

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-136596-07]

RIN 1545-BH12

Guidance Regarding Marketing of Refund Anticipation Loans (RALs) and Certain Other Products in Connection with the Preparation of a Tax Return

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: This document describes rules that the Treasury Department and the IRS are considering proposing, in a notice of proposed rulemaking, regarding the disclosure and use of tax return information by tax return preparers. The rules would apply to the marketing of refund anticipation loans (RALs) and certain other products in connection with the preparation of a tax return and, as an exception to the general principle that taxpayers should have control over their tax return information that is reflected in final regulations published in T.D. 9375 which is published elsewhere in this issue of the **Federal Register**, provide that a tax return preparer may not obtain a taxpayer's consent to disclose or use tax return information for the purpose of soliciting taxpayers to purchase such products. This document invites comments from the public regarding these contemplated rules. All materials submitted will be available for public inspection and copying.

DATES: Written or electronic comments must be received by April 7, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-136596-07), Room 5203,

Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-136596-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-136596-07).

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, Kelly Banks at (202) 622-7180; concerning the proposals, Lawrence Mack at (202) 622-4940 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### **Background**

This document describes rules that the Treasury Department and the IRS are considering proposing in a notice of proposed rulemaking regarding the marketing of refund anticipation loans (RALs) and certain other products identified below in connection with the preparation of a tax return.

The proposed rules would amend the Regulations on Procedure and Administration (26 CFR Part 301) under section 7216 of the Internal Revenue Code. Section 7216 was enacted by section 316 of the Revenue Act of 1971, Public Law 92-178 (85 Stat. 529, 1971), and has been amended several times since 1971. Section 7216 imposes criminal penalties on tax return preparers who knowingly or recklessly make unauthorized disclosures or uses of information furnished to them in connection with the preparation of an income tax return. In addition, tax return preparers are subject to civil penalties under section 6713 for disclosure or use of this information unless an exception under the rules of section 7216(b) applies to the disclosure or use.

A notice of proposed rulemaking (REG-137243-02) was published in the **Federal Register** (70 FR 72954) on December 8, 2005. Concurrent with publication of the proposed regulations, the IRS published Notice 2005-93, 2005-52 I.R.B. 1204 (December 07, 2005), setting forth a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of consents to use and consents to disclose tax return information under §301.7216-3.

Among other recommendations received in response to the notice of proposed rulemaking published on December 8, 2005, a number of commentators recommended that the regulations prohibit or substantially restrict the disclosure or use of tax return information for marketing purposes. As described in the preamble of the final regulations published in T.D. 9375 which is published elsewhere in this issue of the **Federal Register**, these commentators specifically recommended banning tax return preparers from disclosing or using tax return information for the purpose of soliciting refund anticipation loans (RALs) and similar products. The Treasury Department and the IRS did not adopt this recommendation in the final regulations that are being published concurrently with this ANPRM because of the significant policy issues that need to be considered and because they had not previously proposed a rule regarding the use or disclosure of tax return information for purposes of marketing of RALs and similar products.

This ANPRM addresses two major areas of concern that have been raised and describes rules that the Treasury Department and the IRS are considering proposing regarding the marketing of RALs and certain other products identified below in connection with the preparation of a tax return. It also solicits comments on specific

issues as described herein.

Concerns Raised by RALs and Certain Other Products

Financial Incentive To Inflate Refunds

The Treasury Department and the IRS are concerned that RALs and certain other products may provide tax preparers with a financial incentive to take improper tax return positions in order to inappropriately inflate refund claims. In general, RAL amounts are capped by the amount of the refund claimed on a tax return. Therefore, a preparer who inappropriately inflates the amount of a refund is able, directly or indirectly through arrangement with a RAL provider, to collect a higher fee. Additionally, a significant number of RALs are made to taxpayers who claim the earned income tax credit (EITC). The Treasury Department and the IRS are concerned that the financial benefits of selling a RAL to a taxpayer can create an incentive for the preparer to not fully comply with due diligence requirements designed to ensure the accuracy of EITC claims. See section 6695(g).

Even when a flat fee is charged for RALs, it may be possible that a financial incentive to inappropriately inflate the amount of a refund exists. As an example, some merchants who offer tax preparation services may encourage customers to obtain RALs and spend the funds on the merchant's products or services. To the extent that the preparer prepares a return that claims an inappropriately large refund, the taxpayer is enabled to purchase more of the merchant's products or services.

The Treasury Department and the IRS are concerned that overall tax compliance suffers when tax advisors or tax preparers benefit directly from maximizing a refund in preparing a tax return. Treasury Department Circular 230 restricts the ability of tax

practitioners to charge contingent fees in certain circumstances when there are tax administration concerns. See 31 C.F.R. § 10.27. The Treasury Department and the IRS are considering whether similar restrictions should be placed on use or disclosure of tax return information by preparers who receive a financial benefit from the sale of an ancillary product, such as a RAL, rather than directly from the determination of a taxpayer's tax liability.

