



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 7: Title IV Revenue and Non-Federal Education Assistance Funds (90/10)
Session 1: January 18-21, 2022

Issue: Title IV Revenue and Non-Federal Education Assistance Funds (90/10)
Statutory cites: §487(a)(24) of the Higher Education Act, as amended
Regulatory cites: 34 CFR 668.28

Summary of issues:

Section 2013 of the American Rescue Plan Act amends the applicable statute to require that at least 10 percent of a proprietary institution's revenue be derived from sources other than Federal educational assistance funds. This change means that the numerator of the revenue calculation, which formerly consisted only of Title IV funds, will now include "Federal funds that are disbursed or delivered to or on behalf of a student" (defined collectively as Federal educational assistance funds).

Proposal:

We propose to amend 34 CFR 668.28 to account for the statutory change requiring that a proprietary institution's revenue be derived from sources other than Federal educational assistance funds. Additionally, we are proposing changes to 34 CFR 668.28 that would close existing loopholes in the 90/10 calculation and provide clarification on the treatment of revenue. Specifically, these changes would:

- 1. Designate as Federal educational assistance funds any educational assistance for students sent directly to the institution by the awarding agency, as well as funds that flow directly to students, where the authorizing Federal agency provides funding data to the institution.** As part of implementation the Department would create data sharing arrangements with Federal agencies to provide student-level funding data to institutions, including funds paid directly to students by the awarding agency. The Department would publish an annual notice in the *Federal Register* indicating which agencies have such an arrangement. Mirroring the current requirement in 34 CFR 668.28(a)(4) with respect to Title IV, HEA program funds, Federal educational assistance funds disbursed or delivered to or on behalf of a student would be presumed to pay the student's tuition, fees, or institutional charges, regardless of whether the institution credits the funds to the student's account or pays the funds directly to the student, except to the extent that the student's tuition, fees, or other charges are satisfied by the sources identified in 34 CFR 668.28(a)(4)(i) through (iv) (referred to in the 90/10 calculation as funds received first). This would include those funds paid directly to students by awarding agencies up to the amount of cash payments made to the institution by the student.
- 2. Disallow counting the sale of receivables, including from institutional loans, as non-Federal educational assistance revenue.** Section 487(d)(1)(b) of the HEA requires that in performing a 90/10 calculation, an institution may only include as revenue, those funds generated by the institution from tuition, fees, and other institutional charges for students enrolled in programs eligible for assistance under the Title IV programs, activities conducted by the institution that are necessary for the education and training of the institution's students, or certain non-eligible training programs. Revenue that results from the sale of receivables is not derived from tuition, fees, or other institutional charges for students enrolled in programs eligible for Federal

(90/10)

educational assistance and does not indicate a willingness on the part of students to pay cash for a portion of their program.

3. **Require proprietary institutions to award, disburse, and request Title IV funds according to established parameters.** Loss of eligibility under 90/10 occurs only after two consecutive years of failing rates. Because 34 CFR part 668 imposes no timeframe for requesting Federal funds, institutions can avoid a loss of eligibility under 90/10 by deferring drawdowns of Title IV funds from G5 until the subsequent fiscal year. We propose to address this loophole by adding a disbursement rule requiring proprietary institutions to disburse funds to eligible students and request those funds from G5 prior to the end of the institution's fiscal year.
4. **Limit the revenues from activities conducted by the institution to those derived from such activities that are necessary for the education and training of its students.** Under the HEA, institutions may count as revenue activities conducted by the institution that are necessary for the education and training of the institution's students. Only funds generated from services provided by students may count as revenue for 90/10 purposes. Such revenue does not include revenue derived from product sales. Proposed changes to 34 CFR 668.28 would require that institutional accounting records clearly identify the service revenue, not related to product sales, that is unique to service activities performed by students in the program and necessary for the education of those students.
5. **Clarify under what circumstances funds paid by a student, or on behalf of a student by a party other than the institution, for an education or training program that is not an eligible program may count as revenue for 90/10 purposes.** We propose that only the funds generated from non-eligible programs offered at an eligible location of the institution and where the institution itself provides the education be counted as non-Federal educational assistance revenue for the purposes of the 90/10 calculation. This would preclude revenue from programs where the institution merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study.

Proposed Regulations Redline

§ 668.28 Non-~~title IV~~Federal revenue (90/10).

(a) *General* –

(1) **Calculating the revenue percentage.** A proprietary institution meets the requirement in § 668.14(b)(16) that at least 10 percent of its revenue is derived from sources other than ~~Title IV, HEA program~~ Federal funds by using the formula in appendix C of this subpart to calculate its revenue percentage for its latest complete fiscal year. For purposes of this section--

(i) For any annual audit submission for a proprietary institutional fiscal year beginning on or after January 1, 2023, Federal funds used to calculate the revenue percentage include title IV, HEA program funds and any other educational assistance funds provided by a Federal agency directly to an institution or a student. The Secretary identifies the Federal agency and the other educational assistance funds provided by that agency in a notice published in the Federal Register.

