a critical role in carrying out the mission of the Higher Education Act.").

[171] FOSTER, *supra* note 23, at 10.

Proprietary school students tend to be poorer[172] and older than students at traditional schools.[173] They are also more likely to be first in their families to go to college,[174] be female,[175] and to belong to a racial/ethnic minority group.[176] Proprietary schools award a disproportionately high percentage of degrees through the doctoral level to black and Hispanic students, [177] and their graduates typically complete degree requirements faster than graduates of traditional schools.[178] These statistics are laudable, and they confirm that proprietary schools help broaden access to higher education. However, this access is motivated more by profit than altruism.[179] Moreover, this access comes at a high cost, due to high rates of attrition at these institutions and concomitant high rates of loan defaults among former students.

C. OUTCOMES

Proprietary schools suffer from poor student outcomes. Lower completion rates tend to create negative cascades that depress placement rates and increase loan default rates.[180] Less than 25 percent of proprietary school students graduate within six-years of beginning their studies, compared to 55 percent and 64 percent at public and private non-profit institutions respectively.[181] Regrettably, this statistic is

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[172] GAO, STRONGER OVERSIGHT, *supra* note 13, at 20 (listing the annual median family income for proprietary school students as 24,300, compared to $40,400 and $49,200 for students at public and private non-profit schools respectively).
[173] *Id.* at 7 (providing that 56 percent of students at proprietary schools are age 25 and older, compared to 35 percent and 38 percent at public and private non-profit schools respectively).
[174] *Id.* at 20 (providing that 63 percent of proprietary school students' parents lack a college degree, compared to 48 percent and 39 percent at public and private non-profit schools respectively).
[175] *Id.* at 7 (providing that 63 percent of students at proprietary schools are females, compared to 54 percent and 56 percent at public and private non-profit schools respectively); See also, *Anti-Fraud Hearings, supra* note 10, at 46 (statement of Nick Glakas) (stating that proprietary schools enroll a large percentage of single mothers).
[176] *Id.* at 8 (providing that 50 percent of students at proprietary schools are non-white, compared to 34 percent and 30 percent for students at public and private non-profit schools respectively).
[177] Proprietary schools award 25 percent of the associate's degrees, 7 percent of the bachelor's degrees, and 6 percent of the master's degree earned by Hispanic students. Walden University, an online proprietary school, ranks among the top 10 of doctoral degree-granters to black students. Devry claims to award more engineering degrees to blacks and Hispanics than in any other school in the country. *Anti-Fraud Hearings, supra* note 10, at 47.
[178] *Id*. at 46. ("On average, students attending career colleges earn their associates degree eleven months sooner than students at community colleges.")
[179] KIRP, *supra* note 87, at 253 (stating that proprietary schools "have no commitment to the idea of public service, no sense of their mission as tied to the good of the commonwealth").
[180] POORER OUTCOMES, *supra* note 164 at 7.
[181] LAURA G. KNAPP, JANICE E. KELLY-REID & SCOTT A GINDER, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP'T. OF EDUC., ENROLLMENT IN POSTSECONDARY

probably inflated, given that it is based on self-reported data, and proprietary schools have many incentives to overstate graduation rates.[182] Placement rates also demonstrate inadequacies within the sector. Schools with the lowest completion rates tend to have the lowest placement rates.[183] This observation is particularly damning because placement rates do not account for attrition; only students who complete the program are included in the calculations. The final links in the chain are student loan default rates. Proprietary school default rates exceed non-profit schools at the 2-, 3-, and 4-year intervals.[184] And once again, the validity of these numbers is questionable, as the method of calculation allows schools to understate their actual number of defaults.[185]

There are many reasons for the lower completion rates at proprietary schools—and not all of them are nefarious. The primary reason concerns the negative association between reliance on Title IV aid and completion rates.[186] This association arises because poorer students persist to degree at lower rates than wealthier students.[187] This phenomenon holds true across higher education, irrespective of sector, and is often used as a powerful justification for those seeking increased or better targeted student aid.[188] And because proprietary schools enroll higher percentages of poor students, it makes sense that their completion and placement rates are lower and their default rates higher.[189]

However, not all factors contributing to these lower rates are benign. Proprietary schools enroll many students who clearly lack the ability to complete a postsecondary program of study.[190] In other words, they exploit their role as access providers—for profit. As discussed earlier, former admissions

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INSTITUTIONS, FALL 2007; GRADUATION RATES, 2001 & 2004 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2007 12 (2009), http://nces.ed.gov/pubs2009/2009155.pdf.

182 LOONIN & DEVANTHERY, *supra* note 28 ("The reliability of the numbers in IPEDS is based solely on the reporting done by the institutions themselves. This is extremely problematic as it leaves nearly absolute discretion in the hands of schools that have every incentive to inflate the numbers.").

183 POORER OUTCOMES, *supra* note 164 at 9.

184 GAO, STRONGER OVERSIGHT, *supra* note 13, at 15 (listing proprietary school default rates that are as much as 250 percent higher than the next highest rate—that of public schools).

185 *Id*. at 13. ("The rate captures only a small portion of all student loan defaults at schools.")

186 POORER OUTCOMES, *supra* note 164.

187 Long & Riley, *supra* note 142.

188 *See e.g., id*.

189 POORER OUTCOMES, *supra* note 164 at 22 ("We believe knowing a school's completion rate helps predict its placement rate and knowing both completion and placement rates helps predict its default rate.").

190 KIRP, *supra* note 87, at 250 ("We accept students who…on paper, aren't likely to make it…").

representatives allege that they were pressured to induce enrollment among unqualified students. And as *60 Minutes* documented, proprietary schools engage in entrance exam improprieties in order to ensure that all prospective students attain satisfactory scores. Actions such as these have created a perception that proprietary schools care less about their students and more about their students' Title IV eligibility.[191]

D. INDUSTRY

Today, the proprietary sector is dominated by five publicly-traded entities: Apollo Group (parent company of UOP), Education Management Corporation, Kaplan Higher Education, Career Education Corporation, and Devry. Combined, these institutions enroll more than 820,000 students.[192] All told, there are 2900 Title IV-eligible proprietary schools[193] providing both degree programs and vocational training.[194] The predominant niche of proprietary education remains career-focused education.[195] They have harnessed new technologies in delivering education programming, both online and on-ground.[196] Their programs are flexible and accelerated, thus appealing to older students who tend to be place-bound and limited in the amount of time they can spend attending classes.[197] Given their adaptive skills, it

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[191] *Anti-Fraud Hearings, supra* note 10, at 22 (statement of Congresswoman Maxine Waters) ("The real motive behind wanting to enroll more minority and low income students is that they are the most profitable students since they qualify for the highest amounts of federal financial aid and the smallest expected family contribution, or none at all.")
[192] HENDRY, *supra* note 159.
[193] LAURA G. KNAPP, JANICE E. KELLY-REID & SCOTT A GINDER, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP'T. OF EDUC., POSTSECONDARY INSTITUTIONS AND PRICE OF ATTENDANCE IN THE U.S.: FALL 2008, DEGREES AND OTHER AWARDS CONFERRED: 2007-08, AND 12-MONTH ENROLLMENT: 2007-08 7 (2009), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/45/5d/ce.pdf.
[194] FOSTER, *supra* note 23, at 8. ("The primary purpose of for-profit postsecondary institutions is preparing graduates for jobs or career advancement. As a result, these institutions generally offer a small, focused range of programs limited to high-demand occupational or professional fields."); *But see,* GAO, OVERSUPPLIED OCCUPATIONS, *supra* note 22 (discussing the amount of federal financial aid used by students training for low-demand fields).
[195] KIRP, *supra* note 87, at 242.
[196] *Anti-Fraud Hearings, supra* note 10, at 46. ("For-profit institutions are pioneering a wide array of innovative program delivery methodologies such as on-line, modular, and weekend programs to complement their traditional classroom offerings.")
[197] *Id*. ("Students choose to attend for-profit colleges because…delivery methods meet their time and geographical needs, allowing them to achieve their postsecondary education goals while continuing to meet the demands of their everyday lives. On average, students attending career colleges earn their associate's degree eleven months sooner than students at community colleges.")

