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

Aaron N. Taylor
Saint Louis University School of Law

Follow this and additional works at: https://scholarship.law.slu.edu/faculty

Part of the Education Law Commons

Recommended Citation

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.
“Your Results May Vary”: Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations

Aaron N. Taylor

Reprinted from Administrative Law Review Volume 62, Number 3, Summer 2010

Cite as 62 ADMIN. L. REV. 729 (2010).
"YOUR RESULTS MAY VARY": PROTECTING STUDENTS AND TAXPAYERS THROUGH TIGHTER REGULATION OF PROPRIETARY SCHOOL REPRESENTATIONS

AARON N. TAYLOR*

TABLE OF CONTENTS

Introduction ............................................................................................. 730

I. Higher Education Misrepresentations and Fraud ..................................... 733
   A. Inflated Placement and Completion Rates ........................................ 735
   B. Inappropriate Compensation Arrangements .................................... 736
   C. Entrance Test Impropricities ......................................................... 739
   D. Cohort Default Rate Manipulation ............................................... 740

II. The Comoditization of Higher Education .............................................. 742
   A. Knowledge-Based Economy ......................................................... 744
   B. New Technologies ........................................................................ 745
   C. Globalization ............................................................................... 746
   D. Neoliberal Financial Aid Policies ................................................. 747
   E. Changing Student Populations ...................................................... 748
   F. Rising Tuition ............................................................................... 749
   G. Demands for Accountability ......................................................... 750
   H. New Higher Education Providers ................................................. 751

III. The Rise of Proprietary Colleges ........................................................ 752
   A. Title IV Expansion ....................................................................... 753

* Assistant Dean for Admissions and Scholarships and Adjunct Professor of Education Law, University of Arkansas at Little Rock William H. Bowen School of Law, B.A., North Carolina A&T State University; J.D., Howard University School of Law; Ed.D., Vanderbilt University. The Author wants to thank Lisa S. Taylor and Theresa M. Beiner for their helpful feedback and guidance. He thanks Laurenia Byrd and Elizabeth Davis for their research assistance.
B. Students ........................................................... 753
C. Outcomes .......................................................... 754
D. Industry ............................................................. 756
E. Profitability .......................................................... 757
F. Operational Efficiencies ........................................... 758
G. Emphasis on Recruitment .......................................... 759

IV. The Need for Tighter Regulation of Higher Education
   Recruitment and Marketing .................................. 760
   A. The Susceptibilities of the Market ......................... 761
   B. The Costs of Failure ............................................. 761

V. Inadequate Safeguards .................................................. 763
   A. Tort Law .......................................................... 764
   B. Contract Law ...................................................... 766
   C. Consumer Protection ............................................ 767
   D. The “Triad” ......................................................... 768

VI. Regulating Higher Education Representations ................. 769
   A. Proposals .......................................................... 770
   B. Relevant Oversight Agencies .............................. 770
      1. The Department of Education .......................... 770
      2. The Federal Trade Commission .......................... 771
      3. State Regulatory Agencies ................................ 771
      4. Accrediting Agencies ....................................... 772
      5. Self-Regulatory Bodies ..................................... 773
   C. Discussion ......................................................... 773
      1. Requiring Disclaimers ....................................... 775
      2. Expanding FTC Proprietary School Guides ............. 778
      3. Encouraging Self-Regulation ............................. 779
      4. Requiring Affirmative Disclosures ....................... 780
      5. Expanding Disclosures ..................................... 781

Conclusion ............................................................ 782

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 The Jerry Springer Show and Maury Povich) before deciding to enroll at Monroe College—a career-focused proprietary (for-
profit) college with campuses in New York and the Caribbean. 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. But after graduating without a job in April 2009, 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. Shortly thereafter, she filed a lawsuit against Monroe alleging inadequate career-placement assistance and seeking a tuition reimbursement of $70,000.

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. 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.

Individuals who are induced to enroll in an institution based on misrepresentations are allowed little recourse to recoup damages they may incur. The courts have been very reluctant to recognize certain causes of action against higher education institutions. And regulatory safeguards are

3. See id. (noting that Trina is suing because Monroe has not helped her to secure a job).
5. See id. (noting that Trina seeks $2,000 for stress induced by her failed job search).
7. Patrick F. Linehan, Dreams Deflated: 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. See id. at 764-65 (describing how the academic abstention doctrine raises "a significant obstacle" to students seeking to recover against proprietary schools under tort
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 to induce enrollment should be subject to heightened disclosure requirements. Akin to the "triad" that monitors institutions' Title IV financial aid eligibility, 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, thus rendering the idea of escaping poverty in a matter of months very appealing. They also tend to be poorly educated, coming from families with little, if any, higher education experience. Lastly, they tend to be older and further removed from their last educational experience than traditional students, and they are more likely to have experienced past educational difficulty. These characteristics make these individuals particularly susceptible to deceptive marketing and unfounded promises.

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.").


11. See id. at 6 (providing a quote from an admissions counselor stating that her former employer enrolled students who were ill-prepared to complete the program).

12. See id. at 46 (statement of Nick Glakas, President, Career College Association) ("Seventy percent of proprietary school students are the first in their families to attend college...")).

13. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 7 (2009), available at http://www.gao.gov/new.items/d09600.pdf [hereinafter GAO, STRONGER OVERSIGHT] ("Over 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. See Linehan, supra note 7, at 756 ("Most [proprietary school] enrollees...have previously experienced educational failure.").

15. See Anti-Fraud Hearings, supra note 10, at 22 (statement of Rep. Maxine Waters) (arguing that victims of proprietary schools' misrepresentations "are less likely to complain,"...).
Similarly, these characteristics put these individuals at higher risks of dropping out before program completion and eventually defaulting on student loans. The costs of higher education failure are high; therefore, the costs of higher education misrepresentations are high. Unfortunately, taxpayers, in addition to the victims, are saddled with these costs. 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 the case for better oversight, 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 representations in a manner that protects the public from misrepresentations without unduly restricting competition and protected speech.

I. HIGHER EDUCATION MISREPRESENTATIONS AND FRAUD

When 60 Minutes visited campuses of the Katharine Gibbs School and Brooks College to investigate proprietary school business practices, the

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, at 19-20.
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.”).
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, providing insider views into the high pressure world of proprietary school recruiting and the debilitating effects of unscrupulous recruitment tactics. These tactics have drawn the ire of former students, policymakers, governmental regulators, and consumer watchdogs, and have formed the basis of lawsuits, investigations, and congressional hearings. Proprietary schools, for all of their virtues, have a checkered collective past. 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.

20. Rebecca Leung, For-Profit College: Costly Lesson, 60 MINUTES, Jan. 30, 2005, http://www.cbsnews.com/stories/2005/01/31/60minutes/main620479.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. See 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).


23. See LISA K. FOSTER, CAL. STATE LIBRARY, CRB 04-010, FOR-PROFIT POSTSECONDARY EDUCATIONAL INSTITUTIONS: OVERVIEW OF ACCREDITATION AND STATE AND FEDERAL OVERSIGHT 14 (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. See 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 [of Education]'s student loan fraud and abuse investigations.").

25. See Catherine Elton, Degrees of Difficulty: The Truth About Online Universities, CONSUMERS DIG., Mar./Apr. 2009, at 20-21 (describing "a disturbing pattern" of aggressive recruiting tactics by for-profit schools that ensnare unqualified students who ultimately fall out or qualified students who receive little benefit from the noncompetitive learning environment).
A. Inflated Placement and Completion Rates

Proprietary school misrepresentations and other improprieties cost individual students and taxpayers. Misrepresentations typically pertain to job placement rates, a benchmark upon which proprietary schools market themselves. 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. A prerequisite to placement, completion rates are often misrepresented or not disclosed as required. 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%; however, Department of Education (DOE) data put the rate at 29%. 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.”

