

CRS Report for Congress

Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status

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Rebecca R. Skinner
Specialist in Education Policy
Domestic Social Policy Division



**Prepared for Members and
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Summary

Title IV of the Higher Education Act (HEA; P.L. 89-329, as amended by P.L. 105-244) authorizes programs that provide federal student financial aid to support student attendance at institutions of higher education (IHEs) meeting Title IV eligibility requirements. To participate in these programs, proprietary (for-profit) institutions must meet requirements included in Section 102 of the HEA, including requirements that proprietary institutions have been in existence for at least two years and derive at least 10% of school revenue from non-Title IV funds. This latter requirement forms the basis for the 90/10 rule.

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). The 85/15 rule was similar to a requirement that had been placed on the veterans' assistance programs administered by the then Veterans' Administration to prevent institutions from being established solely to profit from the payments received by veterans.

Supporters of the 85/15 rule argued that the rule was necessary to stem fraudulent and abusive practices that had been identified at proprietary institutions. It also was argued that implementing the rule might restore some market incentive to education as proprietary institutions would be unable to charge more than what students not receiving enough federal financial aid to pay all their institutional charges were willing to pay. Detractors of the new rule argued that requiring proprietary institutions to obtain at least 15% of their revenue from non-Title IV sources could limit access to low-income students if proprietary institutions were forced to deny admission to students receiving Title IV funds to meet the required percentage of non-Title IV revenues.

During the 1998 reauthorization process, Congress reduced the percentage of revenue that proprietary institutions had to obtain from non-Title IV sources to at least 10%. Congress declined to make changes to the formula for calculating revenue that had generated controversy since its inception following the 1992 reauthorization. The U.S. Department of Education, however, opted to modify the definition of revenue and calculation of eligibility through regulations following the 1998 reauthorization.

As part of its consideration of reauthorizing the HEA, the Senate has passed a bill (S. 1642, Higher Education Amendments of 2007) that would eliminate the 90/10 rule as a condition of institutional eligibility for proprietary institutions. Rather, the 90/10 rule would be moved to HEA Section 487 (Program Participation Agreement), where it would continue to affect only proprietary institutions.

The HEA may be considered for reauthorization by the 110th Congress. This report will be updated as warranted by legislative action.

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Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status

Title IV of the Higher Education Act (HEA; P.L. 89-329, as amended by P.L. 105-244) 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 Title IV eligibility. HEA, Section 101 recognizes *nonprofit* institutions that are, among other things, legally authorized by the state, accredited or preaccredited 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. HEA, Section 102 expands the definition of an IHE for the purposes of Title IV eligibility only. Section 102 recognizes *proprietary (for-profit)* institutions of higher education, postsecondary vocational institutions, and institutions outside of the United States as being eligible for Title IV programs.¹ To participate in Title IV programs, in addition to other requirements, proprietary institutions must have been in existence for at least two years and derive *at least 10%* of school revenue from non-Title IV funds. This latter requirement forms the basis for the 90/10 rule.

As part of its consideration of reauthorizing the HEA, the Senate has passed a bill (S. 1642, Higher Education Amendments of 2007) that would eliminate the 90/10 rule as a condition of institutional eligibility for proprietary institutions. Rather, the 90/10 rule would be moved to HEA Section 487 (Program Participation Agreement), where it would continue to affect only proprietary institutions. The House Committee on Education and Labor has not yet considered an HEA reauthorization bill.

This report begins with an introduction to the current 90/10 rule and the formula used to determine whether an institution is in compliance with the rule. This is followed by a brief overview of the legislative history of the 90/10 rule and its predecessor, the 85/15 rule. The report concludes with a discussion of the 90/10 rule with respect to HEA reauthorization and a brief overview of relevant legislation considered in the 110th and the 109th Congresses.

