

August 5, 2002

Charles A. James, Esq.  
Assistant Attorney General  
Antitrust Division  
Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

**Re: *Request for Business Review Letter***

Dear Mr. James:

On behalf of the private sector companies that intend to offer free electronic tax preparation and filing services to the public in coordination with the Internal Revenue Service (“IRS”) (the “Consortium”)<sup>1</sup> and pursuant to the Department of Justice’s Business Review Procedures codified at 28 C.F.R. §50.6, this is to request that the Department of Justice (the “Department”) issue a statement of its present enforcement intentions in connection with the proposed business relationship described in this letter. Specifically, the Consortium of potential industry participants seeks a statement that the formation and operations of the Consortium as described herein is not likely to produce anticompetitive effects, and that the Department thus has no present intention of challenging the formation and operations of the Consortium or the corollary promises of the United States government.

***Overview***

The Consortium is an informally organized group of private sector companies that intend to individually offer and provide free electronic tax preparation and filing services to individual United States taxpayers in coordination with the Internal Revenue Service (“IRS”) of the U.S. Department of Treasury through the Consortium. These services would be offered to the public via the IRS’ web site at [www.irs.gov](http://www.irs.gov) no later than January 15, 2003.<sup>2</sup> The Consortium and the IRS have negotiated a non-binding but detailed Term Sheet describing the basic terms of a definitive agreement governing their contemplated business relationship.<sup>3</sup> That Term Sheet is incorporated by reference here as if fully described.

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<sup>1</sup> At this time it is not fully known which private sector companies will participate in the Consortium. As discussed below, any company in the industry can join the Consortium to the extent it meets the standards for participation.

<sup>2</sup> It is the Consortium’s understanding that the IRS will continue to use the Business Partners page on its web site to identify those industry tax preparation firms that are not a part of the Consortium.

<sup>3</sup> A copy of the Term Sheet is attached as **Exhibit 1** hereto.

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As stated in Section I of the Term Sheet, the relationship between the Consortium and the IRS will provide substantial public benefits, including the following:

- seek to assure access to free and secure electronic preparation and filing of tax returns for certain taxpayers, including, but not limited to, certain low income groups.
- support the IRS' statutory goals of increased electronic filing, as stated in the IRS Restructuring and Reform Act of 1998, which encourages the IRS to set a goal of having 80% of federal tax returns filed electronically by 2007.
- implement a proposal in the President's 2003 budget by encouraging further growth in electronic filing with the cooperation of private industry as described in this letter, and with minimal expenditure of public funds.

To accomplish these objectives, the IRS would establish a web page with links to the free services offered by the companies that comprise the Consortium. Thus, the IRS has a substantial interest in ensuring that all of the free services offered by the members of the Consortium: (1) meet certain minimum standards to conform to IRS regulatory requirements with respect to security and privacy; and (2) are available to the public as promised in the Consortium companies' respective offerings.

As stated in Section VIII of the Term Sheet, the agreement will specify an initial term of three (3) years, with automatic successive two (2) year renewals, subject to explicitly reserved termination provisions. During the term of the Agreement, the IRS will not compete with the members of the Consortium in the provision of free on-line tax return preparation and filing services to taxpayers. In addition, the IRS has agreed to provide notice of any intention on its part to provide competing free services to taxpayers. At that point, the Consortium may withdraw from providing free services.

### ***The Consortium***

Members of the Consortium are companies that compete against one another in the preparation of tax returns for individual taxpayers. They offer electronic tax preparation and filing services to the public, and in some cases offer services for free to certain taxpayers. For example, one company's commercial product is free to those taxpayers with adjusted gross income below \$25,000 or military personnel. This free offer covers approximately 47% of U.S. taxpayers (and covered approximately 55% when it was first instituted). This program will encourage and permit the institutionalization for multi-year periods of such individual corporate

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free offers from multiple companies and permit the IRS to draw public attention to the free offers to the benefit of the taxpayers and the public treasury.

In order to ensure coverage to a sufficient number of taxpayers, the Consortium's free services are intended to be made available to 60% of the individual taxpayer population, and the individual company that wishes to participate must meet other requirements as set forth in Section IV of the Term Sheet and the Operating Agreement.