Proprietary schools have

26. See 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 “[t]he ultimate outcome measure”).

27. See Anti-Fraud Hearings, supra note 10, at 15 (statement of Rep. 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% 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); U.S. GEN. ACCOUNTING OFFICE, GAO/T-HEHS-96-158, HIGHER EDUCATION: ENSURING QUALITY EDUCATION FROM PROPRIETARY INSTITUTIONS 11–12 (1996), [hereinafter GAO, ENSURING QUALITY] (statement of Cornelia M. Blanchette, available at http://www.gao.gov/archive/1996/he96158.pdf) (discussing the financial ramifications of students incurring debt in order to train for jobs for which little demand exists). But if GAO, OVERSUPPLIED OCCUPATIONS, supra note 22, at 11 (discussing benefits conferred upon students who trained in oversupplied fields).

29. See, e.g., Leung, supra note 20 (reporting that representatives from the Katharine Gibbs School in New York lied about the school’s graduation rate).


also been accused of misrepresenting the transferability of credits, programmatic content, and accreditation status. In addition, shareholders of publicly-traded schools have filed lawsuits alleging misrepresentations and omissions in annual reports and other required disclosures.

B. Inappropriate Compensation Arrangements

Impropricities also involve the fraudulent obtaining of Title IV financial aid funds. 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 schools from compensating recruiters based solely on the number of students they induce to enroll. This ban on "incentive compensation" is intended to protect students by lessening the pressure on recruiters to induce enrollment at all costs.

The National...
Association for College Admission Counseling (NACAC) argues that "reducing the basis for compensation to the number of students enrolled in any circumstance introduces an incentive for recruiters to actively ignore the student interest in the transition to postsecondary education." In spite of this ban, accusations against proprietary school compensation structures abound. In a 2003 audit, the DOE found that the University of Phoenix (UOP) had violated the ban. The audit described a system under which recruiter compensation was tied to "asses in classes" and a culture where a recruiter's enrollment numbers could mean the difference between lucrative employment and unemployment. 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 enroll. Recruiters also pressured students to take out loans to pay tuition, and recruiters were encouraged to cease providing information as a means to the transition to postsecondary education.


40. See, e.g., LOOIN & DEVANTHÉRY, supra note 29, at 1 (summarizing these accusations).

41. University of Phoenix (UOP) is "the nation's largest private university, offering undergraduate and graduate degree programs at more than 200 locations, as well as online in most countries around the world." University of Phoenix, History, http://www.phoenix.edu/about_us/about_university_of_phoenix/history.html (last visited Aug. 3, 2010).


43. The audit also referenced "bias in seats." Id. at 10.

44. See, e.g., id. at 7–8 (listing a salary schedule showing that UOP recruiters could make upwards of $120,000 per year and discussing how the potential for high salaries often prompted employees in other departments to seek recruiter positions).

45. Id. at 12 (quoting a UOP enrollment director saying in a recruiter meeting: "My job is on the line. And 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 the job. And... I don't mean applications in. I mean starts.").

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 25; see also Ani-Fraid
support to these students once their enrollment was credited for salary purposes. UOP ended up paying $9.8 million to settle the investigation but admitted no wrongdoing.

The issue of incentive compensation has spawned a spate of lawsuits filed pursuant to the federal False Claims Act (FCA). The qui tam provisions of the Act permit private citizens to bring lawsuits alleging fraud against the government on behalf of the government. If the plaintiffs, referred to as relators, are successful in winning damages on behalf of the government, they share in the recovery. The law is intended to incentivize whistleblowing by individuals with first-hand knowledge of fraud against the government. Proprietary schools are particularly susceptible to FCA

Hearing, supra note 10, at 41 (statement of Paula L. Dorse, former Director of Admissions, Bryn Mawr College) (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. See UOP PROGRAM REVIEW REPORT, supra note 42, at 24 (illustrating how, to be considered enrolled for purposes of calculating 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. See Apollo Group, Inc., The February 2004 Program Review Report Relating to the University of Phoenix was Fundamentally Flawed, http://www.apollolegal.com/prcCritique.html (last visited July 31, 2010) ([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."


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." Vi. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000).

52. 31 U.S.C. § 3730(b)(1) (2000) ("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. § 3729(a)(7). Plaintiffs can recover between 25% and 30% of the latter assessment. Id. § 3730(d)(2).

54. See, e.g., Constitutionality of the Qui Tam Provisions of the False Claims Act, 109 Op. Att'y Gen. 4–6 (1989) (stating that the 1986 Amendments to the FCA were the result of Congress being "dissatisfied with the way the Executive branch was enforcing government procurement laws" and therefore desiring to "deputize" private citizens to ensure effective
lawsuits, plaintiffs have filed many lawsuits alleging fraud in the 
obtainment of Title IV funds, primarily arising from recruiter 
compensation arrangements. FCA actions of this type have proved 
fruitful. In 2007, Oakland City University paid $5.3 million to settle such a 
lawsuit. In late 2009, UOP settled an FCA suit for almost $80 million. In both cases, the whistle-blowers received millions of dollars for their 
efforts.

C. Entrance Test Impropieties

Proprietary schools have also faced accusations of improperities relating 
to the enrollment of ineligible students for financial aid purposes. Entrance 
test improperities and the falsification of attendance records commonly 
form the bases of these accusations. For federal financial aid purposes, 
students not possessing a high school diploma or General Equivalency 
Diploma (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." An investigation 
by the Government Accountability Office (GAO) documented test 
admirators giving out answers and changing answers to ensure passing 
scores. 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. Additionally,

55. See Sara Hebel, Supreme Court Blocks Suits Against Public Colleges Under U.S. Whistle-
individuals are barred from suing public, but not private, colleges).

56. See generally Hanch & Arnold, supra note 50, at B16 (providing an overview of FCA 
lawsuits brought against educational institutions).

57. Elizabeth Quill, University Will Pay $5.3-Million to Settle Whistle-Blower's Lawsuit, 

r.net/phoenix.zhtml?c=79624&p=irol-newsArticle&ID=1365655 ("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 seven out of fifty. Upon retaking the test, the admissions 
recruiter said she got fourteen out of fifty answers correct, which was sufficient for 
enrollment. Leung, supra note 20.
recruiters alleged that schools forced them to enroll students even without required exam scores. A federal raid in 2004 of the headquarters of ITT Educational Services (ITT) and ten of its campuses is believed to have been related to allegations that the proprietary educational provider was overstating student enrollment in order to increase its federal financial aid revenue. The investigation found no wrongdoing among executives within the company; however, investigations of individual campuses remained open.

D. Cohort Default Rate Manipulation

Cohort default rates provide schools with incentives to minimize defaults...
among their student-borrowers and protect taxpayers from the costs of excessive defaults. Schools with default rates that exceed certain thresholds can have their federal financial aid eligibility stripped. Historically, proprietary schools have recorded higher default rates than nonprofit institutions, and numerous proprietary schools have been closed due to unacceptably high rates. Given the extent to which proprietary schools rely on Title IV aid, losing eligibility is akin to an institutional death sentence.

