

REINING IN THE PREDATORY NATURE OF FOR-PROFIT COLLEGES

Sarah Ann Schade*

Despite the alarming growth of for-profit colleges in recent years, such colleges are not exempt from harsh and relentless criticisms, ranging from alleged unethical recruiting practices to exorbitant, unparalleled tuition costs. This Note exposes the predatory practices of for-profit colleges, where for-profit colleges target vulnerable populations, particularly the poor and minorities; provide low quality education, exemplified through abysmal graduation rates and a general lack of postgraduate employment opportunities; conduct frivolous spending focused primarily on marketing and executive salaries; and leave students with unprecedented levels of nondischargeable debt. This Note addresses potential public and private remedies for addressing abuses by for-profit colleges and proposes several federal, state-specific, and individual solutions, arguing that various federal proposals should be adopted, states should continue to pass effective legislation, and qui tam whistleblower actions should be encouraged and facilitated. The United States must take a stand against the predatory nature of for-profit colleges to preserve the integrity and future of America's higher education system.

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2014. The Author would like to thank Professor Jean Braucher for her invaluable insight, Omar E. Vasquez for his ongoing support, Daniel A. Arellano for his brilliant feedback, and Alex McCourt for his thoughtful comments. The Author also extends immeasurable gratitude to her family and friends for their continuous love, humor, and encouragement.

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INTRODUCTION

While searching the Internet for college funding, fourteen-year-old Bobby Ruffin Jr. clicked on a link that promised to help find money for college.¹ However, this link was actually a disguised lead generator for for-profit colleges.² Subsequently, Ruffin was contacted by Ashford University, a for-profit university in Iowa, which promised to be a “stepping-stone” to fulfilling Ruffin’s dream of becoming a doctor.³ Even though Ruffin was only in eighth grade, the recruiter said that “[he would] be working toward a degree as a medical doctor, so when [he does] graduate high school, [he will be] almost there.”⁴ Alarming, when Ruffin expressed an interest in speaking with his parents about the program, the sales staff member suggested otherwise by stating, “No, I wouldn’t tell your parents because that would take away from the shock when it happens. If I were you, I’d complete the program, and when graduation comes around, let them know. Mom and Dad will be super excited.”⁵

Because Ashford University requires a high school diploma or equivalency for admission, the recruiter told Ruffin to falsify his financial aid forms to indicate that he had already graduated, but, wary of such suspicious advice, Ruffin left the graduation date blank.⁶ At some point, someone filled in the blank with a fraudulent graduation date because Ashford University began illegally receiving federal student-loan money on Ruffin’s behalf.⁷

As a result, Ruffin took online classes for nearly a year.⁸ But when he refused to endorse Ashford University’s lies on his financial aid forms, college

1. Chris Parker, *For-Profit Colleges: Predators in the Ivory Tower*, SF WEEKLY (Aug. 1, 2012), <http://www.sfweekly.com/2012-08-01/news/for-profit-colleges-higher-education-government-cons-university-of-phoenix/full/>.

2. *Id.*

3. ASHFORD UNIVERSITY, <http://www.ashford.edu/> (last visited Oct. 5, 2013).

4. Parker, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

administrators then claimed that he was ineligible for federal aid due to his age, and he was forced to return his loan money.⁹ Ashford University then billed Ruffin for \$13,000 worth of tuition.¹⁰ Although Ruffin eventually enrolled in Eastern Michigan University, he continues to owe Ashford University money; because his debt is private, he is not eligible for deferments during college, and his future wages are subject to garnishment.¹¹

In order to properly navigate through the higher education realm, it is critical to note the distinctions between the various types of higher education colleges. Public colleges are substantially funded by state funds, which can effectively lower the rate of tuition costs and make it easier for state residents to be admitted.¹² Private colleges, conversely, are largely funded by tuition, endowment, and donations and tend to be more expensive than public colleges, yet they generally offer the best financial aid.¹³ Nonprofit universities, moreover, operate independently of an owner structure and can focus more on providing quality educations, which are far more affordable and competitive with public university tuition costs.¹⁴ On the other hand, for-profit universities, often referred to as “proprietary schools,” function to make money for owners and shareholders by offering the service of education, whereby tuition rates are exorbitantly high and making profit is a priority.¹⁵ Unlike public universities, for-profit colleges are operated and controlled by private organizations and corporations.¹⁶

Currently, the largest for-profit college entities in the country include the Apollo Group and Career Education Corporation.¹⁷ Notable for-profit colleges nationwide include Kaplan University, Brooks Institute—owned by Career Education Corporation—Bryant & Stratton College, and Westwood College.¹⁸ These institutions appeal to students by claiming that they offer flexible scheduling

9. *Id.*

10. *Id.*

11. *Id.*

12. *Private Versus Public Colleges*, COLLEGE CONFIDENTIAL, <http://www.collegeconfidential.com/dean/archives/000294.htm> (last visited Oct. 5, 2013).

13. *Id.*

14. *Id.*

15. *Non-Profit vs. For-Profit Colleges: What You Need to Know*, FRANKLIN UNIVERSITY, BACK TO COLLEGE BLOG (Oct. 12, 2012), <http://www.franklin.edu/blog/non-profit-vs-for-profit-colleges-what-you-need-to-know/>.

16. NAT'L CONFERENCE OF STATE LEGISLATURES (NCSL), *For-Profit Colleges and Universities* (July 2013), <http://www.ncsl.org/research/education/for-profit-colleges-and-universities.aspx>.

17. *Cracking Down on For-Profit Colleges*, THE WEEK (Sept. 16, 2011), <http://theweek.com/article/index/219247/cracking-down-on-for-profit-colleges>; Mandi Woodruff, *For-Profit Colleges Are Looking Sketchier than Ever*, BUSINESS INSIDER (Aug. 20, 2013, 5:12 PM), <http://www.businessinsider.com/career-education-corp-will-pay-9-million-to-students-after-allegedly-inflating-job-numbers-2013-8..>

18. KAPLAN UNIVERSITY, <http://www.kaplanuniversity.edu/home.aspx> (last visited Nov. 24, 2013); BROOKS INSTITUTE, <http://www.brooks.edu/> (last visited Nov. 24, 2013); BRYANT & STRATTON COLLEGE, <http://ss.bryantstratton.edu/> (last visited Nov. 24, 2013); WESTWOOD COLLEGE, <http://www.westwood.edu/> (last visited Nov. 24, 2013).

with year-round enrollment, online courses, small class sizes, and convenient locations.¹⁹

Over the years, for-profit colleges have grown exponentially.²⁰ In the first decade of the twenty-first century, undergraduate enrollment at universities of all kinds nationwide increased by more than one third, with the most dramatic growth occurring at for-profit universities.²¹ In fact, as of 2010, enrollment in the nation's for-profit colleges had grown faster than the rest of higher education, growing by an average of 9% each year over the past 30 years, in comparison to a mere 1.5% each year for all other institutions.²² For-profit colleges enroll nearly 12% of all postsecondary students—roughly 2.4 million students during the 2010–2011 academic year.²³ Additionally, the for-profit sector grew a whopping 235% in enrollment from 2000 to 2010, thereby increasing its market share from 3% to 9.1% of all tertiary enrolled students.²⁴

Two specific factors account for the growth of for-profit colleges. First, the massive expansion of these colleges correlates with the wide variety of institutions and offerings the sector provides, ranging from small vocational and technical schools offering hands-on training to large, fully accredited colleges and universities offering traditional classroom experiences.²⁵ Second, the growth is also attributed to providing postsecondary educational opportunities to historically underserved populations, thereby increasing the number of people applying through targeting largely underrepresented classes, such as older populations and racial minorities.²⁶

The rise of for-profit colleges has nonetheless resulted in great scrutiny and controversy.²⁷ Critics of for-profit colleges, who often refer to such institutions

19. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

20. Mary Beth Marklein, *For-Profit Colleges See Major Gains in Past Decade*, USA TODAY (June 2, 2011), http://usatoday30.usatoday.com/news/education/2011-05-26-for-profit-college-undergraduate-enrollment_n.htm. In fact, enrollment at for-profit universities has increased a tremendous 225% over the course of the past two decades. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

21. Marklein, *supra* note 20.

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

23. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

24. JOHN AUBREY DOUGLASS, *Money, Politics and the Rise of For-Profit Higher Education in the US: A Story of Supply, Demand and the Brazilian Effect*, CTR. FOR STUDIES IN HIGHER EDUC., UNIV. OF CAL., BERKLEY (Feb. 2012), available at <http://cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROPS.JAD.ForProfitsUS.2.15.2012.pdf>.

