

Federal Regulations in Play

NC-SARA | 2024 SPE Annual Conference

September 11, 2024



Thompson Coburn LLP

- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Presenter Profile

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Syllabus

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ED's Newly Effective Rules

ED's Newly Effective Rules

July 1, 2024
effective date

- [July 10, 2023 \(88 FR 43820\)](#)
 - Income-driven repayment plans (aka SAVE Plan)
- [October 10, 2023 \(88 FR 70004\)](#)
 - Financial value transparency and gainful employment
- [October 31, 2023 \(88 FR 74568\)](#)
 - Financial responsibility
 - Certification procedures for Title IV participation
 - Standards of administrative capability
 - State-defined processes for ability to benefit

Professional Licensure Programs +

- As of July 1, new rules relating to professional licensure programs, programmatic accreditation, and state closure law compliance will become conditions of participation expressly set forth in the PPA.
- These requirements must be satisfied for any Title IV eligible program being offered in a covered state.
- During the next session, Russ, Cheryl, and Jeannie will explore the origin story of these new requirements.

Professional Licensure Programs +

Covered States

Any state in which the institution is located.

Any state in which students enrolled by the institution in distance education or correspondence courses are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2).

Any state in which a student who enrolls in a program on or after July 1, 2024, attests that they intend to seek employment.

Professional Licensure Programs +

For any **Covered State**, an institution must determine that each Title IV eligible program it offers...

- Satisfies the applicable educational requirements for **professional licensure or certification** requirements in the state so that a student who enrolls in the program and seeks employment in that state after completing the program qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.
- Is **programmatically accredited** if the state or a federal agency requires such accreditation, including as a condition for employment in the occupation for which the program prepares the student, or is programmatically pre-accredited when programmatic pre-accreditation is sufficient according to the state or federal agency.
- Complies with all state **laws related to closure**, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.

Professional Licensure Programs +

- In the commentary, ED makes clear that it added “§ 668.14(b)(32)(i) and (ii) to require all programs that prepare students for occupations requiring programmatic accreditation or State licensure to **meet** those requirements.”
- ED observes that if programmatic or licensure requirements exist “an institution **must** follow them with respect to the students attending from those States. That also means that if an institution cannot determine that its program meets the education requirements for licensure or certification, then it **cannot offer the program** to future students in that State.”

Professional Licensure Programs +

- On April 9, 2024, ED released [EA \(GE-24-03\)](#), which indicates that there will be a period of relaxed enforcement between July 1, 2024, and January 1, 2025.
- “An institution can raise as a defense to an enforcement action that it faced challenges in meeting compliance due to reasons that are unique, time-specific, and outside the control of the institution.”
- ED’s [Certification Procedures - Questions and Answers](#) page includes guidance relating to the implementation of the new rules relating to professional licensure programs.



ED's Regulatory Agenda

ED's Regulatory Agenda

- ED is presently working to complete an extraordinarily ambitious regulatory agenda.
- The [Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions](#) sets out status and projected schedules for ED's planned regulatory initiatives.

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Agency Rule List - Spring 2024

