

# EDUCATION LAW ALERT

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## U.S. DEPARTMENT OF EDUCATION PROPOSES CHANGES IN PRIVACY REGULATIONS

On March 24, 2008, the U.S. Department of Education (ED) issued a notice of proposed rulemaking to amend its regulations implementing the Family Educational Rights Privacy Act of 1974 (FERPA). FERPA is a federal law designed to protect the privacy of student records maintained by educational agencies or institutions, or those acting on their behalf. The law generally requires educational agencies or institutions that receive funds through programs administered by ED to obtain prior written consent from a student (or the student's parent, as applicable) to disclose a student's education records or personally identifiable information within such education records to a third party. The following discussion summarizes some of the many significant proposed revisions.

### Definitions of Key FERPA Terms

**Directory Information** – Neither the statute nor current regulations currently specify whether a student's Social Security Number (SSN), student ID number, or personal identifier for use in electronic systems may be designated and disclosed as directory information. Under the proposed rule, neither an SSN nor a student ID number can be designated directory information. An educational agency or institution may, however, designate as directory information a user ID or other unique identifier used by the student to access or communicate in electronic systems, provided that such user ID or other unique identifier does not permit access to education records covered by FERPA except when combined with other authenticating information known only to the student, such as a PIN.

**Education Records** – Current regulations specify that "education records" do not include records that contain only information about an individual after he or she is no longer a student. The proposed rule would clarify the intent of this exclusion as covering only records that concern an individual

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## GREEN COLLEGE RATINGS: FTC SCRUTINY SHOULD TEMPER CLAIMS

Colleges and universities should pay close attention in scoring their own eco-friendliness for the upcoming Princeton Review "green ratings" – the Federal Trade Commissions (FTC) may be watching. Princeton Review has announced that, for the first time, it will be ranking institutions of higher learning on their environmental efforts.<sup>1</sup> The rankings will be based on a voluntary survey sent to each institution and the Princeton Review will then rate them on a scale from 60 to 99 on the basis of responses to questions such as: "What percentage of your grounds are managed organically?" and "Please list your school's top three undertakings that represent your environmental commitment."<sup>2</sup>

As third-party "green" certification programs like the Princeton Review ratings have proliferated, the FTC has shown an increased concern for monitoring false or misleading "green" advertising and is reviewing its "Green Guides." Those guides, which represent administrative interpretations of laws enforced by the FTC, provide advice to businesses and consumers on allowable environmental marketing claims. The Green Guides, formally known as the "Guides for the Use of Environmental Marketing Claims," are designed to help marketers avoid making claims that the agency would challenge as "unfair" or "deceptive" under Section 5 of the FTC Act, and can also influence state and private false advertising litigation. The guides were first issued in 1992

and were revised most recently in 1998. The current guides fill almost a dozen pages in the U.S. Code of Federal Regulations and are explained at length in a 36-page FTC brochure, "Complying With The Environmental Marketing Guides."<sup>3</sup> The FTC had planned to revise the guides in 2009 but decided to advance its review because of the current increase in green claims.

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<sup>1</sup> Scott Carlson, "Princeton Review Will Issue 'Green' Ratings in Coming College Guide," *CHRON. OF HIGHER ED.*, April 22, 2008.

<sup>2</sup> *Id.*

<sup>3</sup> The brochure is available at <http://www.ftc.gov/bcp/online/pubs/buspubs/greenguides.pdf>.

## IRS INCREASING FOCUS ON COMPLIANCE OF TAX-EXEMPT BOND FINANCED FACILITIES

The Internal Revenue Service (IRS) has recently expanded its focus regarding whether and the extent to which 501(c)(3) organizations (Qualified Not-for-Profits) that have been the beneficiaries of proceeds of tax-exempt bonds have established and followed adequate procedures to ensure compliance with tax law requirements applicable to the bonds (and the projects financed). The impetus for this expanded program, revealed by the IRS in an industrywide conference call April 23, 2008, was a survey the IRS had conducted through which it learned that although more than 90 percent of Qualified Not-for-Profits that had benefited from tax-exempt financings claimed to have written procedures in place to ensure tax law compliance, only 15% of such entities were able to verify that fact.

