



March 21, 2008

VIA ELECTRONIC MAIL AND FACSIMILE

CC:PA:LPD:PR (REG-136596-07)
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, DC 20044

Re: Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return, 73 Fed. Reg. 1131 (January 7, 2008)

The Office of Advocacy offers the following comment in response to the above-referenced advance notice of proposed rulemaking (ANPRM) entitled Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection With the Preparation of a Tax Return, published by the Department of Treasury (Treasury) and the Internal Revenue Service (IRS). The ANPRM, if finalized, would affect small businesses that market RALs and other similar products.

Office of Advocacy

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act¹ enhances small business participation in the Federal rulemaking process. Advocacy is an independent entity within the SBA, so the views expressed herein by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the RFA. On August 13, 2002, President Bush underscored the importance of agency compliance with the RFA and Advocacy's role in giving a voice to small businesses in the rulemaking process when he signed Executive Order 13272 (E.O. 13272), titled "Proper Consideration of Small Entities in Agency Rulemaking."

Background

The ANPRM details rules that Treasury and the IRS are considering for a proposed regulation that would separate the act of return preparation from the act of marketing or purchasing certain

¹ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq).

financial products. The proposal that Treasury and the IRS are contemplating would prohibit the use of information obtained by a tax return preparer, obtained during the tax-preparation process, for the purpose of marketing a RAL or similar products or services. Treasury and the IRS are considering this proposed regulation because of their concern that tax advisors or tax return preparers will inappropriately maximize refunds when preparing tax returns in order to benefit directly from their clients' use of a RALs or similar products or services.

RFA Responsibilities for Proposed Rules

When an agency is developing a regulation and determines that the RFA applies then the agency must determine whether a certification of the rule is appropriate or whether an initial regulatory flexibility analysis (IRFA) is required. When an agency certifies under the RFA the agency states that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA an agency must provide a factual basis in support of the certification. At a minimum the factual basis should include: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.²

Alternatively, if an agency cannot properly certify the proposed rules, then an IRFA must be developed and published in the *Federal Register* with a period for notice and comment. An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.³

Recommendations

To comply with the RFA, Treasury and the IRS can do one of two things when developing the proposed rules related to RALs. Treasury and the IRS can develop the rules so that the notice of proposed rulemaking does not have a significant economic impact on a substantial number of small entities and then certify the rules with a factual basis. Alternatively, if Treasury and the IRS will not be able to properly certify the proposed rules, then an IRFA must be developed and published in the *Federal Register* with a period for notice and comment.

Advocacy is committed to helping Treasury and the IRS comply with the RFA in the development of the proposed rules related to RALs. Accordingly, Advocacy stands ready to assist Treasury and the IRS in the completion of the factual basis for the certification, or in the completion of an IRFA.

² 5 USC § 605(b)

³ 5 USC § 603

Conclusion

Advocacy looks forward to working with Treasury and the IRS. If you have any questions or require additional information please contact Assistant Chief Counsel for Dillon Taylor at (202) 401-9787 or by email at Dillon.Taylor@sba.gov. Thank you for this opportunity to contribute to the record.

Sincerely,

/s/

Thomas M. Sullivan
Chief Counsel for Advocacy

/s/

Dillon Taylor
Assistant Chief Counsel for Tax

cc: The Honorable Eric Solomon, Assistant Secretary (Tax Policy), United States
Department of the Treasury
The Honorable Donald Korb, Chief Counsel, Internal Revenue Service