

Treasury and IRS's Proposed Regulations Would Significantly Alter Racial Nondiscrimination Requirements for Tax-Exempt Private Schools, Including Colleges and Universities

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On September 4, 2026, the Department of Treasury ("Treasury") and Internal Revenue Service ("IRS") published proposed regulations under § 1.501(c)(3)-2(b) (the "Proposed Regulations") that, if finalized, would significantly change the existing rules on the racial nondiscrimination requirements for tax-exempt private schools. This includes the approximately 18,000 primary and secondary schools, colleges, universities, professional schools, and trade schools in the United States that currently qualify for tax-exempt status as organizations described in Sections 501(c)(3) and 170(b)(1)(A)(ii) of the Internal Revenue Code of 1986, as amended (the "Code").

The Proposed Regulations adopt an absolute rule that 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 administering any educational, admissions, scholarship or loan, athletic, or other school-administered or school-supported policy or program, clarifying that discrimination "for any purpose" is disqualifying.

The stated basis for the rule change is that there is a fundamental public policy of the United States against racial discrimination in education, and that schools engaging in such discrimination are not eligible for section 501(c)(3) status. The preamble to the Proposed Regulations cites various antidiscrimination laws as well as U.S. Supreme Court cases such as *Bob Jones University v. United States*, 461 U.S. 574 (1983) and the more recently decided *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), as demonstrating this fundamental public policy.

The Proposed Regulations would apply to tax-exempt private schools in taxable years beginning after May 31, 2027.

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Existing Nondiscrimination Requirements

The IRS's current racial nondiscrimination requirements for private schools are described in Revenue Procedure 75-50, 1975-2 C.B. 587, as modified by Revenue Procedure 2019-22, 2019-22 I.R.B. 1260 ("Rev. Proc. 75-50, as modified"). The Revenue Procedure establishes guidelines and recordkeeping requirements for private schools to ensure they have and operate under a "racially nondiscriminatory policy as to students."

Under Rev. Proc. 75-50, as modified, a "racially nondiscriminatory policy as to students" means:

the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Section 3.02 of Rev. Proc. 75-50, as modified, clarifies that "discrimination on the basis of race" includes discrimination on the basis of color and national or ethnic origin. In addition, if a school selects students on the basis of membership in a religious denomination or unit, the school will not be deemed to have a discriminatory policy as long as membership in the denomination or unit is open to all on a racially nondiscriminatory basis.

Most notably, Rev. Proc. 75-50, as modified, allows favoring minority groups to promote nondiscrimination. The second sentence of section 3.02 provides:

A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students.

To this end, the third sentence of section 4.05 of Rev. Proc. 75-50, as modified, states that scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status. Similarly, the fourth sentence of section 4.05 provides that financial assistance programs favoring members of one or more racial groups will not adversely affect tax-exempt status if they do not significantly derogate from the school's racially nondiscriminatory policy.

The requirements under Rev. Proc. 75-50, as modified, are currently enforced by requiring existing tax-exempt private schools to maintain certain records and information showing compliance with the requirements and to annually certify compliance in Schedule E to IRS Form 990, Return of Organization Exempt From Income Tax. New tax-exempt private schools must demonstrate fulfillment of the requirements in Schedule B to IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3)

of the Internal Revenue Code, to receive tax-exempt status.

What's Changed

The key difference in the Proposed Regulations from the existing nondiscrimination requirements set forth in Rev. Proc. 75-50, as modified, is what actions count as “racial discrimination.” The Proposed Regulations contain an absolute rule that 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 administering any educational, admissions, scholarship or loan, athletic, or other school-administered or school-supported policy or program, clarifying that discrimination “for any purpose” is disqualifying. According to the preamble, **a disqualifying purpose includes race-based policies or programs with the intent to ameliorate the effects of past racial discrimination, a practice that is expressly permitted by Rev. Proc. 75-50, as modified.**

In addition, the Proposed Regulations would delete the allowances in Rev. Proc. 75-50, as modified, for minority-favoring policies and scholarships/loans by deleting the second sentence of section 3.02 and the third and fourth sentences of section 4.05 of Rev. Proc. 75-50, as modified, described above.

Of note, the Proposed Regulations leave the exception for religious denomination intact, providing that selecting students based on religious affiliation or membership is not race discrimination if the criterion is based solely on religion and not on shared ancestry or ethnic characteristics. Further, the Proposed Regulations still permit private schools to consider characteristics such as first-generation status, individual hardship (demonstrated financial or personal struggle), family income, and geographic location. Finally, similar to Rev. Proc. 75-50, as modified, the Proposed Regulations apply to schools as described in Section 170(b)(1)(A)(ii) of the Code and not those exempt as a governmental unit or under Code Section 509(a)(2).