In an effort to reduce cohort default rates, some proprietary schools unilaterally pay off loans obtained by students who later withdraw. 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; therefore, schools settle the loans for these students as a means of protecting their Title IV eligibility from likely defaults. The schools then engage in aggressive efforts to collect the debt from students, offering less favorable repayment terms than those available through Title IV. As a result, former students have brought lawsuits alleging contract-based causes of action.

---


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

70. GAO, STRONGER OVERSIGHT, supra note 13, at 13, 15-17.

71. See, e.g., Lynch, supra note 7, at 760 (noting that the closures have resulted from "fraudulent misrepresentations and deceptive marketing").


74. See, e.g., GAO, STRONGER OVERSIGHT, supra note 13, at 20 (providing an overview of six different research studies that showcase trends in students' default rates).

75. Lederman, supra note 73.

76. Id.

77. See NACAC TESTIMONY, supra note 39, at 16 (summarizing a lawsuit against UOP filed by former students whose loans were paid by UOP without their permission).
The DOE has expressed disapproval of this behavior. In 2008, an inspector for the DOE 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. School officials stated that this “default prevention policy” was implemented due to past problems with the school’s default rate. 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.

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 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.

II. THE COMMODITIZATION OF HIGHER EDUCATION

The United States has the most market-oriented system of higher education in the world. Compared to its European counterparts, the American system has developed with little direct influence from the federal government. This freedom has spawned a vast, entrepreneurial expansion of higher education within the United States. Through much of the country’s history, new colleges were established “without restraint,” and the result has been a proliferation and democratization of higher education.

79. Id. at 4.
80. Id.
84. Id. at 117.
education that stand in contrast to the elitist systems in Europe and other parts of the world. 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. However, various economic and social trends have led to a diminishment of higher education’s protected market standing, and as a result, a capitalistic academic system has come to the fore.

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. The primary competitors are institutions, which are embodied by the actors who operate therein: faculty, students, and administrators. Networks are central to viability within the academic capitalist system. As such, institutional actors seek to link institutions (and themselves) to the modern, knowledge-based economy. 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. Fundamentally, the goal

---

85. See id. at 108 (arguing that republican ideals in the young nation’s history contributed to liberalization of higher education in the United States).
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. See DAVID L. KIRKP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 2 (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.”).
89. Id.
90. See id. at 24 (providing examples of organizations and networks that act as intermediaries between the public and private sectors).
91. Id. at 1.
92. Id.
of institutions competing in this environment is to generate income, particularly from "alternative revenue streams," with the assumption that robust, diversified funding will lead to greater prestige, better students, and increased viability.

A. Knowledge-Based Economy

In a knowledge-based economy, knowledge is a commodity that when exploited can reap tangible benefits upon the possessor. Higher education institutions are central to the knowledge-based economy because they are considered "a major source of alienable knowledge." 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. 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. 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.

The relatively new emphasis on knowledge as a tool of economic vitality has created a market for education and has changed the motivations and

93. See id. at 11 (defining academic capitalism as "the pursuit of market and marketlike [sic] activities [by colleges and universities] to generate external revenues").
94. See JAMES C. HEARN, ASL. COUNCIL ON EDUC. DIVERSIFYING CAMPS REVENUE STREAMS: OPPORTUNITIES AND RISKS 1 (2003) (identifying "alternative revenue streams" as those from sources other than state appropriations or tuition and fees).
95. Cf. id. at 5 (stating that institutions are being forced "to seek additional revenue sources" to meet the demands of "increased expectations" and the threats of "new providers and technologies").
96. See SLAUGHTER & RHODES, supra note 88, at 15 ("[K]nowledge is a raw material to be converted to products, processes, or service.").
97. Id.
99. See PATRICK M. CALLAN ET AL., THE NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., GOOD POLICY, GOOD PRACTICE: IMPROVING OUTCOMES AND PRODUCTIVITY IN HIGHER EDUCATION: A GUIDE FOR POLICYMAKERS 1 (2007), http://www.highereducation.org/reports/Policy_Practice/index.html (asserting that opportunities for higher education are not "as widespread as they need to be to place Americans in good jobs, fuel economic growth, promote social mobility and social justice, and sustain the country's democratic ideals").
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, 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 seeking 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

101. See, e.g., SLAUGHTER & RHODES, supra note 88, at 12 ("[R]aising 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 1-2 (discussing how students “increasingly choose majors linked to the new economy, such as business, communications, [and] media arts”).
103. See, e.g., id. at 42-43 ("By the 1980s and 1990s, higher education was constructed less as a necessary public or social good and more as an individual or private good, justifying ‘just pays’ policies.") (citation omitted).
104. THOMAS J. KANE, THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE 1 (1999) (noting that the difference in earnings between a high school graduate and a college graduate increased from 19% in 1980 to 52% in 1995). But see MICHAEL S. MCAFARNAX & MORTON OWEN SCHAPIRO, THE STUDENT AD GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION 49 (1996) (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 a college education).
107. See OECD POLICY ANALYSIS, supra note 98, at 18 (describing the impact of new digital technologies on higher education).
institutions for both students and faculty members. Technology has also led to greater institutional operating efficiencies, a trend that has allowed some institutions to better harness the academic capitalist system to their advantage.

C. Globalization

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


109. See e.g., Carol A. Tyrer, THE NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., COURSE REDESIGN IMPROVES LEARNING AND REDUCES COST 1 (2005), available at 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 37% for the participants).


112. See id. ("Globalization affects each country in a different way due to each nation's individual history, traditions, cultures, resources[,] and priorities.") (quotation omitted).

113. See OECD POLICY ANALYSIS, supra note 98, at 103 ("There is growing interest in ways to build cumulative knowledge across the profession... ").


115. See id. at 11 ("In 2006, there were 2.7 million students studying abroad... [P]rojections indicate that the demand...will increase to 7.2 million by 2025.").

Unsurprisingly, the principle motivation behind higher education globalization is economic. Individuals possessing foreign credentials can broaden employment prospects and demand higher salaries. Governments can exploit the globalized knowledge of their workforce in dealings with foreign counterparts. In response, the World Trade Organization formally commoditized education under the General Agreement on Trade in Services (GATS) in 1995. Under GATS, education trade encompasses cross-border supply and consumption, as well as the presence of commercial providers in foreign countries.

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.

D. Neoliberal Financial Aid Policies

Neoliberalism is premised on encouraging productivity through the empowerment of individuals as economic actors. Salient characteristics of neoliberal policies are “privatization, commercialization, deregulation, and reregulation.” 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 students with 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 [sic] 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

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 nontraditional adult learners are seeking higher education in increasing numbers.132 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 49% between 1994 and 2004.134 Adult learners now comprise more than half of the college student

126. See, e.g., Trow, supra note B2, at 59 (inserting that the 1972 education amendments “established higher education as a national priority in its own right”).
127. See id. at 60 (explaining that student aid had previously been awarded directly to institutions in the form of block grants).
128. Peterson & DeI, supra note 106, at 5-6.
129. Id. at 6.
130. SLAUGHTER & RHOADES, supra note B3, at 35.
131. See 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).
132. See COUNCIL FOR ADULT EXPERIENTIAL LEARNING, SERVING ADULT LEARNERS IN HIGHER EDUCATION: FINDINGS FROM CAEL'S BENCHMARKING STUDY 1 (1999), http://www.cael.org/pdf/publication_pdf/CAEL%20Benchmarking%20Findings%20Executive%20Summary.pdf (defining the adult learner as 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: ACCESS, PERSISTENCE, AND SUCCESS 44, 44-46, 56 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007) (noting the substantial rise in college enrollment, especially in community colleges, and the fact that 80% of postsecondary students “attend postsecondary institutions that either accept all qualified applicants or are open enrollment”).
134. BRYAN J. COOK & DIANA I. CÓRDOVA, AM. COUNCIL ON EDUC., MINORITIES IN HIGHER EDUCATION: TWENTY-SECOND ANNUAL STATUS REPORT 3 (Supp. 2007),
population. Their primary motivation for undertaking higher education is job skills training and professional development. With these new consumers have come new needs and demands that vary from those of the “typical college student” of the past. And institutions seeking to exploit these new markets have been forced to adjust accordingly. Put simply, the academic capitalist system is prompting these institutions to respond to consumer demands.

