Note

Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market Incentives to the For-Profit College Industry

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Abstract

The 90/10 rule in the Higher Education Act ("HEA") requires for-profit colleges to obtain at least 10% of their revenue from sources other than the federal government. There is, however, a critical loophole in the law: Post-9/11 GI Bill benefits technically do not count as federal revenue under the rule. For-profit colleges have shaped a profitable business model around this loophole and are exploiting U.S. veterans for their Post-9/11 GI Bill benefits. By manipulating a gap in the federal laws intended to prevent the precise behavior in which they are engaging, these for-profit colleges can now secure up to 100% of their revenue risk free from the federal government. Compounding this problem, for-profit colleges maintain the country's highest tuition rates, lowest graduation rates, and highest student loan default rates. Despite such troubling outcomes, these corporately owned colleges are the country's largest recipients of federal student aid funds.

This Note argues that Congress must amend the 90/10 rule to (1) count Post-9/11 GI Bill benefits as federal, not private, sources of revenue and (2) lower the cap on federal revenue from 90% to 55% of a for-profit college's total revenue. This two-pronged amendment would fulfill the legislative intent

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of both the 90/10 rule and the Post-9/11 GI Bill. And by restoring market incentives to the for-profit college industry, this amendment would stop exploitation of veterans, reduce student loan defaults, and eliminate wasteful government spending.

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Introduction

Sergeant Chris Pantzke always planned to attend college after serving his country in Iraq.[1] In 2005, Sergeant Pantzke suffered a traumatic brain injury when insurgents attacked his truck convoy outside of Baghdad.[2] Determined to provide for his family, he returned home to his wife and joined more than 300,000 veterans taking advantage of tuition assistance under the Post-9/11 GI Bill.[3] An aspiring photographer, he enrolled in an online program through the Art Institute of Pittsburgh,[4] a for-profit college operated by the Education Management Corporation.[5] His veterans' benefits and other federal aid paid the $20,000-plus annual cost of his online classes.[6] Unable to receive tutoring or disability services, he conducted further research into the program's reputation and concluded that the degree was not "worth much more than the paper is worth."[7] Discouraged, Sergeant Pantzke withdrew from the program without a degree,[8] and because most colleges do not recognize courses from the Art Institute, without transferrable credits.[9] Haunted by the realization that the Art Institute pressured him into "throwing away" his GI Bill funds, Sergeant Pantzke today "just want[s] to be able to start over."[10]

Sergeant Pantzke's experience is not unusual for students recruited by for-profit colleges such as the Art Institute of Pittsburgh.[11]

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1 *See Frontline: Educating Sergeant Pantzke* (PBS television broadcast June 28, 2011), *transcript available at* http://www.pbs.org/wgbh/pages/frontline/educating-sergeant-pantzke/etc/transcript.html).

2 *See id.*

3 *See* Daniel Golden, *Veterans Failing Shows Hazards of For-Profit Schools in GI Bill*, Bloomberg News (Sept. 23, 2010, 3:51 PM), http://www.bloomberg.com/news/2010-09-23/veterans-failing-to-learn-show-hazards-of-for-profit-schools-under-gi-bill.html.

4 *See id.*

5 The Education Management Corporation enrolls 150,000 students in 105 schools operating under four names: Art Institute, Argosy University, Brown Mackie College, and South University. *See* Tamar Lewin, *Citing Wide Fraud, U.S. Sues a For-Profit College Company*, N.Y. Times, Aug. 9, 2011, at A1.

6 *See* Golden, *supra* note 3.

7 Gretchen Gavett, *Sgt. Pantzke: "I Just Want to Be Able to Start Over,"* PBS (Oct. 25, 2011, 11:00 AM), http://www.pbs.org/wgbh/pages/frontline/education/educating-sergeant-pantzke/sgt-pantzke-i-just-want-to-be-able-to-start-over.

8 *See id.*

9 *See Information on Credit Transfers*, Art Insts., http://www.artinstitutes.edu/admissions/credit-transfers.aspx (last visited June 24, 2012) ("[I]t's unlikely that credits [students] earn in our schools will be transferable to other schools.").

10 Gavett, *supra* note 7.

11 Nearly two-thirds of students who enroll in the Art Institute of Pittsburgh find themselves in Sergeant Pantzke's position: only 37% of the school's freshmen graduate within 150% of the normal time taken to complete their programs. Student-Right-to-Know Act, Art

Many for-profit colleges are among the lowest performing colleges in the United States.[12] They maintain many of the country's lowest student graduation rates,[13] highest tuition rates,[14] and highest student loan default rates.[15] For-profit colleges with particularly poor outcomes—which this Note will refer to as "risky for-profit colleges" ("RFPCs")[16] because of the substantial investment risk they present to student borrowers and their taxpayer subsidizers—include schools such as the University of Phoenix,[17] Ashford University,[18] and

INST. PITTSBURGH, *available at* http://www.artinstitutes.edu/pdf/student-consumer-information/student-right-to-know-pittsburgh.pdf (last visited Nov. 8, 2012). By contrast, 70.4% of freshmen enrolled at public campuses operated by the Penn State system earned their bachelor's degree within six years. *Six-Year Graduation Rates: 2005 Cohort*, PENN STATE UNIV. BUDGET OFFICE, https://budget.psu.edu/FactBook/StudentDynamic/gradretratesummary.aspx?&ratetype=grag&repyear=2011&YearCode=2011&FBPlusIndc=N (last visited Oct. 8, 2012).

12 A recent Senate Committee report concluded that "high withdrawal rates, coupled with high profits, suggest that not all for-profit schools are quality educational institutions. Some appear to be nothing more than highly efficient government subsidy collectors. For these companies, high dropout rates and low student success rates appear to be irrelevant." S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 111TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 12 (2010) [hereinafter DEBT WITHOUT A DIPLOMA], *available at* http://harkin.senate.gov/documents/pdf/4caf6639e24c3.pdf.

13 The average graduation rate at four year for-profit institutions is twenty-two percent, compared to fifty-five percent at public and sixty-five percent at private nonprofit colleges. *See* MAMIE LYNCH ET AL., THE EDUC. TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 3 (2010), *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf.

14 The average net price for full-time dependent undergraduates in 2007–2008 was $30,900 at four-year for-profit colleges, versus $26,600 at private nonprofit colleges and $15,600 at public institutions. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2011-033, THE CONDITION OF EDUCATION 2011, at 11 (2011), *available at* http://nces.ed.gov/pubs2011/2011033.pdf.

15 Nearly half of all federal student loan defaults occur at for-profit schools, although the schools enroll only ten percent of higher education students. Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 13, 2011, at A14.

16 This Note uses the term "RFPC" to describe a for-profit college where (1) a substantial majority of students drop out and are relatively likely to default on their student loans and (2) almost all of the school's revenue comes from the federal government using a business model that relies on high-risk loans, immediate profits, and shifting of risk to third parties.

17 The six-year graduation rate for the University of Phoenix, the nation's largest for-profit college, is nine percent. *See* LYNCH ET AL., *supra* note 13, at 4. The six-year graduation rate for bachelor's degree seekers at the University of Phoenix's online campus is five percent. *See id.* at 5.

18 Eighty-four percent of two-year students and sixty-three percent of four-year students starting at Ashford in the fall of 2008 dropped out by the fall of 2010. *See Bridgepoint Education, Inc.: A Case Study in For-Profit Education and Oversight*: *Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions,* 111th Cong. (2011) [hereinafter Statement of Senator Harkin] (statement of Chairman Tom Harkin), *available at* http://harkin.senate.gov/press/release.cfm?i=331806.

the Art Institute.[19] And these schools are specifically targeting veterans.[20]

Under a carefully designed business model, RFPCs are taking advantage of a loophole in the Higher Education Act ("HEA")[21] to obtain close to 100% of their funding risk free from the federal government.[22] The HEA requires for-profit colleges to obtain at least 10% of their funds from sources other than federal student aid programs administered under Title IV of the HEA, but a critical loophole exists: Post-9/11 GI Bill benefits technically do not count as federal aid because they are administered under Title 10 of the U.S. Code, as opposed to Title IV of the HEA.[23] Hence, the current law encourages RFPCs to secure 90% of their revenue from federal Title IV funds and the remaining 10% from federal non-Title IV funds such as Post-9/11 GI Bill benefits.[24]

Moreover, with rapidly increasing enrollments, RFPCs have captured all of the upside of increased volume while shifting the downside risk of student loan default to students and taxpayers who guarantee these student loans.[25] Tellingly, this business model is identical to that used by investment banks that reaped record profits in the years leading up to the subprime mortgage crisis.[26] Indeed, the same investment banks now own and operate several of these RFPCs, having purchased the colleges when the housing bubble burst.[27] These banks are applying the subprime-mortgage business model to a new area of the U.S. economy: the for-profit college industry.[28]

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19 As of 2010, the Art Institute operated sixteen campuses, including the Art Institute of Pittsburgh. Collectively, these campuses had a six-year graduation rate of only forty-one percent. *See* LYNCH ET AL., *supra* note 13, at 4.

20 *See* Eric Lipton, *Colleges That Recruit Veterans Garner Profits and Scrutiny*, N.Y. TIMES, Dec. 9, 2010, at A1.

21 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1146 (2006)).

22 *See infra* Part II.B.

23 *See infra* Part I.B.

24 *See infra* Part I.B.

25 *See infra* Part II.B.

26 *See infra* Part II.A.

27 For example, Goldman Sachs, a firm at the center of Wall Street's mortgage speculation, purchased Education Management Corporation in 2006 and immediately became a driving force in the for-profit college industry. *See* Andrew Ross Sorkin, *Education Management Said to Be Sold for $3.4 Billion*, N.Y. TIMES, Mar. 6, 2006, at C2; Chris Kirkham, *With Goldman's Foray into Higher Education, A Predatory Pursuit Of Students and Revenues*, HUFFINGTON POST (Oct. 14, 2011, 9:34 AM), http://www.huffingtonpost.com/2011/10/14/goldman-sachs-for-profit-college_n_997409.html.

28 *See infra* Part II.B.