¹ Foreign institutions are eligible to participate only in Title IV, Part B (i.e., Federal Family Education Loan (FFEL) program). For more information about foreign institutions' participation in Title IV, Part B, see CRS Report RL33909, *Institutional Eligibility for Participation in Title IV Student Aid Programs Under the Higher Education Act: Background and Reauthorization Issues*, by Rebecca R. Skinner. (Hereafter cited as CRS Report RL33909, *Institutional Eligibility*.)

The 90/10 Rule and Related Formula

The 90/10 rule states that a proprietary institution must derive at least 10% of its revenue from non-Title IV funds. Failure to comply with this requirement results in an institution losing its eligibility to participate in Title IV programs.

The current formula² used to calculate proprietary school compliance with the 90/10 rule is stated in program regulations as follows:

- (i) Title IV funds used for tuition, fees, and other institutional charges
divided by
- (ii) Sum of revenues generated by the school from: (1) tuition, fees, and other institutional charges for students enrolled in Title IV-eligible training programs; plus (2) school activities necessary for the education or training of students enrolled in those Title IV-eligible programs³

The denominator only includes revenues generated from school activities necessary for the education or training of students to the extent that they are not included in tuition, fees, and other institutional charges.

Several funds are excluded from both the numerator and denominator for determining institutional compliance with the 90/10 rule. Leveraging Educational Assistance Partnership (LEAP) program, Special Leveraging Educational Assistance Partnership (SLEAP) program, and Federal Work Study (FWS) funds can not be included, except under specific circumstances.⁴ Institutional funds used to match federal student aid funds and refunds paid to or on behalf of students that have failed to complete the period of enrollment (e.g., withdrawn, expelled) may not be included. Finally, the cost of books, supplies, and equipment may not be considered unless those costs are institutional charges.⁵

In calculating revenue, institutions must use the cash basis of accounting. 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

² Information for this section was taken from U.S. Department of Education, Office of Federal Student Aid, *Volume 2 — School Eligibility and Operations, 2006-2007*, pp. 2-8 through 2-11, available online at [<http://ifap.ed.gov/sfahandbooks/attachments/0607FSAHBkVol2Master.pdf>]. (Hereafter cited as Office of Federal Student Aid, *Volume 2*.) Additional information about the 90/10 rule also is available in 34 CFR 600.5.

³ For more information about Title IV-eligible programs, see Office of Federal Student Aid, *Volume 2*, pp. 2-1 through 2-2.

⁴ See Office of Federal Student Aid, *Volume 2*, p. 2-9 and 34 CFR 600.5(e) for additional information about the treatment of these funds under the 90/10 rule.

⁵ For more information, see U.S. Department of Education, Office of Federal Student Aid, *Volume 5 — Overawards, Overpayments, and Withdrawal Calculations*, available online at [<http://ifap.ed.gov/sfahandbooks/attachments/0607Vol5Master.pdf>].

services.”⁶ An institution may only recognize revenue when it represents cash received from a source outside of the institution. Thus, institutional grants in the form of tuition waivers do not count as revenue because they do not represent an inflow of cash from outside the institution.

Current regulations permit several types of non-Title IV revenue to be included in the denominator of the 90/10 calculation.⁷ Revenue generated by the institution from activities that are necessary for its students’ education or training may be considered in the denominator.⁸ These activities must be conducted on campus or at a facility under the institution’s control, performed under the supervision of a faculty member, and required of all students in a specific educational program. Examples of specific non-Title IV revenue that may be included in the denominator include non-Title IV funds used by students to pay tuition, fees, and other institutional charges; loan repayments received by the institution during the fiscal year for which the determination is made; and institutional scholarships if the funds were disbursed from an established restricted account and the funds in that account are funds from an outside source.⁹

Finally, Title IV funds must be used to pay institutional charges prior to the application of other funds unless the student receives grant funds provided by nonfederal public agencies or independent private sources, funds from qualified government agency job training contracts, or funds from a prepaid tuition plan. Thus, institutions are able to count all funds available from these sources toward their 10% non-Title IV funds requirement.¹⁰ It should be noted that although funds from prepaid tuition plans, authorized under Section 529 of the Internal Revenue Code (529 plan), may be applied to institutional charges prior to Title IV funds, funds from tuition savings plans, also authorized by Section 529, may not be applied prior to Title IV funds.¹¹

⁶ Office of Federal Student Aid, *Volume 2*, p. 2-9.