25. Daniel L. Bennett, Adam R. Lucchesi & Richard K. Vedder, *For-Profit Higher Education, Growth, Innovation, and Regulation*, CTR. FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY, 5 (July 2010), http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf.

26. *Id.* at 10–12.

27. See, e.g., Chelsea Asplund, *For-profit Colleges Raise Controversy*, ASSOCIATED STUDENTS OF WESTERN WASH. UNIV. (Feb. 28, 2011), <http://as.wvu.edu/asreview/for-profit-colleges-raise-controversy/>; see also Susan Adams,

as “predatory lenders,”²⁸ condemn them for unethical recruiting tactics, making false promises of high-salary jobs, inaccurately representing institutional information, and charging vastly higher tuition in comparison to public universities.²⁹ Critics argue that these colleges place immense pressure on students to enroll and make promises to them that they cannot keep.³⁰ One generalized criticism is that the majority of students who attend for-profit colleges accumulate immense debt that is generally higher than that of students from other institutions, are left with minimal educational credentials, struggle finding employment, and are statistically more likely to default on their student loans.

Proponents, on the other hand, argue that such unfavorable statistics are generally inconclusive given that graduation rates are largely affected by selectivity and demographics, such as income, age, race, prior education, and parental education levels, which can effectively skew the data.³¹ In the eyes of for-profit university supporters, “[i]t is to no one’s advantage to thwart a growing sector that is training underserved people.”³²

This Note, however, argues that for-profit colleges target, rather than serve, vulnerable populations. In Part I, this Note will first explore the business model of for-profit colleges, including how such colleges market to vulnerable populations, specifically poor and minority communities; provide low-quality education as evidenced by abysmal graduation rates and the lack of job opportunities for those who do graduate; engage in frivolous spending, much of which is allocated to marketing and executive salaries; and leave students with an immense debt burden that is nondischargeable in bankruptcy.

Part II then suggests potential public and private remedies for addressing abuses by for-profit universities, including implementing the proposed gainful employment rule, which would require for-profit colleges to prepare students for “gainful employment” or risk losing federal funding; adopting the Obama Administration’s proposal of making for-profit colleges more affordable through the use of a ratings system tied to the receipt of federal funding; employing stricter guidelines for deceptive marketing under the Federal Trade Commission; reducing the 90/10 Rule, which prohibits for-profit colleges from receiving more than 90% of all revenue from federal financial aid, to 85/15 in order to deter the targeting of vulnerable populations to receive federal funding; and revising the federal

Pressure Rising on For-Profit Colleges, FORBES (July 31, 2012, 6:01 PM), <http://www.forbes.com/sites/susanadams/2012/07/31/pressure-rising-on-for-profit-colleges/>.

28. Arguments have been made that for-profit colleges are “predatory lenders” because they are fueled by government funding, plagued with unfulfilled promises, managed improperly, and promote questionable values. See, e.g., Julia Lawrence, *Sun Could Be Setting on For-Profit Colleges, Universities*, EDUCATION NEWS (Oct. 23, 2012), <http://www.educationnews.org/online-schools/sun-could-be-setting-on-for-profit-colleges-universities/>.

29. Asplund, *supra* note 27.

30. Adams, *supra* note 27.

31. Henry Bienen, *In Defense of For-Profit Colleges*, WALL ST. J. (July 24, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703724104575378933954267308.html>.

32. *Id.*

Bankruptcy Code to allow either partial discharges or full discharges of student loan debt. In addition to also detailing various state proposals that are being implemented to crack down on for-profit colleges, including requiring the disclosure of more information from these colleges and greatly restricting state financial assistance provided to them, Part II concludes by describing the potential of whistleblower *qui tam* actions under the False Claims Act, which could effectively deter dishonesty and fraudulent behavior of for-profit colleges.

Next, Part III proposes several solutions: federal proposals should be adopted and supported; states should continue to pass effective legislation; and *qui tam* whistleblowers should be encouraged and enabled to litigate against for-profit colleges. Lastly, this Note concludes with the position that the United States must take action against the predatory nature of for-profit colleges through supporting the Obama Administration's federal initiatives, approving of the Federal Trade Commissions' stricter regulations, shrinking the 90/10 Rule, amending the federal Bankruptcy Code to allow the discharge of student loan debts, adopting additional state actions to better regulate for-profit colleges, and facilitating whistleblower *qui tam* actions, primarily under the False Claims Act.

I. THE FOR-PROFIT COLLEGE BUSINESS MODEL

For-profit colleges are businesses focused on recruiting consumers who can get federal financial aid. These business entities are profit driven and are guided by their bottom line. This feature is perhaps the most salient difference between for-profit colleges and state and private colleges, which are governed by trustees chiefly motivated not by profit, but by educational outcomes. This section will overview the business model cycle of for-profit colleges.

A. Marketing Toward Vulnerable Populations

Marketing is a key component of for-profit colleges, for which they pay incredible amounts of money to ensure successful recruitment.³³ For instance, in 2008 alone, the University of Phoenix spent \$130 million on advertising, which was far more than many well-known commercial brands, including Tide, Revlon, and FedEx.³⁴ Spending does not appear to be slowing down any time soon, such that in 2012, the University of Phoenix spent close to \$400,000 a day on advertising, which is more than any financial firm or retailer—the traditional big spenders on such advertising.³⁵ Even more distressing is that the amount of money

33. See Suevon Lee, *The For-Profit Higher Education Industry, by the Numbers*, PROPUBLICA (Aug. 9, 2012, 8:24 AM), <http://www.propublica.org/article/the-for-profit-higher-education-industry-by-the-numbers> (the for-profit industry spent \$4.2 billion on marketing, recruiting, and admissions staffing in the fiscal year of 2009 alone).

34. *College, Inc.: The Sales and Marketing Story*, PBS FRONTLINE (April 4, 2010), <http://www.pbs.org/wgbh/pages/frontline/teach/collegeinc/>.

35. A. Ananthalakshmi, *U.S. For-Profit Colleges Spend Big on Marketing While Slashing Other Costs*, REUTERS (Nov. 28, 2012, 9:33 AM), <http://www.reuters.com/article/2012/11/28/net-us-forprofitcolleges-analysis-idUSBRE8AR0FJ20121128>.

that for-profit colleges spend on sales and marketing can often exceed the amount of money that is allocated to teaching.³⁶

For-profit colleges purposefully direct their marketing campaigns toward vulnerable populations, including the underemployed and out-of-work, military personnel and their families, low-income students with no prior college experience, community college students, and minorities.³⁷ There have even been instances of for-profit colleges recruiting the homeless, and many of these institutions have even gone as far as sending recruiters to homeless shelters to recruit potential homeless students.³⁸ While one may counter with the notion that for-profit colleges are doing society a service by reaching out to populations in desperate need of education and opportunities, these institutions have ulterior motives—for-profit colleges target disadvantaged students because they qualify for federal grants and loans, which translates into profit for the college entities.³⁹ Furthermore, the high price of attending for-profit colleges places immense burdens on vulnerable populations such as the homeless, many of whom suffer from mental illnesses and substance abuse problems and eventually default on their student loans, thereby forfeiting their chances for public housing and rendering them ineligible for future federal financial aid to return to college.⁴⁰

Specifically, for-profit colleges have been accused of abusing the Post-9/11 GI Bill,⁴¹ which increased the amount of federal funding veterans can receive in order to advance their education and allows for-profit colleges to, as one critic put it, “take as much of that new money as they want without worrying about

36. *College, Inc.: The Sales and Marketing Story*, *supra* note 34.

