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The Fix Was In: Mitre’s ‘Independent’ Review of Free File

by Dennis J. Ventry Jr.



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In this report, Ventry analyzes Mitre Corp.’s review of the IRS Free File program. He argues that Mitre’s lack of professional distance from the IRS prevented it from delivering an independent report. He

discusses how Mitre found a majority of Free File Alliance (FFA) companies hid their Free File websites from eligible Free File users, and lured them to commercial sites. He shows how Mitre reinforced the view that FFA companies participate in Free File for economic gain rather than “philanthropy,” and warned the IRS against challenging the “free-to-fee” model. Mitre’s warning was unnecessary, Ventry concludes, because the IRS is complicit in the FFA’s actions.

Introduction

Last year, a firestorm engulfed the IRS Free File program. Investigative news reports revealed that members of the Free File Alliance (FFA) — the consortium of tax return preparation software firms partnering with the IRS to offer free return filing to 70 percent of taxpayers — were actively undermining Free File participation. Such behavior violated provisions of the memorandum of understanding between the IRS and the FFA,¹ an agreement into which the parties entered “intending to be legally bound.”² It also potentially constituted unfair and deceptive trade practices and unfair methods of competition under federal and state law.³ Highlights of the violative behavior included:

- Intuit — the maker of TurboTax, a founding member of the FFA, and the return preparation firm with the industry’s largest market share⁴ — used deceptive web design and misleading advertising known as “dark patterns” to trick low-income taxpayers into paying to file their taxes, even though they were eligible to file for free with Free File.⁵
- Intuit and H&R Block deliberately hid their Free File offers from eligible Free File users by adding code to their Free File websites, which had the effect of preventing those

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¹ See *infra* notes 64-66 and accompanying text for specific examples of how FFA companies violated the MOU.

² Eighth Memorandum of Understanding on Service Standards and Disputes Between the Internal Revenue Service and Free File Inc., at preamble (Oct. 31, 2018).

³ See *infra* notes 11-22 and 185-196 and accompanying text.

⁴ See Michael Cohn, “Tax Reform Had Little Impact on Tax Prep. Market Share, Says Moodys,” *Accounting Today*, Apr. 29, 2019 (showing Intuit with a 30 percent share of all e-filing and H&R Block with a 16 percent share).

⁵ See Justin Elliott and Lucas Waldron, “Here’s How TurboTax Just Tricked You Into Paying to File Your Taxes,” *ProPublica*, Apr. 22, 2019.

websites from appearing in online search results.⁶

- A subsequent study conducted by congressional staffers found that three additional FFA companies — TaxSlayer, FreeTaxUSA, and 1040.com — engaged in the same obstructive behavior.⁷
- Intuit and H&R Block deliberately and tactically steered low-income taxpayers from free products (including Free File) to paid products.⁸
- In defending his company hiding its Free File product from eligible Free File users, Intuit's CEO said it was merely acting "in the best interest of taxpayers" by steering them to "educational content" rather than to Intuit's Free File offer.⁹
- Intuit promoted a "military discount" under its commercial version of TurboTax and then charged service members for return prep services, even though they would have otherwise been eligible to file for free under Intuit's Free File product.¹⁰

In response to these and other revelations, prominent members of Congress asked the Federal Trade Commission to investigate whether Intuit, H&R Block, and other FFA companies' behavior constituted "unfair and deceptive practices or unfair methods of competition, and to determine if these companies may have entered into an illegal agreement to do so."¹¹

The Treasury Inspector General for Tax Administration opened its own examination of the Free File program.¹² Treasury Inspector General J. Russell George told Congress in September that TIGTA's audit of the IRS's

administration of Free File was motivated by concerns that "taxpayers eligible for the program were being charged for returns or being diverted to preparation services that are not free."¹³

States, cities, and counties also undertook investigations of the Free File program and the business practices of FFA companies, some in the form of litigation. At the behest of New York Gov. Andrew Cuomo (D), the New York State Department of Financial Services initiated an inquiry into four FFA companies, including Intuit and H&R Block, over possible violations of the state's unfair and deceptive trade practices law.¹⁴ In addition, the Los Angeles city attorney filed separate suits against Intuit and H&R Block alleging the companies violated California's Unfair Competition Law.¹⁵ As alleged, Intuit and H&R Block "defrauded the lowest earning 70 percent of American taxpayers . . . by actively undermining public access to the IRS's 'Free File' program, while simultaneously employing deceptive and misleading advertising and design schemes intended to induce taxpayers into unnecessarily purchasing expensive products."¹⁶ Santa Clara County filed its own suit against Intuit under California's false and deceptive advertising law alleging that Intuit made "false or misleading statements about TurboTax and taxpayers' ability to file their taxes for free, by causing such statements to be made and disseminated to the public, and by making statements that taxpayers could use TurboTax for free with the intent to charge most of those taxpayers to use TurboTax and/or to sell a different service than advertised."¹⁷

Lawsuits brought by individual California residents (some purporting to represent a class of similarly situated Californians) were also filed

⁶ See Elliott, "TurboTax Deliberately Hid Its Free File Page From Search Engines," *ProPublica*, Apr. 26, 2019.

⁷ Letter to Federal Trade Commission from Elizabeth Warren et al. (May 2, 2019) (describing congressional staff study, which found five FFA companies hid Free File sites from searches).

⁸ See Elliott and Paul Kiel, "TurboTax and H&R Block Saw Free Tax Filing as a Threat — and Gutted It," *ProPublica*, May 2, 2019.

⁹ Elliott and Waldron, "Intuit CEO in Internal Video: Hiding Free TurboTax Was in 'Best Interest of Taxpayers,'" *ProPublica*, May 15, 2019.

¹⁰ Elliott and Kengo Tsutsumi, "TurboTax Uses a 'Military Discount' to Trick Troops Into Paying to File Their Taxes," *ProPublica*, May 23, 2019.

¹¹ Letter to FTC, *supra* note 7.

¹² Elliott, "Senior IRS Leaders Launch Review of Agency's Partnership With TurboTax and H&R Block," *ProPublica*, May 6, 2019 (reporting TIGTA as "launching an audit of the Free File program").

¹³ Testimony of George before the House Appropriations Subcommittee on Financial Services and General Government, at 7-8 (Sept. 24, 2019).

¹⁴ Paige Jones, "New York Investigates Companies Over Free File Allegations," *Tax Notes Federal*, May 20, 2019, p. 1250.

¹⁵ See *People of the State of California v. Intuit Inc.*, No. 19STCV15644 (Cal. Super. Ct., L.A. County, May 6, 2019); and *People of the State of California v. H&R Block Inc.*, No. 19STCV15752 (Cal. Super. Ct., L.A. County, May 6, 2019). For California's unfair competition law, see Cal. Bus. & Prof. Code section 17200 et seq.

¹⁶ *Intuit*, No. 19-cv-354178, at 1; and *H&R Block*, No. 19STCV15752, at 1.

¹⁷ *Intuit*, No. 19-cv-354178, at 22-23.

against Intuit. These suits alleged violations of California's unfair competition law,¹⁸ Consumers Legal Remedies Act,¹⁹ false advertising law,²⁰ and general claims of fraud and unjust enrichment. Some of these suits have been consolidated into a large putative class action that is proceeding in federal court in the Northern District of California.²¹ Others have been dismissed, stayed, or are pending.²²

Meanwhile, the Free File controversy threatened to derail the Taxpayer First Act of 2019 (TFA),²³ a bipartisan, bicameral tax administration bill that was two years in the making and passed the House in early April 2019.²⁴ The TFA contained a provision that would have codified the IRS Free File program and made it a permanent part of the IRC.²⁵ Critics of the provision worried that codification would prevent the IRS from walking away from the Free File partnership or developing its own in-house, free e-filing program,²⁶ an option that the agency had enjoyed since the program's inception in 2002.²⁷ Meanwhile, supporters of the TFA (even if not supporters of Free File) insisted that the bill did not prohibit the IRS from developing

alternatives to Free File.²⁸ To avert having the standoff scuttle the bill altogether,²⁹ legislators stripped out the offending Free File provision,³⁰ preserved the other 45 provisions, and passed a restyled TFA³¹ in late June.³² On July 1 the president signed the bill into law.³³

Amidst the backlash to FFA companies' potentially illegal behavior and doubtful commitment to the success of the Free File program, the IRS defended its private sector partners. "Free File has been a successful program and partnership that's benefited millions of taxpayers," the agency said, even after reports surfaced that FFA companies deliberately hid their Free File sites from eligible Free File taxpayers searching for Free File products.³⁴

But even the IRS could not ignore the parade of horrors. In early May the agency announced it was assembling a "senior leadership team . . . to review the current Free File program" and would "take fast action to ensure the integrity of the program."³⁵ Weeks later, IRS Commissioner Charles Rettig reiterated the agency's commitment to "taking a hard look at every facet" of the program as a way to assure taxpayers that Free File has "unparalleled integrity."³⁶ An "independent consultant" would be selected to conduct an "independent review," and to leave no stone unturned while bringing a critical eye to the program.³⁷ Observers were heartened by the announcement, including key members of Congress who pressed the IRS to seek a full and complete investigation of Free File and FFA

¹⁸ *Intuit*, No. 19-cv-354178; *H&R Block*, No. 19STCV15752. For California's unfair competition law, see Cal. Bus. & Prof. Code section 17200 et seq.