should be no surprise that while traditional schools are dealing with enrollment and budgetary shortfalls, proprietary schools are experiencing vast increases in enrollment and revenue.[198]

E. PROFITABILITY

Many proprietary schools are highly profitable. In 2006, Apollo Group and ITT boasted returns on investment capital of 69 percent and 40 percent respectively, beating out companies such as Exxon Mobil and Microsoft.[199] Since 1995, Apollo's stock price has risen an unfathomable 7,000 percent, and ITT has risen more than 3,500 percent.[200] The stock prices for other publicly-traded education providers have experienced precipitous increases as well.[201] A major component of proprietary schools' profitability is operational efficiency.[202]

F. OPERATIONAL EFFICIENCIES

Like any profit-seeking entity, proprietary schools "place a high value on running their operations efficiently and taking advantage of economies of scale."[203] They minimize inefficiencies in academic planning and teaching by designing curricula centrally[204] and relying principally on untenured faculty to render instruction.[205] Some proprietary schools even base instructor pay on the number of students in the

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[198] HENDRY*,* *supra* note 159. ("The recession has left nonprofit colleges and universities across the country struggling with budget cuts and uncertainties over enrollment, but many for-profit institutions are reporting record increases in student numbers and revenue—a sign that the recession is prompting more adults and nontraditional students to seek career training.")
[199] DEP'T OF EDUC., STATEMENT BEFORE THE SEC'Y OF EDUCATION'S COMM'N ON THE FUTURE OF HIGHER EDUC. 10 (2006) (statement of Howard M. Block) http://www.ed.gov/about/bdscomm/list/hiedfuture/3rd-meeting/block2.pdf.
[200] On January 1, 1995, Apollo and ITT stock were priced at 79 cents and $2.56 respectively. By late 2009, they were trading at around $60 and $90 respectively. MSN Money, Stock Quotes, http://moneycentral.msn.com/detail/stock_quote (last visited Nov. 13, 2009).
[201] Devry stock price has risen more than 3,200 percent since 1991. Career Education Corporation stock price has risen more than 750 percent since 1998. MSN Money, Stock Quotes, http://moneycentral.msn.com/detail/stock_quote (last visited Nov. 13, 2009).
[202] RUCH, *supra* note 110, at 76 (citing "Scale Economies and Operating Efficiencies" as one of eight "Ingredients for Profitability" for proprietary schools).
[203] *Id*. at 88.
[204] *Id*. at 118.
[205] *Id*. at 119.

instructor's class.[206] They use technology to minimize inefficiencies in administrative operations, such as in admissions.[207] Some proprietary schools promote efficiency by calculating optimal facilities usage ratios.[208] These calculations help institutions determine the size of their facilities and the types of leasing agreements they enter.[209]

Enrollment management, however, is the primary method that proprietary schools use to promote efficiencies.[210] Like all institutions, proprietary schools need students; but their need is more intense than that of most non-profit schools.[211] Most non-profits are able to subsidize their expenses with non-tuition revenue, such as endowment income or public appropriations. Proprietary schools, however, do not benefit from such subsidies. As a result, each student represents a revenue stream that directly affects the company's bottom line.[212] As such, these institutions are under intense and constant pressure to increase enrollments. And given this pressure, it should be no surprise that improprieties in the sector almost always bear some relation to institutions' enrollment management functions.

## G. EMPHASIS ON RECRUITMENT

Admissions representatives at proprietary schools are essentially salespeople.[213] At many proprietary schools, the number of admissions representatives outnumbers full-time faculty.[214]

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[206] Goldie Blumenstyk, *Lessons From For-Profit Institutions About Cutting College Costs,* CHRON. OF HIGHER EDUC., Jun. 5, 2008, http://chronicle.com/article/For-Profit-Colleges-Share-L/867/.
[207] *See, e.g.,* Jeffrey Selingo, *U. of Phoenix Owes Rapid Growth to Use of Technology, Its President Says,* CHRON. OF HIGHER EDUC., Jun. 17, 2005, http://chronicle.com/article/U-of-Phoenix-Owes-Rapid-Gr/3394/.
[208] Facility costs are the second largest expense incurred by proprietary schools, behind salaries. Blumenstyk, *supra* note 206.
[209] This approach to managing space differs somewhat from that of most non-profit schools, as these schools are often incentivized to own their facilities and expand such holdings. *Id.*
[210] RUCH, *supra* note 110, at 88 (discussing how proprietary schools track class enrollments closely and make adjustments accordingly).
[211] See, e.g., KIRP, *supra* note 87, at 242 ("Increasing enrollment has to be the paramount concern for any for-profit university, especially one whose stock is publicly traded.").
[212] *Id.*
[213] KIRP, *supra* note 87, at 247. *See also, id.* (explaining that for schools with multiple campuses, these individuals are often responsible for recruiting on behalf of all schools within a particular region).
[214] *Anti-Fraud Hearings, supra* note 10, at 8.

Proprietary schools also invest heavily in advertising;[215] anyone who has ever watched daytime or late-night TV can attest to this. In fact, recruitment and marketing expenses typically dwarf the total salaries paid to faculty.[216] Proprietary school advertisements often portray education as the path to a career and to financial security—and the advertising institution as the ideal provider of that education. Unfortunately, many of the electronic and human representatives of proprietary schools proffer misrepresentations as a means of inducing enrollment. The primary targets of these misrepresentations are people who are most susceptible to being fooled by them and most likely to reap the negative effects of an unsuccessful educational experience. Therefore, a clear imperative to prevent schools from inducing enrollment using misrepresentations exists.

## PART IV: THE NEED FOR TIGHTER REGULATION OF HIGHER EDUCATION RECRUITMENT AND MARKETING

The typical proprietary school student is undertaking education for very pragmatic reasons—most often, earning a degree that will soon result in a well-paying job.[217] Cognizant of their niche, proprietary schools have done a convincing job of characterizing themselves as effective, if not obligatory, intermediaries between job seekers and the job market.[218] And both through their advertisements and their recruitment practices, proprietary schools use the single-minded determination common among their students to their advantage. Take for example the following jingle, which is sung in very catchy fashion

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[215] *Id.* at 8.
[216] *Id*. at 8. ("The amount spent on advertising, lead creation, recruiting, and admissions representatives far exceeds the salaries paid to faculty.").
[217] *See e.g.,* KIRP, *supra* note 87, at 245.
[218] Linehan, *supra* note 7, at 757 ("Students generally view proprietary schools as the gatekeepers to their trade of choice").

on a television commercial for a company that markets online programs for proprietary schools.[219] The lyrics are written from the perspective of a prospective student:

I'm working for an hourly wage;
I went to high school…didn't do great;
Still I gotta make more cash…more education is what I'm looking at;
When I get a degree, I will make a bigger salary;
So now I've got to see…which college is right for me;
I went on the internet and found Education Connection;
I took some free tests to find out my direction;
I'm taking my classes online…getting my degree on my own time;
Education Connection matched me with the right college for free!

The lyrics touch on all the common themes utilized by proprietary schools in pursuing their market, including monetary benefit and convenience. Moreover, the commercial is replete with graphical statements, such as "Make $25,000 More Each Year".

## A. THE SUSCEPTIBILITIES OF THE MARKET

Given the educational niche proprietary schools have carved out, the most common targets of proprietary school advertisements are poor, undereducated, and older.[220] Individuals who fit this profile are highly susceptible to being persuaded by misrepresentations, due to their lack of insight about higher education.[221] Unlike typical students at traditional colleges and universities, most proprietary school

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[219] Education Connection, Get Connected, :60 TV Commercial, http://www.youtube.com/user/EducationConnection#p/u/13/7a0wat0C2dM (last visited December 22, 2009).
[220] *See e.g.,* Linehan, *supra* note 7, at 757.
[221] *See e.g., id.*

students are first-generation college students.[222] This lack of educational experience limits their ability to discern honest claims from deceptive ones. They are more likely to finance their education with student loans and eventually default on those loans.[223] They are least likely to complain about unfair conduct to which they have been subjected,[224] and even for those who do complain, current safeguards are inadequate in providing effective remedies.[225] Assurances that an educational program would quickly lead to a well-paying job are very compelling. Add a lack of higher education exposure and a burning desire to escape poverty to the equation, and it becomes clear why misrepresentations concerning graduation and placement rates are so dangerous.