37. *Cracking Down on For-Profit Colleges*, *supra* note 17; Daniel Golden, *For-Profit Colleges Target the Military*, BLOOMBERG BUSINESSWEEK (Dec. 30, 2009), http://www.businessweek.com/magazine/content/10_02/b4162036095366.htm (military personnel and their families); *see also* Amy Bingham, *For-Profit Colleges Target Military Personnel, Marketing High-Interest Private Loans*, ABC NEWS (Nov 3, 2011, 12:37 PM), <http://abcnews.go.com/blogs/politics/2011/11/for-profit-colleges-target-military-personnel-market-high-interest-private-loans/> (military personnel and their families); *For-Profit Colleges: Targeting People Who Can't Pay*, NAT'L PUB. RADIO (May 12, 2011), <http://www.npr.org/2011/05/12/136238528/for-profit-colleges-targeting-people-who-cant-pay> (low-income students with no prior college experience); Sarah Pavlus, *For-Profit University Targets Community College Students*, AM. INDEP. (Dec. 5, 2012, 8:49 AM), <http://americanindependent.com/217987/for-profit-university-targets-community-college-students> (community college students); John Hechinger, *For-Profit Colleges Fail Poor, Minority Students, Report Says*, BLOOMBERG.COM (Nov. 23, 2010, 12:47 PM), <http://www.bloomberg.com/news/2010-11-23/for-profit-colleges-fail-to-help-poor-minorities-education-trust-says.html> (minorities).

38. Daniel Golden, *Homeless High School Dropouts Lured by For-Profit Colleges*, BLOOMBERG.COM (April 29, 2010, 9:01 PM), <http://www.bloomberg.com/news/2010-04-30/homeless-dropouts-from-high-school-lured-by-for-profit-colleges-with-cash.html>; *see also* Don Bauder, *For-Profit College Tried to Recruit Homeless*, SAN DIEGO READER (May 8, 2013), <http://www.sandiegoreader.com/news/2013/may/08/citylights1-profit-college-recruit-homeless/>.

39. Golden, *supra* note 38.

40. *Id.*

41. *See The Post-9/11 GI Bill*, U.S. DEP'T. OF VETERANS AFF., http://www.gibill.va.gov/benefits/post_911_gibill/ (last visited Oct. 5, 2013).

running afoul of the law.”⁴² Therefore, veterans are extremely attractive, yet vulnerable, candidates for for-profit college recruiters who generally see veterans as “nothing more than dollar signs in uniform.”⁴³

Furthermore, much of the marketing material promoted by for-profit colleges frequently misrepresents data.⁴⁴ For example, some former employees of for-profit colleges have alleged that various universities conduct “wretched fraud” by manipulating job placement data to create false impressions for potential students.⁴⁵ Many former students of for-profit colleges have also complained that their schools do not give them accurate information regarding future job prospects or degree recognition.⁴⁶ The colleges respond that they “go above and beyond what they need to do to create transparency,” and that students know exactly what they are getting into when they register for classes.⁴⁷

However, many critics, notably including the U.S. Government Accountability Office (GAO), have identified major flaws surrounding these for-profit colleges’ questionable marketing practices.⁴⁸ For instance, in 2010, the GAO conducted an undercover investigation of 15 for-profit colleges.⁴⁹ It determined that all 15 colleges made deceptive or questionable statements to undercover applicants.⁵⁰ Some colleges exaggerated undercover applicants’ potential

42. Sarah Childress, *For-Profit Colleges Under Scrutiny, Again*, PBS (July 25, 2013, 4:40 PM), <http://www.pbs.org/wgbh/pages/frontline/education/educating-sergeant-pantzke/for-profit-colleges-under-scrutiny-again/>.

43. *Id.* Veterans are also attractive to for-profit colleges under the 90/10 Rule, which provides that “a post-secondary institution can receive no more than 90 percent of its revenue from title IV funds, which are the primary source of federal funding.” Thomas Osmun & Tucker Moon, *For-Profit Education: Is It Making the Grade?*, 31 AM. BANKR. INST. J. 20 (2012); *see also* 20 U.S.C. § 1094(a)(24) (2012) (for-profit colleges must “derive not less than ten percent of such institution’s revenues from sources other than funds provided under . . . title 42.”). Under the 90/10 Rule, “Post-9/11 GI Bill benefits technically do not count as federal revenue.” Daniel J. Riegel, *Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market Incentives to the For-Profit College Industry*, 81 GEO. WASH. L. REV. 259 (2013). Consequently, “[f]or-profit colleges have shaped a profitable business model around this loophole and are exploiting U.S. veterans for the Post-9/11 GI Bill benefits,” whereby these institutions “can now secure up to 100% of their revenue risk free from the federal government.” *Id.*

44. *See, e.g.*, Mark Greenblatt, *Whistle-Blower: For-Profit College Operator Allegedly Inflates Job Placement Rates*, ABC NEWS (Nov. 26, 2012), <http://abcnews.go.com/US/whistle-blower-profit-college-operator-allegedly-inflates-job/story?id=17810902>.

45. *Id.*

46. *See, e.g.*, Stephanie Chen, *For-Profit College Risk: Huge Debt, Questionable degree*, CNN (Sept. 2, 2010, 9:50 AM), <http://www.cnn.com/2010/LIVING/09/02/for.profit.college.debt/index.html>.

47. *Id.*

48. *For-Profit Colleges: Targeting People Who Can’t Pay*, *supra* note 37.

49. *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices*, U.S. GOV’T ACCOUNTABILITY OFFICE (2010), <http://www.gao.gov/products/GAO-10-948T>.

50. *Id.*

postgraduation salaries, and several admission staff members pressured undercover applicants to enroll before speaking with a financial advisor.⁵¹ Four of the colleges outright encouraged applicants to falsify their financial aid forms so they would qualify for federal financial aid.⁵²

Congress has, however, taken a stand against such reckless practices. For example, Congress passed the Higher Education Act (HEA),⁵³ which was signed into law “to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”⁵⁴ Under the HEA, for-profit colleges are barred from offering incentive-based payments to recruiters.⁵⁵ Although for-profit colleges are expressly prohibited from incentivizing recruiters to engage in such practices, violations continue to occur.⁵⁶

For-profit colleges present other grave issues in addition to their aggressive recruiting of vulnerable populations and misrepresentations of salient data. Even aggressive and borderline recruitment practices can be overlooked, particularly if the colleges are providing novel and effective educational approaches for communities traditionally underserved by institutions of higher education. Yet, as the next section demonstrates, for-profit colleges are not doing a good job educating, either.

B. Poor Quality of Education

For-profit colleges proclaim that their degree programs will prepare students to obtain the jobs and the salaries that they want.⁵⁷ But critics note that these colleges fail to graduate a high percentage of students, their credits are generally not transferable, and students who do graduate do not value their degree and do not make as much money as students who graduate from different colleges.

51. *Id.*

52. *Id.*

53. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001-1146 (2012)).

54. *Higher Education Act*, ASS’N FOR CAREER AND TECHNICAL EDUC., <https://www.acteonline.org/HEA/#.UpP7-o0Vw7A> (last visited Nov. 25, 2013).

55. Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem with Title VII Federal Student Aid*, 62 DUKE L. J. 119, 127 (2012).

56. *See, e.g.*, Josh Keller, *Education Management Corp. Improperly Paid Recruiters, Prosecutors Say*, CHRON. OF HIGHER EDUC. (Aug. 8, 2011), <http://chronicle.com/article/Education-Management-Corp/128560/> (the Education Management Corporation, a for-profit college, was sued after allegations arose that recruiters were paid “solely based on how many students they enrolled, which would violate the Higher Education Act’s ban on incentive compensation.”).

57. Daniel Luzer, *For-Profit College Graduates Barely Earn More than High School Graduates*, WASH. MONTHLY (April 29, 2013, 2:03 PM), http://www.washingtonmonthly.com/college_guide/blog/forprofit_college_graduates_ba.php.