(ii) For any fiscal year beginning prior to January 1, 2023, Federal funds are limited to title IV, HEA program funds.

(90/10)

(2) ~~Cash basis accounting.~~ Except for institutional loans made to students under ~~paragraph (a)(5)(i) of this section, the institution must use the cash basis of accounting in calculating its revenue percentage.~~ **Disbursement rule.** An institution must use the cash-basis of accounting in calculating its revenue percentage by —

(i) For each eligible student, counting the amount of non-title IV Federal funds the institution received during its fiscal year—

(A) Directly from an agency identified under paragraph (a)(1)(i) of this section; and

(B) Tuition and fees and other institutional charges paid by a student to whom the Federal agency provided funds.

(ii) For each eligible student, counting the amount of title IV, HEA program funds received during its fiscal year. However, before the end of its fiscal year, the institution must—

(A) Request funds under the advanced payment method in §668.162(b)(2) or the heightened cash monitoring method in §668.162(d)(1) that the students are eligible to receive and make any disbursements to those students by the end of the fiscal year; or

(B) Make disbursements to those students 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 under the reimbursement or heightened cash monitoring methods in §668.162(c) or (d)(2).

(3) Revenue generated from programs and activities. The institution must consider as revenue only those funds it generates from -

(i) Tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in § 668.8;

(ii) Activities conducted by the institution that are necessary for the education and training of its students provided those activities are -

(A) Conducted on campus or at a facility under the institution's control;

(B) Performed under the supervision of a member of the institution's faculty; ~~and~~

(C) Required to be performed by all students in a specific educational program at the institution; and

(D) Related directly to services performed by students; and;

(iii) Funds paid by a student, or on behalf of a student by a party unrelated to other than the institution, its owners, or affiliates, for an education or training program that is not eligible under § 668.8 and that does not include any courses or coursework offered in an eligible program. The non-eligible education or training if the program must—

(90/10)

~~(A) Be provided by the institution at one of its approved locations. The institution may not count revenue from a non-eligible education or training program where it merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study;~~

~~(BA) Is~~ Be approved or licensed by the appropriate State agency;

~~(CB) Be~~ Is accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602; or

~~(DC) Provides an industry-recognized credential or certification, or prepares students to take an examination for an industry-recognized credential or certification issued by an independent third party;~~

~~(D) Provides training needed for students to maintain State licensing requirements; or~~

~~(E) Provides training needed for students to meet additional licensing requirements for specialized training for practitioners that already meet the general licensing requirements in that field.~~

(4) Application of funds. The institution must presume that any ~~Title IV, HEA program~~ Federal funds it disburses, or delivers, to or on behalf of a student will be used to pay the student's tuition, fees, or institutional charges, regardless of whether the institution credits the funds to the student's account or pays the funds directly to the student, except to the extent that the student's tuition, fees, or other charges are satisfied by -

(i) Grant funds provided by —

~~(A) Non-Federal public agencies,~~ provided that those grant funds do not include Federal or institutional funds; or

~~(B) Private sources unrelated to~~ independent of the institution, its owners, or affiliates;

~~(ii) Funds provided under a contractual arrangement with~~ the institution and a Federal, State, or local government agency for the purpose of providing job training to low-income individuals who need that training;

~~(iii) Funds used by a student from a savings plan 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; or~~

~~(iv) Institutional scholarships that meet the requirements in paragraph (a)(5)(iv) of this section.~~

(5) Revenue generated from institutional aid. The institution ~~must~~ may include the following institutional aid as revenue:

~~(i)~~ For loans made to students and credited in full to the students' accounts at the institution, ~~on or after July 1, 2008 and prior to July 1, 2012, include as revenue the net present value of the loans made to students during the fiscal year, as calculated under paragraph (b) of this section, if the loans — include as revenue only the amount of payments made on those loans by current or former students that the institution received during the fiscal year, if the loans —~~

- (A) Are bona fide as evidenced by standalone repayment agreements between the students and the institution that are enforceable promissory notes;
- (B) Are issued at intervals related to the institution's enrollment periods;
- (C) Are subject to regular loan repayments and collections by the institution; and
- (D) Are separate from the enrollment contracts signed by the students.

(ii) Loans made or held by the institution's current or former owners, officers, directors, trustees, key employees (as defined by the IRS) or their family members, or any entity in which the institution or a current or former officer, director, trustee, key employee, or family member thereof has at least 10 percent ownership, shall be considered institutional aid and the institution may only include as revenue the amount of payments made on those loans by current or former students that the owner of the loan received during the fiscal year, pursuant to the limitations in subsection (i)(A) through (i)(D).

