

NEVER ASCRIBE TO MALICE THAT WHICH IS
ADEQUATELY EXPLAINED BY INCOMPETENCE:
A FAILURE TO PROTECT STUDENT VETERANS

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INTRODUCTION

Recent years have seen a surge in the for-profit higher education market. Enrollment at for-profit colleges and universities has expanded significantly. There has also been an influx of veterans of the United States armed services at many of these proprietary institutions. Proponents of the for-profit educational model argue that the growth in the for-profit higher education industry has ushered in a dramatic increase in access to higher education for traditionally underserved segments of the population. A growing number of critics, however, have pointed to various forms of abusive conduct on the part of for-profit institutions and the frequent recurrence of unfavorable outcomes experienced by their enrollees. This Note seeks to analyze a narrow segment of the for-profit debate—how for-profit institutions treat United States military veterans. By examining the interplay between educational funding programs, such as the Post-9/11 GI Bill and Title IV of the Higher Education Act, this discussion aims to expose the impact that veterans’ educational benefits programs have had on the for-profit higher education industry. More importantly, this discussion will highlight the manipulative and deceitful recruitment practices implemented by a number of for-profit institutions at the expense of student veterans. Finally, this Note will examine the uncoordinated and contradictory efforts by the executive, legislative, and judicial branches of the federal government to curb abuses in the for-profit higher education market. This Note will describe the reasons why government efforts have been ineffective at addressing the problem and perhaps have even exacerbated the risk of student veterans falling prey to predatory recruitment tactics of some nefarious proprietary colleges and universities.

I. BACKGROUND

Title IV of the Higher Education Act of 1965 (“HEA”) primarily shapes the current legal and economic landscape of the for-profit education industry.¹ Congress enacted the HEA as a federal mechanism for financing the college and university costs borne by economically disadvantaged

1. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232 (codified as amended in scattered sections of 20 U.S.C. §§ 1070 to 1099c-2, 42 U.S.C. §§ 2751-2756b (2012)).

students.² Financial assistance is available to qualified students via several programs established under Title IV of the HEA (“Title IV”).³ Qualifying students are eligible for federal Pell grants, which need not be repaid,⁴ as well as federally guaranteed loans, which must be repaid by the recipient student.⁵ Initially, participation in Title IV programs was limited to students of public and private non-profit institutions of higher learning.⁶ However, a Congressional shift of position in 1972,⁷ while perhaps well-intentioned, nevertheless set in motion the emergence of for-profit education, which has today become a lucrative and increasingly scandalous industry.⁸

Beginning in the early 1980s, the profit-seeking higher education industry has enjoyed a thirty-year period of rapid expansion and profitability.⁹ By the late 1980s, “[s]tudents at for-profits accounted for 41% of the [Title IV guaranteed loan program] borrowers.”¹⁰ More recently, enrollment in the for-profit college and university sector “increas[ed] from 766,000 students in 2001 to 2.4 million students in 2010.”¹¹ Similarly, the amount of money paid to for-profit institutions of higher education (“FPIs”)¹² in the form of Title IV grants and loans grew

2. S. REP. NO. 89-621, at 28 (1965).

3. 20 U.S.C. § 1070 (2012).

4. *Id.* at § 1070a.

5. *Id.* at § 1071. Importantly, these loans are notoriously dangerous because it is difficult to discharge them in bankruptcy. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009). *But see* Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013) (affirming a bankruptcy judge’s order to discharge a student loan where the obligor has demonstrated financial circumstances amounting to a “certainty of hopelessness”).

6. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, pt. B, § 421(a)(1), 79 Stat. 1232, 1236.

7. Education Amendments of 1972, Pub. L. No. 92-318, tit. I, pt. D, § 417B(a), 86 Stat. 235, 258 (extending Title IV eligibility to students enrolled at proprietary colleges and universities).

8. *See, e.g.*, Kelly Field, *Undercover Probe Finds Widespread Deception in Marketing by For-Profit Colleges*, CHRON. HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Undercover-Probe-Finds/123744/>; S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS MAJORITY COMMITTEE STAFF REPORT AND ACCOMPANYING MINORITY COMMITTEE STAFF VIEWS 53 (2012) [hereinafter FAILURE TO SAFEGUARD] (discussing for-profit institution “tactics [that] most people would find misleading and deceptive in order to secure enrollments”).

9. Jennifer Gonzalez, *Federal Proposal Could Jeopardize For-Profit Programs, Especially Bachelor’s Degrees*, CHRON. HIGHER EDUC. (May 17, 2010), <http://chronicle.com/article/Federal-Proposal-on-Student/65604>.

10. William Beaver, *Fraud in For-Profit Higher Education*, 49 SOC’Y 274, 275 (2012).

11. FAILURE TO SAFEGUARD, *supra* note 8, at 31.

12. The Code of Federal Regulations defines and uses the term “proprietary

from about \$5 billion in 2001 to \$32 billion in 2010.¹³ Since Congress extended eligibility for Title IV funding to students enrolled at FPIs, the rate at which this market grows has steadily gained momentum.¹⁴ Since then, the number of student veterans pursuing degrees at FPIs has similarly increased at an unprecedented rate.¹⁵ Today, “[t]he best known of the for-profits is the University of Phoenix with an enrollment of 450,000 making it the second largest university system in the country.”¹⁶

Proponents of the for-profit educational market argue that the aggressive recruitment techniques and innovative instructional programs that are commonly associated with FPIs have expanded access to higher education for traditionally underrepresented demographics, such as adults, racial and ethnic minorities, the economically disadvantaged, and even the homeless.¹⁷ Proponents highlight this expansion of access in defense of the for-profit model.¹⁸ Proponents of FPIs also argue that these institutions have helped to fill a void left by the two-fold effect of shrinking higher education budgets at the state level and the ubiquitously growing demand for skilled labor.¹⁹ They claim that criticisms of FPIs are unduly harsh,²⁰

institution” in a similar sense to my use of the term FPI. *See, e.g.*, 34 C.F.R. § 600.5(a). For the purposes of this Note, the terms may be used interchangeably.

13. FAILURE TO SAFEGUARD, *supra* note 8, at 15. *See also*, Beaver, *supra* note 10, at 275 (“Like the G.I. Bill, the large infusion of government funds provided another windfall for proprietary education. During the 1980s alone, it is estimated that for-profits accounted for one-half the increase in higher education’s total enrollment, and federal student-aid became the crucial element to the financial well-being and survival of for-profit schools.”).

14. EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 51 (David W. Breneman et al. eds., 2006) (“Over the past three decades, for-profit enrollments . . . have increased at about seven times the rate of the entire postsecondary sector, or at a rate of 10.4% versus 1.4% for [traditional colleges and universities].”).

15. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS 1 (2010) [hereinafter BENEFITTING WHOM?] (“Revenue from VA educational programs for [a selection of] 18 for-profit education companies increased from \$26.3 million in 2006 to an expected \$285.8 million for 2010, including a five-fold increase between 2009 and 2010.”).

16. Beaver, *supra* note 10, at 274.

17. Daniel Golden, *The Homeless at College*, BLOOMBERG BUS. WK. (Apr. 30, 2010), http://www.businessweek.com/magazine/content/10_19/b4177064219731.htm.

18. Kenneth J. Cooper, *Minority Leaders Oppose “Gainful Employment” Rules for For-Profit Colleges*, DIVERSE (Sep. 20, 2010), <http://diverseeducation.com/article/14154/>.

19. FAILURE TO SAFEGUARD, *supra* note 8, at 167 (“The for-profit sector will continue to play an important role in providing capacity to the Nation’s higher education infrastructure. And, indeed, the sector can play a constructive role, bringing much-needed innovation to the higher education sector and producing graduates in high-demand fields.”).

20. Bonnie K. Fox Garrity, Mark J. Garrison & Roger V. Fiedler, *Access for Whom, Access to What? The Role of the “Disadvantaged Student” Market in the Rise of For-Profit Higher Education in the United States*, 8 J. FOR CRITICAL EDUC. POL’Y

ostensibly because abusive and unethical recruitment practices are kept in check by a number of legislative safeguards embedded within the HEA. The lion's share of this Note is dedicated to an analysis of the efficacy of these safeguards in the context of student veterans, in light of "factors in the social, political, and economic environment that are likely to facilitate malfeasance" among FPIs.²¹

A. Statutory Rules of the HEA

There are statutory safeguards in place to discourage abuse by FPIs that participate in Title IV programs. Due to the complexity of the legal framework under the HEA, it is crucial for the purposes of this Note to carefully distinguish between purely statutory rules *vis-a-vis* regulatory rules: the former are fully animated by the text of legislation produced by Congress, while the latter are at least partly defined by regulations promulgated by federal administrative agencies, such as the Department of Education. The four salient rules in this regard are: (1) the "Cohort Default Rate Rule," (2) the "90/10 Rule," (3) a rule prohibiting FPIs from communicating certain misrepresentations to students, and (4) a rule against performance-based pay incentives for recruiting staff.²²

Under the Cohort Default Rate Rule, students of institutions that produce a sufficiently egregious proportion of graduates (and drop-outs) who fail to repay their loans are ineligible for Title IV programs.²³ The restriction operates by tracking the average rate at which former students of an institution become delinquent on remitting monthly payments to their loan servicers.²⁴ Where more than twenty-five percent of a particular institution's former students default for three continuous years,²⁵ or where more than forty percent default in any given year, the Secretary of Education can usually revoke the eligibility of students at that institution to participate in Title IV funding.²⁶ This is said to discourage "diploma mills"—institutions that produce graduates without marketable skills or with false expectations of gainful employment.²⁷ "[S]chools receive the

STUD. 203, 219 (2010).

21. Beaver, *supra* note 10, at 277.

22. The Cohort Default Rate Rule, the misrepresentation prohibition, and the ban on performance-based pay incentives apply to all colleges and universities that participate in Title IV, while the 90/10 Rule applies only to proprietary institutions. Compare 20 U.S.C. §§ 1085(a), 1094(a)(20), 1094(c)(3)(A) (2012), with 20 U.S.C. § 1094(a)(24) (2012).

