

United States Senate

WASHINGTON, DC 20510

November 13, 2019

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Commissioner Rettig:

We are alarmed by new reports that members of the Free File Alliance (FFA) continue to use tricks and traps to charge low- and moderate-income families fees to file their taxes and concerned that despite assurances to the contrary, the Internal Revenue Service (IRS) continues to ignore the serious flaws and conflicts of interest in the program. Less than three percent of eligible taxpayers file their taxes for free through the program, and according to recent reports, this appears to be because the for-profit tax preparation companies that are members of FFA have taken deliberate steps to steer eligible customers toward their paying products. The IRS's continued refusal to police the bad faith efforts by participants in the Free File program to scam customers, which have now cumulatively cost millions of taxpayers millions of dollars¹, demonstrates that the only way for the agency to fulfill its commitment to free tax filing services for low- and moderate-income filers is to provide that service directly.

According to a report last month from ProPublica, Intuit, the owner of TurboTax and the largest participant in the Free File program, has used design tricks known as "dark patterns" to push customers eligible for Free File into paying more to file their taxes by "tap[ping] into Americans' fear, uncertainty and doubt about the tax filing process."² A subsequent ProPublica report revealed that in the fall of 2018 – just days before the IRS Advisory Council was set to publish a "blistering" report concluding that "deficient oversight and performance standards for the Free File program put vulnerable taxpayers at risk" – IRS officials secretly extended the program for a full year, with no public negotiations or discussions.³

These new allegations are the latest manifestation of Intuit's twenty year-long battle to prevent the IRS from providing services directly to taxpayers for free, including by "manufacturing '3rd party grass roots' [sic] support;" "buy[ing] ad[s] for op-eds/editorials/stories

¹ MITRE Corporation, "Independent Assessment of the Free File Program," October 3, 2019, pp. xi, https://www.irs.gov/pub/newsroom/01_free-file-program-assessment-100319.pdf.

² ProPublica, "Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free," Justin Elliott and Paul Kiel, October 17, 2019, <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

³ ProPublica, "The IRS Tried to Hide Emails That Show Tax Industry Influence Over Free File Program," Justin Elliott and Paul Kiel, October 29, 2019, <https://www.propublica.org/article/the-irs-tried-to-hide-emails-that-show-tax-industry-influence-over-free-file-program>.

in African American and Latino media;” and launching several products it confusingly marketed as free, when they cost many filers hundreds of dollars.⁴ As a result of these efforts, and aggressive lobbying, the IRS has given Intuit and the other FFA participants unprecedented control over the operation of the Free File program.

We have written to you in the past about the IRS’s inability or unwillingness to fix the structural flaws in the Free File program, and the need to implement return-free filing in order to save taxpayers time and money. In May 2019, Senators wrote to express alarm that FFA members were inserting code into their Free File websites to hide them from search engine results, and asked you to remove tax preparation companies participating in these misleading practices from the program, and refund consumers who were steered into paying for products that should have been free.⁵ In 2016, Senator Warren’s office released Tax Maze, a report outlining how the IRS has prioritized the interests of the tax preparation industry over American taxpayers — a pattern which the agency has, disappointingly, doubled down on in the years since.⁶

You have called Free File “an important tool”⁷ that you want to “have unparalleled integrity”⁸ and said the IRS is “committed to improving the Free File program.”⁹ In a May 23, 2019 letter to Senator Warren’s office, you wrote that the IRS is “committed to ensuring that low-income taxpayers can electronically file for free.”¹⁰

Yet the IRS, under your leadership, continues to allow taxpayers to get scammed. In response to our inquiries, you assured Senator Warren that the IRS would hire an outside contractor “to provide a thorough, independent review” of the Free File program.¹¹

The subsequent report, which was written by the MITRE Corporation, was released last month. This report confirmed many of the key criticisms of the Free File program: its low utilization rate, the fact that companies are deliberately hiding their free program offerings from the public, and the failure by the IRS to conduct adequate oversight of the program. MITRE reported that the IRS “has not conducted a customer survey since 2009;” “the number of returns

