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April 3, 2006

Commissioner Mark W. Everson
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

RE: Reg-137243 and Notice 2005-93

Dear Commissioner Everson:

The undersigned Attorneys General recently became aware of IRS's proposed regulation permitting the secondary use and disclosure of taxpayer information. We are greatly concerned that this regulation, if adopted as proposed, will erode consumer privacy and the security of sensitive personal information, with a consequent increase in such serious problems as identity theft and intrusive or even abusive marketing practices. As the chief law enforcement officials of our respective States, we approach these matters with particular interest. We therefore respectfully request your consideration of these comments.

As state officials, we recognize that it is in the interest both of taxpayers and of the government, which depends on accurate information in tax returns in order to produce appropriate revenues, to ensure that taxpayers provide full and correct information to their tax preparers. Allowing such information to be used or disclosed for secondary purposes dangerously undermines that vital goal.

We recognize the careful work that IRS has done in designing the penalties and safeguards set out in proposed sections 301.7216-1 and 301.7216-2. We understand further that the Service's *intended* goal is continued or enhanced protection of taxpayers' privacy – a goal we fully support.

We share many of the concerns stated by Minnesota Attorney General Mike Hatch in his separate letter of March 28 submitted to the Service as part of this

proceeding. Attorney General Hatch's letter addresses many of the very serious problems raised by the prospect of enhanced marketing of tax return information and the necessity of addressing those problems in the present proceeding.

We believe that the best, most prudent course for the Service to take is simply to prohibit tax preparers from sharing tax return information for purposes unrelated to the preparation of tax returns. There is simply too much at risk for American taxpayers, particularly with respect to the ongoing scourge of identity theft, to increase the likelihood that their most personal information will be stolen or misused. Crucially, there is no pressing need to put that information at risk: American consumers' financial information is already copiously provided to businesses offering financial services and related products. We are aware of no complaints from taxpayers that they receive too few solicitations from these companies.

While we believe a prohibition on marketing and non-preparer use would best serve the American taxpayer, if the Service decides to stop short of that mark we would recommend at the very least a number of safeguards – in addition to those set forth in the proposed regulations and revenue procedure – to ensure that taxpayers' most sensitive information remains protected. Particularly, in order to accomplish the stated purpose of the proposed regulations, section 301.7216-3 should be modified. Our recommendations are set forth below.

In essence, we concur with the Service's adoption of the principle that taxpayers should be able to "control and direct the use of their own tax return information as they see fit." (Notice of Proposed Rulemaking, p. 72954.) We are troubled, however, by the provisions of the proposed regulations that seem to undermine rather than to advance that goal. In particular, the ease with which taxpayers may consent to essentially unlimited sharing of their tax return information would seem to run directly counter to the very protections embraced by the Service. We urge the Service to consider provisions – including those set out in Attorney General Hatch's letter – that would advance the goals embraced by the Service and bolster the work that IRS has traditionally done in securing the privacy of taxpayers and their most personal information.

Law Enforcement and Consumer Protection Concerns

We are particularly concerned about the greater opportunity for identity theft represented by any increase in the secondary use and disclosure of taxpayers' personal information. Identity theft is a crime that, according to the Federal Trade Commission, affects some 10 million Americans every year.[1] In 2005, identity theft accounted for more than three times as many complaints to the FTC as to any other source.[2] It is a scourge with which all State Attorneys General have had to contend, and recent news stories underscore the fact that breaches of privacy and the threat of identity theft

[1]http://www.ftc.gov/opa/2005/02/ncpw05.htm.

[2]http://www.ftc.gov/opa/2006/01/topten.htm.

represent an acute and continuing problem.[3]

The wealth of personal information contained in a tax return represents a particularly attractive target for identity thieves, and a correspondingly difficult challenge for those who work to prevent such theft. The spread of tax return information to far greater numbers of individuals, companies, databanks, and records repositories represents a nightmare to the law enforcement community. As representatives of law enforcement, we believe more, not less, privacy protection is needed.

Recommended Solutions

From the perspective of law enforcement as well as consumer protection, there appear to be several steps that the Service could take in order to ameliorate the problems raised by tax preparers' sale or other dissemination of tax return information.