23. 20 U.S.C. § 1085(a) (2012); 34 C.F.R. § 668.187 (2012).

24. *Id.*

25. *Id.* at § 668.187(a)(2).

26. *Id.* at § 668.187(a)(1) (revocation of eligibility to participate in Title IV is stayed during pendency of an appeals process).

27. Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 508

benefit of accepting tuition payments from students receiving federal financial aid, regardless of whether those students are ultimately able to repay their loans. Therefore, Congress codified statutory requirements in the HEA to ensure against abuse by schools.”²⁸

Under the 90/10 Rule, students of FPIs that are not sufficiently funded by sources other than those provided by Title IV are ineligible to participate in Title IV programs. This statutory restriction, which was originally the “85/15 Rule,” was modeled after a similar rule that was in place to protect the integrity of veterans’ educational benefits programs.²⁹ Like the veterans’ benefits rule,³⁰ the HEA rule was imposed by Congress in response to “problems in the proprietary sector.”³¹ As the Government Accountability Office explained, “[t]he rationale behind this provision . . . is that schools providing a quality educational product should be able to attract a reasonable percentage of their revenues from sources other than Title IV.”³² Supporters of the provision said “it was intended to ‘weed out’ the ‘bad’ proprietary schools.”³³ They argue that if an FPI cannot pass a “modest market test” then it is likely to be engaged in fraudulent and deceitful practices.³⁴ In application, the rule requires that no FPI derive more than ninety percent of its revenue from Title IV programs.³⁵ As

(“These enterprises often centered around a motive of profiting from deception and a complete disregard for the ‘quality’ of the education they provided.”). *See also* Ass’n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 147 (D.D.C. 2012) [hereinafter *Duncan II*] (“If [an educational program at a for-profit college or university] does not in fact lead to jobs for any of its students, it is reasonable to conclude that those students were not truly prepared.”).

28. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 435 (D.C. Cir. 2012) [hereinafter *Duncan I*].

29. REBECCA R. SKINNER, CONG. RESEARCH SERV., RL32182, INSTITUTIONAL ELIGIBILITY AND THE HIGHER EDUCATION ACT: LEGISLATIVE HISTORY OF THE 90/10 RULE AND ITS CURRENT STATUS 4 (2005).

30. 38 U.S.C. § 3680A(d) (2012) (generally withholding funding for any given program if “the Secretary finds that more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs”).

31. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-103, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL AID 3 (1997), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-HEHS-97-103/pdf/GAOREPORTS-HEHS-97-103.pdf>.

32. *Id.* at 1.

33. *Id.*

34. WILLIAM G. TIERNEY & GUILBERT C. HENTSCHE, NEW PLAYERS, DIFFERENT GAME: UNDERSTANDING THE RISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 174 (2007). “Since for-profit entities, by definition, set their prices above their costs, we are particularly concerned that student-aid funds will be used to pay the profit margin of business.” *Id.* (quoting David Warren, President of the National Association of Independent Colleges and Universities).

35. 20 U.S.C. § 1094(a)(24) (“In the case of [an FPI], such institution will derive not less than ten percent of such institution’s revenues from sources other than funds provided under [Title IV]”); 34 C.F.R. § 668.14(b)(16).

discussed in Part IIB, *infra*, it is significant that there is no provision that restricts the type of sources from which an FPI might derive the remaining ten percent of its revenue.³⁶

The statutory misrepresentation prohibition bans institutions from communicating any “substantial misrepresentation” regarding “the nature of its educational program, its financial charges, or the employability of its graduates.”³⁷ Through this ban, Congress intended to provide the Department of Education with “the necessary tools to keep unethical individuals from engaging in unlawful conduct and sharp practice in the name of helping financially disadvantaged students obtain the education necessary to succeed.”³⁸ Since the HEA does not define the term “substantial misrepresentation,” Congress left it to the Department of Education to shape the contours of this regulation.³⁹ Prior to 2011, the Department had construed “misrepresentation” to mean “[a]ny false, erroneous or misleading statement an eligible institution makes to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary.”⁴⁰ The Department construed a “substantial” misrepresentation to be one “on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.”⁴¹

The restriction on performance-based incentives for recruitment staff is part of an agreement into which institutions are required to enter as a condition precedent to participation in Title IV funding programs under the HEA. Each school must agree not to “provide *any* commission, bonus, or other incentive payment based *directly or indirectly* on success in securing enrollments or financial aid to any persons or entities engaged in *any* student recruiting or admission activities.”⁴² Congress appreciated that if recruiters were compensated on a performance basis then they might have an incentive to “enroll students who could not graduate or could not find employment after graduating.”⁴³ Nevertheless, the Department of Education departed from the broad rule implied by the statutory text, instead promulgating regulations with three exceptions, or “safe harbors,”

36. For example, tuition payments made by the Department of Veterans Affairs on behalf of a student veteran enrolled at an FPI is included in calculating the 10% of non-Title IV revenue. BENEFITTING WHOM?, *supra* note 15, at 7–8. *See also infra*, notes 85–100 and accompanying text.

37. 20 U.S.C. § 1094(c)(3)(A).

38. H.R. REP. NO. 94-1086, at 13 (1976).

39. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 452 (D.C. Cir. 2012) (“The HEA prohibits institutions from engaging in ‘substantial misrepresentation,’ a phrase which is not defined in the statute.”).

40. 34 C.F.R. § 668.71(b) (2010).

41. *Id.*

42. 20 U.S.C. § 1094(a)(20) (2012) (emphasis added).

43. *Duncan I*, 681 F.3d at 436.

to the general rule against performance-based incentives. First, institutions can adjust recruiter compensation twice per year so long as the adjustment was not based *solely* on the number of students recruited.⁴⁴ Second, performance-based compensation is permitted if it is “based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter.”⁴⁵ Third, performance-based compensation of “managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting” is permissible.⁴⁶

Prior to 2008, the HEA existed in concert with relatively inert permutations of veterans’ educational benefits programs.⁴⁷ Thus, the HEA regulations could be conceptualized without regard to the presence of student veterans at FPIs.⁴⁸ Regulation of the for-profit higher education industry did not present a need to take account of other educational benefits programs until 2008, when a plentiful source of alternative federal funding emerged. The discussion in the following subpart will focus on the 2008 expansion of veteran-specific federal funding sources before shifting in Part II to an analysis of the interplay between these funding sources and the HEA.

B. The Post-9/11 GI Bill Act of 2008

The Post-9/11 Veterans Education Assistance Act of 2008 (“Post-9/11 GI Bill”) is the current, foundational legislative vehicle for the provision of federal educational assistance for veterans of the United States military.⁴⁹ Recognizing that “[s]ervice on active duty in the Armed Forces has been especially arduous for the members of the Armed Forces since September 11, 2001,” Congress endeavored to ameliorate the “difficult challenges involved in readjusting to civilian life after wartime service” by funding the educational pursuits of qualified veterans.⁵⁰ Unlike previous incarnations of the GI Bill, which disbursed benefits payments directly to the student veteran, the benefits available under the Post-9/11 GI Bill are paid by disbursing tuition payments directly to a college or university on behalf of an enrolled student veteran.⁵¹ Living allowance and book stipend

44. 34 C.F.R. § 668.14(b)(22)(ii)(A) (2011).

45. *Id.* at § 668.14(b)(22)(ii)(E).

46. *Id.* at § 668.14(b)(22)(ii)(G).

47. *See generally* BENEFITTING WHOM?, *supra* note 15.

48. Stated more generally, the pecuniary influence of the 90/10 Rule on FPI behavior could be analyzed in isolation from other federal legislation because no alternative source of federal funds was extant to uncouple regulatory causes from observable effects.

49. Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 112 Stat. 2357 (codified as amended in 38 U.S.C. §§ 3301–24).

50. *Id.* §§ 5002(2–5), 122 Stat. at 2358.

51. Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and*

payments, on the other hand, are still disbursed to the student veteran's personal bank account.⁵²

Student veterans must meet two requirements to be eligible for benefits under the Post-9/11 GI Bill. First, the veteran must have completed at least 90 days of active duty service after September 10, 2001.⁵³ Second, the veteran must not have been dishonorably discharged.⁵⁴ Unlike previously enacted educational benefit programs, which precluded eligibility for benefits unless the service member made financial contributions to the program while serving on active duty, the current GI Bill omits this requirement.⁵⁵ After separating from active duty, a veteran generally must utilize educational benefits under the Post-9/11 GI Bill within ten years, or else he or she permanently forfeits the benefit.⁵⁶ Alternatively, an active duty service member may, prior to separation, elect to transfer entitlement to a spouse.⁵⁷ This election is no longer available once a service member has separated from active duty.⁵⁸

The benefits provided by the Post-9/11 GI Bill are generous and give veterans or their spouses broad discretion with regard to choice of institution and program pursued. While a number of options are available, veterans commonly elect to pursue a bachelor's degree at an institution of higher education.⁵⁹ Importantly, the Post-9/11 GI Bill does not distinguish between public, private non-profit, and private for-profit institutions.⁶⁰ The maximum tuition payment that the Department of Veterans Affairs would disburse to private institutions was initially capped at a rate equal to the costliest tuition rate of a bachelor's degree program at a public institution of the state in which an FPI was located.⁶¹ Subsequent legislation fixed the maximum at a uniform national figure.⁶²

Colleges and universities that charge tuition rates in excess of the nationally uniform maximum may elect to avail themselves of the Yellow

Modernization of Education Benefits Under the Post-9/11 Veterans Assistance Act of 2008, 2 VETERANS L. REV. 185, 187, 217 (2010).

52. *Id.*

53. *Id.* at 204–05 (there is a minimum of 30 days, rather than 90, if the veteran is medically discharged).