Department of Education

Agency	Agenda Stage of Rulemaking	Title	RIN
ED/OESE	Proposed Rule Stage	Innovative Assessment Demonstration Authority	1810-AB60
ED/OESE	Proposed Rule Stage	Office of Indian Education Professional Development Program	1810-AB70
ED/OESE	Final Rule Stage	Impact Aid Program	1810-AB66
ED/OSERS	Proposed Rule Stage	Amendments to Definitions Under the Randolph-Sheppard Vending Facility Program and Related Provisions of That Program and to the State Vocational Rehabilitation Services Program	1820-AB83
ED/OSERS	Final Rule Stage	Individuals With Disabilities Education Act	1820-AB82
ED/OCTAE	Proposed Rule Stage	Carl D. Perkins Career and Technical Education Act of 2006	1830-AA33
ED/OPE	Proposed Rule Stage	Documentation of Foreign Source Gifts and Contracts	1840-AD50
ED/OPE	Proposed Rule Stage	Federal TRIO Programs	1840-AD68
ED/OPE	Proposed Rule Stage	Accreditation and Related Issues	1840-AD82
ED/OPE	Proposed Rule Stage	State Authorization	1840-AD83
ED/OPE	Proposed Rule Stage	Return to Title IV	1840-AD85
ED/OPE	Proposed Rule Stage	Cash Management	1840-AD86
ED/OPE	Proposed Rule Stage	Third-Party Servicers and Related Issues	1840-AD87
ED/OPE	Proposed Rule Stage	Distance Education	1840-AD92
ED/OPE	Proposed Rule Stage	Student Debt Relief Hardship	1840-AD95
ED/OPE	Final Rule Stage	Direct Grant Programs, State-Administered Formula Grant Programs	1840-AD72
ED/OPE	Final Rule Stage	Public Service Loan Forgiveness – Employer Eligibility	1840-AD91
ED/OPE	Final Rule Stage	Student Debt Relief	1840-AD93
ED/OPE	Final Rule Stage	National Resource Centers Program and Foreign Language and Area Studies Fellowships Program	1840-AD94
ED/FSA	Proposed Rule Stage	Cybersecurity Standards for Institutions of Higher Education to Comply With EO 13556 and NIST 800-171	1845-AA25
ED/OCR	Proposed Rule Stage	Discrimination Based on Shared Ancestry or Ethnicity in Response to EO 13899 on Combating Anti-Semitism and EO 13985 on Advancing Racial Equity and Support for Underserved Communities	1870-AA15
ED/OCR	Proposed Rule Stage	Nondiscrimination on the Basis of Sex and Disability in Programs or Activities Receiving Federal Financial Assistance	1870-AA17
ED/OCR	Proposed Rule Stage	Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of Education	1870-AA18
ED/OPEPD	Proposed Rule Stage	Protection of Pupil Rights Amendments	1875-AA13
ED/OPEPD	Proposed Rule Stage	Family Educational Rights and Privacy Act	1875-AA15
ED/OPEPD	Final Rule Stage	EDGAR Revisions	1875-AA14
ED/OS	Final Rule Stage	Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards	1894-AA11

ED's Regulatory Agenda

- You can view documentation, schedules, and a range of other materials relating to ED's ongoing negotiated rulemaking efforts on this [web page](#).
- This includes the recently completed Program Integrity and Institutional Quality negotiations.

The screenshot shows the U.S. Department of Education website. At the top, there is a navigation bar with 'Student Loans', 'Grants', and 'Laws'. The main heading is 'Negotiated Rulemaking for Higher Education 2023-2024'. Below this, there are menu buttons for 'General Information', 'Student Loan Debt Relief', 'Program Integrity and Institutional Quality', and 'TRIO Subcommittee'. A note indicates that clicking on a link with a green arrow icon will expand or collapse the information. The 'General Information' section is expanded, providing details about the Department's negotiated rulemaking in 2023-2024. It includes links to 'Federal Register Notices and Fact Sheets' and 'Public Hearing Information'. The 'Student Loan Debt Relief' section lists committee members and protocols, along with three sessions: Session 1 (October 10-11, 2023), Session 2 (November 6-7, 2023), and Session 3 (December 11-12, 2023). The 'Program Integrity and Institutional Quality' section lists committee and subcommittee members and protocols, along with three sessions: Session 1 (January 8-11, 2024), Session 2 (February 5-8, 2024), and Session 3 (March 4-7, 2024). The 'TRIO Subcommittee' section lists committee and subcommittee members and protocols, along with two sessions: Session 1 (January 12, 2024) and Session 2 (February 9, 2024). Red 'New' tags are placed next to 'Session 2 Registration: Coming Soon' and 'Session 2 Public Comment: Coming Soon' for both the Student Loan Debt Relief and Program Integrity and Institutional Quality sections.