⁷ 34 CFR 600.5(e)(4)

⁸ Revenues from auxiliary enterprises, such as revenue from vending machines or the sale of equipment and supplies to students that are not necessary for their education or training, may not be considered revenue for purposes of complying with the 90/10 rule.

⁹ For more information about the treatment of institutional scholarships, see Office of Federal Student Aid, *Volume 2*, pp. 2-10.

¹⁰ Without this provision, institutions would have to consider Title IV aid first, which could limit the amount of funding applied from these other sources. For example, if a student had \$10,000 available from a prepaid tuition plan and institutional charges were \$12,000, the institution could apply the full \$10,000 toward these charges even if the student had \$6,000 in federal student aid. Without this provision, the institution would have to apply the \$6,000 of federal student aid toward institutional charges first, and then would only be able to apply \$6,000 from the student’s prepaid tuition plan toward institutional charges and compliance with the 90/10 rule.

¹¹ Prepaid state tuition plans, established under Section 529 of the Internal Revenue Code, currently are applied toward institutional charges prior to Title IV aid because this mirrors how they are treated in determining eligibility for Title IV aid. In contrast, tuition savings
(continued...)

Legislative History¹²

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.

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 the U.S. Department of Education 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.¹³ 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.¹⁴ When default rates peaked nationwide in 1990, default rates at proprietary institutions reached 41% compared with an overall default rate of 22%. Many proprietary institutions were failing to provide

¹¹ (...continued)

plans established under Section 529 are treated as family savings plans and included in the calculation of the estimated family contribution. For more information about the treatment of Section 529 tuition savings plans during the negotiated rulemaking process, see U.S. Department of Education, Office of Postsecondary Education, *2002 Negotiated Rulemaking for Higher Education, Team Two — Program and Other Issues: No Tentative Agreement, Third Session — April 24-26*. For more information on the treatment of Section 529 plans, see CRS Report RL32155, *Tax-Favored Higher Education Savings Benefits and Their Relationship to Traditional Federal Student Aid*, by Linda Levine and Charmaine Mercer (hereafter referred to as CRS Report RL32155, *Tax-Favored Higher Education Savings Benefits*).

¹² This report draws, in part, on information contained in archived CRS Report 90-424, *Proprietary institutions: The Regulatory Structure*, by Margot A. Schenet; and archived CRS Report 97-671, *Institutional Eligibility For Student Aid Under the Higher Education Act: Background and Issues*, by Margot A. Schenet. (Both archived reports are available from the author of this report.)

¹³ 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.

¹⁴ GAO, *Testimony*.

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.¹⁵

All IHEs, including proprietary institutions, eligible for Title IV funds 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.¹⁶ 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. 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.¹⁷

¹⁵ See for example, General Accountability Office (formerly Government Accountability Office), *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*.)

¹⁶ For additional information about the triad, see CRS Report RL33909, *Institutional Eligibility*.)

¹⁷ For more information about this precedent, see for example, *Congressional Record*, Letter from the Office of the Inspector General, p. H5327.

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.¹⁸ 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 market incentive to education as proprietary institutions would not be able to charge more than what students not receiving enough federal financial aid to pay all their institutional charges were 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.¹⁹ The formula, as stated in regulations, used to determine whether proprietary institutions were in compliance with this requirement²⁰ 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.²¹ 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.

It should be noted that 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 was changed to include more sources of revenue

¹⁸ The rule as it applied to veteran's assistance programs was based on percentage of enrollment, not revenue, in part because individual programs and not institutions were approved.

¹⁹ 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.

²⁰ 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.

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

in the denominator, it would be easier for proprietary institutions to meet the requirements of the rule.