Critical to the realization of the above-stated objectives are the minimum criteria by which a company can be a member of the Consortium. Standards must ensure that members are viable, on-going commercial entities with the capacity to deliver the promised free services, but should encourage new competition and new entry. To this end, as set out in Section IV of the Term Sheet and the draft Operating Agreement,<sup>4</sup> the IRS and the Consortium intend to employ objective and open standards for entry into the Consortium:

1. The IRS has requested that in order to ensure coverage to a sufficient number of taxpayers, the company's free services must be made available to a minimum of 10% of the individual taxpayer population, and the company must meet other requirements as set forth in Section IV of the Term Sheet. This will also assist taxpayers in finding company offers that meet their requirements and prevent clutter at the web sites of companies whose offers are so limited they will not be available to a sufficient number of taxpayers; and
2. A company must have processed a sufficient number of on-line or e-filed returns: for example, a cumulative total of 2,500 online returns during the previous year, *or* have processed 25,000 electronically filed tax returns in the previous calendar year is enough to demonstrate the capacity to serve. However, if a company is a new entrant to the industry and does not have such a track record, it will be permitted to participate by substituting self-certification as is further described in the Operating Agreement.

Based on IRS research, it is believed that 26 companies electronically filed more than 25,000 tax returns in 2001.<sup>5</sup> Twelve (12) of these 26 companies were listed more than once with the same name and are franchises of one of the two national tax preparation companies. Overall, the 26 firms electronically filed 16.8 million returns, representing 43% of all individual returns electronically filed in 2001. We are not in a position to accurately estimate the number of

<sup>4</sup> A copy of the draft Operating Agreement is attached as **Exhibit 2** hereto. The Consortium members propose to sign the Operating Agreement upon issuance of the business review letter requested herein.

<sup>5</sup> A partial list of some of the companies that have consistently and actively participated in discussions with the IRS and may participate in the Consortium is contained in **Exhibit 3** hereto.

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companies that can meet either the 2,500 online criterion; the 25,000 e-filed returns criterion; or could simply certify they have the capacity to service their offer, but we believe the number of companies that could qualify is substantial.

In addition to meeting the above standards, entry into the Consortium will be available to companies that also meet all of the following objective requirements:

1. Offer online software approved by the IRS that generates returns that can be sent to the IRS via an IRS-approved channel.
2. Are authorized IRS e-file providers in accord with IRS Rev. Proc. 2000-31.
3. Are in compliance with applicable Treasury/IRS rules, including, but not limited to, 31 C.F.R. Part 10, IRS Rev. Proc. 2000-31, current versions of IRS Publications 1345 and 1345-A, and IRC 7216.
4. Have the competence and capability to deliver on their free offerings, as demonstrated by evidence of prior experience in providing online or electronic filing services, or self-certification.
5. Have security certification from a third party, agreed to by the IRS.
6. Comply with the privacy provisions of 26 U.S.C. 7216, and have privacy certification from a third party agreed to by the IRS.
7. Will not contain or provide links to inappropriate content.
8. Clearly discloses to users the company's customer support options and privacy policy.
9. Agree to have at least one link to the IRS.

There are no prohibitions or limitations on the ability of the Consortium members to compete in the offering of free or paid tax preparation and filing services *outside* the scope of the contemplated business relationship. Members of the Consortium will be free to prepare and file electronic tax returns outside the bounds of the Consortium on a free or paid basis.

The Consortium will be part of an existing non-profit organization established under Section 501(c)(3) of the Internal Revenue Code, The Council for Electronic Revenue Communication Advancement (CERCA).

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## *Offering of Free Services*

The Consortium members and the IRS agree that the key organizational principal for placement on the IRS web site is the breadth of the free services to be offered. This ordering is intended to meet IRS goals of the broadest set of free offerings. Visitors to the web site will be provided with links to the free services offered by the Consortium members. As set out in the Operating Agreement, five "tiers" of services would be offered:

**Tier 1:** offers covering 50% or more of the taxpayer population.

**Tier 2:** offers covering between 35% and 49% of the taxpayer population.

**Tier 3:** offers covering between 20% and 34% of the taxpayer population.

**Tier 4:** offers covering between 10% and 19% of the taxpayer population.

**Tier 5:** "new" offers covering between 10% and 100% of the taxpayer population where the new offeror has neither processed a cumulative total of 2,500 online returns during the previous year, *nor* has processed 25,000 electronically filed tax returns in the previous calendar year. Any Tier 5 company's offer will be rotated within the Tier 1-4 bracket equivalent to the percentage of population its offer covers, while costs and voting rights in the Consortium will be equivalent to its tiering.

Within each tier, each company would be on equal footing. Thus, if two companies in Tier 1 offered free services to 75% and 55% of the taxpayer population respectively, each would be treated equally on the IRS' web site.