Compounding the problem, RFPCs have developed this business model at a time when the country is facing two deleterious debt problems. First, Americans now owe more student loan debt than credit card debt.[29] Second, Congress is urgently seeking ways to manage federal spending to avoid a repeat of the debt-ceiling crisis of the summer of 2011.[30] Against this backdrop, the U.S. Government is worsening both debt problems by directly investing billions of dollars into RFPCs, whose low graduation rates and high student loan default rates make them the nation's riskiest colleges for student borrowers and riskiest investments for taxpayer subsidizers.[31]

Congress can and should take steps to solve these grievous problems. This Note argues that Congress must amend the HEA's "90/10" rule to close the loophole exploited by these for-profit schools and to restore market incentives to the for-profit college industry. Such an amendment must (1) count Post-9/11 GI Bill funds as federal, not private, sources of revenue under the 90/10 rule and (2) tighten the cap on federal revenue from 90% to 55% of a for-profit college's total revenue.[32]

This Note proceeds in four parts. Part I highlights the sources of RFPC funding, the origins of the 90/10 rule, and the regulations specially designed to protect veterans. Part II explains the business model used by RFPCs to take advantage of the current state of the law and analogizes it to the remarkably similar business model used by investment banks in the months leading up to the collapse of the subprime mortgage market. Part III proposes a two-pronged amendment to the HEA that would (1) count Post-9/11 GI Bill funds as federal, not private, sources of revenue under the 90/10 rule and (2) tighten the cap on federal revenue from 90% to 55% of a for-profit college's total revenue. This Part explains how the two-pronged amendment would fulfill the legislative intent of both the 90/10 rule and the Post-9/11 GI Bill by stopping the exploitation of veterans, reducing student loan defaults, and decreasing wasteful government

29 *See* FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, 1–2 (2012), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q12012.pdf. The amount of student loans owed by Americans is approaching and perhaps has already exceeded $1 trillion. *See id.*

30 *See* Robert Pear, *Senate Vote Approves Rise of $1.2 Trillion in Debt Limit*, N.Y. TIMES, Jan. 27, 2012, at A12.

31 In 2010, the government backed more than 90% of new student loans. COLL. BD. ADVOCACY & POLICY CTR., TRENDS IN STUDENT AID 13 (2011), *available at* http://trends.collegeboard.org/downloads/Student_Aid_2011.pdf.

32 *See infra* Part III.

spending. Finally, Part IV addresses potential counterarguments to the proposed amendment by demonstrating that fears about amending the 90/10 rule are unfounded.

I. The Legal Framework Governing the Federal Funding of RFPCs

In 1965, Congress passed the HEA, creating a multitude of new federal aid programs to help students finance the cost of attending college.[33] Under the HEA as originally enacted, only public and nonprofit colleges were eligible to receive these funds.[34] In 1972, however, Congress amended the HEA to make for-profit colleges eligible for the first time to receive the full range of federal student aid.[35] During the last forty years, the legal framework governing the federal funding of for-profit colleges has "been amended, renamed, moved, and manipulated in ways" that have given rise to a for-profit college industry composed of "major companies with deeply vested" corporate interests.[36] Under this legal framework, the for-profit college industry—dominated by fifteen publicly traded corporations that enroll 62% of the industry's students—has mushroomed.[37]

For example, between 2005 and 2010, Ashford University, owned by Bridgepoint Education, Inc., grew from approximately 300 students to 78,000 students.[38] Although RFPCs such as Ashford secure a small

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33 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001–1146 (2006)).

34 *See id.* § 435.

35 Education Amendments of 1972, Pub. L. No. 92-318, § 131(b), 86 Stat. 235, 259–60 (codified as amended at 20 U.S.C. §§ 1001–1146 (2006)). Although the 1972 amendment granted eligibility to for-profit colleges, the amendment imposed restrictions on for-profit colleges not imposed on nonprofit institutions because legislators recognized a need for training programs to relate to labor market needs. *See* U.S. Gen. Accounting Office, GAO/HEHS-97-104, Proprietary Schools: Millions Spent to Train Students for Oversupplied Occupations 5 (1997), *available at* http://www.gao.gov/archive/1997/he97104.pdf.

36 *Improving Educational Outcomes for Our Military and Veterans: Hearing Before the Subcomm. on Fed. Fin. Mgmt. of the S. Comm. on Homeland Sec. & Gov't Affairs*, 112th Cong. 3 (2011) [hereinafter Gallucci] (statement of Ryan M. Gallucci, Deputy Director, National Legislative Service, Veterans of Foreign Wars of the United States), *available at* http://www.hsgac.senate.gov/download/gallucci-testimony.

37 *See* Senator Harkin's Findings Regarding Veterans and For-Profit Colleges, *available at* http://www.harkin.senate.gov/documents/pdf/4f9ac62292704.pdf (last visited Oct. 20, 2012) [hereinafter Senator Harkin's Findings]. *See also* Mary Beth Marklein, *For-Profit Colleges See Major Gains in Past Decade*, USA Today (May 25, 2011, 11:53 PM), http://www.usatoday.com/news/education/2011-05-26-for-profit-college-undergraduate-enrollment_n.htm.

38 Statement of Senator Harkin, *supra* note 18, at 2.

portion of funding through nonpublic funding, RFPCs owe their growth almost completely to federal funding.[39]

In 2009, the Senate Health, Education, Labor, and Pension Committee ("HELP Committee") found that fourteen RFPCs secured, on average, 87.4% of their revenue from federal sources.[40] By contrast, the average nonprofit college secures no more than 40% of its revenue from federal aid programs.[41] The HEA's 90/10 rule prohibits for-profit colleges from securing more than 90% of their revenue from federal sources, but due to a loophole in the HEA—only funds under Title IV count as federal funds—the reliance of RFPCs on federal dollars is approaching 100%.[42]

To understand the legal framework governing the receipt of these federal funds, it is first necessary to examine the types of federal funds that for-profit colleges receive.

A. *Types of Federal Funds Received by RFPCs*

The for-profit college industry receives $24 billion annually in federal funding from two sources: (1) Title IV student aid programs and (2) non-Title IV student aid programs.[43]

Many RFPCs secure 85 to 93% of their funding from federal student aid programs.[44] The Department of Education administers many of these student aid programs under the authority of Title IV of the Higher Education Act of 1965, as amended in 1998.[45] Federal student aid programs under Title IV include Federal Direct Loans,[46] Federal PLUS Loans,[47] Pell Grants,[48] Academic Competitiveness Grants,[49]

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39 *See* Debt Without a Diploma, *supra* note 12, at 9.

40 *Id.* at 2. In fiscal 2010, Education Management Corporation, owner and operator of the Art Institutes, received $2.2 billion of federal financial aid, making up 89.3% of its net revenues. Lewin, *supra* note 5.

41 *See* William G. Tierney & Guilbert C. Hentschke, New Players, Different Game: Understanding the Rise of For-Profit Colleges and Universities 76–77, 79 (2007).

42 *See infra* Part I.B.

43 *See* Debt Without a Diploma, *supra* note 12, at 3 n.2, 9.

44 *See id.* at 2; *see also* U.S. Gov't Accountability Office, GAO-12-150, For-Profit Schools: Experiences of Undercover Students Enrolled in Online Classes at Selected Colleges 4 (2011), *available at* http://www.gao.gov/new.items/d12150.pdf (finding that over 2,000 for-profit colleges participated in Title IV programs in 2011).

45 *See* Higher Education Amendments Act of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1650.

46 *See* 20 U.S.C. § 1087a (2006).

47 *See id.* § 1078-2.

48 *See id.* § 1070a.

49 *See id.* § 1070a-1.

National Science and Mathematics to Retain Talent Grants,[50] and Leveraging Education Assistance Partnership Grants.[51] Of these programs, RFPCs derive "significantly more of their revenue" from Federal Direct loans and Pell Grants.[52] In 2009–2010, four of the five largest recipients of Pell Grants—the University of Phoenix, Kaplan University, Devry University, and Ashford University—were for-profit colleges that received a combined $1.65 billion.[53]

Already the nation's largest recipients of Title IV student aid programs, RFPCs have recently used the 90/10 loophole[54] to become the nation's largest recipients of non-Title IV student aid programs administered under Title 10 and Title 38 of the U.S. Code.[55] RFPCs obtain the bulk of their non-Title IV funding from veterans' education benefits programs overseen by the Department of Veterans Affairs ("VA").[56] Since 2008, RFPCs have created a strategic business model[57] around one particular program: the Post-9/11 GI Bill benefits program.[58]

The Post-9/11 GI Bill benefits program provides education subsidies to veterans to cover most, if not all, of the tuition and fees charged by their universities.[59] These tuition subsidies go directly to their educational institutions in the form of "GI Bill Disbursements" and can total over $17,500 per year.[60] Between 2009 and 2011, RFPCs were eight of the country's top ten recipients of GI Bill disbursements.[61] These eight RFPCs collectively received over $1 billion in

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50 *See id.* § 1070a-1(b)(2).

51 *See id.* § 1070c.

52 DEBT WITHOUT A DIPLOMA, *supra* note 12, at 11. Between 2006 and 2009, several RFPCs doubled their revenue deriving from Pell Grants and Direct Loans. *See id.*

53 These four schools received over six percent of the U.S. Department of Education's entire 2009–2010 Pell Grant budget. *See* DEP'T OF EDUC., DISTRIBUTION OF FEDERAL PELL GRANT RECIPIENTS AND AWARDS: AWARD YEAR 2009–10 (2010), *available at* http://www2.ed.gov/finaid/prof/resources/data/pell-inst-09-10.xls.

54 *See infra* Part I.B.

55 Title 10 contains provisions governing the armed forces, and Title 38 contains provisions governing veterans' benefits. *See generally* 10 U.S.C. § 101 (2006); 38 U.S.C. § 101 (2006).

56 *See* Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, §§ 5001–5006, 122 Stat. 2357, 2357–86 (to be codified at 38 U.S.C. §§ 101, 3301, 3311–3319, 3321–3324); DEBT WITHOUT A DIPLOMA, *supra* note 12, at 11 (explaining that while many RFPCs rely primarily on GI bill funds, some are securing non-Title IV funds from Workforce Investment Act dollars and Vocational Rehabilitation dollars).

