

WHERE THE FEDERAL GOVERNMENT FAILS  
STATE LEGISLATURES CAN SUCCEED:  
ELIMINATING STUDENT DEBT BY  
REGULATING FOR-PROFIT COLLEGES AND  
UNIVERSITIES

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## INTRODUCTION

Throughout recent decades in the United States, choosing to invest in oneself through education, regardless of the costs, has been a practical way to a happier and more successful life.<sup>1</sup> Furthermore, such an investment is easily achieved, thanks to accessible financial support for students from the federal government.<sup>2</sup> The result of this reality has been an increase in the number of people seeking post-secondary educations.<sup>3</sup> This increase leads to more students, higher education costs, and, ultimately, increased student debt.<sup>4</sup> The two most common forms of federal financial aid are grants and loans.<sup>5</sup> In order to qualify for the largest grant programs, students have to show financial need, while student loans are available to all potential students.<sup>6</sup> Because of this availability, student loans are the most common form of federal aid.<sup>7</sup> Student loans, although long-term and low-interest, still come with the obligation of repayment and have created a massive debt burden.<sup>8</sup> In 2014, the total amount of debt created by student loans surpassed one trillion dollars.<sup>9</sup> This amount is triple the amount of student debt in 2004, and is now greater than debt caused by either credit cards or auto loans.<sup>10</sup> Such a debt burden creates a multitude of economic problems for students and threatens the viability of pursuing higher-level education. This Note seeks to evaluate what has been identified as one of the main contributors to the problem of rising student debt: for-profit colleges and universities –specifically, the disproportionate amount of debt originating from students at for-profit institutions. At both the federal and state level, government action has been underway to establish greater regulation of for-profit institutions, but recent federal attempts at such regulations have been stymied by federal courts.<sup>11</sup> First, this Note will evaluate attempted regula-

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1. See, e.g., Katherine Peralta, *Benefits of College Still Outweigh Costs, Fed Study Says*, U.S. NEWS & WORLD REPORT (June 24, 2014), <http://www.usnews.com/news/articles/2014/06/24/benefits-of-college-still-outweigh-costs-fed-study-says>.

2. See *Federal Student Loans*, SIMPLETUITION, <http://www.simpletuition.com/student-loans/federal/> (last visited Mar. 1, 2015).

3. See *Fast Facts: Enrollment*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Mar. 1, 2015).

4. See Janet Lorin, *Student Debt: The Rising U.S. Burden*, BLOOMBERG (Oct. 8, 2014, 11:48 AM), <http://www.bloombergtv.com/quicktake/student-debt>.

5. *Fast Facts: Financial Aid*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=31> (last visited Mar. 1, 2015).

6. *Id.*

7. *See id.*

8. *See* Lorin, *supra* note 4.

9. *Id.*

10. *Id.*

11. *See infra* Part II; *see also infra* Part IV.

tions by the Department of Education, and the judicial decisions vacating their implementation. After establishing the barriers to regulation at the federal level, this Note will examine the California State Legislature's efforts to regulate for-profit institutions. Finally, this Note will conclude that although a comprehensive legislative plan at the federal level would be the ideal way to regulate for-profit institutions and reduce overall student debt, state legislatures can offer more practical and immediate assistance to these problems.

### I. THE FOR-PROFIT PROBLEM

Under Title IV of the Higher Education Act of 1965 ("HEA"), Congress made financial assistance available to qualified students attending colleges and universities.<sup>12</sup> Students could receive either a Federal Pell Grant, which required no repayment from the student and was only available to students of demonstrated need, or federally guaranteed loans, which required repayment.<sup>13</sup> Originally, this financial assistance was limited to students attending non-profit colleges and universities.<sup>14</sup> However, in 1972 Congress amended the HEA, extending Title IV assistance to students at proprietary institutions of higher learning.<sup>15</sup> This change in the HEA led to an explosion of for-profit institutions ("FPIs") in the early 1980s.<sup>16</sup>

Due to the availability of federal assistance, FPIs have grown and expanded into a wide-ranging and profitable industry over the last thirty years.<sup>17</sup> The majority of FPIs are either owned by companies traded on a major stock exchange or by a private equity firm.<sup>18</sup> In 2009, the publicly traded companies that own one or more FPIs "had an average profit margin of 19.7 percent, [and] generated a total of \$3.2 billion in pre-tax profit. . ."<sup>19</sup> For the most part, these profits are the result of Title IV financial assis-

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

13. See *Fast Facts: Financial Aid*, *supra* note 5.

14. Higher Education Act of 1965, § 421(a)(1).

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

16. See Mark Andrew Nelson, Note, *Never Ascribe to Malice that which is Adequately Explained by Incompetence: A Failure to Protect Student Veterans*, 40 J.C. & U.L. 159, 161 (2014).

17. *Id.*

18. 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 2 (July 30, 2012) [hereinafter FAILURE TO SAFEGUARD].

19. *Id.*

tance, with the government investing as much as thirty-two billion dollars in FPIs in 2009.<sup>20</sup> FPIs are eligible to receive “up to 90 percent of their revenue from taxpayer dollars, with the additional revenue frequently coming from veterans’ benefits and private student loans.”<sup>21</sup> Additionally, the for-profit industry only continues to grow as the number of students has increased “from approximately 766,000 students in 2001 to 2.4 million students in 2010.”<sup>22</sup>

Many believe this growth is cause for concern, because, as they see it, the rise in for-profit education has contributed to the growing student debt crisis. The Obama Administration, for example, has expressed concern about the fact that “[s]tudents at for-profit colleges represent only about 13 percent of the total higher education population, but about 31 percent of all student loans. . . .”<sup>23</sup> Of even more cause for concern, recent numbers suggest that students at for-profit colleges account for nearly half of all loan defaults, and “about 22 percent of student borrowers at for-profit colleges defaulted on their loans within three years. . . .”<sup>24</sup> The cause of this debt crisis with students at FPIs is twofold. The first cause is the large number of FPI students who fail to graduate. For example, a Senate investigation of select FPIs in 2012 showed that “more than half of the students who enrolled in those colleges in 2008-9 left without a degree or diploma within a median of 4 months.”<sup>25</sup> Additionally, among students seeking a two-year associate’s degree, sixty-three percent left without earning their degree.<sup>26</sup> At some FPIs the withdrawal rate tops seventy-five percent, leaving the majority of students with debt and no diploma.<sup>27</sup> The second cause is the failure of graduates of FPIs to obtain gainful employment. According to another study done by the Department of Education, “the majority [of programs] – 72 percent – produced graduates who on average earned less than high school dropouts.”<sup>28</sup> Therefore, even if students enrolled at FPIs are able to defy the odds and graduate, it is still unlikely that they will find gainful employment and be able to manage their student debt.

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20. See *id.* (stating that in 2009-2010 for profit colleges and universities received \$32 billion or “25 percent of the total Department of Education student aid program funds.”).

21. Press Release, U.S. Dept. of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014) [hereinafter Obama Administration Takes Action].

22. FAILURE TO SAFEGUARD, *supra* note 18, at 32.

23. Obama Administration Takes Action, *supra* note 21.

24. *Id.*

25. FAILURE TO SAFEGUARD, *supra* note 18, at 1.

26. *Id.* at 2.

27. See S. HEALTH, EDUC., LABOR & PENSIONS COMM., 111TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 11 (2010).

28. Obama Administration Takes Action, *supra* note 21.

## II. DEPARTMENT OF EDUCATION ATTEMPTS REGULATION

Beginning in 2009, the Department of Education passed new regulations under Title IV of the HEA in order to improve program integrity and graduate-employment placement.<sup>29</sup> These regulations applied to all Title IV institutions, but targeted problems perpetuated by FPIs. The first set of regulations targeted the abusive recruitment techniques used by some FPIs, which were believed often to be aggressive, misleading, and deceptive (“Abusive Recruitment Regulations”).<sup>30</sup> Then in 2010 and 2011, the Department of Education passed a series of regulations regarding the rate of gainful employment obtained by graduates of FPIs (“Gainful Employment Regulations”).<sup>31</sup> This second set of regulations was aimed at creating specific standards that FPIs would be required to meet in order to continue gaining HEA Title IV funding.<sup>32</sup> The Department of Education hoped these two sets of regulations would help protect students from predatory institutions and promote responsible use of Title IV financial assistance.<sup>33</sup>

### A. Abusive Recruitment Regulations

The recruiting practices of FPIs have been identified as one of the more malicious and indecent aspect of the for-profit system. The focus of FPI recruiting is usually on “a population of non-traditional prospective students who are often not familiar with traditional higher education and may be facing difficult circumstances in their lives.”<sup>34</sup> Admissions representatives are often trained to target painful aspects of a potential student’s life, and then exploit that emotion to enroll the student.<sup>35</sup> Compounding on this viciousness, FPIs will then often misrepresent information to potential students:

Internal documents, interviews with former employees, and Government Accountability Office (GAO) undercover recordings demonstrat[ed] that many companies use tactics that misled prospective students with regard to the cost of the program, the availability and obligations of Federal aid, the time to complete

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

30. *Id.*

31. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616 (July 26, 2010) (codified at 34 C.F.R. § 668); Program Integrity: Gainful Employment-New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010) (amending 34 C.F.R. §§ 600.10, 600.20); Program Integrity: Gainful Employment-Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (codified at 34 C.F.R. § 668.7).