GAO Evaluation of Student Outcomes at Proprietary Institutions

After the 1992 HEA amendments were enacted, 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.²² The GAO study found that proprietary institutions that were more dependent on Title IV funds had poorer student outcomes in terms of student completion and placement rates, and higher student 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.²³

There also were discussions of altering the formula used to determine whether an institution was in compliance with the rule. For example, the House proposed to include revenue 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.²⁴

²² General Accountability Office, *Proprietary Schools: Poorer Student Outcomes at Schools That Rely More on Federal Student Aid*, GAO/HEHS-97-103, 1997.

²³ In legislation passed by the House (H.R. 6 as introduced and H.Rept. 105-481) and Senate (S. 1882 and S.Rept. 105-181), the 85/15 rule remained intact; however, the House proposed including revenue from services provided on a contractual basis in the denominator of the formula. For proprietary institutions providing services on a contractual basis, this would have made it easier for them to meet the revenue requirements from non-Title IV funds. In conference, the Senate did not agree to this change, but both the House and Senate did agree to change the percentage of non-Title IV revenues that proprietary institutions had to receive from 15% to 10%, making it easier for proprietary institutions to comply with the rule.

²⁴ 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 (continued...)

Department of Education Changes 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.²⁵ The new regulations also specified that scholarships could only be recognized as revenue if they represented cash received from an outside source. Under most circumstances, institutional scholarships provided by proprietary institutions do not meet this criteria. 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. The new regulations also clarified that Title IV funds had to be applied to student charges before most other sources of payments, such as education IRAs.²⁶

Violations of the 90/10 Rule

The Office of Federal Student Aid (FSA) at the U.S. Department of Education is responsible for tracking institutional violations of Title IV eligibility requirements.²⁷ Based on FSA data on violations for January 1, 2000 through December 31, 2005, a total of 530 IHEs lost their eligibility to participate in Title IV programs for a variety of reasons.²⁸ Of these IHEs, only three proprietary institutions lost their eligibility to participate in Title IV programs due to violations of the 90/10

²⁴ (...continued)

institutional charges. For more information, see 34 CFR 600.5, revised as of July 1, 1997.

²⁵ 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 incurred, 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.)

²⁶ For additional information about regulations regarding the 90/10 rule, see *Federal Register*, October 29, 1999, 64 CFR 58608-58611; and *Federal Register*, July 15, 1999, 64 CFR 38271-38282.

²⁷ For additional information about institutional eligibility requirements to participate in Title IV programs, see CRS Report RL33909, *Institutional Eligibility*.

²⁸ Institutions lose Title IV eligibility for reasons such as closure, loss of accreditation, failure to meet administrative capability or financial responsibility requirements, or voluntary withdrawal. Data on violations of institutional eligibility requirements based on unpublished data provided by the U.S. Department of Education.

rule. Two violations of the 90/10 rule occurred in 2001, and one violation of the 90/10 rule occurred in 2004.²⁹

More specifically, for example, one of the two institutions was found to have derived 90.30% of its revenue from Title IV funds for the fiscal year ending December 31, 2001.³⁰ As a result of this violation of the 90/10 rule, the institution should not have received Title IV funds for the period extending from January 1, 2002 through September 30, 2002, as the institution was ineligible to participate in Title IV programs. The institution had to return Title IV funds received during FY2002, the year for which it was ineligible to participate in Title IV programs. However, the institution has asked ED whether traditional rounding rules apply to the 90/10 rule; that is, anything below 90.50% would be rounded down to 90%. According to the FSA office, the use of a rounding rule is being considered.

Another proprietary institution was found to have violated the 90/10 rule in 2002.³¹ An examination of the institution's annual compliance audit revealed that the institution had derived 92% of its revenue from Title IV funds in 2002. As a result, the institution was found to be ineligible to participate in Title IV federal student aid programs in 2003.