First, a remarkably high percentage of enrolled students in for-profit colleges fail to graduate.⁵⁸ The National Center for Educational Statistics studied full-time students seeking bachelor's degrees at four-year colleges in 2012 and discovered that while 56% of public college students and 65.4% of private college students graduated within six years, only 28.4% of for-profit college students similarly graduated.⁵⁹ For the University of Phoenix, the nation's largest for-profit college,⁶⁰ the figure is even worse—only 9% of first-time, full-time bachelor's degree students graduated within six years.⁶¹

Additionally, credits students do attain at for-profit colleges are frequently nontransferable to public and private colleges, thereby rendering coursework effectively unusable at other institutions.⁶² For-profit colleges may even be deliberately creating this phenomenon to keep students from transferring out of their programs.⁶³ For example, at Arizona Summit Law School (formerly known as Phoenix College of Law), a for-profit law school located in Phoenix, two former professors have alleged that in an effort to “build a better mousetrap,” the school proposed curriculum changes that would reduce students' ability to transfer to better law schools.⁶⁴ They allege that the school has implemented antitransfer proposals, including a requirement for all students interested in transferring to meet with school administrators before the school would release their transcripts, refusing to write recommendation letters for transferring students, making first-year classes incompatible with other law schools, and grading all first year courses as “pass/fail” so that competing law schools cannot identify the school's top performers.⁶⁵

Even if students manage to graduate from for-profit colleges, critics note that their graduates still are less likely to find their degrees to have been worth the expense and are less likely to secure employment compared to their peers at

58. James Marshall Crotty, *For-Profit Colleges Thrashed In Congressional Report*, FORBES (Aug. 2, 2012, 5:42 PM), <http://www.forbes.com/sites/jamesmarshallcrotty/2012/08/02/for-profit-colleges-thrashed-in-congressional-report/>.

59. David Halperin, *4-Year Students at For-Profit Colleges Graduate Less than Half as Often as Other Students, but Their Schools Do Create Jobs – for Lobbyists*, REPUBLIC REP. (April 2, 2012, 3:10 PM), <http://www.republicreport.org/2012/4-year-students-at-for-profit-colleges-graduate-less-than-half-as-often-as-other-students-but-their-schools-do-create-jobs-for-lobbyists/>.

60. Sarah Pavlus, *Phoenix Takes a Nosedive: Major For-Profit College Accreditation in Jeopardy*, ALTERNET (Jan. 9, 2013), <http://www.alternet.org/education/phoenix-takes-nosedive-major-profit-college-accreditation-jeopardy>.

61. Tamar Lewin, *Report Finds Low Graduation Rates at For-Profit Colleges*, N.Y. TIMES (Nov. 23, 2010), http://www.nytimes.com/2010/11/24/education/24colleges.html?_r=0.

62. See, e.g., Chen, *supra* note 46.

63. See, e.g., O'Connor v. Phoenix Sch. of Law, LLC, Complaint, No. 13-01107 (D. Ariz. 2013), available at <http://www.abajournal.com/files/PhoenixlaSuit.pdf>.

64. *Id.*

65. *Id.*

traditional public and private colleges.⁶⁶ Those students who do find work ultimately tend to earn lower salaries compared to their peers who graduated from traditional colleges.⁶⁷ In fact, students who attended for-profit colleges “are less likely to state that their education was worth the amount they paid and are less apt to think their student loans were a worthwhile investment.”⁶⁸

Consider, for example, The Trump Entrepreneur Initiative, founded by Donald Trump in 2004 (and operated as an unlicensed educational institute from 2005–2011), which offers expensive real estate, asset management, entrepreneurship, and wealth creation courses.⁶⁹ The Trump Entrepreneur Initiative is aggressively marketed and Trump has even gone as far as to personally assert that “his handpicked instructors would ‘teach you better than the best business school.’”⁷⁰ Trump’s “students,” however, have been gravely disappointed in the quality of the courses—in fact, as a result of countless complaints, the Better Business Bureau gave the institution a “D-” for 2010, which is its second-lowest grade.⁷¹ In 2010, moreover, four former students sued The Trump Entrepreneur Initiative in California by alleging that “the school used high-pressure sales tactics to enroll students in the costly classes, promised extensive one-on-one instruction that did not materialize and employed ‘mentors’ who at times recommended investments from which they stood to profit.”⁷² Furthermore, a \$40 million lawsuit was recently brought against The Trump Entrepreneur Initiative in New York for fraudulently misleading more than 5,000 students into enrolling into the institution under a “bait-and-switch” scheme.⁷³

66. Menachem Wecker, *Students at For-Profit Universities Earn Less*, *Study Says*, U.S. NEWS (Mar. 23, 2012), <http://www.usnews.com/education/best-colleges/articles/2012/03/23/students-at-for-profit-colleges-earn-less-study-says>; see also Dan Berrett, *Graduates of For-Profits Lag Behind Their Peers in Earnings and Employment*, *Study Finds*, CHRON. OF HIGHER EDUC. (Feb. 22, 2012), <http://chronicle.com/article/Graduates-of-For-Profits-Lag/130900/>; see, e.g., *Three Senators Fight to Protect Students from ‘Worthless Degrees’ at For-Profit Colleges*, YAHOO! (Aug. 14, 2012, 1:40 PM), <http://news.yahoo.com/three-senators-fight-protect-students-worthless-degrees-profit-174000039.html>.

67. Wecker, *supra* note 66.

68. Paul Fain, *Questions of Quality*, INSIDE HIGHER ED (Dec. 7, 2011), <http://www.insidehighered.com/news/2011/12/07/profits-lag-behind-other-colleges-student-outcomes>.

69. Daniel Luzer, *Was Trump University a Scam?*, WASH. MONTHLY (Aug. 26, 2013, 12:58 PM), http://www.washingtonmonthly.com/college_guide/blog/was_trump_university_a_scam.php.

70. Michael Barbaro, *New York Attorney General Is Investigating Trump’s For-Profit School*, N.Y. TIMES (May 19, 2011), http://www.nytimes.com/2011/05/20/nyregion/trumps-for-profit-school-said-to-be-under-investigation.html?pagewanted=1&_r=0&ref=nyregion&src=me.

71. *Id.*

72. *Id.*

73. See Caroline Howard, *Donald Trump University Lawsuit is Lesson for All For-Profit Colleges*, FORBES (Aug. 27, 2013, 4:08 PM), <http://www.forbes.com/sites/carolinehoward/2013/08/27/donald-trump-universitys-big-lesson-for-all-for-profit-schools/>; see also Bruce Watson, *Lawsuit Against “Trump University” Puts For-Profit Schools in the Cross Hairs Again*, DAILY FIN. (Aug. 27, 2013,

C. Profitability and Frivolous Spending

Notwithstanding any harms to students, the for-profit college industry is extremely profitable for shareholders and executives.⁷⁴ During the 2009–2010 school year alone, for-profit colleges received \$32 billion in federal aid, including \$7.5 billion in Pell Grants.⁷⁵ In 2010 alone, publicly traded companies operating for-profit colleges had an average profit margin of 19.7%, resulting in \$3.2 billion in profit.⁷⁶ Yet, the majority of for-profit colleges spend less than half of their budgets on education and instead spend close to one-third on recruiting and marketing.⁷⁷

In addition to marketing, for-profit colleges direct much of their revenue toward executive compensation.⁷⁸ For instance, in 2009, the average compensation of CEOs of for-profit college corporations was \$7.3 million.⁷⁹ In comparison, the average compensation of the five highest-paid leaders of large public colleges was only \$1 million.⁸⁰ In 2010, Charles Edelstein, the co-CEO of Apollo Group, which offers online and on-campus degrees through the University of Phoenix, made \$11 million.⁸¹ Since 2003, Peter Sperling, the vice chairman of Apollo's University of Phoenix, has earned over \$574 million.⁸²

D. High Rates of Nondischargeable Student Debt

Many critics question the extremely high price of for-profit college tuitions.⁸³ As of 2011, tuition at two-year for-profit colleges was five times higher

6:00 AM), <http://www.dailyfinance.com/2013/08/27/trump-university-lawsuit-for-profit-schools/>.

74. Adams, *supra* note 27.

75. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 16. In fact, for-profit colleges are also earning hundreds of millions of dollars under the Post-9/11 GI Bill. Aaron Smith, *For-Profit Schools Cash in on the GI Bill*, CNN MONEY (June 26, 2012), <http://money.cnn.com/2012/06/26/news/economy/veterans-schools/>. For instance, “[f]rom 2009 to 2011, the VA paid \$196 million to the University of Phoenix, \$175 million to ITT Tech, \$128 million to DeVry University, about \$50 million each to Kaplan and The Art Institutes, and \$28 million to Westwood College.” *Id.*

76. Adams, *supra* note 27.

77. Mike Quigley & Dick Durbin, *The Predatory Nature of Some For-Profit Colleges*, in *Opinion*, CHI. TRIB., (July 30, 2010), http://articles.chicagotribune.com/2010-07-30/opinion/ct-oped-0730-loans-20100730_1_pell-grant-dollars-for-profit-federal-student-loans.