F. Rising Tuition

State appropriations to higher education (as percentage of overall budgets) have declined steadily over the past three decades. As a result, institutions have had to generate more “market income” principally in the form of tuition. Between 1976 and 2005, the average cost of a public four-year institution increased 270%. Compounding the effects of rising tuition has been a decline in federal funding of need-based student aid, particularly Pell Grants. Twenty years ago, the maximum Pell Grant covered 60% of tuition at a typical public four-year institution; in 2006, that purchasing power had declined to 33%. The discretionary nature of government funding means that increasing tuition has led in turn to higher expectations from parents and students on the quality of education received.

http://www.acenet.edu/AM/Template.cfm?Section=CAREE&Template=/CM/ContentDisplay.cfm&ContentID=25716.


136. See, e.g., Peterson & Dill, supra note 108, at 18-19 (discussing how the rising popularity of non-degree and continuing education programs among adult learners has forced institutions to reassess their programmatic offerings).

137. See, e.g., SLAUGHTER & RHoades, supra note 88, at 13 (noting that this trend occurred during the 1970s, 80s, and 90s).

138. ANGEL, supra note 105, at 4 ("Market income has increasingly substituted for public appropriations in higher education ... ").

139. See, e.g., SLAUGHTER & RHoades, supra note 88, at 12 (explaining that increasing tuition has led in turn to higher expectations from parents and students on the quality of education received).

140. See, e.g., BRIDGET TERRY LONG & Erin Riley, FINANCIAL AID: A BROKEN BRIDGE TO COLLEGE ACCESS, 77 Harv. Educ. Rev. 39, 40 (2007) (noting that median family income only increased by 23% during the same period).

141. See, e.g., id. at 45 (noting that the maximum Pell Grant has decreased by 20% from 1975-1976 to 2005-2006 after accounting for inflation).

higher education funding has made it an easy target for cuts, as entitled expenses such as health care increasingly strain state and federal budgets.\textsuperscript{143}

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\% to 50\%.\textsuperscript{146} Between 1993 and 2004, cumulative debt levels for college students at public and private institutions rose 76\% and 57\% respectively.\textsuperscript{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.\textsuperscript{148}

G. Demands for Accountability

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.\textsuperscript{149} In other words, institutions have had to provide evidence of successful outcomes, particularly as they relate to student learning.\textsuperscript{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.\textsuperscript{151} Private sector watchwords like “performance,” “investment,” and “efficiency” have become part of the higher education lexicon.\textsuperscript{152} Accountability models first...
tested (and often discredited) in the private sector have found homes in higher education institutions.\textsuperscript{133}

Demands for accountability have manifested in various ways that reflect the capitalistic nature of education. Most prominently, states and accrediting agencies have required institutions to develop performance indicators and methods for assessing them. Many states have also tied institutional funding to performance.\textsuperscript{131} While performance indicators take many forms, they are most often expressed numerically,\textsuperscript{133} 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 graduates), and operational (e.g., unit costs, class sizes, and course options).\textsuperscript{136} 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.

\textbf{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 cased these

\textsuperscript{133} See Gary Rhoades & Barbara Sporn, Quality Assurance in Europe and the U.S.: Professional and Political Economic Framing of Higher Education Policy, 43 HIGHER EDUC. 355, 366 (2002) (explaining how accountability models "arrive at higher education's doorstep" after initial trials in business that lead to these models' being "discarded") (quotation omitted).

\textsuperscript{134} See Doved, supra note 151, at 109-10 (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).

\textsuperscript{135} Robert Ball & Rob Wilkinson, The Use and Abuse of Performance Indicators in UK Higher Education, 27 HIGHER EDUC. 417, 418 (1994) (defining performance indicators as "[a]numerical values which provide a measurement for assessing the quantitative performance of a system").

\textsuperscript{136} Ball & Halwachi, supra note 149, at 401; see also Rob Barnett & Marc Cutright, Performance Indicators as Conceptual Technologies, 40 HIGHER EDUC. 277, 278-79 (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).
providers' entry 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, 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 nonprofit institutions did not. They have also adapted through an evolution of their own. The 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.

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 purposes of these early institutions evolved from teaching basic literacy to career training. 161 These

157. See Foster, supra note 23, at 8 (referring to these schools as "super systems").
158. See, e.g., ANCTR, supra note 105, at 22.
159. The student enrollments of the five largest proprietary schools are as follows: Apollo Group (Parent Company of UOP), 490,700; Education Management Corporation, 112,700; Kaplan Higher Education, 103,300; Career Education Corporation, 93,100; and DeVry, 90,300. Erica R. Hendry, For-Profit Colleges See Large Increases in Enrollment and Revenue, CHRON. HIGHER EDUC., Aug. 23, 2009, http://chronicle.com/article/For-Profit-Colleges­See­Lar/48173/.
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").
institutions embodied the entrepreneurial spirit that would come to symbolize the founding of the United States and the spread of higher education. These institutions also embraced the ideal of educational access, an ethos that would hasten their reemergence in the early 1970s.

A. Title IV Expansion

The 1970s brought vast expansion of the proprietary school market. The 1972 Amendments to the Higher Education Act sought to broaden higher-education access by making proprietary institutions eligible to collect Title IV aid. Anxious to tap into Title IV, proprietary schools aggressively recruited students by touting programs that purported to provide job training; however, much of the promised training never materialized. The lack of effective oversight provided an environment in which sham schools and diploma mills operated with virtual impunity. As a result, student defaults on Title IV loans increased sharply. The 1990s brought closer scrutiny on the proprietary school sector, and between 1992 and 1997, almost 800 schools were shut down or stripped of their Title IV eligibility—which effectively shut down schools not closed outright. 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 currently underserved by traditional institutions. They tend to enroll the “other 75 percent”—students “who

---

162. Id.
163. Id. at 57 (discussing how proprietary schools were among the first institutions to educate former slaves and Native Americans).
165. See e.g., GAO, OVERSUPPLIED OCCUPATIONS, supra note 22, at 7.
166. See, e.g., Foster, supra note 25, 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 Rep. John Boehner, Chairman, H. Comm. on Educ. and the Workforce) (“Proprietary schools . . . are playing a critical role in providing college access for some of our Nation’s most vulnerable students."

---

This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
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.

Proprietary school students tend to be poorer and older than students at traditional schools. They are also more likely to be first in their families to go to college, be female, and to belong to a racial or ethnic minority group. Many proprietary schools award a disproportionately high percentage of degrees through the doctoral level to black and Hispanic students, and their graduates typically complete degree requirements faster than graduates of traditional schools. 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. 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. Less than 25% of proprietary school students graduate within six years of beginning their studies, compared to 55% and 64% at public and private nonprofit institutions respectively. Regrettably, this statistic is probably inflated, given that it is based on self-reported data, and proprietary schools have many incentives to overstate graduation rates. Placement rates also demonstrate inadequacies within the sector. Schools with the lowest completion rates tend to have the lowest placement rates. 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 nonprofit schools at the two-, three-, and four-year intervals. And once again, the validity of these numbers is questionable, as the method of calculation allows schools to understate their actual number of defaults.