### Compliance Questionnaires

The IRS has begun to send out “compliance questionnaires” to a random sampling of Qualified Not-for-Profits for the purpose of assessing the extent to which the organizations are complying with the various tax law requirements imposed upon such entities by virtue of their utilization of facilities financed with tax-exempt bonds.

### Same Timing as Initial 990, Schedule K

Much of the information being sought is contained in the proposed Schedule K to Form 990 (Return of Organization Exempt from Income Tax), which outlines numerous categories of information that, if finalized in its current form, the IRS will seek to obtain from Qualified Not-for-Profits. The information can be broken down into the following three categories.

**(1) Proceeds** – Under this category, Qualified Not-for-Profits may be asked to disclose: (i) the total proceeds of an issue; (ii) the gross proceeds deposited into reserve funds, or refunding or defeasance escrows; (iii) proceeds spent on costs of issuance; (iv) the amount of proceeds spent on working capital; (v) the amount of proceeds spent on capital expenditures; (vi) the year of a project’s substantial completion; and (vii) whether the Qualified Not-for-Profit maintains adequate books and records to support its final allocation of bond proceeds to costs.

**(2) Private Business Use** – Under this category, the Qualified Not-for-Profits will be required to answer the following questions or provide information with respect to: (i) evidence of arrangements creating private business use of the facility; (ii) the existence of management contracts of bond-financed facilities or related research agreements; (iii) whether the organization routinely engages a bond counsel or other outside counsel to review such contracts and agreements; (iv) the percentage of private use being made at the facility; and (v) whether the organization has adopted management practices and procedures to ensure the post-issuance compliance with respect to the outstanding tax-exempt bonds.

**(3) Arbitrage** – Under this category, the Qualified Not-for-Profits will provide the following information: (i) whether the issue has a variable rate of interest; (ii) whether a qualified hedge has been entered into in connection with the bonds and whether such hedge has been identified on the issuer’s books and records; (iii) the name of the hedge provider and the term of the hedge; (iv) whether the proceeds of the bonds were invested in a guaranteed investment contract (GIC) and, if so, the name of the GIC provider, the term of the GIC and whether the regulatory safe harbor for establishing the fair market value of the GIC was satisfied; and (v) whether any gross proceeds of the bonds were invested beyond an available temporary period and whether the bond issue qualified for an exception to rebate.

Although there is no assurance that a particular Qualified Not-for-Profit that has benefited from an issue of tax-exempt bonds will receive a compliance questionnaire from the IRS or even fall under the IRS’s ever-expanding scrutiny, the more prudent approach is for the organization to ensure that all tax law requirements applicable to the organization, its bond-financed facility and the bonds themselves (and particularly the information detailed above) have been, and continue to be, satisfied.

### Optional but Educational

Currently, these questionnaires are optional and an organization may refuse to participate and respond without formal penalty, but the IRS has indicated that such refusal may encourage it to open an examination of the entity and its outstanding bond issue(s). Therefore, voluntary compliance is the best course of action to take to become more educated on these issues and to prevent problems.

In most tax-exempt bond transactions, the bond and tax documentation that a Qualified Not-for-Profit is asked to sign will address most (if not all) information to be sought by the IRS in the proposed Schedule K to Form 990. The better (and safer) practice is to maintain clear and accurate records of all the information for as long as the bonds are outstanding (and for at least three years after the bonds mature or are redeemed).

All colleges and universities that have been or expect to be the recipients of proceeds of tax-exempt financing are advised to consult counsel experienced in the area of tax-exempt financing to ensure that all required information is identified, documented and maintained for as long as necessary to ensure that the college or university can comply with any future IRS requests.