¹⁹ See Cal. Civ. Code section 1750 et seq.

²⁰ See Cal. Bus. & Prof. Code section 17500 et seq.

²¹ See Consolidated Class Action Complaint, Demand for Jury Trial, *In re Intuit Free File Litigation*, No. 3-19-cv-02546 (N.D. Cal. 2019).

²² See, e.g., *Macklin v. Intuit Inc.*, No. 19-cv-347208 (Cal. Super. Ct., Santa Clara County, 2019) (stayed); and *Callaway v. Intuit Inc.*, No. 19-cv-354484 (Cal. Super. Ct., Santa Clara County 2019) (dismissed without prejudice).

²³ H.R. 1957, Taxpayer First Act of 2019 (TFA 2019).

²⁴ Stephen K. Cooper and Fred Stokeld, "House Approves IRS Reform Measure Despite Free File Fight," *Tax Notes*, Apr. 15, 2019, p. 471.

²⁵ See TFA 2019, *supra* note 23, at section 1102, "IRS Free File Program."

²⁶ See, e.g., Cooper and Stokeld, *supra* note 24 (quoting Rep. Alexandria Ocasio-Cortez, D-N.Y.); Rep. Sean Casten, D-Ill., press release, "Casten Statement: Fighting for Free Tax Filing Services" (Apr. 10, 2019); and Jeff Stein and Rachael Bade, "House Backs Bill Barring IRS From Offering Free Tax Filing Services," *The Washington Post*, Apr. 9, 2019 (quoting former Rep. Katie Hill and Rep. Ro Khanna, D-Calif.).

²⁷ Since 2002 the Free File program has operated under an original agreement ("Free Online Electronic Tax Filing Agreement" (Oct. 30, 2002), 67 F.R. 67247 (Nov. 4, 2002)) as amended by five subsequent agreements and eight MOUs, all of which included termination clauses permitting the IRS to terminate with or without cause. See 67 F.R. at 67251; and Eighth MOU, *supra* note 2, at arts. 10.1 to 10.3.

²⁸ See, e.g., Sen. Ron Wyden, D-Ore., "Making It Easier to File Taxes," *The New York Times*, Apr. 14, 2019; and Cooper and Stokeld, *supra* note 24, at 471-472 (quoting Senate Finance Committee Chair Chuck Grassley, R-Iowa).

²⁹ See Jad Chamseddine, "Free File Allegations Freeze IRS Overhaul Bill" (May 15, 2019).

³⁰ See Chamseddine, "Revised IRS Reform Bill Omits Free File Language," *Tax Notes*, June 10, 2019, p. 1739.

³¹ Taxpayer First Act, P.L. 116-25 (July 1, 2019).

³² See Chamseddine, "Senate Clears IRS Reform Bill for Trump's Signature," *Tax Notes Federal*, June 17, 2019, p. 1886.

³³ William Hoffman, "Tax Pros Find Much to Like as Taxpayer First Act Becomes Law," *Tax Notes Federal*, July 8, 2019, p. 244.

³⁴ Elliott, *supra* note 6.

³⁵ IRS Statement on Free File (May 3, 2019).

³⁶ Allyson Versprille, "IRS Hiring Consultant After Uproar Over Free File," *Bloomberg Tax*, May 22, 2019.

³⁷ Jonathan Curry, "IRS Bringing in Fresh Eyes to Review Free File," *Tax Notes*, May 27, 2019, p. 1422.

companies “to ensure industry compliance” with the MOU and to further “ensure the integrity and purpose of the Free File program.”³⁸ It seemed that Free File and the IRS’s private sector partners would finally receive the kind of rigorous, independent review³⁹ that critics had been requesting for years.⁴⁰

Two months later, however, when the IRS announced the contractor that would conduct the “independent” review of the besieged Free File program, hope for a conflict-free review was lost.

The Fix Was In

In early July the IRS announced it had awarded a contract to Mitre Corp. “to conduct an independent third-party review of the Free File program,” at a potential cost of \$3,178,138.⁴¹ Three months later, parts of Mitre’s report, “Independent Assessment of the Free File Program,”⁴² trickled into the public domain, albeit under odd circumstances.⁴³ The FFA — whose members were the subject of the report — wasted no time in publicizing Mitre’s “extensive independent review” of the Free File program.⁴⁴ The IRS joined in, saying it hired Mitre “to

conduct an independent review” of Free File and that it was “carefully reviewing” Mitre’s “independent assessment.”⁴⁵

But much like FFA member Intuit’s promises to deliver “Free Federal. Free State. Free to File. *FREE guaranteed.* \$0 \$0 \$0,”⁴⁶ stating over and over again that something is true does not necessarily make it true.

The fact of the matter is that Mitre is anything but independent when it comes to the IRS. So it comes as no surprise that the report reads more like advocacy of the IRS-FFA partnership and a defense of FFA companies’ behavior than an independent, objective, rigorous examination of the IRS Free File program and the IRS’s private sector partners.

For starters, Mitre is a major and important IRS contractor. Since 1998 it has run what amounts to a national lab sponsored by Treasury and the IRS and cosponsored by the Department of Veterans Affairs, called the Center for Enterprise Modernization (CEM), a federally funded research and development center.⁴⁷ In October 2018 Mitre signed a \$650 million contract to continue running the CEM for another five-year term.⁴⁸

The CEM is focused on modernizing bureaucracies and updating IT systems infrastructure. But unlike other IRS contractors that are paid primarily for programming and reprogramming IRS computers (including Accenture, Booz Allen Hamilton, Deloitte, IBM, and Northrup Grumman), Mitre provides higher-level advice and strategy.⁴⁹ Indeed, Mitre is intimately involved with IRS management in myriad ways, from creating web apps to running the IRS information sharing and analysis center for identity theft and tax refund fraud to

³⁸ Finance Committee press release, “Grassley, Wyden Press IRS for Accountability Regarding the Free File Program” (May 7, 2019).

³⁹ See, e.g., Versprille, *supra* note 36 (quoting Rettig saying the IRS would not shrink from examining “every facet” of the program).

⁴⁰ See, e.g., statement of Nina Olson, former national taxpayer advocate, during hearing on the tax return filing season before House Ways and Means Subcommittee on Oversight, at 21-22 (Mar. 7, 2019) (testifying that Free File “is failing to achieve its objectives and should be substantially improved or eliminated”); and IRS Advisory Council public report, at 17 (Nov. 2018) (IRSAC 2018) (urging systemic and immediate improvements to the Free File program).

⁴¹ Naomi Jagoda, “IRS Announces Contractor Reviewing ‘Free File’ Program,” *The Hill*, July 12, 2019. For a summary of the contract, see USA Spending.gov.

⁴² Mitre Corp., “Independent Assessment of the Free File Program, Free File Program Assessment Final Report” (Oct. 3, 2019) (final report).

⁴³ Parts of the report entered the public domain on October 8, with no announcement from the IRS or Mitre. Some news organizations received the report, while others did not. With no publicity, the IRS posted to its “newsroom” website three documents associated with the Mitre report at 9 a.m. EST on October 8, while four additional documents posted the next day between 2 and 2:30 p.m. EST. See IRS Newsroom, IRS Static Files Directory (viewed Oct. 17, 2019). All seven documents were stamped on every page, “Pre-Decisional — For Internal IRS W&I Use Only — Not for Public Release.” On October 11 the IRS posted a “statement” with links to all seven documents. IRS, “IRS Statement on Free File Program” (Oct. 11, 2019). The FFA received the report in plenty of time to digest its 400-plus pages and issue a press release on October 8. See FFA press release, “Independent Review Calls Benefits of Public-Private Free Tax-Filing Partnership ‘Substantial,’ Allowing IRS to Avoid ‘Prohibitive Costs,’” (Oct. 8, 2019).

⁴⁴ FFA press release, *supra* note 43.

⁴⁵ IRS statement, *supra* note 43.

⁴⁶ See Intuit TurboTax blog (Dec. 27, 2019) (emphasis in original).

⁴⁷ See CEM, “Where We Focus”; and CEM, “Tax, Revenue & Financial System Transformation.”

⁴⁸ See Paul Merion, “Non-Profit Think Tank Plays Key Role IRS Decision-Making,” 15 *MLex US Tax Watch* 5 (Oct. 9, 2018).