ED's Regulatory Agenda

Student Debt Relief
Completed in
December 2023

- Student Debt Relief (aka Plan B) ([NPRM published April 17, 2024](#); Final Rule: Oct. 2024)

Program Integrity
and Institutional
Quality Completed
in March 2024

- Distance education ([NPRM published July 24, 2024](#))
- Return to Title IV ([NPRM published July 24, 2024](#))
- Federal TRIO programs ([NPRM published July 24, 2024](#))
- Accreditation and related issues (NPRM: Nov. 2024)
- State authorization (NPRM: Nov. 2024)
- Cash management (NPRM: July 2024)

Notice of Intent for
Negotiated
Rulemaking

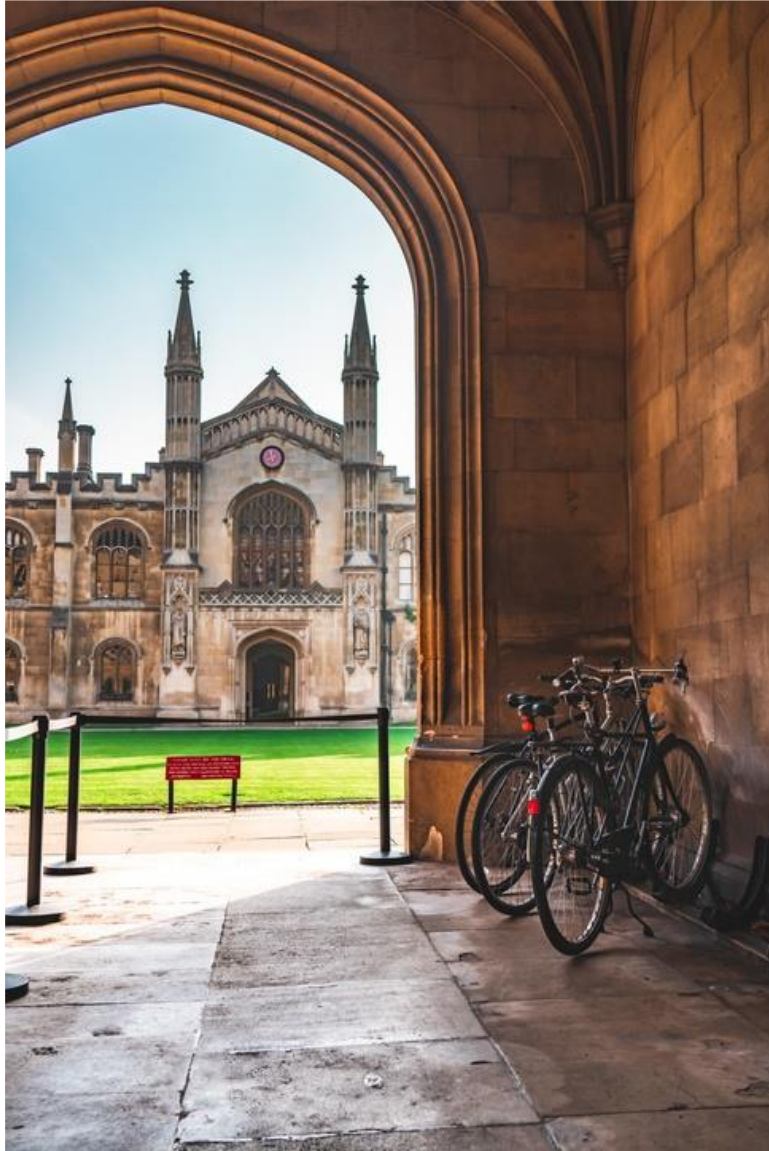
- Third-Party Servicers and Related Issues (NPRM: June 2025)
- Student Debt Relief Hardship (NPRM: Sept. 2024)

Kvaal Blog Post on ED's Regulatory Agenda

- “Proposed regulations related to State authorization, including State authorization reciprocity agreements, cash management, and accreditation will be published by **next year**.”
- “We have decided to conduct negotiated **rulemaking** to consider regulations related to third-party servicers broadly.
 - We will consider clarifying the scope of third-party servicer rules in several areas, including software and computer services, student retention, and instructional content.
 - In addition... we may also consider audit requirements; an application process; reporting, financial, past performance, and other compliance requirements; and other ideas proposed by the community.”

