

February 6, 2007

The Institute for College Access and Success  
c/o Robert Shireman, President  
2150 Shattuck Avenue, Suite 800  
Berkeley, CA 94704

Re: Opinion on Legal Requirements for Disclosure of Tax Transcript Data  
from the IRS to the Department of Education at the Taxpayer's Request

Dear Mr. Shireman:

We understand that The Institute for College Access and Success (the "Institute") has made a proposal whereby federal student aid applicants would provide written consent for the Internal Revenue Service ("IRS") to share data from their tax transcripts with the United States Department of Education (the "Department") for the purpose of determining whether the applicants qualify for financial aid. The Institute has engaged Holland & Knight LLP to render a legal opinion as to whether the federal income tax laws or the Higher Education Act (the "HEA") prohibit the release of such information to the Department, its outside contractors or independent agents.

After reviewing the relevant statutes, regulations and case law, we have determined that under certain circumstances the federal income tax laws and the HEA permit the IRS to release tax transcript information to the Department pursuant to an applicant's valid written request, as further detailed and qualified below. **This opinion is not to be relied upon by any other party.**

## I. STATEMENT OF FACTS

### A. The Institute

The Institute's primary mission is to make higher education more available and affordable for people of all backgrounds. The Institute was organized on June 8, 2004, as a public charity under the laws of the State of California. It operates as a not-for-profit, charitable, and educational organization, exempt under Section 501(a) and described in Section 501(c)(3) of the Internal Revenue Code (the "Code").

## **B. The Institute's Proposal**

According to the Institute, the goal of its financial aid simplification proposal is to lower a significant barrier between aid-eligible students and the resources that they need to attend and succeed in college. The Free Application for Federal Student Aid ("FAFSA") is lengthy, complicated and burdensome for all applicants. One indication of the barrier posed by the FAFSA is that an estimated 1.5 million U.S. college students who were eligible for a federal Pell grant did not apply for aid in 2004, and the American Council on Education has shown that this trend is on the rise.

The Institute proposes to simplify the financial aid application process for students and families by using data that the government already has. Most of the income information used to calculate aid eligibility comes from applicants' federal tax records. For example, 22 of the 28 main income and asset questions on the FAFSA instruct applicants to refer to specific lines on their IRS Form 1040. The proposed alternative is for students and parents to give the IRS permission to release the relevant data directly to the U.S. Department of Education. The data would then be processed electronically to determine aid eligibility.

The Institute maintains that this proposal would make the application process much simpler and more accessible for all users, while increasing the accuracy, efficiency and security of the financial aid process as a whole. Currently, colleges and universities as well as the Department must expend significant resources on verifying the income data students and families provide. This involves gathering even more information from applicants, including their original tax records, which schools have to process and store. Using IRS data from the start would eliminate much of this burdensome and duplicative process, and reduce opportunities for sensitive data to fall into the wrong hands.

The specific aspect of the Institute's proposal addressed in this document involves student aid applicants giving the IRS permission to share their tax transcript data with the Department as part of their financial aid application. Students would execute some form of tax disclosure authorization that is ultimately sent to and accepted by the IRS. The financial aid applicant would name the Department (or an outside contractor or independent agent of the Department) as the applicant's designated recipient of tax transcript information (sometimes referred to as the "tax designee"). The Department (or its outside contractors or independent agents) would then be permitted to obtain data directly from the applicant's tax transcripts. Upon receiving the data, the Department could determine the applicant's eligibility for federal grants and loans.

## **II. STATEMENT OF LAW**

The general rule under Section 6103(a) of the Code is that "returns and return information shall be confidential" and "no officer or employee of the United States... shall disclose any return or return information" except as authorized under Section 6103. This nondisclosure rule protects taxpayers against the improper disclosure of certain "tax return" and

"return information." Section 6103(b)(1) of the Code defines a tax return as "any tax or information return, declaration of estimated tax, or claim for refund" made or provided by any person including supporting schedules, amendments, attachments, and lists supplemental to such return."

The term "return information" is even broader. Section 6103(b)(2) of the Code defines return information as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments." In essence, all information obtainable from a tax return that can be associated with, or otherwise identifiable with a taxpayer, directly or indirectly, constitutes return information.

The general rule of nondisclosure and confidentiality has several narrow but important exceptions. One of these exceptions is found in Section 6103(c) of the Code. Section 6103(c) allows the disclosure of a taxpayer's return or return information to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information made by the taxpayer to such other person. The disclosures are subject to the requirements and conditions prescribed in the Regulations.