⁴⁹ See, e.g., Merion, “Nine Contractors Tapped to Update IRS Computer Systems,” 31 *MLex US Tax Watch* 4 (June 24, 2019); Merion, “Seven Data Firms Retained to Analyze Pressing IRS Issues,” 19 *MLex US Tax Watch* 5 (Dec. 18, 2018); Merion, “Largest IRS Contractors Driven by Agency’s Data Needs,” 11 *MLex US Tax Watch* 5 (July 27, 2018); and Merion, “IRS Outsources Bulk of New Tax Law’s Implementation,” 8 *MLex US Tax Watch* 7 (June 8, 2018).

developing predictive algorithms for catching tax evasion, to conducting R&D credit audits for the IRS.⁵⁰

Mitre and the IRS enjoy a long, cozy, codependent relationship. Or, in the words of a top IRS executive, “They have been very supportive and have been a true partner with us. We use them strategically.”⁵¹ With such close ties, it would have been reasonable to question whether Mitre could undertake and deliver a truly independent review of any IRS program, particularly one fraught with so many political and public implications.

It was even more reasonable to question Mitre’s independence in the specific context of Free File. Indeed, the company has opined previously on the program and specifically on whether to expand it and increase user participation. In a two-part study that examined policy alternatives to increasing e-filing generally,⁵² Mitre analyzed potential effects on Free File participation from, for instance, altering adjusted gross income limitations or dropping them altogether, manipulating other eligibility criteria, increasing the number of forms and schedules supported by the program, and improving the user experience. Mitre was pessimistic about deploying an expanded Free File to increase e-filing, largely due to industry concerns over how the policy would affect profits. FFA companies had “a financial disincentive to expand Free File eligibility requirements,” Mitre concluded, because expansion “will cut into the

pool of potential customers who will pay for the services and products they sell.”⁵³

Mitre came to the same conclusion in the above study concerning whether the IRS should operate its own e-filing program without the assistance of the FFA. “Commercial software vendors and transmitters will likely expend considerable resources opposing this Option,” Mitre wrote, and it would “adversely affect IRS partnerships with key stakeholders such as tax preparation software vendors and transmitters” on whom the IRS relied “for much of its taxpayer outreach.”⁵⁴ In the end, Mitre summarized in its 2019 Free File report, it “was neither cost-beneficial, nor could the IRS keep pace with the innovation of the private sector,” for the agency to pursue its own e-filing system.⁵⁵ Mitre’s cynicism toward government-run e-filing programs is noteworthy in its own right. But it is particularly relevant in light of the political battle in 2019 over codification of the Free File program during which opponents argued that codification would prevent the IRS from offering a truly free e-filing system, the optimal outcome for many members of Congress.⁵⁶

Therefore, before the release of Mitre’s Free File report, observers were right to question whether Mitre could produce the kind of independent review that the Free File program sorely needed. After the report’s issuance, those concerns were reinforced and amplified. Mitre’s review of Free File amounted to advocacy rather

⁵⁰ See Merion, *supra* note 48. See also Kat Lucero, “Tax Refund Anti-Fraud Pilot ISAC Seen as Boon for States,” *6 MLEX US Tax Watch 7* (May 11, 2018) (specifically discussing IRSAC and Mitre’s role). IRS field directive, “Use of Sampling Methodologies in Research Credit Cases,” at 7-8, 10-11 (Mar. 2002) (discussing the IRS “Mitre Expert Program” and its use in R&D audits). I discussed with several practitioners familiar with the process how the IRS used Mitre in its R&D credit audits. None of them thought Mitre acted objectively in assessing whether a particular activity qualifies for the R&D credit. In fact, one practitioner said pointedly that Mitre “relentlessly remembers who’s paying it.”

⁵¹ Merion, *supra* note 48 (quoting IRS Chief Information Officer Gina Garza).

⁵² Mitre, “Advancing E-File Study Phase 2 Report: An Examination of the Options to Increase Electronic Filing of Individual Returns,” at 76 and 161-168 (Dec. 15, 2010) (Mitre phase 2 report); Mitre, “Advancing E-File Study Phase 1 Report: Achieving the 80 Percent E-File Goal Requires Partnering With Stakeholders on New Approaches to Motivate Paper Filers,” at 134-135 (Sept. 30, 2008) (Mitre phase 1 report).

⁵³ Mitre phase 1 report, *supra* note 52, at 135. See also Mitre phase 2 report, *supra* note 52, at 166-167 (opining that FFA members “may be unwilling to support expansion of the existing Free File Program, because this may encroach on their ability to sell their own products and produce revenue,” and that this policy alternative “may adversely affect IRS partnerships with key stakeholders such as tax preparation software vendors and transmitters”).

⁵⁴ Mitre phase 2 report, *supra* note 52, at 72. See also *id.* at 122-123 and 125-127. For Mitre’s full discussion of this issue, see *id.* at 111-131.

⁵⁵ Final report, *supra* note 42, at 11.

⁵⁶ See, e.g., Tax Filing Simplification Act of 2019, S. 1194 (sponsored by Sens. Warren et al. and endorsing government-run return filing and “pre-prepared” tax returns for taxpayers with “simple tax situations”); William Hoffman, “Treasury Misses Dems’ Deadline for Handing Over Trump’s Returns,” *Tax Notes*, Apr. 15, 2019, p. 439 (quoting Wyden as wanting to replace Free File with an IRS-run “simple return” system); Cooper and Stokeld, *supra* note 24, at 471 (reporting Ocasio-Cortez as saying the IRS “should automatically file taxes for low-income taxpayers”); Casten statement, *supra* note 26 (envisioning a government-run system “that would enable millions of citizens to access free filing services”); and Warren’s staff, “Tax Maze: How the Tax Prep Industry Blocks Government From Making Tax Day Easier” (Apr. 4, 2016) (endorsing government-run tax return filing).

than analysis. Mitre accepted uncritically and without serious inquiry FFA companies' characterization of the purposes and goals of the Free File program. Without inspection, moreover, Mitre credited FFA companies' explanations for their behavior, the same behavior that has become the subject of multiple government investigations and lawsuits, as well as litigation initiated by aggrieved taxpayers.

Far from criticizing FFA companies' behavior, Mitre lauded it. Mitre praised the companies for maximizing returns on their Free File investment at the expense of eligible Free File users and other low-income taxpayers. In the process, Mitre confirmed that FFA companies took affirmative acts to undermine the Free File program by hiding their Free File websites from eligible Free File users. Mitre further revealed that FFA companies spent more than \$17 million on paid search advertisements in 2019 to position their "free commercial" sites atop internet search results for free tax filing, further depressing Free File usage and increasing the likelihood that eligible Free File users would end up paying to file returns. By showing that economic incentives motivate FFA companies to participate in Free File, Mitre also undercut arguments from FFA companies that they view Free File as a "philanthropic endeavor." Moreover, having concluded that FFA companies primarily participate in Free File to extract economic benefits, Mitre warned the IRS against challenging the companies' free-to-fee tactics.

This report concludes that Mitre's warning was unnecessary. The IRS has refused to exercise any meaningful oversight of its FFA partners' interactions with eligible Free File taxpayers, leaving vulnerable taxpayer populations to largely fend for themselves every filing season. In this way, the IRS is complicit in the FFA's actions.

FFA Companies Hid Free File Sites, Violated MOU

Mitre's Free File report did nothing to contradict earlier investigative reporting and congressional findings that FFA companies hid their Free File websites from low-income taxpayers and violated the Free File MOU. In fact, the report bolsters those revelations.

First, Mitre confirmed that FFA companies concealed their Free File websites from eligible Free File users. Congressional leaders had

criticized these practices as potentially violating laws designed to prevent "unfair and deceptive practices or unfair methods of competition," and evidencing that FFA companies "may have entered into an illegal agreement" to engage in these unlawful acts, in other words, a conspiracy.⁵⁷ Earlier reports indicated that at least five of the 12 FFA companies engaged in practices that kept their Free File sites from appearing in internet searches for the Free File program.⁵⁸ Mitre found that the number of FFA companies perpetrating such acts was eight rather than five.

Inexplicably, Mitre buried that critical finding more than 100 pages into its report, and then misled readers at various points into believing that only five FFA companies concealed their Free File sites from eligible Free File users.⁵⁹ The fact of the matter is that six FFA companies deployed at least one of several "common techniques used to discourage discovery on organic internet searches,"⁶⁰ while two additional FFA companies used less common methods to prevent their Free File landing pages from being "discoverable" through internet searches.⁶¹ These "steps to inhibit indexation of their Free File offering in the main organic search results" were wildly successful.⁶² One of the "more commonly used methods"

⁵⁷ See letter to FTC, *supra* note 7.

⁵⁸ *Id.*

⁵⁹ Mitre focused on the five FFA companies that used a common technique to hide Free File sites from internet searches (*i.e.*, a "NOINDEX" code) rather than consider and discuss the full universe of FFA companies that prevented their Free File sites from appearing in search results. See, *e.g.*, final report, *supra* note 42, at iv ("During [filing season] 2019, five of the 12 FFA members did engage in a practice that excludes their company's Free File landing page in organic searches."); and *id.* at vii, xxii, 45, 47, 84 (same).