Kvaal Blog Post on ED's Regulatory Agenda

- Regarding the bundled service provider exception to the incentive compensation rule, “we have reviewed those comments to better understand the impact of this exception and whether any updates are necessary to the guidance. We continue to review those comments and plan to issue revised guidance no sooner than late **this year.**”



ED's Proposed Distance Education Rule

Defining a “Distance Education Course”

“Distance education course” is a “course in which instruction takes place exclusively as described in the definition of distance education in this section notwithstanding in-person non-instructional requirements, including orientation, testing, academic support services, or residency experiences.”

- “[T]he proposed addition of a definition for distance education course would enable the Department to **better assess the effectiveness of distance education** and compare its outcomes with those of traditional in-person instruction.”
- “It is not the Department's intent to capture in this definition coursework that is offered primarily on campus but that includes online components...”

Reporting Enrollment in Distance Ed Courses

For each Title IV recipient at the institution, the institution must report to ED, in accordance with procedures established by ED, the recipient's enrollment in distance education or correspondence courses.

- “We believe this will provide the Department with expanded information to better answer questions about college access, persistence, completion, and success, and to better inform student-centered policies for distance education.”
- “This reporting requirement would also improve the Department's ability to determine whether institutions have reached the 50 percent threshold for distance education enrollment...”

Tracking Attendance in Distance Ed Courses

An institution must take attendance for each course offered entirely through distance education as defined in 34 CFR 600.2, except for dissertation research courses that are part of a doctoral program.

- “[T]o increase the accuracy of return calculations in distance education courses, the Department proposes to require institutions to take attendance in such courses for R2T4 purposes.”

The New Virtual Location

A virtual location through which the institution offers 100 percent of an educational program through distance education or correspondence courses, notwithstanding requirements for students to complete on-campus or residential periods of 90 days or less.

- “The proposed changes would help the Department measure and better understand student outcomes... conduct more accurate program oversight... improve the Department’s ability to determine the States where [Title IV] recipients are located and allow the Department to provide this information to State oversight entities and the public. This additional information would improve the ability of State oversight entities to oversee distance education programs and better assess the risk that such programs may pose...”
- “Separately identifying virtual locations would also provide greater protection for students if an institution offering both distance education and in-person instruction suspends coursework in one modality but maintains the other. Students whose modality has been discontinued and who may not wish to, or may not be able to, continue in the alternative modality, would be eligible for **closed school discharges**.”



Loper Bright

The Chevron Doctrine

- Under the *Chevron* doctrine, courts generally gave agencies discretion to issue regulations enforcing statutes in which Congress had been ambiguous or silent, so long as the agency's statutory interpretation was "reasonable" even if not entirely consistent with the statutory text.
- For example, in the legal challenges to the 2010 and 2014 GE rules, the courts, applying *Chevron*, found that the HEA's GE provision was ambiguous, and that ED's interpretation was "reasonable."

Loper Bright

- On June 28, the Supreme Court in *Loper Bright* flipped *Chevron*. Generally, the deference that agencies enjoyed under *Chevron* to issue regulations enforcing **ambiguous or silent statutes** no longer exists.
- The majority observed that both the Constitution and the APA require courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. Courts may not defer to an agency simply because a statute is ambiguous or silent. Courts are the experts in deciding what Congress intended, not agencies.
- The overall tenor of *Loper Bright* also suggests that agencies' stated justifications for their regulations will be more closely scrutinized as well.