54. 38 U.S.C. § 3311(c)(1) (2012).

55. *Compare* 38 U.S.C. § 3011(b)(1) (2012), *with* 38 U.S.C. §§ 3311(a)–(b) (2012).

56. 38 U.S.C. § 3321 (2012).

57. 38 U.S.C. § 3319(a)–(c) (2012).

58. *Id.* at § 3319(f).

59. Michael Sewall, *Veterans Use New GI Bill Largely at For-Profit and 2-Year Colleges*, CHRON. HIGHER EDUC. (Jun. 13, 2010), <http://chronicle.com/article/Veterans-Use-Benefits-of-New/65914/>.

60. 38 U.S.C. §§ 3313(b), 3452(c).

61. Buckley & Cleary, *supra* note 51, at 204–05.

62. Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 111-377, tit. I, § 102, 124 Stat. 4108 (codified as amended in 38 U.S.C. § 3313).

Ribbon GI Education Enhancement Program (“Yellow Ribbon Program”).⁶³ Under this voluntary program, a college or university may enter into an agreement with the Secretary of Veterans Affairs to share equally the cost of an enrolled student veteran’s unfunded tuition expenses.⁶⁴ The terms of the agreement must obligate the college or university to make contributions equal to half of an eligible student veteran’s unmet tuition expenses so long as the student remains in good standing and the college or university participates in the program.⁶⁵ The agreement must also declare a maximum number of participants that the school is willing to obligate itself to subsidize.⁶⁶

Rather than implement independent program integrity measures, Congress aligned the regulatory exigencies of the Post-9/11 GI Bill with the measures already in place under the HEA. For example, the task of policing predatory and deceptive educational practices is left to the Department of Education through its Title IV enforcement mechanisms.⁶⁷ Similarly, requiring accreditation by recognized authorities discourages fraud.⁶⁸ It is not clear whether, in doing this, Congress realized that the Department of Education might not have been sufficiently equipped to shoulder this added responsibility⁶⁹ or that accreditation entities might not have proper incentives to effectively guard against abuse.⁷⁰

II. ADVERSE INCENTIVES TO EXPLOIT STUDENT VETERANS

Congress and the Department of Education have endeavored to curtail abuse of Title IV funding in the for-profit education market.⁷¹ However,

63. 38 U.S.C. § 3317(b).

64. *Id.* at § 3317(a).

65. 38 C.F.R. § 21.9700(d)(2) (2009).

66. *Id.* at § 21.9700(d)(1)–(4) (students may claim this benefit on a first come, first served basis).

67. BENEFITTING WHOM?, *supra* note 15, at 4 (“... [T]he Department of Veterans Affairs primarily [relies] on the Department of Education and accreditation agencies to approve eligible educational programs for servicemembers and veterans.”).

68. *See, e.g.*, Beaver, *supra* note 10.

69. *See, e.g., id.* at 278 (“In the early 1990s, the Inspector General told Congress that he would need a 60-70% increase in staff to adequately address fraud and abuse, which of course never happened.”).

70. *See, e.g.*, FAILURE TO SAFEGUARD, *supra* note 8, at 123 (“The self-reporting and peer-review nature of the accreditation process exposes it to manipulation by companies that are more concerned with their bottom line than academic quality and improvement.”).

71. *See, e.g.*, Tierney & Hentschke, *supra* note 34, at 174 (discussing “rampant fraud and abuse of taxpayer money” by FPIs); Melanie Hirsch, *What’s In A Name? The Definition of an Institution of Higher Education and its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U.J. LEGIS. & PUB. POL’Y 817, 822 (2005); Kelly Field, *Government Scrutinizes Incentive Payments for College Recruiters*, CHRON. HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Government-Scrutinizes/123728/> (“Congress passed the incentive-compensation ban in 1992, as part of a broader effort

following passage of the Post-9/11 GI Bill, the HEA's statutory rules and the Department of Education's clumsy regulations were undermined by a number of FPIs that sought to circumvent them by capturing the new benefits exclusively available to the growing multitude of veterans disorged by a downsizing United States military.⁷² The distinction between student veterans and ordinary students had relatively less regulatory significance in the context of Title IV before the enactment of the Post-9/11 GI Bill.⁷³ Until 2008, the Department of Veterans Affairs administered a series of predecessor statutes to the Post-9/11 GI Bill.⁷⁴ These programs channeled funds into the hands of the individual recipients and were, therefore, less susceptible to capture by FPIs. The unintended side effect of the Post-9/11 GI Bill was that the new tuition payments, which are disbursed directly to colleges and universities, enabled a number of FPIs to manipulate the rules and regulations of the HEA.⁷⁵

Since the Post-9/11 GI Bill relies upon the HEA's existing framework of rules and industry self-regulation, recipients of educational benefits under the HEA are protected almost entirely by the Act's oversight and enforcement tools.⁷⁶ The four regulatory mechanisms that are relevant to this discussion are the Cohort Default Rate Rule, the 90/10 Rule, the misrepresentation prohibition, and the incentive pay restriction.⁷⁷ The efficacy of these tools as they existed prior to the enactment of the Post-9/11 GI Bill is a topic that lies beyond the scope of this Note; what follows is an analysis of the pernicious incentives created by the interplay between the Cohort Default Rate Rule, the 90/10 Rule, and the Post-9/11 GI Bill.⁷⁸ Specifically, the focus will be upon certain loopholes through which FPIs might seek to subvert HEA restrictions by exploiting student veterans, and the ineffective safeguards found in the misrepresentation prohibition and the incentive pay restriction.

to crack down on unscrupulous trade schools that were milking the federal student-aid system.”).

72. *BENEFITTING WHOM?*, *supra* note 15, at 7 (discussing the FPI practice of subverting HEA regulations by aggressively recruiting student veterans).

73. *Id.* at 8 (arguing that interplay between regulations under the HEA and benefits afforded by the Post 9/11 GI Bill “incentivizes [FPIs] to aggressively recruit and market to veterans and servicemembers”).

74. 38 U.S.C. § 3014 (2012).

75. *BENEFITTING WHOM?*, *supra* note 15, at 8 (“Not only does the failure to count military educational benefits as federal financial aid subvert the intent of a regulation focused on limiting for-profit schools from being entirely dependent on federal dollars, it actually incentivizes these companies to aggressively recruit and market to veterans and servicemembers.”).

76. *Id.* at 4.

77. *See supra* notes 23–46 and accompanying text.

78. *See generally Abuses in Federal Student Grant Programs Proprietary School Abuses: Hearing Before the Permanent Subcommittee on Investigations of the S.Comm. on Governmental Affairs*, 104th Cong. (1995).

A. The Cohort Default Rate Rule

At first glance, the Cohort Default Rate Rule seems to be a robust and benign legislative effort to rein in some of the abusive practices of a number of unsavory colleges and universities. In the process, however, Congress ultimately created an incentive to aggressively recruit student veterans—often into poor quality programs—for reasons beyond merely capturing the educational benefits available to them under the Post-9/11 GI Bill.⁷⁹ The rationale behind this rule is to incentivize colleges and universities to invest in the quality of their educational programs to the extent that their students graduate with marketable skills.⁸⁰ This incentive exists because graduates who do not possess sufficiently marketable skills are less likely to obtain gainful employment and thus, without the post-graduation income they might reasonably have expected to be earning, are more likely to default on their educational loans.⁸¹ If more than twenty-five percent of a college or university's former students default on their loans, the school risks losing the eligibility of its students to participate in Title IV funding. Private for-profit colleges and universities have a particularly strong aversion to the Cohort Default Rate Rule because their graduates tend to draw upon substantially larger loans than their peers at public and private non-profit institutions.⁸²

Since FPIs are beholden to private interests, they have a disincentive to invest in the quality of their programs; they can retain their revenue as profit.⁸³ By recruiting a large proportion of student veterans, for whom benefits are available under the Post-9/11 GI Bill, an FPI can shirk some of the expense of investing in the quality of its educational programs without

79. BENEFITTING WHOM?, *supra* note 15, at 7.

80. “The idea was that abnormally high default rates would signify a low-quality institution that was failing to prepare students for work and life, and that holding colleges accountable for the rates at which their students defaulted on loans . . . would weed out fraudulent schools . . .” Doug Lederman, *A More Meaningful Default Rate*, INSIDE HIGHER ED (Nov. 30, 2007), <http://www.insidehighered.com/news/2007/11/30/defaults>.

81. J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera & Michelle R. Napierski-Pran, *Factors Associated with Student Loan Default among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206 (1998).

82. Rebecca Hinze-Pifer & Richard Fry, *The Rise of College Student Borrowing*, PEW RESEARCH CENTER (Nov. 23, 2010), <http://www.pewsocialtrends.org/2010/11/23/the-rise-of-college-student-borrowing/>.

83. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 844 (1980) (“The nonprofit producer, like its for-profit counterpart, has the capacity to raise prices and cut quality in such cases without much fear of customer reprisal; however, it lacks the incentive to do so because those in charge are barred from taking home any resulting profits.”). Figures seem to suggest that many FPIs aim to retain an attractive brand name, despite the diminished quality of their programs, through extensive marketing efforts; “Recent reports indicate that the typical for-profit spends 30% of revenues on marketing, compared to less than 5% at non-profits.” Beaver, *supra* note 10, at 277.

jeopardizing the Title IV eligibility of its students.⁸⁴ Since the Department of Veterans Affairs funds some or all of their tuition and school-related expenses, student veterans are less likely to borrow in order to fund their educational pursuits. With their lower debt burdens, veteran graduates are more likely to meet their educational loan obligations, even if they lack marketable skills and are forced to accept lower post-graduation incomes than they might otherwise have expected.⁸⁵ Thus, by aggressively recruiting student veterans, FPIs are able to invest less in their educational programs—while producing graduates with fewer marketable skills—without running afoul of the Cohort Default Rate Rule.⁸⁶

B. The 90/10 Rule

The 90/10 Rule creates another incentive for FPIs to aggressively recruit student veterans. Recall that under this rule, an FPI jeopardizes the eligibility of its students to participate in Title IV programs if it does not derive at least ten percent of its revenue from sources other than Title IV funding.⁸⁷ In creating this restriction, Congress intended to prevent waste and abuse by withholding funds from any FPI that was unable to draw at least ten percent of its revenue from the competitive market.⁸⁸ Inability to derive funding from the private sector is thought to be a signal of an institution's poor quality.⁸⁹ In this way, Congress sought to avoid the undesirable result of sustaining sub-standard FPIs that were unable to compete with other colleges and universities in the private market.⁹⁰

Student veterans are entitled to benefits under the Post-9/11 GI Bill, which is not a Title IV program.⁹¹ When an FPI receives tuition reimbursement from the Department of Veterans Affairs (“VA”) on behalf of an enrolled student veteran, the sum can be included in the required ten

84. Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 71 (2011) (“Excessively high tuition rates at FPIs indicate rent-seeking behavior in the industry.”).

