MEMORANDUM January 25, 2011

Subject: **Examination of the Current 90/10 Rule and Its Legislative and Regulatory History**

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This memorandum was prepared to enable distribution to more than one congressional office.

To participate in Title IV programs[1] authorized in the Higher Education Act, as amended (HEA; P.L. 89-329), in addition to other requirements, proprietary (for-profit) institutions must derive at least 10% of their total revenue from non-Title IV funds (or conversely, no more than 90% of their revenue from Title IV funds) during a fiscal year (FY). The 10% requirement, as specified in law,[2] forms the basis for the so-called "90/10 rule."

This memorandum begins with a brief description of the current definition of a proprietary institution in the HEA as it relates to eligibility to participate in Title IV programs. The next section details the current 90/10 rule and examines the formula used to determine whether an institution is in compliance with the rule. This section is followed by an overview of the legislative and regulatory history of the 90/10 rule, and its predecessor, the 85/15 rule. The memorandum concludes with a discussion of some of the changes Congress may consider to the 90/10 rule in light of a renewed focus on proprietary institutions that receive Title IV funds.

Definitions of Institutions of Higher Education under the Higher Education Act

Title IV of the HEA authorizes programs that provide federal student financial aid to support student attendance at institutions of higher education (IHEs) meeting Title IV eligibility requirements. The HEA includes two definitions of institutions of higher education for the purposes of eligibility for institutions to participate in HEA programs. Section 101 of the HEA recognizes *nonprofit* institutions that are, among

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[1] Student financial assistance programs under Title IV of the HEA include Pell Grants, Academic Competitiveness Grants (ACG), Science and Mathematics Access to Retain Talent (SMART) Grants, Federal Supplemental Educational Opportunity Grants (FSEOG), Teacher Education Assistance for College and Higher Education (TEACH) Grants, Leveraging Educational Assistance Partnership (LEAP) Grants, and Special LEAP (SLEAP) Grants, Federal Work-Study earnings, the William D. Ford Federal Direct Loan Program, and the Federal Perkins Loan Program.

[2] The 10% requirement can be found in section 487(a)(24) of the HEA.

other things, legally authorized by the state, accredited or pre-accredited by an agency or association recognized by the U.S. Department of Education (ED), and that award a bachelor's degree or provide at least a two-year program that is accepted as credit toward the completion of a bachelor's degree. Section 102 of the HEA expands the definition of an IHE for the purposes of Title IV eligibility only. Section 102 recognizes proprietary institutions of higher education, postsecondary vocational institutions, and institutions outside of the United States[3] as being eligible for Title IV programs.

The 90/10 Rule[4]

Prior to the enactment of the Higher Education Opportunity Act (HEOA; P.L. 110-315), the 90/10 rule was a condition of institutional eligibility for proprietary institutions participating in Title IV programs. That is, if a proprietary institution violated the 90/10 rule, it would automatically lose its Title IV eligibility. The HEOA removed the rule from section 102 of the HEA definition of a proprietary IHE, but retained the effect of the original provision by making it part of the Program Participation Agreement (PPA) required under Title IV, Part G, section 487.

If a proprietary institution fails to satisfy the 90/10 rule for one year, its participation status becomes provisional[5] for two fiscal years. Failure to comply with the 90/10 rule for two consecutive fiscal years results in a loss of eligibility to participate in Title IV programs for at least two fiscal years. If a proprietary institution loses eligibility, it must immediately stop awarding Title IV funds and follow closeout procedures issued by ED. A proprietary institution has 45 days after its most recently completed fiscal year has ended to notify ED if it did not satisfy the 90/10 rule for the required period.

Current Formula

The current formula used to calculate proprietary institution compliance with the 90/10 rule can be stated as follows:[6]

(i) Title IV funds used for tuition, fees, and other institutional charges to students

<u>*divided by*</u>

(ii) Sum of revenues generated by the institution from: (1) tuition, fees, and other institutional charges for students enrolled in Title IV-eligible programs and certain non-Title IV training programs; plus (2) school activities necessary for the education or training of students.

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[3] Foreign institutions are eligible to participate only in the Federal Direct Loan program.

[4] This section of the memorandum is based on the final regulations issued by ED in October 2009; and pages 2-31 and 2-32 of the *2009-10 Federal Student Aid Handbook*, U.S. Department of Education.

[5] For more information about provisional certification, see the HEA, Section 498(h).