32. *See* Nelson, *supra* note 16, at 175.

33. *See id.*

34. FAILURE TO SAFEGUARD, *supra* note 18, at 4.

35. *Id.* at 58.

the program, the completion rates of other students, the job placement rate of other students, the transferability of the credit, or the reputation and accreditation of the school.<sup>36</sup>

Admission services at FPIs have also aggressively recruited veterans and service members for a variety of economic advantages.<sup>37</sup> Primarily, veterans have access to additional federal student aid by way of military benefits, providing FPIs with another source of potential revenue.<sup>38</sup> Veteran service members are such attractive prospects for FPIs that recruiting has even occurred inside wounded warrior centers and veterans hospitals, with many recruiters having “misled or lied to service members as to whether their tuition would be covered by military benefits.”<sup>39</sup>

One possible explanation for this behavior and other recruitment problems is that FPIs frequently offer financial incentives to their admissions representatives.<sup>40</sup> These positions became intense sales jobs “in which hitting an enrollment quota was the recruiters’ highest priority,”<sup>41</sup> and under many circumstances “[r]ecruiters who failed to bring in enough students were put through disciplinary processes and sometimes terminated.”<sup>42</sup> Previously, in 1992, an amendment to the HEA eliminated enrollment-based compensation for all institutions of higher learning.<sup>43</sup> However, this amendment only eliminated the use of incentives and did not restrict FPIs from establishing general enrollment quota requirements for their recruiters.<sup>44</sup> Furthermore, in 2002 the Department of Education created twelve regulatory “safe harbors” that allowed for specific types of incentive-based compensation for recruiters.<sup>45</sup> These incentives could not be based directly on the number of enrolled students, but could be based on other indirect factors such as the number of recruited students that completed their educational program.<sup>46</sup>

The Abusive Recruitment Regulations proposed by the Department of Education sought to eliminate these payment-based incentives for FPI recruiters.<sup>47</sup> By adjusting regulations, the Departments proposal would have

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36. *Id.* at 4.

37. *Id.* at 68. *See also* Nelson, *supra* note 16, at 172 (“Student veterans are entitled to benefits under the Post-9/11 GI Bill which is not a Title IV program.”).

38. FAILURE TO SAFEGUARD, *supra* note 18, at 68.

39. *Id.* at 70.

40. *See id.* at 48.

41. *Id.* at 4.

42. *Id.*

43. *Id.* at 48.

44. FAILURE TO SAFEGUARD, *supra* note 18, at 4.

45. *Id.* at 48.

46. 34 C.F.R. § 668.14(b)(22) (2010).

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

eliminated the twelve “safe harbors” that had been created under the 2002 regulations.<sup>48</sup> In addition to eliminating incentive based compensations, the 2009 regulations broadened the definition of “misrepresentation” in order to prevent FPIs from continuing to recruit students using wrongful or misleading information.<sup>49</sup> These types of regulatory changes would hopefully benefit prospective students, allowing them to make unpressured, informed, and reasonable decisions regarding their education. However, these regulations would not benefit any potential graduates of FPIs struggling in the future to find gainful employment and establish viable economic stability.

### B. Gainful Employment Regulations

Concerned with the rate of employment obtained by graduates of FPIs, the Department of Education imposed a series of new statutory based regulations, the last of which became effective on July 1, 2011.<sup>50</sup> These regulations focused on previously inactive statutory language within the HEA that requires institutions of higher learning to offer a “program of training to prepare students for gainful employment in a recognized occupation.”<sup>51</sup> Relying on this “gainful employment” language, the Department of Education believed it had the statutory authority to monitor vocational programs, associate degree programs, and certain baccalaureate programs.<sup>52</sup> Thus, all of the Gainful Employment Regulations would apply broadly to any educational program that intended to prepare students for “gainful employment.” However, the regulations were motivated out of concerns surrounding poor performing programs at FPIs,<sup>53</sup> and the Department of Education sought to implement “regulatory benchmarks that measured FPI performance against objective metrics of their graduates’ employment process.”<sup>54</sup>

The regulatory benchmark instituted by the Department was a debt measure rule (“Debt Measure Rule”). This Debt Measure Rule presented a debt-to-income standard, which determined if an educational program did a successful job of preparing a student for employment, “by comparing a

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48. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 438 (D.C. Cir. 2012) [hereinafter *Duncan I*].

49. *Id.* at 439.

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

51. 20 U.S.C. § 1001(b)(1) (2012).

52. The regulations could not apply to baccalaureate programs offered by accredited FPIs offering said programs after January 1, 2009. 20 U.S.C. § 1002(b)(1)(A)(ii) (2012).

53. *See, e.g.*, Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,671 (July 26, 2010) (codified at 34 C.F.R. § 668).

54. Nelson, *supra* note 16, at 175.

program completer's typical educational debt and income levels."<sup>55</sup> Under this standard, for a program to be eligible for Title IV funds, a typical student's annual loan payment must represent "no more than 12 percent of annual earnings or 30 percent of discretionary income, using median loan debt and mean or median earnings."<sup>56</sup> The Debt Measure Rule also maintained a debt repayment standard.<sup>57</sup> This standard measured educational programs on whether or not students in their programs are repaying their loans, regardless of completion.<sup>58</sup> Under this standard, students enrolled in FPI programs must repay their Federal loans at an aggregate rate of at least thirty-five percent.<sup>59</sup> If an FPI failed to meet this standard in three out of four years their eligibility for Title IV funding would be jeopardized.<sup>60</sup> Finally, the Gainful Employment regulations also had a disclosure rule. This rule required FPIs to disclose and report all information necessary to conform to the standards under the Debt Measure Rule.<sup>61</sup>

Finally, the Gainful Employment Regulations also implemented a rule that required Department of Education approval for additional programs instituted at FPIs ("Program Approval Rule").<sup>62</sup> Under this rule, the Department could have requested that FPIs formally apply for approval and be evaluated "on several factors including whether the number of additional educational programs being added is inconsistent with the institution's historic programs offerings, growth, and operations."<sup>63</sup> Another primary factor would have considered if an FPI has demonstrated "financial responsibility and administrative capability in operating its existing programs."<sup>64</sup> The focus on these factors would have allowed the department to conclude whether or not the FPI was offering a new educational program that offers the potential for "gainful employment in a recognized occupation."<sup>65</sup>

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55. *Gainful Employment Debt Measures: Debt-to-Earnings Ratios*, TEX. GUARANTEED STUDENT LOAN CORP. (2012), available at <http://www.tgslc.org/pdf/GE-Debt-to-Earnings-Ratios.pdf>.

56. *Id.*; see also Program Integrity Issues: Gainful Employment, 75 Fed. Reg. at 43,618.

57. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,395 (June 13, 2011) (codified at 34 C.F.R. § 668.7).

58. *Id.*

59. *Id.*

60. *Id.* at 34,405.

61. Program Integrity Issues: Final Rule, 75 Fed. Reg. 66,832, 66,835–36 (Oct. 29, 2010) (codified at 34 C.F.R. § 668.6(b)).

62. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,665 (July 26, 2010) (codified at 34 C.F.R. § 668).

63. Press Release, U.S. Dep't of Educ., Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers (Oct. 28, 2010).

64. Nelson, *supra* note 16, at 177 (quoting 34 C.F.R. § 600.20(d)(1)(ii)(E) (2010)).

65. 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), 1002(c)(1)(A) (2012).