⁶⁰ Final report, *supra* note 42, at Appendix D-1 (identifying these practices as "Robots.txt 'Disallow' Statements" (described as "a test file, usually located in the root folder level, informing search bots which files and file folders can or cannot be crawled"), "Meta Robots NOINDEX" (or "a directive placed in the HEAD section of a web page providing instructions to bots at the page level not to include that page in the search index"), and "Rel 'Canonical' tags" (or "a method of communicating which page among a set of duplicate pages is preferred for indexation. A page canonicalized to another page will be omitted from the search index.")).

⁶¹ *Id.* at Appendix D-1 to D-2 (discussing "other methods to prevent indexation").

⁶² Mitre, "Independent Assessment of the Free File Program, Appendix A: The Economics of Free File," at 36 (Sept. 13, 2019) (Appendix A).

resulted in “thirty-two times more traffic being driven to the commercial products versus the Free File services.”⁶³

By making it harder for eligible Free File users to locate FFA companies’ Free File websites, while at the same time making it significantly easier to land on the companies’ “free commercial” sites, FFA companies hindered Free File participation. In turn, by engaging in behavior that decreased rather than increased Free File participation, FFA companies violated express provisions of the Free File MOU.⁶⁴ For just two examples, impairing taxpayer participation in the Free File program violated articles 2.1 and 2.3 of the MOU, provisions that obligate Free File companies to expand Free File usability, service, and access.⁶⁵ Violations of the MOU’s provisions, moreover, either by the IRS or the FFA, are legally actionable, as reflected by the express intent of the Free File partners to be “legally bound” by the MOU’s terms and conditions.⁶⁶

Actively depressing the number of taxpayers who participate in the Free File program also violated the underlying spirit of the most recent MOU, which, according to the IRS, pledged FFA companies to “strengthen and expand taxpayer options” under the program.⁶⁷ Reducing taxpayer participation even violated the basic premise of the Free File program and the public-private partnership under which the program operates. In each of the eight Free File MOUs, the MOU mandates: “Members shall work in concert with the IRS to increase electronic filing of tax returns, which includes 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.”⁶⁸ In contravention of this directive, FFA companies concealed their Free File websites from eligible Free File users and pushed those “economically disadvantaged and underserved” taxpayers toward FFA companies’ paid commercial sites (as detailed later).

Mitre defended the actions of FFA companies with improbable explanations.

First, Mitre claimed that FFA companies “are not bound” by “the responsibility of reducing the government’s or taxpayers’ burden through increased e-filings at no cost to the taxpayer. This is solely the government’s objective and not the organizational goals of the” FFA.⁶⁹ That is true, but only in the strictest sense. FFA companies have an affirmative duty to refrain from, at the very least, *increasing* the government’s or taxpayers’ burden, a duty that they violated by hiding their Free File sites from eligible Free File users and pushing taxpayers to FFA companies’ commercial sites, actions that Mitre acknowledged increased burdens on taxpayers.⁷⁰ Moreover, as discussed later, every Free File MOU has expressly obligated FFA companies to “extend 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.”⁷¹ Like it or not, FFA companies are bound to uphold these objectives and make them part of their organizational goals. Failure to uphold these objectives (especially, although not exclusively, if the failure is willful, as is the case here) violates the MOU.

Second, Mitre claimed that FFA efforts to conceal Free File websites from eligible Free File users and to push them toward paid commercial

⁶³ *Id.*

⁶⁴ Eighth MOU, *supra* note 2, at preamble.

⁶⁵ *See id.* at art. 2.1 (“Members shall . . . [m]ake tax return preparation and filing easier and reduce the burden on individual taxpayers, particularly the economically disadvantaged and underserved populations,”) and art. 2.3 (“Members shall . . . [p]rovide greater service and access to the [Free File] Services to taxpayers.”).

⁶⁶ *Id.* at preamble (stating that the parties entered into the MOU “intending to be legally bound”). Mitre incorrectly stated the Free File MOU “is not a contract . . . but a mutually negotiated tool for governance agreed upon by the two partners.” Final report, *supra* note 42, at 6. The truth is that an MOU can bind parties contractually depending on the intention of the parties as indicated in the express provisions of the MOU. The Free File MOU clearly states that the IRS and FFA entered into the agreement “intending to be legally bound” by its terms and conditions.

⁶⁷ IR-2018-213.

⁶⁸ Eighth MOU, *supra* note 2, at 5. *See also* Seventh MOU, at 5 (Mar. 6, 2015); Sixth MOU, at 5 (May 2, 2014); Fifth MOU, at 5 (Oct. 20, 2009); Fourth MOU, at 5 (Jan. 13, 2009); Third MOU, at 3 (Jan. 2, 2008); Second MOU, at 3 (Jan. 12, 2007); and First MOU, at 4 (Dec. 20, 2005).

⁶⁹ Appendix A, *supra* note 62, at 31-32.

⁷⁰ Mitre distinguished FFA companies’ Free File offerings from those found on the companies’ commercial sites by saying the former “eliminate the monetary cost of filing taxes in the form of guaranteed zero preparation and filing fees,” and “unlike the commercial offerings, Free File guarantees protection from hidden costs and fees for using the program.” *Id.* at 13.

⁷¹ *See supra* note 68 and accompanying text.

sites did not necessarily depress Free File participation.⁷² To support this claim, Mitre reported that its analysis of “organic” (that is, unpaid) searches for the IRS Free File website during the 2019 filing season found “the vast majority of those searching for free tax filing landed on commercial sites, and no searches landed on sites of the five companies that excluded their Free File landing pages.”⁷³ (Here again,⁷⁴ Mitre accounted for only the five FFA companies that deployed the “NOINDEX” tactic to hide Free File websites, and it omitted the additional three FFA companies that used other methods to conceal their Free File sites.) In fact, according to Mitre, only 3 percent of all organic searches directed taxpayers to an FFA company’s Free File site, while 97 percent of organic searches directed them to FFA companies’ commercial sites.⁷⁵ In other words, the scheme worked as anyone would have predicted: Negligible numbers of taxpayers found FFA companies’ Free File websites when searching for the Free File program, and instead were bombarded with search results for the companies’ commercial sites, which, as Mitre conceded, subjected taxpayers to “hidden fees that are characteristic of [FFA companies’] commercial options.”⁷⁶ Ultimately, Mitre’s own numbers contradict its claim that FFA companies’ efforts to conceal Free File websites from eligible Free File users had no effect on Free File participation.

In another flimsy attempt to discredit the notion that hiding Free File sites from internet searches did not influence Free File usage, Mitre estimated that more taxpayers trafficked IRS.gov’s Free File landing page (780,000) than

any individual FFA company’s commercial page (698,000).⁷⁷ But that finding is irrelevant. For starters, the pertinent comparison is traffic on IRS.gov (780,000) versus *all* FFA companies’ commercial pages (1,812,218).⁷⁸ Moreover, Mitre’s estimate accounted only for *unpaid* (or organic) search traffic, not *paid* search traffic. It turns out that organic searches generated 1,812,218 visits to FFA companies’ commercial sites, while paid searches generated an additional 10,267,117 visits to the companies’ commercial sites, or 5.66 times the traffic for paid searches versus organic searches.⁷⁹ (See below for FFA companies spending more than \$17 million on paid search advertisements to position their “free commercial” sites atop internet search results for free tax filing.) And because no FFA company paid for internet traffic to be directed to Free File sites⁸⁰ and the IRS does not allocate funds to paid advertising,⁸¹ that means the number of searches that went to IRS.gov totaled 780,000 versus 12,069,335 visits for the number of organic and paid searches to FFA companies’ commercial sites. For more evidence that FFA companies hiding their Free File sites made it harder for eligible Free File users to find and participate in Free File, consider that Mitre’s own estimates indicate that organic searches for those websites yielded a paltry 56,000 visits.⁸²

Finally, Mitre touted that among the companies that hid their Free File websites, most of them processed more Free File returns than the previous year.⁸³ But again, that is the wrong comparison, a distraction from what we really need to know — that is, how many Free File returns would those companies have processed

⁷² Final report, *supra* note 42, at 47 (“It must also be pointed out that excluding the Free File landing pages may not have translated into fewer Free File returns for those companies.”).

⁷³ *Id.* at 46-47.

⁷⁴ See *supra* notes 58-63 and accompanying text (discussing how eight rather than five FFA companies’ efforts prevented their Free File sites from being discovered by taxpayers’ internet searches, as well as how Mitre used the lower number almost exclusively throughout its report).