Please address any questions to Charles D. Katz at (312) 569-1248 or [Charles.Katz@dbr.com](mailto:Charles.Katz@dbr.com).

## U.S. DEPARTMENT OF EDUCATION PROPOSES CHANGES IN PRIVACY REGULATIONS

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or events that occur after the individual is no longer a student in attendance, such as alumni activities. The definition would therefore be revised to exclude records created or received by an institution after an individual is no longer a student in attendance and that also are not directly related to the individual's attendance as a student. The proposed rule would further amend the definition of "education records" to exclude peer-graded papers that have not been collected and recorded by a teacher, codifying the U.S. Supreme Court's decision in *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

**Personally Identifiable Information** – In addition to a student's SSN, student ID number, indirect identifiers such as the name of the student's parent or other family members, and the student's address, the regulatory definition of "personally identifiable information" currently includes any personal characteristics or other information that would make the student's identity easily traceable. The proposed rule would add to the scope of this definition: (1) other information that alone or in combination is linked or linkable to a specific student that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; (2) information requested by a person the institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates; and (3) biometric records of the student.

### Permissive Disclosures to Parents of Eligible Students

The substantive legal rights granted by FERPA are generally held by either a student's parent or an "eligible student" (*i.e.*, students 18 years of age or older, or in attendance at a postsecondary educational institution), but never both at the same time. This has created significant concern and confusion in some parts of the higher education community about how parents of postsecondary students can receive information regarding their children. The proposed changes would clarify several statutory and regulatory provisions that currently permit disclosures of information to the parents of eligible students, including disclosures related to: (1) health or safety emergencies; (2) a violation of law or school policies regarding alcohol or controlled substances by a student under 21 years of age; (3) court orders and subpoenas; and (4) students who are dependents for income tax purposes.

### Non-Consensual Disclosures for Health and Safety Emergencies

The current FERPA regulations permit non-consensual disclosure of a student's personally identifiable information in

connection with a health or safety emergency, if such disclosure is necessary to protect the student or other individuals in the school community. According to ED, such currently permitted disclosures include information concerning disciplinary actions for conduct that posed a safety risk to the student or other members of the school community, and disclosures regarding health and safety concerns to teachers and other school officials with a legitimate educational interest in the pertinent student. Under existing regulations, however, the FERPA provision allowing these non-consensual disclosures is to be strictly construed.

In commentary accompanying the proposed rule, ED acknowledges the June 13, 2007 *Report to the President on Issues Raised by the Virginia Tech Tragedy* (see <http://www.hhs.gov/vtreport.html>), which includes a finding that widespread "fears and misunderstandings" regarding FERPA and other privacy laws "likely limit the transfer of information in more significant ways than is required by law." That report further recommended that ED "ensure that parents and school officials understand how and when postsecondary institutions can share information on college students with parents." See 73 Fed. Reg. 15,574, 15,589 (Mar. 24, 2008).

In response to the report's findings and recommendations, and in recognition that the current regulations offer no standard for determining whether a health and safety emergency warrants non-consensual disclosure of student information, the proposed rule would make the following revisions:

- Remove the current "strict construction" requirement for determining whether to disclose information that would otherwise be protected by FERPA;
- Permit an institution to take into account the totality of the circumstances pertaining to a threat to the safety of a student or to other individuals;
- Permit an institution, if it determines that there is an articulable and significant threat, to disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals; and
- Clarify that if there is a rational basis for the institution's disclosure determination at the time it is made, ED will not retroactively substitute its judgment in evaluating the circumstances.