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. This association arises because poorer students persist towards college degrees at lower rates than wealthier students. 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. And because proprietary schools enroll higher percentages of poor students, it makes sense that their completion and placement rates

180. GAO, POORER OUTCOMES, supra note 164, at 5.
181. KNAPE ET AL., supra note 6, at 12.
182. LOONIN & DEVANTHRY, supra note 29, at 38 ("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. See GAO, POORER OUTCOMES, supra note 164, at 9.
184. See GAO, STRONGER OVERSIGHT, supra note 13, at 14–15 (listing proprietary school default rates that are as much as 250% higher than the next highest rate—that of public schools).
185. See id. at 13–14 ("The rate captures only a small portion of all student loan defaults at schools."").
186. See GAO, POORER OUTCOMES, supra note 164, at 24–25 (demonstrating that increased reliance by schools on Title IV revenue leads to lower completion and graduation rates, and higher default rates).
187. See Long & Riley, supra note 142, at 40 (explaining that only 43% of students from families making less than $30,000 per year "immediately entered a post-secondary institution" compared to 75% of students whose families make more than $50,000).
188. See, e.g., id. at 38 (concluding that the Pell Grant will provide more access to higher education for low-income students).
are lower and their default rates higher.\textsuperscript{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.\textsuperscript{190} In other words, they exploit their role as access providers—for profit. As discussed earlier, former admissions 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 like these have created a perception that proprietary schools care less about their students and more about their students’ Title IV eligibility.\textsuperscript{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 enrolled more than 820,000 students in 2009.\textsuperscript{192} All told, there are 2,900 Title IV-eligible proprietary schools providing both degree programs and vocational training.\textsuperscript{193} The predominant niche of proprietary education remains career-focused education.\textsuperscript{194} They have harnessed new technologies in delivering

\textsuperscript{189} See GAO, POORER OUTCOMES, supra note 164, at 20 (“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.”).

\textsuperscript{190} See KIRKP, supra note 87, at 230 (“We accept students who, on paper, aren’t likely to make it . . .”) (quotations omitted).

\textsuperscript{191} See Anti-Fraud Hearings, supra note 10, at 22 (statement of Rep. 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.”).

\textsuperscript{192} See Hendry, supra note 139.


\textsuperscript{194} See 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 generally GAO, OVERSUPPLIED OCCUPATIONS, supra note 22, at 4-5 (discussing the amount of federal financial aid used by students training for low-demand fields).

\textsuperscript{195} See KIRKP, supra note 87, at 242 (listing the MBA program as an example of a predominant niche of proprietary education).
education programming, both online and in the classroom. Their programs are flexible and accelerated, thus appealing to older students who tend to be place-bound and limited in how much time they can spend attending classes. Given their adaptive skills, it should be no surprise that while traditional schools are dealing with enrollment and budgetary shortfalls, proprietary schools are experiencing vastly increased enrollment and revenue.

E. Profitability

Many proprietary schools are highly profitable. In 2006, Apollo Group and ITT boasted returns on investment capital of 69% and 40% respectively, beating out companies such as Exxon Mobil and Microsoft. Since 1995, Apollo’s stock price has risen an unfathomable 7,000%, and ITT’s stock price has risen more than 3,500%. The stock prices for other publicly traded education providers have experienced precipitous

196. See Anti-Fraud Hearings, supra note 10, at 46 (statement of Nick Giakas, President, Career College Association) (“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. See id. (“Students choose to attend for-profit colleges because these 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 associates degree eleven months sooner than students at community colleges.”).

198. See Hendry, supra note 139 (“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.”).


increases as well.\textsuperscript{201} A major component of proprietary schools' profitability is operational efficiency.\textsuperscript{202}

\section*{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."\textsuperscript{203} They minimize inefficiencies in academic planning and teaching by designing curricula centrally\textsuperscript{204} and relying principally on untenured faculty to render instruction.\textsuperscript{205} Some proprietary schools even base instructor pay on the number of students in the instructor's class.\textsuperscript{206} They use technology to minimize inefficiencies in administrative operations, such as in admissions.\textsuperscript{207} Some proprietary schools promote efficiency by calculating optimal facilities usage ratios.\textsuperscript{208} These calculations help institutions determine the size of their facilities and the types of leasing agreements.

\begin{itemize}

\item \textsuperscript{202} RUCH, infra note 110, at 76 (citing "Scale Economics and Operating Efficiencies" as one of seven "Ingredients for Profitability" for proprietary schools).

\item \textsuperscript{203} Id. at 88.

\item \textsuperscript{204} See id. at 118–19 (stating that although the faculty "are the center of academic life," the president is expected to maintain managerial control over decision making).

\item \textsuperscript{205} See id. at 119 (noting the apparent "lack of a tenure system at for-profit universities").


\item \textsuperscript{208} Facility costs are the second largest expense incurred by proprietary schools, behind salaries. Blumenshtyk, supra note 206.
\end{itemize}
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 nonprofit schools.211 Most nonprofits 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 is greater than full-time faculty.214 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

209. This approach to managing space differs somewhat from that of most nonprofit schools, as these schools are often incentivized to own their facilities and expand such holdings. Id.
210. See RUCH, supra note 110, at 88 (discussing how proprietary schools track class enrollments closely and make adjustments accordingly).
211. See, e.g., KIRK, supra note 67, at 242 (“Increasing enrollment has to be the paramount concern for any for-profit university, especially one whose stock is publicly traded.”).
212. See id. at 242, 247 (claiming that for-profit universities, such as DeVry, have higher tuition and must use aggressive marketing and recruiting to bring in prospective students).
213. See id. at 247 (explaining that for schools with multiple campuses, these individuals are often responsible for recruiting on behalf of all schools within a particular region).
215. Id.
216. Id. (“The amount spent on advertising, lead creation, recruiting, and admissions representatives far exceeds the salaries paid to faculty.”).
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.

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. 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. 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 on a television commercial for a company that markets online programs for proprietary schools. 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.”

---

217. See Kirp, supra note 87, at 242 (admitting that because recruiters are expected to meet enrollment quotas, that they sometimes oversell the school and “skirt[] the border of misrepresentation”).
218. See e.g., id. at 245.
219. See Linehan, supra note 7, at 757-58 (“Students generally view proprietary schools as the gatekeepers to their trade of choice . . . .”).
221. Id.
222. Id.
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. Individuals who fit this profile are highly susceptible to being persuaded by misrepresentations due to their lack of insight about higher education. Unlike typical students at traditional colleges and universities, most proprietary school students are first-generation college students. 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. They are least likely to complain about unfair conduct to which they have been subjected and even for those who do complain, current safeguards are inadequate in providing effective remedies. 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. 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. 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. The average amount of these loans is $5,800 for proprietary

---

223. See e.g., Linehan, supra note 7, at 757 (explaining the types of advertising that proprietary schools use when focusing on certain demographics).
224. See e.g., id. at 757-58.
225. Anti-Fraud Hearings, supra note 10, at 48 (statement of Nick Glakas, President, Career College Association).
226. See e.g., GAO, STRONGER OVERSIGHT, supra note 13, at 28.
227. See e.g., FOSTER, supra note 23, at 24.
228. See Linehan, supra note 7, at 754 (alleging that the current legal doctrine fails to protect students from the schools’ predatory practices).
229. Knap et al., supra note 193, at 6.
230. Id.
231. See Christina Chang Wei et al., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T
school students; once again, the highest in higher education.\textsuperscript{232} It is no
wonder that while proprietary school undergraduates only account for 8% of
students in higher education, they account for 18\% of the loan volume.\textsuperscript{233}