There are two other products that potentially raise similar concerns – refund anticipation checks (RACs) and audit insurance. A RAC is a post-refund product that allows taxpayers to pay for return preparation services out of their refunds. As with a RAL, a taxpayer will only qualify to purchase a RAC if a refund is claimed on the return. Audit insurance is a type of insurance that covers professional fees and other expenses incurred in responding to or defending against an audit by the IRS. Taxpayers who purchase audit insurance may be encouraged to take aggressive tax reporting positions if they believe the insurance will provide protection against the risk of an adjustment. The Treasury Department and the IRS generally believe that arrangements that create financial incentives for taxpayers or tax preparers to exploit the audit selection process undermine tax compliance.

#### *Potential for Inappropriate Use by Tax Preparers*

In responding to the proposed regulations, some commentators expressed concern that tax preparers are inappropriately profiting from marketing RALs and certain other products to relatively unsophisticated taxpayers who do not comprehend the full costs of the products. These commentators noted that RALs are marketed primarily to low-income taxpayers who receive the EITC, that these taxpayers generally have

relatively low levels of financial expertise, and that these taxpayers are more likely than other taxpayers to rely on the advice of their preparers. These commentators urged the IRS to amend the proposed regulations to protect these taxpayers from exploitation. The National Taxpayer Advocate also expressed similar concerns. See National Taxpayer Advocate FY 2007 Objectives Report to Congress, vol. II, *The Role of the IRS in the Refund Anticipation Loan Industry*, at 18 (June 30, 2006).

As a general rule, the Treasury Department and the IRS believe that taxpayers should have the ability to control the use or disclosure of their tax return information. Taxpayer control, however, must be balanced against the ability of the government to effectively administer the internal revenue laws, which includes guarding against (1) the potential lessening of tax compliance, (2) the potential exploitation of taxpayers described by certain commentators, and (3) the potential existence of inappropriate financial incentives for tax preparers to inflate tax refunds.

#### Explanation of Contemplated Rules

Sections 7216 and 6713 provide a broad prohibition against the disclosure and use of tax return information by return preparers. Statutory exceptions are provided for a “disclosure” pursuant to any other provision of the Internal Revenue Code or an order of a court and for a “use” by a preparer to assist the taxpayer in preparing his or her state and local tax returns and declarations of estimated tax. The statutory language also authorizes the Secretary to prescribe regulations permitting additional exceptions. Thus, tax return preparers may use or disclose tax return information beyond the statutory exceptions only if, and to the extent that, Treasury regulations expressly authorize such acts.

Among other exceptions, the regulations under section 7216 generally provide that preparers may use or disclose tax return information if the taxpayer provides consent. As a general rule, taxpayers should have the ability to control the use or disclosure of their tax return information. To address the tax administration concerns described above, the Treasury Department and the IRS are considering proposing regulations that would create an exception from the general consent framework prescribed by §301.7216-3 for RALs, RACs, audit insurance, and similar products. This exception would effectively separate the act of return preparation from the act of marketing or purchasing certain financial products by prohibiting the use of information obtained during the tax-preparation process for the non-tax administration purpose of marketing: (i) a RAL or a substantially similar product or service; (ii) a RAC or a substantially similar product or service; or (iii) audit insurance or a substantially similar product or service.

#### Proposed Effective Date

The Treasury Department and the IRS anticipate that these new proposed rules would apply for returns filed on or after January 1<sup>st</sup> of the year following the date of publication in the **Federal Register** as final or temporary regulations.

#### **Request for Comments**

Before a notice of proposed rulemaking is issued, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

Specifically, comments are encouraged on the following questions:

1. If RALs and certain other products create a direct financial incentive for preparers to inflate tax refunds, are there alternative approaches that would eliminate or reduce this incentive?
2. If the marketing of RALs and certain other products exploit or have the potential to exploit certain taxpayers, is the approach described in this ANPRM better viewed as protecting taxpayers from exploitation or as restricting taxpayers' ability to control their tax return information? If the latter, is there an alternative approach that would address the concerns described above?
3. Should RACs be treated the same way as RALs and audit insurance, or do RACs present lesser concerns?
4. Are there other products that present significant concerns for tax compliance or taxpayer exploitation that should be addressed by regulation?

### **Drafting Information**

The principal author of this advance notice of proposed rulemaking is Dillon Taylor, formerly of the Office of the Associate Chief Counsel (Procedure and Administration). For further information, contact Lawrence Mack of the Office of Associate Chief Counsel (Procedure and Administration) at 202-622-4940 (not a toll-free call).

/s/ Linda E. Stiff

Deputy Commissioner for Services and Enforcement.