Although some taxpayers may choose to have their tax return information used in evaluating their eligibility for a specific financial product, like a refund anticipation loan or a home mortgage, we do not believe that these taxpayers would elect to abandon control over their most private financial information in exchange for access to this product. The proposed regulations recognize and begin to address this issue, but additional safeguards are necessary to offer taxpayers a meaningful opportunity to limit the uses and disclosures of their information. Above all, the taxpayer's election must, as the Service has recognized, be knowing and voluntary; additional measures are required to achieve that goal. The process must also ensure against limited disclosure becoming, in effect, unlimited. We believe the following proposals would make significant progress toward achievement of these goals.

I. Prohibit or greatly restrict the use or disclosure of tax return information for marketing purposes.

Tax preparation firms should focus on tax preparation; the Service should not permit them to reap additional commercial benefits from the special relationship of trust they have with their clients – one considerably at odds with the commercial, arm's-length relationship between merchant and customer. The undersigned Attorneys General are acutely aware of the many private and public lawsuits involving unlawful practices associated with refund anticipation loans, the most prevalent by-product of tax-information sharing. Little would be lost, and much gained, by banning the sharing of tax return information with the banks that provide these high-interest loans.

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[3]Washington Post, Mar. 23, 2006, *N.Y. Sues Internet Firm for Privacy Breach*, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/23/AR2006032300639.html; New York Times, Mar. 22, 2006, *Laptop With HP Employee Data Stolen*, http://www.nytimes.com/cnet/CNET_2100-7348_3-6052964.html; New York Times, Jan. 27, 2006, *US Settles With Company on Leak of Consumers' Data* http://select.nytimes.com/search/restricted/article?res=F30B12FC3A5B0C748EDDA80894DE404482.

Even if the Service decides not to ban information-sharing, it should at least significantly restrict the practice. One possibility is suggested by the practices of some in the tax preparation industry itself, which is to condition the disclosure of tax return information on the agreement by the company receiving the information that it will not be used for any purpose other than that for which the information is provided. Thus, a bank providing refund anticipation loans must agree, in order to receive tax return information, that it will not use or disclose that information for any purpose other than processing the loans. We are aware of agreements between tax preparers and financial institutions that contain provisions of this nature. Such agreements address an otherwise gaping hole in the protection afforded taxpayer information: once information has been shared for any reason with someone who is not a tax preparer, the safeguards of section 7216 do not apply. Adopting a regulation requiring these safeguards for all would create a level playing field across the tax preparation industry.

II. Make the form and manner of the consent more protective of taxpayers by ensuring that the consent is in fact knowing and voluntary.

IRS has concurrently published a notice containing a proposed Revenue Procedure to provide guidance on the format and content of consents to disclose and use tax return information. While the proposed regulation itself does contain useful requirements, such as the limit on the duration of the consent and the prohibition on retroactive consent, it does not sufficiently address the form and content of a consent. If IRS adopts a regulation permitting use and disclosure as proposed, it is imperative that specific criteria for the consent be included in the regulation and not left to the discretion of tax preparers. These criteria must, at a minimum, mandate a separate document that meets the following requirements (in addition to those already set out in the proposed regulation and revenue procedure):

A. The title must be in at least 15-point type, in a font that is different from any other on the page. The text of the title should be mandated (to avoid deceptive use of terms like "Offer" or "Opportunity" or "Sign Me Up"): "Consent To Disclose My Tax Return Information" or words of similar import.