⁷⁵ Final report, *supra* note 42, at 44 (reporting that of the nearly 1.9 million visits from organic searches to an FFA company’s websites, 56,095 went to FFA companies’ Free File landing pages compared to 1,812,218 going to FFA companies’ commercial sites).

⁷⁶ Appendix A, *supra* note 62, at 12.

⁷⁷ Final report, *supra* note 42, at 47. For the search traffic, see *id.* at vii.

⁷⁸ *Id.* at 44.

⁷⁹ *Id.*

⁸⁰ See *id.* at viii (reporting that “no member had paid advertising for their Free File landing pages”); and *id.* at 44 (same).

⁸¹ See Taxpayer Advocate Service, “2018 Annual Report to Congress,” vol. 1, at 65 (Feb. 2019) (reporting “the IRS has not committed funding to advertise FFI”); and Olson statement, *supra* note 40, at 21 (same).

⁸² Final report, *supra* note 42, at 44. Even that number is inflated, because Mitre’s web analysis accounted for only the five FFA companies that deployed the “NOINDEX” scheme, while omitting the additional three FFA companies that used other methods to conceal their sites. See *supra* notes 58-63 and accompanying text.

⁸³ *Id.* at 47 (“Of the five companies who used the NOINDEX, four increased their free filed returns in the 2019 filing season, and one remained relatively flat.”).

had they not concealed their websites from eligible Free File users and then paid millions of dollars to get their commercial sites to appear at the top of search results for free tax filing. Mitre had nothing meaningful to say about such an inquiry, except that “it’s impossible to know whether the increases would have been greater had the landing pages not been excluded.”⁸⁴

That’s baloney. Had Mitre extended its analysis slightly further, it absolutely could have shed light on this question. Using Mitre’s own web analytics,⁸⁵ I typed “free tax filing” into Google, which Mitre said generated the highest traffic for FFA landing pages during the 2019 filing season (1,177,297 visits). The top four discovered websites reflected paid ads for commercial sites, including two FFA companies, Intuit (first) and H&R Block (third). The fifth result was the IRS Free File landing page. Thus, removing the four paid searches would have raised the IRS landing page to the top of the list, a reordering that by itself would increase Free File usage and probably by a substantial amount (recall that Mitre found paid search advertisements appearing at the top of search results generated 5.66 times more traffic to FFA companies’ commercial sites than all organic search traffic⁸⁶). I then clicked through the first 25 pages of search results (representing more than 300 websites), and not a single FFA Free File landing page appeared. I saw websites for commercial vendors hawking “free” tax return filing, sites for state tax departments, cities, counties, the United Way, the “One Source” military portal, AARP, Goodwill, libraries, foodbanks, the Volunteer Income Tax Assistance program (VITA), Tax Counseling for the Elderly (TCE), and even free services for tax return filing in foreign jurisdictions. But no FFA Free File landing pages. And yet Mitre said it was unable take a position on whether removing at least eight⁸⁷ of the official 13 Free File landing pages

(including the IRS landing page) lowered Free File participation.

Implausible Explanations for FFA Tactics

Mitre saw nothing wrong with FFA companies concealing their Free File sites from eligible Free File users. Nor did Mitre explore how that practice might evidence a conspiracy among FFA companies to commit unlawful acts. Mitre further failed to meaningfully investigate or take seriously the various ways that FFA companies violated provisions of the Free File MOU, a legally binding document. Instead, Mitre accepted uncritically and without hesitation FFA companies’ false and implausible explanations for their actions.

According to Mitre, it queried FFA companies why they hid their Free File websites from internet searches conducted by eligible Free File taxpayers. The companies reported that such behavior “keeps them in compliance with the MOU (language in the MOU preamble) and in alignment with IRS marketing that states Free File is ‘accessible only through IRS.gov.’”⁸⁸ Mitre accepted this explanation without further inquiry or analysis.

Had Mitre conducted even a modicum of critical investigation into the validity of FFA companies’ explanation for why they concealed their Free File sites, it would have been forced to conclude — and report — that the explanations were alternately false and implausible.

First, the language in the MOU to which FFA companies presumably referred does not in any way prohibit FFA companies from hosting Free File websites accessible by taxpayers from locations other than the IRS site. Specifically, the MOU states that FFA companies “will offer the [Free File] Services and the IRS will provide taxpayers with links to the Services offered by the Alliance participants through a webpage, which is hosted at irs.gov with links from www.usa.gov.”⁸⁹ This language outlines affirmative duties of FFA companies and the IRS without limiting how

⁸⁴ *Id.*

⁸⁵ *Id.* at 43.

⁸⁶ See *supra* note 77 and accompanying text.

⁸⁷ See *supra* notes 58-63 and accompanying text (discussing how eight FFA companies prevented their Free File sites from being discovered by taxpayers’ internet searches).

⁸⁸ Final report, *supra* note 42, at iv. See also *id.* at 46 (“When questioned about the practice, most members reported they believed that excluding their Free File landing pages from search results kept them in accordance with the MOU.”); and *id.* at 84 (same).

⁸⁹ Eighth MOU, *supra* note 2, at preamble.

taxpayers can access FFA companies' Free File sites.

Further, the relevant language in the MOU has remained virtually unchanged since the program's origin in 2002.⁹⁰ Thus, if we are to believe FFA companies' explanation for why they hid their Free File sites from taxpayers, those companies have been violating the MOU for nearly the entire existence of the Free File program. Indeed, Intuit placed into service its "TurboTax Freedom Edition" Free File offering in 2004, accessible to taxpayers through online searches and not solely through IRS.gov.⁹¹ In fact, as late as the 2019 filing season, Intuit's website provided a direct link — albeit difficult to find due to Intuit's acts of concealment — to its Free File website.⁹² And as of January 1, 2020, at least six FFA companies — including Intuit — hosted websites offering taxpayers direct access to their Free File products through internet searches.⁹³ Following the FFA's explanation for why its members concealed Free File sites from taxpayers, those six FFA companies would be in violation of the Free File MOU. Mitre failed to make that connection.

Mitre also failed to reconcile FFA companies' implausible explanation for why they concealed Free File sites with contradictory statements made by a leading member of the FFA. In May 2019, as the controversy swirled around FFA companies' potentially unfair and deceptive trade practices, Intuit CEO Sasan Goodarzi attempted to defend his company's actions. In a video sent to Intuit

employees — and obtained and published by the investigative news organization *ProPublica* — Goodarzi explained why Intuit concealed its Free File website from eligible Free File users: "To avoid confusion between the IRS Free File program and our own free product, we also decided to have the landing page for the IRS product we offer not rank in search results."⁹⁴

That explanation is as disingenuous as the one Mitre accepted uncritically from FFA companies. For one thing, the "free product" to which Goodarzi refers is one of Intuit's "free commercial products" (itself a contradiction in terms) offered on a website that aggressively pushes taxpayers away from Intuit's free products toward its paid products, a practice that *ProPublica* also documented.⁹⁵ For our purposes here, it is enough to observe that Intuit's CEO said nothing about hiding the company's Free File site in order to avoid violating the Free File MOU.

Second, Mitre accepted indiscriminately FFA companies' additional explanation that they hid their Free File sites as a way to remain "in alignment with IRS marketing that states Free File is 'accessible only through IRS.gov.'"⁹⁶ That explanation lacks credibility, as discussed in more detail later. But Mitre extended the explanation to encompass a considerably more problematic defense of FFA companies' behavior — that is, eligible Free File taxpayers have never been protected by the terms and conditions of the MOU unless and until they enter the Free File program through IRS.gov. Or as Mitre put it: "Only taxpayers that access a Free File offering (online software product) with a direct link from the IRS.gov landing page are actually participants in the Free File program."⁹⁷

Such a claim leads to several troubling conclusions. For example, if an eligible Free File user went directly to, say, Intuit's Free File landing page at taxfreedom.com and used Intuit's

⁹⁰The original agreement, *supra* note 27, was entered into October 20, 2002, and stated, "The IRS will provide taxpayers with links to the Free Services offered by the Consortium Participants through a web page . . . which will be hosted at irs.gov accessible through firstgov.gov." 67 F.R. at 67249. In 2005 the IRS and FFA entered into the First MOU, *supra* note 68, which included a preamble describing the affirmative duties of the IRS and FFA companies that is nearly identical to the above-quoted language from the original agreement.

⁹¹See Memorandum in Support of Demurrer to the Complaint at 9, *Intuit*, No. 19STCV15644 (Cal. Super. Ct., L.A. County, July 8, 2019). Before the 2019 filing season, Intuit changed the name of its Free File offering to "TurboTax Free File Program." *Id.*

⁹²See "What Is the TurboTax Free File Program?" TurboTax Help (accessed Nov. 18, 2019). See also Class Action Complaint and Demand for Jury Trial at 8, *Nichols v. Intuit Inc.*, No. 19-cv-2666 (N.D. Cal. May 16, 2019) (sharing a screenshot of a TurboTax FAQ, "What Is the TurboTax Free File Program?" which includes a direct link to taxfreedom.com, Intuit's Free File site).