Formatted: Font: Bold
Formatted: Indent: Left: 0.57", No bullets or numbering

(iii) Loans made or held by by any person or entity other than one referenced in subsection (ii) that are subject to institutional guarantees or credit enhancement, or a recourse or risk-sharing agreement of any kind, shall be considered institutional and the institution may only include as revenue the amount of payments made on those loans by current or former students that the owner of the loan received during the fiscal year, pursuant to the limitations of subsection (i)(A) through (i)(D).

Formatted: Font: Bold
Formatted: Indent: Left: 0.57", No bullets or numbering
Formatted

(A) For purposes of this subsection, the net present value of all institutional points, subsidies, and upfront inducements to a third-party lender shall be deducted from the amount of any private loans made to students and credited to their account.

Formatted: Indent: Left: 0.57", No bullets or numbering
Formatted: Font: Bold

~~(B)~~ For purposes of this subsection, the entire amount of any private financing arrangement, whether directly or indirectly provided by the institution or by an independent entity, shall be considered a loan if it requires future payments from the student under any circumstances.

Formatted: Highlight
Formatted: Highlight
Formatted: Indent: Left: 0.57", No bullets or numbering
Formatted: Font: Bold

~~(iii)(iv)~~ For loans made to students before July 1, 2008, include as revenue only the amount of payments made on those loans that the institution received during the fiscal year.

Formatted: Highlight
Formatted: Highlight
Formatted: Highlight

~~(iii)(v)~~ For loans made to students on or after July 1, 2012, include as revenue only the amount of payments made on those loans that the institution received during the fiscal year.

Commented [1]: New language
Formatted: Highlight

(v) For scholarships provided by the institution in the form of monetary aid or tuition discount and based on the academic achievement or financial need of its students, include as revenue the amount disbursed to students during the fiscal year. The scholarships must be disbursed from an established restricted account and may be included as revenue only to the extent that the funds in that account represent —

(90/10)

(A) Designated funds from an outside source that is unrelated to the institution, its owners, or affiliates; or

(B) Income earned on those funds.

~~(6) Revenue generated from loan funds in excess of loan limits prior to the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA). For each student who receives an unsubsidized loan under the FFEL or Direct Loan programs on or after July 1, 2008 and prior to July 1, 2011, the amount of the loan disbursement for a payment period that exceeds the disbursement for which the student would have been eligible for that payment period under the loan limit in effect on the day prior to enactment of the ECASLA is included and deemed to be revenue from a source other than Title IV, HEA program funds but only to the extent that the excess amount pays for tuition, fees, or institutional charges remaining on the student's account after other Title IV, HEA program funds are applied.~~

(67) Funds excluded from revenues. For the fiscal year, the institution does not include -

(i) The amount of Federal Work Study (FWS) wages paid directly to the student. However, if the institution credits the student's account with FWS funds, those funds are included as revenue;

(90/10)

(ii) The amount of funds received by the institution from a State under the LEAP, SLEAP, or GAP programs;

(iii) The amount of institutional funds used to match ~~i~~Title IV, HEA program funds;

(iv) The amount of ~~i~~Title IV, HEA program funds refunded to students or returned to the Secretary under § 668.22. ~~If any funds from the loan disbursement used in the return calculation under § 668.22 were counted as non title IV revenue under paragraph (a)(6) of this section, the amount of Title IV, HEA program funds refunded or returned under § 668.22 is considered to consist of pre-ECASLA loan amounts and loan amounts in excess of the loan limits prior to ECASLA in the same proportion to the loan disbursement; or~~

(v) The amount the student is charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges; or

(vi) Any 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.

(b) [Reserved]

(c) **Sanctions.** If an institution does not derive at least 10 percent of its revenue from sources other than ~~Title IV, HEA program~~ Federal funds -

(1) For two consecutive fiscal years, it loses its eligibility to participate in the Title IV, HEA programs for at least two fiscal years. To regain eligibility, the institution must demonstrate that it complied with the State licensure and accreditation requirements under 34 CFR 600.5(a)(4) and (a)(6), and the financial responsibility requirements under subpart L of this part, for a minimum of two fiscal years after the fiscal year it became ineligible; ~~or~~

(2) For any fiscal year, it becomes provisionally certified under § 668.13(c)(1)(ii) for the two fiscal years after the fiscal year it failed to satisfy the revenue requirement. However, the institution's provisional certification terminates on -

(i) The expiration date of the institution's program participation agreement that was in effect on the date the Secretary determined the institution failed this requirement; or

(ii) The date the institution loses its eligibility to participate under paragraph (c)(1) of this section; ~~and~~

(3) It must notify the Secretary no later than 45 days after the end of its fiscal year that it failed to meet this requirement; and

(4) It is liable for any title IV, HEA program funds it disburses after the fiscal year it becomes ineligible to participate in the title IV, HEA program under paragraph (c)(1) of this section, excluding any funds the institution was entitled to disburse under §668.26.