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Higher Education Update September 8, 2026

Treasury and IRS Propose Regulations Denying Tax-Exempt Status to Private Schools That Use Race in Admissions, Scholarships, or Other Programs

Proposed regulations released on September 3, 2026 would deny tax-exempt status under section 501(c)(3) to any private school that considers race, color, or national or ethnic origin in any school program or policy for any purpose, including remedial or diversity objectives. Comments are due by November 3, 2026, and if finalized the rules would first apply to taxable years beginning after May 31, 2027.

On September 3, 2026, the Treasury Department and the Internal Revenue Service released proposed regulations that would condition a private school's federal tax exemption on racial nondiscrimination in every school policy and program, regardless of whether the policy is for a remedial or diversity purpose.[1] When announcing the rule, Treasury Secretary Scott Bessent said that "rebranding race-based preferences as equitable, inclusive, or diversity-enhancing" does not change their discriminatory nature.[2]

The proposed rule would apply to private schools at any level, including colleges and universities. Loss of tax-exempt status would subject a school's net income to federal tax and end the tax deductibility of contributions.[3] The proposal was published in the Federal Register on September 4, 2026, with comments due by November 3, 2026, and would first apply to taxable years beginning after May 31, 2027.[4]

Background

Section 501(c)(3) of the Internal Revenue Code exempts organizations organized and operated exclusively for charitable or educational purposes, and contributions to them are (subject to applicable limits) tax deductible under section 170.[5] The Supreme Court has read "charitable" to incorporate a common-law condition: a charity must "serve a public purpose and not be contrary to established public policy."[6] In *Green v. Connally*, a three-judge court in the U.S. District Court for the District of Columbia held that the Code "must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private."[7] In *Bob Jones University v. United States*, the Supreme Court upheld the IRS's denial of tax-exempt status to two schools with segregation-era policies, holding that "racial discrimination in education violates a most fundamental national public policy."[8]

In 1971, the IRS adopted these principles in Revenue Ruling 71-447, which denies exemption to a private school lacking a racially nondiscriminatory policy as to students, and in 1975 issued Revenue Procedure 75-50, which prescribes how a school adopts, publicizes, and documents that policy.[9] Revenue Procedure 75-50 also provides that policies favoring racial minority groups "will not constitute discrimination" when the purpose and effect is to promote a school's nondiscriminatory policy.[10]

In *Students for Fair Admissions v. Harvard/UNC*, the U.S. Supreme Court held race-conscious admissions practices at Harvard and the University of North Carolina unlawful under Title VI and the Equal Protection Clause.[11] The Court did not address federal tax exemption or private scholarships or other programs.

The Proposed Regulations

The proposal would add a new Treas. Reg. § 1.501(c)(3)-2 that reads as follows:

Nondiscrimination requirement. A private school is not operated exclusively for exempt purposes if it adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin in the administration of any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program. . . . [D]iscrimination . . . includes any discrimination on the basis of race, color, or national or ethnic origin for any purpose.

The proposed rule defines "private school" as any section 501(c)(3) organization (determined without regard to the new nondiscrimination requirement) that is classified as an educational organization under section 170(b)(1)(A)(ii), other than a governmental unit, an agency or instrumentality of a governmental unit, or an organization owned or operated by such an agency or instrumentality.[12] Treasury estimates the rule "may affect . . . 18,000 private elementary, secondary, and post-secondary schools" and "750,000 students attending these schools who may qualify for scholarships allocated on the basis of racial, ethnic, or national identity."[13]

Because the proposed rule includes both "school-administered" and "school-supported" programs, the proposed regulations appear to encompass not only a school's own educational and financial programs, but also possibly programs involving third parties, including certain donor-based funds, mentoring and pre-college programs, third-party recruitment efforts, and other programs run by third parties with school funding, staff, or facilities.