57 *See infra* Part II.B.

58 *See* Post-9/11 Veterans Educational Assistance Act of 2008 §§ 5001–5006.

59 *See* Whitney Howe, Comment, *Public or Private University? New Legislation Caps Veterans' Educational Choices That Could Cost Less*, 14 SCHOLAR 1075, 1090–92 (2012).

60 *See id.* at 1092.

61 S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 112TH CONG., FOR PROFIT HIGHER

revenue from GI Bill funds[62]—more than ten times the $96 million secured by the two largest public recipients of GI Bill funds.[63] Moreover, in 2010–2011, six of these companies received 41% of the *entire* federal military tuition assistance benefit program.[64] As a whole, the for-profit college sector receives 50% of all military tuition assistance dollars, and nonprofit and public colleges receive only 21% and 29% respectively.[65]

This fast-developing pipeline of non-Title IV funds from the federal government to the for-profit college sector is a consequence of the loophole in the 90/10 rule, described below.

B. The HEA's 90/10 Rule and the VA's 85/15 Rule

To participate in Title IV programs, for-profit colleges must derive at least 10% of school revenue from non-Title IV funds.[66] In other words, for-profit colleges may secure no more than 90% of revenue from Title IV funds.[67] Failure to comply with this requirement, commonly known as the 90/10 rule, results in an institution losing its eligibility to participate in Title IV programs.[68] The 90/10 rule, imple-

EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 28 (2012), *available at* http://www.help.senate.gov/hearings/hearing/?id=cdd6e130-5056-9502-5dd2-e4d005721cb2.

62 A total of $4.4 billion was disbursed by the U.S government under the Post-9/11 GI Bill. *Id.*. The eight companies deriving the most revenue from Post-9/11 GI Bill funds are The Apollo Group ($210 million), Education Management Corp. ($173 million), ITT ($178 million), DeVry ($144 million), Career Education Corp. ($130 million), Strayer Corp. ($80 million), Corinthian ($60 million), and Kaplan ($44 million). *Id*.

63 The University of Maryland and the University of Texas received $51 million and $45 million, respectively, in Post-9/11 GI Bill benefits. *Id.*

64 *See* Goldie Blumenstyk, *Senate Committee's Report Focuses on For-Profit Colleges' Share of Military Education Benefits*, THE CHRON. OF HIGHER EDUC. (Feb. 23, 2012), http://chronicle.com/article/US-Senate-Panel-Examines/130909/. Altogether, the tuition assistance program distributed $563 million to active-duty service members in the 2011 fiscal year. *See id.*

65 S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 112TH CONG., *supra* note 61, at app. 12-1.

66 *See* 20 U.S.C. § 1094(a)(24) (Supp. 2011) (For-profit colleges must "derive not less than ten percent of such institution's revenues from sources other than funds provided under . . . title 42.").

67 *See id.*

68 If a for-profit school does not comply with the 90/10 rule for one year, the school's eligibility to participate in the federal student aid program becomes provisional for the next two years. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-4, FOR-PROFIT SCHOOLS: LARGE SCHOOLS AND SCHOOLS THAT SPECIALIZE IN HEALTHCARE ARE MORE LIKELY TO RELY HEAVILY ON FEDERAL STUDENT AID 8 (2010), *available at* http://www.gao.gov/assets/320/310897.pdf. If a for-profit school does not comply with the 90/10 rule for two consecutive years, the school becomes ineligible to participate in the federal student aid program for at least two years. *See id.*

mented as part of the 1998 HEA amendments,[69] replaced its predecessor, the 85/15 rule, which was authorized in the 1992 HEA amendments.[70] The 85/15 rule operated in the same way as today's 90/10 rule, except that it required for-profit colleges to derive at least 15%, rather than 10%, of revenue from non-Title IV sources.[71] Notably, a few months before Congress weakened the rule from 85/15 to 90/10, the U.S. General Accounting Office ("GAO")[72] concluded that a "substantial increase to the current 15-percent threshold" would "materially improve the effectiveness of the 85-15 rule."[73] The GAO found that "tripling the 15-percent threshold to 45 percent" would "save millions in default claims" for U.S. taxpayers.[74] According to the GAO report, a 55/45 rule would constitute precisely the "substantial increase" in the non-Title IV funds requirement necessary to achieve positive outcomes for students and taxpayers.[75] Congress, however, facing significant lobbying from the for-profit college industry, elected to weaken the rule to the current 90/10 rule.[76]

Congress passed the original 85/15 rule in 1992 in response to the rise of student loan default rates during the late 1980s and early 1990s.[77] Congress was specifically targeting "predatory education programs, seeking to get rich" off taxpayer funding of Pell Grants and other federal programs.[78] The objectives of the 85/15 rule were twofold. First, Congress intended for the 85/15 rule to protect students from rapidly growing for-profit colleges with low graduation rates and high student loan default rates.[79] Second, Congress intended for the

69 *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 102(b)(1)(F), 112 Stat. 1581, 1588 (codified at 20 U.S.C. § 1002 (2006)).

70 *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481(b)(3), 106 Stat. 448, 611 (codified at 20 U.S.C. § 1088).

71 *See* Rebecca R. Skinner, Cong. Research Serv., RL 32182, Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status 5–6 (2005), *available at* http://www.policyarchive.org/handle/10207/bitstreams/1904.pdf.

72 The General Accounting Office has since been renamed the Government Accountability Office.

73 U.S. Gen. Accounting Office, GAO/HEHS-97-103, Proprietary Schools: Poorer Student Outcomes at Schools That Rely More on Federal Student Aid 3, 8 (1997), *available at* http://www.gao.gov/archive/1997/he97103.pdf.

74 *Id.* at 3, 9.

75 *See id.* at 3, 8–10.

76 *See* Robert Greene, *Government Relaxes Rules: For-Profit Schools Win New Status*, Sarasota Herald-Trib., Nov. 3, 1998, at 2D.

77 *See* U.S. Gen. Accounting Office, *supra* note 73, at 3.

78 *See* Gallucci, *supra* note 36, at 3.

79 In 1990, default rates at for-profit schools reached 41% compared with an overall default rate of 22%. *See* Skinner, *supra* note 71, at 3. Several government investigations found

85/15 rule to protect taxpayers from footing the bill on federal investments in colleges whose students were unlikely to complete their academic programs or subsequently repay their loans.[80] The 85/15 rule would accomplish both objectives by ensuring that for-profit colleges attracted a specific percentage of their revenue from nonfederal sources, which according to the rule's drafters, would be easily possible for a college that provided a high-quality education.[81] In other words, a college providing a high-quality education would have little difficulty recruiting at least a small percentage of students willing to pay the "sticker price" of the school's program using nonfederal resources, such as cash, savings, or grants and scholarships.[82]

In this way, the 85/15 rule would force for-profit colleges to have "skin in the game" by securing at least 15% of their revenue from non-federal sources.[83] The law was designed to develop the market incentives in the for-profit college industry that already shape the nonprofit college market.[84] The average nonprofit college secures over 60% of its funding from nonfederal sources such as cash payments, alumni donations, private grants, endowment income, and investment returns.[85] Motivated to secure these revenues, the average nonprofit college has higher graduation rates and lower student loan default rates than for-profit colleges that rely almost entirely on federal funding.[86] Thus, by increasing the number of colleges with "skin in the game," Congress intended for the 85/15 rule to protect students and taxpayer subsidizers of student aid programs by creating market incentives that would increase accountability for the largest recipients of federal programs.[87]

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that many for-profit colleges were failing to "provide students with a quality education or training in occupations with job openings, focusing instead on obtaining federal student aid dollars." *Id.*

80 *See id.* at 3–4.

81 *See id.*

82 *See id.*

83 Arthur M. Hauptman emphasized the necessity for colleges to have "skin in the game" in his recent commentary describing the market incentives necessary to reduce college student debt burdens. *See* Arthur M. Hauptman, *The Federal Role in Pricing*, INSIDE HIGHER ED, (Dec. 5, 2011, 3:00 AM), http://www.insidehighered.com/views/2011/12/05/essay-federal-role-controlling-college-prices-and-spending?width=775&height=500&iframe=true.

84 *See* TIERNEY & HENTSCHKE, *supra* note 41, at 81.

85 *See id.* at 77.

86 *See* DEBT WITHOUT A DIPLOMA, *supra* note 12, at 1–2; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-143, POSTSECONDARY EDUCATION: STUDENT OUTCOMES VARY AT FOR-PROFIT, NONPROFIT, AND PUBLIC SCHOOLS 1–9 (2011), *available at* http://www.gao.gov/new.items/d12143.pdf.

87 *See* SKINNER, *supra* note 71, at 3–7.

Congress modeled this 85/15 rule after a similar rule created in 1952 to enable the VA to protect Korean War veterans from "fly-by-night" colleges that prioritized one-time payouts of federal benefits over long-term educational outcomes.[88] The VA's "85/15" rule—which differed from its later HEA counterpart with the same name—is still in operation today and requires that no more than 85% of students at a particular college receive military benefits under Title 10 and Title 38 of the U.S. Code.[89] The legislative purpose of the VA's "85/15" rule, as explained by the Supreme Court, was to function as a "free market mechanism . . . [that would] weed out those institutions [which] could survive only by the heavy influx of Federal payments."[90] The Supreme Court also observed that both Congress and the VA recognized the "great potential for abuse of our GI educational programs" when a for-profit college "cannot attract sufficient nonveteran and nonsubsidized students to its programs."[91] Hence, the VA's 85/15 rule, like the HEA's original 85/15 rule, was designed to restore market incentives to the for-profit college industry, thereby deterring schools that sought to rely exclusively on federal funds.[92]

Together, the VA's 85/15 rule and the HEA's original 85/15 rule, now the 90/10 rule, were passed to prevent for-profit colleges from relying exclusively on federal Title IV funds or exclusively on federal non-Title IV funds.[93] Nevertheless, as discussed below, because these two rules operate independently of each other, for-profit colleges can strategically structure their business models to rely entirely on a combination of federal Title IV funds and federal non-Title IV funds.