The downside of these high borrowing rates is manifested mainly in the
high default rates among former proprietary school students. Proprietary
schools account for a disproportionate share of student loan defaults.\textsuperscript{234} In
2006, the sector's two-year cohort default rate was 8.6\%, the highest in
higher education.\textsuperscript{235} 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.\textsuperscript{236} 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.\textsuperscript{237} They could also face income
garnishments and restricted employment options.\textsuperscript{238} And to the
disappointment of many, it is very difficult to discharge federal student
loans in bankruptcy.\textsuperscript{239} 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.\textsuperscript{240}

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item \textsuperscript{232} Id. at 20 (listing average loan amounts for public two-year, public four-year, and private institutions in 2003–04 as $3,400, $4,900, and $5,100 respectively).
\item \textsuperscript{233} Id. at 21.
\item \textsuperscript{234} GAO, POORER OUTCOMES, supra note 164, at 5.
\item \textsuperscript{235} GAO, STRONGER OVERSIGHT, supra note 13, at 13 (stating that the public and
private nonprofit sectors had rates of 4.7\% and 3\% respectively).
\item \textsuperscript{236} See id. at 15 (providing a four-year default rate of 23.3\% for proprietary school
borrowers and 9.5\% and 6.5\% for public and private school borrowers, respectively).
\item \textsuperscript{237} Id., id. at 12.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} See, e.g., U.S. Dep't of Educ., Federal Student Aid, Common Disputes Involving
Defaulted Student Loans, http://www.ed.gov/offices/OSFAP/DCS/disputes.html#
Bankruptcy (last visited Aug. 4, 2010) (“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.”).
\item \textsuperscript{240} See Oversight Hearing on the Department of Education: Hearing Before the Subcommittee
on Human Resources and Intergovernmental Relations of the H. Comm. on Government Reform and Oversight, 104th
\end{itemize}
\end{footnotesize}
Given the disadvantaged backgrounds from which proprietary school students often come, these students lack the social clout and political sophistication necessary to foster widespread dismay regarding their victimization. They are less likely to even complain about fraud perpetrated against them by proprietary schools. Even for those who complain, current legal and regulatory processes provide few options for redress.

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. 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 University illustrates this reasoning: The plaintiff alleged that the defendant institution failed to adequately educate his child, but 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." The court was loath to evaluate the "complex educational determinations" made by the defendant. This type of judicial reluctance can greatly disadvantage plaintiffs by limiting the circumstances in which they can win, or even seek, recovery for damages.

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 misrepresentation or fraud is alleged.

241. See Foster, supra note 23, at 24 ("[L]egal 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 perpetrated by some for-profit institutions.").
242. Linehan, supra note 7, at 764.
243. See id. ("[T]he doctrine of academic abstention reflects courts' ... reluctance to delve into the operation of educational institutions . . . .").
245. Id. at 873.
246. Id. at 872.
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) and the target justifiably relied on the misrepresentation to his detriment. In order for the target's reliance 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 . . . .” 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.

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, while 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. The primary difficulty plaintiffs face in these cases is proving scienter on the part of the defendant. In representing future job prospects, proprietary schools are able to hide behind the fact that much of what determines a graduate’s job prospects is outside of the school’s control. At least one court has characterized such representations as “no more than a prophecy,” in highlighting the limited power schools have in securing employment for their graduates. 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.

248. Id. § 537.
249. Id. § 538(2)(a).
250. Id. § 538(2)(b).
251. See, e.g., Linehan, supra note 7, at 770 (discussing the heightened pleading requirements for complaints alleging intentional fraud).
252. Id.
253. Id.
255. See Linehan, supra note 7, at 768 (“By promising outcomes which in some way

© 2010 by the American Bar Association. Reproduced by permission. All rights reserved.
This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
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.

In addition, plaintiffs alleging negligence 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. 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.

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. CanCar Career Colleges, Inc., a group of former students of the defendant institution asserted various negligence claims relating to the quality of the education they received and the advertisements used by the defendant. 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 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.

256. 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 of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 548 (1965). Negligence lawsuits against proprietary schools usually allege that the school failed to provide training or education it had a duty to provide.

257. See, e.g., Amaral v. Am. Sch. of Correspondence, 107 F. App’x. 497, 498–99 (6th Cir. 2004).
260. 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 204–05.
The court concluded that "there is no workable standard of care" that could be imposed upon schools. 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. They have cited various public policy considerations as reasons for this broad rejection. But the failure of both educational malpractice and negligent misrepresentation can be traced back to the judicial reluctance that characterizes the academic abstention doctrine.

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 or her educational institution is contractual in nature. Promises made by an institution or its representatives are binding. Catalogs and other materials made available to the student by his institution help define the contours of the contractual relationship. If certain promises are not kept by the institution, the student could have a claim of breach of contract.

In Ross v. Creighton University, a former student-athlete brought a lawsuit claiming that the defendant institution failed to provide promised tutoring services and other academic accommodations. The court allowed the plaintiff's contract

---

261. Id. at 205.
262. Id.
263. Ross, 957 F.2d at 412, 414, 416 (characterizing educational malpractice claims as "beloved of commentators, but not of courts," and identifying Montana as the only state that allows educational malpractice claims to go forward).
264. See, e.g., id. at 414 (discussing reasons courts have rejected educational malpractice as a cause of action, including the lack of a standard of care, uncertainty about the cause and nature of damages, the potential for mass litigation, and the possibility that courts would be forced to oversee the operations of schools).
265. Linehan, supra note 7, at 771.
266. Wicks v. N. Idaho Coll., 723 P.2d 155, 157 (Idaho 1986) ("There seems to be almost no dissent from the proposition that the relationship [between institution and student] is contractual in nature.").
268. Ross, 957 F.2d at 416.
269. Id. at 417.
270. 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
claims to proceed because they could “point to an identifiable contractual promise that the defendant failed to honor.”

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 contract claim of this 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. If the allegation requires the former, it cannot stand; if it allows the latter, it can be pursued on the merits. The former approach would, of course, run afoul of the academic abstention doctrine, 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. Some states even have consumer protection statutes specifically addressing the operation of proprietary schools. However, the standards of proof required by these statutes often make winning damages difficult for victims. Some of these statutes require victims to prove scienter and proximate cause, creating the same difficulties.

allow him to better focus on academics, and funds to attain a college degree. Id. at 416.

271. Id. at 417.
272. Id.
273. See id. (dismissing the plaintiff’s negligence claims while preserving his contract claims).

274. Sheila B. Schuehner, The Consumer Fraud Class Action: Reviving in Abusive by Requiring Plaintiffs to Allege Reliance as an Essential Element, 43 HARV. J. ON LEGIS. 1, 29 (2006); see also Jan Mize, Comment, Forcing 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).


276. Linchun, supra note 1, at 776. But see Mize, supra note 274, at 661 (characterizing state consumer fraud statutes as “the path of least resistance” in suits alleging false advertising).

277. See, e.g., Rizzo v. Michener, 584 A.2d 973, 980 (Pa. Super. Ct. 1990) (“Actual fraud has five elements which must concur. There must be (1) misrepresentation of a material
described earlier. Also, because some states limit attorney’s fees, 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 “triat.” The triad consists of the DOE, state regulatory bodies, and accrediting agencies. Its purpose is to ensure “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.” DOE’s primary functions within the triad are to verify institutional eligibility for Title IV funds and to certify accrediting agencies. States provide oversight in many ways, including through higher education regulatory agencies, as well as through indirect means such as consumer protection and commerce laws. Accrading agencies certify institutions as having met certain minimum standards of quality. Only institutions that are accredited by an agency certified by the DOE can receive Title IV aid.

