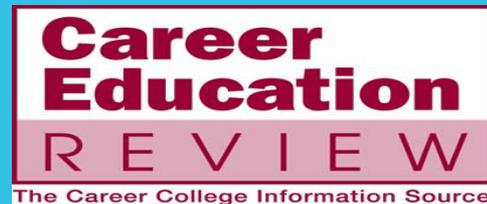


CAREER EDUCATION REVIEW  
AND  
RITZERT & LEYTON, P.C.  
WEBINAR SERIES:  
"90/10"

NOVEMBER 12, 2015



# DISCLAIMER

- The Views Expressed In This Webinar And Its Accompanying Materials Are Those Of The Speakers And Do Not Necessarily Reflect The Policy Or Position Of Career Education Review.
- The Contents Of This Presentation And Its Accompanying Materials Do Not Constitute Legal Or Regulatory Advice. No One Should Act Or Refrain From Acting On The Basis Of This Webinar Without Seeking Individualized, Professional Counsel As Appropriate.

# INTRODUCTION



# INTRODUCTION

- Why should you care about the 90/10 requirements?
  - Applies only to proprietary institutions.
  - Failure to meet the standard for two consecutive years means the school will lose Title IV eligibility (for a period of not less than two years).

# INTRODUCTION

**Proprietary School 90/10 Revenue Attestation Percentages  
from Financial Statements with Fiscal Year Ending Dates  
Between 7/1/2013 and 6/30/2014**

*Source: eZ-Audits as of 6/8/2015*

Revenue Attestation Percentage	Number of Schools
Greater than 90 from Title IV Sources	14
Greater than 85 and up to 90 from Title IV Sources	364
Greater than 80 and up to 85 from Title IV Sources	305
Greater than 70 and up to 80 from Title IV Sources	495
Greater than 60 and up to 70 from Title IV Sources	347
Greater than 50 and up to 60 from Title IV Sources	180
Greater than 40 and up to 50 from Title IV Sources	112
Greater than 30 and up to 40 from Title IV Sources	60
Greater than 20 and up to 30 from Title IV Sources	34
Greater than 10 and up to 20 from Title IV Sources	17
Between 0 and 10 from Title IV Sources	19
<b>Total Number of Schools</b>	<b>1,947</b>

# INTRODUCTION

- Why should you care about the 90/10 requirements?
  - Failure to meet the standard in a single year transforms your Program Participation Agreement (“PPA”) into one of provisional status for the two following years. Provisional status can create significant problems:
    - Must obtain prior approval to add a location; and
    - May allow the U.S. Department of Education (“ED”) to revoke the PPA if it determines the institution “is unable to meet its responsibilities under its [PPA].” 34 C.F.R. § 668.13(d)(1).

# INTRODUCTION

- Focus for government investigations and remains high on the list for ED in program reviews and audits;
- Increasing focus for litigation; and
- Source of Reputational Risk – your 90/10 rates are made public at:  
<https://studentaid.ed.gov/sa/about/data-center/school/proprietary>
- How can you manage your revenues to ensure compliance with the 90/10 ratio requirements?

# WHERE DOES 90/10 TEST APPEAR?

- The regulation is at 34 C.F.R. § 668.14(b)(16), which recounts what is necessary for an institution to do to participate in Title IV programs – namely, execute a PPA.
- The 90/10 requirement is therefore a critical component to fundamental institutional Title IV eligibility.
  - Perceived violations can lead ED (or a *qui tam* relator in the context of a False Claims Act lawsuit) to allege all Title IV funds disbursed must be returned (in addition to treble damages and penalties).

# WHAT DOES THE RULE REQUIRE?

- Requires an institution to “derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA programs funds.” 34 C.F.R. § 668.14(b)(16).
  - Calculation must be included as a footnote to the institution’s audited financial statement (which must be provided annually).
  - Utilizes the cash basis of accounting.
  - Must report a failure to satisfy the 90/10 requirements to ED within 45 days after the end of the most recent fiscal year.