78. Lee, *supra* note 33.

79. *Id.*

80. *Id.*

81. Shelly K. Schwartz, *Pay for CEOs of For-Profit Colleges Top of the Class*, CNBC (Dec. 21, 2010, 8:51 AM), <http://www.cnbc.com/id/40680879>.

82. John Hechinger & John Laueran, *Executives Collect \$2 Billion Running U.S. For-Profit Colleges*, BLOOMBERG.COM (Nov. 9, 2010, 10:02 PM), <http://www.bloomberg.com/news/2010-11-10/executives-collect-2-billion-running-for-profit-colleges-on-taxpayer-dime.html>.

83. Walter Hamilton, *For-Profit Colleges Face Federal Crackdown*, L.A. TIMES (Feb. 6, 2011), <http://articles.latimes.com/2011/feb/06/business/la-fi-for-profit-colleges-20110206>.

than at state schools.⁸⁴ At four-year for-profit colleges, half of graduates leave school with at least \$31,000 in student loans, which amounts to closely four times that of their traditional-university counterparts.⁸⁵

The cost of attending for-profit colleges is exorbitant and places a heavy financial burden on students with respect to loans, stability, and security.⁸⁶ For instance, a 2012 study discovered that 96% of for-profit college students took out loans, compared to 13% of students in community colleges and 48% of students in four-year public universities.⁸⁷ Not only do students take out more loans at for-profit colleges, but they also take out larger loans.⁸⁸

For example, in 2012, the Arizona Summit Law School ranked a staggering 5th out of 191 law schools for leading to the most student debt. The average debt of Arizona Summit Law School students was \$145,357.⁸⁹ The average amount of debt has continued to increase, such that in 2012, only one year later, Arizona Summit Law School's average amount of student debt increased by nearly \$20,000, totaling \$162,627, with 97% of students graduating with debt.⁹⁰

Additionally, because many students will not be able to meet the burden of paying back such substantial student loans, for-profit colleges arguably encourage involvement with fringe credit.⁹¹ Moreover, the vulnerable demographic profiles of students who take out student loans to attend for-profit colleges, including minorities and single parents, are "similar to the targets of other fringe credit providers, such as payday lenders and the purveyors of subprime mortgages involved in the mortgage crisis."⁹²

84. *Id.*

85. *Id.*

86. *See generally For-Profit College Investigation*, TOM HARKIN, IOWA'S SENATOR, <http://www.harkin.senate.gov/help/forprofitcolleges.cfm> (last visited Oct. 5, 2012).

87. Adams, *supra* note 27.

88. Kelsey Sheehy, *Student Borrowing Higher at For-Profit than Public Colleges*, U.S. NEWS (Aug. 22, 2013), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2013/08/22/student-borrowing-higher-at-for-profit-than-public-colleges>.

89. Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012, 4:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

90. *Which Law School Graduates Have the Most Debt?*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings> (last visited Nov. 25, 2013).

91. Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 441 (2012) ("Even though much of the credit is in the form of federal student loans with reasonable interest rates, the label 'subprime higher education' accurately captures the nature of the risk to individual students.").

92. *Id.* at 441–42.

Students of for-profit colleges tend to default on student loan debt at higher rates.⁹³ For-profit colleges alone comprise close to half of loan defaults nationally,⁹⁴ and more than one in five students enrolled at for-profit colleges default within three years of starting to repay their loans.⁹⁵ The large number of defaults directly correlates with the high costs of attending for-profit colleges—with attendance costs so high, many students understandably fail to keep up with their loan payments.⁹⁶

A critical issue, however, lies in the fact that under the federal Bankruptcy Code, student loan debt generally is not dischargeable when filing for bankruptcy.⁹⁷ There is a narrow exception, however—student loan debts can be discharged if excepting such debt from discharge “would impose an undue hardship on the debtor and the debtor’s dependents.”⁹⁸ It is critical to note, however, that it is extremely difficult to meet this standard, so this exception is not much of an exception, since the requirements are extremely hard to satisfy.⁹⁹ Without discharge, student loan defaults can subject debtors “to government confiscation of salaries, tax refunds, and Social Security payments—and disqualify them for aid to get more marketable degrees.”¹⁰⁰ In other words, student loan defaults can cause an immense headache for for-profit college students, many of whom may be forced to file for bankruptcy as a result of the costs of attending the colleges in the first place.

II. POTENTIAL REMEDIES

In light of all of the harms that are perpetuated by the business model cycle of for-profit colleges, there are several public and private remedies available. For instance, the Obama Administration has suggested federal legislation to reduce the amount of aid given to for-profit colleges, while individual states have proposed legislation to altogether restrict state financial assistance to for-profit colleges. In the absence of legislation, individuals may have to turn to private *qui tam* remedies in the form of lawsuits, such as under the False Claims Act.

93. John Hechinger, *For-Profit College Grads Also Earn a Life of Debt*, BUSINESS WEEK (Jan. 6, 2011), http://www.businessweek.com/magazine/content/11_03/b4211018017031.htm.

94. Adams, *supra* note 27.

95. Emily Hanford, *The Case Against For-Profit Colleges and Universities*, AM. RADIOWORKS, <http://americanradioworks.publicradio.org/features/tomorrows-college/phoenix/case-against-for-profit-schools.html> (last visited Aug. 31, 2013).

96. Hechinger, *supra* note 93.

97. 11 U.S.C. § 523(a)(8) (2012).

98. *Id.* See also Hon. W. Homer Drake, Jr. & Karen D. Visser, §6:20. *Dischargeability—Student Loan Debts*, BANKR. PRACTICE FOR THE GEN. PRACTITIONER (July 2013).

99. See, e.g., Natalie Kitroeff, *Loan Monitor Is Accused of Ruthless Tactics on Student Debt*, N.Y. TIMES (Jan. 1, 2014), http://www.nytimes.com/2014/01/02/us/loan-monitor-is-accused-of-ruthless-tactics-on-student-debt.html?_r=1.

100. Hechinger, *supra* note 93.

A. Federal Proposals

The Obama Administration has publically criticized and condemned for-profit colleges.¹⁰¹ According to President Obama, students are “loaded down with enormous debt. They can’t find a job. They default. The taxpayer ends up holding the bag. Their credit is ruined, and the for-profit institution is making out like a bandit. That’s a problem.”¹⁰² The Administration has set out two proposals to address the growing for-profit college industry.

1. The Gainful Employment Rule

In order to combat the predatory practices of for-profit colleges, President Obama proposed the “gainful employment rule,” which, proposed in 2011, sought “to measure the performance of vocational programs, mostly at for-profit institutions but also at some nonprofit colleges.”¹⁰³ The proposed regulation promulgated by the Department of Education was aimed at creating educational transparency through protecting both students from taking unmanageable loans and taxpayers alike from high loan default rates.¹⁰⁴

Under this rule, career education programs would be required to prepare students for “gainful employment” in recognized occupations or risk losing federal student aid funding.¹⁰⁵ In order to be eligible for such funding, the U.S. Department of Education “would define whether a program successfully prepares students for gainful employment using a two-part test: measuring the relationship between the debt students incur and their incomes after program completion; and measuring the rate at which all enrollees, regardless of completion, repay their loans on time.”¹⁰⁶ Based on such data, educational programs would be deemed eligible, restricted, or ineligible for federal funding.¹⁰⁷

The gainful employment rule, however, was struck down in federal district court as setting arbitrary and capricious graduation and loan repayment rates under the Administrative Procedure Act.¹⁰⁸ The U.S. District Court for the

101. Goldie Blumenstyk, *Obama Singles Out For-Profit Colleges and Law Schools for Criticism*, CHRON. FOR HIGHER EDUC. (Aug. 24, 2013, 7:36 AM), <https://chronicle.com/article/Obama-Singles-Out-For-Profit/141253/>.