II. The RFPC Business Model

In order to maximize the amount of federal funding they can receive, the leading RFPCs have carefully designed a business model to exploit the interstices in the laws regulating federal educational funding. These schools aggressively target veterans because their Post-9/11 GI Bill benefits enable the RFPCs to secure up to 100% of their funding risk free from the federal government due to a critical loophole in

88 *See* Veterans Readjustment Assistance Act of 1952, Pub. L. No. 82-550, § 226, 66 Stat. 663, 667; Skinner, *supra* note 71, at 4. The VA's 85/15 rule, unlike the HEA's 90/10 rule, applies to both nonprofit and for-profit colleges. *See* Skinner, *supra* note 71, at 3.

89 *See* Skinner, *supra* note 71, at 4; *see supra* note 55 and accompanying text.

90 Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 216–19 (1978) (per curiam) (second alteration in original) (quoting S. Rep. No. 94-1243, at 128 (1976)).

91 *Id.* at 217 (internal quotation marks omitted) (citing S. Rep. No. 94-1243, at 89).

92 *See id.* at 216–19.

93 *See id.* at 218.

the 90/10 rule—Post-9/11 GI Bill funds technically do not count as "federal" funds under the HEA.[94] As observed by the Veterans of Foreign Wars ("VFW"), the official nonprofit service organization for U.S. veterans,[95] the current laws have resulted in a "perfect storm through which predatory schools could master a complex cycle of compliance simply by manipulating students eligible for taxpayer-funded education programs."[96] Under this scheme, RFPCs are capturing all of the upside of enormous student enrollments while shifting all of the downside risk to students and taxpayers.[97] According to the Director of the National Economic Council, this business model is identical to the business model used by investment banks before the collapse of the subprime mortgage industry.[98]

A. *The Investment Banks' Business Model Prior to the Collapse of the Subprime Mortgage Industry*

In the years leading up to the collapse of the subprime mortgage industry, large investment banks carefully perfected a two-step business model: (1) issue enormous numbers of high-risk loans, thereby maximizing short-term profits; and (2) sell these over-valued loans to investors, thereby shifting the risk of default to third parties.[99] This unsustainable business model, combined with the government's failure to regulate these deceptive, high-risk loans, brought about one of the greatest market failures in U.S. history.[100]

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94 *See* Educ. Mgmt. Corp., Annual Report (Form 10-K) 29 (Aug. 25, 2011), *available at* http://www.sec.gov/Archives/edgar/data/880059/000119312511236734/d10k.htm (explaining that the $129 million in veterans benefits received in 2010-2011 would put the company well over the 90% threshold of the 90/10 rule).

95 The Veterans of Foreign Wars is a congressionally chartered war veterans' organization and the largest organization of combat veterans in the United States with over 1.5 million members. *See* 36 U.S.C. § 230102 (2006); *Career Marine Elected to Lead Nation's Largest Organization of Combat Veterans*, VETERANS OF FOREIGN WARS (Sept. 1, 2011), http://www.vfw.org/News-and-Events/Articles/Career-Marine-Elected-to-Lead-Nation%E2%80%99s-Largest-Organization-of-Combat-Veterans/.

96 Gallucci, *supra* note 36, at 3.

97 *See* Tamar Lewin, *Education Department Increases Its Regulation of For-Profit Colleges*, N.Y. TIMES, June 2, 2011, at A18.

98 *See id.*

99 *See* FIN. CRISIS INQUIRY COMM'N, 112TH CONG., THE FINANCIAL CRISIS INQUIRY REPORT xv–xxiv (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; *see also* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 2–3 (2011), *available at* http://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2 (describing the high-risk lending practices of Washington Mutual Bank in the years leading up to the financial collapse).

100 *See* FIN. CRISIS INQUIRY COMM'N, 112TH CONG., *supra* note 99, at xv.

During this time, banks "flourished in an environment of collapsing lending standards and lax regulation. . . . Lenders made loans that they knew borrowers could not afford and that could cause massive losses to investors in mortgage securities."[101] Goldman Sachs, one of the leading participants in the U.S. mortgage market, maintained blatant conflicts of interest, often profiting off the failure of securities that it had sold to its own clients.[102]

In response to this market failure, the U.S. Senate Permanent Subcommittee on Investigations ("SPSI") proposed several regulatory solutions to prevent future market collapses caused by high-risk lending.[103] Such regulations would prevent another situation in which banks undermine the mortgage market by using the high-risk lending model which they perfected in the years leading up to the collapse of the subprime mortgage industry.[104] The targeted behavior of these banks—the massive use of high-risk lending to undermine the free market—is the dominant feature of an identical business model currently used by a small group of corporately owned, for-profit colleges.

B. The Current RFPC Business Model

Like large investment banks, RFPCs have carefully perfected a business model that relies on high-risk loans, immediate profits, and shifting of risk to third parties, and have done so by exploiting lax regulations and gaps in the laws intended to prevent the precise behaviors in which they are engaging.[105] Under this two-step business model, RFPCs (1) enroll enormous numbers of students through federal grants and loans, thereby maximizing short-term profits and (2) rely on students and their taxpayer guarantors to pay off these loans, thereby shifting the risk of default to third parties.[106]

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101 *Id.* at xxii.

102 *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., *supra* note 99, at 8.

103 *See id.* at 12. The SPSI recommended that in a well-performing mortgage market, federal regulators should (1) ensure that "qualified mortgages" carry a low risk of default; (2) require meaningful risk retention by banks issuing mortgage loans; (3) safeguard taxpayer dollars by requiring banks to meet capital requirements; (4) require greater reserves for negative amortization loans; and (5) safeguard bank investment portfolios. *See id.* at 12–13.

104 *See id.*

105 *See* LYNCH ET AL., *supra* note 13, at 1–3.

106 *See id.* at 1–6. In 2007, 95.4% of students at two-year for-profit colleges and 93.4% at four-year for-profit colleges took out student loans, while only 16.6% of students attending community colleges and 44.3% at public four-year institutions borrowed during the same period. *See* DEBT WITHOUT A DIPLOMA, *supra* note 12, at 6.

Like large investment banks in the years leading up to the financial collapse, RFPCs are earning record-setting, short-term profits.[107] Between 2009 and 2010, one RFPC doubled its profits from $119 million to $241 million, while another increased its profits from $235 million to $411 million.[108] And these schools are earning record-setting profits by exploiting veterans. According to the VFW, RFPCs are "aggressively recruit[ing] and prey[ing] on veterans . . . with no intention of conferring a valuable degree or relevant industry credentials."[109] Under their business model, RFPCs are avoiding regulatory accountability by strategically manipulating the VA's 85/15 rule and HEA's 90/10 rule.[110] After securing 90% of their revenue from Title IV funds, RFPCs are aggressively recruiting veterans to secure the remaining 10% of their revenue from Post-9/11 GI Bill benefits because they are administered under a separate provision of the U.S. Code.[111] Thus, RFPCs have perfected a business model in which 100% of their funds can come risk free from the federal government.[112]

Moreover, similar to the investment banks that misleadingly issued mortgage loans before the collapse of the housing market,[113] an astonishing one hundred percent of RFPCs recently investigated by the GAO are making "deceptive or otherwise questionable statements" when recruiting students to take out loans for which they have a high likelihood of defaulting.[114] As a result, RFPCs faced a plethora of class action lawsuits from veterans during 2011.[115] In addition, like the precollapse investment banks, many RFPCs—several of which are owned and operated by the same investment banks—are issuing loans that they know borrowers cannot afford.[116] For example, several RFPCs have recognized that some students require private loans to

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107 LYNCH ET AL., *supra* note 13, at 2. In 2009, profits at sixteen RFPCs analyzed by the Senate HELP committee totaled $2.7 billion. DEBT WITHOUT A DIPLOMA, *supra* note 12, at 8.

108 DEBT WITHOUT A DIPLOMA, *supra* note 12, at 2.

109 Gallucci, *supra* note 36, at 1–2.

110 *See id.* at 3.

111 *See id.*

112 *See id.*

113 *See* FIN. CRISIS INQUIRY COMM'N, 112TH CONG., *supra* note 99, at 20–22.

114 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 1 (2010), *available at* http://www.gao.gov/new.items/d10948t.pdf.

115 *See* Guzman v. Bridgepoint Educ., Inc., No. 11cv69 WQH (WVG), 2011 U.S. Dist. LEXIS 120611, at *2–5 (S.D. Cal. Oct. 19, 2011); Rosendahl v. Bridgepoint Educ., Inc., No. 11cv61 WQH (WVG), 2011 U.S. Dist. LEXIS 119735, at *2–5 (S.D. Cal. Oct. 17, 2011); Ferguson v. Corinthian Colls., 823 F. Supp. 2d 1025, 1026–27 (C.D. Cal. 2011).

116 *See* LYNCH ET AL., *supra* note 13, at 7.

afford tuition, so these RFPCs are now doubling as a bank and issuing loans to students with interest rates as high as eighteen percent.[117] These companies have assumed that over half of these students will default, but they determined that the profit derived from federal funds obtained by enrolling new students outweighs the financial losses resulting from the students' defaults on these private loans.[118] This conflict of interest is eerily similar to the conflicts of interest apparent when investment banks were profiting off the failure of securities that they sold to their own clients before the financial collapse.[119]

Furthermore, RFPCs have been accused of choosing "not to focus on the educational outcomes for [students] they enroll, but rather a bulk of one-time payouts of federal benefits to maintain their bottom line."[120] Sixteen of the largest RFPCs enrolled 959,000 students in 2008–2009, and 547,000 of those students, or fifty-seven percent, withdrew by August 2010.[121] Over a three-year period, an estimated 1.9 million students left these RFPCs, most with "nothing to show for their time in a for-profit school but student loan debt."[122] This result reflects an industry-wide risk of default: while only 10% of college students attend for-profit schools, students from for-profit colleges are responsible for 50% of all student loan defaults.[123] Thus, "[u]nder current law, a for-profit school can be extremely profitable while failing a majority of its students."[124]

With such outcomes, the business model used by RFPCs shares the same fundamental characteristics of the business model used by investment banks left unregulated before the collapse of the subprime mortgage market.[125] Accordingly, Congress has a rare second chance to prevent the market-undermining effects of this business model, and it can do so by amending the HEA to close the 90/10 loophole, thereby restoring free market incentives to the for-profit college industry.