If finalized, the standard set forth in the Proposed Regulations is intended to bind tax-exempt private schools effective for tax years after May 31, 2027. This means schools' tax-exempt status, including eligibility for tax-exempt bonds, could be impacted as early as fiscal year 2028.

What's Still Unclear

The Proposed Regulations leave many unanswered questions for tax-exempt private schools.

Eliminating Prejudice and Discrimination Standard

The preamble to the Proposed Regulations indicates that tax-exempt private schools may continue to take actions or adopt policies intended to eliminate prejudice and discrimination; provided that the organization achieves these purposes by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic

origin. This is an important carveout, since the definition of “charitable” for purposes of section 501(c)(3) of the Code includes eliminating prejudice and discrimination. See Treas. Reg. 1.501(c)(3)-1(d)(2)(ii). What’s unclear under the Proposed Regulations, however, is how the elimination of prejudice and discrimination may be accomplished by private schools given that decades of IRS rulings expressly permit practices that are now considered contrary to the Proposed Regulations.

Revising Eligibility Criteria

The preamble to the Proposed Regulations acknowledges that private schools may revise eligibility criteria for scholarships and loans to conform to the Proposed Regulations, including using geographic or income-based criteria in lieu of racial or ethnic criteria to accomplish substantially similar outcomes. It generally minimizes, however, the compliance costs and impacts making these changes would have on private schools, stating the Treasury Department and the IRS do not have “readily available parameters or models” to assess these things. It is therefore unclear how far private schools must go under the Proposed Regulations to revise eligibility criteria of existing programs to be considered in overall compliance with the requirements and whether there could be circumstances where the IRS would consider such changes a proxy for race-based determinations. There is also virtually no acknowledgement of the competing donor considerations in making such changes. Such considerations include, but are not limited to, laws regarding respecting donor intent such as the Uniform Prudent Management of Institutional Funds Act (UPMIFA), and donor free-speech rights under the First Amendment.

State Law

The preamble states that the Proposed Regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of Executive Order 13132. Nowhere in the document, however, do the Treasury Department and the IRS acknowledge that States may have antidiscrimination laws for private schools that are contrary to the Proposed Regulations or that State laws could impact the ability of private schools to revise eligibility criteria in the manner suggested by the preamble.

Fundamental Public Policy

The stated basis for the rule change is that there is a fundamental public policy of the United States against racial discrimination in education, and that schools engaging in such discrimination are not eligible for section 501(c)(3) status. The fundamental public policy standard stems from the U.S. Supreme Court’s decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983) where the Court upheld the IRS’s revocation of tax-exempt status for schools that maintained racially discriminatory policies promoting racial segregation based on a fundamental public policy in the United States against such practices. Citing *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), the preamble to the Proposed Regulations states that all forms of racial discrimination in education, regardless of intent, are now against a fundamental public policy of the United States and preclude tax exemption.

The question is whether the Treasury Department and the IRS have the authority to announce, through these Proposed Regulations, what a fundamental public policy of the United States is, and then use that fundamental public policy standard to make decisions on tax-exempt status. The fundamental public policy standard does not appear in Section 501(c)(3) of the Code and goes beyond the *Bob Jones University* decision involving the practice of racial segregation. The use of this standard to deny tax-exempt status also potentially raises First Amendment concerns, a discussion of which is beyond the scope of this update.

Enforcement

Neither the Proposed Regulations, nor the preamble to the Proposed Regulations address how the IRS intends to enforce the requirements under the Proposed Regulations. Presumably, tax-exempt private schools would continue to be required to show compliance on IRS Form 1023 and Schedule E to Form 990. The IRS also could create an audit initiative or campaign to address the new requirements. Given the procedural safeguards built into the Code, any such audits could take years to play out.

What's Next

A number of groups have already publicly announced they intend to challenge the Proposed Regulations on a variety of grounds, such as statutory authority, administrative law, and constitutional claims. It is also possible that Congress could take action in this area.

In the meantime, tax-exempt private schools should review existing policies and programs to determine whether any changes would be needed to comply with the Proposed Regulations. This could include review of educational program criteria and policies, admissions criteria and policies, scholarship or loan-related agreements and application documents, donor and gift agreements, athletic programs and policies, website information, and existing records to show compliance with racial nondiscrimination requirements. Schools should also continue to monitor the status of the Proposed Regulations and potential challenges, any changes to IRS forms related to reporting compliance with the nondiscrimination requirements, and any IRS audit initiatives for private schools.

The Treasury Department and the IRS have asked for comments on all aspects of the Proposed Regulations. All comments should be submitted in writing, either electronically or by paper, to the Treasury Department and the IRS by November 3, 2026, following the procedures provided in the notice.

For schools that wish to submit comments or that have questions or need assistance regarding the Proposed Regulations, please contact [Katrina Wessbecker](#) or [Claire Topp](#) from Dorsey's Nonprofit and Tax-Exempt Organizations practice group.