Both the Gainful Employment Regulations and the Abusive Recruitment Regulations offered significant and meaningful changes to the landscape of the For-Profit education industry. However, because FPIs believed their creation was unlawful, the regulations would face aggressive legal challenges.<sup>66</sup> Ultimately, the fate of the Department of Education's regulations would ultimately be decided in the federal courts.

### III. REGULATIONS REJECTED

#### A. *Association of Private Sector Colleges and Universities v. Duncan* – June 5, 2012

After being approved by the Department of Education, both the Abusive Recruitment Regulations and the Gainful Employment Regulations were challenged on legal grounds by the Association of Private Sector Colleges and Universities (“APSCU”). Each regulation was the subject of individual lawsuits filed in the DC Circuit. In the first lawsuit, the APSCU sued to have the Abusive Recruitment Regulations invalidated.<sup>67</sup> Within this lawsuit, the regulations expanding the definition of misrepresentation (“Misrepresentation Regulations”) and the regulations removing protections for compensation incentives (“Compensation Regulations”) were specifically targeted.<sup>68</sup> At the District Court level both the Misrepresentation Regulations and Compensation Regulations were upheld.<sup>69</sup> This District Court ruling was appealed to the DC Circuit Court of Appeals producing the decision in *Association of Private Sector Colleges and Universities v. Duncan* (“*Duncan I*”) on June 5, 2012.<sup>70</sup>

On appeal the APSCU argued, *inter alia*, that the Abusive Recruitment Regulations exceeded the limits of the Department of Education's authority under the HEA.<sup>71</sup> In determining the extent of the administrative agency's statutory authority, the court applied a *Chevron*<sup>72</sup> analysis.<sup>73</sup> The court determined that the Misrepresentation Regulations exceeded the Depart-

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66. See *Duncan I*, 681 F.3d 427 (D.C. Cir. 2012); see also *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 147 (D.D.C. 2012) [hereinafter *Duncan II*].

67. *Duncan I*, 681 F.3d at 437.

68. *Id.*

69. *Id.* at 440.

70. *Id.*

71. *Id.*

72. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A *Chevron* analysis is a two-part analysis where the court first determines whether or not the applicable statute is clear or contains the unambiguous expressed intent of Congress. *Id.* If the intent of Congress is not clear, then the court determines if the agency's interpretation is based on a permissible construction of the statute. *Id.*

73. *Duncan I*, 681 F.3d 427, 441 (D.C. Cir. 2012)

ment's statutory authority under the HEA.<sup>74</sup> The court pointed out the term "substantial misrepresentation" has an unambiguous meaning within the context of the HEA, meaning "[a]ny false, erroneous or misleading statement."<sup>75</sup> However, the new regulations attempted to expand the definition of "misrepresentation" to mean "any statement which has the likelihood or tendency to deceive or confuse."<sup>76</sup> It was the court's view that this extended definition fell outside the scope and purpose of the HEA's unambiguously defined "substantial misrepresentation."<sup>77</sup> Therefore, the court said, the new definition in the Misrepresentation Regulations went beyond Congress's intentions in enacting the HEA and could not be considered valid.<sup>78</sup>

Moving on to the Compensation Regulations, the court found that the regulations were not a violation of the Department's statutory authority under the HEA.<sup>79</sup> Instead, the court held the regulations invalid on procedural grounds, saying that two aspects of the Compensation Regulations were arbitrary and capricious for want of reasoned decision-making.<sup>80</sup> First, the court addressed the elimination of the safe harbor that allowed for compensation based on students "completing their educational programs, or one year of their educational programs."<sup>81</sup> Out of the twelve safe harbors that the Compensation Regulations eliminated, this graduation or completion based safe harbor was the only one the court determined to be arbitrary and capricious.<sup>82</sup> The court said that eliminating this safe harbor exception lacked proper explanation, claiming the Department's explanation was "brief", "fleeting", and "insufficient."<sup>83</sup> Second, the court evaluated the Department's response to concerns that removing the protections for compensation based incentives "could have an adverse effect on minority enrollment."<sup>84</sup> The court determined the Department "fell short" and "failed to address" the concerns.<sup>85</sup> As a result of these two failures, the court reversed, in part, the judgment of the district court and remanded the issue with instructions for the Department to better explain its reasoning behind these two aspects of the Compensation Regulations.<sup>86</sup>

The decision in *Duncan I* eliminated much of the practical impact of the

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74. *Id.*

75. *Id.* at 452.

76. *Id.*

77. *Id.* at 452–53.

78. *Duncan I*, 681 F.3d at 452–53.

79. *Id.* at 442.

80. *Id.* at 447.

81. *Id.* at 448 (quoting 34 C.F.R. § 668.14(b)(22)(ii)(E) (2010)).

82. *See id.* at 447–49.

83. *Duncan I*, 681 F.3d at 448.

84. *Id.*

85. *Id.* at 448–49.

86. *Id.* at 449.

Abusive Recruitment Regulations. A later section of this essay will examine the second blow to these regulations by discussing the most recent ruling on the remanded portion of *Duncan I* regarding Compensation Regulations.<sup>87</sup>

B. *Association of Private Sector Colleges and Universities v. Duncan*  
– June 30, 2012

A second lawsuit filed by the APSCU targeted the Gainful Employment Regulations created by the Department of Education. The district court for the District of Columbia decided *Association of Private Sector Colleges and Universities v. Duncan* (“*Duncan II*”) only weeks after the decision in *Duncan I*.<sup>88</sup> Just as in *Duncan I*, the district court in *Duncan II* was considering whether or not the Department of Education exceeded its statutory authority under the HEA in promulgating the Gainful Employment Regulations.<sup>89</sup> The focus of the court’s decision was on the Debt Measure Rule within the Gainful Employment Regulations.<sup>90</sup> In evaluating the Debt Measure Rule, the district court decided that the Gainful Employment Regulations were “a reasonable interpretation of an ambiguous statutory command,” and that, therefore, the Department of Education did not exceed its statutory authority under the HEA.<sup>91</sup> The district court did find, however, a portion of the Debt Measure Rule invalid on procedural grounds.<sup>92</sup> As discussed in Part II.B, the Debt Measure Rule maintained two standards, a debt to income standard and a loan repayment standard.<sup>93</sup> The district court held that the Department acted arbitrarily and capriciously when it promulgated the debt repayment standard.<sup>94</sup> Furthermore, the district court determined that the remaining parts of the Gainful Employment regulations were not severable from the Debt Measure Rule, vacating virtually the entire regulation.<sup>95</sup>

In evaluating the Debt Measure Rule the district court determined that the facts and reasoning provided by the Department of Education supported the establishment of the debt-to-income standard. However, in evaluating the debt repayment standard, the court determined the standard “was not based upon any facts at all,” and “[n]o expert study or industry standard

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87. See *infra* Part III.A.1.

88. *Duncan II*, 870 F. Supp. 2d 133 (D.D.C. 2012).

89. *Id.* at 145.

90. *Id.*

91. *Id.* at 149.

92. *Id.* at 154.

93. See *supra* Part II.B.

94. *Duncan II*, 870 F. Supp. 2d at 154.

95. *Id.* at 155. One small portion of the regulations requiring FPIs to disclose debt measure information to potential students was not vacated. *Id.*

suggested that the rate selected by the department would appropriately measure whether a particular program adequately prepared its students.<sup>96</sup> As a result, the district court concluded the debt repayment standard was the result of arbitrary and capricious decision-making.<sup>97</sup> Despite the separate determinations for the two standards, the district court said that they could not be ruled on separately “[b]ecause the Department has repeatedly emphasized the ways in which the debt repayment and debt-to-income standards were designed to work together.”<sup>98</sup> Thus, the entire Debt Measure Rule was vacated.<sup>99</sup> The district court also determined the Program Approval Rule within the Gainful Employment regulations was not severable from the Debt Measure Rule.<sup>100</sup> The reasoning was that the purpose of the Program Approval Rule was to keep the relevant institutions from circumventing the Debt Measures Rule.<sup>101</sup> The court described the Program Approval Rule as “centered on” the Debt Measures Rule, and for that reason, it was also vacated and remanded.<sup>102</sup>

This decision, along with decision in *Duncan I* effectively blocked the Department of Education’s attempt to solve many of the student debt problems related to FPI. The Department of Education filed a motion to amend the judgment in *Duncan II*, but the motion was denied.<sup>103</sup> *Duncan I* and *II* reveal the complex difficulties in attempting to implement mass administrative regulations at the federal level. Additionally, there has been no significant legislative action in response to *Duncan I* and *II* to address the student debt problems created by FPIs.<sup>104</sup> Instead, the only federal response has been attempts by the Department of Education to rework the remanded regulations from *Duncan I* and *II*.<sup>105</sup>

#### IV. RESPONDING TO *DUNCAN I* AND *II*

##### A. Editing the Abusive Recruitment Regulations

The decision in *Duncan I* remanded the Abusive Recruitment Regula-

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96. *Id.* at 154.