85. BENEFITTING WHOM?, *supra* note 15, at 13.

86. This argument comports well with empirical observation: The GAO reports that the quality of the educational programs at for-profit institutions is lower than those at public and not-for-profit colleges and universities. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-143, POSTSECONDARY EDUCATION: STUDENT OUTCOMES VARY AT FOR-PROFIT, NONPROFIT, AND PUBLIC SCHOOLS 5-7 (2011).

87. 20 U.S.C. § 1094(a)(24); 34 C.F.R. § 668.28.

88. H.R. REP. NO. 82-1943, at 30 (1952) (“This . . . is believed to be a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions.”).

89. SKINNER, *supra* note 29, at 3 (“[P]roprietary institutions that were overly dependent on Title IV revenue were considered institutions that were not providing a high quality education . . .”).

90. *Id.* at 4 (“[I]t was concluded that these institutions should not be subsidized by federal dollars.”).

91. BENEFITTING WHOM?, *supra* note 15, at 8.

percent of non-Title IV funding.⁹² Therefore, an FPI can circumvent the 90/10 Rule and derive potentially all of its revenue from federal sources by drawing, for example, ten percent of its revenue from the VA via tuition payments on behalf of enrolled student veterans and the remaining ninety percent from Title IV funding programs.⁹³ It might come as no surprise, then, that by November of 2010, members of the House of Representatives “raised concerns that treating VA and [Department of Defense (“DoD”)] funds differently than federal student aid undermined the intent of the 90/10 Rule.”⁹⁴ Worse, the loophole created by this interplay between the 90/10 Rule and the Post-9/11 GI Bill creates an even *stronger* incentive for *sub-standard* FPIs to aggressively recruit student veterans into their poor-quality programs; sub-standard programs are less likely than high-quality programs to successfully compete for private sector revenue, consequently relying more heavily on federal funding.⁹⁵ To put it differently, every dollar of revenue derived from the VA as a tuition payment on behalf of an enrolled student veteran enables an FPI to collect nine more dollars from non-veteran students under Title IV without running afoul of the 90/10 Rule. In this way, one student veteran can be as valuable to an FPI as nine non-veteran students.

It is reasonable to infer that Congress did not contemplate this result. Recall that the predecessor to the 90/10 Rule was modeled after a similar rule—the VA Rule—pertaining to the eligibility of students enrolled at FPIs to receive veterans’ educational benefits.⁹⁶ The VA Rule withheld funding if more than 85% of an FPI’s students received educational benefits from VA sources.⁹⁷ In crafting this requirement, Congress used the familiar reasoning that an FPI that could not draw at least 15% of its revenue from non-VA sources was unlikely to provide its graduates with a quality education.⁹⁸ When the VA Rule was created, funding sources under Title IV programs did not yet exist.⁹⁹ Thus, the requirement that an institution derive at least 15% of its revenue from non-VA sources effectively meant that at least 15% of an institution’s revenue had to flow from non-federal sources, which generally meant the competitive private

92. *Id.*

93. *Id.*

94. *Id.* at 8 n.12.

95. *Id.* at 8.

96. SKINNER, *supra* note 29.

97. Act of Jul. 16, 1952, Pub. L. No. 82-550, § 226, 66 Stat. 663, 667 (1952). This requirement is absent from the Post-9/11 GI Bill.

98. SKINNER, *supra* note 89 at 3 (“[P]roprietary institutions that were overly dependent on Title IV revenue were considered institutions that were not providing a high quality education . . .”).

99. The VA Rule was created in 1952, Pub. L. No. 82-550, while the HEA was not created until 1965, Pub. L. No. 89-329.

market.¹⁰⁰ Congress discouraged waste and abuse by excluding FPIs that were unable to compete for at least 15% of their students.¹⁰¹ Given that the predecessor to the 90/10 Rule is modeled after the VA Rule, it is likely that Congress intended that the eligibility of an FPI's students to participate in Title IV programs depends upon an FPI's ability to draw at least 10% of its revenue from non-federal sources.¹⁰²

C. The For-Profit Higher Education Market Reacts to the Post-9/11 GI Bill

The result of distorted incentives created by the interplay between HEA restrictions and the Post-9/11 GI Bill was as swift as it was predictable. A number of FPIs quickly developed a competency for aggressively recruiting student veterans.¹⁰³ Some FPIs developed large recruitment staffs "to bring in veterans, service members and their spouses."¹⁰⁴ Abusive and predatory recruitment of student veterans became commonplace.¹⁰⁵ In one example, a veteran was told that an FPI was accredited and that his credits would transfer if he wanted to pursue a master's degree.¹⁰⁶ However, when he attempted to transfer to a public, non-profit institution, he learned that none of his credits would transfer. As the misrepresentation regulations currently exist, this particular FPI could argue that no sanctionable misrepresentation had been made. If challenged, the FPI could argue that, if this particular student veteran had completed a bachelor's degree program with the FPI, he would subsequently have been able to enroll in a master's

100. "By ensuring that a modest amount of such schools' revenue come from non-Title IV sources, the 85-15 rule will re-introduce a measure of free market control and force prices to reasonable levels relative to the value of the training offered, without direct federal price controls." 140 CONG. REC. 15100 (1994) (letter of Hon. James B. Thomas, Jr., Inspector General, Department of Education).

101. See H.R. REP. NO. 82-1943, at 32 (1952).

102. The congressional subcommittees that were considering the National Vocational Student Loan Insurance Act, intended "that the 'fly-by-night' [vocational schools] of the post-World War II era be explicitly eliminated from eligibility." S. REP. NO. 89-758, at 12 (1965). Congress merged the programs under the National Vocational Student Loan Insurance Act with the HEA and replaced the phrase "vocational school" with "proprietary institution of higher education." Higher Education Amendments of 1968, Pub. L. No. 90-575, § 116(a); Higher Education Amendments of 1992, § 481, Pub. L. No. 102-325 (codified as amended at 20 U.S.C. § 1088(b) (2012)).

103. "[There is a] very heavy, aggressive pursuit of veterans by for-profit colleges. They go to military fairs for former military; they attend conventions of veterans' groups; they advertise in military publications and on the Web to go after veterans as students." *Interview with Daniel Golden. Educating Sergeant Pantzke*, FRONTLINE (Apr. 15, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/educating-sergeant-pantzke/dan-golden/>.

104. BENEFITTING WHOM?, *supra* note 15, at 8.

105. *Id.* at 8-9.

106. *Id.* at 13.

degree program elsewhere. In such a case, the statement made to the veteran was merely confusing, but was not a misrepresentation, strictly speaking, because it was not untrue.¹⁰⁷

In the years following passage of the Post-9/11 GI Bill, payments flowing from the VA to FPIs grew dramatically. An investigation conducted by the Senate Health, Education, Labor, and Pensions Committee (“HELP Committee”) revealed in 2012 that, at twenty for-profit schools, “the combined VA and DoD total military educational benefits increased from \$66.6 million in 2006 to a projected \$521.2 million in 2010, an increase of 683 percent.”¹⁰⁸ Worse, this data did not include funds collected by the largest for-profit school.¹⁰⁹

III. DEPARTMENT OF EDUCATION PROMULGATES REGULATIONS

Graduates of FPIs, both veteran and non-veteran, increasingly found themselves struggling in a tightening job market and holding degrees that proved to be worth less than they had been led to expect.¹¹⁰ The Department of Education responded in 2009 by announcing its intent “to develop proposed regulations to maintain or improve program integrity in the Title IV, HEA programs,” relating, *inter alia*, to “[s]atisfactory academic progress,” “[i]ncentive compensation paid by institutions to persons or entities engaged in student recruiting or admission activities,” “[g]ainful employment in a recognized occupation,” and “[v]erification of information included on student aid applications.”¹¹¹

A. The Employment Regulations

“Concerned about inadequate programs and unscrupulous institutions, the Department [of Education] has gone looking for rats in ratholes”¹¹² by

107. For example, admission to the Two-Year MBA Program offered by the University of Notre Dame Mendoza College of Business does not depend on transferability of individual credits; the admissions criteria require merely that, “applicants . . . hold a bachelor’s degree or its international equivalent from an accredited college or university in any area of concentration.” *Admissions & Financial Aid*, UNIVERSITY OF NOTRE DAME MENDOZA COLLEGE OF BUSINESS, http://business.nd.edu/mba/admissions_and_financial_aid/apply/

108. BENEFITTING WHOM?, *supra* note 15, at 9.

109. *Id.* at 9, n.17. This data was compiled from financial records voluntarily disclosed by FPIs in response to a HELP Committee inquiry. *Id.* The University of Phoenix, the largest such entity, was among the five institutions that refused to cooperate with the inquiry. *See id.*

110. *See, e.g.*, Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (discussing instances where FPIs “leave large numbers of students with unaffordable debts and poor employment prospects”).

111. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728, 24,728 (May 26, 2009).

112. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 148 (D.D.C. 2012).

promulgating new regulations concerning the rate of gainful employment obtained by graduates of FPIs (“Employment Regulations”).¹¹³ These regulations, which took effect July 1, 2011, were founded upon statutory language, which, until then, had been legally inert. For instance, a seemingly long-overlooked provision of the HEA imposes an eligibility requirement upon FPIs mandating that, in order to draw funds under Title IV, they must offer a program that will “prepare students for gainful employment in a recognized occupation.”¹¹⁴ Another provision uses similar language, defining an “eligible program of training” as one that “prepare[s] students for gainful employment in a recognized profession.”¹¹⁵ Thus, the Department of Education had a statutory foundation upon which to promulgate regulatory benchmarks that measured FPI performance against objective metrics of their graduates’ employment prospects. Since only a narrow exception exists for certain FPI baccalaureate programs, the term “gainful employment program” is a useful label that captures the educational programs that fall under these new regulations.¹¹⁶ The Employment Regulations enforced compliance with this reanimated statutory language by imposing a Debt Measure Rule,¹¹⁷ a Reporting and Disclosure Rule,¹¹⁸ and a new Program Approval Rule.¹¹⁹

1. The Debt Measure Rule

The Debt Measure Rule established maximum and minimum standards for the debt-to-income and loan repayment rates of students who graduate from gainful employment programs offered by FPIs. Under the debt-to-income standard, FPIs whose graduates typically have annual debt service payments that are twelve percent or less of their average annual earnings or thirty percent or less of their discretionary income would continue to qualify for Title IV funds.¹²⁰ Under the loan repayment standard, which “measure[d] . . . whether program enrollees are repaying their loans, regardless of whether they completed the program,” an FPI would fail unless:

113. The Employment Regulations apply to vocational certificate, associate degree programs, and certain baccalaureate programs; they do not pertain to baccalaureate programs offered by accredited FPIs that have offered such programs after January 1, 2009. 20 U.S.C. § 1002(b)(1)(A)(ii) (as amended by Pub. L. 110-315).

114. 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), 1002(c)(1)(A) (2012).

115. *Id.* at § 1088(b)(1)(A)(i).

116. *See, e.g., Duncan II*, 870 F. Supp. 2d at 141.

117. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. § 668.7).

118. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,835–44, 66,948–49 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.6).

119. Program Integrity: Gainful Employment—New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010) (amending 34 C.F.R. §§ 600.10, 600.20).

120. Program Integrity Issues: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (July 26, 2010).

[S]tudents who attended the program (and are not in a military or in-school deferment status) repay their Federal loans at an aggregate rate of at least [35] percent. . . . A loan would be counted as being repaid if the borrower (1) made loan payments during the most recent fiscal year that reduced the outstanding principal balance, (2) made qualifying payments on the loan under the Public Service Loan Forgiveness Program, as provided in 34 CFR 685.219(c), or (3) paid the loan in full.¹²¹

Were an FPI to fall short of these standards, it would be required to notify its current and prospective students of that failure and of any corrective action that the FPI would take to improve its performance.¹²² An FPI that failed in two out of the previous three years would have to include “[a] clear and conspicuous statement that a student who enrolls or continues in the program should expect to have difficulty repaying his or her loans.”¹²³ Failure in three of the previous four years would jeopardize the school’s Title IV eligibility for at least three years.¹²⁴

2. The Reporting and Disclosure Rule

Under the Reporting and Disclosure Rule, FPIs were required to provide the Department of Education with information needed to verify compliance with the Debt Measure Rule.¹²⁵ FPIs were also required to provide prospective students with information regarding the occupation that they would be prepared to enter, the rate at which students graduate on-time at the institution, the tuition and fees charged, the job placement of graduates of the institution, and the median loan burden borne by graduates of the program.¹²⁶

3. The Program Approval Rule

The Program Approval Rule required FPIs to “notify the Secretary [of Education] at least 90 days before the first day of class when it intends to add an educational program that prepares students for gainful employment in a recognized occupation.”¹²⁷ The Secretary had discretion to decide whether or not to scrutinize the program by requiring “program approval.”¹²⁸ The Secretary would then evaluate four factors to determine whether the program should be approved:

121. *Id.* at 43,618–19. The 35% figure is from 76 Fed. Reg. at 34,395 (describing 34 C.F.R. § 668.7(a)(1)).

122. 34 C.F.R. § 668.7(j)(1) (2011).

123. *Id.* at § 668.7(j)(2)(i)(D).

124. *Id.* at §§ 668.7(i), 668.7(l)(2)(ii).

125. 34 C.F.R. § 668.6(a) (2010).

126. *Id.* at § 668.6(b).

127. 34 C.F.R. § 600.10(c)(1) (2010).

128. *Id.* at § 600.20(d)(1)(ii)(B).

- (1) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.
- (2) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.
- (3) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.
- (4) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.¹²⁹

B. The Abusive Recruitment Regulations

The Department of Education, slowed by procedural requirements under the APA,¹³⁰ eventually promulgated another set of regulations under the HEA that were aimed at curbing abusive recruitment practices ("Abusive Recruitment Regulations").¹³¹ The Department "had determined that the existing regulations were too lax, allowing schools to circumvent the proscriptions of the HEA and threaten the integrity of Title IV programs."¹³² After a notice and comment period, the Department promulgated the Abusive Recruitment Regulations.¹³³ The new regulations, *inter alia*, eliminated a regulatory safe-harbor for performance based pay incentives¹³⁴ and broadened the scope of the misrepresentation prohibition.¹³⁵ They also expanded the definition of "misrepresentation" to include:

Any false, erroneous or misleading statement an eligible institution, [. . .] organization, or person with whom the eligible institution has an agreement to provide educational programs, or

129. *Id.* at § 600.20(d)(1)(ii)(E).

130. Despite its negotiated rulemaking committee failing to reach a consensus, the Department of Education ultimately moved forward with proposed regulations. Program Integrity Issues, 75 Fed. Reg. 34,806, 34,807–08 (June 18, 2010).

131. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728 (May 26, 2009); 34 C.F.R. § 668.71(c) (2011).

132. *Ass'n of Private Sector Colls. & Univs., v. Duncan*, 681 F.3d 427, 436 (D.C. Cir. 2012). "For example, following an investigation, agency officials found that the University of Phoenix had 'systematically engage[d] in actions designed to mislead the [Department] and to evade detection of its improper incentive compensation system for those involved in recruiting activities.'" *Id.* (quoting Letter from Donna M. Wittman, Institutional Review Specialist, to Todd S. Nelson, President, Apollo Grp., Inc. (Feb. 5, 2004)).

133. 34 C.F.R. § 668.71(c) (2011).

134. *See supra* notes 42–46 and accompanying text.

135. *See supra* notes 37–41 and accompanying text.

to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to deceive or confuse. A statement is any communication made in writing, visually, orally, or through other means.¹³⁶

Ideally, these regulations should discourage offending FPIs from using misleading recruitment techniques, both directly and indirectly. Directly, recruiters would be constrained by the new regulations such that they could no longer seek to capitalize on deliberately confusing, but technically accurate representations. Indirectly, tightened restrictions on compensation-based incentives would bar offending FPIs from promoting abusive recruitment behavior by way of compensation.¹³⁷

The Association of Private Colleges and Universities filed two complaints in the United States District Court for the District of Columbia, the first in January¹³⁸ of 2011 and the second in July¹³⁹ of 2011. The complaints separately challenged the validity of both the Employment Regulations and the Abusive Recruitment Regulations. The White House acted before the outcome of the above cases could be determined.

IV. EXECUTIVE ORDER 13607

In April of 2012, President Obama responded to the mounting public outcry over “reports of aggressive and deceptive targeting of service members, veterans, and their families” by issuing Executive Order 13607.¹⁴⁰ This directive instructed the Departments of Education, Defense, and Veterans Affairs, *inter alia*, to implement a voluntary honor code, referred to as the “Principles of Excellence.”¹⁴¹ The purpose of this code was to:

[E]nsure that [...] educational institutions provide meaningful information to service members, veterans, spouses, and other family members about the financial cost and quality of educational institutions to assist those prospective students in

136. 34 C.F.R. § 668.71(c) (2011).

137. 34 C.F.R. § 668.14(b)(22)(iii)(C)(2) (2011).

138. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 436 (D.C. Cir. 2012). *See infra*, Part V.

139. Ass’n of Private Sector Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 155 (D.D.C. 2012). *See infra*, Part VI.

140. Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members, 77 Fed. Reg. 25,861, 25,861 (Apr. 27, 2012). *See also* Daniel Golden, *Online Colleges Target Veterans*, BLOOMBERG BUS. WK. (Nov. 4, 2010), available at http://www.businessweek.com/magazine/content/10_46/b4203026910225.htm.

141. *Id.*

making choices about how to use their Federal educational benefits; prevent abusive and deceptive recruiting practices that target the recipients of Federal military and veterans education benefits; and ensure that educational institutions provide high-quality academic and student support services to active-duty service members, reservists, members of the National Guard, veterans, and military families.¹⁴²

The language of the order incorporated several of the Abusive Recruitment Regulations by direct reference. Importantly, section 2(c) provides that the Principles of Excellence should, to the extent permitted by law, require educational institutions receiving funding pursuant to federal military and veteran education benefits to “end fraudulent and unduly aggressive recruiting techniques on and off military installations, as well as misrepresentation, [. . .] *consistent with the regulations issued by the Department of Education* (34 C.F.R. 668.71–668.75, 668.14, and 600.9) . . .

. . .¹⁴³

Executive Order 13607, *strongly encouraged* schools that participate in Title IV to *voluntarily* conform to the Principles. Section 5 expressly says that nothing in the order “shall be construed to impair or otherwise affect [. . .] the authority granted by law to an executive department, agency, or the head thereof.”¹⁴⁴ The order’s power to incentivize FPI’s compliance rests upon section 3(a),¹⁴⁵ which provides that “[t]he Department of Veterans Affairs shall [. . .] notify all institutions participating in the Post-9/11 GI Bill program that they are strongly encouraged to comply with the Principles and shall post on the Department’s website [a list of] those that do.”¹⁴⁶ Presumably, any FPIs that refused to conform to the Principles of Excellence would have difficulty recruiting student veterans because those students might be reluctant to trust an institution that was not listed on the VA’s website.