## B. THE COSTS OF FAILURE

Proprietary schools are relatively expensive to attend. When compared to public and private institutions, proprietary schools charge by far the highest average tuition for non-degree and two-year degree programs.[226] Additionally, the average tuition for bachelor's degree programs at proprietary schools is higher than the average public school tuition, though slightly lower than private school tuition.[227] These high tuition rates have encouraged high levels of borrowing among proprietary school students. Seventy-two percent of proprietary school students finance their education (at least in part) with Stafford loans; this is the highest percentage in higher education.[228] The average amount of these loans is

[222] *Anti-Fraud Hearings, supra* note 10, at 46 (statement of Nick Glakas).
[223] *See e.g.,* GAO, STRONGER OVERSIGHT, *supra* note 13.
[224] *See e.g.,* FOSTER, *supra* note 23, at 33.
[225] *See e.g.,* Linehan, *supra* note 7, at 754.
[226] LAURA G. KNAPP, JANICE E. KELLY-REID & SCOTT A GINDER, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP'T. OF EDUC., POSTSECONDARY INSTITUTIONS IN THE UNITED STATES: FALL 2007, DEGREES AND OTHER AWARDS CONFERRED: 2006-07, AND 12-MONTH ENROLLMENT: 2006-07 6 (2008), http://nces.ed.gov/pubs2008/2008159rev.pdf.
[227] *Id.*
[228] CHRISTINA C. WEI & LUTZ BERKNER, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, U.S. DEP'T. OF EDUC., TRENDS IN UNDERGRADUATE BORROWING II: FEDERAL STUDENT LOANS IN 1995–96, 1999–2000, and 2003–04 19 (2008), http://nces.ed.gov/pubs2008/2008179rev.pdf (listing borrowing percentages for public 2-year, public 4-year, and private institutions as 11 percent, 42 percent, and 53 percent respectively).

$5,800 for proprietary school students, once again, tops in higher education.[229] It is no wonder that while proprietary school undergraduates only account for 8 percent of students in higher education, they account for 18 percent of the loan volume.[230]

The downsides of these high borrowing rates are manifested mainly in the high default rates among former proprietary school students. Proprietary schools account for a disproportionate share of student loan defaults.[231] In 2006, the sector's two-year cohort default rate was 8.6 percent, the highest in higher education.[232] Default rates among all borrowers increase over time; but the increase is much higher among proprietary school borrowers. Almost a quarter of proprietary school borrowers default on student loans within four years of entering repayment, greatly exceeding the public and private school sectors.[233] The effects of student loan defaults are immense. Individuals who default acquire negative credit history that limits their ability to secure housing or other loans.[234] They could also face income garnishments and restricted employment options.[235] And to the disappointment of many, it is very difficult to discharge federal student loans in bankruptcy.[236] For taxpayers, the costs of covering defaults are immense as well. Taxpayers cover virtually all the expenses associated with defaulted loans, including interest, and the price tag is in the billions of dollars.[237]

Given the disadvantaged backgrounds from which proprietary school students often come, they lack the social clout and political sophistication necessary to foster widespread dismay regarding their

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[229] *Id*. at 20 (listing average loan amounts for public 2-year, public 4-year, and private institutions as $3,400, $4,900, and $5,100 respectively).
[230] *Id*. at 21.
[231] POORER OUTCOMES, *supra* note 164, at 5.
[232] GAO, STRONGER OVERSIGHT, *supra* note 13, at 13 (stating that the public and private non-profit sectors had rates of 4.7 percent and 3 percent respectively).
[233] *Id*. at 14 (providing a four-year default rate of 23.3 percent for proprietary school borrowers and 9.5 percent and 6.5 percent for public and private school borrowers respectively).
[234] *See e.g., Id*. at 12.
[235] *Id*.
[236] *See e.g.,* U.S. Dep't. of Educ., Common Disputes Involving Defaulted Student Loans, available at http://www.ed.gov/offices/OSFAP/DCS/disputes.html#Bankruptcy ("Whether a bankruptcy discharge relieves an individual of his or her obligation to repay a student loan or grant overpayment is now determined by whether a court has ruled that repayment would impose an undue hardship on the borrower and his or her dependents.").
[237] *See e.g.,* DEP'T OF EDUC., STATEMENT BEFORE THE H. SUBCOMM. ON HUMAN RESOURCES AND INTERGOVERNMENTAL AFFAIRS (1995) (statement of Richard W. Riley), available at http://www.ed.gov/Speeches/03-1995/shays.html.

victimization. They are less likely to even complain about fraud perpetrated against them by proprietary schools.[238] Even for those who complain, current legal and regulatory processes provide few options for redress.[239]

PART V: INADEQUATE SAFEGUARDS

The prominence of higher education institutions makes them frequent targets of lawsuits. The diverse nature of this litigation represents a virtual microcosm of American jurisprudence. But in adjudicating disputes involving higher education institutions, courts have been rather consistent about their reluctance to intrude upon the inner workings of these institutions. This reluctance has been termed academic abstention.[240] The concept has been applied in cases involving all types of educational institutions, and its fundamental premise is the judiciary's belief that the professional judgment of educators should be protected from the unqualified assessments of judges or other fact finders. *Paladino v. Adelphi Univ.,*[241] illustrates this reasoning: The plaintiff alleged that the defendant-institution failed to adequately educate his child; the court dismissed the case in large part because adjudicating it would have required the "fact finder to enter the classroom and determine whether or not the judgments and conduct of professional educators were deficient."[242] The court was loath to evaluate the "complex education determinations" made by the defendant.[243] This type of judicial reluctance can greatly disadvantage plaintiffs by limiting the circumstances in which they can win, or even seek, recovery for damages.

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[238] FOSTER, *supra* note 23, at 24 ("Legal aid attorneys believe that most students who have been misled by institutions do not complain; and, as a result, the number of complaints is not an adequate indication of the level of fraud and abuse perpetuated by some for-profit institutions.").
[239] Linehan, *supra* note 7, at 764.
[240] *Id*. ("The doctrine of academic abstention reflects courts'…reluctance to delve into the operation of educational institutions…").
[241] 1982 N.Y. App. Div. LEXIS 17975 (Oct. 12, 1982).
[242] *Id*. at 16.
[243] *Id*. at 11.

Plaintiffs use tort law and contract law frequently as bases upon which to sue educational institutions; but both provide only narrow paths to recovery in cases where misrepresentations or fraud is alleged.

## A. TORT LAW

In tort law, the most logical cause of action for victims of proprietary school fraud seems to be fraudulent misrepresentation. Generally, a target of a fraudulent misrepresentation may recover damages if the maker of the misrepresentation knew or should have known that it was false or baseless (scienter)[244] and the target justifiably relied on the misrepresentation to his detriment.[245] In order to be justified, the misrepresentation must be material—or in other words, the person making the misrepresentation must know or should know that the target will "attach importance to [the misrepresentation] in determining his choice of action in the transaction in question."[246] Additionally, liability can attach when the maker of a misrepresentation knows or should know that the target will rely on the misrepresentation, even if a reasonable person would not.[247]

A typical scenario during which an admissions representative induces a student to enroll based on unjustifiably rosy future job prospects seems to comprise a textbook case of fraudulent misrepresentation. The representative knowingly makes a representation that is baseless, if not fraudulent, in order to induce enrollment. The representative knows that the target will justifiably attach importance to the virtual promise of a well-paying job. However, courts are reluctant to award damages to plaintiffs in fraudulent misrepresentation cases against educational institutions; typically, only the most barefaced instances of fraud are successful.[248] The primary difficulty plaintiffs face in these cases is proving scienter on the part of the defendant.[249] In representing future job prospects, proprietary schools are able to hide behind the

[244] RESTATEMENT (SECOND) OF TORTS § 526 (1977).
[245] *Id*. at § 537.
[246] *Id*. at § 538A.
[247] *Id*. at § 538B.
[248] *See e.g.,* Linehan, *supra* note 7, at 770.
[249] *Id.*

fact that much of what determines a graduate's job prospects is outside of the school's control.[250] At least one court has characterized such representations as "no more than prophecy", in highlighting the limited power schools have in securing employment for their graduates.[251] But this view allows schools to make baseless forward-looking claims with impunity, by shielding them on the back end, without restricting their representations on the front end.[252] It seems that academic abstention has fostered reluctance on the part of judges to critique what amounts to sales pitches, due to the tangential relationship of these pitches to the educational process. Therefore, fraudulent misrepresentation fails to provide a viable avenue of redress for most victims of proprietary school misrepresentations.

