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90/10 Final Regulations Overview

With Peter S. Leyton and Steven M. Gombos

On October 29, 2009, the Department of Education issued final regulations resulting from the negotiated rulemaking sessions held earlier in the year. Those regulations, which will become effective on July 1, 2010—but which can be implemented anytime before then if you desire—include changes to how the 90/10 rule is calculated. The changes include calculating revenue from programs and activities, revenue generated from institutional aid and the application of Title IV and non-Title IV funds. Additionally, the penalties for being out of compliance with the 90/10 rule have changed.

Peter Leyton and Steven Gombos, both attorneys with the Washington, D.C.-based firm of Ritzert & Leyton, P.C., recently outlined the changes in greater detail.

"One significant change, if you miss 90/10 or exceed the percentage, was to move the hammer, so to speak, from a one-year violation to a two-years-in-a-row violation before you lose your eligibility. After one year over 90 percent, there is an automatic conversion to provisional certification status," Leyton says. "It's not inconceivable that the Department might look at some other things to tag onto that, but the provisional certification element is something that is specifically addressed in the regulation as an automatic event."

"The move to a provisional status is significant because in the event the Secretary determines you're not meeting your responsibilities under Title IV, you can be revoked by letter. You can ask for a reconsideration of that revocation within 20 days, but in effect, you don't get the benefit of a hearing in a determination proceeding as you would if you were not provisional," adds Gombos.

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If you were to lose your eligibility after two years, you can then apply for reinstatement. You would have to wait at least two fiscal years before applying for reinstatement and then demonstrate administrative capability and financial responsibility, explains Leyton.

"I know CCA is also looking at trying to amend this provision further to extend that out one more year, so you'd have three years out," Leyton says.

The annual financial statement audit has also changed in that you now must disclose the percentage of Title IV rev-

enue as well as dollar amount of numerator and denominator. In addition to that, there is a new Section 2 included in Appendix C.

"The reason for all that is the Department thought that this would simplify the presentation of 90/10 and facilitate their review of the audit. I would note that there are several places within the preamble to the regulations where the Department has made a comment about their own review, so I take that to mean they really are going to be reviewing these things closely," says Gombos.

> ***Under prior provisions, the institution had a responsibility to notify the Department if it exceeded 90/10 within 90 days after the fiscal year ended. They've now shortened that from 90 to 45 days.***
> ***– Steven Gombos***

"The other thing to point out is the related party footnote is still required, so to the extent that impacts either your institutional loan or scholarship program, it'll have to be disclosed," adds Leyton.

Under prior provisions, the institution had a responsibility to notify the Department if it exceeded 90/10 within 90 days after the fiscal year ended. They've now shortened that from 90 to 45 days. "Their answer in terms of why, is that they think the school should know before the end of the fiscal year whether they're going to be close to 90/10 or close to 90 and should be planning for the audit in

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His practice focuses particularly on representing institutions of higher education, especially with respect to resolving federal student financial assistance compliance matters, national and regional accreditation matters, and in achieving desired transactional results such as institutional mergers, acquisitions, and reorganizations. Peter works daily with clients and regulatory agencies regarding transactions, compliance, and accrediting matters. He has represented many institutions throughout the United States and successfully resolved matters before the U.S. Department of Education, accrediting agencies, and federal and state court.

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Steve also has significant trial experience in cases involving commercial disputes, business torts, and professional liability matters. He possesses considerable expertise in employment law matters, employment agreements and covenants not to compete, and has negotiated and handled significant mergers and acquisitions.

His practice areas include: Civil Litigation, Business Crimes and Investigations, Labor and Employment Law, Commercial Litigation, Strategic Alliances, Business Litigation, Business Torts, Corporate Litigation, Corporate Contracts, Corporate Commercial Law, Higher Education Law, Professional Malpractice, and Sports Law.

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time to meet this deadline. So that's a pretty tough deadline," says Gombos.

"I think this confirms that you should be tracking it through the year, and do not make a bid adjustment at year end. That's the message there," says Leyton.

Another very important part of the 90/10 regulations is the fact that any Title IV funds that are disbursed or delivered to, or on behalf of, a student are presumed to pay for the student's tuition, fees and institutional charges regardless of whether the school credits a student's account or pays the funds directly to the student unless they are satisfied by: Grant funds from non-federal public agencies or private sources independent of the school; funds provided under a contractual arrangement with a government agency for the purpose of providing job training to low income individuals in need of training; all tax savings plans qualified under IRC; or institutional scholarships.

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Ritzert & Leyton's higher/postsecondary education group offers a unique combination of experience and expertise in the highly specialized and regulated areas of federal student financial assistance, accreditation, licensure, corporate and tax related matters, and mergers and acquisitions of postsecondary institutions from both a corporate and regulated industry perspective. The firm works with applicable laws, regulations and procedures and the people who regulate institutions of higher education on a daily basis. They assist their clients in understanding and navigating the complex regulatory framework affecting postsecondary institutions in order to manage and avoid problems and, when necessary, defend them before regulatory agencies and in federal and state court.

