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Date: September 16, 2013

To: Linda Michalowski
Vice Chancellor, Student Services and Special Programs

From: Michelle Goldberg
Attorney, Legal Division

Re: IRS Penalties for incorrect or missing TINs on IRS Form 1098-T
Legal Opinion 13-05

BACKGROUND

California Community Colleges are receiving Internal Revenue Service (IRS) penalty notices for failure to provide students' correct tax payer identification numbers (TINs) on IRS Form 1098-T or in some cases for failure to provide a TIN at all.

ISSUES

- 1) Does California law or other federal law preclude colleges from providing TINs to the IRS?

No, providing student TINs to the IRS does not violate any California law or other federal law.

- 2) Are colleges required to provide correct TINs to the IRS?

Yes; however, colleges do not need to provide TINs of nonresident aliens. Further, colleges that "act in a responsible manner" as defined by the IRS can be eligible for a waiver of penalties for failure to provide a correct TIN.

LAW AND ANALYSIS

The Tax Payer Relief Act of 1997

In 1997, Congress enacted the Tax Payer Relief Act which, among other things, provided a tax credit to qualifying taxpayers who have incurred expenses related to the first two years of postsecondary education. Those provisions are referred to as the Hope Scholarship Credit and the Lifetime Learning Credit. The Hope Scholarship Credit can be claimed for specified education expenses incurred by the taxpayer, the taxpayer's spouse, or the taxpayer's dependent. (26 U.S.C. § 25A(b).)

In 2002, the Internal Revenue Service (IRS) adopted regulations (effective December 31, 2003) requiring eligible educational institutions that enroll any individual for any academic period to:

- file an informational return (1098-T) with respect to specified individuals; and
- provide specified individuals a statement containing specified information.

(26 C.F.R. § 1.6050S-1(a).)

These requirements apply to any student, regardless of whether the tax payer seeks or intends to seek the Hope Scholarship Credit.

Institutions are not required to report this information for an individual who is a nonresident alien unless that individual requests the institution to report the information. (26 C.F.R. § 1.6050S-1(a)(2).) The reporting requirements also do not apply for students enrolled solely in noncredit courses. (26 C.F.R. § 1.6050S-1(a)(2)(ii), (b)(5)(ii).) The courses for which the Hope Scholarship Credit can be claimed must be for course work leading toward a post-secondary degree, certificate, or other recognized post-secondary educational credential. (26 C.F.R. § 1.6050S-1(a)(2)(ii)(B).)

The information the college must report to the IRS on the Form 1098-T includes:

- name, address and TIN -- which can also be the social security number (SSN) -- of the student;
- name, address and TIN of anyone claiming the student as a dependent for purposes of specified tax deductions;
- aggregate amount of payments for qualified tuition and related expenses received by the student during the calendar year;
- aggregate amount of reimbursements or refunds paid to the student during the calendar year;
- whether the student is carrying at least half the normal full-time work load for the course of study the student is pursuing;
- whether the student has completed the first two years of postsecondary education; and

- the name and employer identification number of the institution.¹
(26 CFR § 1.6050S-1(b)(3).)

The college must include the following information on the statement it provides to the student:

- the information the college is required to report to the IRS; and
- other specified admonishments to the tax payer regarding the tax payer's obligations and rights.
(26 CFR § 1.6050S-1(c).)²

Institutions that fail to report or misreport the required information to the IRS can be penalized. (26 C.F.R. § 1.6050S-1(e)(1).) Institutions can also be penalized for failure to provide affected individuals a correct information statement. (26 C.F.R. § 1.6050S-1(e)(2).)

Penalties resulting from a failure by the institution to provide a correct TIN can be waived if the failure is "due to reasonable cause." (26 C.F.R. § 1.6050S-1(e)(3).) An institution can establish reasonable cause if "the failure arose from events beyond the institution's [...] control, such as failure of the individual to furnish a correct TIN. However the institution [...] must establish that it acted in a responsible manner both before and after the failure." (26 C.F.R. § 1.6050S-1(e)(3)(i).) (See also, *Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs*, Department of the Treasury, Internal Revenue Services, Publication 1586, Rev. June 2012, <http://www.irs.gov/pub/irs-pdf/p1586.pdf>.)

The IRS prescribes precisely what an institution must have done to have acted in a responsible manner. (§ 1.6050S-2(e)(3)(ii).) The institution must have requested the TIN of each individual for whom it is required to file a return (1098-T) if it does not already have a record of the individual's correct TIN. If the institution does not have the TIN then the institution must request the TIN in writing, and must clearly notify the individual that the law requires the individual to furnish a TIN so that it may be included on an information return filed by the institution. Institutions can use IRS form W-9S to request the information, or may create their own process (including an electronic process) for doing so. (26 C.F.R. § 1.6050S-1(e)(3)(iii).) An individual who fails to furnish a TIN upon request by the institution can be subject to a penalty imposed by the IRS. (26 C.F.R. § 1.6050S-1(e)(4).)

¹ Colleges should review the IRS regulations for a complete listing of all the information that the college must report to the IRS.