As well, plaintiffs alleging negligence[253] have been largely unsuccessful. For this discussion, the two most relevant negligence claims are negligent misrepresentation and educational malpractice. In order for a negligent misrepresentation claim to be successful, the plaintiff must show that the defendant, while acting in a business or professional capacity, supplied false information that was negligently obtained or communicated, upon which the plaintiff justifiably relied to his detriment.[254] Educational malpractice is premised on the claim that the institution failed to provide the plaintiff an adequate education, thereby causing harm, such as failure to prepare the plaintiff for employment.[255]

Both claims tend to fail because courts are reluctant to impose a duty of care upon educational institutions for their student outcomes. For instance, in *Tolman v. CenCor Career Colleges,*[256] a group of former students of the defendant asserted various negligence claims relating to the quality of the

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[250] *Id.*
[251] Schwitters v. Des Moines Commercial College, 1925 Iowa Sup. LEXIS 351, at 1 (Apr. 1925).
[252] Linehan, *supra* note 7, at 768 ("By promising outcomes which in some way depend on student ability, labor demand, or other factors outside the control of the school, the school can employ deceptively persuasive statements about the benefits to be reaped from their program with little threat of liability under a fraudulent misrepresentation tort action.")
[253] Generally, negligent conduct can be found where "(a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." RESTATEMENT (SECOND) OF TORTS § 284 (1977). Negligence lawsuits against proprietary schools usually allege that the school failed to provide training or education it had a duty to provide.
[254] *See, e.g.,* Amaral v. American School of Correspondence, No. 03-6144, 2004 U.S. App. LEXIS 16497, at 4 (Aug. 9, 2004).
[255] *See e.g.,* Ross v. Creighton, No. 90-2509, 1992 U.S. App LEXIS 3038, at 4 (Mar. 2, 1992).
[256] No. 91CA0339, 1992 Colo. App. LEXIS 363 (Sept. 24, 1992).

education they received and the advertisements used by the defendant.[257] In dismissing all of the negligence claims, the court cited the "collaborative and subjective process" through which education is undertaken and the "outside factors" that determine a student's level of success.[258] The court concluded that "there is no workable standard of care" that could be imposed upon schools.[259] And of course, without a heightened standard of care or duty, no negligence claim can stand. Moreover, courts have almost universally rejected education malpractice as a recognized cause of action.[260] They have cited various public policy considerations as reasons for this broad rejection.[261] But the failure of both educational malpractice and negligent misrepresentation can be traced back to the judicial reluctance that characterizes academic abstention.[262]

## B. CONTRACT LAW

Breach of contract suits stand a better chance of success than those asserting negligence; this is because it is generally settled that the relationship between a student and his educational institution is contractual in nature.[263] Promises made by an institution or its representatives are binding.[264] Catalogs and other materials made available to the student by his institution help define the contours of the contractual relationship.[265] If certain promises are not kept by the institution, the student could have a claim of breach of contract.[266] In *Ross,* a former student-athlete brought a lawsuit claiming that the

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[257] Specifically, the claims alleged negligence in informing plaintiffs of the type of education they would receive; negligence of a specialist in technical education; and negligence based on defendants' failure to avoid false or misleading advertising. *Id.* at 2.
[258] *Id.* at 5.
[259] *Id.*
[260] Ross, 1992 U.S. App LEXIS 3038 at 18, at 6 (characterizing educational malpractice claims as "beloved of commentators, but not of courts"); *See also id.,* at 10 (identifying Montana as the only state that allows educational malpractice claims to go forward).
[261] See, e.g., *id.*, at 12 (discussing reasons courts have rejected educational malpractice as a cause of action).
[262] Linehan, *supra* note 7, at 771.
[263] Wickstrom v. North Idaho College, No. 16202, 1986 Ida. LEXIS 509, at 5 ("There seems to be almost no dissent from the proposition that the relationship [between institution and student] is contractual in nature.").
[264] CenCor, Inc. v. Tolman, No. 92SC821, 1994 Colo. LEXIS 129, at 7.
[265] Ross v. Creighton, No. 90-2509, 1992 U.S. App LEXIS 3038, at 4 (Mar. 2, 1992).
[266] *Id.* at 21.

defendant failed to provide promised tutoring services and other academic accommodations.[267] The court allowed the plaintiff's contracts claims to proceed because they stated allegations that could "point to an identifiable contractual promise that the defendant failed to honor."[268]

The *Ross* court's emphasis on specific promises is central to how the propriety of these types of cases is assessed. The court articulated a standard for whether a contracts claim of the sort can stand: Whether ruling on the issue would require the court to delve into the nuances of "educational processes and theories" or allow it to make "an objective assessment" of whether the institution failed to make good on promises.[269] If the allegation requires the former, it cannot stand; if it allows the latter, it can be pursued on the merits.[270] The former approach would, of course, run afoul of academic abstention, while the latter would not. Unfortunately, the practical effect of this approach is similar to the effect on tort claims; institutions are allowed to make misrepresentations that are clear in their implications, but vague enough to evade legal obligation. As a result, when a student suffers damages arising from these legally vague, but practically convincing, misrepresentations, options for redress are limited.

### C. CONSUMER PROTECTION

State consumer protection statutes theoretically provide avenues for redress, as practically every state allows victims of fraud to sue for damages.[271] Some states even have consumer protection statutes

[267] Ross was a basketball player who entered Creighton with known academic deficiencies. In his complaint he averred that Creighton breached its promise to provide Ross "an opportunity to participate, in a meaningful way, in the academic program of the University despite his academic background" in return for his promise to play basketball. The breach arose from Creighton's alleged failure to provide Ross with tutoring services, an opportunity and directive to take advantage of those services, an athletic redshirt that would allow him to better focus on academics, and funds to attain a college degree. *Id.* at 17.
[268] *Id.* at 21.
[269] *Id.* at 22.
[270] *Id.* (dismissing the plaintiff's negligence claims while preserving his contracts claims).
[271] Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 Harv. J. on Legis. 1, 23 (2006); *See also,* Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the **Law** of False Advertising*, 72 Tenn. L. Rev. 653, 660 (2005) (listing treble damages, punitive damages, statutory minimum damages, and attorney's fees as the most common damages allowed by state consumer fraud statutes).

specifically addressing the operation of proprietary schools.[272] However, the standards of proof required by these statutes often make winning damages difficult for victims.[273] Some of these statutes require victims to prove scienter and proximate cause,[274] creating the same difficulties described earlier. Also, because some states limit attorney's fees,[275] it may be difficult for some victims to find lawyers willing to litigate cases in which only a few thousand dollars are at issue.

D. THE "TRIAD"

Lastly, victims of proprietary school fraud are inadequately protected by the Title IV oversight mechanism—also known as the "triad." The triad consists of the DOE, state regulatory bodies, and accrediting agencies. Its purpose is to ensure that "that the 'gate' to student financial aid programs open only to those institutions that provide students with quality education or training worth the time, energy, and money they invest."[276] DOE's primary functions within the triad are to verify institutional eligibility for Title IV funds[277] and to certify accrediting agencies.[278] States provide oversight in many ways, including through higher education regulatory agencies,[279] as well as through indirect means such as consumer protection and commerce laws.[280] Accrediting agencies certify institutions as having met

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[272] *See e.g.,* Utah Division of Consumer Protection, *Postsecondary Proprietary Schools,* http://consumerprotection.utah.gov/registrations/schools.html.