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117 *See* S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 112TH CONG., *supra* note 61, at 7.

118 *See* LYNCH ET AL., *supra* note 13, at 7.

119 *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG, *supra* note 99, at 396–416.

120 Gallucci, *supra* note 36, at 2.

121 DEBT WITHOUT A DIPLOMA, *supra* note 12, at 5.

122 *Id.* at 1.

123 *See* Lewin, *supra* note 15.

124 DEBT WITHOUT A DIPLOMA, *supra* note 12, at 2.

125 *See* Lewin, *supra* note 97 (quoting Gene B. Sperling, Director of the National Economic Council, as saying that the for-profit education sector shares many of the "same characteristics of what happened with subprime housing and securitization").

III. Congress Should Amend the HEA to Count Post-9/11 GI Bill Funds as Federal Revenue and Reduce the Cap on Federal Revenue from 90% to 55% of a For-Profit College's Total Revenue

To stop RFPCs from preying on veterans and exploiting loopholes in federal education funding laws to the significant detriment of the American taxpayer, Congress should amend the 90/10 rule to (1) count Post-9/11 GI Bill funds as federal, not private, sources of revenue under the 90/10 rule and (2) tighten the cap on federal revenue from 90% to 55% of a for-profit college's total revenue.

First, this amendment would redefine "federal funds" as counted under the 90/10 rule in 20 U.S.C. § 1094(a)(24) from "funds provided under . . . title 42"[126] to "funds provided under . . . title 42 or any Federal student aid programs administered under Title 10 and Title 38 of the U.S. Code, including educational assistance benefits provided by the Secretary of Defense or the Secretary of Veterans Affairs to an individual." This amended language mirrors the language of two bills currently pending before Congress.[127] While these pending bills would count veterans' benefits as federal revenue, neither bill would make the "large change" to the 90/10 rule necessary to "materially improve [student] outcomes, such as lower [student loan] default rates."[128] To adequately protect veterans and safeguard the interests of American taxpayers, the HEA amendment must go further and tighten the cap on federal revenue from 90% to 55% of a for-profit college's total revenue.[129] This 35 percentage point cap reduction

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126 20 U.S.C. § 1094(a)(24) (Supp. 2011).

127 On December 20, 2011, Congresswoman Maxine Waters introduced a bill that would revise the 90/10 rule to count veterans' education benefits as federal funds, where veterans' education benefits are those "listed in subparagraphs (A) through (L) of section 480(c)(2) and any other educational assistance benefits provided by the Secretary of Defense or the Secretary of Veterans Affairs to an individual." Ensuring Quality Education for Veterans Act, H.R. 3764, 112th Cong. § 2(a)(2)(B) (2011). On January 23, 2012, Senators Tom Harkin and Dick Durbin introduced a bill that would revise the 90/10 rule to define federal funds as:

> [A]ny Federal financial assistance provided, under this Act or any other Federal law, through a grant, contract, subsidy, loan, guarantee, insurance, or other means to a proprietary institution, including Federal financial assistance that is disbursed or delivered to an institution or on behalf of a student or to a student to be used to attend the institution, except that such term shall not include any monthly housing stipend provided under the Post-9/11 Veterans Educational Assistance Program under chapter 33 of title 38, United States Code.

Protecting Our Students and Taxpayers (POST) Act, S. 2032, 112th Cong. § 2(a)(3) (2012).

128 U.S. Gen. Accounting Office, *supra* note 73, at 10.

129 Several recent articles support the closing of the 90/10 loophole to include veterans' benefits, but these articles do not take the necessary step of substantially tightening the 90/10

would stop the near-complete reliance of RFPCs on the federal government and restore the market incentives necessary to achieve optimal market outcomes.[130] Thus, 20 U.S.C. § 1094(a)(24) should be changed as follows (amended language in bold type):

> In the case of a proprietary institution of higher education, such institution will derive not less than **forty-five** percent of such institution's revenues from sources other than funds provided under . . . title 42 . . . **or any federal student aid programs administered under Title 10 and Title 38 of the U.S. Code, including educational assistance benefits provided by the Secretary of Defense or the Secretary of Veterans Affairs to an individual**.[131]

To allow affected for-profit colleges sufficient time to adapt their business models to avoid penalties for noncompliance with the new 55/45 rule, the proposed HEA amendment would include a grace period of two years, followed by a four-year implementation period in which the federal revenue cap decreases incrementally from 90% to 55%.[132] Altogether, this HEA amendment—by extinguishing the current 90/10 loophole, restoring market incentives with a more stringent 55/45 rule, and allowing for-profit colleges a grace period to adapt their business models—would achieve three significant groups of objectives: it would (1) fulfill the legislative intent behind the HEA's 85/15 rule (now 90/10 rule) and the VA's 85/15 rule; (2) achieve the congressional objectives of the Post-9/11 GI Bill; and (3) reduce student loan defaults and wasteful government spending.

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cap. *See* Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 519–21 (2012) (proposing a series of new regulations of the for-profit college industry, including the creation of a new oversight body within the Department of Education); Vasanth Sridharan, Note, *The Debt Crisis in For-Profit Education: How the Industry Has Used Federal Dollars to Send Thousands of Students into Default*, 19 GEO. J. ON POVERTY L. & POL'Y 331, 349–50 (2012) (proposing that the government require that for-profit colleges maintain a minimum ratio of career and student services staff to recruitment, admissions and financial aid staff).

130 *See supra* text accompanying note 123.

131 The provision currently reads as follows: "In the case of a proprietary institution of higher education, such institution will derive not less than ten percent of such institution's revenues from sources other than funds provided under . . . title 42. 20 U.S.C. § 1094(a)(24).

132 To ensure that affected for-profit colleges have sufficient time and opportunity to adapt their business models, 90/10 cap reductions should go into effect incrementally after an initial grace period of two years. The percentage cap on federal revenue should decrease from 90% to 70% in year three, 65% in year four, 60% in year five, and 55% in year six.

A. *The Proposed HEA Amendment Would Fulfill the Legislative Intent Behind the HEA's 85/15 Rule (Now 90/10 Rule) and the VA's 85/15 Rule*

The legislative intent behind the HEA's 85/15 rule and the VA's 85/15 rule was to ensure that for-profit schools could not secure all of their funding from the federal government.[133] Nevertheless, because both rules were implemented years before Congress passed the Post-9/11 GI Bill in 2008,[134] RFPCs have tailored a business model around veterans' benefits in order to sidestep the present day 90/10 rule.[135] This business model—in which RFPCs secure over 90% of their revenue through federal student aid programs—directly violates the intent of both the 85/15 and 90/10 rules.[136] The proposed amendment to the HEA 90/10 rule would eliminate RFPCs' strategic workaround by closing the loophole in the existing law and stripping federal funding eligibility from for-profit colleges who violate the new 55/45 rule.

Furthermore, in drafting both 85/15 rules, legislators intended to protect beneficiaries of federal programs from predatory education programs seeking to "get rich" off of taxpayer money.[137] The new 55/45 rule would do just this by reducing the reliance of for-profit colleges on federal funds, thereby requiring all for-profit colleges to have some "skin in the game."[138] With "skin in the game," for-profit colleges would be incentivized to maintain better academic outcomes, such as higher graduation rates and lower student loan default rates.[139] Moreover, such market incentives would not result if the 90/10 ratio is merely maintained, as proposed in a pending House bill,[140] or only reduced to the original 85/15 ratio, as proposed in a pending Senate bill.[141] In evaluating the success of the HEA's 85/15 ratio—which is more stringent than today's 90/10 ratio—the GAO concluded that a

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133 *See supra* Part I.B.

134 Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, §§ 5001–5006, 122 Stat. 2357, 2357–86 (to be codified at 38 U.S.C. §§ 101, 3301, 3311–3319, 3321–3324). The VA's 85/15 rule went into effect in 1952. Veterans Readjustment Assistance Act of 1952, Pub. L. No. 550-226, 66 Stat. 663, 667. The HEA's 85/15 rule went into effect in 1992. Higher Education Amendments Act of 1992, Pub. L. No. 102-325, 106 Stat. 448 (codified at 20 U.S.C. § 1094(a)(24)).

135 *See supra* Part II.B.

136 *See supra* Part I.B.

137 *See supra* Part II.B.

138 *See* Hauptman, *supra* note 83.

139 *See supra* Part II.B.

140 *See* Ensuring Quality Education for Veterans Act, H.R. 3764, 112th Cong. § 2(a)(2)(B) (as introduced by House, Dec. 20, 2011).

141 *See* Protecting Our Students and Taxpayers (POST) Act, S. 2032, 112th Cong. § 2(a)(3) (as introduced by Senate, Jan. 23, 2012).

"rather large change" to the ratio was necessary to fulfill the rule's legislative intent to "materially improve school outcomes" in the for-profit college industry.[142] The proposed 55/45 rule is precisely the "rather large change" necessary to accomplish this feat.[143] Indeed, one could imagine a RFPC continuing its business model if forced to reduce its federal funding percentage by only a few percentage points.[144] A 55/45 cap, however, would force RFPCs to recruit, retain, and graduate a sufficient proportion of students willing to pay the "sticker price" of their education. Thus, RFPCs would no longer be able to combat astoundingly high dropout rates—in some cases as high as 84%—by aggressively recruiting a new crop of students—and their federal subsidies—year after year.[145] Instead, the 55/45 cap would introduce the market incentives to the for-profit college industry that have long served as an accountability measure for public and nonprofit colleges.[146]

Recruiting students willing to pay the "sticker price" of their education free of government subsidies is common practice at many state universities and nonprofit colleges.[147] For example, the University of California and the University of Colorado are increasing their recruitment efforts to enroll out of state students who do not qualify for state government subsidies, but are nonetheless willing to pay the fair market value of their programs.[148] Likewise, nonprofit colleges routinely secure a percentage of their revenue by enrolling international students who do not qualify for federal aid programs, but are willing to pay the fair market value of their programs.[149] For example, more

142 U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 10.

143 *See id.* at 8–10.