⁴ ProPublica, “Inside TurboTax’s 20-Year Fight to Stop Americans From Filing Their Taxes for Free,” Justin Elliott and Paul Kiel, October 17, 2019, <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

⁵ Letter from Senator Elizabeth Warren to IRS Commissioner Charles P. Rettig, May 2, 2019, <https://www.warren.senate.gov/imo/media/doc/2019.05.02%20Letter%20to%20IRS%20on%20Free%20File%20Abuses1.pdf>.

⁶ Office of Senator Elizabeth Warren, “Tax Maze: How the Tax Prep Industry Blocks Government from Making Tax Day Easier,” April 2016, https://www.warren.senate.gov/files/documents/Tax_Maze_Report.pdf.

⁷ Internal Revenue Service, “IRS Free File Opens Today in Advance of Tax Season,” press release, January 11, 2019, <https://www.irs.gov/newsroom/irs-free-file-opens-today-in-advance-of-tax-season>.

⁸ Bloomberg Tax, “IRS Hiring Consultant After Uproar Over Free File Program,” Allyson Versprille, May 22, 2019, <https://news.bloombergtax.com/daily-tax-report/irs-hiring-consultant-after-uproar-over-free-file-program>.

⁹ Internal Revenue Service, “IRS, Free File Alliance Announce Changes to Improve Program; Improved Taxpayer Options Available for 2019 Free File Program,” press release, November 2, 2018, <https://www.irs.gov/newsroom/irs-free-file-alliance-announce-changes-to-improve-program-improved-taxpayer-options-available-for-2019-free-file-program>.

¹⁰ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, May 23, 2019. [on file with Senator Warren’s office]

¹¹ *Id.*

submitted through Free File have not increased in the same way that e-file numbers have;” 85% of web traffic searching for free tax filing led a user to a paid search result for a FFA member site; “different company offerings create confusion as a taxpayer navigates the various choices;” and “improvements could be made to enhance the user experience.”¹² But the report’s conclusions and recommendations are irredeemably flawed. Inexplicably, this supposedly objective investigation frames these serious problems disingenuously and in an overtly industry-friendly way, handing the IRS a guidebook for how to excuse and ignore the program’s most egregious failures. Indeed, the report begins with an “assum[ption] that industry will continue to be the entity that provides free tax return preparation and filing offerings to taxpayers” – rigging the conclusion before the report was even written.¹³

For example, the report spins failed oversight of the Free File program as a “lack of public awareness” about how public-private partnerships work – falsely suggesting that the structure of the program, rather than causing the problems identified by MITRE and others, somehow absolves or excuses the program from public accountability.¹⁴ The report recommends that the IRS use “talking points” about public-private partnerships “when addressing critics or publicly discussing the program” – suggesting empty words as an alternative to meaningful oversight and accountability.¹⁵

The investigation confirms that FFA companies deliberately hid Free File from taxpayers in order to steer them to paid products – but then “[does] not take a position” on “whether this is a deceptive business practice,” only recommending that the IRS decide if the agency should “determine their position” on this practice and update the FFA-IRS Memorandum of Understanding (MOU) accordingly.¹⁶

Even worse, the report goes to nearly-heroic efforts to whitewash the key objective failure of the program – that it only reaches less than three percent of eligible taxpayers. But instead of attempting to provide recommendations to solve this problem, the report again misstates the problem as an excuse, concluding that the majority of the 97% of eligible taxpayers who were forced to use non-Free File alternatives (paid tax preparers, Volunteer Income Tax Assistance [VITA], or non-Free File do-it-yourself software), and those who sought refund anticipation checks (RAC) or refund anticipation loans (RAL), should not be included in the “actual pool of candidates for the Free File program.”¹⁷ Cooking the numbers in this way allows the report to claim the program usage percentage is really nine percent¹⁸ – when, in fact, it is 2.6 percent.¹⁹

MITRE then suggests that this bizarre assertion regarding potential program users should be adopted as a permanent metric to track Free File’s success. The report takes the program’s

¹² MITRE Corporation, “Independent Assessment of the Free File Program,” October 3, 2019, pp. xvi-xx, https://www.irs.gov/pub/newsroom/01_free-file-program-assessment-100319.pdf.