[273] Linehan, *supra* note 7, at 776; But see, Mize, *supra* note 273 (characterizing state consumer fraud statutes as "the path of least resistance" in suits alleging false advertising).

[274] See, e.g., Rizzo v. Michener, 584 A.2d 973, 980 (1990) ("Actual fraud has five elements which must coalesce. There must be (1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result.").

[275] *See, e.g.,* Fla. Stat. § 501.2105 (placing the awarding of attorney's fees within the discretion of the trial judge).

[276] GAO, ENSURING QUALITY, *supra* note 27, at 6.

[277] An example of this function is DOE's tracking of cohort default rates. *Id.* at 6.

[278] *Id.* (DOE "certifies that such agencies are reliable authorities as to what constitutes quality education or training provided by postsecondary institutions.").

[279] *Id.* at 7 (stating that these agencies are often responsible for establishing standards).

[280] *Id.*

certain minimum standards of quality.[281] Only institutions that are accredited by an agency certified by the DOE can receive Title IV aid.[282]

None of the components of the triad provides much relief for victims of proprietary school misrepresentations. The DOE only provides a limited mechanism for victims to lodge complaints,[283] and that mechanism does not include a private right to damages.[284] Moreover, fines and other sanctions imposed upon schools by the DOE are often inadequate disincentives to unscrupulous behavior.[285] The shortcomings of state oversight have already been discussed. And accrediting agencies often provide insufficient and conflicted oversight of the institutions they certify.[286] Such lax oversight allows unscrupulous institutions to stay in operation and continue to victimize students.

## PART VI: REGULATING HIGHER EDUCATION REPRESENTATIONS

The proposals presented in this section have a singular focus: to reduce, if not prevent, incidences of misrepresentations made by proprietary schools in order to induce enrollment. The proposals are not focused on deterrence per se, as penalties against offending schools will not be presented. Similarly, avenues of redress for victims of misrepresentations are not directly proposed either. Pragmatism is the motivation behind this narrow focus; the author wants to present solutions that account for the multi-faceted nature of higher education oversight and the sensitive nature of commercial speech regulation without getting bogged down in their complexity. As such, the principle thrust of the proposals will be to harness current regulatory frameworks in new ways.

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[281] *Id.*
[282] *Id.* at 8.
[283] *Anti-Fraud Hearings, supra* note 10, at 23 ("The Department does not investigate charges made by students regarding misrepresentations made to influence students to enroll.").
[284] Linehan, *supra* note 7 at 788.
[285] *See e.g., Anti-Fraud Hearings, supra* note 10, at 20 ("[T]he school doing the defrauding may be allowed to pay a few cents on the dollar to settle claims with the Department, or placed on reimbursement status so that they have to wait 45 days for payment of financial aid.").
[286] *Id.* at 17 ("[T]here is a built-in conflict of interest with respect to accrediting agencies, because they have no incentive to revoke accreditation since their income-stream is directly determined by the number of schools they accredit.").

The proposals are organized around two areas of focus: proprietary school marketing and recruitment. While there is overlap between the two areas, there are certain distinctive hallmarks of each. For purposes of this article, marketing pertains to the efforts of proprietary schools to promote their programs to prospective students via wide-reaching means. Advertising, whether on television, online, or in print, is the principle method of proprietary school marketing. Recruitment pertains to the representations made and methods used to enroll individual students. The tactics of admissions representatives are central to this area of focus.

## A. PROPOSALS

### Marketing

1. Proprietary schools should be required to place disclaimers on all advertisements making forward-looking claims.
2. The Federal Trade Commission should expand its regulations pertaining to proprietary school advertising.
3. The Federal Trade Commission and the proprietary school industry should encourage self-regulation of proprietary school advertising practices.

### Recruitment

4. Proprietary schools should be required to make relevant affirmative disclosures to students prior to enrollment.
5. Proprietary schools should be required to disclose relevant labor market data to students prior to enrollment.

## B. RELEVANT OVERSIGHT AGENCIES

Five types of entities play significant roles in regulating higher education and commercial speech. These entities are the DOE, the Federal Trade Commission (FTC), state regulatory agencies, accrediting agencies, and self-regulatory bodies. Due to their integral role in the proposals, a brief overview of each entity's oversight function is necessary.

DOE

The primary role of the DOE within higher education is to certify institutional eligibility for Title IV financial aid funds. In addition to collecting various forms of data and providing oversight of accrediting agencies, the department oversees entrance exam publishers[287] and dictates education policy. The DOE also accepts complaints filed by persons "suspecting fraud, waste or abuse involving [DOE] funds or programs".[288]

FTC

The FTC is responsible for regulating and enforcing advertising laws.[289] The Commission is principally concerned with promoting fair competition through truth in advertising.[290] The FTC promulgates both general and industry-specific advertising standards; and it also assists industries in developing their own standards and best practices.[291] The FTC has devised Guides that explain how

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287 See, e.g., GAO, STRONGER OVERSIGHT, *supra* note 13.
288 U.S. Dep't. of Educ., Office of Inspector General, available at http://www.ed.gov/about/offices/list/oig/hotline.html (last visited Nov. 21, 2009).
289 Patricia Bailey, *Unfair Competition and Misleading Advertising: How Advertising is Regulated in the United States,* 54 Antitrust L.J. 531 (1985) ("Congress authorized the agency…to challenge 'unfair or deceptive acts or practices' to promote truth in advertising and fair merchandising practices. The Commission's goal is…to ensure that consumers receive both the information necessary to make informed choices in the marketplace and the opportunity to use that information effectively.").
290 *Id.*
291 Over the last two decades, the Commission has gradually shifted away from rulemaking, focusing instead on enforcement. The reason for this shift is that rulemaking is seen as labor-intensive and controversial. Rulemaking is now typically undertaken at the behest of Congress. Today, the Commission's primary method of rulemaking is the public workshop conference, where industry stakeholders (e.g. business entities, consumer groups, other federal agencies, and state law enforcement officials) are brought together to discuss proposed rules changes. The input provided in these conferences help inform the rules promulgated by the FTC. Lydia B. Parnes & Carol Jennings,

Commission rules are applied to specific industries,[292] including one that addresses advertising practices of private vocational and distance education schools.[293] In pursuing sanctions against offending advertisers, the FTC can bring lawsuits and administrative actions.[294] Through these actions, the Commission can seek various form of relief, such as injunctions, corrective advertising, monetary penalties, and consumer redress.[295]

State regulatory agencies

Every state has a higher education regulatory body that oversees the operations of postsecondary institutions within its border. Some states have agencies that specifically oversee proprietary institutions.[296] The extent of oversight provided by state higher education regulatory bodies can be broad, encompassing operational aspects of institutions as well as institutional marketing practices.[297] Every state also has a consumer protection agency that provides oversight of various aspects of commerce, including advertising.[298] Some of these agencies have divisions that specifically oversee proprietary institutions.[299]

Accrediting agencies

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*Federal Agency Focus: Federal Trade Commission: Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission,* 49 Admin. L. Rev. 989 (1997).

[292] *Id*. at 992, n. 14 (Industry guides provide "an interpretation of the underlying statute, but [does not afford] an independent basis for enforcement action.").

[293] FTC Guides for Private Vocational and Distance Education Schools, 16 C.F.R. § 254 (1998).

[294] *See e.g.,* Bailey, *supra* note 289.

[295] *Id*.

[296] See, e.g., N.C. Office of Proprietary Schools, a division of the State Board of Community Colleges. NC Community Colleges, *Proprietary Schools,* http://www.ncccs.cc.nc.us/Proprietary_Schools/.

[297] See, e.g., Utah Code Ann. § 13-34-108 (2009).