# WHAT IS THE 90/10 FORMULA?

- Expressed as a formula, 90/10 is comprised of:

Adjusted Student Title IV Revenue

---

Adjusted Student Title IV Revenue + Student Non-Title IV  
Revenue + Total Revenue from Other Sources

# WHAT IS THE 90/10 FORMULA?

- Think of the denominator as a cabinet with two drawers. Drawer One holds Adjusted Student Title IV Revenue + Student Non-Title IV Revenue. Drawer Two holds Total Revenue From Other Sources.
  - BUT Drawer One can only hold a cash amount equal to tuition and fees charged. For example, if tuition and fees total \$15,000, then Drawer One holds 15,000 \$1.00 bills.
- The school's first job is to determine what sources of funds must be used to fill Drawer One.

# WHAT IS THE 90/10 FORMULA?

- How does the school fill Drawer One? It follows ED's rules regarding how to do so.
  - It does so by placing into Drawer One:
    - Adjusted Student Title IV Revenue, then
    - Student Non-Title IV Revenue (if there is still room).
- But remember, when filling Drawer One, if Adjusted Student Title IV revenue is equal to tuition and fees charged, the drawer will not hold any non-Title IV cash you may have received on behalf of the student.

# WHAT IS THE 90/10 FORMULA?

- Adjusted Student Title IV Revenue:
  - Total Title IV funds disbursed to the student MINUS institutional matching funds (e.g., SEOG and FWS) and R2T4 funds refunded on behalf of a student.

# WHAT IS THE 90/10 FORMULA?

- Adjusted Student Title IV Revenue (an example):
  - Tuition and Fees = \$15,000.
    - Total Title IV disbursed = \$10,000.
    - Institutional matching = \$500.
    - Total R2T4 = \$250.
    - Private scholarship = \$5,000.
  - So, the adjusted Title IV revenue is \$9,250.

# WHAT IS THE 90/10 FORMULA?

- Funds Applied First:
  - If the sum of (i) grant funds from non-Federal entities/ independent private sources; (ii) funds from a government agency under contract with the institution to provide workforce training (e.g., WIA); and/or (iii) funds from qualified savings plan for educational expenses (e.g., 529 plans), PLUS the adjusted Title IV funds disbursed, EXCEEDS tuition and fees, then Title IV is reduced by the excess amount.

# WHAT IS THE 90/10 FORMULA?

- Funds Applied First (an example):
  - Tuition and Fees = \$15,000.
    - Adjusted Title IV revenue = \$10,000.
    - Private scholarship = \$5,000.
    - 529 funds = \$5,000.
    - State Grant = \$2,500.
  - So, the final Title IV revenue for the student is \$7,500.

# THE 90/10 FORMULA – PRESUMPTION RULE

- ED’s “Presumption Rule” is that a school must presume any Title IV funds it disburses on behalf of a student will be used to pay tuition, fees, or other institutional charges regardless of whether they are credited to the student’s account or paid directly to the student.
- This presumption applies except to the extent that the student’s tuition/fees/charges are satisfied by “funds applied first”: (i) grant funds from non-Federal entities/independent private sources; (ii) funds from a government agency under contract with the institution to provide workforce training (e.g., WIA); and/or (iii) funds from qualified savings plan for educational expenses (e.g., 529 plans).

# THE 90/10 FORMULA – PRESUMPTION RULE

- The Presumption Rule (an example):
  - Tuition and Fees = \$15,000.
    - Total Title IV disbursed = \$10,000.
    - Institutional matching = \$0.
    - Total R2T4 = \$0.
    - Private scholarship = \$0.
    - Student cash payment = \$10,000.
  - So, the adjusted Title IV revenue is \$10,000 (and we put \$10,000 of Adjusted Title IV revenue into Drawer One which means that drawer can only hold \$5,000 of the student cash payments).

# 90/10 MITIGATION STRATEGIES

# POLL QUESTION #1

- ABC Medical Institute wants to sell student accounts receivables in order to recognize revenue before the end of the current fiscal year. Knowing that the school will need an additional \$75,000 in non-Title IV revenue to be assured of a 90/10 calculation of that is below 90%, the school's owner and CEO arranges the sale of the A/R to his brother for \$75,000. According to school's accountant, many of the accounts are seriously delinquent and are probably not worth more than \$35,000.