⁹³For the simple search terms that yielded results for these companies' Free File sites as well as the associated URL, see "turbo tax free file"; "h&r block free file"; "1040NOW free file"; "taxact free file"; "fileyourtaxes.com free file"; and "olt free file."

⁹⁴Elliott and Waldron, *supra* note 9.

⁹⁵See, e.g., Elliott and Tsutsumi, *supra* note 10; Elliott and Meg Marco, "Listen to TurboTax Lie to Get Out of Refunding Overcharged Customers," *ProPublica*, May 9, 2019; Elliott and Kiel, *supra* note 8; Ariana Tobin, Elliott, and Meg Marco, "Here Are Your Stories of Being Tricked Into Paying by TurboTax. You Often Needed the Money," *ProPublica*, Apr. 26, 2019; and Elliott and Waldron, *supra* note 5.

⁹⁶Final report, *supra* note 42, at iv. See also *id.* at 46 (same).

⁹⁷*Id.* at 4.

TurboTax Free File Program (which the website indicates is “Part of IRS Free File”), according to Mitre, the MOU’s protections against Intuit marketing and upselling paid products to this Free File user would not apply, and Intuit could treat this taxpayer as aggressively as it treats taxpayers visiting its commercial site. Equally troubling, Intuit has adopted this claim as part of its legal defense against multiple lawsuits alleging that the company violated laws pertaining to deceptive trade practices and unfair competition in its interactions with eligible Free File taxpayers. Indeed, peppered throughout its legal filings, Intuit asserts that taxpayers can become Free File taxpayers only if they access Free File offerings through IRS.gov.⁹⁸

All of this is news to me and presumably to anyone following the program over the last 17 years, supporters and critics alike. To be sure, the IRS issued press releases in late 2018 and early 2019 (the first announcing an updated Free File MOU,⁹⁹ the second signaling the 2019 filing season with an “improved version of IRS Free File”¹⁰⁰) that stated, “To use Free File, taxpayers must use IRS.gov to connect to a company offering Free File.” But that statement was buried in press releases highlighting substantive changes to the program and can hardly be said to constitute a formal alteration to long-standing policy and practice. Indeed, if the IRS wished to formalize an alleged shift in policy that severely restricted how taxpayers participate in the Free File program, the agency presumably would have done so as part of the process for revising the Free File MOU in late 2018. But it didn’t.

Claiming that taxpayers can participate in Free File only by directly linking from IRS.gov lacks credibility. Further, claiming that FFA companies hid their Free File sites from internet searches due to a fundamental change in the Free File program is specious. Nonetheless, Mitre’s

“independent” review of the Free File program accepted and repeated both claims.

FFA Companies Lured Free Filers to Paid Sites

The tactics FFA companies deployed to hide their Free File sites from eligible Free File users resulted in fewer taxpayers locating and participating in the IRS Free File program.¹⁰¹ In fact, despite Mitre’s efforts to obscure this conclusion, Mitre acknowledged — albeit buried in an appendix to the report — that FFA companies’ maneuvers “put downward pressure on Free File usage.”¹⁰² In exchange for fewer Free File sites, eligible Free File users were bombarded with search results for FFA companies’ “free commercial” sites and those sites’ predatory upselling tactics. Also on those sites, eligible Free File users were not protected by the terms and conditions of the Free File MOU, and FFA companies were free to undertake any and all efforts within the bounds of the law to lure eligible Free File taxpayers into paying for tax return filing services they would have received for free under the Free File program. These sites were devised to look free, emblazoned with reassuring signage such as “TurboTax Free Edition. Free Federal. Free State. Free to File. *FREE guaranteed.* \$0 \$0 \$0,”¹⁰³ but which deployed design tricks known as “dark patterns” to get low-income taxpayers to purchase FFA companies’ paid products they neither needed nor wanted.¹⁰⁴

Mitre reported that FFA companies’ appetite for extracting revenue from eligible Free File users did not stop there. Mitre estimated that FFA members spent \$17.3 million on paid search advertisements during the 2019 filing season to position their “free commercial” sites atop internet search results for free tax filing services.¹⁰⁵ According to Mitre, the “pay-per-click search advertising and search engine optimization

⁹⁸ See, e.g., Joint Case Management Statement at 4, *In re Intuit Free File Litigation*, No. 3:19-cv-02546 (stating that the arrangement between the IRS and FFA “allowed taxpayers to access FFA members’ free services through the IRS website, ‘via a [Free File] homepage managed and hosted’ by the agency”); and Memorandum in Support of Demurrer, *supra* note 91, at 8 (same).

⁹⁹ IR-2018-213.

¹⁰⁰ See IR-2019-2.

¹⁰¹ See *supra* notes 72-87 and accompanying text.

¹⁰² Appendix A, *supra* note 62, at 36.

¹⁰³ See, e.g., *supra* note 46.

¹⁰⁴ See Elliott and Waldron, *supra* note 5.

¹⁰⁵ Final report, *supra* note 42, at 43. See also Appendix A, *supra* note 62, at 36 n.37 (reporting “over \$17 million”). The precise number is \$17.35 million based off \$1.69 (the average cost per click for a free tax return filing search advertisement) multiplied by 10,267,117 (the number of visits to FFA companies’ commercial sites generated by paid search advertisements). See *id.* at 44.

techniques (collectively known as search marketing) allow “web publishers [in this case, FFA companies] to acquire large amounts of traffic from the major web search engines and exert control to which pages on their websites this traffic is directed” (that is, FFA companies’ “free commercial” sites that are not subject to the strictures of the MOU).¹⁰⁶ Mitre estimated that the paid search advertisements generated five¹⁰⁷ times more traffic to FFA companies’ commercial sites than organic searches.¹⁰⁸

Mitre saw nothing wrong with these aggressive marketing tactics. At the same time, it failed to conduct any analysis of whether taxpayers might conflate FFA companies’ “free commercial” sites with the companies’ Free File sites, only the latter of which protected taxpayers from the companies’ aggressive upselling of paid products and “value-added” services. Nor did Mitre analyze the extent to which the conspicuous promises of “Free Federal. Free State. Free to File. *FREE guaranteed. \$0 \$0 \$0*” blanketing FFA companies’ “free commercial” sites might result in taxpayers being manipulated, cajoled, and tricked into buying or signing up for something they never intended. These practices are particularly insidious because FFA companies know that they are dealing with the most vulnerable taxpayers, who are generally some combination of low-income, financially unsophisticated, nonnative English-speaking persons not in the market for commercial products but merely a free, safe opportunity to fulfill their tax return filing obligations. Instead, they are besieged by FFA companies’ seemingly endless attempts to extract profits from them. These attempts are nauseating and include (reflecting two prominent FFA companies):

- importing prior-year tax return information — \$24.99;
- upgrading to account for education expenses — \$19.99;

- upgrading to account for student loan interest — \$59.99;
- upgrading to account for small business income — \$19.99;
- upgrading to account for small business expenses — \$34.99;
- cross-marketing third-party gift cards, purchased by “some or all of your federal refund”;
- upselling “Free Edition State Return” — \$29.99;
- cross-marketing third-party access to “credit score and personalized financial recommendation”;
- upselling “Tax Identity Shield” — \$14.99;
- upselling “Worry-Free Audit Support” — \$19.99;
- upselling “Tax Identity Shield + Worry-Free Audit Support” — \$24.99;
- upselling FFA company’s branded credit card by “load[ing] your refund onto the award-winning” card;
- upselling “Tax Pro,” to “review and sign your return. They’ll find your best outcome for this year” — \$49.99; and
- upselling storage of return for six years — \$12.49.

Moreover, in many cases, the cost of upgrading FFA companies’ “value-added” products ends up exceeding any tax savings associated with the upgrade.¹⁰⁹ In other words, taxpayers are worse off and affirmatively harmed.

Rather than scrutinize the ways FFA companies expose eligible Free File users and other vulnerable taxpayers to these practices, Mitre lauded the effort. “Paid advertising yields results,” Mitre wrote approvingly.¹¹⁰ Because of FFA companies’ paid search advertising, “85 percent of the traffic followed a paid search result to a member site, while the other 15 percent of visits to member sites came from an organic

¹⁰⁶ *Id.* at 42.

¹⁰⁷ Mitre underreported the multiplier, which, according to Mitre’s own data, reached 5.6654 times rather than five times (*i.e.*, estimated traffic to FFA commercial sites generated by paid searches (10,267,117) divided by traffic generated by organic searches (1,812,218)). *Id.* at 44.

¹⁰⁸ *Id.* at viii, xviii, 43, and 81.

¹⁰⁹ See, e.g., Elliott and Kiel, “Trump’s Tax Law Threatened TurboTax’s Profits. So the Company Started Charging the Disabled, the Unemployed and Students,” *ProPublica*, July 16, 2019 (reporting Intuit upsold a student-taxpayer with \$12,000 in taxable income its “Deluxe” package for \$59.99, which allowed the taxpayer to deduct her student loan interest, saving her \$26, for a net loss of \$33.99).