Their education clients include postsecondary education institutions of all types and sizes, including privately held, nonprofit, and publicly traded institutions; private equity and venture capital firms; investment bankers; investment analysts; and financial institutions. They have substantial experience in representing clients in administrative proceedings before the U.S. Department of Education, accrediting agencies, state licensing agencies, and in federal and state courts in connection with:

- mergers, acquisitions, and other forms of growth or ownership restructuring;
- obtaining and maintaining institutional and program eligibility with respect to federal student financial aid;
- obtaining and maintaining institutional and programmatic accreditation;
- obtaining and maintaining state licensure;
- appealing and resolving federal student financial aid program reviews;
- appealing and resolving federal student financial aid audits and investigations by the Office of the Inspector General (OIG) of the U.S. Department of Education;
- defending *False Claim Act* investigations and prosecutions;
- defending criminal investigations and prosecutions involving participation in the federal student financial assistance programs; and
- conducting internal investigations involving regulatory compliance.

"This is a very important element in the preparation of 90/10. So from the Department's point of view, if the funds don't fit into one of those four categories, then the presumption applies," Gombos says.

In determining 90/10, you must know what is and isn't considered revenue by the Department. In the past, schools must consider as revenue only those funds they generate from tuition, fees and other institutional charges for students enrolled in eligible programs; or from activities conducted by the school that are necessary for a student's education and training, provided certain provisions are met. A new provision could be significant, Gombos says, as it allows for the institution to receive revenue for students enrolled in non-eligible Title IV programs, so long as the program is approved or licensed by the appropriate state agency, is accredited by a recognized agency, or provides an industry-recognized credential or certification or prepares students to take an exam for such a credential or certification.

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"But it goes beyond that even to include courses," says Gombos. "If a course is being offered that provides training for students needed to maintain state licensing or to meet additional licensing requirements for specialized training, the revenue from that could also be counted."

The *Higher Education Opportunity Act* has added a new Title X, which has amended the *Truth in Lending Act* (*TILA*) to add some specific disclosures for private education loans. The Federal Reserve Board published final regulations to implement the disclosure requirements and they became effective February 14.

"There are certain loans which will be exempt from the new regulations. Private education loans with a term of 90 days or less, or loans with no interest rate and a term of one year or less, are exempt from the new regulations or disclosure requirements, even if the credit is payable in more than four installments," Leyton says. "Any loans with fewer than four installments are exempt from *TILA,* entirely. But if you have a loan that is exempt from the new disclosure requirements, it may still be a loan where you have to provide the pre-existing *TILA* disclosure requirements. In fact, it might encompass not only Regulation Z, but Regulation B on equal credit and Regulation E on electronic funds transfer and Regulation V on the *Fair Credit Reporting Act.* So in this context, the institutions need to be very cognizant of the *TILA* disclosures."

For a scholarship to count within 90/10, Leyton says there have to be funds that have gone into a restrictive account for the scholarship purpose.

"And it's really only the earnings on those funds that can be used for 90/10 purposes in the denominator. Of course one of the advantages of an institutional scholarship, if you do have it, is it defeats the presumption. So it takes the place of Title IV funds that you may have received."

Excluded from revenues in the calculation of 90/10 are work-study funds, funds under LEAP, SLEAP and GAP, and institutional matching funds under Title IV programs.

"Title IV funds that are returned under R2T4 are also not counted in the 90/10 calculation. The Department did make it clear that to the extent that you have received excess unsub funds or direct loan funds, the calculation of how much is or is not included within

the 90/10 calculation on the R2T4 is in the same proportion," says Leyton. "So if the loan disbursement for a payment period is $3,000 and $1,000 of that represented excess unsub, the proportional breakdown of funds returned is two-thirds pre-ESCASLA and one-third post-ESCASLA, which has the benefit of or insurance that you still would get to keep some proportion of the excess unsub that you counted in the 90/10 calculations."

The amount charged for books, supplies and equipment is also excluded unless the school includes the amount as tuition, fees or other institutional charges.

Finally, when calculating net present value, the Department has a formula that schools can use, or, in the alternative, the institution may treat 50 percent of the total amount of loans that it made during the fiscal year as non-Title IV revenue; however, none of the loans may be sold until they have been in repayment for at least two years. One reason for this rule, Leyton says, is to allow the Department sufficient time to monitor whether the loans are subjected to routine collection efforts.

"If you're a school with a history of loans and good collections, using the formula may produce a higher percentage that you can apply than the alternative," Leyton says. "Obviously this only comes into play if you are a school whose tuition, fees and institutional charges exceed the amount of Title IV that the student can get."

Leyton believes that overall the changes to 90/10 are beneficial for schools, though 90/10 itself is a problem.

"It has been and it remains one, and to the extent that there are continued increases in Title IV funding, it just pushes schools closer to that point," he says.

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This article by no means covers every aspect of the regulatory changes to 90/10. For clarification or additional information, one can contact the Department of Education. You may also contact Leyton or Gombos.

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