The requirements and conditions prescribed for a written disclosure request are set out in Section 301.6103(c)-1(b) of the Regulations. Sections 301.6103(c)-1(b)(1) and (2) require that the request include the taxable year or years covered by the return or return information, and be received by the IRS within 60 days of the request being signed and dated by the taxpayer. In addition, the request must include the name, mailing address, and taxpayer identification number, the person or persons to whom disclosure is to be made, the type of return or return information to be disclosed, and other sufficient facts to enable the IRS to determine the nature and extent of the information requested.

If a taxpayer makes a written disclosure request that includes all of the required information discussed above, then the IRS should, subject to the limitations discussed herein, disclose the taxpayer's return information, to the extent necessary to honor the request, to the taxpayer's designee pursuant to Section 301.6103(c)-1(b).

The actual form of the written disclosure request is not prescribed in the Regulations. Consequently and, as a practical matter, the IRS will exercise its discretion in determining the "proper" form that an applicant may use.

Under Section 301.6103(c)-1(e)(3), permissible designees include individuals, trusts, estates, corporations, partnerships, Federal, State, local and foreign government agencies, or subunits of such agencies, or the general public. The term "Federal agency" is defined in Code Section 6103(b)(9) as an "agency within the meaning of section 551(1) of title 5, United States Code."

Under 5 U.S. Code Section 551(1), the term "agency" means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency...." Section 552(f)(1) states the term "agency," as defined in Section 551(1), "includes any executive department, military department, ... Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

An "agency" may include outside contractors and independent agents. To determine whether an outside contractor or independent agent falls within the agency definition, there are two important considerations. First, do the outside contractors or independent agents have the authority to make decisions? *See Washington Research Project, Inc. v. Department of Health, Education, and Welfare*, 504 F.2d 238 (D.C. Cir. 1974). Second, did a Federal agency expressly delegate part of its authority to the outside contractors or independent agents? *See id.* If both of these considerations are satisfied, then the outside contractors or independent agents will be included in the definition of Federal agencies, and thus, will be permitted designees.

However, even if a disclosure request satisfies all of the requirements set out above, it may not always be allowed. Under Section 6103(c), the Secretary is given the broad authority to deny a valid disclosure request if such disclosure would seriously impair Federal "tax administration." The term "tax administration" under Section 6103(b)(4) is defined very broadly. First, it includes administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party. Second, it includes the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions. Third, it includes the assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions. Consequently, if the Secretary believes that the disclosure request would impair tax administration under any of the enumerated definitions under Section 6103(b)(4), then the request may be denied.

Pursuant to Section 484(q) of the HEA, 20 U.S.C. § 1091(q), the Secretary of Education is "authorized to confirm with the [IRS] the adjusted gross income, Federal income taxes paid, filing status, and exemptions reported by applicants (including parents) . . . on their Federal income tax returns for the purpose of verifying the information reported by applicants on student financial aid applications." The Secretary must notify the applicant that the IRS will be disclosing this information to the Department, and this notification is included in the FAFSA. *See* 20 U.S.C. § 1091(q)(2). This provision does not address the situation where an applicant expressly designates the Department to receive IRS data. We have found no other HEA provision authorizing or prohibiting the receipt of IRS data.

### III. ANALYSIS

Our research confirms that the Code permits the disclosure of a taxpayer's tax transcript to the Department under certain specified conditions. Section 6103(a) of the Code renders all tax

return and return information confidential with certain narrowly specified exceptions found in Sections 6103(c) – (o). The exception applicable here is found in Section 6103(c). This section and Section 301.6103(c)-1(b) of the Regulations permit the disclosure of a taxpayer's own return and return information to Federal government agencies when:

1. The taxpayer – in this case a student aid applicant -- makes a written request for disclosure;
2. The written request is signed and dated;
3. The written request includes the applicant's "taxpayer identity," or name, mailing address, taxpayer identification number, or any combination thereof;
4. The written request names a designee to whom such disclosure is to be made;
5. The written request includes the taxable year or years covered by the return or return information;
6. The written request includes the returns or return information to be disclosed; and
7. The written request is received by the IRS within 60 days of the applicant's signing and dating the request.

*See* Section 301.6103(c)-1(b).

If a valid request is made under the circumstances described above, Section 6103(c) and the Regulations thereunder expressly lift the confidentiality veil of Section 6103(a) to permit disclosure.