The American Council on Education (“ACE”), a for-profit education industry trade organization, responded to Executive Order 13607 with an open letter addressed to the Directors of the Departments of Defense, Education, and Veterans Affairs, and to the Director of the Consumer Financial Protection Bureau. In the letter, the ACE took the position that the language of section 2(c) parallels “HEA requirements” to which most “member institutions . . . are already subject” as participants in Title IV

142. 77 Fed. Reg. at 25,861. These principles apply to all institutions that participate in Title IV.

143. *Id.* at 25,862 (emphasis added). As discussed above, it might have been difficult to predict the result of tying the functional nuances of the Principles of Excellence to regulations that were recently promulgated and were the subject of two pending cases.

144. *Id.* at 25,864.

145. *Id.* at 25,862.

146. *Id.*

programs.¹⁴⁷ The Department of Education indicated that this understanding was correct.¹⁴⁸ This response shows that Executive Order 13607 does no more to prevent misrepresentation by FPIs than that which was already accomplished by the Department of Education's Abusive Recruitment Regulations.

V. ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES V.
DUNCAN – JUNE 5, 2012

A. The Decision

The legal framework of protections afforded to student veterans gained another layer of complexity with the D.C. Circuit's decision in *Association of Private Sector Colleges and Universities v. Duncan* ("Duncan I") on June 5, 2012.¹⁴⁹ The controversy in that case centered on the validity of the Department of Education's Abusive Recruitment Regulations.¹⁵⁰ The ASPCU argued, *inter alia*, that the restriction on compensation-based incentives for recruitment professionals¹⁵¹ and the newly expanded scope of the ban on misleading and confusing statements¹⁵² exceeded the Department's authority under the HEA, and were arbitrary and capricious.¹⁵³ Ultimately, the D.C. Circuit invalidated several portions of the regulations that were integral components of the Department's efforts to curb predatory recruitment of student veterans by for-profit colleges and universities.¹⁵⁴

The court held that the restriction on compensation-based incentives was invalid on procedural grounds.¹⁵⁵ Applying a *Chevron*¹⁵⁶ analysis, the court

147. Letter from Am. Council on Educ. to Leon E. Panetta, U.S. Sec'y of Def.; Arne Duncan, Sec'y of Educ.; Eric K. Shinseki, Sec'y of Veterans Affairs; and Richard Cordray, Dir. of Consumer Prot. Bureau (Jun. 22, 2012) (on file with author), *available at* <http://www.acenet.edu/news-room/Documents/Letter-to-Obama-Administration-on-Principles-of-Excellence-for-Service-Members,-Veterans-Education.pdf> (re: Executive Order 13607).

148. See Letter from David A. Bergeron, Acting Assistant Sec'y for Postsecondary Educ. to "Colleague" on Executive Order 13607 (Jul 13, 2012) (on file with author), *available at* <http://ifap.ed.gov/dpceletters/attachments/GEN1210PEO13607.pdf> (EO 13607 Information Working Group discussing compliance requirements for FPIs).

149. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012). This case was heard on appeal following a proceeding in the United States District Court for the District of Columbia wherein the Association of Career Colleges, *inter alia*, brought a challenge under the Administrative Procedure Act to certain regulations promulgated by the Department of Education under the HEA. See *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011).

150. See *supra* notes 129–136 and accompanying text.

151. *Duncan I*, 681 F.3d at 442, 447.

152. *Id.* at 449.

153. *Id.* at 440.

154. *Id.* at 435.

155. *Id.* at 448–49.

found that the new compensation regulations did not exceed the Department's statutory authority under the HEA.¹⁵⁷ The court was, however, unsatisfied by the reasoning provided by the Department for the elimination of a regulatory "safe harbor" and the perfunctory manner with which it replied to certain comments about minority outreach compensation incentives.¹⁵⁸ The court remanded this particular issue with instructions to allow the Department an opportunity to provide sufficient reasoning behind its new regulations.¹⁵⁹

The court also held that the expanded scope of the Abusive Recruitment Regulations pertaining to misrepresentations exceeded the statutory authority under the HEA.¹⁶⁰ The court decided that the Abusive Recruitment Regulations impermissibly broadened both the scope and the definition of "misrepresentation."¹⁶¹ With regard to scope, the HEA prescribed sanctions for misrepresentation of the "nature of [an institution's] educational program, its financial charges, or the employability of its graduates," while the new regulations provided sanctions for institutions that made misrepresentations "regarding the eligible institution, including about the nature of its educational program, its financial charges, or the employability of its graduates."¹⁶²

As a matter of definition, the HEA prohibits institutions from engaging in "substantial misrepresentation," while the new regulations redefined the term "misrepresentation" to include "any statement that has the likelihood or tendency to deceive or confuse."¹⁶³ Since the term "misrepresentation" was originally qualified by the adjective "substantial," the court reasoned that Congress did not intend to capture terms that are likely to confuse, but which are "both truthful and nondeceitful," within the definition of "misrepresentation."¹⁶⁴ Thus, according to the court, the Department's new prohibition on "confusing" representations had exceeded the intention of Congress when it enacted the HEA and its subsequent amendments.¹⁶⁵

It is possible that the court misunderstood congressional intent with regard to what the prohibition on misrepresentation should encompass. Legislative history reveals that Congress included the Misrepresentation Rule because it sought to provide the Department of Education with "the necessary tools to keep unethical individuals from engaging in unlawful

156. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

157. *Duncan I*, 681 F.3d at 442–47.

158. *Id.* at 447–50.

159. *Id.*

160. *Id.* at 452–53.

161. *Id.*

162. *Id.* at 439.

163. *Id.*

164. *Id.* at 452–53.

165. *Id.*

conduct and *sharp practice*.”¹⁶⁶ The use of the term “sharp practice” is indicative of a broader congressional intent because it describes “[u]nethical action and trickery.”¹⁶⁷ Since unethical action and trickery do not rise to the level of “substantial misrepresentations” as that phrase was construed by the *Duncan I* court,¹⁶⁸ the court likely erred when it concluded that Congress intended to exclude “confusing” representations from the definition of “misrepresentation.”

Regrettably, the *Duncan I* decision indirectly stymied Executive Order 13607, thereby stunting presidential efforts to reduce predatory behavior by FPIs toward student veterans. The force of Executive Order 13607, with respect to its goal of protecting student veterans from predatory recruitment practices, derives from language embedded in the text of section 2(c). This section elaborates upon what is expected of FPIs that conform to the Principles of Excellence. Specifically, this section requires FPIs to “end fraudulent and *unduly aggressive* recruiting techniques . . . as well as misrepresentation, [and] payment of incentive compensation, . . . consistent with the regulations issued by the Department of Education (34 C.F.R. 668.71–668.75, 668.14, and 600.9).”¹⁶⁹ The plain language clearly contemplates a prohibition on *unduly aggressive*¹⁷⁰ recruiting techniques, as well as misrepresentation, even if they do not rise to the level of misrepresentation.¹⁷¹ Moreover, the order makes reference to section 668.71, which directs FPIs to refrain from making communications that are likely to confuse, even where no misrepresentation is made, strictly speaking. By invalidating section 668.71, the *Duncan I* court curtailed the scope of the Principles of Excellence; no conduct is denounced now that was not already prohibited by regulations prior to Executive Order 13607. At best, Executive Order 13607 is now practically ineffectual; at worst, the Principles of Excellence may have the perverse effect of exacerbating the hazard faced by student veterans.

B. The Perverse Effect of *Duncan I* on Executive Order 13607

Executive Order 13607 and the Principles of Excellence have been distorted by the *Duncan I* decision so much so that they are likely to

166. H.R. REP. NO. 94-1086, at 13 (1976) (emphasis added).

167. BLACK'S LAW DICTIONARY 1501 (9th ed. 2009).

168. See *supra* notes 152–156 and accompanying text.

169. Exec. Order 13607, 77 Fed. Reg. 25,862, § 2 (Apr. 27, 2012) (emphasis added).

170. “Undue” is defined as “unsuited to the time, place, or occasion.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip Babcock Gove et al eds., 1986). “Aggressive” is defined as “combative readiness or bold determination.” *Id.*

171. The phrase “as well as” demonstrates a prohibition of distinct categories of conduct—the first category is “unduly aggressive recruiting techniques” and the second category is “misrepresentations.”

exacerbate predatory recruitment practices.¹⁷² Without section 668.71's prohibition on confusing statements, FPIs may abide by the Principles of Excellence without significantly altering recruitment practices that were in place before President Obama intervened¹⁷³—the very same recruitment practices that prompted the order.¹⁷⁴ Moreover, student veterans, who are unlikely to be sufficiently familiar with the legal nuances implicated by *Duncan I* to appreciate that Executive Order 13607 has no independent legal force, might rely on the assurances implied by the Principles of Excellence.¹⁷⁵ For example, the University of Phoenix, Devry, and Kaplan University are listed participants in the Principles of Excellence.¹⁷⁶ These same institutions are among those criticized by Senator Harkin's report on abuses in for-profit higher education.¹⁷⁷ The list of conforming institutions is prominently advertised on the VA's website.¹⁷⁸ It is reasonable to presume that at least some student veterans might view conformity with the Principles of Excellence as an official endorsement of an FPI's quality and trustworthiness. In this way, the Principles of Excellence might lull some student veterans into a false sense of confidence in FPIs that are listed on the Department of Veteran's Affairs's official website.