A Loper Bright Future (for Plaintiffs)

- We do not expect that *Loper Bright* will deter administrations from pursuing their policy agendas through rulemaking and sub-regulatory guidance.
- But ED is expected to struggle in court defending its rules in the new *Loper Bright* paradigm, and a future Harris Administration would have to navigate future rulemaking in this new, restricted context.
- In particular, ED will be challenged defending rules that were created long after the authorizing statute was enacted, and rules that have been published and rescinded multiple times.



ED's Litigation Woes

Rules Subject to Current Challenges

Borrower Defense to Repayment

- In April, the Fifth Circuit Court of Appeals granted a preliminary injunction and remanded the case, postponing the effective date of the rule pending final judgment in the litigation.

FVT / GE

- In June, the U.S. District Court for the Northern District of Texas denied preliminary injunction. All motions will be fully briefed by January 31, 2025.

Bare Minimum Rule

- In June, the U.S. District Court for the Northern District of Texas granted a preliminary injunction pending a final merits determination.

SAVE Plan

- In August, the Eighth Circuit Court of Appeals granted a preliminary injunction, blocking the entire SAVE Plan while the legal challenges over the program continue. The Supreme Court declined to lift the injunction.

Student Debt Relief (Plan B)

- In September, the US. District Court for the Southern District of Georgia issued a preliminary injunction regarding ED's April 2024 Student Debt Relief Plan (Plan B). This rule has not even been issued in final form.

Title IX

- Challenges to the new Title IX rule already have been brought by various states, school districts, and organizations, and several courts have issued injunctions, including in Texas, Kentucky, Louisiana, and Kansas.



TC Extra Credit

TC Extra Credit | Resources Page



HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

WEBINARS/TRAINING RESOURCES



THE BIDEN ADMINISTRATION'S NEW
TITLE IX RULE

In this slide deck, Scott



SLIDE DECK: ED'S LATEST
FINANCIAL VALUE
TRANSPARENCY/GAINFUL
EMPLOYMENT GUIDANCE

In this slide deck, Aaron Lacey



WEBINAR: ED'S EVOLVING STATE
AUTHORIZATION AND
PROFESSIONAL LICENSURE
REQUIREMENTS

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U.S. Department of Education Issues New Guidance on Implementation of Program Length Regulations

 Roger Swartzwelder  April 23, 2024



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On April 15, 2024, the U.S. Department of Education ("Department") issued new [guidance](#) regarding the implementation of the program length restrictions for Gainful Employment ("GE") programs. These restrictions are included in the Department's [Financial Responsibility, Administrative Capability, Certification Procedures and Ability to Benefit Final Rule](#) ("Final Rule") published in the *Federal Register* on October 31, 2023. The Final Rule takes effect on July 1, 2024.

The Final Rule impacts the operations of all types of schools, colleges and universities across all sectors of higher education. We reviewed and summarized

TC Extra Credit | Webinars & Training Series



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HigherEdReg Rundown

Important Guidance Regarding ED's new Financial Value Transparency and Gainful Employment Rule



Higher Education

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TC Extra Credit | Compliance Materials



Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.¹ On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.² On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide [injunction](#) of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.³ Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available [here](#). Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.⁴

I. Initial Assessment of the Claim

When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

¹ Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]." 20 U.S.C. § 1087(h); see also 34 C.F.R. § 685.206, 34 C.F.R. § 685.222.

² See 87 Fed. Reg. 65904 (Nov. 1, 2022).

³ In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download [here](#).

⁴ In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.

A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule

Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the final rule

November 2023

COMPLIANCE

Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#) (the "Act"), a \$1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."¹ Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

¹ 34 C.F.R. §668.14(a)(16); see also 20 U.S.C. §1094(a)(24).

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Maintaining Compliance with the Evolving 90/10 Rule | 1



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