[6] The calculation of the 90/10 rule is specified in section 487(d)(1) of the HEA and Title 34 Code of Federal Regulations (CFR), Section 668.28, and Appendix C to Subpart B of Part 668. The mathematical expression of the 90/10 calculation is described in Appendix C to Subpart B of Part 668 at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=4df52965d82dc8490dc814416f588efa&rgn=div9&view=text&node=34:3.1.3.1.34.2.39.19.6&idno=34.

Changes to the numerator or denominator of the formula could have substantial effects on proprietary institutions. For example, if the formula were changed to include more sources of revenue in the numerator, proprietary institutions may require more offsetting revenue to meet the requirements of the rule. If, on the other hand, the formula were changed to include more sources of revenue in the denominator, it would be easier for proprietary institutions to meet the requirements of the rule.

Application of Title IV Funds

Title IV funds generally must be treated as used to pay institutional charges (i.e., counted in the numerator in the formula above) prior to the application of other funds, regardless of whether the institution credits the funds to the student's account or pays funds directly to the student, unless the student receives funds to pay tuition, fees, or other institutional charges from the following:

- non-federal public agencies or private sources independent of the institution;
- a contract with a federal, state, or local government agency for the purpose of providing job training to low-income individuals in need of such training;
- savings plans for educational expenses established by or on behalf of the student if the saving plan qualifies for special tax treatment under the Internal Revenue Code of 1986;[7]
- institutional scholarships in the form of monetary aid or tuition discounts disbursed during the fiscal year applicable to the 90/10 rule, but only if such funds are disbursed from an established restricted account and represent designated funds from an outside source or income earned on those funds.

Thus, institutions are able to count funds available from the sources listed above toward their 10% non-Title IV funds requirement, prior to applying any Title IV funds.

Exclusions From Formula

Several types of funds are excluded from both the numerator and denominator when determining institutional compliance with the 90/10 rule. These include:

- funds received by the institution from a state under the Leveraging Educational Assistance Partnership (LEAP) program, Special Educational Assistance Partnership (SLEAP) program, and Grants for Access and Persistence (GAP) program;
- funds paid directly to a student under The Federal Work Study (FWS) program, unless the institution credits the student's account with FWS funds;
- institutional funds used to match federal student aid funds and refunds[8] paid to or on behalf of students who have failed to complete the period of enrollment (e.g., withdrawn, been expelled);

[7] For example, prepaid tuition plans and funds from tuition savings plans authorized under section 529 of the Internal Revenue Code of 1986.

[8] For more information, see U.S. Department of Education, *2009-10 Student Aid Handbook*, *Volume 5—Overawards, Overpayments, and Withdrawal Calculations*, available online at http://ifap.ed.gov/fsahandbook/0910FSAHBKVol5.html.

- the cost of books, supplies, and equipment unless these costs are included as tuition, fees, or institutional charges.

Revenue Generated From the Institution

In calculating the sum of revenues from institution-generated charges in the denominator, proprietary institutions must use the cash basis of accounting, except for certain institutional loans.[9] Under the cash basis of accounting, revenue is recognized only when it is received rather than when it is earned. For the purposes of determining compliance with the 90/10 rule, revenue is considered "an inflow or other enhancement of assets to an entity, or a reduction of its liabilities resulting from the delivery or production of goods or services."[10] A proprietary institution may only recognize revenue when it represents cash received from a source outside of the institution.

Sources of Revenue

A variety of sources of revenue are included in the sum of institution-generated charges for the purposes of the denominator of the 90/10 calculation. These sources can be applied to a student's tuition, fees, and other institutional charges after following the application of Title IV funds discussed above. In general, these sources include:

- funds paid by a student, or on behalf of a student by a party other than the institution, for Title IV programs and certain non-Title-IV education or training programs;[11]

- the proceeds of Unsubsidized Stafford Loans that exceed the loan limits in effect on May 6, 2008 and are received by a student on or after July 1, 2008, but before July 1, 2011;[12]

- certain forms of institutional aid provided to students (see below).

Table 1 below provides a summary of how certain forms of institutional aid are treated in the 90/10 calculation.

Table 1. Treatment of Different Types of Institutional Aid in the 90/10 Rule Calculation

Type of Institutional Aid	Treatment in 90/10 Rule Calculation
Tuition Waivers	Institutional grants in the form of tuition waivers do not count as revenue generated by the institution because no new revenue is generated.

[9] The treatment of institutional loans in the 90/10 calculation is discussed below in **Table 1**.

[10] U.S. Department of Education, *2009-10 Federal Student Aid Handbook,* page 2-30.

[11] Non-Title IV programs of study must be approved by the state, accredited by an agency recognized by ED, or provide an industry-recognized credential or certificate.