VI. ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES V.
DUNCAN – JUNE 30, 2012

Shortly after the *Duncan I* court reached its June 5, 2012 decision, the United States District Court for the District of Columbia decided *Association of Private Colleges and Universities v. Duncan* (“*Duncan II*”).¹⁷⁹ The ASPCU filed this complaint almost six months after it filed the complaint in *Duncan I*, affording *Duncan I* the time to rise to the appellate

172. “At its simplest, the definition of a predatory educator might be one who, in pursuit of profit, takes advantage of students by unfair, although not necessarily unlawful, means.” James, *supra* note 84, at 69.

173. See Bergeron, *supra* note 149.

174. Exec. Order 13607, 77 Fed. Reg. 25,862 (Apr. 27, 2012).

175. “[T]he quality of education can be assessed neither in advance nor upon initial inspection These obstacles to assessment are only compounded by information asymmetry.” James, *supra* note 84, at 76.

176. See, e.g., California Principles of Excellence Schools, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/gibill/resources/education_resources/principles_of_excellence/2012/states/ca.asp (last visited Jan. 13, 2014).

177. FAILURE TO SAFEGUARD, *supra* note 8, at 20–21. See also Golden, *supra* note 140 (“At Kaplan University, only 30 percent of two-year students and 33 percent of four-year students graduate.”); Stephen Burd, *More Scrutiny Needed of the University of Phoenix’s Recruiting Practices*, HIGHER ED WATCH (Feb. 19, 2009), <http://www.newamerica.net/blog/higher-ed-watch/2009/more-scrutiny-needed-university-phoenix-10193>.

178. See *supra* note 174.

179. Ass’n of Private Colleges and Universities v. Duncan, 870 F. Supp. 2d 133, 155 (D.D.C. 2012).

level before *Duncan II* was decided in district court. The issue in *Duncan II* centered on whether the Department of Education had exceeded the scope of its authority under the HEA, or acted arbitrarily or capriciously, when it promulgated the Employment Regulations of 2011.¹⁸⁰ After rejecting the ASPCU's argument that the Department had exceeded its authority under the HEA, the court invalidated most of the Department's Employment Regulations (the Debt Measure Rule, Disclosure Requirements, and a Program Approval Rule) for lack of reasoned decision-making.¹⁸¹ More specifically, the court held that one portion of the Debt Measure Rule was arbitrary and capricious,¹⁸² and vacated most of the remaining provisions of the Employment Regulations of 2011 because they were not severable from the invalidated Debt Measure Rule.¹⁸³

The court invalidated only one component of the Employment Regulations, a debt repayment standard, on the grounds that it was the product of arbitrary and capricious rulemaking.¹⁸⁴ It also declared invalid the Debt Measure Rule, of which the debt repayment standard was a component, because its individual components could not be severed from the invalidated debt repayment standard.¹⁸⁵ The court partially vacated another component, the disclosure requirement, because, without the Debt Measure Rule, it was "not in accordance with" 20 U.S.C. § 1015c."¹⁸⁶

180. *Id.* at 144–45 (citing 5 U.S.C. § 706(2)(A) (2012)).

181. *Id.* at 155.

182. *Id.* at 154. The debt repayment standard of the Debt Measure Rule was the only portion of the Employment Regulations of 2011 that the court found to be arbitrarily and capriciously promulgated; the rest of the Regulations, with the exception of a disclosure requirement, were invalidated because they were not severable from the debt repayment standard. *Id.* at 154, 158.

183. *Id.* at 158.

184. The threshold repayment rate of thirty-five percent, below which an institution would jeopardize its Title IV eligibility, was "chosen because approximately one quarter of gainful employment programs would fail a test set at that level." *Id.* at 153. "That this explanation could be used to justify any rate at all demonstrates its arbitrariness." *Id.* at 154.

185. *Duncan II*, 870 F. Supp. 2d at 154. A court must vacate an entire rule, rather than just an invalid portion of the rule, when the portions of the rule are "intertwined" such that there is "a substantial doubt that a partial affirmance would comport with the [agency's] intent." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994). The relevant test is "whether . . . there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina v. FERC*, 730 F.2d 790, 795–96 (D.C. Cir. 1984).

186. *Duncan II*, 870 F.Supp. 2d at 155. The court left in place the requirement that FPIs offering gainful employment programs disclose to prospective students information on "the occupation that the program prepares students to enter, the on-time graduation rate for students completing the program, the tuition and fees charged, and the placement rate and median loan debt for students completing the program." *Id.* at 155–56 (citing 34 C.F.R. § 668.6(b)). *See also Ass'n of Private Colleges and Universities v. Duncan*, 2013 WL 1111438 (D.D.C. Mar. 19, 2013) (denying Department of Education's motion to amend on the ground that the vacated reporting

Finally, the court vacated the Program Approval Rule, because it was no longer “animate[d]” by the Debt Measure Rule.¹⁸⁷

The court invalidated the debt repayment standard because it was not the product of reasoned decision making.¹⁸⁸ Despite an acknowledgement that “[t]he debt to income standards were the product of a ‘rational connection between the facts found and the choice made,’”¹⁸⁹ the court vacated the entire debt measure rule because “the Department has repeatedly emphasized the ways in which the debt repayment and debt-to-income tests were designed to work together,” and were therefore “obviously ‘intertwined.’”¹⁹⁰ The opinion did not elaborate on the *Duncan II* court’s conclusion that there is “substantial doubt that a partial affirmance [of the debt repayment test] would comport with the . . . [agency’s] intent.”¹⁹¹

VII. LEGISLATIVE ACTION

Given that the *Duncan* decisions stymied efforts by the White House and the Department of Education to protect veterans from the predatory recruitment practices of certain unscrupulous FPIs, legislative action appears to be the best hope for a solution. Encouragingly, Congress passed the Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012¹⁹² (“Other Veterans’ Benefits Improvement Act”) and the Improving Transparency of Education Opportunities for Veterans Act of 2012¹⁹³ (“Improving Transparency Act”). President Obama signed both bills into law on January 10, 2013.

A. The Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012

The Other Veterans’ Benefits Improvement Act is composed of several sections, but contains only two that are relevant to the for-profit higher education industry. The first provides that the Secretary of Labor is to provide the Transition Assistance Program, which currently exists as an on-base service that is provided for all service members nearing the end of

requirements were necessary to the proper operation of the upheld disclosure requirements).

187. *Duncan II*, 870 F. Supp. 2d at 158.

188. *Id.* at 153–54.

189. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

190. *Id.* at 154 (citing Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,394–400 (Jun. 13, 2011)).

191. *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994) (citing *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984)).

192. Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012, Pub. L. No. 112-260, 126 Stat. 2417 (2013).

193. Improving Transparency of Education Opportunities for Veterans Act of 2012, Pub. L. No. 112-249, 126 Stat. 2398 (2013).

their service contracts, as well as their spouses,¹⁹⁴ “to [veterans and their spouses] at locations other than military installations to assess the feasibility and advisability of providing such program . . . at locations other than military installations.”¹⁹⁵ The second relevant section provides that the Secretary is to “ensure that the training provided . . . generally follows the content of the Transition Assistance Program.”¹⁹⁶ The program is to be implemented in no less than three and no more than five states.¹⁹⁷ There are no modifications to the content of the training to be provided. The disappointing feature of this legislation is that it appears to be nothing more than a repetitive offering of training that properly discharged veterans are already required to receive.

B. The Improving Transparency of Education Opportunities for Veterans Act of 2012

The Improving Transparency Act also contains two sections that implement reforms to veterans’ educational benefits programs. Section 1 directs the Secretary of Veterans Affairs “to develop a comprehensive policy to improve outreach and transparency to veterans . . . through the provision of information on institutions of higher learning.”¹⁹⁸ Section 2 includes a provision that would withhold eligibility to participate in Post-9/11 GI Bill funding from institutions that provide certain recruiter incentive payments.¹⁹⁹

Pursuant to section 1, the Secretary’s comprehensive policy is to include “effective and efficient methods” of informing veterans of educational and vocational counseling services that are available to them.²⁰⁰ Additionally, the policy must create a “centralized mechanism for tracking and publishing feedback from students and State approving agencies regarding the quality of instruction, recruiting practices, and post-graduation employment placement of institutions of higher learning.”²⁰¹ The Secretary’s policy must also include the “merit of and the manner in which

194. 10 U.S.C. § 1144(a) (2012).

195. Pub. L. No. 112-260, § 301(a)–(b), 126 Stat. 2417, 2424 (2013). Under the Transition Assistance Program, “attendees learn about job searches, career decision-making, current occupational and labor market conditions, and resume and cover letter preparation and interviewing techniques. Participants also are provided with an evaluation of their employability relative to the job market and receive information on the most current veterans’ benefits.” VETS Fact Sheet 1, U.S. DEP’T OF LABOR, http://www.dol.gov/vets/programs/tap/tap_fs.htm (last visited May 17, 2013).

196. § 301(d).

197. § 301(c).

198. Pub. L. No. 112-249, § 1, 126 Stat. 2398, 2398 (2013).

199. § 2, 126 Stat. at 2401.

200. § 1, 126 Stat. at 2398 (to be codified at 38 U.S.C. § 3698).

201. *Id.* (feedback will only be published if it satisfies criteria for relevancy, which are to be determined by the Secretary, and only after institutions are allowed to verify and address the information).

a State approving agency shares” its evaluations with recognized accrediting agencies.²⁰² Lastly, the Secretary is to implement “effective and efficient methods” to inform student veterans of available postsecondary education opportunities.²⁰³ Specifically, the different types of accreditation are to be explained to them, along with the various Federal student aid programs.

