



90/10 Rule Compliance Strategies & Considerations

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To remain eligible to participate in the federal student aid programs, proprietary institutions must comply with the "90/10 rule." This rule, as amended by Section 2013 of the [American Rescue Plan Act of 2021](#) (the "Act"), requires proprietary institutions to derive at least 10 percent of their revenue from sources other than "Federal education assistance funds."¹ Federal education assistance funds are defined in the Act as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution[.]"²

In late 2021, the U.S. Department of Education ("ED") engaged in a negotiated rulemaking to implement the changes detailed in the Act. As part of this process, ED proposed a number of significant revisions to the 90/10 rule. Consensus ultimately was reached by negotiators, and [final regulations](#) were published by ED on October 28, 2022.³ These final regulations apply to institutional fiscal years beginning on or after January 1, 2023.

Given the significance of these regulatory changes, and the challenges they create for many proprietary institutions, we determined to create this compilation of strategies we have seen used for managing 90/10 rule compliance. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

1. See 20 U.S.C. §1094(a)(24).

2. *Id.* Regulations at 34 CFR 668.28 identify the types of funds that institutions must treat as Federal and non-Federal revenue. 34 CFR 668.28(a)(1)(i) provides that the Secretary will identify Federal education assistance funds, by agency, to assist proprietary institutions in complying with the 90/10 requirement. On December 21, 2022, ED published a notice in the Federal Register at 87 FR 78096 listing the Federal education assistance funds for qualifying students that proprietary institutions of higher education must include as Federal revenue in their non-Federal revenue calculation. ED will update this list for subsequent fiscal years as needed.

3. See 87 FR 65426 (Oct. 28, 2022).

Monitoring 90/10 Rule Compliance

As a threshold matter, we encourage institutions to consider how they might strengthen their ability to monitor 90/10 rule compliance on a daily or weekly basis. We have observed that many institutions use software designed to track 90/10 rule compliance, which enables them to accurately project a 90/10 ratio at any given time. We also know that a number of institutions have worked closely with their auditors and other professionals in recent years to improve their understanding of the 90/10 rule and their ability to project their ratio. Regardless of what method is used, there is little question that an ability to understand and track 90/10 compliance throughout the fiscal year will improve an institution's ability to identify and implement the most effective compliance strategies.

Revenue from External Student Scholarships

When students use external scholarship funds received from an outside source to cover their tuition, fees, and other institutional charges, these typically count towards the institution's "Good Ten" revenue, meaning they qualify as revenue from sources other than federal education assistance funds. We have seen proprietary institutions improve their 90/10 rule compliance by developing relationships with employers, trade associations, and a range of non-profit foundations and organizations to increase opportunities for their students to obtain external student scholarships. Institutions also may be able to play a critical role in ensuring that qualified current and prospective students are aware of and apply for available external scholarships.

We caution that external scholarship funds originally contributed by a party related to the institution, its owners, or affiliates would need to be excluded from an institution's Good Ten calculation.⁴ These funds, though received in the form of an external scholarship, would not be from a bona fide outside source.

Revenue from Internal Student Scholarships

Federal regulations concerning the 90/10 rule also contemplate narrow opportunities for institutions to count revenue from internal student scholarships in their Good Ten. We have worked with institutions that use internal scholarships for this purpose, and always caution close adherence to the law and guidance.

As discussed in the *FSA Handbook*, tuition discounts or waivers "do not count as revenue because no new revenue is generated. Similarly, internal transfers of cash among accounts are not considered revenue because they are not an inflow of cash to the school."⁵ However, an internal scholarship program that results in an actual inflow of cash to the school can generate Good Ten provided the scholarship funds are "disbursed from an established restricted account" and "the funds in that account represent designated funds from an outside source that is unrelated to the institution, its owners, or its affiliates or income earned on those funds."⁶

Revenue from Employer Tuition Payments

When students use funds received from current or future employers to cover their tuition, fees, and other institutional charges, this revenue frequently can count towards the institution's Good Ten. Indeed, in recent years, we have observed a number of institutions improving their 90/10 rule compliance by expanding their employer tuition benefit and tuition reimbursement programs. We do caution, however, that these relationships can be deceptively complex, and institutions should confirm with their advisors that a particular relationship will benefit their Good Ten, if that is their objective.