[12] The Ensuring Continued Access to Student Loans Act (ECASLA; P.L. 110-27) raised loan limits for Unsubsidized Stafford Loans by $2,000 for most types of undergraduate borrowers. The excess loan proceeds resulting from the increased loan limits are technically Title IV funds. For additional information on changes to the HEA made by the ECASLA, see CRS Report RL34452, *The Ensuring Continued Access to Student Loans Act of 2008*, by David P. Smole.

Type of Institutional Aid	Treatment in 90/10 Rule Calculation
Internal Transfers of Cash Between Accounts	Same treatment as Tuition Waivers.
Tuition Discounts	Included in both the denominator and numerator, but the funds must be disbursed during the fiscal year and from an established restricted account with funds from an outside source or income earned on such funds. In addition, the discount must be based on the academic achievement or financial need of an institution's students.
Institutional Scholarships	Same treatment as Tuition Discounts.
Institutional Loans	An institution may only include in the denominator loan repayments it receives during the appropriate fiscal year for previously disbursed institutional loans. When an institution makes a loan to a student, it does not receive cash from an outside source. Therefore, based on the cash basis of accounting, cash revenue from institutional loans is recognized only when such loans are repaid. Accordingly, proceeds from institutional loans disbursed to students cannot be counted in the denominator since these proceeds neither generate nor represent actual inflows of cash. The HEOA provided an exception to the cash basis of accounting treatment for a four-year window. For institutional loans made to students from July 1, 2008, but before July 1, 2012, institutions may count as total revenue the net present value of the institutional loans made during a fiscal year, provided the loans are (1) evidenced by promissory notes; (2) issued at intervals related to the institution's enrollment periods, and; (3) subject to regular loan repayments and collections. For loans made after July 1, 2012, institutions may only count as total revenue the amount of loan repayments they receive during a fiscal year and must exclude any repayments that the institution has already counted in the net present value for prior 90/10 calculations.
Recourse Loans	Recourse loans are loans made by a private lender that are in any matter guaranteed by the institution. The proceeds from recourse loans may be included in the denominator of an institution's 90/10 calculation, provided that the institution's reported revenues are also reduced by the amount of recourse loan *payments* made to recourse loan holders during the same fiscal year. The non-recourse portion of a partial recourse loan (i.e., any portion not guaranteed by the institution) may also be included as revenue in the 90/10 calculation, provided the contract identifies the percentage of the sale that is non-recourse; only that percentage can be included.

Source: Information compiled by CRS from the U.S. Department of Education**,** *2009-2010 Federal Student Aid Handbook,* available at http://ifap.ed.gov/fsahandbook/attachments/0910FSAHandbookIndex.pdf.

Revenue Generated From School Activities Necessary for the Education or Training of Students

Revenue generated by the institution from activities that are necessary for its students' education or training may be considered in the denominator.[13] These activities must be (1) conducted on campus or at a facility under the institution's control; (2) performed under the supervision of a faculty member; and (3) required of all students in a specific educational program.

Treatment of Military and Veterans Educational Assistance Benefits

If a student receives tuition assistance from the Department of Defense (DOD) or veterans' educational assistance benefits from the U.S. Department of Veterans Affairs (VA),[14] these funds are treated as non-Title IV revenue in the denominator when calculating revenues for the 90/10 rule. However, if a student qualifies for both Title IV aid and military or veterans' education benefits, the Title IV aid is presumed to pay the student's tuition, fees, or other institutional charges first. In these cases, an institution can only count the portion of military or veterans' education benefits in the denominator that represents the difference between the tuition, fees, and other institutional charges and the Title IV aid received by the student.

Some have argued, for the purposes of the 90/10 rule, that military benefits should be applied to a student's tuition, fees, and institutional charges before Title IV aid since students have earned these benefits through employment. Moreover, in general, veterans education benefits, including most educational benefits under the VA's Post-9/11 GI Bill Program, are presumed to pay for a student's tuition and fees. However, in accordance with federal need analysis procedures, all veterans education benefits are excluded from the treatment of other financial assistance, and thus not considered when awarding Title IV federal student aid.[15] Under the 90/10 rule, these funds cannot be treated as having been applied to a student's tuition and fees prior to the application of Title IV funds.

Legislative History

The 90/10 rule was put into effect by the 1998 HEA amendments (P.L. 105-244), replacing its predecessor, the 85/15 rule, which was authorized by the 1992 HEA amendments (P.L. 102-235). This section provides a brief overview of the impetus for developing the 85/15 rule, the 1992 HEA amendments, and the 1998 HEA amendments.[16]

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[13] Revenues from the sale of equipment and supplies to students and revenues from vending machines may not be included in the denominator of the calculation.