¹³ *Id.*, pp. vi.

¹⁴ *Id.*, pp. xviii.

¹⁵ *Id.*

¹⁶ *Id.*, pp. vi.

¹⁷ *Id.*, pp. x.

¹⁸ *Id.*, pp. xvii.

¹⁹ *Id.*, pp. xi.

greatest failure and, rather than providing recommendations on how to fix it, uses it to justify abandoning eligible taxpayers who were tricked by abusive FFA member practices in the past.

Despite Free File's serious and well-documented failures, the report makes the extraordinary suggestion that Free File has been a success. It states the "program objective of providing the venue for free tax filing for 70% of the population has been met" — even though less than three percent of eligible taxpayers have been able to access and use those services.²⁰ Ultimately, the report contains not a single recommendation on how to fix the program to ensure that it achieves its objective of "extending the benefits of online federal tax preparation and electronic filing to economically disadvantaged and underserved populations at no cost to either the individual user or to the public treasury."²¹ Indeed, MITRE did not even interview one of the millions of taxpayers who make up 97% of eligible filers who did not use the program.²²

In order to better understand your commitment to providing eligible taxpayers with free filing options, addressing egregious abuses by Free File Alliance member companies, and conducting a serious, unbiased assessment of the Free File program, we ask that you provide answers to the following questions no later than November 27, 2019:

1. In your May 23, 2019 letter to Senator Warren, you stated, "a senior leadership team was assembled to review the current Free File Program."²³
 - a. When was this team assembled?
 - b. Who was on the team?
 - c. What was the agenda and charge given to this team?
 - d. What were the findings of this leadership team?
 - e. Why did the team decide to hire a contractor to review the program when the IRS Advisory Council had already produced feedback on the program at IRS' behest?²⁴

2. In your May 23, 2019 letter to Senator Warren, you stated your senior leadership team "decided to hire an outside contractor to provide a thorough, independent review of the websites of FFA companies, the validity of the allegations, and the MOU and to make recommendations for improvements."²⁵ In your October 8, 2019 letter to Senator Warren, you stated you had commissioned a company to conduct an assessment, and described the purpose as "conduct[ing] an unbiased third-party

²⁰ MITRE Corporation, "Independent Assessment of the Free File Program," October 3, 2019, pp. xvi, https://www.irs.gov/pub/newsroom/01_free-file-program-assessment-100319.pdf.

²¹ Internal Revenue Service, "Eighth Memorandum of Understanding on Service Standards and Disputes, Between the Internal Revenue Service and Free File, Incorporated," October 2018, <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf>.

²² MITRE Corporation, pp. iii-v.

²³ *Id.*, pp. vi.

²⁴ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, May 23, 2019. [on file with Senator Warren's office]

²⁵ ProPublica, "Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free," Justin Elliott and Paul Kiel, October 17, 2019, <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

²⁶ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, May 23, 2019. [on file with Senator Warren's office]

review of the program in its current state and to develop recommendations to enhance the program.”²⁶