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, and that mechanism does not

---

279. GAO, Ensuring Quality, supra note 27, at 4.
280. An example of this function is DOE’s tracking of cohort default rates. Id. at 4.
281. See id. at 4–5 (noting that DOE “certifies that such agencies are reliable authorities as to what constitutes quality education or training provided by postsecondary institutions”).
282. See id. at 5 (stating that these agencies are often responsible for establishing standards for regulation of higher education institutions).
283. See id. (“Other state agencies define certain consumer protection measures, such as refund policies. In the normal course of regulating commerce, all states require postsecondary institutions to have a license to operate within their borders.”).
284. See id. at 5–6 (“Accrediting agencies adopt criteria they consider to reflect the qualities of a sound educational program and develop procedures for evaluating institutions to determine whether they operate at basic levels of quality.”).
285. See id. at 4–6 (describing the accreditation process).
286. See Anti-Fraud Hearings, supra note 10, at 23–24 (statement of Rep. Maxine Waters) (“[T]he Department does not investigate charges made by students regarding misrepresentations made to influence students to enroll ... [t]hese federal regulations have no private right of action, and can only be enforced by the Department, which does not do its job.”).
include a private right to damages.\textsuperscript{287} Moreover, fines and other sanctions imposed upon schools by the DOE are often inadequate disincentives to unscrupulous behavior.\textsuperscript{288} The shortcomings of state oversight have already been discussed. And accrediting agencies often provide insufficient and conflicted oversight of the institutions they certify.\textsuperscript{289} Such lax oversight allows unscrupulous institutions to stay in operation and continue to victimize students.

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 are not presented. Similarly, avenues of redress for victims of misrepresentations are not directly proposed. Pragmatism is the motivation behind this narrow focus; the goal of this Part is to present solutions that account for the multifaceted 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 is to harness current regulatory frameworks in new ways.

The proposals are organized around two areas of focus: (1) proprietary school marketing, and (2) 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.

\textsuperscript{287} See Linehan, supra note 7, at 788 (noting that "nothing is done to compensate the victim").

\textsuperscript{288} See, e.g., Anti-Fraud Hearing, supra note 10, at 21 (statement of Rep. Maxine Waters) ("[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.").

\textsuperscript{289} See 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.").
A. Proposals

To protect students and taxpayers from misrepresentations and impropriety from proprietary schools, tighter regulation of their marketing practices is necessary. First, proprietary schools should be required to place disclaimers on all advertisements making forward-looking claims. Second, the Federal Trade Commission should expand its regulations pertaining to proprietary school advertising. Third, the FTC and the proprietary school industry should encourage self-regulation of proprietary school advertising practice. In addition to tighter regulation in the marketing area, existing regulation of proprietary schools' recruitment practices should be expanded. Specifically, proprietary schools should be required to make affirmative disclosures and provide relevant labor market information 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.

1. The Department of Education

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 and dictates education policy. The DOE also accepts complaints filed by persons “suspecting fraud, waste[,] or abuse involving [DOE] funds or programs.”

---

290. See, e.g., GAO, STRONGER OVERSIGHT, supra note 13, at 9–11 (stating that the DOE is “responsible for overseeing test publishers” and setting standards).
2. **The Federal Trade Commission**

The FTC is responsible for regulating and enforcing advertising laws. The Commission is principally concerned with promoting fair competition through truth in advertising. The FTC promulgates both general and industry-specific advertising standards, and it also assists industries in developing their own standards and best practices. The FTC has devised guides that explain how its rules are applied to specific industries, including one that addresses advertising practices of private vocational and distance education schools. In pursuing sanctions against offending advertisers, the FTC can bring lawsuits and administrative actions. Through these actions, the FTC can seek various forms of relief, such as injunctions, corrective advertising, monetary penalties, and consumer redress.

3. **State Regulatory Agencies**

Every state has a higher education regulatory body that oversees the operations of postsecondary institutions within its borders. Some states have agencies that specifically oversee proprietary institutions. The

---

292. See Patricia P. Bailey, *Unfair Competition and Misleading Advertising: How Advertising is Regulated in the United States*, 54 ANTI-TRUST LJ. 531, 532 (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 . . . .").

293. See id. ("[T]he Commission investigates commercial behavior that may be deceptive or unfair, including advertising . . . .").

294. Over the last two decades, the Federal Trade Commission (FTC) 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 FTC'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 helps inform the rules promulgated by the FTC. See generally Lydia B. Barnes & Carol Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 998–99 (1997) (describing the role of workshop conferences).

295. Id. at 992 n.14 (noting that industry guides provide "an interpretation of the underlying statute, but [do not afford] an independent basis for enforcement action").

296. Guides for Private Vocational and Distance Education Schools, 16 C.F.R. pt. 254 (2010).

297. See, e.g., Bailey, supra note 292.

298. Id. at 533.

299. For example, the North Carolina Office of Proprietary Schools is a division of 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. Every state also has a consumer protection agency that provides oversight of various aspects of commerce, including advertising. Some of these agencies have divisions that specifically oversee proprietary institutions.

4. Accrediting Agencies

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


302. See, e.g., Utah Div. of Consumer Prot., supra note 275 (providing instructions for postsecondary proprietary schools to complete registration with the Utah Division of Consumer Protection, as required by state law).

303. 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 accredited institutions nationwide, and the vast majority of them are for-profit. FOSTER, supra note 23, at 18.

304. GAO, ENSURING QUALITY, supra note 27, at 5–6.

305. See, e.g., FOSTER, supra note 23, at 19.

306. 20 U.S.C. § 1092a(a)(3)(A) (2006) ("[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.).


308. See, FOSTER, supra note 23, at 2, 4.
5. Self-Regulatory Bodies

Within the realm of advertising, various self-regulatory bodies promote good advertising practices. 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. 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. Like accreditation, participation in a self-regulatory scheme is voluntary. In the most developed arrangements, these bodies work directly with the FTC and state agencies in regulating advertising.

C. Discussion

Proprietary schools invest heavily in mass media advertising. They spend upwards of one billion dollars each year promoting their programs. Their commercials dominate non-prime-time television, and their online ads seem omnipresent. But when it comes to advertising, proprietary schools suffer from a problem common among all educational institutions: their product—education—is largely intangible. 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, nonprofit institutions often promote tangible ancillaries to the educational experience, such as

309. See generally Bailey, supra note 292.
311. See, e.g., Bailey, supra note 292, at 537 (“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.”).
312. See 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).
315. See, e.g., ANCHL, supra note 105, at 31 (“Among the greatest challenges to successfully marketing higher education is the inerently intangible nature of the very thing that is being marketed.”).
attractive buildings and tangential student services.\(^{316}\) Proprietary schools, however, tend to take a different tack; they make more concerted efforts to sell their products by touting them to tangible end results, such as career advancement and financial stability.\(^{317}\) It is on these types of forward-looking ads that the FTC should require prominent disclaimers.