[14] For more information on educational assistance programs administered by the VA, see CRS Report R40723, titled *Educational Assistance Programs Administered by the U.S. Department of Veterans Affairs,* by Cassandria Dortch at http://www.crs.gov/ReportPDF/R40723.pdf.

[15] HEA, section 480(j).

[16] This section of the memorandum draws, in part, on information contained in CRS Report RL32182, *Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status*, by Rebecca R. Skinner. http://www.crs.gov/ReportPDF/RL32182.pdf.

Impetus for the 85/15 Rule

Limiting the amount of revenue proprietary institutions could derive from Title IV funds became a topic of debate in Congress for several reasons. During the late 1980s and into the 1990s, the Government Accountability Office (GAO), Congress, and Office of the Inspector General (OIG) at ED conducted investigations of student aid programs and found evidence of extensive fraud and abuse; some of the worst examples of these practices were found at proprietary institutions.[17] According to GAO, for example, from FY1983 to FY1993, federal payments to honor default claims on student loans across all institutions increased from $445 million to $2.4 billion.[18] When cohort default rates peaked nationwide in 1990, default rates at proprietary institutions reached 41% compared with an overall cohort default rate of 22%. Many proprietary institutions were failing to provide students with a quality education or training in occupations with job openings, focusing instead on obtaining federal student aid dollars. As a result, students left proprietary institutions with no new job skills or few prospects of employment in their field of study and burdened with substantial loan debt. At the same time, there was evidence that proprietary institutions were recruiting low-income students who were not qualified to participate in postsecondary education and who had little chance of even completing a program. Arguments were made that if proprietary institutions were providing a high-quality education, they should be able to attract a specific percentage of their revenue from non-Title IV programs. Thus, proprietary institutions that were overly dependent on Title IV revenue were considered institutions that were not providing a high-quality education, and institutions that might be misusing federal dollars. Therefore, it was concluded that these institutions should not be subsidized by federal dollars.[19]

All IHEs eligible for Title IV funds, including proprietary institutions, are governed by a three-part regulatory structure commonly referred to as the "triad." The triad consists of accreditation, licensure by a state agency, and eligibility or certification. In addition to concerns of fraud and abuse during the late 1980s and early 1990s, there also were concerns that the triad was not providing enough oversight of the activities of proprietary institutions. First, there were concerns that accrediting bodies of proprietary institutions were hesitant to withdraw accreditation due to its financial implications (e.g., an institution could potentially sue the accrediting body). Second, studies had found that state regulation of proprietary institutions was limited in its effectiveness. For example, gaps in state laws allowed fraudulent practices to continue, and existing laws were not adequately enforced. Third, the OIG found that ED's certification procedures, at the time, were inadequate to protect the federal government's or students' financial interests.

Various suggestions were made prior to the 1992 HEA reauthorization about how to strengthen the federal role in eligibility and certification, including requiring annual financial reports from all institutions or requiring that institutions submit financial reports based on their dependence on federal aid or their default rates. The idea of evaluating institutional soundness or basing the need for monitoring on institutional dependence on federal funds was already being used in veterans' assistance programs.

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[17] See for example, Letter from the Office of the Inspector General, House, *Congressional Record*, (June 29, 1994), pp. H5327-H5328. (Hereafter cited as *Congressional Record*, Letter from the Office of the Inspector General.) See also U.S. Government Accountability Office, House Committee on Government Reform and Oversight, Testimony before the Subcommittee on Human Resources and Intergovernmental Relations, *Ensuring Quality Education From Proprietary Institutions*, statement of Cornelia M. Blanchette, Associate Director, Education and Employment Issues, Health, Education, and Human Services Division, GAO/T-HEHS-96-158, June 6, 1996, pp.1-3. (Hereafter cited as GAO, *Testimony*.) The Senate Permanent Subcommittee on Investigations conducted some of the investigations of fraud and abuse in Title IV programs in 1990.

[18] GAO, *Testimony*.

[19] See for example, GAO, *Testimony*, pp.10-11; *Congressional Record*, Letter from the Office of the Inspector General, pp. H5322-H5334; and *Congressional Record*, August 8, 1994, pp. S10918-S10923. (Hereafter cited as *Congressional Record*.)