- a. How much was MITRE paid for the review and report?
 - b. What specific parameters did you use to solicit the award for this assessment? Please provide the Request for Proposal and any supporting documentation.
 - c. How many applications did you receive for this grant?
 - d. What specific parameters did you use to evaluate the applications for this grant and to make the award?
 - e. Did any IRS officials consult with a representative of the Free File Alliance or its members regarding the parameters of this report? If so, what was the nature of these consultations?
 - f. Please provide any written exchanges between IRS and MITRE Corporation related to this award and the Free File program between May 23, 2019 and October 8, 2019.
 - g. Please provide documentation of any additional instructions for the assessment in addition to the Request For Proposal, including purpose, scope, and limitations.
 - h. Why did the IRS instruct the contractor to conduct the assessment under the assumption “that industry will continue to be the entity that provides free tax return preparation and filing offerings to taxpayers”?²⁷
3. The MITRE report claims that “according to IRS leadership, its focus for free file is less about target number of participants, and more about maximizing awareness to ensure people recognize it is a choice.”²⁸
- a. Who in IRS leadership made this assertion to MITRE Corporation, and how was it communicated?
 - b. When did IRS make this decision about the focus of the Free File program, and what was the basis for this decision?
 - c. Why did the IRS make a decision about its focus for the program before having the program independently evaluated?
4. In your October 8, 2019 letter to Senator Warren, you stated the IRS will “move forward with several recommendations contained in the [MITRE] report.”²⁹
- a. Which recommendations is the IRS planning to implement?
 - b. The report recommends excluding individuals who used a paid tax preparer, used paper filing, went to VITA, received RACs or RALs, or used non-Free File do-it-yourself software in calculating the pool of eligible Free File users. Do you agree that it is appropriate to exclude more than 70% of eligible taxpayers when assessing the utility of the Free File Program?

²⁶ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, October 8, 2019. [on file with Senator Warren’s office]

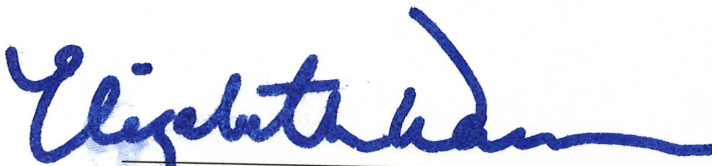
²⁷ MITRE Corporation, “Independent Assessment of the Free File Program,” October 3, 2019, pp. vi, https://www.irs.gov/pub/newsroom/01_free-file-program-assessment-100319.pdf.

²⁸ *Id.*, pp. xvi.


²⁹ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, October 8, 2019.

5. The IRS Advisory Council report from November 2018 includes 14 recommendations, including an annual independent audit of each member of the FFA.³⁰
 - a. Is the IRS planning to adopt this recommendation? Why or why not?
6. For each of the other 13 IRS Advisory Council report recommendations please provide:
 - a. A date by which you expect to have the recommendation implemented.
 - b. If you are not implementing a particular recommendation, an explanation for your failure to do so.
7. In your October 8, 2019 letter to Senator Warren, you stated the IRS is “identifying short-term and long-term negotiation items” for the Free File program.³¹
 - a. Who is involved in identifying these negotiation items?
 - b. What is the timeline for identifying these negotiation items?
 - c. What information is IRS using to develop these negotiation items?
 - d. When is IRS planning to begin negotiating with the Free File Alliance?
 - e. Who will be negotiating on behalf of the IRS?
 - f. Is the IRS planning to consider removing FFA members with especially egregious records of scamming consumers from the program?
8. Why did the IRS agree to sign a new MOU with FFA in Fall of 2018, two years before the current MOU expired?
 - a. Who negotiated the current MOU on behalf of the IRS?
 - b. Please provide all emails between the personnel identified in your office, and the IRS communications office, regarding the timing of the announcement of the new MOU.
 - c. Was any IRS official aware of the findings of and pending public release of the IRS Advisory Council report at the time the MOU was renewed?
 - d. If so, what efforts did IRS officials make to address the IRS Advisory Council concerns in the MOU?

Sincerely,



Elizabeth Warren
United States Senator



Sherrod Brown
United States Senator

³⁰ Internal Revenue Service, “Internal Revenue Service Advisory Council Public Report,” November 2018, pp. 17, <https://www.irs.gov/pub/irs-pdf/p5316.pdf>.

³¹ Letter from IRS Commissioner Charles P. Rettig to Senator Elizabeth Warren, October 8, 2019 [on file with Senator Warren’s office.]