[298] See, e.g., Scheuerman, *supra* note 271, at 23

[299] *See e.g.,* Utah Division of Consumer Protection, *Postsecondary Proprietary Schools,* http://consumerprotection.utah.gov/registrations/schools.html.

Accrediting agencies assess and certify that institutions receiving Title IV funds are of sufficient quality. These agencies are non-governmental[300] and are typically formed by peer institutions seeking to devise and promote certain educational standards.[301] These standards, however, are rarely concrete, allowing individual schools to define their own missions.[302] Federal law mandates this flexibility,[303] though accreditation agencies are allowed to set standards that can trump institutional standards.[304] Accreditation is voluntary; however, only accredited institutions can receive Title IV funds.[305]

Self-regulatory bodies

Within the realm of advertising, various self-regulatory bodies promote good advertising practices.[306] Generally, the purposes of self-regulation are twofold: to promote a set of industry norms and best practices and to provide a means of applying and enforcing these norms.[307] As it concerns advertising, self-regulation is also intended to protect consumers and foster fair competition—two goals that are highly compatible with free market ideals.[308] Like accreditation, participation in a self-regulatory

[300] In most countries, accreditation is a governmental function. However, concerns about federalism have prompted Congress to place the responsibility of institutional quality assessment in the hands of these private entities. There are about 3,500 accreditation agencies, and the vast majority of them are for-profit. FOSTER, *supra* note 23.
[301] GAO, ENSURING QUALITY, *supra* note 27, at 7.
[302] *See e.g.,* FOSTER, *supra* note 23, at 19.
[303] 20 USCS § 1099b (5) (A) ("[T]he standards for accreditation of the agency or association assess the institution's 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…")
[304] DRINKERBIDDLE, EDUCATION LAW ALERT: HIGHER EDUCATION OPPORTUNITY ACT FINAL RULE – ACCREDITING AGENCY RECOGNITION (2009), http://www.drinkerbiddle.com/files/Publication/88e5ba42-9a12-4632-b416-09b3a1510d27/Presentation/PublicationAttachment/43c2b066-fc38-48e7-bbfe-0a27d1e85586/Higher_Education_Opportunit.pdf (last visited December 29, 2009).
[305] *See e.g.,* FOSTER, *supra* note 23, at 19.
[306] *See e.g.,* Bailey, *supra* note 289.
[307] INTERNATIONAL CENTER FOR ALCOHOL POLICIES, ICAP REPORTS 9: SELF-REGULATION OF BEVERAGE ALCOHOL ADVERTISING (2001), http://www.icap.org/portals/0/download/all_pdfs/ICAP_Reports_English/report9.pdf [hereinafter ICAP REPORTS].
[308] *See e.g.,* Bailey, *supra* note 289 ("An often-stated goal of the self-regulatory apparatus is to protect consumers from deceptive advertising; there is no doubt in my mind, however, that another important goal served by it is to protect—if not necessarily to promote—fair competition.").

scheme is voluntary. In the most developed arrangements, these agencies work directly with the FTC and state agencies in regulating advertising.[309]

C. DISCUSSION

Proprietary schools invest heavily in mass media advertising. They spend upwards of one billion dollars each year promoting their programs.[310] Their commercials dominate non-prime-time television, and their online ads seem omnipresent.[311] But when it comes to advertising, proprietary schools suffer from a problem common among all educational institutions: their product—education—is largely intangible.[312] In most cases, the only tangible manifestation of education is the diploma that is received upon completion. In attempting to sell their product and differentiate themselves from competitors, non-profit institutions often promote tangible ancillaries to the educational experience, such as attractive buildings and tangential student services.[313] Proprietary schools, however, tend to take a different tact; they make more concerted efforts to sell their products by tying them to tangible end results, such as career advancement and financial stability.[314] It is on these types of forward-looking ads that the FTC should require prominent disclaimers.

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[309] *Id*. (describing how the National Advertising Division of the Council of Better Business Bureaus, Inc. and the National Advertising Review Board serve as valuable components to state and federal oversight of advertising).
[310] Goldie Blumenstyk, *Economic Downturn Is a Boon for For-Profit Colleges,* CHRON. OF HIGHER EDUC., Dec. 10, 2008, http://chronicle.com/article/Economic-Downturn-Is-a-Boon/1400/.
[311] UOP alone is the seventh biggest online advertiser. Goldie Blumenstyk, *Marketing, the For-Profit Way,* CHRON. OF HIGHER EDUC., Dec. 1, 2006, http://chronicle.com/article/Marketing-the-For-Profit-Way/6212/.
[312] See, e.g., ANTCIL, *supra* note 105, at 31 ("Among the greatest challenges to successfully marketing higher education is the inherently intangible nature of the very thing that is being marketed.").
[313] ANTCIL, *supra* note 105, at 17 (In seeking market differentiation, "[c]olleges and universities are reduced to boasting of their multimillion-dollar student recreation centers, their nouveau chic dining residence halls…").
[314] ITT often features graduates discussing how receiving their degrees positively affected not only their careers, but their family life. *See e.g.,* ITT Tech Commercial: If I Want To Do Something I Will Do My Best To Accomplish It, http://vids.myspace.com/index.cfm?fuseaction=vids.individual&VideoID=691408, (last visited January 3, 2010). However, this is not to suggest that proprietary school ads only focus on careers and jobs. Proprietary school ads take a variety of approaches. In addition to ads that focus on end results, other ads tout components of an institution's suite of services, such as those relating to student support. UOP's "I am a Phoenix" campaign provides examples of this approach. See e.g. UOP, Ad Campaigns: I Am a Phoenix, http://www.phoenix.edu/about_us/ad-campaigns.html (last visited January 3, 2010).

Free market competition requires that commercial entities be allowed to communicate with consumers.[315] Therefore, commercial speech is given many of the same First Amendment protections as regular speech.[316] In the seminal case, *Va. State Board of Pharmacy v. Va. Citizens Consumer Council,*[317] the Supreme Court reviewed the constitutionality of a Virginia state law banning pharmacies from advertising prices. The Supreme Court struck down the ban, reasoning that in a free market, consumers must be empowered by the free-flow of information.[318] *Va. State Board of Pharmacy* represented a departure, as previous Court decisions suggested that commercial speech fell outside the purview of First Amendment protection.[319]

The Court in *Va. State Board of Pharmacy* insisted that First Amendment protections only extend to truthful and non-misleading commercial speech,[320] and in a later case, *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,*[321] explained that such speech can only be restricted when the government proves a substantial interest and its restriction directly advances that interest in the least intrusive manner possible.[322] In *Central Hudson,* the Court struck down a New York State ban on electric company

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[315] Pauline M. Ippolito, *What Can We Learn from Food Advertising Policy Over the Last 25 Years,* 12 Geo. Mason L.Rev. 939, 959 (2004) ("The ability of firms to speak to potential consumers about important product characteristics is an essential element of competition -- it informs consumers and pushes firms to offer better products.").

[316] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."); See also, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (specifying that speech is commercial in nature when 1) it is a paid-for advertisement 2) that refers to a specific product and 3) is published in the economic interest of the speaker. However, the Court indicated that not all three characteristics are necessary for speech to be considered commercial.).

[317] 425 U.S. 748 (1976).

[318] *Id.* at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions…be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

[319] *Id.* at 758.

[320] *Va. State Board of Pharmacy,* 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); See also *In re* Int'l Harvester Co., 1984 FTC LEXIS 2, at 236 (1984) (Deceptive advertising "is harmful to consumers, undermines the rational functioning of the marketplace, and…never offers increased efficiency or other countervailing benefits that must be considered.").

[321] 447 U.S. 557 *(1980).*

[322] *Id.* at 566 ("For commercial speech to come within [First Amendment protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

advertising. The Court reasoned that even though the state had a substantial interest in energy conservation, the challenged restrictions were "more extensive than necessary"—and therefore could not stand.[323] The holdings in both *Va. State Board of Pharmacy* and *Cent. Hudson* affirm the Court's view that the First Amendment "favor[s] the dissemination of truthful product information over government suppression of ideas."[324] So any proposed regulation of proprietary school advertising, including required disclaimers, must serve a compelling state interest and be narrowly tailored to serve that interest.