Veterans were not permitted to enroll in courses in which over 85% of the enrollees had all or part of their tuition or fees paid to them or for them by the then Veterans' Administration or the institution. Evaluations of the veterans' assistance programs found that the policy had helped prevent abuse.[20]

Thus, there was precedent for implementing a rule such as the 85/15 rule as a condition for proprietary institutions to be eligible to participate in Title IV programs leading up to the 1992 HEA reauthorization (discussed below).[21] There were arguments for and against the proposal. Those in favor of an 85/15 rule argued that it would stem abuse and might restore some healthy market-based incentives, as proprietary institutions would no longer be able to set their prices at a level students not fully supported by federal financial aid would be willing to pay. Those against the proposal argued that it could limit access for low-income students if proprietary institutions were forced to deny such students admission in order to meet the required percentage of students not receiving Title IV student aid.

1992 HEA Amendments

The 1992 HEA Amendments contained an amendment specifically targeted at the source of revenue for proprietary institutions. The definition of a proprietary institution for purposes of HEA Title IV eligibility was changed to state that proprietary institutions must derive at least 15% of their revenue from non-Title IV funds.[22] The formula, as stated in regulations, used to determine whether proprietary institutions were in compliance with this requirement[23] was similar to the formula currently used to determine compliance with the 90/10 rule (see previous discussion).

The 85/15 rule generated considerable controversy. The Career College Association, representing proprietary institutions, brought several unsuccessful court challenges against the provision.[24] In addition, ED's regulations implementing the 85/15 rule were delayed by language in appropriations statutes. Also, there were disputes about the formula used to calculate the percentage of funds derived from non-Title IV sources. There were discussions about whether the numerator should include all Title IV aid received by students or only the portion used to pay tuition and fees. There also was debate about whether the denominator should include only revenues from Title IV-eligible courses or revenues from other similar contract training or related businesses.

GAO Evaluation of Student Outcomes at Proprietary Institutions

After the 1992 HEA amendments were enacted, and given ongoing concerns about the performance of proprietary institutions, GAO was asked to examine the relationship between proprietary school performance and reliance on Title IV funds.[25] The GAO study found that proprietary institutions that were

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[20] For more information about this precedent, see for example, *Congressional Record*, Letter from the Office of the Inspector General, p. H5327.

[21] The rule as it applied to veterans' assistance programs was based on percentage of enrollment, not revenue, in part because individual programs and not institutions were approved.

[22] In the 1992 HEA amendments, the definition of a proprietary institution and specific requirements that these institutions had to meet to be eligible for Title IV programs were found in Section 481 of the HEA.

[23] Information about the formula used to determine compliance with the 85/15 rule was taken from 34 CFR 600.5, revised as of July 1, 1997.

[24] See for example, *Education Daily*, July 21, 1994, p. 5.

[25] GAO, *Proprietary Schools: Poorer Student Outcomes at Schools That Rely More on Federal Student Aid*, GAO/HEHS-97-103, 1997.

more dependent on Title IV funds had poorer student outcomes in terms of student completion and placement rates, and higher student loan default rates. The researchers also concluded that requiring proprietary institutions to obtain a higher proportion of their revenues from non-Title IV funds would result in substantial savings from a reduction in student loan defaults. However, GAO acknowledged that increasing the required proportion of revenue derived from non-Title IV funds could limit student access to postsecondary education as proprietary institutions might have to deny access to low-income Title IV aid recipients to comply with more stringent revenue requirements.

The 1998 HEA Amendments

The most significant change made to the 85/15 rule during the 1998 HEA reauthorization was to alter the percentage of non-Title IV revenues proprietary institutions were required to earn. The 85/15 rule became the 90/10 rule, meaning that proprietary institutions had to earn at least 10%, rather than 15%, of their revenues from non-Title IV funds.

There also were discussions of altering the formula used to determine whether an institution was in compliance with the rule. For example, a proposal was considered by the House that would have included revenue received from non-Title IV-eligible programs provided on a contractual basis as non-Title IV revenue in the denominator of the formula. In conference, the House and Senate agreed to continue to define non-Title IV revenues as they were defined by ED regulations in effect at the time of enactment.[26]

Department of Education Changes to the Formula

Following the reauthorization of the HEA in 1998, ED opted to make changes to prior regulations stating how revenue was defined and institutional eligibility calculated. For example, new regulations explicitly stated that proprietary institutions must use the cash basis of accounting in determining whether they met the requirements of the 90/10 rule.[27] The new regulations also specified that scholarships could only be recognized as revenue if they represented cash received from an outside source. As with institutional scholarships, tuition waivers were not considered revenue. The regulations also stated that cash revenue from institutional loans could be recognized only when the loans were repaid. Additionally, the new regulations clarified that Title IV funds had to be applied to student charges before most other sources of payments, such as education IRAs.