¹¹⁰ Final report, *supra* note 42, at 81.

search result,” with taxpayers being more than “five times”¹¹¹ as likely to click on a paid search result versus an organic result.¹¹² In fact, Mitre so admired the practice that it recommended the IRS adopt the strategy for increasing traffic to its own Free File landing page.¹¹³ Of course, that is not the kind of advertising the Free File MOU encourages the IRS to conduct,¹¹⁴ nor the kind of advertising public agencies should spend money on. But Mitre was so enamored of the practice and its results for private sector companies that it attempted to foist it on the public sector despite the sharply different contexts in which the IRS and FFA companies deliver services to taxpayers.

In addition to revealing and then celebrating the \$17.3 million that FFA companies spent on paid search ads directing traffic to their “free commercial” sites, Mitre reported that FFA companies spent zero dollars on paid ads to promote their Free File sites. According to Mitre’s analysis, “none of the FFA members purchased any paid search advertisements to take taxpayers to their FFA landing page.”¹¹⁵ Mitre defended FFA companies’ lack of paid advertising or promotion for Free File by stating that the companies “do not have an incentive to advertise the program,”¹¹⁶ and that the MOU “assigns advertising responsibility to the IRS”¹¹⁷ and to “the IRS alone.”¹¹⁸

First, FFA companies have an affirmative incentive to advertise Free File as a way to fulfill their obligations under the Free File MOU to expand Free File access, service, and usability¹¹⁹ and to “strengthen and expand taxpayer options”

under the program.¹²⁰ Second, Mitre intimated that FFA companies are prohibited from advertising and promoting Free File on their websites or through paid search advertisements. And while the MOU states that the IRS “will make consistent, good-faith efforts to promote the Free File Program” through press releases, social media and networking, interagency interactions, and technology applications,¹²¹ it does not in any way prevent FFA companies from promoting the program. In fact, important advisory organizations, including the IRS Advisory Council (IRSAC), have urged the FFA and its member companies to advertise and promote Free File as a way of fulfilling their obligations under the MOU to enhance the program,¹²² particularly at a time of severe budget constraints at the IRS.¹²³ But the FFA has refused.

In any event, Mitre failed to analyze FFA companies’ refusal to advertise the Free File program. Worse, Mitre failed to connect the dots between FFA companies (1) refusing to buy paid advertising for their Free File products, (2) making it virtually impossible for eligible Free File users to find Free File sites by hiding the sites from organic internet searches, and (3) spending \$17.3 million in paid advertising to lure eligible Free File users to the companies’ “free commercial” sites where the companies were not bound by the MOU’s taxpayer protections. Just saying aloud those three affirmative acts reveals a plausible connection: Paying for ads to promote Free File would have been counterproductive to FFA companies’ efforts to hide the existence of the program from eligible Free File users and to lure them to “free commercial” sites where FFA companies can inveigle them into paying for “value-added” products they should be getting for free or that they never intended to purchase. Put more simply, given all the effort FFA companies expended on undermining Free File,

¹¹¹ See *supra* note 107 for how Mitre underreported the multiplier, which is closer to 5.66 times the traffic going to commercial sites.

¹¹² Final report, *supra* note 42, at 81.

¹¹³ See *id.* at xviii (“Mitre recommends the IRS conduct a cost-benefit analysis to determine whether to purchase paid advertising to reach taxpayers searching for free tax filing.”); *id.* at 81 (same).

¹¹⁴ See *infra* note 121 and accompanying text.

¹¹⁵ Final report, *supra* note 42, at 44. See also *id.* at viii (“no member had paid advertising for their Free File landing pages”) and viii n.10 (same). Mitre indicated that one FFA company claimed it paid to advertise the Free File program “through a number of methods,” but Mitre could not verify the company’s unsubstantiated claim. See *id.* at viii, 44, and 44 n.58.

¹¹⁶ Appendix A, *supra* note 62, at 35.

¹¹⁷ Final report, *supra* note 42, at viii.

¹¹⁸ Appendix A, *supra* note 62, at 35. See also final report, *supra* note 42, at 53 (same).

¹¹⁹ See *supra* note 65 and accompanying text.

¹²⁰ See *supra* note 67 and accompanying text.

¹²¹ Eighth MOU, *supra* note 2, at art. 4.35. An earlier version of the MOU indicated, “Any final decision by IRS on this issue will depend on budgetary and other IRS considerations.” Seventh MOU, *supra* note 68, at art. 4.36.

¹²² See IRSAC 2018, *supra* note 40, at 18 (recommending that the MOU “require the FFA to spend a certain percentage of its membership dues for advertising and promotion of the program”).

¹²³ *Id.* at 9-13; IRSAC 2019 Public Report, at 13-36 (Nov. 2019) (IRSAC 2019).

advertising the program would have been money poorly spent.

Perhaps sensing that its whitewashing of FFA companies' behavior would prompt some of these criticisms, Mitre emphasized that FFA companies helped a lot of taxpayers file returns for free in 2019 through the companies' "free commercial" sites. In fact, the FFA told Mitre that their members "provided free commercial filings last tax season to nearly 18 million taxpayers,"¹²⁴ more than six times the number of taxpayers who filed through Free File.¹²⁵ Moreover, Mitre equated the 18 million free returns prepared on FFA companies' "free commercial" sites to free returns prepared through government programs such as Free File, the VITA program, and TCE.¹²⁶ Further, Mitre argued that to the extent taxpayers eligible for Free File end up using other alternatives to file their returns, that decision is purely voluntary. "Free File is just one choice taxpayers have to file their returns for free,"¹²⁷ Mitre observed, and "many taxpayers eligible for Free File continue to file taxes through FFA members' commercial offerings."¹²⁸

Mitre's commentary on eligible Free File taxpayers filing returns on FFA companies' "free commercial" sites is problematic. First, Mitre made no effort to verify FFA claims that its members filed "nearly 18 million returns" without charging taxpayers. Second, those 18 million returns allegedly filed for free on FFA companies' commercial sites were most certainly not the equivalent of filing 18 million returns through Free File, VITA, or TCE. For starters,

there is no upselling, hidden fees, "value-added services," dark patterns, or deceit with Free File, VITA, or TCE, unlike with FFA companies' "free commercial" sites. Mitre itself made this distinction: "While most of the Free File companies provide free versions of their commercial offerings, taxpayers may be subject to hidden fees and costs of using these programs," and "customers looking to file state returns . . . typically bear additional costs."¹²⁹ Moreover, eligible Free File taxpayers filing returns on FFA companies' "free commercial" sites are not afforded the valuable protections contained in the Free File MOU and instead are subject to the nauseating upselling described earlier. To Mitre's credit, it acknowledged that some not insignificant number of taxpayers eligible for Free File end up paying FFA companies to file their returns, and "could benefit from migrating to Free File."¹³⁰ But Mitre made no attempt to ascertain the actual number or to analyze the potential benefits.

Finally, it is preposterous to suggest that individual choice drives millions of taxpayers otherwise eligible for Free File to pay to file their return on FFA companies' "free commercial" sites.¹³¹ Indeed, despite the significant shortcomings of Mitre's report, it contains overwhelming evidence that FFA companies made substantial and affirmative efforts to make it harder for taxpayers to find and participate in the Free File program. From concealing their own Free File sites to spending millions of dollars on

¹²⁴ Final report, *supra* note 42, at 29. The actual number was 17.7 million. *Id.* at x.

¹²⁵ *Id.* at 30.

¹²⁶ *Id.* at 29 ("With free venues such as VITA, military assistance, TCE and free commercial filings, Free File is just one choice taxpayers have to file their returns for free."); and Appendix A, *supra* note 62, at 10 ("the government provides free tax preparation help through its Volunteer Income Tax Assistance (VITA) program, while private companies offer free online software for tax preparation and tax filing"). VITA celebrated its 50th anniversary in 2019. It has 3,700 sites throughout the country and provides tax return preparation and filing assistance to underserved communities with an emphasis on low- and middle-income taxpayers and persons with limited English proficiency. Meanwhile, TCE offers tax counseling and return prep to taxpayers 60 and older and specializes in questions about pensions and retirement-related issues. In 2018 taxpayers filed 3.5 million returns using VITA and TCE. See IR-2018-215; and Joanna Ain, "After Providing Free Tax Prep for 50 Years, It's Time to Make the VITA Program Permanent," *Prosperity Now*, Mar. 27, 2019.

¹²⁷ Final report, *supra* note 42, at 29.

¹²⁸ Appendix A, *supra* note 62, at 30.