² Colleges should review the IRS regulations for a complete listing of all the information that the college must include on the statement provided to the student.

State and federal privacy laws

Collection and Use of Social Security Numbers by Community Colleges

In 2005, Civil Code section 1798.85³ was enacted protecting the confidentiality of social security numbers. Persons and entities, including post-secondary educational institutions, could no longer use social security numbers on student identification cards, post social security numbers, require students to transmit his or her social security number over the Internet unless specified security precautions have been taken, or require a student to use his or her social security number to access a web site unless an authentication device is also required to access the web site. (Civ. Code, § 1798.85(a), [partial list].) However, the statute specifically allowed the “collection, use or release of a social security number as required by state or federal law or the use of a social security number for internal verification or administrative purposes.” (Civ. Code, § 1798.85(b).) Thus, Civil Code section 1798.85 does not preclude colleges from collecting social security numbers or providing them to the IRS for the purposes of complying with the requirements of part 26 of the Code of Federal Regulations, section 1.6050S-1 et seq.

FERPA

Generally, the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 C.F.R. part 99) precludes educational institutions, including colleges, from disclosing personally identifiable information (PII) from students’ education records without consent. Students’ education records are those records that “contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.” (34 C.F.R. § 99.3 “Education Records.”)

The reporting requirements of the Hope Scholarship Credit require colleges to disclose to the IRS the student’s SSN/TIN, name, address, enrollment status (part time or full time), and whether the student has completed the first two years of postsecondary education, all of which are PII maintained in the student’s education records within the meaning of FERPA. Generally, colleges must first obtain the consent of the student prior to disclosing those records to a third party. While there are some exceptions to the prior consent rule, none of the exceptions are applicable in the instant matter. Obviously, this means that there is a conflict between two federal laws, one requiring colleges to disclose PII from education records and the other prohibiting disclosure of PII from education records. The Family Policy Compliance Office (FPCO), the entity responsible for enforcement of FERPA, addressed this conflict in 1997. (Tax Legislative Council, Dept. of the Treasury, and Chief Counsel, IRS, letter to Director, FPCO, November 25, 1997, <http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/hope.html>.) The FPCO concluded that the Tax Relief Act controlled because it was the more specific statute as well as the more recently enacted statute. (*Id.* at p. 2, (citations omitted).)

³ Community colleges were required to comply with Civil Code section 1798.85 by January 1, 2007. (Civ. Code, § 1798.85(i).)

Education Code

State law, like FERPA, precludes the disclosure of PII from students' education records without consent, except in very limited circumstances not applicable in the instant matter. (Ed. Code, § 76210, et seq.) A state law actually conflicts with federal law where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz*, (1941) 312 U.S. 52, 67.) Clearly, state statutes prohibiting disclosure of SSNs, etc. from students' education records directly conflict with federal statutes requiring the disclosure. State law that conflicts with federal law is without effect. (U.S.C.A. art. VI, cl. 2.) Thus, the IRS regulations supersede state privacy laws which would otherwise prohibit disclosure of specified PII from students' education records without the student's consent to the IRS. Colleges may legally provide the IRS with the required information without the student's consent as necessary to meet the reporting requirements of the Hope Scholarship Credit.

However, FERPA and state law limit the redisclosure of PII from the student's education record. These requirements are not preempted or superseded by the IRS regulations. Thus, the IRS is prohibited from redisclosing the information provided by colleges without the student's consent (or unless an exception applies). (34 C.F.R. 99.33(a)(1), Ed. Code, § 76243(a)(8)(B) .) Colleges can be sanctioned for improper redisclosure of PII. Further, in the event the IRS did make an improper disclosure the college would be prohibited from providing the IRS with PII from education records without the student's consent for at least five years. (20 U.S.C. § 1232g(b)(4)(B).)

CONCLUSION

Colleges must comply with the reporting provision of IRS regulations 26 C.F.R. § 1.6050S-1 et seq., including obtaining a correct TIN from each student. Colleges that do not obtain correct information from the student can be penalized by the IRS. Colleges that act in a "responsible manner" as defined by the regulations in obtaining the TIN/SSN may be able to have any assessed penalty waived. Colleges that receive a Notice of Proposed Civil Penalty from the IRS should work with their local counsel to file a request to waive the penalty. The IRS has provided comprehensive guidelines that provide information needed to avoid penalties, describes what actions must be taken to request TINs, and explains the requirements for establishing reasonable cause (which can result in the waiver of penalties). (<http://www.irs.gov/pub/irs-pdf/p1586.pdf>.) If your college has received a Notice of Proposed Civil Penalty you have to answer that notice within 45 days from the notice date (not when it was received, but the date

on the notice). It may be possible for colleges to receive an extension of time. A written request should be sent before the expiration of the 45 days to the IRS' Philadelphia Campus address:

Internal Revenue Service
2970 Market Street 4-E08.141
LIH Unit - Mail Stop E-08.143
Philadelphia, PA 19104

Reasonable cause requests should be sent to the IRS center where you filed your return.
(<http://www.irs.gov/uac/Where-to-File-Certain-Elections,-Statements,-Returns-and-Other-Documents>.)