### Disclosures to Contractors Performing Institution's Services and Functions

Under existing regulations, personally identifiable information from a student's education records may be disclosed to school officials having a legitimate educational interest in the information, without prior written consent of the student. ED has previously indicated through guidance letters that outside

parties performing services or functions that would otherwise traditionally be undertaken by the institution should benefit from inclusion in the school official exception. The proposed changes would explicitly define the school official exception to include contractors, consultants, volunteers and other outside parties performing institutional services or functions, and further permit non-consensual disclosure of student information on the following terms:

- The outside contractor must be under the direct control of the educational agency or institution;
- The outside contractor must be performing the type of institutional service for which the educational agency or institution would otherwise use its own employees;
- The outside contractor must be subject to the same conditions governing use and redisclosure of student information applicable to school officials under FERPA, namely, that (1) the student information may be used only for the purpose that the disclosure was made; and (2) redisclosure generally may not occur without prior written consent of the student; and
- The institution must have complied with FERPA's annual notification requirements by (1) specifying to students the criteria used in designating school officials; and (2) identifying the contractors, consultants, and/or volunteers that have been designated as "school officials" for the purposes of non-consensual disclosures.

Additionally, it is incumbent upon the educational agency or institution to ensure that its outside contractors use any student's personally identifiable information in strict compliance with the institution's requirements and for no purpose beyond that specifically underlying the disclosure. Ultimately, it is the educational institution that is responsible to ED for its outside contractor's failure to comply with FERPA's requirements.

### **Identification and Authentication of Information Recipients**

Presuming that disclosure is permitted, there is nothing in the current statute or regulations addressing whether an educational agency or institution must also ensure that it has properly identified and authenticated the party to whom it discloses personally identifiable information from a student's education records. The proposed regulatory revisions would require an educational agency or institution to use reasonable methods to identify and authenticate the identity of the recipient before any information is provided. Although ED does not specifically define "reasonable methods," it emphasizes that the chosen method must reduce the risk of unauthorized disclosure to a level that is commensurate with the likely threat and potential harm from wrongful disclosure. The proposed rule further states that "reasonable methods" can be defined by the usual

and customary good business practices of other educational agencies and institutions, which requires ongoing review and modification of procedures as standards and technologies change.

### **FERPA Investigations and Enforcement**

Current regulations specify that if an educational agency or institution has been found by ED to be noncompliant with FERPA and does not comply with corrective measures within a prescribed timeframe, then ED may withhold further payments of federal funds, issue a cease-and-desist order to compel compliance or terminate eligibility to receive federal funding. Acknowledging the U.S. Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), which held that FERPA does not create a private right of action and that the enforcement of FERPA is exclusively a regulatory matter for ED, the proposed revisions would clarify that enforcement authority. Among other things, the proposed rule would clarify that ED may take any appropriate enforcement action in addition to those specifically listed in the regulations.

The above are just some of the major changes proposed to the regulations implementing FERPA. The full notice of proposed rulemaking is available at 73 Fed. Reg. 15574 (March 24, 2008) or in PDF format online at <http://edocket.access.gpo.gov/2008/pdf/E8-5790.pdf>. Comments to the proposed changes were due by May 8, 2008, and a final rule is expected to be issued later this year.

Please address any questions to Jonathan D. Tarnow in our Washington, D.C., office at (202) 354-1357 or Jonathan.Tarnow@dbr.com.

### **GREEN COLLEGE RATINGS: FTC SCRUTINY SHOULD TEMPER CLAIMS**

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The current guides outline general principles that apply to all environmental marketing claims and provide guidance regarding specific claims. They advise, for example, that qualifications and disclosures should be sufficiently clear and prominent to avoid deception; marketers should indicate whether their claims apply to the product, the package or a component of either; claims should not overstate an environmental attribute or benefit expressly or by implication; and marketers should present comparative claims in a manner that makes the basis for comparison sufficiently clear to avoid deception. The current FTC guidance addresses such terms as "environmentally friendly," "recyclable," "recycled content," "biodegradable," "degradable," "compostable" and "refillable" to claim that packaging is green. The guides advise, for example, that to claim a product is biodegradable, it must breakdown and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal, unless the claim is qualified. They also advise that

a product should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the solid waste stream for reuse or in the manufacture or assembly of another package or product, through an established recycling program. Regardless of how the Green Guides are revised, colleges and universities are obligated under present standards to paint an accurate picture of their greening efforts.