Free-market competition requires that commercial entities be allowed to communicate with consumers.\(^{318}\) Therefore, commercial speech is given many of the same First Amendment protections as regular speech.\(^{319}\) In the seminal case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court reviewed the constitutionality of a Virginia state law banning pharmacies from advertising prices.\(^{320}\) The Supreme Court struck down the ban, reasoning that consumers in a free market must be empowered by the free flow of information.\(^{321}\) This case represented a departure from previous Court decisions suggesting that commercial speech fell outside the purview of First Amendment protection.\(^{322}\)

In *Virginia State Board of Pharmacy*, the Court insisted that First

---

316. Id. at 17 (arguing that in seeking market differentiation, "[c]olleges and universities are reduced to boasting of their multimillion-dollar student recreation centers, [and] their nouveau chic dining residence halls").

317. ITT often features graduates discussing how receiving their degrees positively affected not only their careers, but also their family life. See, e.g., MySpace.com, ITT Tech Commercial: "If I Want to Do Something I Will Do My Best to Accomplish It," http://vids.myspace.com/index.cfm?FuseAction=vick.individual&VideoID=691408 (last visited June 27, 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., University of Phoenix, UOPX on Television: I Am a Phoenix, http://www.phoenix.edu/about_us/ad-campaigns.html (last visited Aug. 4, 2010).

318. Pauline M. Ippolito, *What Can We Learn from Food Advertising Policy over the Last 25 Years*, 12 Geo. Mason L. Rev. 339, 359 (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.").

319. Bolger v. Young's 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); Va. State Bd. of Pharm. v. Va. 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.").


321. 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.").

322. Id. at 758.
Amendment protections only extend to truthful and non-misleading commercial speech, and in a later case, Central Hudson Gas & Electric Corp. v. Public Service Commission, it explained that such speech can only be restricted when the government proves it has a substantial interest and its restriction directly advances that interest in the least intrusive manner possible. In Central Hudson, the Court struck down a New York State ban on electric company 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. The holdings in both Virginia State Board of Pharmacy and Central Hudson affirm the Court's view that the First Amendment "favor[s] the dissemination of truthful product information over government suppression of ideas." 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. When the Court struck down a ban on attorney advertising in Bates v. State Bar of Arizona, the state bar association argued that attorney advertisements were inherently misleading due to the individualized nature of each potential client's needs. The Court was unconvinced, however, reasoning that such a view "assumes that the public is not sophisticated enough to realize the limitations of advertising." The Court further reasoned that correct but incomplete information was better remedied by more disclosure, not less. 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. 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 levels of education are positively associated with higher income levels. 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. Generally, disclaimers are required to be conspicuously placed and easy to understand. The 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. For instance, in adjudicating In re La Salle Extension University, 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

331. Ippolito, supra note 318, at 950 (“[R]equire[d] [disclaimers] raises the firm’s cost of making the claims, and the ‘chatter’ 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.”).
333. See, e.g., In re La Salle Extension Univ., 78 F.T.C. 1272, 1284 (1971) (“Where . . . the mere offering of the product or service leads to deception . . . we believe that it is reasonable and necessary to demand that a disclosure required to dispel the deception be given equal prominence with the offer.”).
335. 78 F.T.C. at 1272–73.
and appearance as the advertising claims. Further, the FTC dictated the placement and content of these disclaimers.

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. 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. 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.

336. Id. at 1280-81.
337. 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").
338. Id. at 1281 (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").
339. A recent Remington College commercial airing in the Nashville, Tennessee area displayed two disclaimers, including one stating, "Individual results vary." The disclaimers were displayed in very small font and only appeared for ten seconds of the sixty-second commercial. Vimeo.com, Remington College Commercials, http://www.vimeo.com/2901300 (last visited Aug. 1, 2010).
340. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, Consumer Endorsements, 16 C.F.R. § 255.2(b) (2010).
341. See John E. Villafranco & Andrew B. Lustgarten, 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, 723-24 (2007) (noting that "the degree of sophistication of the target audience is a significant factor in determining the reasonable message conveyed by the advertising" and explaining that the FTC has assessed both higher and lower standards of reasonableness).
of proprietary schools ads increases the need for disclaimers.

2. Expanding FTC Proprietary School Guides

In fostering good marketing practices, including the systematic use of disclaimers, the FTC should expand its Guides for Private Vocational and Distance Education Schools.342 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, how to avoid unfair or deceptive practices in connection with the advertising, promotion, marketing, or sale of their courses or programs."343 As such, the Guides address prohibitions against various types of misrepresentations.344 However, the Guides only pertain to proprietary schools offering less than a two-year degree.345 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.346 In fact, at some of the largest proprietary schools, most students are enrolled in degree-granting programs.347 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.348

343. Private Vocational and Distance Education Schools, Request for Public Comments, 74 Fed. Reg. 37,973, 37,973 (July 30, 2009).
344. 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. at 37,973–74.
345. 16 C.F.R. § 254(a) (“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.”).
346. See 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.”).
347. See KIRSCH, supra note 87, at 241 (describing a “new breed” of proprietary schools where the majority of students are enrolled “in degree programs for everything from the associate degree to the Ph.D.”).
348. 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 presented eighteen questions relating to how the Guides can be made more effective. None of the...
3. Encouraging Self-Regulation

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), an umbrella self-regulatory agency, has set advertising guidelines for various industry-specific self-regulatory agencies, including those relating to electronic retailing and children’s advertising. Also, the FTC has incorporated self-regulatory agencies into its regulatory framework. The Children’s Advertising Review Unit (CARU) and the National Advertising Division (NAD) of the Council of Better Business Bureaus 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). In assessing challenged ads, the FTC gives great weight to precedent set by these quasi-judicial self-regulatory agencies.

A proprietary school self-regulatory body could be chartered through an impartial agency such as the Better Business Bureau. 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. Requiring Affirmative Disclosures

The federal Student Right-to-Know and Campus Security Act 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. 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.” 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 only documentation a school must provide is a list of information it is required to make available, and a process for obtaining that information. In effect, the Act places the onus on
the student to not only request the information, 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 placement 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.\textsuperscript{359} Also, individual states, like Utah, require proprietary schools to provide employment and graduation rate data prior to enrolling a student or accepting tuition payments.\textsuperscript{360} 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 accrediting agencies.

5. \textit{Expanding Disclosures}

Disclosure requirements for proprietary schools should be expanded to include labor market data, specifically information relating to labor demand and salary.\textsuperscript{361} 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.\textsuperscript{362} Additionally, salary data is often inflated by admissions representatives.\textsuperscript{363} Thus, providing this information to students prior to enrollment will better inform students, allowing them, as consumers, to make informed choices in the marketplace.\textsuperscript{364} Similar to a disclaimer, it

\begin{flushleft}
\textsuperscript{359} Id. § 1092(e)(2). \textit{But see id.} § 1092(c)(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”).

\textsuperscript{360} \textit{UTAH CODE ANN.} § 13-34-108 (2009).

\textsuperscript{361} This proposal is based on a recommendation made by the GAO. \textit{See GAO, OVERSUPPLIED OCCUPATIONS, supra note 22, at 13–14.}

\textsuperscript{362} \textit{See id.} at 8 (“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.”).

\textsuperscript{363} \textit{See Anti-Fraud Hearings, supra note 10, at 5 (statement of Honorable George Miller) (“[C]ertain colleges . . . misrepresented graduation rates, promised inflated salaries to prospective enrollees, [and] enrolled students who did not have the ability to complete casework . . . .”).}

\textsuperscript{364} GAO, OVERSUPPLIED OCCUPATIONS, supra note 22, at 5 (“Using labor market projections provides a rational basis for making training investment decisions . . . .”). \textit{But see}
\end{flushleft}
would also prompt proprietary schools to consider the costs of making claims 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, nonprofit 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 in 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.

To protect 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 is 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.”