²⁹ While it appears that only three proprietary institutions lost their Title IV eligibility due to violations of the 90/10 rule, it is possible that other proprietary institutions violated the 90/10 rule in conjunction with other violations (e.g., fiscal mismanagement). The specific reason for loss of Title IV eligibility is determined by the U.S. Department of Education. Thus, if an institution has multiple violations, the primary violation may not be attributed to a violation of the 90/10 rule. In addition, if an institution voluntarily closes or voluntarily withdraws from Title IV eligibility, the reason for loss of eligibility could then be recorded as "closure" or "voluntary withdrawal" rather than a violation of the 90/10 rule. For example, ED issued a combined emergency action and termination/fine action against Teddy Ulmo Institute based on allegations of misconduct and breach of fiduciary duty, including violating the 90/10 rule. The institution voluntarily closed, so ED's actions were rendered moot. The institution's loss of Title IV eligibility was not recorded as a 90/10 violation. For more information, see [<http://www.ed-oha.org/cases/2003-42-SF.pdf>].

³⁰ U.S. Department of Education, Office of the Inspector General, *Audit of American School of Technology's Administration of Title IV HEA Programs, Columbus, Ohio*, March 2003. Available at [<http://www.ed.gov/about/offices/list/oig/areports.html>].

³¹ In data provided to CRS by the U.S. Department of Education, no violations of the 90/10 rule were indicated for 2002, but two violations were indicated for 2001. It appears that one of the two violations of the 90/10 rule in 2001 may have actually occurred in 2002. A final determination in the specific violation of the 90/10 rule was issued in June 2005. The institution appealed the decision and a final judgement was rendered in November 2005. U.S. Department of Education, Office of Hearings and Appeals (OHA), Index of OHA decisions, docket number 05-49-SA. Available online at [<http://www.ed-oha.org/ohaindex.html>].

Reauthorization of the Higher Education Act

As Congress considers reauthorization of the Higher Education Act, it may consider continuing, eliminating, or modifying the 90/10 rule. This raises several questions and issues that are addressed below.

Elimination of the 90/10 Rule

As Congress debates the reauthorization of the HEA, it may consider eliminating the 90/10 rule. One of the primary reasons offered for the elimination of the 90/10 rule is that it limits proprietary institutions' ability to serve 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 students interested in attending the institution may be denied admission. Proponents of the elimination of the rule also argue that in addition to being limited in 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 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; thus, making it harder for low-income students to enroll.³²

Opponents of eliminating the rule suggest that for-profit institutions are fundamentally different from not-for-profit institutions based on their profit-seeking motive, raising questions about why these institutions should be fully supported by the federal government and tax-payer dollars. In addition, 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.³³ 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).

³² Various arguments against having the 90/10 (or 85/15) rule have been made since Congress first considered implementing the rule. See for example, *Congressional Record*, Letter from the Office of the Inspector General, pp. H5322-H5334; Testimony of Mr. David Moore, in U.S. Congress, House Education and the Workforce Committee, Subcommittee on 21st Century Competitiveness, hearing on H.R. 3039, the Expanding Opportunities in Higher Education Act, September 11, 2003. Available at [<http://edworkforce.house.gov/hearings/108th/21st/hr3039091103/moore.htm>].

³³ See for example, Testimony of Dr. Donald E. Heller, in House Education and the Workforce Committee, Subcommittee on 21st Century Competitiveness, hearing on H.R. 3039, the Expanding Opportunities in Higher Education Act, September 11, 2003. Available at [<http://edworkforce.house.gov/hearings/108th/21st/hr3039091103/heller.htm>].

