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MEMORANDUM FOR ELIZABETH A. BOYD
MARKETING AND BRAND MANAGER, OFFICE OF THE
DIRECTOR, ELECTRONIC TAX ADMINISTRATION

FROM: Stuart W. Endick [/s/swe]
Chief, Ethics & General Government Law Branch
(General Legal Services)

SUBJECT: E-File Marketing Issues

This is in response to your request for guidance in marketing the IRS e-file program through Authorized e-file Providers (Providers). You have explained that the Service's budget for promoting electronic filing of tax returns has been significantly reduced and, as a result, your office is looking at ways to encourage the use of e-file through the Service's Authorized e-file Providers, a group of electronic service vendors and electronic tax return preparers who have applied with the Service to be authorized to file tax returns electronically and who have met the Service's requirements for that purpose and obtained official authorization to do so. Your office is developing e-file promotional packages which you would like to give to the Authorized e-file Providers as a means of assisting them in promoting e-file. You would like to know whether use of the e-file logo is properly authorized, and whether the materials should include advertisement disclaimers explaining that the Service does not endorse the Provider and, if so, what type of disclaimer language might be appropriate. As explained below, Authorized e-file Providers have already been granted permission to use the e-file logo.

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Ethics rules which apply government-wide prohibit a government employee from using her office in a manner that could reasonably be construed to imply that her agency or the government sanctions or endorses the activities of another. 5 C.F.R. § 2635.702(b). Furthermore, absent statutory authority to the contrary, an employee cannot authorize the use of her official title or any authority associated with her public office to endorse any product, service or enterprise. 5 C.F.R. § 2635.702(c). The ethics rules also require that an employee act impartially and not give preferential treatment to any private organization or individual. 5 C.F.R. § 2635.101(b)(8). Nor can the employees create an appearance of acting without impartiality or of giving preferential treatment. 5 C.F.R. § 2635.101(b)(14). Whether an improper appearance exists is determined from the perspective of a reasonable

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person with knowledge of the relevant facts. *Id.* In applying these rules, the Office of Government Ethics has determined that, while endorsements and preferential treatment are generally improper, agencies can associate themselves with a private entity in promoting an authorized Government project even though the private entity obtains some benefit from the agency involvement. See 1995 OGE Lexis 330 (July 10, 1995).

In connection with the exception to the ethics rules on endorsement where statutory authority exists to promote a product, service or enterprise, we note that IRC § 6011(f) provides authority "to promote the benefits of and encourage the use of electronic tax administration programs, as they become available, through the use of mass communications and other means." Further, in the IRS Restructuring and Reform Act, Congress declared that it should be the goal of the Service to have at least 80 percent of all returns filed electronically by the year 2007. Pub. L. 105-206, 112 Stat. 685, § 2001(a)(2) (July 22, 1998). To achieve that goal, Congress directed the Service to cooperate with and encourage the private sector by encouraging competition to increase electronic filing. RRA § 2001(a)(3). In that regard, the Service established uniform, objective criteria through which electronic service providers can be authorized to submit taxpayer returns electronically. <http://www.irs.gov/taxpros/providers/article/0,,id=97657,00.html>. The authority granted to companies to be Authorized e-file Providers is contingent on their compliance with certain standards that are, for the most part, contained in two publications: Publication 3112 (2004) (IRS e-file Application and Participation) and Publication 1345 (2004) (Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns).

Both Publication 3112 and 1345 contain advertising standards. Publication 3112 states:

"IRS e-file" is a brand name. The firms accepted for participation in IRS e-file, EROs, Transmitters, Intermediate Service Providers, Reporting Agents and Software Developers are "Authorized IRS e-file Providers". Acceptance to participate in IRS e-file does not imply endorsement of the software or quality of services provided by the IRS, Financial Management Service (FMS), or Treasury.

Pub. 3112 at 23. The advertising standards also state that Providers must comply with Treasury Department Circular No. 230, 31 C.F.R. Part 10, which covers practice before the IRS and which addresses advertising by persons practicing before the IRS. Circular 230 provides that practitioners cannot engage in advertising that is false, fraudulent, misleading or deceptive and must disclose certain fee information. 31 C.F.R. § 10.30. The standards further state that Providers must adhere to Federal, state, and local consumer protection laws. Pub. 3112 at 23. While a Provider may represent itself as an "Authorized IRS e-file Provider", each Provider is prohibited from using the IRS name within its firm name and from using the IRS logo or any other Treasury logo. *Id.*

Although the advertising standards begin by describing "IRS e-file" as a brand name, they recognize the IRS e-file logo (the words IRS e-file in an oval with a lightning bolt depiction for the hyphen) is not copyrighted. *Id.* The standards instruct that the IRS e-file logo should

be used only to indicate that the Provider offers or has offered e-filing to taxpayers and cannot be used to portray any other relationship between the IRS and the Provider, and cannot be combined with the IRS eagle symbol, or the word "Federal" or other language or symbols that suggest a special relationship between the IRS and the Provider. *Id.*¹ Providers are required to retain for possible IRS review copies of their advertisements until the end of the calendar year following the year in which the advertisement appeared or was broadcast. *Id.* at 24. Publication 1345 focuses on the advertising of refund anticipation loans by Providers. See Pub. 1345 at 45. The advertising standards are silent as to whether Providers must inform their clients and prospective clients that the government does not endorse their products and services.

As discussed above, the Service has statutory authority to promote e-filing and that authority encompasses, we believe, the authority to promote its electronic filing initiatives through the private sector. Under the exception to the ethics rules on improper endorsements (5 C.F.R. § 2635.702(c)), Service officials may allow the authorities associated with the Service to be used by Providers to promote e-file. Further, the Service is not engaged in preferential treatment in associating its official program with certain private sector entities because the Service has objective criteria for granting Authorized e-file Provider status and the Service's public advertising standards clarify that the agency is not endorsing the products or services of the Providers by granting such status. Finally, the Service seeks to avoid a suggestion that offering e-file through Providers constitutes an endorsement by imposing standards which require the Providers not be deceptive (*e.g.*, confuse the public about their relationship with the Service) and which prescribe the use of official government agency names and logos by the Providers. For these reasons, the absence of a disclaimer as to any official endorsement in Provider advertisements promoting e-file would not violate ethics rules prohibiting endorsement and preferential treatment. Further, a reasonable person with knowledge of the relevant facts would not find that Provider e-file advertisements which omit such disclaimers create an appearance of improper endorsement or preferential treatment.



¹ By Directive, Treasury has granted to bureau heads the discretion to determine appropriate uses of the seals and other official insignia of their respective bureaus. See TD 73-04. The advertising standards are consistent with the authority granted by Treasury.

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If you have any questions about this memorandum or if we can provide further assistance, please contact Christine Pembroke of this office at (202) 283-7935.

cc: Carol P. Nachman, Special Counsel, APJP