Can the school use the \$75,000 proceeds from this sale to achieve a compliant 90/10 calculation?

# POLL QUESTION #1 - DISCUSSION

- ED will disallow sales of A/R when the transaction is not conducted at arm's length.
  - See: In the Matter of Star Technical Institute Dkt. No. 09-22-SA, Dept. of Education O.H.A., Feb. 7, 2012 (Decision on appeal to Secretary Duncan).
  - “I am persuaded that the record contains substantial evidence showing that the sales of receivables from [the school] to [the buyer] were structured significantly by considerations other than those expected in arm's length transactions, and that the requisite conditions of competitive, rivalrous, free market dealings did not exist. As such, no new revenue was generated by Respondent's sales of receivables, and as a result the purported revenue may not be included as non-Federal revenue in the 90/10 calculation.”

## POLL QUESTION #2

- The Generic Cosmetology Academy operates a clinic floor where students provide haircutting, coloring, and styling services on members of the general public. The students are required to provide these services as part of the school's cosmetology program and they are supervised by school instructors.

Can the school count revenue generated from the student preformed services in its 90/10 calculation?

## POLL QUESTION #2 - DISCUSSION

- According to 34 CFR 668.28(a)(3), you may count revenue from 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.

## POLL QUESTION #3

- Can Generic Cosmetology Academy also count revenues from the retail sales of hair styling products and accessories that are made on the clinic floor?

## POLL QUESTION #3 - DISCUSSION

- Although 34 CFR 668.28(a)(3) would seem to leave this possibility open, both FSA and ED/OIG have taken the position that the provision should be construed narrowly and the revenues from the sales of retail products has been disallowed in some circumstances even when the school presented evidence of the connection of these activities to the curriculum.

## POLL QUESTION #4

- This year Median Career College (“MCC”) entered into a relationship with Local Community Bank (“Bank”) to guarantee the payment of \$5,000 private educational loans to 12 of MCC’s students. 1/3 of the students default on their loans in the following year and MCC has to pay the Bank according to its guarantee.

What revenue can MCC count in its 90/10 calculation?

- \$60,000.
- \$40,000.
- None of it .

## POLL QUESTION #4 - DISCUSSION

- MCC's guarantee to the Bank makes the private loans "full recourse loans."  
Under ED's rules, MCC must reduce its revenue by the amounts of recourse payments it makes in the year in which payments were made.

# POLL QUESTION #5

- MCC decides that it wants to limit its exposure under the guarantee to the Bank and changes its agreement to provide that MCC will guarantee up to 25% of the value of each student's loan. Under that agreement the Bank extended \$5,000 loans to 20 students.

How much of this revenue can MCC count in its 90/10 calculation?

- \$100,000.
- \$75,000.
- \$25,000.

# POLL QUESTION #5 - DISCUSSION

- MCC's changed agreement makes these loans “partial recourse” loans. Under ED's rules, MCC may only include the non-recourse portion of the loan proceeds (\$75,000) in the 90/10 calculation in the year those proceeds are received.

## POLL QUESTION #6

- MCC's relationship with the Bank has been so positive that MCC also turns to the Bank to sell student A/R. MCC has \$100,000 of A/R to sell. The Bank agrees to buy the entire portfolio if MCC provides the same recourse amount – 25%.

How much revenue can MCC include in its 90/10 calculation?

- \$100,000.
- \$75,000.
- None of it.

# POLL QUESTION #6 - DISCUSSION

- Unlike the private loans, the sales of A/R may not include recourse, therefore MCC may not include revenue for the sale of A/R based on recourse.

# POLL QUESTION #7

- MCC's CEO and owner establishes a scholarship fund by writing a \$250,000 check to the school. The school deposits the check in its operating account and uses the money to award \$50,000 in scholarships this year.

Can MCC count the \$50,000 awarded to students as revenue for its 90/10 calculation?

# POLL QUESTION #7 - DISCUSSION

- ED's guidance regarding scholarships provided by the institution in the form of monetary aid or tuition discount and based on the merit or financial need of its students permits schools to include revenue reflecting the amount disbursed to students during the fiscal year.
- However, the scholarships must be disbursed from an established restricted account and only to the extent that the funds in that account represent designated funds from an outside source or income earned on those funds.