The potential access problem associated with the 90/10 rule and its predecessor 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 of Education (Secretary) to waive the rule for proprietary institutions demonstrating that they serve their students well.³⁴ It was suggested that proprietary institutions might be held to the same standard as short-term programs,³⁵ which must demonstrate a 70% graduation rate and a 70% job placement rate.³⁶

The impact of eliminating the 90/10 rule is difficult to determine. It is possible that many of the proprietary institutions that were engaged in fraudulent or abusive practices prior to the implementation of the 85/15 rule and its successor the 90/10 rule have already closed or altered their practices to comply with statutory language. There are still questions, however, whether there are enough other safeguards to prevent proprietary institutions from potentially engaging in fraudulent or abusive practices, and to identify those that do. In addressing this issue at a hearing, ED's Deputy Inspector General suggested that caution should be exercised when considering the elimination of any rule, including the 90/10 rule, until the effects of such an action are better understood.³⁷

It should be mentioned that other measures have been implemented that also have reduced the incidence of fraud and abuse in HEA Title IV programs. For example, the HEA cohort default rate rules were established to prevent institutions with a high percentage of their students defaulting on loans received through the Federal Family Education Loan (FFEL) program or Ford Federal Direct Loan (DL) program from participating in FFEL, DL, or Pell Grant programs.³⁸ This led to

³⁴ 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*.)

³⁵ Short-term programs are programs offered by proprietary institutions or not-for-profit postsecondary vocational institutions that provide at least 300 but less than 600 hours of instruction during a minimum of 10 weeks of instruction.

³⁶ 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.

³⁷ U.S. House of Representatives. Hearing before the Committee on Education and Workforce Development, "Enforcement of Federal Anti-Fraud Laws in For-Profit Education." Serial No. 109-2, March 1, 2005, p. 60. Available at [<http://www.gpo.gov/congress/house/house06ch109.html>].

³⁸ U.S. Department of Education, *Cohort Default Rate Guide*, 2001. Available at (continued...)

declines in cohort default rates at all institutions, including proprietary institutions. However, cohort default rates at proprietary institutions have remained higher than those at two-year and four-year non-profit institutions.³⁹ In addition, during the early 1990s, ED strengthened the eligibility and certification component of the triad, resulting in lower percentages of institutions receiving certification for participation in Title IV programs. For example, in 1990, 17% of initial applications to participate in Title IV programs were denied compared with 43% in 1995.⁴⁰ ED also provided staff training in detecting fraud and abuse at postsecondary institutions.⁴¹ Finally, during the 1990s, accreditation organizations that worked with proprietary institutions began to accredit fewer institutions, the number of proprietary institutions participating in Title IV programs declined, and a lower proportion of Title IV funds went to proprietary institutions. While these measures have helped to identify and reduce incidents of fraudulent and abusive behavior at proprietary institutions, it is difficult to know whether these measures alone would compensate for the elimination of the 90/10 rule.

Modifications to the 90/10 Rule

Short of eliminating the 90/10 rule, Congress may debate several other changes to the rule. First, Congress may reevaluate the percentage of funds proprietary institutions must derive from non-Title IV funds, possibly increasing or decreasing the percentage of revenue proprietary institutions must receive from non-Title IV funds. Second, Congress may consider changes to how revenue is defined or to the formula used to calculate revenue. Congress also may examine the order in which funds are applied to institutional charges that affects the calculation of non-Title IV revenue. For example, during the 2002 negotiated rulemaking process⁴² instituted by ED, participants suggested that distributions from “IRS 529” tuition savings plans should be added to the list of exceptions of non-Title IV sources of funds that can be applied toward institutional charges prior to Title IV aid. This change would increase the size of the denominator in the formula used to calculate the percentage of revenue

³⁸ (...continued)

[<http://www.ifap.ed.gov/drmaterials/finalcdrg.html>]. For more on cohort default rates, also see CRS Report RL30656, *The Administration of Federal Student Loan Programs: Background and Provisions*, by Adam Stoll.

³⁹ For FY2004, the most recent year for which cohort default rates are available, the cohort default rate was 4.7% at public institutions, 3.0% at private institutions, and 8.6% at proprietary institutions. For more information, see U.S. Department of Education, Institutional Default Rate Comparison of FY20021, 2003, and 2004 Cohort Default Rates, available at [<http://www.ed.gov/offices/OSFAP/defaultmanagement/2004instrates.html>].

⁴⁰ Senate Committee on Governmental Affairs, *Hearing on Proprietary School Abuses*, p. 121.