[26] For example, according to regulations, the numerator did not include State Student Incentive Grant (SSIG, now called LEAP) or Federal Work Study program funds. In addition, the amount charged for books, supplies, and equipment was not included in the numerator or denominator unless the amount was included in tuition, fees, or other institutional charges. For more information, see 34 CFR 600.5, revised as of July 1, 1997.

[27] After the 1992 HEA amendments were implemented, the Secretary of Education (Secretary) proposed that proprietary institutions could calculate their compliance with the 85/15 rule of Education using the cash basis of accounting to determine Title IV program revenues (numerator) and the accrual basis of accounting to determine total revenue (denominator). The cash basis of accounting recognizes revenue when it is received, regardless of when payments are due. The accrual basis of accounting recognizes revenue when it is earned, regardless of the actual date of collection or payment. Based on comments received by ED, the Secretary agreed that the same basis of accounting should be used for the numerator and denominator. The cash basis of accounting was selected because that is the accounting method used by Title IV institutions to report and account for Title IV program expenditures. (For more information, see *Federal Register*, February 10, 1994, 59 FR 6446-64675; and *Federal Register*, July 15, 1999, 64 FR 38271-38282.).

Recent Changes

The 90/10 rule was recently changed in the 110th Congress in 2008 as part of the HEOA. Subsequently, ED published final regulations pertaining to the 90/10 rule in October 2009. The next section examines the changes to the 90/10 rule resulting from these more recent actions.

Higher Education Opportunity Act of 2008

Most of the changes to the 90/10 rule enacted in the HEOA made it less difficult for proprietary institutions to meet the 10% requirement, although Congress did strengthen some of the reporting and disclosure requirements associated with the rule.

As discussed earlier, the HEOA eliminated the 90/10 rule as a condition of institutional eligibility by removing it from the Title I, Part A definition of a proprietary IHE. Consequently, proprietary institutions that violate the 90/10 rule in a given year do not lose their Title IV eligibility immediately, but are placed on provisional eligibility status for two years. Proprietary institutions that violate the 90/10 rule for two consecutive years lose their Title IV eligibility for at least two years, dependent upon further requirements to regain eligibility.

The HEOA also changed the revenue sources used for determining compliance with the 90/10 rule. The HEOA amendments specify certain sources of revenue that may be counted in the 10% portion that is comprised of total revenues from non-Title IV sources. While many of these sources were allowed under regulations prior to the enactment of the HEOA, proprietary institutions are now allowed to count revenue sources toward the 10% requirement that were not permitted previously. For example, the HEOA amendments allow for proprietary institutions to count revenue earned from non-Title IV eligible programs of study toward the 10% requirement, provided the program is approved by the state, accredited, or provides an industry-recognized credential or certification. In effect, a proprietary institution could have its Title IV programs fully paid for by Title IV federal student aid but have this aid count as only 90% of its total revenue if the other 10% of its total revenue is derived from non-Title IV programs. The HEOA amendments also allow, from July 1, 2008 to July 1, 2011, proprietary institutions to count toward the 10% portion the proceeds of Unsubsidized Stafford Loans in excess of the loan limits that existed the day before the enactment of the Ensuring Continued Access to Student Loans Act (ECASLA; P.L. 110-27).[28]

The HEOA also established new reporting requirements for ED as they relate to the 90/10 rule. The Secretary of Education (Secretary) is now required to submit annually to Congress a report that contains, for each proprietary institution, the amount and percentage of the institution's revenues from Title IV sources and non-Title IV sources, as provided by the institution in its audited financial statements. If an institution fails to satisfy the 90/10 Rule, the HEOA requires ED to publicly disclose on the College Navigator Website the identity of that institution and the extent to which the institution failed to satisfy the rule. In addition, ED's online Federal Student Aid Data Center provides 90/10 revenue percentages for all proprietary institutions participating in Title IV programs.[29]

[28] Refer to footnote 12 in this memorandum for more information on the ECASLA.

[29] See http://federalstudentaid.ed.gov/datacenter/proprietary.html.