# POLL QUESTION #8

- Generic Cosmetology Academy plans to offer a 240 clock hour Nail Technology program as a way to add a revenue stream that is not connected to Title IV. The school seeks approval from its accreditor for the program and begins enrolling students.

Can it include this revenue in its 90/10 calculation?

# POLL QUESTION #8 - DISCUSSION

- According to 34 CFR 668.28(a)(3) revenue from non-title IV programs may be included in the denominator of the 90/10 calculation if the program is:
  - (A) Is approved or licensed by the appropriate State agency;
  - (B) Is accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602;
  - (C) 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.

# FUTURE CHALLENGES

# FUTURE CHALLENGES

- Legislative efforts to include VA benefits as “federal revenue” for 90/10 purposes, e.g., S.1664 (“Military Veterans Education Protection Act”) Sponsored by Sen. Tom Carper (D-DE) co-sponsored by Senators Durbin, Blumenthal, Murray, Brown, Schumer, McCaskill, Franken, Stabenow, Feinstein, Boxer, Baldwin, Schatz, Murphy, Menendez, Reed, Merkley, Markey, Coons, Peters, Warren, Hirono, Shaheen, Cardin, Gillibrand, and Whitehouse.
- Gainful Employment tuition reduction.
- Consumer Financial Protection Bureau (“CFPB”) oversight of private loan programs.

# STEPHEN T. CHEMA II

Steve is a Senior Associate at Ritzert & Leyton, PC. As a member of the Firm's Postsecondary Education Practice Group, he advises clients on a wide array of matters related to compliance with student financial aid programs under Title IV of the Higher Education Act, including topics such as 90/10, the incentive compensation rule, institutional and student eligibility issues, and gainful employment.

He also specializes in advising postsecondary institutions on compliance with privacy laws, including the Family Educational Rights and Privacy Act ("FERPA"), the Gramm-Leach-Bliley Act ("GLBA"), and the Federal Trade Commission's "Red Flags" rule. In addition, his work involves counseling institutions on issues related to anti-discrimination and employment law, campus security and consumer protection.

Steve has appeared in matters before the U.S. Department of Education, Office of Hearings and Appeals, and in administrative matters before national and regional accrediting agencies as well as state regulatory agencies. He has also counseled clients in the regulatory aspects of ownership changes and substantive changes resulting from mergers and acquisitions. He earned a B.A. from The College of the Holy Cross and a J.D. from Catholic University.



# ROBERT B. (BEN) WALKER, JR.

Mr. Walker has been admitted to practice in the Commonwealth of Virginia since 2005. He works closely with the postsecondary education law group and has participated in a broad range of investigations, including regulatory and civil matters with the U.S. Department of Education, as well as state and accrediting agencies.

He has also focused on criminal investigations, including issues involving or relating to the administration of Title IV, HEA program funds. He helps clients assess and then address compliance matters as well as submit data to various regulatory bodies.

Mr. Walker received his law degree from the University of California Hastings College of Law, where he was on the staff of the Hastings Law Review and also served as a legal extern for Chief Judge Marilyn Hall Patel in the Northern District of California. He earned a Bachelor of Arts degree from the University of Virginia.



# CONTACT INFORMATION

Stephen Chema II, Esq.

Ritzert & Leyton, PC

Phone: (703) 934-9835 (direct)

Email: [stchema@Ritzert-leyton.com](mailto:stchema@Ritzert-leyton.com)

Website: [www.ritzert-leyton.com](http://www.ritzert-leyton.com)

Jenny Faubert

Career Education Review

Phone: 920-264-0199

Email: [jfaubert@careereducationreview.net](mailto:jfaubert@careereducationreview.net)

Website: [www.careereducationreview.net](http://www.careereducationreview.net)

Robert “Ben” Walker, Esq.

Ritzert & Leyton, PC

Phone: (703) 934-9834 (direct)

Email: [bwalker@ritzert-leyton.com](mailto:bwalker@ritzert-leyton.com)

Website: [www.ritzert-leyton.com](http://www.ritzert-leyton.com)