⁴¹ *Ibid.*, p. 37.

⁴² The negotiated rulemaking process is used by the Secretary of Education to seek input from the public and major interest groups in developing proposed regulations for HEA, Title IV in compliance with HEA, Section 492. For more information about the negotiated rulemaking process, see [<http://www.ed.gov/policy/highered/reg/hearulemaking/2002/index2002.html>].

derived from non-Title IV sources, making it easier for proprietary institutions enrolling students with 529 tuition savings plans to meet the 90/10 rule. Finally, Congress may consider moving the 90/10 rule to another section in the HEA, such as to the Program Participation Agreement (PPA) in Section 487.⁴³ This could lessen the penalties for violations of the 90/10 rule, while continuing to apply the rule to only proprietary institutions or the rule could be expanded to apply to all IHEs.⁴⁴

Brief Overview of Relevant Legislation from the 110th Congress

This section provides a brief overview of relevant provisions contained in S. 1642, the Higher Education Amendments of 2007 — the primary vehicle for HEA reauthorization in Senate in the 110th Congress. S. 1642 was reported by the Senate Committee on Health, Education, Labor, and Pensions on July 10, 2007, without a written report. It was subsequently passed by the Senate on July 24, 2007, by a vote of 95-0.⁴⁵ No similar action has been taken by the House Committee on Education and Labor.

S. 1642 would eliminate the 90/10 rule as a specific institutional eligibility requirement for proprietary institutions. It would move the 90/10 rule to the PPA but continue to apply it only to proprietary institutions. By making this change, the penalties for violating the 90/10 rule would be the same as those imposed for violating any provision of the PPA (e.g., fine, suspension, termination); in addition, proprietary institutions could be placed on provisional certification status⁴⁶ and be subject to increased monitoring and reporting requirements for a violation of the 90/10 rule. Under S. 1642, a proprietary institution that violated the 90/10 rule for two consecutive years would lose its Title IV eligibility until it is able to demonstrate that it is in compliance with the requirement. The bill would require the Secretary to publicly identify any institution that failed to meet the 90/10 rule in any given year.

S. 1642 would incorporate current regulatory language into statutory language regarding the use of the cash basis of accounting and several sources of allowable non-Title IV revenue, while also expanding the sources of non-Title IV revenue to include sources of revenue that are currently prohibited from being counted toward the 10% requirement. Below is a brief overview of each of the sources of non-Title IV revenue that are specifically included in the Senate bill that could be counted toward the 10% requirement:

⁴³ All institutions participating in Title IV federal student aid programs are required to sign a PPA that governs their participation in the programs. For more information, see CRS Report RL33909, *Institutional Eligibility*.

⁴⁴ Although both H.R. 609 and S. 1614, considered in the 109th Congress, would have moved the 90/10 rule to the PPA and applied it to all IHEs, Congress could move the 90/10 rule to the PPA and apply it only to proprietary institutions.

⁴⁵ See record vote number 275.

⁴⁶ For more information about provisional certification, see HEA, Section 498(h).

