Date: February 28, 2011

To: Campus Tax Coordinators, Campus HR Directors, Campus A/P Managers, Campus Payroll Managers

From: George V. Ashkar, Assistant Vice Chancellor/Controller

CC: Nikhil Bassi, Roberta McNiel, Sedong John, Theresa Hines, Evelyn Nazario

Re: Guidance for Foreign National Information Form & IRS Forms W-8BEN and 8233

This memorandum is being sent in order to clarify usage of IRS forms related to nonresident alien taxation, and to promote consistency across campuses. As you are aware, there is an ongoing IRS payroll tax audit of the California State Controller’s Office. In connection with this audit, the CSU has been asked to produce certain documents for examination, including all W-8BENs. The W-8BEN is used to grant provisions of tax treaties that relate to payment for non-compensatory, non-personal services. Although the IRS has not yet concluded their audit, one of our campuses was identified as improperly using the Foreign National Information Form (FNIF) as a substitute for the W-8BEN. This is to notify you that if your campus also uses the FNIF as a substitute for the W-8BEN, this practice should stop.

Foreign National Information Forms are source documents that some campuses use to determine substantial presence and gather data that will be entered into Arctic International’s GLACIER or Windstar’s Tax Navigator NRA tax compliance software applications. The FNIF is used as a general information intake form at some campuses and is not an official IRS or Chancellor’s Office approved form.

In addition to this notification, below we provide general information about IRS Forms W-8BEN and 8233. The 8233 allows parties receiving compensatory payments to claim treaty benefits. If a Foreign National Information Form is used at your campus, these forms should be collected in addition to the FNIF when applicable. The information contained in this memorandum is very general in nature. It is critical that you consider all facts and circumstances and applicable tax treaties in determining which forms to use.
Payments for Personal Services

When compensatory payments are made to independent contractors or employees for services performed in the United States, an IRS Form 8233 is required to be collected if treaty benefits are claimed by the individual and granted by the campus. This includes situations where non-compensatory scholarship / fellowship payments and personal services payments are made by the same entity, and a tax treaty withholding exemption is claimed for both types of income. When employing an NRA individual, an EAR / SPAR (CSU’s substitute W-4 form) is also required to be collected for payroll purposes.

If you have hired an NRA to perform services in the U.S. and treaty benefits are not claimed by the individual, then an 8233 need not be collected. Collection of an EAR / SPAR is all that is needed.

It is the responsibility of the entity making the payment to review the Form 8233 submitted by the employee / independent contractor to determine whether a valid treaty claim is being made. A U.S. Taxpayer Identification Number or Social Security Number is required in order for treaty benefits to be granted. Treaty benefits must not be granted if the NRA individual’s eligibility for his tax treaty claim cannot be readily determined, or if the campus has reason to know that the information presented on Form 8233 is not accurate.

Based on the facts presented, if the campus chooses to grant treaty benefits, an authorized person must then sign the 8233 and certify acceptance under penalty of perjury. Once the 8233 is accepted, three copies of the form must be made. The first is given to the NRA individual. The second should be kept for your records. Within five days of acceptance, the third copy needs to be transmitted to the IRS via mail or fax.

The campus must wait ten days after the 8233 is faxed / mailed to determine whether the IRS has any objections to the form. If an incorrect 8233 is submitted, you will be notified by the IRS that the form is not acceptable and that withholding must begin immediately. The 8233 must be filled out by the NRA individual, accepted by the campus, and submitted to the IRS each calendar year. If this procedure is not followed, the campus is liable for tax on the treaty benefits it is improperly granting.

Scholarship Payments

Payments of qualified scholarships (tuition and fees required for the enrollment or attendance at a university, along with books, supplies, and equipment required for courses of instruction) are neither taxable nor reportable for NRA students. This is because qualified scholarships are not considered fixed or determinable annual or periodical (FDAP) income subject to nonresident alien tax withholding.

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1 See IRS Form 8233 instructions, page 4, for the mailing address and fax number for the IRS’ International Section.

2 IRC § 1441
Nonqualified scholarships are subject to tax and withholding, typically at a rate of 14% for students with F, J, M, or Q visas. For such payments, a W-8BEN is required to be collected if an NRA student’s tax treaty claim is granted by the campus.

Royalty Payments

It is common for CSU campuses to make royalty payments to NRA entities. Royalties may be paid for licenses of computer software, or access to online journals, for example. For this type of income, a W-8BEN must be collected so the individual or entity can certify their foreign status and claim treaty benefits (if applicable). A U.S. Employer Identification Number or Social Security Number is required in order for treaty benefits to be granted.

Unlike IRS Form 8233, the W-8BEN is only signed by the NRA individual. It is not signed by the campus. You are required to keep it in your records, but it is not transmitted to the IRS. The W-8BEN ceases to be valid at the end of the third succeeding year, unless there is a change in circumstances that makes any information on the form incorrect. As an example, a W-8BEN signed on 9/30/2010 remains valid through 12/31/2013.

Nonresident alien taxation is a complex area of the tax law. We look forward to reinforcing our guidance on this topic as part of the tax training we will provide later this year. Please contact Nikhil Bassi (nbassi@calstate.edu or (562) 951-4697) with any questions you may have. Nik is available for consultation with regard to specific transactions.