For example, assume a group of students enroll in a Title IV-eligible electrician program offered by an institution, and they work for an employer that offers a tuition benefit program. The tuition payments made by the employer to cover the students' tuition and fee charges should count in the Good Ten, as it is outside revenue paid to the institution to cover tuition, fees, and other institutional charges generated from a Title IV program offered by the school.

On the other hand, assume the same institution is providing electrician training to a group of employees pursuant to a contract with the employer and the employer pays the institution directly. In this scenario, the employees are not students of the institution enrolled in a Title IV-eligible program. They are simply the beneficiaries of the training contract between the school and the employer.

4. 34 C.F.R. §668.28(a)(6)(viii) (July 1, 2023).

5. See 2022-23 FSA Handbook, Volume 2.

6. 34 C.F.R. §668.28(a)(5)(iii) (July 1, 2023).

Practically speaking, these arrangements may look and feel very similar to the institution. In both cases, the school may be providing the training on its campus. Its Title IV program students (in the first scenario) and the employees (in the second scenario) might even train in the same facilities and use the same curriculum. And in both cases, the employer ultimately is paying for the training. But in the latter scenario, whether the revenue may be counted in the Good Ten is uncertain, and would turn on the considerations discussed in the next section (Revenue from Non-Title IV Programs).

Complexities also can arise if a school has a contractual relationship with an employer, and the employer's tuition payments are contingent on the student completing the program or remaining employed for a period after graduation. Even if students are enrolled in a Title IV program, whether such revenue may be counted in the Good Ten will be impacted by when it is received, whether it constitutes a private education loan, and whether any amount of the payment received from the employer is guaranteed by the school (for more on this point, see the section below titled Revenue from Third-Party Loans).

Revenue from Non-Title IV Programs

We have seen many proprietary institutions successfully improve their 90/10 rule compliance by generating revenue from non-Title IV programs. In some instances, institutions have developed these programs internally, and in others they have added non-Title IV programs through a strategic acquisition. In either case, the revenue generated from a non-Title IV program offered by a proprietary institution may be counted as Good Ten so long as the funds are paid by the student (or on behalf of the student by a party unrelated to the institution), and the non-Title IV program satisfies the following requirements.⁷

First, the non-Title IV program must fit into at least one of the five categories below, which are set out in ED's regulations.⁸ Specifically, the institution may only count the revenue in its Good Ten if the non-Title IV program:

- Is approved or licensed by the appropriate State agency;
- Is accredited by an accrediting agency recognized by ED under 34 CFR part 602;
- Provides an industry-recognized credential or certification;⁹
- Provides training needed for students to maintain State licensing requirements; or
- Provides training needed for students to meet additional licensing requirements for specialized training for practitioners who already meet the general licensing requirements in that field.

Second, the non-Title IV program must meet all of the following "new" requirements, which were introduced in the regulations ED promulgated on October 28, 2022:¹⁰

- The program must not be considered an eligible Title IV program;
- The program must not include any courses offered in one of the institution's eligible Title IV programs;¹¹
- The program must be taught by one of the institution's instructors;¹²
- The program must be taught at the institution's main campus, an approved additional location, another school facility approved by the appropriate State agency or accrediting agency, or at an employer facility;
- The program may not merely involve providing facilities for test preparation courses, acting as a proctor, or overseeing a course of self-study; **and**
- The program may not be offered all or in part by distance education.

7. ED confirmed this interpretation in its 90/10 - Questions and Answers document at IP-A1 and IP-A6, available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/90-10-q-and-a.html>.

8. 34 C.F.R. §668.28(a)(3)(iii) (July 1, 2023).

9. In the commentary to the new regulations, ED observes that non-Title IV programs that "prepare students for licensure would generally be considered programs that provide an industry-recognized credential or certification. Therefore, the Department would consider revenue generated from these programs as permissible..." 87 FR 65450-51 (Oct. 28, 2022).