1. Requiring Disclaimers

The Supreme Court has weighed in on the issue of disclaimers. In *Bates v. State Bar of Ariz.*,[325] a case in which the Court struck down a ban on attorney advertising, the state bar association argued that attorney advertisements were inherently misleading, due to the individualized nature of each potential client's needs.[326] The Court was unconvinced, however, reasoning that such a view "assumes that the public is not sophisticated enough to realize the limitations of advertising.[327] The Court further reasoned that "correct but incomplete information" was better remedied by more disclosure, not less.[328] As such, disclaimers are preferred over broader restrictions on speech, such as bans.

Disclaimers serve two basic purposes: to prevent deception and to prompt advertisers to weigh the benefits of making deceptive or incomplete claims in light of the costs of the disclaimer.[329] In arguing for required disclosures on forward-looking proprietary school ads, the author borrows language from the *Bates* Court and characterizes these ads as correct but incomplete. As the commercials assert, higher

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[323] *Id.* at 602.
[324] Tom Valuck, Note, *Keeping Dietary Supplement Regulations Slim and Fit: Finding a Healthy Balance between Paternalism and Consumer Choice,* 2 Geo. J.L. & Pub. Pol'y 285, 300 (2004).
[325] 433 U.S. 350, 375 (1977)
[326] *Id.* at 372.
[327] *Id.* at 374.
[328] *Id.* at 375.
[329] Ippolito, *supra* note 315,at 950 ("[R]equiring [disclaimers] raises the firm's cost of making the claims, and the "clutter" of the added requirements may make the claims less effective as a marketing tool. If these effects are significant, they reduce firms' incentives to make the claims at all.").

levels of education are positively associated with higher income levels.[330] So in that sense the information is correct. The incompleteness is in the suggestion that completion of the program assures higher income and that completion itself is assured—or even likely. The association between education and income is not absolute, and as discussed earlier, most proprietary school students fail to persist to degree. Required disclaimers would address the incomplete treatment of these realities. Regulation such as this would meet the test put forth in *Central Hudson*: the state has substantial interests in protecting its citizens from misrepresentations and reducing the public costs thereof, and disclaimers directly addressing incomplete information would be the least restrictive manner of serving these interests.

The FTC has required advertisers to use disclaimers when necessary to prevent deception.[331] Generally, disclaimers are required to be conspicuously placed and easy to understand.[332] These basic requirements make sense, because for a disclaimer to be effective, it must be noticed and understood by consumers. In its orders, the FTC is often very specific regarding the form, content, and placement of disclosures. In adjudicating *In re La Salle Extension University,*[333] the Commission found that the respondent deceptively advertised its law degree program by not sufficiently disclosing its lack of accreditation. As a result, it ordered the respondent to disclose the program's limitations with disclaimers "in type the same size and appearance as the advertising claims."[334] Further, the FTC dictated the placement[335] and content[336] of these disclaimers.

[330] See, e.g., Bureau of Labor Statistics, *Education Pays…,* http://www.bls.gov/emp/ep_chart_001.htm.
[331] See, e.g., *In re* La Salle Extension Univ., 1971 FTC LEXIS 157 (1971).
[332] FTC, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY, 6 (2009), http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.pdf.
[333] 1971 FTC LEXIS 157 (1971).
[334] *Id.* at 20.
[335] See e.g. *id.* (requiring disclaimers to be placed "on the front page or cover and on each page of any promotional material or descriptive brochure wherein respondent's law courses or law degrees are mentioned in type the same size and appearance as the advertising claims appearing thereon").
[336] See e.g. *id.* (requiring disclaimers to state that "courses are not recognized or accepted as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law in any of the States in the United States or the District of Columbia").

Similar requirements could be placed on forward-looking proprietary school ads. In order to prevent deception, disclaimers relating to low completion rates and the relationship between education and earnings should be required components of these ads. The following disclaimers could be placed on ads:

- Most students who begin academic or training programs at this institution do not complete them.
- Completing the degree/training does not guarantee employment or a higher salary.

These disclaimers should appear conspicuously on ads, using the same font size and appearance as the advertised claims. In television ads, disclaimers could be displayed conspicuously on the screen or stated clearly by the narrator.[337] These disclaimers would be particularly necessary for ads using consumer testimonials, a common marketing strategy for proprietary schools. The claims of consumer endorsers must be "typical," or a disclaimer is required.[338] Given proprietary school completion rates, any consumer endorser touting the benefits of attaining a degree is arguably describing an atypical experience. Lastly, in determining whether an ad is deceptive, the FTC will consider the ad's effect on a reasonable member of the targeted group.[339] The previously discussed susceptibility of the targets of proprietary schools ads increases the need for disclaimers.

2. Expansion of FTC Proprietary School Guides

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[337] A recent Remington College commercial airing in the Nashville, TN area displayed two disclaimers, including one stating, "Individual results may vary." The disclaimers were displayed in very small font and only appeared for ten seconds of the 60-second commercial. Remington College Commercials, http://www.vimeo.com/2901500 (last visited Dec. 28, 2009).

[338] FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (2009).

[339] John E. Villafranco & Andrew B. Lustigman, Regulation of Dietary Supplement Advertising: Current Claims of Interest to the Federal Trade Commission, Food and Drug Administration and National Advertising Division, 62 Food Drug L.J. 709, 723 ("[T]he degree of sophistication of the target audience is a significant factor in determining the reasonable message conveyed by the advertising."); See also, *id.* (explaining that the FTC has assessed both higher and lower standards of reasonableness).

In fostering good marketing practices, including the systematic use of disclaimers, the FTC should expand its Guides for Private Vocational and Distance Education Schools.[340] The FTC promulgated the Guides in 1972 as a means of advising "proprietary businesses offering vocational training courses, either on the school's premises or through distance education, on how to avoid unfair or deceptive practices in connection with the advertising, promotion, marketing, or sale of their courses or programs."[341] As such, the Guides address prohibitions against various types of misrepresentations.[342] However, the Guides only pertain to proprietary schools offering less than a two-year degree.[343] This limited applicability does not reflect the current reality of proprietary school education. When the Guides were first enacted, very few proprietary schools were offering degree programs. Today, many of these schools offer degrees through the doctoral level.[344] In fact, at some of the largest proprietary schools, most students are enrolled in degree-granting programs.[345] But irrespective of their evolving programmatic focus, the marketing strategy used by these schools has remained rather consistent; they still tie their programs to labor market success. Thus, the dangers that the Guides were enacted to address have expanded beyond the scope of the Guides, necessitating a broadening of that scope.[346]

3. Encouraging of Self-regulation

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[340] 16 C.F.R. § 254 (1998).
[341] Request for Public Comments, 74 Fed. Reg. 37973 (July 30, 2009).
[342] These misrepresentations concern the description of the school, its accreditation, the transferability of credits, the content of ads and testimonials, teacher qualifications, courses offered, the availability of employment and financial aid, and enrollment qualifications. *Id*.
[343] 16 C.F.R. § 254 (1996) ("These Guides do not apply to resident primary or secondary schools or institutions of higher education offering at least a 2-year program of accredited college level studies generally acceptable for credit toward a bachelor's degree.").
[344] GAO, STRONGER OVERSIGHT, *supra* note 13, at 1 ("In recent years, the scale and scope of proprietary schools have changed considerably…Traditionally focused on certificate and associate programs ranging from cosmetology to medical assistance and business administration, proprietary institutions have expanded their offerings to include bachelors, masters, and doctoral level programs.").
[345] KIRP, *supra* note 87, at 241.
[346] In July, 2009, the FTC requested public comments on the Guides "as part of its systematic review of agency guides and regulations." In the request, the FTC presents 18 questions relating to how the Guides can be made more effective. None of the questions directly relate to expanding the scope of the Guides, though question 3 asks about possible modifications. Request for Public Comments, *supra* note 341.

