4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Part 668

Classification of Revenue under Title IV

AGENCY: Office of the Secretary, Department of Education.

ACTION: Interpretive rule

SUMMARY: The U.S. Department of Education (Department) is revising its prior interpretation and clarifying its classification of revenue received by a proprietary institution of higher education under the Title IV Revenue and Non-Federal Education Assistance Funds regulations called the "90/10 Rule".

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

Section 487(a)(24) of the HEA establishes the requirement in the Federal Student Aid Program Participation Agreement that proprietary institutions derive not less than 10 percent of their revenue from non-federal sources. Among other things, Section 487(d) of the HEA defines how proprietary institutions calculate the percentage of their revenue that is derived from non-federal sources and outlines

sanctions for proprietary institutions that fail to meet the requirement in Section 487(a). On March 11, 2021, the ARP was signed into law. Section 2013 of the ARP amended the scope of the revenue requirements under Section 487(a) of the HEA. Prior to the enactment of the ARP, as a condition for participation in the Title IV, HEA programs, institutions had to derive not less than 10 percent of their revenue from sources other than the federal student assistance programs authorized under Title IV of the HEA. The ARP amended that provision by requiring proprietary institutions to derive not less than 10 percent of their revenue from non-federal education sources.

On October 28, 2022, the Department published a final rule to amend the Department's regulations relating to the 90/10 Rule under (34 CFR 668.28). The final rule amended several parts of the 90/10 Rule to implement the ARP, among other things. In addition to specific amendments to the regulatory text, the Department also announced in the preamble that it was restricting the ability of institutions to include non-federal revenue received for educational programs that are ineligible for HEA Title IV funding from programs offered through distance education or at unapproved locations. In relevant part and in response to a public comment, the Department stated:

it appreciated "the commenter's support for allowing institutions to include revenue from an ineligible program offered at an employer facility" though it disagreed "with commenters that we should allow proprietary institutions to count funds generated from programs offered at other unapproved locations or through distance education as non-Federal revenue in their 90/10 calculations." The Department worked with the Committee to develop the language regarding the location of ineligible programs and believes that the regulations strike a balance between providing necessary consumer protections

guardrails for purposes of 90/10, while allowing proprietary institutions to incorporate revenue from non-Title IV programs of value to students at other approved locations that provide Title IV programs and from their main campus.

The Department also noted that "guardrails negotiated by the Committee require proprietary institutions to exclude revenue generated from ineligible programs offered through distance education. Restricting program revenues for 90/10 to sources from approved locations will better provide a nexus for those ineligible programs to be offered by the institution's instructors." Doing so "also ensure[s] that the programs are offered from locations that have authorization from an institution's accrediting agency and from the states in which they are located."

The Department believed "limiting these ineligible programs from distance education or from unapproved locations will also permit greater oversight of the reported revenues by the Department." It found that "after weighing the potential benefits and risks, the Department has determined that the risk of abuse outweighs the potential benefits." Therefore, the Department declined "to allow institutions to include revenue generated from these ineligible programs in their 90/10 calculations. We further note that these regulations only govern revenue generated from ineligible programs that an institution counts in its 90/10 calculation and does not exclude a proprietary institution's ability to offer these programs." 87 FR 65450.

But the Department did not include amendments in the final rule to the actual regulatory text or the accompanying Appendix to incorporate the assertions contained within the preamble text cited above. The Department simply refers to "location" in 34 CFR

668.28(a)(3)(iii) but does not specify the modality of instruction. When calculating revenue for the purposes of eligible programs under the 90/10 Rule, the regulation makes no distinction between distance education and in-person instruction. As a result, if the Department intended to break new ground in the regulation by creating a new distinction for ineligible programs (despite there being no distinction for ineligible program under Section 487(a)(24) of the HEA), one would expect it to do so on clear terms. But the Department did not make any substantive changes to the 90/10 Rule explicitly relating to modality in the final rule itself; nor did it make any changes between its proposal in the Notice of Proposed Rulemaking and the final rule.

II. The Preamble Cannot be Used to Add Substantive Duties that the Regulations Do Not Contain

The Administrative Procedure Act (APA) enables agencies to publish interpretive rules outside the informal notice-and-comment rulemaking process. 5 U.S.C. 553(b)(A), (d)(2). Unlike legislative rules, "interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97, 135 S. Ct. 1199, 1204 (2015)(internal citations omitted). Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995). A legal interpretation articulated in the preamble to a final rule has not gone through notice and comment rulemaking and so cannot legally have a binding effect. *See Wilgar Land Co.*, 85 F.4th at 837 (holding that a preamble that responds to comments as part of a final rule is an interpretive rule); *Fertilizer Inst. v. EPA,* 935 F.2d 1303, 1308 (D.C. Cir. 1991)

(concluding that the preamble was an interpretive, not legislative, rule). In other words, agencies "cannot use preambles to add substantive duties that the regulations themselves do not contain." *Wilgar Land Co.*, 85 F.4th at 837. *Id.*

"The critical distinction between legislative and interpretative rules is that, whereas interpretive rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties, a legislative rule imposes new rights or duties." *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (cleaned up). In determining whether a rule is legislative or interpretive, courts consider whether the agency intended to speak with the force of law. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019) (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2122, (2016)). In other words, if the agency used language that conveys that its pronouncements must be followed, the rule is legislative; by contrast, interpretive rules use permissive language that does not purport to bind private actions. *Id.*

Here, the Department's discussion in the preamble text uses language that purports to bind private action in calculating the revenue percentages under the 90/10 Rule. Indeed, the Department wrote, "we decline to allow institutions to include revenue generated from these ineligible programs in their 90/10 calculations." The phrase "we decline to allow" is another way of saying "we prohibit." Prohibitions are mandatory, not permissive. Therefore, the preamble most resembles a legislative rule because it claims to categorically prohibit certain types of private conduct, namely prohibiting institutions from including revenue generated from certain ineligible programs in their 90/10 calculations.

