



DEPARTMENT OF JUSTICE

Antitrust Division

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Stephen M. Ryan, Esq.
Manatt, Phelps & Phillips LLP
1501 M Street, N.W., Suite 700
Washington, D.C. 20005

Dear Mr. Ryan:

This letter responds to your request, on behalf of the group of private sector companies that intend to offer free electronic tax preparation and filing services in coordination with the Internal Revenue Service (the "Consortium"), for a business review letter pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6. You requested a statement of the Department's present enforcement intentions regarding the Consortium's proposal to offer free online tax preparation and filing services to Taxpayers pursuant to terms of a proposed agreement between the Internal Revenue Service ("IRS") and the Consortium, a terms sheet for which was published in the Federal Register on August 8, 2002, at 67 Fed. Reg. 51621 (the "proposed IRS agreement"). The purposes of the proposed IRS agreement include supporting the IRS's statutory goal of increasing electronic filing of tax returns pursuant to the IRS Restructuring and Reform Act of 1998.

Based on information provided, we understand that the Consortium will be a District of Columbia Limited Liability Company affiliated with the Council for Electronic Revenue Communication Advancement, Inc., an existing Illinois Not-for-Profit Corporation. Membership in the Consortium will be open to all persons meeting certain standards set forth in the proposed IRS agreement and in the Consortium's Operating Agreement. The Consortium intends to offer in the aggregate free electronic tax preparation and filing services to at least 60% of the individual taxpayer population during annual January to April tax filing periods. There are no prohibitions or limitations on the ability of Consortium participants to compete to offer either free or paid tax preparation or filing services outside the Consortium.

The Consortium participants will provide free electronic tax preparation and filing services in cooperation with the IRS.¹ The IRS will rank Consortium participants into five “tiers” based on the details of each participant’s offer to provide free services, based primarily on the percentage of taxpayers to which each participant is willing and able to provide free services. One tier is reserved for new entrants who cannot meet experience thresholds for processing of electronic online tax returns during previous years, but who self-certify that they can meet the technical requirements for participation set forth in the proposed agreement contemplated by the IRS terms sheet. The details of each Consortium participant’s offer of free services will not be made available to other Consortium participants until the offers are made to the public. No participant may act on behalf of the Consortium; rather, the Consortium will be managed by a Manager selected by the participants. Voting rights in the Consortium will be weighted to some extent according to the participants’ tiers, but all participants have voting rights regardless of tier. Consortium funding obligations will also be tiered, with participants in lower tiers required to pay significantly less toward the operation of the Consortium.

The Consortium participants’ offers will be made available to the public on an Internet World Wide Web page or pages controlled and hosted by the IRS for the purpose of providing links to free electronic tax preparation and filing to taxpayers (the “IRS Web page”). Each participant will get one listing on the IRS Web page ranked by its tier. While the Consortium will create a proposed Web page and submit it to the IRS, the IRS retains authority to determine the final content that appears on the IRS Web page. The IRS and the Consortium will coordinate marketing of the free services to provide uniformity and maximize public awareness, and the IRS will not endorse specific offerings or products offered by Consortium participants. The IRS also retains the right to continue to accept electronic returns from and to provide other Internet links to the electronic preparation and filing services of either non-participants or participants in the Consortium. Tax preparers and others not wishing to participate in the Consortium will not be foreclosed from being Authorized IRS E-File Providers, *see* IRS Rev. Proc. 2000-31, or otherwise from offering electronic tax services by virtue of the existence of the Consortium.

The proposed agreement between the IRS and the Consortium as set forth in the proposed IRS agreement contemplates an agreement with an initial three-year term, renewable every two years thereafter. Either party may terminate the agreement for cause if the other party fails to comply with the agreement and does not cure its non-compliance within thirty days. Furthermore, the IRS may terminate the proposed agreement without cause if it gives twelve months notice to the Consortium. If the IRS chooses to offer free tax preparation or filing services directly to taxpayers other than within the scope of the proposed agreement, the Consortium may terminate the agreement, subject to timing provisions that would protect the

¹ Notwithstanding IRS involvement in the venture analyzed in this Business Review, the Department assumes, *arguendo*, that there exists no express or implied preemption through active government regulation, or other bar to suit against the Consortium or its participants under the Sherman Act, 15 U.S.C. § 1, *et seq.*, or other applicable Antitrust laws.

ability of taxpayers to be able to complete electronic tax preparation and filing through the Consortium during a pending tax filing season (concluding on April 15).

Based upon the representations made in your submissions, the documents and information submitted in support of the Consortium's request, and on the information obtained during our review, we conclude that the Consortium, if operated as described above, is not likely to produce anticompetitive effects.² It appears that competition among Consortium members and between Consortium members and non-members should not be adversely impacted by the proposed agreement with the IRS. Rather, the proposed agreement contemplated by the IRS terms sheet appears intended to make free electronic tax preparation and filing services readily available to many taxpayers who previously could not take advantage of such services, or might not have been easily able to locate such free services that existed. It also appears that the Consortium is a *bona fide* joint venture open to all competitors offering electronic tax preparation and filing service to individual taxpayers, that is designed to encourage and facilitate the delivery of free electronic tax preparation and filing services to individual taxpayers. The Consortium does not appear to restrict competition among such competitors in the offering of either free or paid services. The confidentiality of each Consortium participant's free services offer prior to its availability to the public should inhibit the ability to limit or coordinate in advance the extent of the free service offers by Consortium participants. Finally, it is significant that the IRS, an agency of the United States Department of the Treasury, retains final control over the content of the IRS Web page through which the free services of Consortium participants will be offered, as well as the final decision on tiering of participants' free service offers. Under such circumstances, the joint activities proposed by the Consortium are not likely to have an adverse impact on competition.

For these reasons, the Department has no present intention of challenging the formation and proposed operations of the Consortium. This letter expresses only the Department's current enforcement intention and is issued in reliance on the information and representations contained in the Consortium's submissions, and in the terms of the proposed IRS agreement as set forth in the IRS terms sheet published in the Federal Register.

² We note that the Consortium Operating Agreement you submitted includes at ¶ C a general averment that "[t]he Consortium desires to set standards for membership in the Consortium, and other terms and conditions for participation in the Consortium." Further, ¶ 4.4 appears to authorize Consortium participants to engage, "independently or with others" in undefined and apparently unlimited "business activity of any type or description." Please be advised that the analysis and conclusions set forth in this letter are based solely on the information already disclosed to the Department about the Consortium's proposed operations. We draw no conclusions and express no enforcement intentions regarding any "standards," "other terms and conditions," "business activity" or other independent or joint actions of the Consortium or its participants beyond those disclosed to the Department in conjunction with your business review request.

This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department remains free to bring an enforcement action in the future should the actual operations of the Consortium prove to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to this procedure, your business review request and this letter will be made available to the public immediately. Your supporting documents will be made publicly available 30 days from the date of this letter, except for any part of the materials for which you have requested and justified confidential treatment in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Charles A. James
Assistant Attorney General