### **New Green Claims**

Many new green claims, however, are not addressed in the current FTC guidelines and are the focus of the present revision process. These include terms such as “sustainable” and “renewable,” and environmental seals and third-party certification programs such as the Princeton Review green ratings. On April 30, the FTC held a public workshop and heard from environmental groups and industry representatives regarding: (1) trends in packaging and environmental claims; (2) use of packaging terms covered by the current guides and new green packaging terms not currently addressed by the guides; (3) claims based on third-party certification; (4) use of new packaging materials and their impact on the environment; and (5) the current state of substantiation for green packaging claims. There was general agreement at the workshop that the sections of the Green Guides dealing with packaging are out of date and need revision, both to provide more specific definitions of key terms and to update the guidelines with clearer standards. Issues raised at the workshop included whether certain “green” claims, such as “sustainable” and “renewable,” are so general and vague that they should be subject to an absolute ban, and whether a life-cycle assessment is necessary before any meaningful environmental claims can be made.

### **Carbon Offsets and Renewable Energy Certificates**

The updated Green Guides are also likely to address the increased marketing of carbon offsets and renewable energy certificates (RECs). Carbon offsets are credits bought by consumers, businesses and government agencies to compensate for greenhouse gas emissions (mainly CO<sub>2</sub>) caused by driving, electricity use or other activities. RECs allow corporations and other buyers to purchase electricity from wind farms and other renewable sources, with the amount of power represented by certificates that are purchased and traded as a commodity. Although there are a number of voluntary standards and

third-party certifiers, there are no specific regulations and the market is not currently subject to a uniformly adopted “quality” standard. Similarly, there are no consistent standards for how to evaluate claims of “carbon neutrality.”

The FTC has also been holding public workshops to examine the market for offsets, RECs and related advertising claims. This may be the first step toward federal oversight or regulation of the voluntary market for offsets and RECs, and ultimately may include broader focus on green marketing claims such as those relating to the “carbon neutrality” of products or facilities. The FTC’s focus on these issues does not necessarily suggest a conclusion that there have been any abuses. In fact, carbon offset and REC programs have encouraged many exemplary alternate energy and greenhouse gas capture projects; more and more of these programs now involve the use of reliable third-party certification subject to verifiable standards. Still, institutions should exercise caution in making “green” claims in this area.

The FTC appears to be moving toward providing clarity. In the meantime, institutions should resist the urge to err on the side of overstating their answers to the Princeton Review questionnaire. More generally, institutions are advised to have their general counsel review and approve any green surveys that they submit. In the future, the Princeton Review ratings may be supplanted by programs that use more specific metrics and open disclosures, such as the Sustainability Tracking, Assessment and Rating System, which is presently being developed by the Association for the Advancement of Sustainability in Higher Education.<sup>4</sup> Such arrangements, analogous to the Leadership in Energy and Environmental Design (LEED) certification system for buildings, could minimize institutions’ risk of running afoul of the current and future FTC Green Guides. Before revising its Green Guides, the FTC will hold one additional workshop on July 15 to examine developments in environmental claims for buildings and textiles, and the consumer perception of such claims.

If you would like to be kept informed directly of developments in this area of the law, please contact Howard Morse at (202) 842-8883 or [Howard.Morse@dbr.com](mailto:Howard.Morse@dbr.com), or Joshua M. Kaplowitz at (215) 988-2966 or [Joshua.Kaplowitz@dbr.com](mailto:Joshua.Kaplowitz@dbr.com), or your regular Drinker Biddle contact.

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<sup>4</sup> *Sustainability, Tracking, Assessment & Rating System for Colleges and Universities, Version 0.5*, April 2008, available at [http://www.aashe.org/stars/documents/STARS\\_0.5.pdf](http://www.aashe.org/stars/documents/STARS_0.5.pdf).

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