B. The regulations should prohibit obtaining consent to multiple uses or multiple disclosures in the same document, to ensure that taxpayers do not give what is in effect blanket consent and so that they can more easily figure out what it is that they are agreeing to. If such a prohibition is not adopted, the regulations should, for the same reasons, at least place a reasonable limit on the number or type of uses or disclosures that may be included in a single document. The prefatory commentary published in the Federal Register ("Explanation of Provisions") states that "[a]lthough the proposed regulations permit a single document to authorize multiple uses or multiple disclosures, the taxpayer must affirm separately each use or disclosure within the single document." This requirement is echoed in

the proposed Revenue Procedure. The proposed regulations themselves, however, contain no such explicit requirement. We urge that the Service ensure that the regulations themselves make clear that each use or disclosure of tax return information must be consented to separately, even if a single document is used, and further that in the same document the number or type of uses or disclosures is limited to a reasonable number, as defined by the Service. In addition, we would propose that the Service make explicit that a taxpayer in a tax preparer's office be required personally to make an affirmative choice for each consent, as by initialing or separately signing a space next to the text describing the use or disclosure (rather than by, for example, having the tax preparer check off a series of boxes on the computer screen). As currently written, it is not clear whether the requirement contained in section 4.04(9) of the proposed Revenue Procedure – "All consents to use or disclose tax return information must be signed by the taxpayer" – applies to *each* consent on a page with multiple uses or disclosures (section 4.05). It should. The same requirement should apply to the electronic media described in section 5 of the proposed Revenue Procedure.

C. Each consent form should contain a clear and conspicuous notice advising taxpayers that they are not required to consent to any use or disclosure of tax return information in order to obtain tax preparation services, or any other service other than one for which the taxpayers are willing to provide such information.

D. If the meeting between the taxpayer and the tax preparer to prepare the tax return has been conducted in a language other than English, then the consent form must be provided in that language as well. According to the Census Bureau, one in five Americans speaks a language other than English at home; in some States, the number is much higher.[4] In order to ensure that any consent to sharing is knowing and voluntary, the written form must be in a language that the taxpayer understands.

III. Prohibit making any service conditional on taxpayers' agreeing to share their return information.

We urge the Service to explicitly prohibit tax preparers' conditioning *any* service – not just tax preparation – on the taxpayer's giving consent to an unrelated use or disclosure of tax return information. The Attorneys General have encountered, for example, instances in which a tax preparer has required taxpayers to consent to disclose their personal financial information to marketers of IRAs as a condition for being considered for a refund anticipation loan. The regulations should make clear that this sort of conduct is unlawful.

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[4]US Census Bureau, *English-Speaking Ability: 2000* (Oct. 2003), available at http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

IV. Prohibit tax preparers from using or disclosing any tax return information not necessary to obtain the service or product sought by the taxpayer.

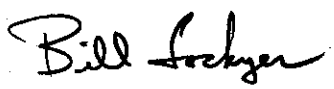
We strongly suggest that the Service add a provision to the regulations that would prohibit a tax preparer from using or disclosing any information from the tax return that is not required to obtain the product or service that the taxpayer has specifically and explicitly agreed to apply for or hear more about. The problem here is precisely that which IRS has stated these regulations are designed to prevent: the sharing of information in ways that the taxpayer has not contemplated, and to an extent that the taxpayer would not choose. Thus, for example, permission to share tax return information to learn more about an IRA should not allow the tax preparer to share the taxpayer's medical information, charitable donation information, or names and ages of dependents. The proposed Revenue Procedure at Section 4.04(4) addresses a similar issue – requiring that "[t]he consent must specify the particular items of tax return information to be disclosed to each recipient or used by the return preparer." This additional measure would further close the potential loophole addressed by the Revenue Procedure.

V. Prohibit the use of raffles, lotteries and other similar games as means of inducing taxpayers to share their return information.

Finally, we recommend that the Service bar tax preparers from employing a common device for the gathering of personal information from consumers, one that has no place in the realm of information as sensitive and extensive as that on a tax return: entry in a lottery, raffle, or other similar game as inducement for taxpayers to share their tax return information.

The undersigned Attorneys General thank IRS for accepting these comments and for considering our concerns and recommendations. We appreciate the opportunity to present the views of law enforcement and of our States. Please contact us if we can be of further assistance.

Sincerely,



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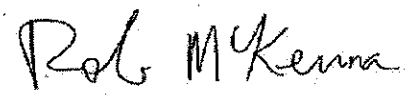
Attorney General of California



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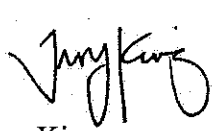

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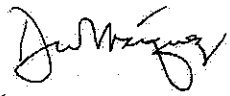

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