The Secretary is also directed to ensure that student veterans receive specific information about “each institution of higher learning” that offers veterans “postsecondary education and training opportunities.”²⁰⁴ They are to receive such information as “whether the institution is public, private nonprofit, or proprietary for-profit,” and “information regarding the institution’s policies related to transfer of credit from other institutions.”²⁰⁵ They are also entitled to information regarding each institution’s median debt burden from Title IV loans and the cohort default rates of recent graduates, “as determined from information collected by the Secretary of Education.”²⁰⁶

It is encouraging that the Improving Transparency Act aims to reduce information asymmetry by establishing a centralized program for tracking and publishing student feedback. However, the language of the statute needlessly injects uncertainty into the particularities of this program’s structure. For example, the feedback regarding quality of instruction, recruiting practices, and employment prospects can be published only if it “conforms with criteria for relevancy” and only after colleges and universities “verify feedback and address issues.”²⁰⁷ While the statute does not clearly indicate how the Secretary is to determine appropriate “criteria for relevancy,” it stipulates that the Secretary is to ensure that “the comprehensive policy is consistent with any requirements and initiatives resulting from Executive Order No. 13607.”²⁰⁸ Recall that Executive Order 13607 compels institutions to “end fraudulent and unduly aggressive recruiting techniques . . . as well as misrepresentation, payment of incentive compensation, and failure to meet State authorization requirements, consistent with the regulations issued by the Department of Education.”²⁰⁹ Recall also that these are the same regulations that were vacated by the

202. *Id.* at 2398–400.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* This language seems to cast doubt on the court’s reasoning in *Duncan II*, where the Department of Education was barred from requiring that this type of information be disclosed to the government.

207. Pub. L. No. 112-249, §1, 126 Stat. 2398, 2398. (to be codified at 38 U.S.C. § 3698(b)(2)(A)).

208. §1, 126 Stat. at 2400 (to be codified at 38 U.S.C. § 3698(d)(1)).

209. Exec. Order 13607, 77 Fed. Reg. 25,862, §2 (Apr. 27, 2012). *See supra* notes 139–146 and 170–176 and accompanying text.

District of Columbia Circuit's holding in *Duncan I*.²¹⁰ If the "criteria for relevancy" are to mirror the *modus operandi* of Executive Order 13607, then feedback of abusive recruitment practices might be censored as irrelevant, provided that recruiters are careful to capitalize on recruitment tactics that tend to confuse their targets (permissible) without going too far by making assertions that amount to substantial misrepresentations (impermissible). This is because, in the wake of *Duncan I*, the requirements of Executive Order 13607 now refer to HEA regulations as they existed before 2011; thus, the requirements do not touch upon the type of abusive conduct that the Department of Education sought to mitigate by promulgating the ill-fated Abusive Recruitment Regulations.

The second relevant section of the Improving Transparency Act imposes a familiarly phrased restriction on certain types of compensation-based recruitment incentives. To wit, the Secretary is directed to withhold approval of programs offered by institutions that pay "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance."²¹¹ This language appears to be a verbatim copy of section 487(a)(20) of the HEA—the very same provision upon which the Department of Education drew when it eliminated regulatory safe harbors for certain compensation programs.²¹² Frustratingly, the Improving Transparency Act's subsequent provision provides that "the Secretary shall carry out . . . [the preceding subsection] in a manner that is consistent with the Secretary of Education's enforcement of section 487(a)(20) of the Higher Education Act of 1965."²¹³ Recall that the *Duncan I* rationale prevented the Department of Education from eliminating safe harbors for compensation-based pay incentives. Thus, rather than strengthen regulatory protection for student veterans, this language almost guarantees that FPIs will continue to offer the type of compensation-based pay incentives that *Duncan I* preserved.

CONCLUSION

The interplay between the HEA and the Post-9/11 GI Bill incentivizes predatory behavior by FPIs. The Cohort Default Rate Rule and the 90/10 Rule make tempting prey out of former service members, and deceptive recruiters working under lax regulations readily capture those former service members' lucrative entitlements. A frustrating history of ineffective

210. See *supra* notes 148–163 and accompanying text.

211. Pub. L. No. 112-249, § 2, 126 Stat. 2398, 2401 (to be codified at 38 U.S.C. § 3696(d)).

212. See *supra* notes 42–46, 133, 151–157 and accompanying text.

213. Pub. L. No. 112-249, § 2, 126 Stat. 2398, 2401 (to be codified at 38 U.S.C. § 3696(d)).

regulation demonstrates that a comprehensive legislative solution is needed. Modifications to the 90/10 Rule would be a step in the right direction. However, some FPIs have demonstrated a clever tenacity to circumvent regulations. So long as *any* incentive to exploit student veterans remains,²¹⁴ there will continue to be a risk of predatory recruitment.

A legislative solution must strengthen the Department of Education's ability to enforce fair and honest recruitment practices. As repeat players in the higher education market, FPIs are likely to enjoy continued advantages over prospective students in the form of an information asymmetry favoring the former and an unsophisticated bargaining position endemic to the latter.²¹⁵ The for-profit model creates a motive for FPIs to maximize returns for equity owners, which can diminish investment in the quality of educational programs. Since prospective students can be ill-suited to the task of appraising the quality of educational programs, FPIs are likely to have an incentive to exploit the market advantages that exist between themselves and student veterans. The *Duncan II* holding curtailed the Department's ability to prevent abuses by FPIs under the current statutory framework of the HEA. Therefore, abusive recruitment is likely to continue until more effective regulatory tools are available.

The Principles of Excellence established under Executive Order 13607 should be eliminated or revised. Under the current scheme, FPIs are able to participate in Title IV funding programs without altering any of the practices that prompted the issuance of the order. The White House intended to implement a plan that would enhance the ability of student veterans to protect themselves by enabling them to quickly identify colleges and universities that conform to a standard of integrity greater than what is currently required by law.²¹⁶ The plan directed that a list of conforming institutions be maintained on the Department of Veterans Affairs website, thereby providing prospective student veterans with an official endorsement of ostensibly high-quality programs with honest recruitment staff. Unfortunately, as a consequence of *Duncan I*, the Principles of Excellence now make reference to the regulations that were in place prior to 2011, which proscribe only "substantial misrepresentations."²¹⁷ In this way, the Principles of Excellence program offers few, if any, of the protections that recipients of educational benefits might reasonably expect. Rather than protecting student veterans from "aggressive and deceptive targeting" by educational institutions, the

214. See, e.g., The Cohort Default Rate Rule, *supra* notes 79–82 and accompanying text.

215. For a discussion of information asymmetries and other distortions in the market for higher education, see Brian Pusser & Dudley J. Doane, *Public Purpose and Private Enterprise: The Contemporary Organization of Postsecondary Education*, 33 CHANGE 18, n.5 (2001).

216. Exec. Order 13607, 77 Fed. Reg. 25,861, §1 (Apr. 27, 2012).

217. 34 C.F.R. § 668.71(a) (2010).

Principles of Excellence assist unsavory FPIs by fostering a false sense of security in prospective victims. Voluntary participants in the Principles of Excellence should be held to a standard that more closely parallels the high expectations implied by the language of Executive Order 13607.

One might wonder why Congress would opt, as it did in January of 2013, for suspiciously worded legislation aimed at increasing access to information. The Senate Health, Education, Labor, and Pensions Committee has made clear that action is needed to address the incentives of FPIs to exploit student veterans. Sadly, the only proposed legislation that would at least partly address the issue of predatory recruitment continues to languish in Congress.²¹⁸ Veterans represent an honorable class of Americans with a long and unbroken tradition of fidelity and service to their country. For decades, Congress has demonstrated that it, in turn, is committed to promoting the well-being of these honored men and women on behalf of a grateful nation. It is discouraging that at a time when our veterans are in such need, and when we can agree on so little else, that our leaders seem so reluctant to act.²¹⁹

218. See, e.g., Military and Veterans Education Protection Act, H.R. 4055, 112th Cong. (2012). This proposed law would remove the incentive to exploit student veterans created by the interplay between the GI Bill and the 90/10 Rule. Specifically, it would categorize revenue received by FPIs from the Department of Veterans Affairs via GI Bill tuition payments so as to be included in the 90 percent of revenue received from Title IV programs. If passed, the proposed law would require FPIs to derive at least 10 percent of their revenue from non-federal sources, which would no longer include tuition payments pursuant to GI Bill education benefits. *Id.*

219. At the time this article was transmitted for publication, the Secretary of Education had recently circulated proposed regulations that, if promulgated, would resemble the Employment Regulations that were vacated by the *Duncan II* decision. See generally, *Draft for Discussion Purposes 11/08/2013*, U.S. DEP'T OF EDU., <http://www2.ed.gov/policy/highered/reg/hearrulemaking/2012/draft-regs-session2-11813.pdf>. Unfortunately, there is a statutory exception to the proposed regulations. *Id.* at 4 (conforming the definition of a "gainful employment program" to 34 C.F.R. § 668.8(d)). Recall that the HEA defines a "proprietary institution of higher education" as one that "provides an eligible program of training to prepare students for gainful employment in a recognized occupation." 20 U.S.C. § 1002(b)(1)(A)(i). This is the language that authorizes the Department of Education to promulgate regulations that impose standards based upon metrics of "gainful employment." See *supra* note 113. However, there is a grandfather clause that exempts any school from the proposed regulations that "provides a program leading to a baccalaureate degree in liberal arts, and has provided such a program since January 1, 2009," and which has been regionally accredited since October 1, 2007. 20 U.S.C. § 1002(b)(1)(A)(ii); 34 C.F.R. § 668.8(d)(4). Thus, many of the schools that were criticized by the Senate HELP committee's reports can claim eligibility for this exception from the proposed gainful employment rule. See *BENEFITTING WHOM?*, *supra* note 15, at 21–25 (noting that 22 of the 30 listed schools drew federal funding in 2006, necessarily implying accreditation and program offerings since at least that year).

While these proposed regulations are a welcome attempt to mitigate abusive practices in the proprietary higher education industry, they are woefully insufficient. They do not address the incentives created by the 90/10 Rule to target student veterans and they do not prevent the use of confusing statements in the recruitment process. Worse, it is

possible that they will not even apply to some of the industry's most suspect members. These measures are unlikely to effectively protect student veterans and, if nothing else, highlight the need for comprehensive legislative reform.