## *Discussion of Potential for Anticompetitive Effects*

The members of the Consortium respectfully submit that the business relationship discussed above and in the attached exhibits is not likely to produce any anticompetitive effects. It is critical that the Department carefully consider the impact of implementation of a theoretical government program to provide "free" tax software and electronic filing, paid for by hundreds of millions of dollars in taxpayer-funded development and operational costs, as an alternative to the proposed agreement between industry and government. We believe such a theoretical government program would have an enormous "anticompetitive" effect and would threaten the structure of the entire private sector industry, including small and medium CPA businesses, store-front office businesses that provide tax preparation and electronic filing services, as well as tax software publishers.

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Moreover, the offering of free services through the Consortium, in conjunction with the IRS and in furtherance of important federal policies, will provide substantial public benefits, including the encouragement of market competition for electronic tax preparation and filing services, which the IRS has been charged to encourage by Congress.<sup>6</sup>

First, participation in the Consortium and the availability of services via the IRS web site is intended to be inclusive of all companies with a demonstrated desire, ability and capacity to provide free electronic tax preparation and filing services. Membership will not be limited to the initial companies, but will be structured to encourage new entry by other eligible companies. At the same time, the members and the IRS want to discourage participation by those who do not have an ability or capacity through experience or self-certification to meet minimum requirements since that could harm the reputation of the IRS or offer the public services that are unreliable or of poor quality.

Second, eligibility for entry into the Consortium will be determined by the IRS in accordance with defined standards and requirements designed to ensure the integrity of the electronic filing process and to promote its growth. Thus, these standards will be transparent and non-discretionary. No member of the Consortium will have the ability to foreclose entry by another company on competitive or other grounds. All applicants that meet IRS and Consortium membership standards and pay their portion of the minimal costs the Consortium incurs shall be admitted.

Third, the services to be provided will be offered to taxpayers for free. No Consortium member will gain direct revenue benefits from the federal tax preparation and filing services that are the subject of this letter.

Fourth, the program is intended to facilitate the greater utilization of electronic filing of individual tax returns, a policy objective consistent with the IRS Restructuring and Reform Act of 1998, and will represent a significant effort in achieving the goal of 80% electronically-filed returns by 2007. Moreover, the program would implement one of the President's proposals as set out in the 2003 budget, namely, the increased availability of free electronic filing of tax returns. In expanding on the President's proposals, Treasury Secretary O'Neill said "the best way to accomplish this is by forging a new partnership with existing private sector expertise in the field."

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<sup>6</sup> See Internal Revenue Restructuring and Reform Act of 1998, Sec. 2001(a)(4).

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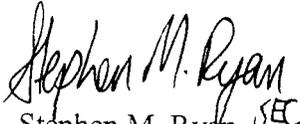
Fifth, within each tier of service, companies will compete with one another in the offering of free services. The IRS web site will provide links to members' web sites on an equal footing, such that no one member's services will be favored over another's. In this manner, the members of the Consortium will continue to compete with one another in the provision of free tax preparation and filing services. Indeed, the government's adoption and support of this approach to expansion of free electronic tax preparation and filing options for taxpayers is consistent with the Congressional mandate to the IRS to act in ways that encourage private sector competition.<sup>7</sup>

### ***Conclusion***

Based on the foregoing and the attached exhibits, the members of the Consortium respectfully request issuance of a business review letter stating that the formation and operations of the Consortium is not likely to produce anticompetitive effects, and that the Department has no present intention of challenging the proposed formation and operations of the Consortium.

If there are any questions or if further information is required, please contact the undersigned at (202) 463-4349, or his partner, Stephen E. Coran, at (202) 463-4310, who are acting on behalf of the proposed Consortium at the direction of CERCA's Executive Director, Michael Cavanagh at (703) 340-1655. It is our intention to share information received from the Department with a broad range of companies that may make offers as Consortium members. Representatives of these companies also can be made available to the Department in some group fashion for a meeting or telephone conference if requested. We are also pleased to provide appropriate points of contact within the IRS and Department of the Treasury who can provide their expertise and knowledge about the proposed arrangements. This staff includes George Wolfe, Deputy General Counsel, Department of Treasury at (202) 622-6362, who can direct you to the IRS and Treasury lawyers with more specific assignments or knowledge, and Terence Lutes of the IRS at (202) 622-7990, the key program official who can direct you to other program personnel.

Sincerely,

  
Stephen M. Ryan *SEC*

cc: (w/encl.): Scott Sacks, Esq.

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<sup>7</sup> *Id.*