10. 34 C.F.R. §668.28(a)(3)(iii) (July 1, 2023).

11. Per ED's 90/10 - Questions and Answers document at IP-A2, institutions cannot count revenue from non-Title IV eligible programs that are part of a Title IV eligible program but can also be offered as a stand-alone program. Such programs also cannot include courses that can be transferred or counted in a Title IV eligible program.

12. The instructor need not teach a title IV-eligible program, but he or she should be employed by the institution, not an instructor under independent contractor status. See 87 FR 65450 (Oct. 28, 2022).

With regard to this final criterion (that revenue from non-Title IV programs offered all or in part by distance education may not be counted in the Good Ten), we observe that this restriction is not found in the regulatory text.¹³ It appears only in the commentary to the new regulation. However, institutions should anticipate that ED will apply it when reviewing 90/10 rule calculations.

Third, the institution must be able to demonstrate that the non-Title IV program is indeed being offered by the institution (i.e., the OPE ID) that will be claiming the revenue in its Good Ten. To our knowledge, there is no bright-line test ED uses to determine whether a non-Title IV program is being "offered" by an institution. But we strongly suggest that any institution intending to claim non-Title IV program revenue in its Good Ten do more than just include the revenue in its financial reporting. This is all the more important if the non-Title IV programs are offered by a division of the institution that uses a different brand name, or by a legal subsidiary. Following are just a few examples of steps an institution might take to clarify that its non-Title IV programs are indeed offered by the school:

- Have the non-Title IV programs approved by the institution's State authorizing agency or institutional accreditor.
- Ensure the non-Title IV programs and sites are properly branded as part of the Title IV institution, including its website, marketing materials, catalogs, signs, and enrollment agreements.
- Formally install the non-Title IV programs as an academic department of the Title IV institution in organizational charts and other documents.
- Appoint a non-Title IV academic officer who, as an employee of the Title IV institution, manages course content and interacts extensively with the school academic officers.
- Ensure the non-Title IV program instructors are deemed employees of the Title IV institution and identified as such.
- Ensure non-Title IV program teachers and adjuncts receive paychecks from the Title IV institution.

Again, this list is simply illustrative. We have no doubt there are many additional steps a school might take to establish that it offers the non-Title IV programs that are generating the revenue claimed in its Good Ten.

Revenue From Student Education or Training Activities

The 90/10 rule expressly permits institutions to count revenue as Good Ten if it is generated from activities conducted by the institution, provided the activities are necessary for the education and training of its students.¹⁴ Specifically, revenues from student education or training activities may be counted if the activities are:

- Conducted on campus or at a facility under the institution's control;
- Performed under the supervision of a member of the institution's faculty;
- Required to be performed by all students in a specific educational program at the institution; and
- Related directly to services performed by students.

We have observed that certain types of schools use this opportunity very effectively, with cosmetology and culinary schools serving as prime examples. Cosmetology schools operate salons where, as a required component of their program, students provide haircutting, coloring, and styling services for the general public. Similarly, culinary schools operate restaurants, where students, as part of their clinical experience, prepare food and serve patrons. In both cases, the revenue generated from these activities may be counted in their Good Ten.

We expect there may be opportunity for other types of institutions and programs to incorporate revenue generating student activities into their programming. Institutions considering this option should keep in mind that students must be required to provide these services as part of their educational program and must be supervised by the institution's instructors. Further, under the regulations published on October 28, 2022, the activities generating the revenue must be "[r]elated directly to services performed by students."¹⁵ Consequently, sales of retail products (i.e., hair products sold as part of a cosmetology school's student salon) will not qualify as Good Ten revenue.

13. See 87 FR 65450 (Oct. 28, 2022).

14. 34 C.F.R. §668.28(a)(3)(ii) (July 1, 2023).

15. *Id.* at §668.28(a)(3)(ii)(D).