As discussed above, legislative rules must go through notice-and-comment rulemaking and cannot be included in the preamble text to a final rule. Yet here, the Department did not include any changes to the regulatory text to incorporate the preamble text quoted herein. Of note, the Department's regulations include eight separate categories of types of revenue that are excluded from revenue calculation for the purpose of calculating the 90/10 Rule. 34 CFR 668.28(a)(6)(i)-(viii). The Department could have added additional categories of excluded revenue to 34 CFR 668.28(a)(6), but it declined to do so. Thus, because the Department did not make the changes to the actual regulatory text, the preamble text cited above is non-binding and does not have the force of law.

III. The 90/10 Rule May Include Revenue Generated from Ineligible Programs

As discussed above, the Department believes the preamble was procedurally deficient under the APA; however, even if the Department had properly created a distinction for these ineligible programs under the 90/10 regulations, it is clear that such a regulation would have been unlawful. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024) (holding that if a federal agency's interpretation of a federal statute is not the best reading of the law, then it is not permissible). Section 487(a)(24) of the HEA provides that to be eligible for Title IV programs, proprietary institutions of higher education must "derive not less than ten percent of such institution’s revenues from sources other than federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution . . . " In making these calculations, Section 487(d)(1) provides very prescriptive rules regarding what revenue is to be included in the institution’s calculation of "federal funds" (the

'90' side) and what other sources of funds may be counted (the '10' side).

As it pertains to the inclusion of revenue from ineligible programs, section 487(d)(1)(B)(iii) provides that institutions consider as revenue only those funds generated by the institution from:

> (iii) 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 eligible for funds under this title, if the program—
>
> (I) is approved or licensed by the appropriate State agency;
>
> (II) is accredited by an accrediting agency recognized by the Secretary; or
>
> (III) provides an industry-recognized credential or certification.

20 USC 1094(d)(1)(b)(iii)

When interpreting the statute, the text should be construed as a whole, as statutory enactments contain interrelated parts that may provide context when construing one of its parts. *See* Scalia & Garner, Reading Law 167 (2012); *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (a statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" (internal citation omitted)); *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 378 (2018) (considering "[t]he language of [the statutory provision at issue],

the specific context in which that language is used, and the broader statutory structure"); *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning.")

Congress's careful construction of subsection (iii) is authoritative. Unlike the interpretation in the preamble, nothing contained within the clause directs the Secretary to consider the modality of educational delivery, such as distance education. Here, when considering the broader statutory enactment throughout the HEA, it is clear that Congress knows how to create distinct rules for distance education programs when it wishes to do so. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so"). Within the text of the HEA, Congress has used the phrase "distance education" 44 times, oftentimes creating distinct rules for such programs under the HEA. Here, the Department presumes that, if Congress had wanted to create a distinction for revenue from distance education programs for the purposes of the 90/10 Rule, it would have said so. It did not, so neither may the Department.

In the same way, and unlike the language of the preamble, subsection (iii) does not authorize the Secretary to engage in a process of "weighing the potential benefits and risks" of including or excluding certain types of revenue. There is no indication in the statute that Congress intended to delegate that sort of legislative judgment to the Secretary. Instead, Congress wrote a granular formula for calculating revenue directly into the statute, leaving little-to-no room for regulatory interpretation, and certainly no room for a policy exercise of "weighing the potential benefits and risks."

Finally, subsection (iii) does not speak of "unapproved locations," that are mentioned in the preamble. To the contrary, it creates a disjunctive three-part test for including revenue from ineligible programs. So long as funds are "paid by a student, or on behalf of a student by a party other than the institution" such revenue may be included if any of the following criteria are met: (1)the program is approved or licensed by the appropriate State agency; (2)the program is accredited by an accrediting agency recognized by the Secretary; or (3) the program provides an industry-recognized credential or certification. 20 USC 1094(d)(1)(b)(iii)

As shown above, none of the subclauses under subsection (iii) deal with the location of instruction, physical or otherwise. As such, location is not relevant for the purposes of calculating revenue within this context under the 90/10 Rule.

Finally, the Department notes that regulatory changes made in the ARP only concerned the shifting of certain types of federal revenue received by institutions from the '10' side to the '90' side of the 90/10 Rule. The ARP did not make any specific amendments to the 90/10 Rule to reduce the overall amount of revenue. Although the Department was not limited in its rulemaking to making regulatory amendments to exclusively implement the ARP, Congress also could have made changes to exclude other types of revenue from the 90/10 Rule if it wanted to within the ARP. Congress chose not to do so, which provides some evidence that Congress was satisfied with the statutory and regulatory balance that had already been struck relating to the inclusion of revenue for certain types of ineligible programs. This provides further evidence that the interpretive rule within the preamble conflicts with the carefully crafted statutory design.

Interpretive rules do not have effective dates and, as such, institutions may revise their revenue calculations under 34 CFR 668.28 for fiscal years that have already concluded. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 20 (D.C. Cir. 2019).

IV. Conclusions

The Department's interpretation announced herein supersedes the interpretive rule that was published in the preamble to the 2022 final rule. This interpretation represents the Department's current interpretation and may be consulted by the Department when enforcing the 90/10 Rule. But this interpretation is not binding on regulated entities or the Department.

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Signing Authority

This document of the U.S. Department of Education was signed on July 1, 2025, by Linda E. McMahon, Secretary of Education. That document with the original signature and date is maintained by the U.S. Department of Education. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned has been authorized to sign the document in electronic format for publication, as an official document of the U.S. Department of Education. This administrative process in no way alters the legal effect of this document upon publication in the Federal Register.

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