144 *See id.* Joseph Sipley suggests that the current 90/10 rule "may actually exacerbate the harm that it seeks to prevent." Joseph Sipley, Note, *For-Profit Education and Federal Funding: Bad Outcomes for Students and Taxpayers*, 64 RUTGERS L. REV. 267, 290 (2011). Mr. Sipley proposes a complete repeal of the 90/10 rule and instead suggests that schools be required to retain a certain percentage of the credit risk of the loans that are extended to their students. *See id.* at 291. The credit risk requirement could stem the practice by RFPCs of shifting risk to third party taxpayers, but repealing the 90/10 rule would undermine the beneficial effects of the requirement. As explained above, reducing the 90/10 rule to a 55/45 rule introduces market incentives to the for-profit college industry in a manner that would complement a credit risk requirement.

145 Senator Harkin's Findings, *supra* note 37.

146 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-179, POSTSECONDARY EDUCATION: FINANCIAL TRENDS IN PUBLIC AND PRIVATE NONPROFIT INSTITUTIONS 14–15 (2012), *available at* http://www.gao.gov/assets/590/587941.pdf.

147 *See id.*

148 Scott Jaschik, *Out-of-State Dreams*, INSIDE HIGHER ED (Oct. 16, 2009, 3:00 AM), http://www.insidehighered.com/news/2009/10/16/outofstate.

149 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 146, at 14.

than 12% of the first-year class at the University of Pennsylvania in 2011 was international students.[150] The free market incentivizes these public and nonprofit schools to provide a high-quality education because they recruit a critical mass of students willing to pay the sticker price without government subsidies.[151] The 55/45 amendment will introduce similar free market incentives to the for-profit college industry and serve as the accountability tool originally intended by Congress to "weed out those institutions [which] could survive only by the heavy influx of Federal payments."[152]

Significantly, the proposed amendment would do more than accomplish these original objectives of the 85/15 rules; it would stop the exploitation of veterans and achieve the congressional objectives of the Post-9/11 GI Bill.

B. *The Proposed HEA Amendment Would Achieve the Congressional Objectives of the Post-9/11 GI Bill*

The Post-9/11 GI Bill is an attempt to replicate the education benefits offered after World War II.[153] On February 28, 2008, Senator Jim Webb, the bill's author, reintroduced the bill to Congress as legislation "designed to provide a level of educational benefits for those who have been serving since 9/11 that would be equal to the service they have given."[154]

Despite this objective, veterans are enrolling at for-profit colleges where a significant majority of students fail to obtain a degree.[155] These students withdraw without completing their program, and almost all of these students will leave school with loan debt.[156] Because students who drop out without completing their degree program are ten times more likely to default on their student loans, a significant majority of veterans who attend a for-profit college will face a high risk of defaulting on their student loans.[157] Incurring debt, dropping

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150 *The University of Pennsylvania by the Numbers: Enrollment, Tuition, Employment, Faculty Size, Annual Budget, and More*, U. PA., http://www.upenn.edu/about/facts.php (last visited June 25, 2012).

151 *See* SKINNER, *supra* note 71, at 3.

152 Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 217–18 (1978) (alteration in original) (quoting S. REP. NO. 94-1243, at 128 (1976)).

153 *See* 154 CONG. REC. 2852–53 (2008) (statement of Sen. Jim Webb).

154 *Id.*

155 *See* DEBT WITHOUT A DIPLOMA, supra note 12, at 3–4.

156 In 2007–2008, 95.8% of students at two-year and four-year for-profit schools took out federal student loans. NAT'L CTR. FOR EDUC. STATISTICS, 2007–08 NATIONAL POSTSECONDARY STUDENT AID STUDY 9 tbl.5 (2008), *available at* http://nces.ed.gov/pubs2009/2009166.pdf.

157 *See* DEBT WITHOUT A DIPLOMA, supra note 12, at 4.

out of school, and defaulting on student loans assuredly do not rise to "a level of educational benefits for those who have been serving since 9/11 that would be equal to the service they have given."[158]

Indeed, in September 2011, Senator Webb called for "aggressive" leadership by the VA and Congress to prevent a repeat of the "abuses of the World War II program, especially among for-profit vocational schools," which prompted the introduction of the VA's 85/15 rule in 1952.[159] The proposed 55/45 amendment would do just this by "materially improv[ing] school outcomes" in the for-profit college industry.[160] Moreover, as noted by Hollister Petraeus, Assistant Director for Service Member Affairs at the Consumer Financial Protection Bureau, "[a]s long as military education funds are on the 10 percent side of the 90-10 rule, service members will be a lucrative target for exploitation."[161] The amendment would remove the strong incentives for for-profit colleges to aggressively, and in some cases, fraudulently recruit veterans.[162] Without such perverse incentives, for-profit colleges would be put on more equal footing with nonprofit and public colleges when competing for veterans.[163]

As a result, the new 55/45 rule would also serve as a safeguard to ensure that veterans can make a well-informed choice to attend a for-profit, nonprofit, or public college.[164] Under the new 55/45 rule, veter-

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158 *See* 154 CONG. REC. 2852–53 (2008) (statement of Sen. Jim Webb).

159 *Improving Educational Outcomes for Our Military and Veterans: Hearing Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info., Fed. Servs., and Int'l Sec. of the S. Comm. on Homeland Sec. and Gov't Affairs*, 112th Cong. 2–3 (2011) (statement of Sen. Jim Webb). Senator Webb has also introduced legislation to strengthen disclosure requirements for colleges that enroll students under the Post-9/11 GI Bill program. *See* Military and Veterans Educational Reform Act of 2012, S. 2179, 112th Cong. (as introduced to Senate, Mar. 8, 2012). This bill would not address the perverse incentives resulting from the loophole in the 90/10 rule, but the act is a good first step toward protecting veterans who rely on Post-9/11 GI Bill benefits.

160 *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 10.

161 Hollister K. Petraeus, Op-Ed., *For-Profit Colleges, Vulnerable G.I.'s*, N.Y. TIMES, Sept. 22, 2011, at A31.

162 *See* Guzman v. Bridgepoint Educ., Inc., No. 11cv69 WQH (WVG), 2011 U.S. Dist. LEXIS 120611, at *4–5 (S.D. Cal. Oct. 19, 2011); Rosendahl v. Bridgepoint Educ., Inc., No. 11cv61 WQH (WVG), 2011 U.S. Dist. LEXIS 119735, at *2–5 (S.D. Cal. Oct. 17, 2011); Ferguson v. Corinthian Colls., 823 F. Supp. 2d 1025, 1027 (C.D. Cal. 2011).

163 For-profit colleges such as the University of Phoenix operate large veterans affairs divisions, with the goal of recruiting as many veterans as possible. *See Veteran Benefits*, U. PHX., http://www.phoenix.edu/colleges_divisions/military/military_programs/veteran_benefits.html (last visited June 25, 2012).

164 On April 27, 2012, President Obama moved closer to this goal by signing an Executive order "aimed at rooting out unscrupulous sales tactics" by for-profit colleges. Exec. Order No. 13,607, 77 Fed. Reg. 25,861 (May 2, 2012); Chris Kirkham, *Obama Targets Colleges Preying on Veterans' GI Bill Benefits*, HUFFINGTON POST (Apr. 26, 2012, 10:00 PM), http://www.huffingtonpost.com/2012/04/26/obama-colleges-veterans-gi-bill_n_1457647.html. The order requires

ans who attend for-profit colleges would have a greater likelihood of earning their degrees and a lower likelihood of defaulting on student loans than under the 90/10 rule. For-profit colleges would be more likely to provide a high-quality education because they would be recruiting a critical mass of students willing to pay the sticker price without government subsidies.[165] These market incentives would more closely align short-term corporate profits with positive student outcomes for veterans and nonveterans alike.[166] The 55/45 rule may also motivate more veterans to choose nonprofit or public colleges, as veterans would no longer face high-pressure recruiting from RFPCs seeking to exploit the 90/10 loophole.[167]

In fact, a 2011 study demonstrates that public colleges in particular provide a remarkably effective environment for veterans to perform academically.[168] Veterans relying on Post-9/11 GI Bill benefits at public colleges are routinely performing at levels higher than nonveterans at the same schools.[169] Furthermore, the average cost of educating veterans at public colleges is $4,874, which is less than half the cost of comparable for-profit programs: $10,875.[170] With such a significant reduction in tuition, fewer veterans would take out student loans—therefore subjecting themselves to the risk of default—to cover expenses that exceed their veterans' benefits.[171] And thus, under the 55/45 rule, the Post-9/11 GI Bill would fulfill its legislative intent and provide "a level of educational benefits for those who have been serving since 9/11 that would be equal to the service they have given."[172]

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the Departments of Defense, Veterans Affairs, and Education to ensure that "educational institutions provide meaningful information to service members . . . about the financial cost and quality of educational institutions to assist those prospective students in making choices about how to use their Federal educational benefits." Exec. Order No, 13,607, 77 Fed. Reg. at 25,861. This Note's proposed solution takes President Obama's order one step further by removing the market incentives that compel for-profit colleges to engage in the precise sales tactics which the order seeks to prevent.

165 *See* SKINNER, *supra* note 71, at 3.

166 *See supra* Part III.A.

167 *See* Lipton, *supra* note 20.

168 *See* WENDY A. LANG & JOHN T. POWERS, COMPLETING THE MISSION: A PILOT STUDY OF VETERAN STUDENTS' PROGRESS TOWARD DEGREE ATTAINMENT IN THE POST 9/11 ERA 11 (2011), *available at* http://www.pattillmanfoundation.org/wp-content/uploads/2011/11/Completing-the-Mission.pdf.

169 *See id.*

170 *See* Senator Harkin's Findings, *supra* note 37.

171 Post-9/11 GI Bill benefits cover all public school in-state tuition and fees, as well as the first $17,500 of a private college's annual tuition. *Changes to the Post-9/11 GI-Bill*, U.S. DEP'T VETERANS AFFAIRS, http://www.gibill.va.gov/benefits/post_911_gibill/Post911_changes.html (last updated Feb. 9, 2012).