Finally, we stress that institutions considering this option also should consider the potential risk and liability to the institution of offering student services to the general public. Some activities are riskier than others, and inviting the public on campus to interact with students creates risks in and of itself. Institutions also should consider how any public-facing services would impact the institution's insurance coverage and other state compliance obligations (for example, required health certifications for a student run restaurant).

Revenue From Third-Party Loans

Over the years, we have seen institutions improve their 90/10 rule compliance by exploring a variety of private education loan arrangements and opportunities. Typically, if a student secures a private education loan from a third-party lender that has no relationship with the school, and uses the proceeds of that loan to cover tuition, fees, and other institutional charges, the revenue will count towards the institution's Good Ten, as it is revenue from an outside source used for a qualified purpose. Thus, institutions may be able to improve their 90/10 compliance simply by ensuring that those students who have a financial need that exceeds their available government and institutional aid have ready access to quality private education loans.

Some institutions enter into arrangements whereby the school agrees to guarantee all or part of the third-party private education loans made to their students. These loans, sometimes referred to as "recourse" or "partial recourse" loans, might be an option for students who otherwise would be unable to qualify for a private education loan. Institutions should note, however, that proceeds from third-party recourse and partial recourse loans are subject to specific rules that dictate when and to what extent the proceeds from such loans may be counted in an institution's Good Ten.

We strongly encourage institutions considering a third-party private education loan program to consult their legal counsel and other trusted professionals to ensure that they understand the nature of the loan program and its impact on their Good Ten.

Revenue From Institutional Loans

We also have seen institutions utilize internal, well-run, institutional loan programs to provide valuable assistance to their students, and to generate Good Ten. Generally speaking, when an institution makes a private education loan to a student, there is no revenue to count in the Good Ten because at the time the loan is made, the institution does not receive any inflow of cash from an outside source. The institution is able to recognize Good Ten revenue only when the principal on the loans is repaid, to the extent it is repaid. This point was emphasized in the commentary to the regulations promulgated on October 28, 2022. ED observed that "[i]nstitutions may only count in their 90/10 calculation the principal payments made on private institutional loans..."¹⁶ ED also noted that this same treatment applies to income share agreements.¹⁷

Schools managing an institutional loan program should consult their legal counsel to ensure they understand its impact on their Good Ten, and that they are complying with the various federal and state consumer finance laws that may apply to their lending activities.

Finally, we emphasize that for fiscal years beginning on or after January 1, 2023, institutions are no longer permitted to include in their 90/10 calculations "[a]ny amount from the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse."¹⁸ With this new prohibition in mind, institutions should take care to understand the impact (or lack thereof) of programs that involve the institution making and then selling an institutional loan, or selling student accounts receivable.

Recruiting Strategy

We deeply appreciate that many proprietary institutions, and career schools in particular, are intentional about recruiting and providing quality postsecondary education to individuals from low-socioeconomic status communities. This focus is consistent with their mission, which is to provide a transformational educational experience that enables individuals to obtain meaningful employment, and to elevate their quality of living.

This having been said, students from lower socioeconomic backgrounds are more likely to use federal funds to pay their tuition costs, and more likely to qualify for higher levels of Title IV aid. In contrast, students from communities with high socioeconomic status typically qualify for less federal aid, and are more likely to pay for some or all of their tuition out-of-pocket. These cash payments, of course, count toward an institution's Good Ten.

16. 87 FR 65452 (Oct. 28, 2022); see also 34 C.F.R. §668.28(a)(5)(i) (July 1, 2023).

17. Additional criteria related to income share agreements can be found in ED's 90/10 - Questions and Answers document at ISA-A1.

18. 34 C.F.R. §668.28(a)(6)(vi) (July 1, 2023).

Setting enrollment limits based on a funding source (e.g., Title IV funds) is prohibited by the Department. However, we have observed some institutions improve their 90/10 rule compliance by altering the focus of their recruiting efforts in an effort to attract more students from communities with a high socioeconomic status. Such institutions have employed a wide range of direct and indirect marketing and recruiting efforts to attract students from such communities. We also have seen institutions locate or re-locate campuses to be nearer to and increase visibility within high socioeconomic communities. Others have revisited their program portfolios, and either introduced new programs, or revised existing ones, in an effort to create a program mix that is more attractive to individuals with higher socioeconomic backgrounds.