Further, nothing in the definition, or the application of the term "tax administration," prevents the Department from obtaining student aid applicant tax information. In fact, Federal government agencies are listed as "permitted designees" under Section 301.6103(c)-1(e)(3) of the Regulations. As such, we believe that the Department would be allowed access to the applicants' tax transcripts under the circumstances described above if the student aid applicant makes a proper request for such information under Section 6103(c) and the Regulations.

There are several additional considerations that need to be addressed relating to a valid disclosure authorization. First, it is common for the Department to engage outside contractors and independent agents to perform certain delegated tasks. Thus, one additional issue is whether those outside contractors or independent agents can become permitted designees under Section 6103 and thereby receive tax return information directly from the IRS.

We believe that the Department's outside contractors and independent agents may be permitted designees under Section 6103. The applicable provisions do not expressly prohibit outside contractors and independent agents working with government agencies from obtaining

such information. This conclusion, however, rests largely on the actual authority provided by the Department to its outside contractors or independent agents. One important consideration is whether the outside contractors or independent agents will have the authority to make decisions for the Department. *See Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir. 1974). A second important consideration is whether the authority to determine if students meet aid requirements rests with the outside contractors or independent agents. *See id.* If both of these factors are present, the outside contractors or independent agents will be deemed the functional equivalent of the Department, satisfying the definition of a government agency, and thus being included as permitted designees. In these circumstances, the Department's outside contractors or independent agents would be allowed to receive and obtain the applicant's tax transcript information.

A second issue relates to the specificity required in a valid disclosure authorization. Neither the Code nor the Regulations address whether student aid applicants are required to designate the name of a specific Department representative or agent as their third party designee, or whether naming the Department alone will suffice for these purposes. Consequently, we believe that the Secretary of the Treasury, subject to Section 6103 and the Regulations, may use his or her discretion in determining the proper amount of specificity for a disclosure authorization.

Third, the only situation in which a permitted designee would not be able to obtain and review a student aid applicant's tax transcripts is when the Treasury Secretary has made a determination that such disclosure would seriously impair Federal tax administration. In that case, the taxpayer's disclosure request would be denied even though the Department or other party is a permitted designee under Section 6103.

Similarly, the HEA does not prohibit the Department from receiving IRS data when the taxpayer has expressly approved the disclosure. Although Section 484(q) authorizes disclosure of IRS data only to confirm certain information necessary to pursue repayment of certain student loans, it does not, by its terms, prohibit receipt of IRS data in other circumstances. In fact, Section 484(q) presumes that there is no express consent or designation from the taxpayer. Accordingly, it does not address situations where the taxpayer consents to the disclosure, nor does it address situations where the taxpayer is applying for student aid, as opposed to repaying it.

#### **IV. OPINION**

It is our opinion that, subject to the qualifying exceptions contained herein, there is nothing in Section 6103 of the Internal Revenue Code, Section 301.6103(c)-1(b) of the Regulations, the Higher Education Act, or the applicable Federal case law prohibiting the Department, its outside contractors or independent agents from obtaining and reviewing student aid applicants' tax return information, if a proper written disclosure request is submitted naming the Department as the designee under the circumstances described above and disclosure is not found to impair federal tax administration.

The opinion stated herein represents our legal judgment as attorneys regarding the disclosure of tax information to third party designees. Please be advised that our opinion is not binding on the IRS or the Department. Therefore, even though we believe that the IRS and the Department would have no reasonable basis to challenge the legal conclusions set forth in this opinion, there can be no assurance that the IRS, the Department, or ultimately the courts, will agree with our opinion.

## V. QUALIFICATIONS AND DISCLAIMERS

The legal analysis in this opinion is the work product of Holland & Knight LLP. However, the facts recited in this opinion were furnished to us by representatives of the Institute or obtained from the Institute's website located at [www.ticas.org](http://www.ticas.org). We have not been asked, nor have we attempted, to verify through independent investigation any facts presented to us in connection with the preparation of our opinion, and we are assuming that all such facts are true, correct, and complete as of the date of this letter. We also assume that all relevant facts have been disclosed to us.

If (i) the relevant facts differ from those represented or stated to us, (ii) our assumptions prove incorrect, or (iii) the existing authorities upon which this opinion is based are modified by legislative, administrative, or judicial action, our conclusions may change and the Institute should not rely upon this opinion. In such event, Holland & Knight LLP does not assume any responsibility to provide a revised opinion or other advice unless expressly requested by the Institute and agreed to by Holland & Knight LLP.

We are furnishing this opinion to the Institute solely for the benefit of the Institute in connection with the issues described herein. **This opinion is not to be relied upon by any other party.**

Very truly yours,

HOLLAND & KNIGHT LLP

/s/ Holland & Knight LLP