102. *Id.*

103. Paul Fain, *Now What?*, INSIDE HIGHER ED (Mar. 21, 2013), <http://www.insidehighered.com/news/2013/03/21/gainful-employments-future-uncertain-after-court-ruling>.

104. Justin Hamilton, *Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates*, U. S. DEP’T. OF EDUC. (July 23, 2010), <http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings-l>.

105. Michelle Asha Cooper, *A Closer Look at Gainful Employment*, FORBES (Oct. 12, 2010, 7:06 PM), <http://www.forbes.com/2010/10/12/gainful-employment-regulation-college-university-lifestyle-education-cooper.html>.

106. Hamilton, *supra* note 104.

107. Cooper, *supra* note 105.

108. Fain, *supra* note 103; *see also* 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A) (2012); *Ass’n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012).

District of Columbia held that the phrase “gainful employment in a recognized occupation” is ambiguous and that the U.S. Department of Education failed to articulate a reasoned explanation for the central regulation of the proposed law.¹⁰⁹ The proposal was also rejected because it conflicted with federal law, due to 2008 legislation banning the creation of a federal “student unit record system,” which was passed by Congress in light of concerns about privacy and mandatory data collection.¹¹⁰ As a result, the “gainful employment rule” is currently not in effect and is awaiting successful negotiations for potential future implementation.¹¹¹

2. *The Obama Administration’s Latest Proposal*

Currently, the Obama Administration is proposing a broad higher education plan that would include provisions addressing concerns over for-profit colleges.¹¹² Under the suggested plan, the Department of Education would cut funding for programs at for-profit colleges where graduates have debt that comprises more than 30% of their discretionary income and 12% of their annual income for two of three years.¹¹³ The plan is intended to make college more affordable under a ratings system that would rate schools based on various factors, such as affordability, and tie the rating to federal funding available.¹¹⁴ Moreover, the plan would “cap student loan repayment plans based on how much graduates earn.”¹¹⁵

For-profit-college proponents nonetheless argue that they are being unfairly targeted, despite having self-corrected improper policies over the years.¹¹⁶ Other critics suggest that the administration should narrow its approach to more directly target for-profit colleges before “subjecting even the most efficient, debt-free sectors of higher education to expansive new regulation.”¹¹⁷

109. *Ass’n of Private Colls. & Univs.* 870 F. Supp. 2d 133.

110. Fain, *supra* note 103.

111. See Michael Stratford & Paul Fain, *Agree to Disagree*, INSIDE HIGHER ED (Sept. 10, 2013), <http://www.insidehighered.com/news/2013/09/10/gainful-employment-negotiations-face-long-odds-reaching-consensus>.

112. Blumenstyk, *supra* note 101; see also Press Release, The White House, Office of the Press Secretary, FACT SHEET on the President’s Plan to Make College More Affordable: A Better Bargain for the Middle Class (Aug. 22, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain->.

113. Emily Deruy, *Obama Administration Goes After For-Profit Colleges Again*, ABC NEWS (Sept. 9, 2013, 10:41 AM), http://abcnews.go.com/ABC_Univision/obama-administration-profit-colleges/story?id=20200162. It is critical, however, to also note that “[t]he administration developed regulations during President Obama’s first term in office, but eventually, a federal judge threw out a rule that said schools where less than 35 percent of graduates were repaying their loans would lose federal financial aid.” *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Jean Braucher, *President Obama Takes on the Student Debt Bomb; Meanwhile, the Gainful Employment Rule Saga Enters a 5th Year*, CREDITSLIPS.ORG (Aug. 24, 2013, 10:58 PM), <http://www.creditslips.org/creditslips/2013/08/president-obama-takes->

3. *The Federal Trade Commission Regulations*

The Federal Trade Commission (FTC) recently took a stand against for-profit colleges under the Obama Administration when it released stricter guidelines addressing deceptive marketing strategies employed by for-profit colleges featuring vocational programs.¹¹⁸ The FTC amended the Vocational School Guides of 1972 (which addressed misrepresenting accreditation, credit transferability, agency affiliations, and testimonials or endorsements) through better addressing more specific misrepresentations, such as misrepresentations commonly used in recruitment, including postgraduation job prospects, licensing exams, admission tests, and financial aid.¹¹⁹ Under the stricter guidelines, the regulation prohibits education industry members from misrepresenting the nature or efficacy of their courses, the time required to complete a course, or the amount or nature of any financial assistance available to students, including any federal student financial assistance.¹²⁰

Although the FTC's guidelines apply only to vocational schools, the FTC has broad jurisdiction, so these regulations can be applied broadly.¹²¹ In fact, the FTC "has the authority to dial up law enforcement on deceptive or unfair practices, regardless of whether a college is covered under the language."¹²²

4. *The 90/10 Rule*

The Obama Administration has also proposed a tightening of the "90/10 Rule," which currently provides that for-profit colleges can receive at most 90% of their revenue from the U.S. Department of Education's federal student aid programs and must obtain the remaining 10% from other, nonfederal sources.¹²³ The main objective of the 90/10 Rule is to safeguard against schools relying solely on taxpayer revenue to function.¹²⁴ Currently, veterans' and active duty service members' federal student aid does not apply toward the 90%, so for-profit colleges have been targeting veterans, service members, and their families in order to comply with the 90/10 Rule.¹²⁵

on-the-student-debt-bomb-meanwhile-the-gainful-employment-rule-saga-enters-a-5.html#more.

118. Paul Fain, *FTC Joins For-Profit Fight*, INSIDE HIGHER ED. (Nov. 14, 2013), <http://www.insidehighered.com/news/2013/11/14/federal-trade-commission-steps-scrutiny-profit-colleges>.

119. *FTC Approves Changes to Vocational School Guides*, FED. TRADE COMM'N (Nov. 7, 2013), <http://ftc.gov/opa/2013/11/vocschools.shtm>; *see also* Guides for Private Vocational and Distance Education Schools, 16 C.F.R. §§ 254.0–254.7 (2013).

120. 16 C.F.R. §§ 254.4(a)(2), 254.4(a)(4), 254.5(c).

121. Fain, *supra* note 118.

122. *Id.*

123. *Harkins Joins Durbin, Cohen to Call for Congress to End Loophole That Encourages For-Profit Colleges to Target Veterans & Servicemembers*, U.S. SENATE COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS (Nov. 6, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=cf24f85c-996f-4240-9f6e-056747f53788>.

124. *Id.*

125. *Id.*

Under the latest proposal, the Protecting Our Students and Taxpayers (POST) Act would be implemented, which would “eliminate the loophole that allows these publicly-traded companies to receive more than 90% of their revenue from the federal government.”¹²⁶ If enacted, the POST Act would reinstate the original ratio of 85/15 and amend the definition of what constitutes federal revenue so that it includes all federal funds.¹²⁷ This would require for-profit colleges to secure more revenue outside of federal financial aid funds.¹²⁸ The idea is that the law would eliminate for-profit colleges’ incentives to recruit aggressively service members and veterans.¹²⁹ Additionally, the POST Act would increase penalties for noncompliance and eliminate accounting tricks that can be used to inflate nonfederal funding sources.¹³⁰

5. Discharging Student Debt

As previously discussed, the federal Bankruptcy Code prohibits discharging student loan debt when filing for bankruptcy.¹³¹ The nondischargeability of student loans in bankruptcy arose in response to a societal fear regarding the possibility of abuse by students and a congressional worry that deceitful students could jeopardize the integrity of the student loan program.¹³² Additionally, the nondischargeability provision of student loans emerged to encourage lenders to lend to students with little or no credit history, thereby extending access to credit for students who would not have otherwise had any.¹³³

However, recall that student loan debt can be discharged only if such debt would impose an undue hardship on the debtor and the debtor’s dependents.¹³⁴ In spite of this, the federal Bankruptcy Code does not define the term “undue hardship”; rather, Congress has left this up to the judicial system on a discretionary, case-by-case basis.¹³⁵ As a result, this exception is challenging, if not nearly impossible, to meet.¹³⁶

In response, advocates of bankruptcy reform propose that Congress repeal the nondischargeability of student loans provision altogether under the federal Bankruptcy Code to, among other things, free student loan debtors from federal disparate treatment, alleviate the inconsistent judicial application of the undue hardship exception, and provide an equitable remedy for student loan debtors through allowing such debtors to have a fresh-start—one of the primary themes of

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. 11 U.S.C. § 523(a)(8) (2012); *see also* Drake, *supra* note 98.