The proprietary school industry, with the encouragement of the FTC, should form a self-regulatory body to encourage good advertising practices within the sector. Industry self-regulation is an important component to FTC oversight and the overall prevention of fraudulent advertising. For example, the National Advertising Review Council (NARC),[347] an umbrella self-regulatory agency, has set advertising guidelines for various industry-specific self-regulatory agencies, including those relating to electronic retailing[348] and children's advertising.[349] Also, the FTC has incorporated self-regulatory agencies into its regulatory framework. The Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU) and the National Advertising Division of the Council of Better Business Bureaus (NAD)[350] serve as initial reviewers of challenged advertisements. If an advertiser does not agree with a decision made by CARU or NAD, it may appeal to the National Advertising Review Board (NARB).[351] In assessing challenged ads, the FTC gives great weight to precedent set by these quasi-judicial self-regulatory agencies.[352]

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347 Better Business Bureaus, *Advertising Review Services,* http://www.bbb.org/us/Advertising-Review-Services/ ("An alliance of the Association of National Advertisers, the American Association of Advertising Agencies, the American Advertising Federation and the Council of Better Business Bureaus. The National Advertising Review Council's (NARC) mission is to foster truth and accuracy in national advertising through voluntary self-regulation.").

348 Better Business Bureaus, *Electronic Retailing Self-Regulation Program,* http://www.bbb.org/us/electronic-retailing-self-regulation-program/ (The mission of the Electronic Retailing Self-Regulation Program "is to enhance consumer confidence in electronic retailing. ERSP provides a quick and effective mechanism for evaluating, investigating, analyzing and resolving inquiries regarding the truthfulness and accuracy of the primary or core efficacy or performance claims that are communicated in national direct response advertising.").

349 Better Business Bureaus, *Children's Advertising Review Unit,* http://www.bbb.org/us/children-advertising-review-unit/ ("The Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus…is the children's arm of the advertising industry's self-regulation system and evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its *Self-Regulatory Program for Children's Advertising* and relevant laws."); See also, Better Business Bureaus, *Children's Food and Beverage Advertising Initiative,* http://www.bbb.org/us/children-food-beverage-advertising-initiative/ ("[A] voluntary self-regulation program with many of the nation's largest food and beverage companies as participants. The Initiative is designed to shift the mix of advertising messaging to children to encourage healthier dietary choices and healthy lifestyles.").

350 Better Business Bureaus, *National Advertising Division,* http://www.bbb.org/us/us/national-advertising-division/ ("The mission of the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is to review national advertising for truthfulness and accuracy and foster public confidence in the credibility of advertising.").

351 Nat'l Advertising Review Bd., http://www.narbreview.org/ ("NARB is the appeal division of the advertising industry's self-regulatory system.").

352 Bailey, *supra* note 289.

A proprietary school self-regulatory body could be chartered through an impartial agency such as the Better Business Bureaus.[353] The body could serve as a clearinghouse for best practices in industry advertising, as well as a place where ad-related complaints could be brought by consumers and competitors alike. Like CARU and NAD, the body could serve as an initial arbiter of complaints, with appeals going to NARB. The proprietary school industry would benefit greatly from this type of self-regulation; it would improve the sector's credibility with the public, while encouraging healthy competition and possibly staving off closer governmental scrutiny of its advertising practices.

4. Required Affirmative Disclosures

The federal Student Right-to-Know and Campus Security Act[354] requires all institutions receiving Title IV aid to make wide-ranging disclosures to prospective and enrolled students. The disclosures most pertinent to this discussion are graduation rates and placement rates. Under the Act, schools must make this information "readily available upon request" to prospective and enrolled students.[355] Further, schools must "provide to all enrolled students a list of the information that is required to be provided…together with a statement of the procedures required to obtain such information."[356] By requiring schools to disclose this information, the Act is acknowledging the predominant motivation of students engaging in higher education; it is also making a powerful policy statement—one that places outcomes at the focal point of assessment.

Unfortunately, the manner in which the statute operationalizes the requirements lessens their effectiveness. The extent of a school's affirmative disclosure requirements is a document listing information it is required to make available, along with the process for securing that information if the student so chooses. In effect, the Act places the onus on the student to not only request the information,

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353 ICAP REPORTS, *supra* note 307 ("Impartiality is seen to be key to an effective [self-regulatory] code and public trust in it.").
354 20 USCS § 1092 (2009).
355 *Id.* at 1092 (a)(1).
356 *Id.*

but take the necessary steps to secure it. It stands to reason that these unnecessary steps limit the dissemination of this information; therefore, proprietary schools should be required to affirmatively disclose, at the very least, graduation rates and placements rates to students before enrollment and each academic year thereafter. Such a requirement would not be novel, as the Act already requires schools to disclose graduation rates and other data to athletes, their parents, and officials at their secondary schools.[357] Also, individual states, like Utah, require proprietary schools to provide employment and graduation rate data prior to enrolling a student or accepting tuition payments.[358] Such a requirement would also make it more difficult for schools to use bureaucratic inconveniences to discourage students from obtaining this information. Oversight of this requirement could be within the purview of the DOE, with assistance from state regulatory and accreditation agencies.

5. Expanded Disclosures

Disclosure requirements for proprietary schools should be expanded to include labor market data, specifically, information relating to labor demand and salary.[359] This expansion would be in direct response to proprietary school marketing and recruitment practices. Some of the occupational areas for which proprietary schools provide training have little to no demand.[360] Additionally, salary data is often inflated by admissions representatives.[361] Thus, providing this information to students prior to enrollment will better inform students, allowing them, as consumers, to make informed choices in the marketplace.[362] Similar to a disclaimer, it would also prompt proprietary schools to consider the costs of making claims

[357] *Id.* at 1092 (e)(2); But see also, *id.* at (e)(6) (waiving these requirements "for any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that…is substantially comparable to the information required under this subsection.")
[358] Utah Code Ann. § 13-34 (2009).
[359] This proposal is based on a recommendation made by the GAO. See GAO, OVERSUPPLIED OCCUPATIONS, *supra* note 22, at 15.
[360] *Id.* at 10 ("The surplus of qualified job candidates, including proprietary school graduates, for some occupations occasionally reached dramatic proportions in some states, exceeding demand by ratios of 10 to 1 or more.").
[361] *Anti-Fraud Hearings, supra* note 10, at 5 (statement of Hon. George Miller).
[362] GAO, OVERSUPPLIED OCCUPATIONS, *supra* note 22, at 7 ("Using labor market projections provides a rational basis for making training investment decisions…"); But see also *id.* (warning that labor market projections are "inherently imprecise").

that may not be supported by the data. To ensure validity, the information should be compiled by a governmental agency or another entity certified by the DOE.

## CONCLUSION

Proprietary schools play an important role in broadening access to higher education. They enroll a large number of students who are underserved by traditional, non-profit institutions. These students tend to be poorer, less educated, and older than students at traditional schools, and they tend to undertake higher education for very practical reasons. These characteristics make them more susceptible to deceptive marketing and unfounded promises of higher education providers.

Proprietary schools invest heavily on marketing and recruitment. They appeal to the characteristics and motivations of their market niche by promoting tangible end results of educational study, such as career advancement and financial stability. Unfortunately, many of their ads and recruitment practices make representations that are incomplete or, worse, untrue. These behaviors contribute to low completion rates and high loan default rates among proprietary school students—outcomes that cost students and taxpayers billions of dollars.

In protecting students and taxpayers from proprietary school misrepresentations and fraud, tighter regulation of their marketing and recruitment practices should be imposed. In the area of marketing, proprietary schools should be required to place disclaimers on forward-looking ads. Also, the FTC should expand its regulation of proprietary school marketing practices and encourage impartial self-regulation within the industry. In the area of recruitment, proprietary schools should be required to make affirmative and expanded disclosures. The goal of these reforms would be to foster disincentives to misrepresentations and fraud. It must be noted that while the specific focus of this article is proprietary schools, the proposals could apply to any school that makes forward-looking representations in inducing enrollment. In the end, the message should be that while educational attainment can, and often does, yield benefits upon the possessor, these benefits are not assured—and because of this, “Your Results May Vary.”