- **Funds used by students other than Title IV aid used to pay their institutional charges:** This would codify provisions currently delineated in regulations.
- **Funds used by institutions to satisfy matching requirements for Title IV programs:** Current regulations strictly prohibit institutions from counting these funds toward the 10% requirement. If institutions are allowed to count these funds toward their 10% requirement, they may be able to count the same funds twice: once when they are initially received by the institution from an outside source of funding (e.g., a student paying tuition), and again when they are used to match Title IV program funds in either the same or a subsequent year.
- **Funds used by a student from a 529 plan to pay institutional charges:** This would codify provisions currently delineated in regulations. As discussed earlier in this report, however, the issue related to 529 plans is whether funds from both college savings plans and pre-paid tuition plans should be applied toward institutional charges prior to applying Title IV to these charges. Current regulations allow funds from 529 pre-paid tuition plans, but not funds from 529 college savings plans, to be applied before Title IV aid.
- **Funds paid by a student to the institution for a training program that is not eligible for Title IV funds but is approved or licensed by the appropriate state agency or an accrediting agency recognized by the Secretary:** Current regulations strictly prohibit institutions from counting these funds toward the 10% requirement. The 90/10 rule is focused on the use of Title IV funds, which are awarded only to students participating in Title IV eligible programs.⁴⁷ Therefore, only revenue generated by the institution that is related to Title IV eligible programs is included in the 90/10 rule calculation.
- **Funds generated by the institution from activities that are necessary for the education and training of students that are conducted on campus or at a facility under the control of the institution, are performed under the supervision of a faculty member, and are required to be performed by all students in a specific educational program:** This would codify provisions currently delineated in regulations.
- **For institutional loans, only the amount of loan repayment received by the institution during the fiscal year for which compliance with the 90/10 rule is being determined:** This would codify provisions currently delineated in regulations.
- **For institutional scholarships provided on the basis of academic merit or financial need, funds must be distributed from an established restricted account and must represent designated**

⁴⁷ For more information about Title IV eligible programs, see CRS Report RL33909, *Institutional Eligibility*.

funds from an outside source or income earned on those funds: This would codify provisions currently delineated in regulations.

- **Tuition discounts provided based on academic merit or financial need:** Tuition discounting is the use of institutionally funded grants to help reduce the price of attendance for students. Thus, tuition discounting is similar to providing an institutional scholarship and would presumably have to meet the requirements placed on institutional scholarships to be counted toward the 10% requirement currently. Despite this similarity, the Senate bill would not require funds used for tuition discounting to come from an established restricted account that includes only designated funds from an outside source or income earned on those funds. Thus, funds used for tuition discounting could be double-counted toward the 10% requirement: once when the institution originally receives the funds (e.g., from a student paying full tuition), and again when the institution provides a discount to another student either in the same or a subsequent year.

Brief Overview of Relevant Legislation from the 109th Congress

This section provides a brief overview of relevant provisions contained in H.R. 609, the College Access and Opportunity Act of 2005, and S. 1614, the Higher Education Amendments of 2005 — the primary vehicles for HEA reauthorization in the 109th Congress. H.R. 609 was passed by the House on March 30, 2006, by a vote of 221-199 (H.Rept. 109-231).⁴⁸ S. 1614 was reported by the Senate Committee on Health, Education, Labor, and Pensions on November 17, 2005, without a written report. A report (S.Rept. 109-218) was subsequently filed on February 28, 2006. It was not considered on the Senate Floor during the 109th Congress.

Both H.R. 609 and S. 1614 would have eliminated the 90/10 rule as a specific institutional eligibility requirement for proprietary institutions. Both bills would have moved the 90/10 rule to the PPA and applied it to all institutions, including public and not-for-profit institutions. By making this change, the penalties for violating the 90/10 rule would have been the same as those imposed for violating any provision of the PPA (e.g., fine, suspension, termination); however, institutions could have been placed on provisional certification status and been subjected to increased cash monitoring for a violation of the 90/10 rule. Under H.R. 609, any institution that violated the 90/10 rule for three consecutive years would have lost its Title IV eligibility. Under S. 1614, an institution would have lost its Title IV eligibility for violating the 90/10 rule for two consecutive years. Both bills would have required the Secretary to publicly identify any institution that failed to meet the 90/10 rule. Both bills would also have incorporated current regulatory language into statutory language regarding the use of the cash basis of accounting and sources of allowable

⁴⁸ For more information, see House Roll Call Vote Number 81, available online at [<http://clerk.house.gov/evs/2006/roll081.xml>].

non-Title IV revenue. Finally, H.R. 609 and S. 1614 would have expanded on the sources of allowable non-Title IV revenue to include, for example, funds used by institutions to match federal student aid funds and tuition discounts. As previously mentioned, current regulations strictly prohibit proprietary institutions from including these funds in their 90/10 calculation.