132. B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(A)(8) of The Bankruptcy Code?*, 34 TEX. TECH. L. REV. 89, 97–99 (2002).

133. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 368 (2013).

134. 11 U.S.C. § 523(a)(8) (2012); *see also* Drake, *supra* note 98.

135. Huey, *supra* note 132.

136. *See, e.g.*, Kitroeff, *supra* note 99; *see also* Huey, *supra* note 132.

the federal Bankruptcy Code.¹³⁷ Others suggest that the judicial system should uniformly permit the partial discharge of student loan debt, which would ensure economic and fundamental fairness for debtors and creditors alike and would, in fact, properly comport with the statutory language and legislative history of the nondischargeability provision.¹³⁸ Unfortunately, the progress of such proposals remains to be seen.¹³⁹

B. State Proposals

Recognizing the dangers of for-profit colleges and the misallocation of financial aid, several states are passing their own legislation to thwart the predatory practices of for-profit colleges. Some states have taken the approach that for-profit colleges must disclose more information, relying on the Consumer Financial Protection Bureau and the U.S. Department of Education's financial aid shopping sheet.¹⁴⁰ Connecticut, for example, recently passed a law requiring for-profit colleges licensed to operate in the state to provide uniform financial aid information to all prospective students to allow such students sufficient time to make informed decisions about enrollment.¹⁴¹ Maryland went even further in April of 2011.¹⁴² In addition to requiring for-profit colleges to provide enrollment, graduation, and retention rate data to the Maryland Higher Education Commission for sufficient regulation, the state prohibits schools from providing commission or incentives to school recruiters, develops a guaranty fund to protect students if a school files bankruptcy or closes, and phases out Maryland student aid for for-profit colleges.¹⁴³ In fact, starting on July 1, 2016, state financial assistance can no longer be used at for-profit colleges, except for legislative scholarships and specific grants for private career schools.¹⁴⁴

Similarly, California passed budget bills in the 2011¹⁴⁵ and 2012¹⁴⁶ sessions to revise its student financial aid program, Cal-Grant,¹⁴⁷ in which eligibility for the Cal-Grant program has been tied to student loan defaults and graduation rates.¹⁴⁸ Specifically, for-profit colleges with more than 40% of students taking out

137. Huey, *supra* note 132; *see also* Devon Merling, *How Bankruptcy Could Help Solve the Student Loan Crisis*, DESERET NEWS (Aug. 23, 2013, 6:35 PM), <http://www.deseretnews.com/article/865585172/How-bankruptcy-could-help-solve-the-student-loan-crisis.html?pg=all>.

138. Frank T. Bayuk, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(A)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U. L. REV. 1091, 1118–19 (2004).

139. *See, e.g.*, Private Student Loan Bankruptcy Fairness Act, H.R. 532, 113th Cong. (2013); Fairness for Struggling Students Act, S. 114, 113th Cong. (2013).

140. NAT'L. CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

141. 2013 Conn. Acts 13-95 (Reg. Sess.).

142. S. 695, Reg. Sess. (Md. 2011).

143. NAT'L. CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

144. *Id.*

145. 2011 Cal. Stat. Ch. 7.

146. 2012 Cal. Stat. Ch. 38.

147. *See* CAL. STUDENT AID COMM'N, <http://www.calgrants.org/> (last visited Dec. 2, 2013).

148. NAT'L. CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

federal loans “must have a graduation rate of at least 30 percent and a maximum loan default rate of 15.5 percent” under the state-funded program.¹⁴⁹ Under such regulations, close to 80% of for-profit colleges will become ineligible to receive Cal-Grant funds, thereby effectively cracking down on for-profit colleges.¹⁵⁰

C. Whistleblower Actions

For-profit college employees may be able to bring claims against their employers under the False Claims Act (FCA) if the school engaged in certain fraudulent conduct. The FCA imposes liability on “any person who knowingly submits a false claim to the government or uses another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government.”¹⁵¹ The FCA allows for *qui tam* actions¹⁵²—lawsuits brought by private persons or “whistleblowers” on behalf of the government to recover civil penalties and treble damages, whereby the person bringing the lawsuit is known as a “realtor.”¹⁵³ If successful, a *qui tam* action can stop dishonest conduct and deter similar conduct by others, in addition to allowing a realtor to receive “a substantial share of the government’s ultimate recovery—as much as 30 percent of the total.”¹⁵⁴ Notably, *qui tam* actions can be brought under the FCA to thwart and deter the predatory practices of for-profit colleges.¹⁵⁵

Recently, in *United States v. Kaplan, Inc.*,¹⁵⁶ a former employee of a for-profit college owned by Kaplan, Inc. filed a *qui tam* lawsuit against the for-profit college, alleging that the college violated the FCA by submitting both false representations for reaccreditation and fraudulent financial aid claims to the U.S. Department of Education.¹⁵⁷ Specifically, the former employee claimed that his for-profit college employer generated graduation diplomas for students that had never begun nor completed the curriculum and manipulated financial aid requests submitted to the federal government.¹⁵⁸

In *Kaplan*, the Ninth Circuit reversed the District Court’s dismissal of the former employee’s claim by holding that a *qui tam* plaintiff does not have to “identify representative examples of false claims” to survive a motion to

149. *Id.*

150. *Id.*

151. 31 U.S.C. §§ 3729–3733 (2012); U.S. DEP’T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER, http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (last visited Dec. 2, 2013); *see* 31 U.S.C. § 3730(b) (2012); *see also id.* §§ 3729(a)(1)(A), (B) (2012).

152. “Qui Tam is shorthand for the Latin phrase ‘*qui tam pro domino rege quam pro seipse*’, meaning ‘he who sues for the king as for himself.’” *What is the False Claims Act?*, THE QUI TAM ONLINE NETWORK, <http://www.quitamonline.com/whatis.html> (last visited Dec. 2, 2013).

153. U.S. DEP’T OF JUSTICE, *supra* note 151; *see also* 31 U.S.C. § 3730(b) (2012); THE QUI TAM ONLINE NETWORK, *supra* note 152.

154. THE QUI TAM ONLINE NETWORK, *supra* note 152.

155. *See, e.g.*, *United States v. Kaplan, Inc.*, 517 Fed.Appx. 534 (9th Cir. 2013).

156. *Id.*

157. *Id.* at 535.

158. *Id.* at 535–36.

dismiss.¹⁵⁹ Instead, the Ninth Circuit adopted the Fifth Circuit's more lenient, plaintiff-friendly approach¹⁶⁰ by holding that "it is sufficient to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'"¹⁶¹ In this case, because the former employee used first-hand knowledge of the alleged fraudulent scheme and described in detail meetings during which the alleged scheme was revealed, the standard was properly met.¹⁶² Thus, in *Kaplan, Inc.*, the Ninth Circuit lowered the plaintiff's burden to survive a motion to dismiss, thereby making it significantly easier for plaintiffs to sue for-profit colleges under the FCA.¹⁶³

As a result, plaintiffs suing for-profit colleges under the FCA in the Ninth Circuit will have an eased burden in pursuing litigation, which will likely increase the number of plaintiffs seeking judicial recourse. This might open the door to future employees blowing the whistle on other fraudulent practices, such as making misrepresentations to students. Consequently, for-profit colleges will have a far more difficult time evading the law in committing fraud, which will reduce the amount of for-profit educational institutions swindling students with misleading statements and data.

Facing a lowered plaintiff's burden of proof in fraud litigation, for-profit institutions will have to be much more cognizant and far more accountable for their actions, which will lead to greater protection for students and consumers alike. Additionally, such litigation may also ultimately have a positive effect on for-profit colleges. By making for-profit colleges more aware of their fraudulent acts and more accountable to society, for-profit colleges may be able to revamp the nation's cynical perspective toward their institutions by renovating their marketing strategies to ensure legal compliance and prevent fraudulent behavior, while at the same time enrolling more informed students who can begin trusting for-profit colleges again.