The preamble states that the rule would reach all consideration of race in education "regardless of the intent behind or the legality of such discrimination," including where such consideration is "defended as serving remedial or diversity-related objectives."[14] Treasury therefore proposes deleting the provisions of Revenue Procedure 75-50 that permit school policies "that favor[] racial minority groups" where the purpose is to further "the school's racially nondiscriminatory policy."[15]

The proposal adds that schools may continue to "adopt policies intended to eliminate prejudice and discrimination . . . by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic origin." Treasury's press release and the preamble's economic analysis point to criteria such as geography, income, or first-generation status as alternatives, which the preamble says have "a weaker relationship with race and ethnicity."[16] The preamble's economic analysis also treats the post-*SFFA* decline in the share of underrepresented-minority students enrolled at the most selective institutions as evidence "consistent with compliance with the Supreme Court ruling in *SFFA*."[17]

The rule addresses race, color, and national or ethnic origin only; it does not reach sex- or gender-based criteria. The proposal also expressly permits "select[ion] of students on the basis of religious affiliation or membership," so long as the criterion is "based solely on religion and not on shared ancestry or ethnic characteristics."[18]

Although there is some uncertainty as to how the IRS would identify non-compliance, as discussed below, a decision by the IRS to revoke the tax-exempt status of a school that maintains a disqualifying policy generally would be effective as of the first day of the taxable year in which the school falls out of compliance with the new rules.[19] In any later dispute with the IRS, the school would generally bear the burden of establishing that it qualifies as tax-exempt.[20] If the IRS proceeds through formal revocation of tax-exempt status, that process traditionally would follow IRS examination and administrative review, followed by judicial review—typically a multi-year path.[21]

Legal Vulnerabilities, Open Questions, and Anticipated Challenges

The proposed regulations create legal uncertainties that will play out in the comment process and, likely, in any litigation challenging the rule.

First, plaintiffs are likely to challenge whether the "fundamental public policy" test under the "charitable" prong of section 501(c)(3) can be applied to exclude schools that employ narrow race-conscious efforts to expand opportunity against the backdrop of general nondiscrimination policies. *Bob Jones* approved that conclusion for schools that had institutional policies to *exclude* or segregate students on the basis of race. Whether the same standard also condemns the conduct at issue in the proposed rule is an open question. After *Loper Bright*, courts will decide those questions without deference to Treasury's interpretation.[22]

Second, the proposed rule does not provide clarity on how it will be implemented. It does not define "discrimination," say whether the government must prove intentional discrimination, or address whether race-conscious conduct by one unit of an otherwise compliant institution could cost the entire institution its tax-exempt status. And it does not explain what a "school-*supported* program" is, as distinct from a "school-administered" one.

Third, the proposed rule does not explain when or how Treasury will assess compliance. It also does not reconcile the new standard with the IRS's prior enforcement statement that it is not positioned to determine illegality under laws other than the Code, and that revocation for illegal activity generally requires a prior judicial determination of illegality, instead sidestepping the concern by treating the legality of a policy as irrelevant, which leaves the IRS to decide for itself whether a policy "discriminates."[23] The New York Times reports that IRS officials have separately discussed a faster revocation process for nonprofits, though that change does not appear in this proposed rule.[24]

Fourth, plaintiffs may challenge the rule on the basis that the IRS has not justified its departure from longstanding agency guidance. Since 1975, the IRS has assured schools that race-conscious aid programs do not jeopardize exemption. An agency that reverses a longstanding position must acknowledge and justify the change in course, including by addressing serious reliance interests.[25] The preamble acknowledges the change, and its Special Analyses estimate certain compliance costs. Courts will assess whether the agency's treatment in any final rule is adequate, particularly given the endowed funds and programs schools built on the guidance in Rev. Proc. 75-50.

Considerations for Schools and Donors

Covered schools will likely need to make compliance decisions before legal challenges to any final rule resolve. Treasury said that it expects to finalize the regulations before May 31, 2027, and the rule would apply to taxable years beginning after that date. For a school with a July 1 fiscal year, the first affected year begins July 1, 2027. For a calendar-year school, it begins January 1, 2028. While legal challenges are likely to follow promptly after finalization, and courts may or may not stay the rule during litigation, schools likely need to set admissions offers and aid packages for the 2027–2028 academic year before that uncertainty resolves.

Schools that have not already done so might consider assessing every policy, program, or fund that arguably considers race, color, or national or ethnic origin—across admissions, scholarships and loans, athletics, DEI programming, and third-party partnerships. Schools might also consider reviewing donor-restricted funds, scholarships, and loans in particular, given that review and modification of these instruments can be time-consuming and might require obtaining donor consent or court approval.

Gibson Dunn lawyers are closely monitoring these developments and are available to discuss the implications for your institution, prepare comments to the agency, and advise on compliance planning.

[1] *Racial Nondiscrimination in Private Schools*, 91 Fed. Reg. 56,811 (Sept. 4, 2026), https://www.federalregister.gov/d/2026-18127.