97. *Id.* (“In setting the debt repayment rate, the Department picked a palatable figure. Because the Department has not provided a reasonable explanation of that figure, the court must conclude that it was chosen arbitrarily.”).

98. *Id.*

99. *Duncan II*, 870 F. Supp. 2d at 154.

100. *Id.* at 158.

101. *Id.*

102. *Id.*

103. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 930 F. Supp. 2d 210 (D.D.C. 2013).

104. Legislation has been passed to help remedy the problems surrounding FPIs and Veteran students. *See Nelson, supra* note 16, at 186.

105. *See infra* Part III.

tions to the Department of Education so that it could provide sufficient explanation and show that the Compensation Regulations are not arbitrary and capricious actions. Specifically, the court in *Duncan I* ordered the Department, “(1) explain its elimination of the safe harbor for graduation-based compensation and (2) respond to commenters’ concerns about the effects of the Compensation Regulations on diversity initiatives.”<sup>106</sup> The Department of Education responded by amending sections of the preamble to the Abusive Recruitment Regulations. The Department’s additions to the preamble focused on the already existing ban on enrollment-based compensation established by the HEA.<sup>107</sup> The preamble additions argued that “[b]ecause a student cannot successfully complete an educational program without first enrolling in the program, the compensation for securing program completion requires the student’s enrollment as a necessary preliminary step.”<sup>108</sup> Therefore, the Department argued, the HEA ban on enrollment-based compensations also requires a ban on graduation-based compensations.<sup>109</sup> Additionally, the Department was concerned that completion-based compensation encourages student enrollment in programs without concern for a student’s academic ability or for the quality of the program.<sup>110</sup> Instead, a recruiter might only be concerned about how quickly and easily a student could complete a program, thus giving a possible incentive for recruiters to lower a student’s standards and misrepresent programs.<sup>111</sup> The Department also acknowledged that completion incentives may have caused some schools to “have devised and operated grading policies that all but ensure that students who enroll will graduate, regardless of their academic performance.”<sup>112</sup>

The Department also added language to the preamble that addressed the concern that the Compensation Regulations would damage existing incentives that encouraged recruitment of minority students and the development of a diverse student body.<sup>113</sup> The additions said:

The incentive compensation ban is designed, among other things, to keep students of all races and backgrounds from being urged or cajoled into enrolling in a program that will not best meet their needs. Minority and low income students are often the targeted

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106. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, No. 14-277, 2014 U.S. Dist. LEXIS 139970, at \*7–8 (D.D.C. Oct. 2, 2014) [hereinafter *Duncan III*].

107. Program Integrity Issues, 78 Fed. Reg. 17,598 (Mar. 22, 2013); *see also* 20 U.S.C. § 1094(a)(20)(2011).

108. Program Integrity Issues, 78 Fed. Reg. at 17,599.

109. *Duncan III*, 2014 U.S. Dist. LEXIS 139970 at \*9.

110. *Id.*

111. *Id.*

112. Program Integrity Issues, 78 Fed. Reg. at 17,599.

113. *Id.* at 17,600.

audience of recruitment abuses, and our regulatory changes are intended to end that abuse.<sup>114</sup>

These limited explanations for why graduation- and diversity-compensation should be eliminated were the only additions to the Abusive Recruitment Regulations. Suffice to say, these limited changes by the Department to the regulation's preamble did not prevent the APSCU from once again bringing suit against the Abusive Recruitment Regulations.

1. *Association of Private Sector Colleges and Universities v. Duncan* – October 2, 2014

The APSCU challenged the Department of Education's amended Abusive Recruiting Regulations arguing "that the Department has once again failed to support its regulations with record evidence and substantiated assertions."<sup>115</sup> Meanwhile, the Department argued that it had satisfied the requirements of the D.C. Circuit Court's "limited remand."<sup>116</sup> On October 2, 2012, the district court for the District of Columbia decided *Association of Private Sector Colleges and Universities v. Duncan* ("Duncan III") and once again found the regulations to be invalid.<sup>117</sup> First, the court said that the Department had "failed to explain and substantiate its wholesale ban on graduation-based compensation."<sup>118</sup> The court's reasoning focused on how the Department had been ordered to provide "some better explanation" and "point to evidence" to support its assertions.<sup>119</sup> The court emphasized repeatedly that the rationale in the amended preamble did not include any kind of supporting evidence.<sup>120</sup> While the preamble did identify a number of potential concerns for graduation-based compensation, the Department's additions did not, the court said, "identify factual grounds in the record for its concerns."<sup>121</sup> Consequentially, the court held the regulation to be invalid and was remanded again to the Department of Education.<sup>122</sup>

The court also evaluated the Department's attempt to suppress concerns that the Compensation Regulations would negatively affect efforts by FPIs to establish diverse student bodies. The APSCU argued that the amended preamble only repeated rationales that had already been rejected by the

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114. *Id.*

115. *Duncan III*, No. 14-277, 2014 U.S. Dist. LEXIS 139970, at \*1 (D.D.C. Oct. 2, 2014)

116. *Id.* at \*2.

117. *Id.*

118. *Id.* at \*15.

119. *Id.* at \*16.

120. *Duncan III*, 2014 U.S. Dist. LEXIS 139970 at \*1, \*19–20, \*22.

121. *Id.* at \*20.

122. *Id.* at \*22.

D.C. Circuit Court.<sup>123</sup> Agreeing with the APSCU, the court said the Department had not furnished “an adequate response to commenters’ concerns about the impact of its regulations on minority recruitment.”<sup>124</sup> Instead, the court said the Department’s amendments to the regulation’s preamble were non-responsive and simply restated its statutory authority to eliminate enrollment-based compensation.<sup>125</sup> The Department was specifically ordered “to address the potential effect on minority recruitment, i.e., whether minority enrollment could decline under new regulations.”<sup>126</sup> The court found the amended preamble did not attempt to answer such specific questions. For that reason, the court held the Compensation Regulations to be invalid and remanded the matter back to the Department of Education.<sup>127</sup>

It is unclear whether or not the Department was unable to meet the demands on remand or just simply failed in its attempt. Regardless, the actions of the *Duncan III* court are another example of the judicial barriers to effective regulation of FPIs by the Department of Education. The final result is a third case showing the reluctance of federal courts to allow administrative agencies to create substantial regulation of FPIs. The Department of Education may well have believed that it would be able to rely on its administrative authority and on judicial deference to that authority in creating regulation of FPIs. However, *Duncan III* and its ancestry clearly show this is not the case.

#### B. 2014 Gainful Employment Regulations

On March 14, 2014, the Obama Administration announced that the Department of Education was offering another set of proposed regulations focused on the gainful employment of FPI graduates (“2014 Gainful Employment Regulations”).<sup>128</sup> These new regulations made significant changes in the previous regulations that had been proposed in 2011. The 2014 Gainful Employment Regulations still contain a debt measure rule, however the only standard requirement under the rule is the debt-to-income standard.<sup>129</sup> The previous Gainful Employment Standards also contained a loan repayment standard in addition to the debt-to-income standard.<sup>130</sup> As

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123. *Id.*

124. *Id.* at \*15.

125. *Duncan III*, 2014 U.S. Dist. LEXIS 139970 at \*23.

126. *Id.* at \*24.

127. *Id.* at \*24–25.

128. Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31 2014) (codified at 34 C.F.R. §§600, 668).

129. *Id.* at 64,891.

130. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,616–19 (July 26, 2010) (codified at 34 C.F.R. §668) (requiring students repay their Federal loans at an aggregate rate of at least 30 percent).

discussed in Part III.B, the court in *Duncan II* primarily remanded the previous Gainful Employment Regulations because it determined the loan repayment standard to be the result of unreasoned decision-making.<sup>131</sup> The Department of Education originally included a loan repayment standard in the 2014 Gainful Employment Regulations, but it was removed during the Department's approval process.<sup>132</sup> Furthermore, the existing debt-to-income standard has been lowered in the 2014 Gainful Employment Standards.<sup>133</sup> Under the previous regulations, the debt-to-income standard for FPIs required that an institution's graduates have annual debt payments that were twelve percent or less of their average annual income or thirty percent or less of their discretionary income.<sup>134</sup> Under the 2014 Gainful Employment Regulations, the rates under the debt-to-income standard have been lowered to eight percent and twenty percent, respectively.<sup>135</sup> Finally, the 2014 Gainful Employment Standards also do not contain any version of the Program Approval Rule that had been included in the previous regulations.<sup>136</sup>

The 2014 Gainful Employment Standards were approved by the Department of Education on October 31, 2014, and they become effective on July 1, 2015.<sup>137</sup> By removing the loan repayment standard from the Debt Measure Rule, the Department has given the 2014 Gainful Employment Standards a much better chance of being upheld by the courts.<sup>138</sup> However this advantage is gained at a significant cost. Now the Debt Measure Rule considers only graduates of FPIs; it will not consider the debt of students who withdraw and never complete their program. Considering that around half of all students enrolled at FPI will not complete the program,<sup>139</sup> the 2014 Gainful Employment Standards do not hold FPIs accountable for a significant portion of their students. Given their lack of degrees, students who withdraw from FPIs are also the most likely to default on their student loans.<sup>140</sup> As a result, the new regulations will not create standards addressing the most significant population contributing to the overall student debt

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131. *See supra* Part III.B.

132. Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,916.

133. *Id.* at 64,891.

134. Program Integrity: Gainful Employment, 75 Fed. Reg. at 43,616.

135. Under the 2014 Regulations the debt to income standard was referred to as the debt to earnings. Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,891.

136. *Id.* at 64,991.

137. *Id.* at 65,037.

138. The loan repayment standard was the only portion of the Gainful Employment Standards the District Court found to be invalid on its face. The remaining portions were found invalid only because they were not severable from the loan repayment standard. *Duncan II*, 870 F. Supp. 2d 133, 158 (D.D.C. 2012).

139. FAILURE TO SAFEGUARD, *supra* note 18.

140. *Id.* at 118–19.



crisis. The APSCU has filed suit against the 2014 Gainful Employment Regulations, saying, “[i]nstead of correcting the flaws that rendered its 2011 rule invalid, the Department’s new rule only repeats and exacerbates them.”<sup>141</sup> Inevitably, yet another *Duncan* case will be decided soon, but regardless of the outcome, the regulation’s potential effect has already been seriously limited.

#### V. CALIFORNIA LEGISLATIVE REGULATIONS

Turning to the evaluation of state regulation of FPIs, this Note will focus on and examine the California’s legislative and regulatory history of private postsecondary institutions. While many states have been involved in significant attempts to regulate FPIs,<sup>142</sup> the for-profit problem has been a significant one for the state of California.<sup>143</sup> During the rise of FPIs in the 1980s, California gained the reputation of being the “diploma mill capital of the world.”<sup>144</sup> Despite various regulatory attempts, California has not been able to eliminate this reputation and, as of 2011, still had the highest number of “diploma mills” of any state.<sup>145</sup> Part of this reputation could be due to the sheer size of California’s private education sector. As of 2013, California’s regulatory body for private postsecondary institutions oversaw 1,960 institutional locations serving a total of 316,000 students.<sup>146</sup> Of the 316,000 total students, 255,000 were enrolled in vocational programs offering diplomas or certification.<sup>147</sup> These numbers show the potential impact state regulation of FPIs could have in California. Additionally, because of the state’s historical struggles with the for-profit industry, if California’s most recent regulations are found to be effective, then states that have encountered fewer difficulties with FPIs might also be able to promulgate effective regulations. Given these factors, an examination of California’s actions allows for the strongest study of whether or not state legislatures are in the position to offer practical and immediate assistance in regulating

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141. Press Release, Ass’n of Private Sector Colls. & Univs., APSCU Files Suit Against Anti-Student Gainful Employment Regulation (Nov. 6, 2014).

142. See Thomas L. Harnisch, *Changing Dynamics in State Oversight of For-Profit Colleges*, AM. ASS’N OF STATE COLL. & UNIV. (Apr. 2012), available at [http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy\\_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf](http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf).

143. *Cal. Private Postsecondary Educ. Act: Hearing before the Cal. Subcomm. on Educ. Analysis*, 2013–2014 Legis., 1–2 (Apr. 30, 2014).

144. *Id.*

145. Eyal Ben Cohen & Rachel Winch, *Diploma and Accreditation Mills: New Trends in Credential Abuse*, VERIFILE ACCREDIBASE (Mar. 2011), available at <http://www.icde.org/filestore/Resources/Reports/NewTrendsInCredentialAbuse.pdf>.

146. *Cal. Private Postsecondary Educ. Act Hearing*, *supra* note 143, at 3.

147. *Id.*

FPIs.

#### A. Maxine Waters School Reform and Student Protection Act of 1989

California's regulation of FPIs stretches back into the late 1980's.<sup>148</sup> During this time FPIs, along with all other education institutions, were regulated by the California State Department of Education.<sup>149</sup> In order to promote the integrity of degrees issued by private postsecondary schools in the state, California created a twenty-member body to oversee specifically degrees offered by private colleges and universities.<sup>150</sup> This body, called the Council for Private Postsecondary Education ("CPPVE") came into existence in 1989.<sup>151</sup> Later that year, California passed the Maxine Waters School Reform and Student Protection Act of 1989; the objectives of the act were "to protect students and reputable institutions, ensure appropriate state control of business and operation standards, ensure minimum standards for educational quality, prohibit unfair dealing, and protect student rights."<sup>152</sup> The Act was also concerned with the fact that many students received funding from state or federal loans that they were unable to repay "because they were unable to obtain the proper educational preparation for jobs."<sup>153</sup> Strikingly, the Act attempted to address many of the same concerns the Department of Education was trying to regulate twenty-five years later.

Unlike the 2014 Department of Education regulations of FPIs, the Maxine Waters Student Protection Act included minimum program-completion rates as well as minimum-employment rates for FPIs as well as all private postsecondary institutions in California.<sup>154</sup> Under the Act, sixty percent of students who start a program at a private postsecondary institution must complete it during the specified duration of the program.<sup>155</sup> Additionally, at least seventy percent of students who complete their program had to be employed within six months in a position for which their program was designed.<sup>156</sup> These regulations were enforced by the CPPVE, and if an institution failed to meet these standards then it could be subject to various

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148. BUREAU FOR PRIVATE POSTSECONDARY EDUC., [http://www.bppe.ca.gov/about\\_us/history.shtml](http://www.bppe.ca.gov/about_us/history.shtml) (last visited Apr. 15, 2015).

149. *Id.*

150. *Id.*

151. See BENJAMIN M. FRANK, BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUC., INITIAL REPORT OF THE OPERATION AND ADMINISTRATIVE MONITOR 9 (Sep. 26, 2005), available at [http://bppe.ca.gov/about\\_us/op\\_monitor\\_report.pdf](http://bppe.ca.gov/about_us/op_monitor_report.pdf).

152. Maxine Waters School Reform and Student Protection Act of 1989, CAL. EDUC. CODE § 94850(d) (2005).

153. *Id.* at § 94850(c).

154. *Id.* at §94854(a).

155. *Id.*

156. *Id.*

types of sanctions.<sup>157</sup> The most serious sanction required an institution to cease offering programs in violation of the standards.<sup>158</sup> More commonly, institutions subject to sanctions could be required to maintain compliance reports conducted by an independent certified public accountant.<sup>159</sup> Thus, the Act set high standards of performance for all private postsecondary institutions as well as methods of enforcement to ensure accountability.

