

## Commentary

[f](#) [t](#) [+](#) [in](#) [e](#) [p](#) Comments (3)

June 17, 2013

### In Online Partnerships, Legal Compliance Is Key

By Joseph G. Casion and Joshua E. Gewollb

More and more colleges are expanding into online education, through traditional courses and MOOCs, or massive open online courses. Developing courses is expensive and requires a lot of technical expertise, so many colleges are forming partnerships with for-profit online vendors to help them.

Those partnerships provide an extraordinary opportunity for colleges—but they also present new legal risks. In the past several years, the for-profit-education sector has been the subject of a number of lawsuits, in which the government has extracted large settlements. Colleges need to be aware of their own risks and to create agreements that protect against liability when entering into partnerships with online-education providers.

The most prominent tool the government has used to penalize noncompliance in online education is the False Claims Act. It allows private individuals (acting on the government's behalf) to bring claims against those who defraud the government. The law provides powerful incentives for whistle-blowers: The government is entitled to damages in the amount of three times the false claim, and the whistle-blower may receive up to 30 percent of the government's recovery, plus lawyer's fees.

Colleges have been the subject of increased False Claims Act activity since the U.S. Court of Appeals for the Seventh Circuit's 2006 decision in *United States Main v. Oakland City University*. The plaintiff, Jeffrey Main, alleged that Oakland City University, a private nonprofit college in Indiana, had paid student recruiters bonuses in violation of the incentive-compensation ban under federal financial-aid regulations. The court reasoned that, by accepting federal funds, the university was certifying that it was in compliance with regulatory requirements and its program participation agreement, both of which included the incentive-compensation ban. The whistle-blower was permitted to proceed to trial to prove that the university was, in fact, violating that ban and thus submitting false claims.

That decision allowed other whistle-blowers and the government to make claims against many colleges on similar grounds. Since the *Main* decision, a number of lawsuits against for-profit education providers have alleged many types of violations of regulatory requirements. These include improper incentives to student recruiters, falsification of job-placement rates, enrollment of unqualified or ineligible students, falsely reporting satisfaction of accreditation standards, and falsely asserting compliance with discrimination laws.

THE CHRONICLE OF HIGHER EDUCATION  
**THE ACADEMIC  
 WORKPLACE**  
 COMING JULY 26  
 Sponsored by:  
**Fidelity**  
 INVESTMENTS

#### Most Popular

Most Viewed Most Commented

1. 'An Industry of Mediocrity': Study Criticizes Teacher-Education Programs
2. Giving Employers What They Don't Really Want
3. Dispute Over Athletes' Rights Challenges NCAA's Principles of Amateurism
4. Against Environmental Panic
5. Each Called by Name

#### Campus Viewpoint

Information provided by participating institution



Victoria is located in New Zealand's capital city, Wellington (named the world's 'coolest little capital' in the Lonely Planet's Best in Travel in 2011 guide), in close proximity to the country's archives and national collection...

• View Campus Viewpoint

The government has extracted large settlements from for-profit educational institutions, including, most notably, a \$67.5-million settlement with the University of Phoenix. Last year the government announced that it was joining a number of new lawsuits, including a suit against a Dallas-area for-profit chain of colleges alleging misrepresentation of job-placement statistics and other frauds.

Most of the False Claims Act lawsuits and recoveries have been against for-profit colleges, so they have not been on the radar for many nonprofit institutions of higher education. However, new partnerships in online education between nonprofit institutions and for-profit organizations expose the nonprofit colleges to a new level of risk. This was illustrated by a December 2012 settlement involving the nonprofit New York Institute of Technology and its for-profit partner, Cardean Learning Group.

In that case, the government held NYIT responsible for the regulatory violations of Cardean. In 2003, NYIT made a contract with the company to permit students at Cardean's online component, Ellis College, to use NYIT's federal-student-loan and grant funds to receive degrees issued by the institute in exchange for a percentage of Cardean's revenue.

Like the for-profit defendants in other False Claims Act cases, Cardean was accused of violating the incentive-compensation ban. The government alleged that the institute had turned a blind eye to Cardean's practices. To resolve those allegations, NYIT agreed to pay \$2.5-million in damages, in addition to the \$1.5-million paid by Cardean. Significantly, there was no allegation that the New York Institute of Technology, in recruiting its own traditional students, had independently violated the incentive-compensation ban.

That case serves as a reminder that colleges contemplating online-education partnerships should protect themselves against the risk of liability from the outset. If the online provider is involved in recruiting, colleges should conduct due diligence, get specific representations that recruiting practices comply with the law, and insist on protection from any lawsuits.

Other areas also demand scrutiny. An institution will need to ensure that the program is accredited in each jurisdiction in which students enroll. It will need to monitor marketing materials to ensure that the program is correctly described, and that job placement rates are reported accurately.

The legal risks of MOOCs under the False Claims Act remain to be seen. The legal landscape will evolve as MOOC providers and affiliated colleges begin to issue certificates of completion, colleges start to offer credit for MOOCs, and MOOC providers attempt to profit from student data. Meanwhile, colleges would be wise to choose their for-profit online partners carefully and proceed with caution.

*Joseph G. Casion and Joshua E. Gewolb are lawyers in Rochester, N.Y.*