Ideally, this reduction in the plaintiff's burden in both the Ninth and Fifth Circuits will spread to various other jurisdictions in the near future, which will further diminish the predatory practices of for-profit colleges. With the adoption of the standard by other jurisdictions, judicial scrutiny against for-profit colleges will continue to intensify and the plaintiff's burden in such claims will continue to be reduced.

159. *Id.* at 536 (citing *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)).

160. *See United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) (holding that "to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.").

161. *Kaplan*, 517 Fed. App. at 534 (citing *Lungwitz*, 616 F.3d at 998 (quoting *Kanneganti*, 565 F.3d at 190)).

162. *Id.* at 536.

163. *Id.*

In sum, by reducing the plaintiff's burden under the FCA, for-profit colleges will be held to a higher standard of responsibility, which may profoundly benefit students as well as the for-profit colleges themselves. Therefore, individual actions against for-profit colleges, specifically under the FCA, should be encouraged and facilitated nationwide.

III. WHAT CAN BE DONE?

In light of the aforementioned criticisms and potential private and public remedies, several actions should be taken to rein in the predatory nature of for-profit colleges: federal proposals and initiatives should be adopted and supported; state legislatures should continue to pass effective legislation; and whistleblowers should be encouraged and enabled to pursue *qui tam* actions against for-profit colleges.

A. Adopting Federal Proposals and Initiatives

Although critics may argue that the Obama Administration's initiatives appear far reaching, these initiatives are positive steps in the right direction for the federal government to take notice of the downfalls of for-profit colleges across the nation. There is no basis to assume that for-profit colleges are being unjustly besieged by the suggested plan. Instead, for-profit colleges are being "targeted" by the Obama Administration purely on the basis of factual, data-driven information implicating, among numerous other issues, corruption and fraud under the guises of educational institutions.

Furthermore, the FTC's recently adopted stricter guidelines should be supported to strike down the largely unregulated deceptive marketing practices of for-profit colleges, safeguard students against fraud, and ensure effective education for our nation's future leaders. Along those same lines, the 90/10 Rule should be amended to deter for-profit colleges from targeting particularly vulnerable populations in order to receive a greater level of federal funding. Not only is the 90/10 Rule too lenient and predator friendly, but it is also in need of great reform, and now is an appropriate time for such reform.

Additionally, Congress should revise the federal Bankruptcy Code to enable the discharge of student loan debt. Data suggest that most degrees awarded by for-profit colleges are of questionable value.¹⁶⁴ For-profit college students and graduates, assuming they make it to graduation, are less likely to succeed professionally, which suggests that these "diploma mill" institutions are a waste of money, time, and effort. Even more troubling is that despite the fact that for-profit colleges fail to graduate a significant number of students, students do not get a refund of their tuition. Instead, for-profit colleges retain the tuition money while students are stuck drowning in their student loan debt.

These statistics should serve as no surprise, since these predatory-practicing institutions consciously decide how much to charge for tuition and actively search for vulnerable, poor populations to recruit. And because for-profit

164. See, e.g., *Three Senators Fight to Protect Students from 'Worthless Degrees' at For-Profit Colleges*, *supra* note 66.

colleges are themselves unaffected by high loan default rates, it is unsurprising that they have done little to address the issue. For-profit colleges derive most of their profits from taxpayer-financed federal grants and financial aid and get paid irrespective of whether those students ultimately repay their loans—it is the students and taxpayers who are instead left on the hook.¹⁶⁵ In fact, “[f]or-profit education companies get 86% of their revenues from taxpayer dollars.”¹⁶⁶ Thus, these defaults are of little or no concern to these predatory lenders, whose primary concern is the bottom monetary line, because they will be paid regardless of who they harm in the process.¹⁶⁷

The federal Bankruptcy Code’s nondischargeability provision places immense burdens on students with staggering student loan debts who have a grave probability of defaulting, potentially resulting in financial, emotional, and personal ruin. Congress should remove these hurdles to such students, especially in the face of national economic turmoil, where jobs are scarce and the overwhelming number of loan defaults by for-profit college students continues to grow. Enabling students to discharge student loan debts will allow them to move forward with their lives and become successful members of society. Until the federal Bankruptcy Code is amended and revised, countless students, especially for-profit college students, will continue to be suffocated by burdensome financial troubles without any hope of recovery.

B. Effectuating State-Specific Legislation

State proposals for adopting specific legislation to tackle the growing problems of for-profit colleges should be encouraged and implemented. Recently, attorneys general from more than a dozen states urged congressional leaders “to pass legislation that would bar institutions from using money from federal grants or student loans to market their programs and recruit students.”¹⁶⁸ These attorneys general argue that Congress must restrict federal funding to for-profit colleges, which typically leave students with endless debt and insufficient training in finding high-paying jobs.¹⁶⁹ These attorneys general could not be more correct. Until Congress acts, states should regulate more closely for-profit colleges and not waste time waiting for the federal government to act. By tackling the issues of for-profit colleges head on, states will better protect the interests of their citizens and potentially spur a nationwide movement directed at protecting student consumers.

Overall, although Connecticut, Maryland, and California have all implemented diverse regulations with respect to for-profit colleges, other state governments should take notice of these exemplary laws and implement similar

165. *For-Profit Colleges: Targeting People Who Can't Pay*, *supra* note 37.

166. Lauren Lyster, *For-Profit Colleges Scams Hurt Students and Taxpayers*, YAHOO! (Aug. 21, 2013, 8:17 AM), <http://finance.yahoo.com/blogs/daily-ticker/profit-college-scams-hurt-students-taxpayers-121740602.html>.

167. *For-Profit Colleges: Targeting People Who Can't Pay*, *supra* note 37.

168. Todd Wallack, *States Seek Limits on US Funds to For-Profit Colleges*, BOSTON GLOBE (Mar. 18, 2013), <http://www.bostonglobe.com/business/2013/03/17/attorney-generals-congress-don-let-for-profit-colleges-use-federal-grants-and-loans-for-advertising/Hxje43FTKO0coIF0UJgPPI/story.html>.

169. *Id.*

regulations to fight back against the predatory practices of for-profit colleges in the states.

C. Supporting Whistleblower Actions

Whistleblowers should be encouraged and supported in taking *qui tam* actions against for-profit colleges to deter against predatory practices and to redress historic wrongs against students and taxpayers. In light of the recent Ninth Circuit decision of *Kaplan*, there is great potential for courts nationwide to follow suit in order to make it easier for plaintiffs to sue for-profit colleges where wrongs have been committed. Indeed, other courts across the country should adopt similar interpretations under the FCA by lowering the burden for *qui tam* plaintiffs. By doing so, the judicial system will provide wronged plaintiffs with their day in court.

CONCLUSION

In conclusion, federal, state, and individual actions should be supported to prevent for-profit colleges from continuing to target vulnerable populations for pure financial gain, poorly educating students by producing low graduation rates and failing to open doors for future employment opportunities, egregiously directing funding to marketing and CEO salaries, and leaving students with large, nondischargeable student loan debt. For-profit colleges cannot escape blame given that they have little financial incentive to ensure student success or improve graduation rates. These for-profit colleges must be held accountable for their actions, not only for the benefit of actual or prospective students, but also for the greater good of higher education in our country.

Consider Bobby Ruffin Jr. and how his situation would have turned out differently had such recommended reforms been adopted. Ashford University would not have recruited Ruffin as heavily had Iowa adopted stricter state-specific legislation to prevent the predatory practices of for-profit colleges, such as through proscribing funding from flowing into the college, thereby reducing the amount of funding available for recruiting-specific purposes. Ruffin could have sought relief through supporting a *qui tam* action against Ashford University under the FCA for misleading him into registering for courses. Lastly, in the unfortunate circumstance that Ruffin were to declare bankruptcy, Ruffin could discharge his student debt and get back on his feet to continue his pursuit of becoming a doctor. Arguably, Ruffin's life would have drastically improved had the aforementioned reforms been implemented.

Regardless of the route taken, the United States must crack down on the predatory practices of for-profit colleges because doing so will halt the harm that for-profit colleges have caused and continue to cause in the lives of students and taxpayers alike. The future of America's system of higher education is at risk—as a nation, we must take action.