However, ultimately the Act only had a moderate amount of success. As noted earlier, the CPPVE had briefly been in existence before the Act took effect.<sup>160</sup> After the Act was passed, the CPPVE and its governing rules attempted to adopt the rules and regulations of the Act.<sup>161</sup> The result was, “a fragmented structural framework with numerous duplicative and conflicting statutory provisions.”<sup>162</sup> Adding to these functional problems were the realistic difficulties inherent in the Act’s regulatory standards. The sixty percent completion standard and seventy percent employment standard were too high. Many traditional colleges and universities in California would not be able to meet such high standards.<sup>163</sup> In particular, some of California’s public community colleges would be unable to meet the Act’s high standards, but such schools were not subject to such standards due to their public status.<sup>164</sup> Despite these problems, the Act stayed in place with limited changes until 2007 when the legislation expired.<sup>165</sup> In 2006, the California Legislature passed a bill that would extend the Act’s expiration date, but California Governor Arnold Schwarzenegger vetoed the legislation.<sup>166</sup> Governor Schwarzenegger believed that the legislation then in effect was ineffective and called for legislative overhaul and comprehensive reform.<sup>167</sup> The legislation also ended the operation of the California Bureau for Private Postsecondary and Vocational Education, which had replaced the CPPVE in 1997, leaving no state regulatory agency to oversee FPIs and other private postsecondary institutions operating in California.<sup>168</sup>

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157. CAL. EDUC. CODE § 94854(f)–(g) (2005).

158. *Id.* at § 94854(g).

159. *Id.* at § 94854(f).

160. *See* FRANK, *supra* note 151, at 9.

161. *See Bureau for Private Postsecondary History*, *supra* note 148.

162. *Id.*

163. *See* WILLIAM G. TIERNEY & GUILBERT C. HENTSCHKE, *NEW PLAYERS, DIFFERENT GAME* 124 (2007).

164. *See id.*

165. *See* ANNUAL REPORT TO THE LEGISLATURE AND CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUC. 1 (2006), available at [http://www.dca.ca.gov/publications/05\\_06\\_bppve\\_annrpt.pdf](http://www.dca.ca.gov/publications/05_06_bppve_annrpt.pdf).

166. *See id.*

167. *See id.*

168. *See* Frank, *supra* note 151, at 22.

As a result, the California Legislature worked on creating new legislation and eventually passed the California Private Postsecondary Education Act of 2009, signed into law by Governor Schwarzenegger on October 11, 2009.<sup>169</sup>

#### B. California Private Postsecondary Education Act of 2009

The California Private Postsecondary Education Act of 2009 (“CPPEA”) established the Bureau for Private Postsecondary Education (“BPPE”) to oversee the regulation of all private postsecondary institutions, including FPIs, operating in California.<sup>170</sup> Hoping to eliminate the functional problems of the past, the BPPE became the clear regulatory authority for FPIs. The Bureau began its operation on January 1, 2010<sup>171</sup> with the intent to fulfill the following goals outline in the CPPEA:

- (1) Minimum educational quality standards and opportunities for success for California students attending private postsecondary schools in California.
- (2) Meaningful student protections through essential avenues of recourse for students.
- (3) A regulatory structure that provides for an appropriate level of oversight.
- (4) A regulatory governance structure that ensures that all stakeholders have a voice and are heard in policymaking by the new bureau created by this chapter.
- (5) A regulatory governance structure that provides for accountability and oversight by the Legislature through program monitoring and periodic reports.
- (6) Prevention of the deception of the public that results from conferring, and use of, fraudulent or substandard degrees.<sup>172</sup>

While these goals are directed toward all private postsecondary institutions, including FPIs, they show the CPPEA’s intent to establish accountability for substandard institutions. Additionally, the CPPEA can be seen as primarily concerned with the regulation of FPIs given the types of institutions exempt under the act.<sup>173</sup> For example, under the law an institution is exempt if it is “owned, controlled, and operated and maintained by a religious organization lawfully operating as a nonprofit religious corporation. . .”<sup>174</sup>

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169. CAL. EDUC. CODE § 94800.5 (2009).

170. *See id.*

171. *See* BUREAU FOR PRIVATE POSTSECONDARY & EDUC., <http://www.bppe.ca.gov/> (last visited Apr. 15, 2015).

172. CAL. EDUC. CODE § 94800 (2009).

173. *Id.* at § 94874.

174. *Id.* at § 94874(e)(1).

Also exempt are institutions that operate as a “nonprofit benefit corporation.”<sup>175</sup> Finally, any institution with education programs costing \$2,500 or less, with no part paid through state or federal aid, is also exempt.<sup>176</sup> These exemptions illuminate the exact scope of the CPPEA and show a clear legislative intent to promulgate regulations directed at FPIs.

Despite its lofty goals, some considered the CPPEA to be a hollow piece of legislation that would be less effective than the preceding regulatory structure.<sup>177</sup> As noted earlier, the CPPEA ended a two-year lapse of oversight after the expiration of previous legislation in 2007. During the two-year lapse there were two attempts made by members in the California legislature to pass bills that would re-establish a regulatory scheme similar to the one that existed in 2007.<sup>178</sup> One of these bills was held in committee, while the other was ultimately passed by the legislature and vetoed by Governor Schwarzenegger.<sup>179</sup> In addition to being burdened by the politics of the legislative process, some believed the CPPEA was adversely affected by significant lobbying of FPI groups.<sup>180</sup> FPI groups “donated at least \$197,700 in 2009 and 2010 to the campaigns of Assembly members and state senators who were in office when the law was passed.”<sup>181</sup> However, this figure is a very small fraction of the over sixty million dollars estimated to have been contributed toward Assembly Seat members in the 2010 election cycle.<sup>182</sup> While it is difficult to determine how the two-year lapse and lobbying by FPI groups affected the CPPEA, it is not difficult to determine that the CPPEA had some obvious shortcomings.

The CPPEA eliminated the harsh completion and employment standards that existed under the Maxine Waters Act, but did not create any new reasonable completion- or employment-standards. The new regulations under the CPPEA instead focused on ensuring that prospective students of FPIs received sufficient and accurate information about the educational programs being offered. In order to do so, the CPPEA required FPIs to provide

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175. *Id.* at § 94874(h).

176. *Id.* at § 94874(f).

177. See Nanette Asimov & Stephanie Lee, *Protections have been weakened for-profit institutions' students*, S.F. CHRON., July 26, 2014, <http://www.sfgate.com/education/article/Protections-have-been-weakened-for-profit-5649498.php>.

178. CAL. ASSEM. COMM. ON HIGHER EDUC., ANALYSIS OF A.B. 48, 2009–2010 Legis. 20 (2010).

179. *Id.*

180. See Asimov & Lee, *supra* note 177.

181. *Id.*

182. See *Find Contributions*, MAPLIGHT, [http://maplight.org/california/contributions?s=1&office\\_party=Assembly%2CDemocrat%2CRepublican%2Cindependent&election=2010&business\\_sector=any&business\\_industry=any&source=All](http://maplight.org/california/contributions?s=1&office_party=Assembly%2CDemocrat%2CRepublican%2Cindependent&election=2010&business_sector=any&business_industry=any&source=All) (last visited Apr. 15, 2015) (saying in 2010 election cycle for California Assembly Members alone there were 52,840 contributions totaling \$61,571,279).

students with a “School Performance Fact Sheet” before enrollment.<sup>183</sup> Information required to be on the Fact Sheet included: completion rate, placement rates, license examination passage rates, salary or wage information, new program data, and a description about how said figures were determined.<sup>184</sup> However, the Fact Sheet lacked important information, most notably information about whether or not the FPI in question was accredited.<sup>185</sup> Additionally, the CPPEA also contained several loopholes that would allow some FPIs to exploit or disguise information that would be critical to prospective students. For example, FPIs were required to disclose salary data for the careers associated with particular programs offered, but the salary data provided did not have to be the salaries of the institution’s own graduates.<sup>186</sup> In fact, the statute requires FPIs to disclose the average salaries of their graduates only “if the institution or a representative of the institution makes any express or implied claim about the salary that may be earned after completing the educational program.”<sup>187</sup> Finally, the CPPEA also contained a section of exemptions that could result in some FPIs not being subject to the Fact Sheet regulations or any oversight regulation implemented by the BPPE.<sup>188</sup> The California legislature was able to overhaul its regulation structure and centralize authority under the BPPE, but the CPPEA as enacted in 2009 failed to present a comprehensive regulatory scheme.