The HEOA also requires the GAO to analyze and report to Congress on proprietary institutions subject to the 90/10 rule.[30]

Department of Education Regulations in October 2009

On October 29, 2009, ED published final regulations in the *Federal Register* amending the regulations for institutional eligibility under the HEA as amended by the HEOA.[31] Some of the key regulations effective no later than July 1, 2010, that affect the 90/10 rule include:

- a proprietary institution must disclose in a footnote to its audited financial statements, the dollar amount of the numerator and denominator of its 90/10 ratio, as well as a breakout of certain individual revenue amounts by source;[32]

- a proprietary institution must notify ED that it failed the 90/10 requirement no later than 45 days after the end of its fiscal year. The prior regulations allow for a 90-day notification period;

- clarification of how excess funds that exceed loan limits prior to ECASLA would be treated in the 90/10 calculation when returning funds under Title IV regulations.[33] For example, if a student withdraws and the institution returns loan funds consisting of pre-ECASLA and post-ECASLA amounts, then the amount returned by the institution will be counted proportionally within the 90/10 calculation. For instance, if a loan disbursement for a payment period is $3,000 and $1,000 of the disbursement represented the post-ECASLA amount, then the ratio of funds returned is two-thirds pre-ECASLA and one-third post-ECASLA, ensuring some funds from Unsubsidized Stafford Loans are counted as revenue in the 90/10 calculation;

- establishment of a formula for determining the net present value (NPV) of institutional loans to be counted as revenue for the purposes of the 90/10 rule.[34] In short, the formula determines the NPV of institutional loans by taking into consideration the discounted value of cash flows caused by inflation over time. As an alternative approach for institutions that prefer a more simple approach, institutions may also count 50% of the total amount of loans made during a fiscal year as NPV. However, institutions that choose the alternative approach may not sell the loans associated with the 50% calculation until those loans have been in repayment for two years.

Violations of the 90/10 Rule

The Office of Federal Student Aid (FSA) at ED is responsible for tracking institutional violations of Title IV eligibility requirements. Based on FSA data for January 1, 2000 through December 31, 2009, a total of 1,014 IHEs have lost their eligibility to participate in Title IV programs for a variety of reasons. Of these

[30] For more information on the requirements of the GAO report, see section 1105 of the HEOA.

[31] See http://edocket.access.gpo.gov/2009/E9-25373.htm.

[32] Individual categories of revenue (i.e., sources) that institutions must disclose are indentified in Appendix C to Subpart B of Part 668.

[33] As mentioned earlier, refunds paid to or on behalf of students are excluded from the total revenues institutions include in the denominator of the 90/10 rule calculation. The regulations issued in October 2009, however, allow for an exception for a proportion of federal loan proceeds in excess of the loan limits established before ECASLA.

[34] For institutional loans made between July 1, 2008 and July 1, 2012.

IHEs, only six proprietary institutions lost their eligibility to participate in Title IV programs due to violations of the 90/10 rule. Violations of the 90/10 rule occurred in 2001, 2004, 2007, and 2008.[35]

In addition to tracking violations of the 90/10 rule, FSA also maintains information on the percentage of total revenues from Title IV funds derived by each proprietary institution, as reported by the institution. According to a letter from ED addressed to the House Committee on Education and Labor dated June 7, 2010,[36] institutions' financial statements with fiscal year ending dates between 7/1/2007 and 6/30/2008 show that approximately 457 institutions, or 24% of the total 1,889 proprietary institutions subject to the rule, reported a percentage of total revenues from Title IV funds between 80.0% and 90%. Furthermore, of these 457 institutions, approximately 209 reported the percentage of Title IV funds between 85% and 90% during this same time period.

Current Issues

Given the renewed focus on the for-profit sector of higher education by the media,[37] Congress,[38] and ED,[39] Congress may consider continuing, eliminating, or modifying the 90/10 rule. Either of these options could have implications that are briefly addressed below.

Elimination of the 90/10 Rule

Congress may consider eliminating the 90/10 rule and establishing a new set of comprehensive metrics for measuring the quality of higher education at proprietary institutions that participate in Title IV programs. One of the primary reasons offered for the elimination of the 90/10 rule is that it limits proprietary institutions' ability to enroll student bodies comprised primarily of low-income students dependent on Title IV aid. That is, because proprietary institutions must derive at least 10% of their revenue from non-Title IV funds, they must enroll some students who are not solely dependent on federal student financial aid. Thus, it is possible that some low-income students interested in attending the institution may be denied admission so that the institution can adhere to the 90/10 rule. Proponents of the elimination of the rule also argue that in addition to limiting their ability to serve low-income students receiving federal student aid, some proprietary institutions must change their mission or programs to be more attractive to students who will be able to pay for their own education. Proponents of elimination also argue that the 90/10 rule provides incentives for institutions to raise their tuition and fees above the amount of funds available to students through Title IV loans and Pell Grants in order to generate non-Title IV revenue;[40] thus, making it harder for low-income students to enroll. Furthermore, some proponents of eliminating the rule argue that it has become too complex and costly to certify.

