IRS Threatens Tax Exemptions for Race-Based Policies at Private Schools

September 9, 2026

On September 4, 2026, the Treasury Department and IRS published proposed regulations (the "Proposed Regulations") that would provide that a private school does not qualify as tax-exempt under Section 501(c)(3) of the Internal Revenue 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, admissions, scholarship, athletic or other school-administered or school-supported program.

The Proposed Regulations emphasize that they cover discrimination on the basis of race, color or national or ethnic origin "for any purpose." They would apply broadly to all private primary and secondary schools, colleges, professional or trade schools and universities.

The Proposed Regulations would apply to taxable years beginning after May 31, 2027. Comments are requested by November 3, 2026.

PUBLIC POLICY DOCTRINE AND RACIAL DISCRIMINATION IN EDUCATION

- Section 501(c)(3) exempts from federal income tax organizations operated exclusively for "charitable … or educational purposes" but does not define those terms.

- In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court upheld an IRS determination that a private school must maintain racially nondiscriminatory policies for its students. The Court held that tax-exempt status requires serving a public purpose that is not contrary to established public policy and that racial discrimination in education violates public policy. The Court looked to consistent and long-standing actions and pronouncements across all three branches of the federal government, including rulings tracing back to *Brown v. Board of Education*, federal legislation (such as the Civil Rights Act of 1964) and executive orders.

- In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), the Supreme Court held that certain race-based admission policies in higher education violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *Students for Fair Admissions* followed several other Supreme Court cases that subjected race-based admissions policies to strict scrutiny but permitted race to be considered as one of many factors in admissions. The Court in *Students for Fair Admissions* expressed that prior allowances for race-based policies to correct for prior race discrimination had run their course and generally cannot continue to be justified.

Comment: The preamble in the Notice of Proposed Rulemaking (the "Preamble") invokes the *Bob Jones* public policy doctrine in the education context and links it to the Court's reasoning in *Students for Fair Admissions*. Viewed from that perspective, the Proposed Regulations reflect a clarification rather than expansion of the public policy doctrine.

PROPOSED REGULATIONS

The Nondiscrimination Requirement

- The Proposed Regulations would provide that a private school is not a tax-exempt organization described in Section 501(c)(3) if the school 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, admissions, scholarship, athletic or other school-administered or school-supported program.

- The Proposed Regulations describe discriminatory practices in general terms, rather than specifically calling out race-conscious policies. However, the Preamble, which is not binding, states that the Proposed Regulations would provide that all forms of racial discrimination are against public policy, including where such discrimination serves remedial or diversity-related objectives or constitutes race-based action for the purpose of ameliorating societal discrimination.

Comment: The Proposed Regulations' application to any educational, admissions, scholarship, athletic or other school-administered or school-supported program draws from existing IRS administrative guidance defining a "racially nondiscriminatory policy for students." However, the IRS's administrative guidance, in Revenue Procedure 75-50, also provides that 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." The

Preamble states that this portion of Revenue Procedure 75-50 will be removed if the regulations are finalized as proposed.

Comment: The Proposed Regulations arguably extend beyond *Students for Fair Admissions*, which only addressed race-based admissions policies. Private schools should consider the use of race-based policies in all aspects of their operations in light of the Proposed Regulations.

Effect of the Proposed Regulations on Endowed Scholarships

- The Preamble also states that for existing race-based scholarships that were endowed by a donor whose letter of intent explicitly stated that eligibility relies on race-based criteria, schools may need to work with the donors, or the donors' heirs, to find an alternative set of eligibility criteria for the scholarship recipients.

What the Proposed Regulations Do Not Reach

- The Preamble specifies that private schools may maintain a religious mission, curriculum or program of observance and select students based on religious affiliation or membership, so long as the criterion is based solely on religion and not shared ancestry or ethnic characteristics. Similarly, the Preamble notes that the Proposed Regulations would not disturb the ability of an organization (including a private school) from taking action or adopting policies intended to eliminate prejudice and discrimination (which are recognized charitable purposes under existing Treasury regulations), provided that the organization achieves these purposes by actions or policies that are racially nondiscriminatory.

IMPACT IF FINALIZED

- As noted previously, the Proposed Regulations would apply to private schools for taxable years beginning after May 31, 2027. For private schools that operate on a June 30 fiscal year-end, the Proposed Regulations would take effect for the 2027–2028 academic year.

Comment: The proposed effective date is intended to allow private schools that may need to amend policies, including admissions or scholarship policies, to do so before the beginning of the taxable year to which the regulations are expected to apply. However, this timeline may present practical issues for admissions processes and scholarship applications that begin in the fall.

Comment: A private school that loses its tax-exempt status would be subject to federal income tax on its earnings, including from its endowment. Donations to a school that is not tax exempt would not be deductible to the donors. Finally, losing tax-exempt status might subject a private school to state income, sales or property taxes.

Comment: Any revocation of a school's tax-exempt status would presumably follow the ordinary IRS examination process, which begins with an audit. If the IRS ultimately issues a final adverse determination letter, the organization may petition for a declaratory judgment regarding its qualification for tax-exempt status within 90 days. Donors seeking to claim a federal income tax deduction for charitable contributions made to a tax-exempt organization may continue to rely on an organization's tax-exempt status until such time as a revocation is made public.

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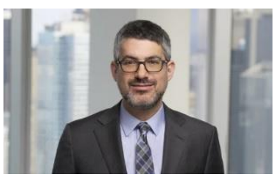
Please do not hesitate to contact us with any questions.



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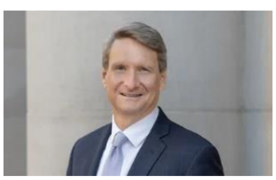

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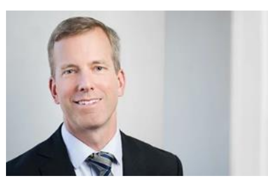

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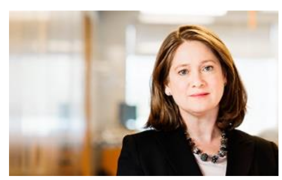

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