#### 1. 2012 California Assembly Bill 2296

The first amendment to the CPPEA came in 2012 and focused on fixing the oversights and loopholes within the School Performance Fact Sheet regulation. Assembly Bill 2296 (A.B. 2296) was signed into law by Governor Brown on September 26, 2012, and it enacted requirements that increased the information FPIs and other private institutions must provide to prospective students.<sup>189</sup> Most significantly, A.B. 2296 required FPIs and other private postsecondary institutions offering associate, baccalaureate, masters or doctoral programs to include information regarding the institution’s accreditation, thereby fixing a clear oversight of the original Fact

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183. CAL. EDUC. CODE § 94910 (2009).

184. *Id.* at § 94910(a)–(e).

185. *See id.*

186. *Id.* at § 94910(d)(1).

187. *Id.* at § 94910(d)(2).

188. *Id.* at § 94874 (2009) (identifying ten types of institutions that are to be exempt from regulation with the CPPEA or promulgated by the BPPE).

189. *Notice to Licensees of Changes to Statute Governing Private Postsecondary Educational Institutions*, BUREAU FOR PRIVATE POSTSECONDARY EDUCATION (2009), [http://www.bppe.ca.gov/lawsregs/ab2296\\_notice.pdf](http://www.bppe.ca.gov/lawsregs/ab2296_notice.pdf); *see also* A.B. 2296, 2011–12 Leg. Sess. (Cal. 2012).

Sheet requirements within the CPPEA.<sup>190</sup> Additionally, A.B. 2296 removed § 94910(d)(1) and (d)(2) from the CPPEA. Those two subsections had created the loopholes allowing FPIs to report misleading information regarding employed graduate's salaries.<sup>191</sup> Concurrently, A.B. 2296 amended the statutory definition for "Graduates employed in the field." The term now means "graduates who are gainfully employed in a single position for which the institutions represents the program prepares its graduates within six months after a student completes the applicable educational program. . ."<sup>192</sup> These concurrent changes ensure that the graduate salary information reported by FPIs is legitimate and is based on the actual salaries of an institution's graduates in their respective fields of employment. Finally, A.B. 2296 added another section that required any FPI that maintains a website to publish its completed Student Performance Fact Sheet on its website.<sup>193</sup> This same section also required that an FPI's website provide the institution's most recent annual report submitted to the BPPE as well as a link to the BPPE website.<sup>194</sup>

Despite these positive changes, the amendment still neglected to address the number of institutions exempt from regulation under the CPPEA. Additionally, when the amendment was enacted in 2012, the BPPE was entering its third year of operation and started to reveal significant performance flaws. Since the passing of A.B. 2296, the BPPE has been criticized for underperforming.<sup>195</sup> A state audit evaluating the BPPE's performance through 2013 identified various failures by the Bureau.<sup>196</sup> For example, despite being required by the CPPEA to conduct equal amounts of announced and unanchored inspections, the BPPE had conducted only two unannounced inspections versus 456 announced inspections.<sup>197</sup> The BPPE also had a backlog in processing school's licensing applications, with 1,100 outstanding licensing applications at the end of 2013.<sup>198</sup> And some of the applications were at least three years old, having been submitted as far back

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190. CAL. EDUC. CODE § 94909(a)(16) (2015). A.B. 2296 added § 94909(a)(16) to the CPPEA. This section required the Fact Sheet to include, "A statement specifying whether the institution, or any of its degree programs, are accredited by an accrediting agency recognized by the United States Department of Education." *Id.*

191. CAL. EDUC. CODE § 94910 (2009).

192. *Id.* at 94928(e)(1).

193. *Id.* at 94913.

194. *Id.*

195. See Asimov & Lee, *supra* note 177.

196. *Bureau for Private Postsecondary Education: It Has Consistently Failed to Meet Its Responsibility to Protect the Public's Interests*, CAL. STATE AUDITOR (Mar. 2014), available at <http://www.auditor.ca.gov/pdfs/reports/2013-045.pdf>.

197. *Id.* at 20–21.

198. *Id.* at 15.

as 2010.<sup>199</sup> The audit was also concerned with the BBPE's inability to effectively respond to complaints, saying, "[t]he bureau also failed to respond appropriately to complaints against institutions, even when students' safety was allegedly at risk."<sup>200</sup> The BPPE on average took two hundred fifty-four days to respond and close a complaint, with some complaints going unacknowledged for months.<sup>201</sup> These disappointing figures left little doubt that the CPPEA need further review and shortly after the audit was published the California Legislature introduced additional amendments.

## 2. 2014 California Senate Bill 1247

In order to address the growing and continued concerns surrounding the CPPEA and the BPPE, the California Legislature passed Senate Bill 1247 (S.B. 1247) and it was signed into law on September 29, 2014.<sup>202</sup> S.B. 1247 addressed issues not covered by A.B. 2296. First, S.B. 1247 took a crucial step in reducing the number of institutions exempt from regulation under the CPPEA. The bill added § 94874.2 to the California Education Code. That section says, "an institution that is approved to participate in veterans' financial aid programs . . . may not claim an exemption from this chapter."<sup>203</sup> With the large number of FPIs participating in veterans' financial aid programs, such as the Post 9/11 GI Bill benefits, the added section drastically reduces the number of FPIs exempt under the previous version of the law.<sup>204</sup> Furthermore, adding this section also acknowledges a desire to stem the ongoing exploitation of veterans' benefits by FPIs.<sup>205</sup> The previous versions of the CPPEA had not addressed this crucial issue.

In addition to addressing veterans' benefits and the CPPEA's exemption problems, S.B. 1247 also contains statutory language that would remedy the problems outlined in the state's audit of the BPPSE. These changes largely focused on the inefficiency of the BPPSE. This is clear in a section of S.B. 1247 that addresses the BPPE's problems in efficiently evaluating FPIs' approval applications.<sup>206</sup> The amendment requires the BPPE to establish "[a]pplication processing goals and timelines to ensure an institution that has submitted a complete application for approval to operate has that

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199. *See id.*

200. *Id.* at 2.

201. CAL. STATE AUDITOR, *supra* note 196.

202. S.B. 1247, 2013–2014 Leg. Sess. (Cal. 2014).

203. CAL. EDUC. CODE § 94874.2 (2015).

204. *See Cal. Private Postsecondary Educ. Act Hearing, supra* note 143, at 3 (noting that three hundred and eighteen institutions participated in federal veteran's financial aid programs).

205. *See generally* Nelson, *supra* note 16 (discussing the common and increasing exploitation of veteran's benefits by FPIs).

206. *See* CAL. EDUC. CODE § 94888(b)(2) (2015).



application promptly reviewed. . .”<sup>207</sup> These goals would apply to applications from both accredited and non-accredited institutions seeking operation approval.<sup>208</sup> Additionally, S.B. 1247 included new language regarding the BPPE’s policies for announced and unannounced inspections. This new language prioritized inspections “based on risk and potential harm to students.”<sup>209</sup> The goal of this change was “[t]o ensure that the bureau’s resources are maximized for the protection of the public. . .”<sup>210</sup> The statute tasked the BPPE with establishing a set of priorities for inspections that would focus inspections on “institutions representing the greatest threat of harm to the greatest number of students.”<sup>211</sup> In order to assist the BPPE in developing these priorities, S.B. 1246 identified nine different characteristics of high risk FPIs.<sup>212</sup> The first four identified characteristics are:

- (1) An institution that receives significant public resources, including an institution that receives more than 70 percent of its revenues from federal financial aid, state financial aid, financial aid for veterans, and other public student aid funds.
- (2) An institution with a large number of students defaulting on their federal loans, including an institution with a three-year cohort default rate above 15.5 percent.
- (3) An institution with reported placement rates, completion rates, or licensure rates in an educational program that are far higher or lower than comparable educational institutions or programs.
- (4) An institution that experiences a dramatic increase in enrollment, recently expanded programs or campuses, or recently consolidated campuses.<sup>213</sup>

These identified characteristics reflect the same concerns expressed in the various regulations promulgated by federal Department of Education in 2011 and 2014.<sup>214</sup> Focusing the BPPE inspections on these types of issues should help the Bureau be more effective, and it also provides California with an opportunity to implement regulations in areas where the federal government has failed.

S.B. 1247 also sought to remedy the problems the BPPE had ineffectively addressing formal complaints. Similar to the approach taken on the in-

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207. *Id.*

208. *Id.* at § 94890(a)(2).