In some cases, institutions also have focused on recruiting international students in order to improve 90/10 compliance. Before they can enter the United States, international students must demonstrate that they have the financial resources to pay their tuition, and to remain, they must demonstrate satisfactory progress in their programs. Further, international students do not qualify for Title IV aid or most other forms of "Federal education assistance funds." As such, international students represent a population that has financial resources, pays for their education with funds that count in the Good Ten, and is motivated to complete their program.

International Locations and Partnerships

In addition to recruiting international students to attend their locations inside the United States, proprietary institutions may wish to explore the establishment of international branch locations. For example, we have recently seen institutions successfully launch authorized and accredited branches in Canada and Mexico. While these branches offer Title IV eligible programs, the students enrolled often fund their education either with cash or with foreign government funds. In either case, this revenue may be eligible for inclusion in the institution's Good Ten. Institutions also may be able to generate Good Ten revenue by offering non-Title IV programs at foreign branch locations. Finally, there may be opportunity for schools to establish relationships with international institutions that could benefit their Good Ten. Because these relationships can be complex, we encourage schools to consult with their legal and compliance advisors to ensure revenue generated from such initiatives will qualify.

Pricing Strategy

As recognized in the prior section, many proprietary institutions are intentional about recruiting and providing quality postsecondary education to individuals from low-socioeconomic status communities. They also are intentional about making their programs affordable for such communities. Of course, if an institution's student population is largely comprised of individuals from low-socioeconomic communities, and its programs are low cost, a majority of the school's students may be able to cover the entirety of their education using federal funds, including Title IV grants and loans. This outcome strongly aligns with the mission of most institutions and the U.S. Department of Education, and the public sentiments of most policymakers. Unfortunately for proprietary institutions, this outcome also can lead to 90/10 compliance issues.

We have seen institutions address this challenge by revising their pricing strategy such that the Title IV aid available to the majority of their students will no longer cover the entire cost of the school's programs. In some instances, institutions have accomplished this objective by increasing tuition and maintaining program length, in others, by maintaining tuition levels and decreasing program length. In either case, the end result is that an increased percentage of the institution's students must cover some portion of their program using non-federal funds. This outcome is consistent with the public policy underlying the 90/10 rule, which purports that at high quality proprietary institutions, students will not be able to fund the entirety of their education with federal funds.

Deferring Receipt of Title IV Aid No Longer Permitted

Finally, we note that for fiscal years beginning on or after January 1, 2023, institutions will no longer be able to defer the receipt of Title IV aid to a subsequent fiscal year. Under the new regulations, before the end of its fiscal year, an institution must request all funds that its students are eligible to receive and make any disbursements to those students by the end of the fiscal year.¹⁹

¹⁹ 34 C.F.R. §668.28(a)(2)(ii) (July 1, 2023). Institutions operating under the reimbursement or heightened cash monitoring methods in §668.162(c) or (d)(2) must make disbursements by the end of the fiscal year and report as Federal funds in the revenue calculations the funds that the students are eligible to receive before requesting funds from ED.

Inquiries and Disclaimer

Institutions with questions regarding 90/10 rule compliance or related matters are welcome to contact Aaron Lacey at alacey@thompsoncoburn.com or Scott Goldschmidt at sgoldschmidt@thompsoncoburn.com. Aaron is the Chair of Thompson Coburn's Higher Education Practice, host of the firm's popular Higher Education Webinar Series, and editorial director of [REGucation](#), the firm's higher education law and policy blog. Scott is the former Deputy General Counsel for Catholic University and a partner in the firm's Higher Education practice.

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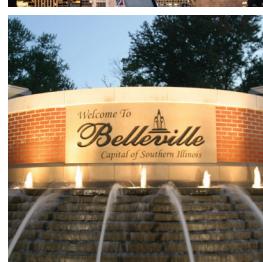
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