



## Education ADVISORY ■

**MAY 15, 2023**

### Department of Education Issues Guidance on the Revised 90/10 Rule

by [Terance A. Gonsalves](#), [Deborah Yoon Jones](#), and [Samantha Burdick](#)

Under the Higher Education Act of 1965 (HEA), for-profit institutions must show that they earn at least 10 percent of revenue from sources other than Title IV of the HEA (known as the “90/10 Rule”) to remain eligible to participate in federal student aid programs. The Moran–Carper Amendment to the American Rescue Plan made significant revisions to the 90/10 Rule that will be effective on July 1, 2023 and apply to fiscal years on or after January 1, 2023. The Department of Education recently provided new guidance in its [90/10 – Questions and Answers](#) regarding the upcoming changes.

The most notable change to the 90/10 Rule – found at 34 CFR § 668.28 – is the sources of funds a proprietary institution may rely upon to satisfy the 10 percent of revenue required by the rule. The current version of the 90/10 Rule requires proprietary institutions to obtain at least 10 percent of their revenue from sources other than Title IV of the HEA. Under the current version of the 90/10 Rule, military benefits, such as the G.I. Bill and Department of Defense benefits, count toward satisfying the 10 percent of revenue institutions must receive from non-Title IV sources. This is because, for the purposes of the 90/10 Rule, these military benefits are characterized as the student’s funds rather than as federal student aid.

However, starting July 1, 2023, under the revised version of the 90/10 Rule, proprietary institutions must obtain at least 10 percent of their revenue from sources other than federal funds. Indeed, pursuant to the new 90/10 Rule, education assistance funds provided by *any* federal agency, including military benefits, must be included as part of the 90 percent of federal funds in the 90/10 calculation. Stated differently, military benefits will no longer be applied toward the 10 percent of revenue. The Department of Education has provided a list of federal education assistance funds that must be counted as federal funds in the “90” side of the 90/10 calculation in the *Federal Register* at [87 FR 78096](#).

The new 90/10 Rule includes many other changes. The Questions and Answers divides the department’s guidance into eight categories:

- 90/10 General Questions
- Ineligible Programs
- Comingled Federal and State Funds

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

- Income Share Agreements
- Enrollment Limitations
- Exiting Title IV Programs
- Disbursement Rule
- Subsequent Fiscal Years

Among other guidance, the general questions section makes clear that an institution must include all federal funds — even those that are not specifically listed in the Federal Register — in its 90/10 calculation unless those funds are specifically awarded directly to students to cover charges other than tuition, fees, or other institutional charges. The general questions section also notes the institution may not include revenue from non-institutional charges, such as charges for additional materials or a replacement of a student ID, in its 90/10 calculation.

The new guidance states that revenue generated from programs that are ineligible for Title IV may only count as “10” revenue if several specific qualifications are met in addition to the existing requirements. The new 90/10 Rule requires that:

- The program does not include courses offered in a program eligible for Title IV.
- The courses are taught by the institution’s instructors.
- The program is located on the institution’s main campus or another approved location.

The department also clarified that institutions must request and make disbursements of Title IV funds before the end of the fiscal year and calculate them for purposes of the 90/10 rule using cash basis accounting. This clarifies that schools may not hold or delay disbursement of funds.

Under the subsequent fiscal years guidance, the department explained that for 90/10 calculations, federal funds must be counted at the time the funds are applied to students’ accounts for tuition, fees, or other institutional charges. If a grant is given in a prior fiscal year but applied to a student’s account in a subsequent year, it would count toward the 90/10 calculation for the year in which it was actually applied.

Proprietary schools should carefully review these changes to the 90/10 Rule when making their calculations for the 2023 fiscal year. Alston & Bird’s Education Team is able to assist with any questions institutions may have on the 90/10 Rule.

You can subscribe to future advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or anyone from our

**Education Team:**

Alexandra Garrison Barnett  
+1 404 881 7190  
alex.barnett@alston.com

Deborah Yoon Jones  
+1 213 576 1084  
debbie.jones@alston.com

Kathleen Benway  
+1 202 239 3034  
kathleen.benway@alston.com

Christopher C. Marquardt  
+1 404 881 7827  
chris.marquardt@alston.com

Derin B. Dickerson  
+1 404 881 7454  
derin.dickerson@alston.com

Chaka Patterson  
+1 415 243 1025  
chaka.patterson@alston.com

Terance A. Gonsalves  
+1 404 881 7983  
terance.gonsalves@alston.com

Samantha Burdick  
+1 213 576 1190  
sam.burdick@alston.com

# ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2023

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ +1 404 881 7000 ■ Fax: +1 404 881 7777  
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500  
 BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
 CHARLOTTE: 1120 South Tryon Street ■ Suite 300 ■ Charlotte, North Carolina, USA 28203-6818 ■ +1 704 444 1000 ■ Fax: +1 704 444 1111  
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ +1 214 922 3400 ■ Fax: +1 214 922 3899  
 FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ +1 214 922 3400 ■ Fax: +1 214 922 3899  
 LONDON: 4th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44 0 20 3823 2225  
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ +1 213 576 1000 ■ Fax: +1 213 576 1100  
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ +1 212 210 9400 ■ Fax: +1 212.210.9444  
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ +1 919 862 2200 ■ Fax: +1 919 862 2260  
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ +1 415 243 1000 ■ Fax: +1 415 243 1001  
 SILICON VALLEY: 755 Page Mill Road ■ Building C - Suite 200 ■ Palo Alto, California, USA 94304-1012 ■ +1 650 838 2000 ■ Fax: +1 650 838 2001  
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ +1 202 239 3300 ■ Fax: +1 202 239 3333