209. *Id.* at § 94932.5.

210. *Id.* at § 94941(b).

211. *Id.*

212. CAL. EDUC. CODE § 94941(c)(1)–(9) (2015).

213. *Id.*

214. *See supra* Part II; Negotiated Rulemaking Committees, *supra* note 29; Program Integrity Issues: Gainful Employment, *supra* note 31.

spection amendments, S.B. 1247 sought to increase efficiency in handling complaints through prioritization. Under the new legislation, the BPPE shall prioritize complaints “alleging unlawful, unfair or fraudulent business acts or practices, including unfair, deceptive, untrue, or misleading statements.”<sup>215</sup> The amendment also instructs the BPPE to focus on complaints that allege private postsecondary institutions have been deceptive or misleading in reporting the information required under the Fact Sheet regulations.<sup>216</sup> Thus, this portion of S.B. 1247 encourages the BPPE to improve its efficiency as well as bolster the regulatory goals established within the Fact Sheet requirements. Furthermore, the amendment lists specific types of complaints that should be given priority by the BPPE.<sup>217</sup> These include complaints regarding:

- (2) Job placement, graduation, time to complete an educational program, or educational program or graduation requirements.
- (3) Loan eligibility, terms, whether the loan is federal or private, or default or forbearance rates. . .
- (6) Affiliation with or endorsement by any government agency, or by any organization or agency related to the Armed Forces, including, but not limited to, groups representing veterans. . .
- (8) Payment of bonuses, commissions, or other incentives offered by an institution to its employees or contractors.<sup>218</sup>

Once again, these specifically identified priorities echo the priorities and concerns found throughout the federal Department of Education’s attempted regulations. S.B. 1247 puts both the BPPE and the California Legislature in the position to enforce and develop regulations that have been repeatedly promulgated by the Department of Education and rejected by the federal courts.

### C. Future Measures and Regulations.

In addition to making substantial change to the structures and functions of the BPPE, S.B. 1247 also places an emphasis on developing future legislation. First, the amendment provides a short re-authorization period.<sup>219</sup> It authorizes the BPPE only until 2017, at which point the legislature is required to consider renewing the BPPE’s authority.<sup>220</sup> The original CPPEA

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215. CAL. EDUC. CODE § 94941(e) (2015).

216. *Id.* (saying priority complaints should include “misleading statements, including all statements made or required to be made pursuant to the requirements of this chapter. . .”).

217. *Id.* at (e)(1)–(8).

218. *Id.*

219. CAL. EDUC. CODE § 94801(d) (2015).

220. CAL. EDUC. CODE § 94950 (2009).

passed in 2009 authorized the original BPPE for five years.<sup>221</sup> This short reauthorization period suggests the potential for further changes and shows that the legislature expects immediate adjustments from the BPPE. Additionally, S.B. 1247 instructs the BPPE to investigate and recommend future legislative changes. This new section instructs the BPPE to consider “requirements that are utilized by the United States Department of Education, the Student Aid Commission, accrediting agencies, and student advocate associations. . .” and then “make recommendations to the Legislature, on or before December 31, 2016.”<sup>222</sup> The section also gives the BPPE power to investigate possible regulations by allowing for “a personal services contract with an appropriate independent contractor to assist in the evaluation[s].”<sup>223</sup> Taking all these sections together, it is clear that the California Legislature intends to further develop its regulation of the for-profit education industry.

Finally, in the passing of S.B. 1247, the Legislature provided the BPPE with the ability to pursue legal remedies in conjunction with the state Attorney’s General office.<sup>224</sup> This change allows the BPPE to seek future enforcement through legal action. Under the new law, if the BPPE “has reason to believe that an institution has engaged in a pattern or practice of violating the provisions of [chapter 8] or any other applicable law . . . the bureau shall contract with the Attorney General for investigative and prosecutorial services, as necessary.”<sup>225</sup> Previously, the CPPEA did not allow for any judicial enforcement of its regulations, which many thought to be a fundamental flaw of the original 2009 law.<sup>226</sup> Now that this flaw has been addressed, the law has gained more appropriate enforcement capabilities. This change in enforcement power gives legitimacy to the CPPEA and increases the possibility for California courts to take future measures in regulating irresponsible FPIs throughout California.

#### CONCLUSION

Regardless of any future measures that California may take in regulating FPIs, the limited scope of the state’s regulations prevents any action from being as effective and comprehensive as federal regulations could be. With some of the most prominent FPIs maintaining both national and online presences, the federal government is in the best position to issue uniform and successful regulations.<sup>227</sup> Additionally, the student-debt problem is

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221. *Id.*

222. *Id.* at § 94929.9(a).

223. *Id.* at § 94929.9(b).

224. *Id.* at § 94945(c).

225. *Id.*

226. *See* Asimov & Lee, *supra* note 177.

227. *See* Gregory Ferenbach & Matthew Johnson, *Major Changes in California’s*

fundamentally a federal problem, with the vast majority of student debt being the result of federal student aid. Regulations of FPIs can contribute to the reduction of the nationwide student debt only if the federal Department of Education is able to adopt and enforce the appropriate regulations. The good news is that the federal Department of Education is willing to regulate FPIs. The bad news is that regulation of FPIs at the federal level is failing. Poorly constructed regulations and the Department of Education's inability to adequately respond to judicial decisions have resulted in ineffective attempts to regulate FPIs.

In the last five years two of the federal Department of Education's more significant regulatory attempts, the Abusive Recruitment Regulations and the Gainful Employment Regulations, have been vacated and remanded by federal courts. The Abusive Recruitment Regulations have been remanded twice, in *Duncan I* and *Duncan III*, because the Department of Education had not promulgated valid regulations to restrict the recruitment techniques of FPI. Furthermore, a primary goal of the Abusive Recruitment Regulations is to simply remove regulatory safe harbors the Department itself had previously established. Nonetheless, in two separate attempts at rulemaking the Department was unable to identify and explain its reasoning for the Abusive Recruitment Regulations. It would appear that the Department of Education has been relying on the existence of judicial deference and the result has been ineffective regulations.

The Gainful Employment Regulations have also suffered at the hands of judicial review and poor agency rulemaking. The initial challenge to these regulations in *Duncan II* found only one small standard to be invalid on its face, yet the entire Gainful Employment Regulations had to be remanded because of a lack of severability. On remand, in a blatant display of agency arrogance, the Department promulgated the same loan repayment standard that had resulted in the regulations being remanded. Ultimately, this standard was removed during the rulemaking process, but there was no attempt to offer a modification of a standard the Department clearly felt was important. Without a loan repayment standard, the latest version of the Gainful Employment Regulations may well survive any legal challenges from the ASPCU or any other similar plaintiff. However, the Gainful Employment Regulations now lack an important standard that held FPIs accountable for graduating too many students who are unable to repay their loans.

While limited in scope, regulations promulgated by state legislatures are not the result of agency rulemaking and are less likely to be exposed to harsh legal challenges. They provide an alternative and practical way to

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*Regulation of Private Postsecondary Institutions*, COOLEY LLP (Oct. 21, 2014), available at <http://www.cooley.com/PdfManager/getpublicationpdf.aspx?type=alert&show=70390> (discussing "physical presence" triggers and the limited jurisdiction of California regulations).

implement regulation of FPIs. To be fair, California's history of regulating private postsecondary institutions shows the potential shortcomings of state legislatures. However, California's most recent legislation, the CPPEA, re-establishes the state's regulatory scheme in this area. Its subsequent amendments attempt to implement many of the same goals outlined in the federal Department of Education's failed regulations. This kind of legislation at the state level provides an opportunity for states to implement federally developed regulations for FPIs. If a state's appointed regulatory agency can effectively implement legislation similar to California's amended CPPEA, then state governments present an avenue by which the federal Department of Education's invalidated regulations could be implemented. Additionally, California's most recent laws focus on ensuring an efficient regulatory body and are expected to have an immediate impact on California's regulation of FPIs and other private post-secondary institutions.<sup>228</sup> Since 2009, California's legislative actions have provided a strong example of how states have the potential to reduce the nation's student debt through the regulation of FPIs. Such state actions against abusive FPIs will not completely remedy the nation's student debt problem, but it does show that individual states have the means to have a serious and influential role in addressing this enduring crisis.

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228. *See id.*