172 154 CONG. REC. 2852–53 (2008) (statement of Sen. Jim Webb).

The proposed HEA amendment would do more than improve the educational outcomes for veterans who take advantage of the Post-9/11 GI Bill; as explained below, the new 55/45 rule would reduce overall student loan defaults as well as wasteful government spending.

C. The Proposed HEA Amendment Would Reduce Student Loan Defaults and Wasteful Government Spending

The proposed HEA amendment would take concrete steps toward reducing student loan defaults and eliminating wasteful government spending. First, the reduction of the 90/10 cap to a 55/45 cap would directly reduce the amount of federal loans invested in the small group of publicly traded corporations that have used the RFPC business model to become the dominant recipients of this country's federal student loan programs.[173] As such, the 55/45 cap would stop the direct pipeline of loan dollars between the federal government and the for-profit college industry in which an astounding 95.8% of students borrow to attend school.[174] As a consequence, nearly half of all federal student loan defaults result from attendance at for-profit schools, although these schools have only ten percent of higher education students.[175] And these student loan default rates are rising sharply.[176] Under the new 55/45 cap, however, market incentives requiring for-profit colleges to have "skin in the game" would motivate greater educational outcomes, including lower student loan default rates and higher quality education.[177] Because the 55/45 cap would require for-profit colleges to secure more revenue from nonfederal sources, more federal loan borrowers would attend nonprofit or public colleges, where they would be two to four times less likely to default on their loans.[178]

Not only is the current federal investment in RFPCs creating a student loan bubble similar to the housing bubble,[179] it is driving up the national debt by investing billions of dollars in colleges whose as-

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173 *See supra* Part II.B.

174 *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *supra* note 156, at 5 tbl.1. By contrast, only 13.2% of students attending public two-year colleges and 43.4% at public four-year institutions borrowed during this period. *Id.*

175 *See* Lewin, *supra* note 15.

176 *See id.*

177 *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 10.

178 *See* Lewin, *supra* note 15.

179 According to many economists, the similarities between the student loan crisis and the housing market collapse present an "eerie conceptual analogy." *See* William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 488 (2011) (identifying common paradigms such as "specific identifiable market forces [that] cause both the

tonishingly poor educational outcomes make them bad investments for taxpayers.[180] In 2009–2011, eight RFPCs collectively received almost 25% of all Post-9/11 GI Bill funds.[181] In the same year, six RFPCs received 41% of the entire federal military tuition assistance benefit program.[182] In contrast, only 22% of students at four-year, for-profit colleges graduate within six years.[183] For example, in 2002, 175,200 students started full time in the online Bachelor's program at the University of Phoenix.[184] By 2008, only 8,797 students—or 5% of the entire class—had graduated.[185] These statistics demonstrate the magnitude of the federal government's wasteful investment in RFPCs, which focus not "on the educational outcomes for those they enroll, but rather [on] a bulk of one-time payouts of federal benefits to maintain their bottom line."[186]

The 55/45 cap would directly and substantially reduce the government's wasteful investment in the University of Phoenix and other RFPCs by limiting—by more than a third—the percentage of federal funds that they can receive in a given year. Moreover, the market incentives introduced by the cap reduction would motivate better educational outcomes, thereby improving the quality of the government's investment in these for-profit colleges.[187]

Thus, the proposed HEA amendment would accomplish a wide range of positive outcomes, including the reduction of student loan defaults and the reduction of wasteful government spending. Nevertheless, advocates of the for-profit college industry, particularly lobbyists for the fifteen publicly traded corporations that enroll 62% of the industry's students, have voiced fears about amending the current 90/10 rule.[188]

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housing market and the higher education market to inflate faster than the 'normal' rate of inflation").

180 *See supra* Part II.B.

181 *See* S. HEALTH, EDUC., LABOR, & PENSION COMMITTEE, 112TH CONG., *supra* note 61, at 28.

182 *See* Blumenstyk, *supra* note 64.

183 *See* LYNCH ET AL., *supra* note 13, at 2–3.

184 *Id.* at 5.

185 *Id.*

186 Gallucci, *supra* note 36, at 2.

187 *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 9–10.

188 *See* Eric Lichtblau, *With Lobbying Blitz, Profit-Making Colleges Diluted New Rules*, N.Y. TIMES, Dec. 10, 2011, at A1; Senator Harkin's Findings, *supra* note 37.

IV. Fears About Amending the 90/10 Rule as Proposed Are Unfounded

Twenty years ago, Congress passed the 85/15 rule, the predecessor of the current 90/10 rule, in order to stem fraudulent and abusive practices that had been identified at for-profit colleges.[189] This rule, according to legislators, was necessary to restore market incentives to the for-profit college industry.[190] Nevertheless, opponents and critics of the 85/15 rule argued that requiring for-profit colleges to obtain a certain percentage of their revenue from non-Title IV sources would limit college access to vulnerable student populations that rely on federal benefits, while unfairly targeting for-profit colleges.[191] Their fears proved unfounded.[192] Yet, these very same fears form the basis of the current arguments against amending the 90/10 rule so as to count veterans' benefits as federal funds or to tighten the 90/10 ratio.[193] These fears are just as unfounded today as they were twenty years ago.

A. The Proposed HEA Amendment Would Increase, Not Decrease, Educational Opportunities for Veterans and Other Students Who Rely on Federal Student Aid

Critics and opponents of a 90/10 rule amendment that counts veterans' benefits as federal funds and tightens the 90/10 ratio argue that the amendment would limit college access to veterans and other students who rely on federal financial aid programs.[194] For example, according to the Association of Private Sector Colleges and Universities ("APSCU"), a leading advocacy group for the for-profit college industry, a 90/10 rule amendment would be the equivalent of "[p]utting sanctions on military or veteran education benefits" and would be "a punitive measure that targets [for-profit colleges] but really hurts stu-

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189 *See* Skinner, *supra* note 71, at 3.

190 *See id.* at 4.

191 *See id.* at 4–5.

192 In 1997, five years after the 85/15 rule went into effect, the GAO confirmed that the rule was accomplishing its intended purposes, that is, improving student outcomes and protecting taxpayers. *See* U.S. Gen. Accounting Office, *supra* note 73, at 8–9, 10. In fact, the 85/15 rule was so effective that the GAO stated that Congress could save taxpayers millions of dollars by tightening the 85/15 rule. *See id.* at 10. Congress, however, facing lobbying efforts from the for-profit college industry, elected to loosen—rather than tighten—the rule from 85/15 to 90/10. *See* Greene, *supra* note 76.

193 *See* Press Release, Ass'n of Private Sector Colls. & Univs., APSCU Says Private Sector Schools Serve Military Students Well (Sept. 22, 2011), http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=24704.

194 *See id.*

dents."[195] According to this rationale, for-profit colleges meet an important market need of veterans who desire to attend online or technical programs.[196]

This argument, however, is undermined by the simple fact that low graduation rates and other statistics demonstrate that RFPCs are *not* meeting the needs of veterans.[197] The majority of students who attend RFPCs drop out with student loan debt, but no degree.[198] And in the case of veterans like Sergeant Pantzke, students leave school having extinguished their Post-9/11 GI Bill benefits.[199] Rather than serving as a "punitive measure" that hurts veterans, the proposed HEA amendment would incentivize for-profit colleges to achieve better outcomes by ensuring that they have "skin in the game."[200] Moreover, veterans relying on Post-9/11 GI Bill benefits at nonprofit and public colleges have outperformed veterans at for-profit colleges.[201] Thus, if a student is denied admission at a for-profit college because the school has reached the 55/45 cap, this student's chances of completing his program would increase by attending a public or nonprofit college.[202]

Advocates for the for-profit college industry, including Donald Graham, CEO of the Washington Post Co., which owns and operates Kaplan University, counter that graduation rates and student loan default rates are unfair evaluation metrics.[203] Mr. Graham contends that such metrics penalize for-profit colleges that enroll a high percentage of low-income and first-generation college students who depend on federal financial aid programs.[204] Such an argument, however, does not stand up to evidence.

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195 *Id.*

196 *See id.*

197 *See supra* Part II.B.

198 *See supra* Part II.B.

199 *See supra* text accompanying notes 1–10.

200 *See supra* Part III.B.

201 *See supra* Part III.B.

202 *See supra* Part III.B. Moreover, it cannot be the case that the student would apply to the for-profit college only because he could not get into any other colleges because almost all public community colleges are open enrollment. *See* George R. Boggs, Am. Ass'n of Cmty. Colls., Democracy's Colleges: The Evolution of the Community College in America 2 (2010), *available at* http://www.aacc.nche.edu/AboutCC/whsummit/Documents/boggs_whsummitbrief.pdf.

203 *See* Alan Scher Zagier, *For-Profit Colleges Respond to Increased Scrutiny*, Huffington Post (Aug. 6, 2011, 6:20 PM), http://www.huffingtonpost.com/2011/08/06/for-profit-colleges-respo_n_920307.html.

204 *See id.*

In December 2011, the GAO rejected Mr. Graham's arguments and determined that demographics do not explain the shortcomings of education outcomes by students who attend for-profit colleges.[205] The GAO analyzed a number of metrics to evaluate the educational outcomes of at-risk students who attended for-profit, nonprofit, and public colleges.[206] The study concluded that at-risk students at for-profit colleges experienced worse outcomes on six metrics, including (1) graduation rate, (2) unemployment rate, (3) borrowing rate, (4) debt load, (5) loan default rate, and (6) licensing exam pass rate.[207] At-risk students attending for-profit colleges fared better in only one outcome: certificate graduation rate.[208]

Moreover, given the right resources, advising, and mentorship, low-income and first-generation college students—the students who rely most on federal financial aid—graduate at rates similar to their high-income peers.[209] This evidence is further supported by the impressive successes of veterans—many of whom are first-generation college students—who outperform their peers at nonprofit and public universities.[210]

Hence, the proposed HEA amendment would improve, not worsen, the educational opportunities and outcomes for veterans and other students who rely on federal financial aid programs.