[2] Press Release, U.S. Dep't of the Treasury (Sept. 3, 2026), https://home.treasury.gov/news/press-releases/sb0621/; IRS News Release IR-2026-103 (Sept.

3, 2026), https://www.irs.gov/newsroom/treasury-irs-move-to-end-tax-exempt-status-for-discriminatory-practices-in-private-schools.

[3] State and local tax exemptions frequently depend on federal section 501(c)(3) status.

[4] 91 Fed. Reg. at 56,811.

[5]26 U.S.C. §§ 501(a), 501(c)(3), 170(b)(1)(A)(ii), 170(c)(2); 26 C.F.R. ("Treas. Reg.") § 1.501(c)(3)-1(d)(2)..

[6] *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

[7] *Green v. Connally*, 330 F. Supp. 1150, 1163 (D.D.C. 1971), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

[8] *Bob Jones*, 461 U.S. at 593; *see also id.* at 595–96 ("[H]owever sincere the rationale may be, racial discrimination in education is contrary to public policy.").

[9] Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 75-50, 1975-2 C.B. 587, modified by Rev. Proc. 2019-22, 2019-22 I.R.B. 1260.

[10] Rev. Proc. 75-50, §§ 3.02, 4.05.

[11] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (*SFFA*).

[12] Prop. Treas. Reg. § 1.501(c)(3)-2(c); 91 Fed. Reg. at 56,819. The term includes primary, secondary, preparatory, or high schools, and colleges and universities. Treas. Reg. § 1.170A-9(c)(1).

[13] 91 Fed. Reg. at 56,816, Special Analyses § I.D. Affected Entities and Taxpayers.

[14] 91 Fed. Reg. at 56,815, Explanation of Provisions.

[15] Rev. Proc. 75-50 §§ 3.02, 4.05; 91 Fed. Reg. at 56,818 (Effect on Other Documents).

[16] 91 Fed. Reg. at 56,815, Explanation of Provisions; *id.* at 56,817, Special Analyses § I.E.2 Economic Effects of the Proposed Regulations - Changes in Recipient Population; Treasury Press Release, supra note 2.

[17] 91 Fed. Reg. at 56,817 & n.7, Special Analyses § I.E Economic Effects of the Proposed Regulations.

[18] 91 Fed. Reg. at 56,815, Explanation of Provisions.

[19] Prop. Treas. Reg. § 1.501(c)(3)-2(a); 91 Fed. Reg. at 56,819 (a private school that fails the nondiscrimination requirement "is not an organization described in section 501(c)(3) with respect to any taxable year" to which the rule applies); 26 U.S.C. § 7805(b); Rev. Proc. 2026-5, 2026-1

I.R.B. 258, §§ 11.02(4), 12.01(4), 12.03(1); IRM 4.70.14.2.1.3.1.13.8(D) (November 24, 2023).

[20] Prop. Treas. Reg. § 1.501(c)(3)-2(a); 91 Fed. Reg. at 56,819. Donors are on somewhat different footing. They generally may rely on a school's listing in the IRS's public database of exempt organizations (Tax Exempt Organization Search) until the IRS publicly announces a revocation, and even after an IRS announcement, a limited amount of an individual donor's contributions (up to $1,000 in the aggregate) generally remains deductible while the school pursues a timely court challenge. Rev. Proc. 2018-32, 2018-23 I.R.B. 739, §§ 4.01, 9.02; 26 U.S.C. § 7428(c). The proposed rule does not address Rev. Proc. 2018-32 and does not state that Rev. Proc. 2018-32 is modified in any way.

[21] 26 U.S.C. § 7428(a)(1)(A), (b)(2)–(3); Rev. Proc. 2026-5, 2026-1 I.R.B. 258, §§ 9, 10, 12; Treas. Reg. § 601.201(n)(6).

[22] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

[23] IRS Gen. Couns. Mem. 37111 (May 4, 1977), as quoted and discussed in IRS, *Illegality and Public Policy Considerations*, Exempt Organizations CPE Text FY 1994 at 11, https://www.irs.gov/pub/irs-tege/eotopicl94.pdf.

[24] Andrew Duehren and Michael C. Bender, *Trump Moves to Strip Tax Exemption From Schools That Aid Minority Students*, N.Y. Times (Sept. 3, 2026), https://www.nytimes.com/2026/09/03/business/economy/trump-irs-college-nonprofits.html. The Proposed Regulations contain no changes to examination or revocation procedures.

[25] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

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