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[35] Data in this section of the memorandum are based on unpublished information provided to CRS by ED in June 2010.

[36] http://federalstudentaid.ed.gov/datacenter/library/FINALSIGNEDLETTERFORREPORTONECOPY610.pdf.

[37] For example, see http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/synopsis.html.

[38] For instance, the Senate Committee on Health, Education, Labor, and Pensions (HELP) held a hearing on June 24, 2010 titled *Emerging Risk? An Overview of the Federal Investment in For-Profit Education*. *http://help.senate.gov/hearings/hearing/?id=464686ba-5056-9502-5d95-e21a6409cc53*.

[39] On November 1, 2010 and October 29, 2010, ED published final regulations pertaining to institutional eligibility and program integrity under the Higher Education Act of 1965. Many of these final regulations affect proprietary institutions. See http://www2.ed.gov/about/offices/list/ope/policy.html.

[40] Moreover, representatives of proprietary institutions argue that the 90/10 rule is increasingly difficult to meet, given the recent increases in Title IV aid.

Opponents of eliminating the rule argue that for-profit institutions are fundamentally different from not-for-profit institutions based on their profit-seeking motive, and raise questions about why these institutions should be fully supported by the federal government and tax-payer dollars. In addition, it may be argued that proprietary institutions have more flexibility than public and non-profit institutions to develop revenue sources other than Title IV due to their less restrictive missions. There also are concerns that without the 90/10 rule, incidents of fraud and abuse by proprietary institutions may increase. Those opposed to eliminating the 90/10 rule argue that the rule protects low-income students from incurring debt to attend proprietary institutions that will not adequately prepare them for employment, and potentially experiencing the multitude of problems associated with student loan default (e.g., bad credit rating, no additional federal aid for higher education).

The potential access problem associated with the 90/10 rule and its predecessor, the 85/15 rule, was acknowledged prior to the implementation of the 1992 HEA amendments. While there may be a number of ways to resolve the access problem, including the elimination of the rule, in 1995 ED proposed adding a mitigating circumstances section to the legislation that would allow the Secretary to waive the rule for proprietary institutions demonstrating that they serve their students well.[41] It was suggested that proprietary institutions might be held to the same standard as short-term programs, which must demonstrate a 70% graduation rate and a 70% job placement rate.[42]

Modifications to the 90/10 Rule

Short of eliminating the 90/10 rule, Congress might consider several other changes to the rule. First, Congress might reevaluate the percentage of funds proprietary institutions must derive from non-Title IV funds, possibly increasing or decreasing this percentage. Second, Congress might consider changes to how revenue is defined or to the formula used to calculate revenue. For instance, should the current treatment of institutional loans in the 90/10 rule calculation be re-examined to ensure that proprietary institutions also account for estimates of annual payments due and potential loan defaults? Some have argued that the temporary treatment[43] of institutional loans in the 90/10 rule calculation allows proprietary institutions to make institutional loans to high-risk students who are more likely to default with no intention of engaging in long-term collection efforts, while benefiting from the upfront NPV of such loans in the 90/10 rule calculation.[44] Next, Congress might also consider the treatment of military and veterans educational assistance benefits in the calculation. Finally, Congress also might examine the order in which funds are applied in the 90/10 calculation.

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[41] Testimony of David A. Longanecker, Assistant Secretary for Postsecondary Education, U.S. Department of Education, in Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations, hearing on *Abuses in Federal Student Grant Programs: Proprietary School Abuses*, held on July 12, 1995, S.Hrg. 104-477 (Washington: GPO, 1996), p.40. (Hereafter cited as Senate Committee on Governmental Affairs, *Hearing on Proprietary School Abuses*.).

[42] In 1994, Senator Pell subsequently proposed a similar waiver that the Secretary could grant to proprietary institutions if they demonstrated graduation and job placement rates of 70% and student loan default rates of less than 25% for FY1991 and FY1992, and had not had their eligibility for Title IV programs limited, suspended, or terminated. (See *Congressional Record*, p. S10918.) Neither Senator Pell's or ED's suggestions regarding the application of a 70% graduation rate and 70% job placement rate have been applied.

[43] As discussed, for the purposes of the 90/10 rule calculation, institutions can use the accrual basis of accounting for institutional loans made from July 1, 2008 to July 1, 2012.

[44] Refer to **Table 1** in this memorandum for the current treatment of institutional loans in the 90/10 rule calculation.