B. The Proposed HEA Amendment Would Not Cause Schools to Exceed the Cap and Force Them to "Close Down"

Critics and opponents of a 90/10 rule amendment that counts veterans' benefits as federal funds and tightens the 90/10 ratio argue that the amendment would cause for-profit colleges to exceed the cap and force them to close down.[211] According to this argument, for-profit

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205 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 86, at 1–3. This GAO report also alleviates the concern once expressed by the GAO that tightening the 90/10 cap could reduce college access opportunities for low-income students. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 73, at 3.

206 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 86, at 1, 3.

207 *See id.* at 5–8.

208 *See id.* at 5–6.

209 Successful college-access programs such as College Forward demonstrate that the students frequently targeted by for-profit colleges achieve greater academic outcomes if they attend colleges that invest money, time, and resources in student support services, rather than marketing and recruitment. *See generally* CATHERINE HORN & MIGUEL RAMOS, THE PRICE OF PERSISTENCE: BARRIERS TO POSTSECONDARY SUCCESS FOR LOW-INCOME AND FIRST-GENERATION STUDENTS (2008), *available at* http://www.collegeforward.org/~PDFs/College_Forward_Report_final_final.pdf.

210 *See supra* Part III.B.

211 *See* Press Release, Ass'n of Private Sector Colls. & Univs., *supra* note 193.

colleges would go out of business due to increased regulation; however, the argument does not hold up to historical scrutiny or the realities of the business model used by those for-profit colleges most affected by the proposed HEA amendment.[212]

The for-profit college industry has a strong record of adapting its business model around the 90/10 rule.[213] For example, between January 1, 2000, and December 31, 2002, only two for-profit colleges lost their eligibility to participate in Title IV programs due to violations of the 90/10 rule.[214] Because of this track record, the proposed HEA amendment provides a two-year grace period and four-year implementation period to enable for-profit colleges affected by a 55/45 cap to adapt their business models to comply with the new regulation.[215]

Thus, in response to a 55/45 cap, for-profit colleges would adapt their business model to obtain a greater diversity of nonfederal revenues commonly secured by nonprofit colleges.[216] One immediate option available to for-profit colleges would be to enroll more students willing to pay the "sticker price" of the school's program, that is, the market value of the program without government subsidies.[217] Enrolling these students would be analogous to when nonprofit and public colleges enroll out of state or international students willing to pay the unsubsidized "sticker price" of their programs.[218]

Another option would be to reserve a portion of profits as investments, similar to an endowment, which would produce a sustainable, steady income for the college.[219] Alternatively, RFPCs could also adopt the "federal-free" business model used by a growing number of for-profit colleges.[220] These successful "federal free" for-profit colleges are smaller schools that do not rely on *any* federal Title IV fund-

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212 *See id.*

213 *See* SKINNER, *supra* note 71, at 7–8.

214 *See id.* at 7.

215 *See supra* note 132 and accompanying text.

216 Alternatively, some for-profit colleges may fail to secure nonfederal sources of revenue, but such colleges would go out of business because they fail to attract private funds in the free market, not because of government regulation. Such a failing would merely demonstrate a virtue of the free market: colleges that are not good enough to foster market demand without a near complete reliance on government subsidies should go out of business.

217 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 146, at 3, 14–16.

218 *See id.* at 3, 14–16.

219 *See* TIERNEY & HENTSCHKE, *supra* note 41, at 77–79. On average, private, not-for-profit four-year universities receiving Title IV funds from the federal government obtain over 30% of their revenue from investments. *See id.* at 79.

220 *See* Judith Scott-Clayton, *The Hidden Majority of For-Profit Colleges*, N.Y. TIMES ECONOMIX (Feb. 24, 2012, 6:00 AM), http://economix.blogs.nytimes.com/2012/02/24/the-hidden-majority-of-for-profit-colleges.

ing, and they represent over half of the for-profit colleges in at least several states.[221] Such schools demonstrate that under a 55/45 cap, for-profit colleges can and will develop successful business models without the need for massive federal subsidies.

Another effect of the proposed 55/45 cap would be the reduction of the massive marketing budgets of RFPCs like Ashford University, owned by Bridgepoint, Inc. In 2010, 29.7% of Ashford's revenues went to marketing, 30.3% were profits largely distributed to shareholders as dividends, and the remaining 40% went to executive compensation, lobbying, and other expenses.[222] As part of this business model, in 2009, Ashford spent only $700 per student on instruction.[223] Hence, under the current law, RFPCs like Ashford spend more of their federal subsidies to convince students to enroll than to teach these students once they start.[224]

Under the 55/45 cap, Ashford would no longer combat its astoundingly high dropout rate of 84% by aggressively recruiting a larger crop of students year after year through advertising and marketing.[225] Instead, Ashford would have market incentives to improve the quality of its program to attract students willing to pay the program's fair market value.[226] Accordingly, Ashford would be more likely to invest in career placement assistance and other student support services that would positively affect student outcomes.[227]

Altogether, these strategic options would allow for-profit colleges to adapt their business models to comply with the proposed HEA amendment. Moreover, as explained below, this amendment would promote free market incentives by decreasing, not increasing, the presence of the federal government in the for-profit college industry.

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221 *See id.* Although some of these for-profit colleges could have secured some non-Title IV funding, by and large, these colleges have developed successful business models without the need for any federal funding. *See id.*

222 S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 112TH CONG., *supra* note 61, at 300.

223 *See id.* at 311 n.1242.

224 *See id*. at 311.

225 *See id*. at 315.

226 *See supra* Part III.A.

227 Between 2007 and 2010, Ashford University employed 1,703 recruiters and 1 career placement staff member. *See* S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 112TH CONG., *supra* note 61, at 313–14. Similarly, Education Management Corporation employed 5,669 recruiters and 321 career placement staff members. *See id.* at 469.

C. *The Proposed HEA Amendment Would Not Cause Undue Government Interference with the Free Market*

Opponents of a 90/10 rule amendment that counts veterans' benefits as federal funds and tightens the 90/10 ratio argue that the amendment would be an unnecessary and improper action for the federal government.[228] According to the APSCU, "informed educational choice is a critical component to higher education success," and "higher education programs and institutions eligible to receive Veterans Affairs educational benefits already receive rigorous scrutiny."[229] Such critics correctly observe that there are several levels of review through the federal government, accrediting agencies, and state governments, all of which have regulatory oversight of for-profit colleges.[230]

Critics fail to recognize, however, that the legislative purpose of the 90/10 rule is regulatory in nature.[231] Congress passed the 90/10 rule *precisely to* stem abusive practices by for-profit colleges and decrease student loan default rates.[232] The proposed HEA amendment would simply accomplish the original regulatory purpose of the law by closing the critical 90/10 loophole and restoring market incentives to the for-profit college industry.[233]

Furthermore, the rampant reliance of RFPCs on aggressive and exploitative recruiting tactics undermines their position that "informed educational choice is a critical component to higher education success."[234] Rather, a significant percentage of students and veterans who attend RFPCs become fully informed only after enrolling, evi-

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228 *See* Press Release, Ass'n of Private Sector Colls. & Univs., *supra* note 193.

229 *Id.*

230 *See* Mark L. Pelesh, *Markets, Regulation, and Performance in Higher Education*, *in* FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 91, 92–97 (Guilbert C. Hentschke et. al. eds., 2010).

231 *See supra* Part II.B.

232 *See supra* Part II.B. This Congressional goal also rebuts an argument made by some for-profit colleges: that they are being singled out unfairly. The for-profit college industry's exploitative recruitment of veterans offers greater, not fewer, justifications for tightening the 90/10 rule. *See* Lipton, *supra* note 20.

233 *See supra* Part II.B. Moreover, the solution proposed in this Note achieves an abundance of positive outcomes simply by amending existing law, not by adding more governmental regulations. Alternatively, Professor Amanda Harmon Cooley proposes a series of state and federal regulations, including the creation of a for-profit educational institution oversight program at the Department of Education. *See* Cooley, *supra* note 129, at 558–63. The regulations proposed by Professor Cooley would achieve many positive outcomes in the for-profit college market, but more government agency oversight will come at a greater long-term operating cost than the proposed 55/45 rule amendment.

234 *See* Press Release, Ass'n of Private Sector Colls. & Univs., *supra* note 193.

denced in part by the astounding dropout rates at RFPCs.[235] Indeed, Sergeant Pantzke felt pressured into enrolling in the Art Institute of Pittsburgh; it was not until after he enrolled that he conducted further research into the program's reputation and concluded that the school's degree was not "worth much more than the paper is worth."[236]

Therefore, the proposed HEA amendment does not represent improper government interference in the free market. The amendment instead fulfills Congress's intent of restoring market incentives to the for-profit college industry by decreasing, not increasing, the federal government's presence in the industry.

Conclusion

Congress designed the 90/10 rule to serve as a "free market mechanism" to "weed out" for-profit colleges that "could survive only by the heavy influx of Federal payments."[237] Today, however, the 90/10 rule is not accomplishing this objective. A small number of for-profit-colleges have created a business model to take advantage of a loophole in the rule that allows these colleges to receive federal funds even after the school has reached its 90% limit on federal student aid. The casualties of this business model are U.S. veterans and taxpayers.

Congress must correct this market failure and amend the 90/10 rule to (1) count Post-9/11 GI Bill funds as federal, not private, sources of revenue under the HEA and (2) tighten the cap on federal revenue from 90% to 55% of a for-profit college's total revenue. This two-pronged amendment would not only fulfill the legislative intent of the 90/10 rule; it would protect veterans like Sergeant Pantzke. Under the proposed 55/45 rule, the Art Institute of Pittsburgh would not have exploited Sergeant Pantzke for his Post-9/11 GI Bill benefits. The Art Institute would not have pressured him into enrolling, and once he did enroll, the school would have had strong market incentives to ensure that he stay in school and graduate. Therefore, to ensure that more veterans are not victims of the perverse incentives created by the interplay of current federal education funding laws, Congress must amend the 90/10 rule and close this loophole.

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235 *See supra* Part II.B.

236 Gavett, *supra* note 7.

237 Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 216–19 (1978) (quoting S. Rep. No. 94-1243, at 128 (1976) (explaining the purpose of the VA's 85/15 rule, after which the current 90/10 rule was modeled)).