¹²⁹ See *id.* at 13. See also *id.* (stating Free File "eliminates the monetary cost of filing taxes in the form of guaranteed zero preparation and filing fees. Moreover, unlike the commercial offerings, Free File guarantees protection from hidden costs and fees for using the program."); and *id.* at 12 (also stating Free File "comes without hidden fees that are characteristic of other comparable commercial options").

¹³⁰ *Id.* at 35. See also *id.* ("The share of eligible filers that use the paid versions of the commercial offers is unclear."); and *id.* at 37 (noting that "many eligible taxpayers are not reached by Free File and there is room for improving participation of Free File candidates who currently use paid, commercial services").

¹³¹ Mitre's argument that eligible Free File taxpayers consciously choose to pay for return preparation and filing is essentially the same argument that Goodarzi made when defending his company's efforts to hide its Free File site and to otherwise steer Free File eligible taxpayers to its "free commercial" site: "Because we advertise so much, our experience and our common sense tells us that the majority of people doing internet searches for the words 'TurboTax free tax preparation' are looking for TurboTax free product. Not the one we offer through the IRS Free File program." And: "Our choice around search was intended to be in the best interest of taxpayers so they were more fully informed about their options and could choose what they felt was best for them." Elliott and Waldron, *supra* note 9.

paid search advertisements for their “free commercial” sites, to spending no money on such advertisements for the Free File program, FFA companies did everything within their power to shrink the number of taxpayers filing through Free File while increasing the number of taxpayers filing with their commercial products. In so doing, FFA companies substantially removed the option for eligible Free File users to file through Free File. At the same time, they significantly decreased the chances of being subject to the MOU’s taxpayer protections when dealing with eligible Free File taxpayers.

In fact, Mitre’s report condemned such actions as harmful to taxpayers. “Ultimately,” Mitre opined, “the revenue and profit motive of FFI members may not be detrimental to the objectives of Free File unless members are actively engaged in redirecting Free File eligible taxpayers to their commercial offerings. Such activities would cause harm to Free File candidates if they were misdirected to paying for premium services.”¹³² Mitre’s own findings provide ample evidence to conclude that this is exactly what FFA companies were doing to taxpayers during the 2019 filing season. Ultimately, Mitre failed to connect its own findings and evidence to conclude what has been obvious for some time: FFA companies care considerably more about their bottom line than helping low-income taxpayers file returns for free.

Alleged Unlawful Business Practices

On the same day Mitre’s Free File report filtered into the public domain,¹³³ the FFA issued a glowing press release celebrating how the report absolved FFA companies of any misconduct vis-à-vis the Free File program or eligible Free File taxpayers. Mitre, “a respected non-profit research institute,” the FFA wrote, delivered “a diligent, highly detailed” report that “gave an overall favorable assessment” of the Free File program.¹³⁴ The report, the FFA continued, concluded that FFA companies were “compliant with the MOU,”

and amounted to “a vote of confidence in a highly successful program.”¹³⁵

In an attempt to frame the narrative around Mitre’s much-anticipated study, the FFA read the report too quickly. The FFA might be forgiven because it had to read, digest, and issue a statement on the 400-page study the same day it became public — unless it received a pre-release copy of the report from Mitre or the IRS, which would have been inappropriate given that the FFA and its member companies were the subject of Mitre’s “independent” review. In any event, while Mitre in fact concluded that FFA companies were “overall compliant to the terms of the MOU,”¹³⁶ the evidence on which Mitre relied failed to substantiate that conclusion.

For starters, Mitre discovered troubling instances of FFA companies violating the MOU. For example, it found that FFA members were overcounting the number of Free File returns they processed, in one case counting returns that included refund anticipation loans — high-interest, short-term consumer loans issued by a third party (in this case, FFA companies) against a taxpayer’s expected refund and payable upon receiving the refund from the IRS.¹³⁷ Use of such loans by FFA companies has been banned since 2007, when the IRS and FFA, under significant pressure from Congress and the national taxpayer advocate,¹³⁸ signed a new MOU that prohibited the use of RALs (as well as refund anticipation checks and similar financial products).¹³⁹ For another example of noncompliance associated with overcounting the true number of Free File returns, Mitre found that a different FFA

¹³⁵ *Id.*

¹³⁶ Appendix A, *supra* note 62, at 41.

¹³⁷ See final report, *supra* note 42, at 84. For a discussion of these loans and their effect on taxpayer consumers and consumers more generally, see Mandi Matlock and Chi Chi Wu, “The Return of the Interest-Bearing Refund Anticipation Loan and Other Perils Faced by Consumers,” National Consumer Law Center (Apr. 3, 2019).

¹³⁸ See, e.g., Dustin Stamper, “Grassley, Baucus Send Questions to Return Prep Companies,” *Tax Notes*, May 15, 2006, p. 753; written statement of Olson before the Finance Committee (Apr. 4, 2006); and Grassley release, “Grassley Urges IRS to Rein in Hidden Expenses to Taxpayers in Free File Program” (Apr. 14, 2006).

¹³⁹ See Second MOU, *supra* note 68, at art. 4.28(c). See also Eighth MOU, *supra* note 2, at art. 4.32.3 (same).

¹³² Appendix A, *supra* note 62, at 35.

¹³³ See *supra* note 43 and accompanying text for the odd circumstances surrounding the release of Mitre’s final report on October 8, 2019.

¹³⁴ See FFA press release, *supra* note 43.

company free-filed returns reflecting AGI exceeding \$66,000, the income cutoff for Free File eligibility in tax year 2018.¹⁴⁰

Mitre also identified a potentially serious instance of noncompliance but then failed to reveal how it investigated or resolved the situation. Specifically, Mitre reported that links to some FFA companies' Free File landing pages reflected on the IRS.gov Free File landing page directed taxpayers to a different webpage of those FFA companies than the one indicated on the IRS.gov Free File landing page.¹⁴¹ Mitre neglected to share how many taxpayers were subject to the misdirection or how many FFA companies were involved. Importantly, if taxpayers were sent to FFA companies' commercial landing pages from the IRS.gov Free File landing page rather than to a different URL that also sent taxpayers to the FFA companies' Free File landing pages, it would represent a serious violation of the MOU. But Mitre failed to resolve the issue, or it resolved the issue and failed to disclose the resolution.

Mitre also downplayed the significance of seemingly serious acts of noncompliance by FFA companies. For example, the MOU requires an FFA company to alert taxpayers "at the earliest feasible point" when they become ineligible for that company's Free File offer and what caused the ineligibility.¹⁴² The MOU further requires FFA companies to direct ineligible taxpayers back to the IRS Free File landing page as "the first and most prominent alternative action" so that ineligible taxpayers can consider Free File offers from other FFA members.¹⁴³ Thereafter, the FFA companies may offer taxpayers to remain on their Free File sites to complete and file a return for free as long as the taxpayer is under the lowest 70 percent of taxpayers by AGI, which, again, was \$66,000 for tax year 2018.¹⁴⁴ Mitre reported that two FFA companies violated these requirements by (1) failing to inform taxpayers with AGI exceeding \$66,000 that they were ineligible, (2)

failing to direct them back to the IRS Free File landing page, and (3) presumably permitting taxpayers with AGI exceeding \$66,000 to complete a return for free while remaining on their Free File sites.¹⁴⁵ Mitre also found that two FFA companies violated the same unequivocal requirements for a different part of the MOU, which imposes obligations on FFA companies consistent with the requirements described above.¹⁴⁶

Both sets of violations reflect serious and specific noncompliance with the Free File MOU. Yet inexplicably, Mitre deemed the indisputable violations "inconclusive or not applicable for specific members"¹⁴⁷ without further elaboration or explanation. In so doing, Mitre gave the noncompliant FFA companies — and, by extension, the FFA — a free pass.

In addition to minimizing clear violations of the MOU by FFA companies, Mitre (as far as one can tell from its report) failed to test or investigate compliance with some of the most important MOU provisions, particularly those designed to protect taxpayers from FFA companies' aggressive tactics.

For example, one of the provisions added to the 2018 MOU addresses the long-standing practice of FFA companies sending to prior-year users of their Free File products emails that market the companies' commercial products.¹⁴⁸ Specifically, the new provision prohibits FFA companies from using these emails "to communicate with the taxpayer about any non-Free File commercial products or services," and from including any "marketing, soliciting, sale or

¹⁴⁰ See final report, *supra* note 42, at 84.

¹⁴¹ *Id.* at 20.

¹⁴² Eighth MOU, *supra* note 2, at art. 4.19.2(i)-(ii).

¹⁴³ *Id.* at art. 4.19.2(iii).

¹⁴⁴ *Id.* at art. 4.19.2(v). The next alternative permits FFA companies to offer ineligible taxpayers the option of continuing on their Free File sites and paying a (fully disclosed) fee to file a return. *Id.* at art. 4.19.2(vi).

¹⁴⁵ Final report, *supra* note 42, at 40. I say "presumably," because Mitre's testing of the FFA Free File sites and software took it only to the signature page of a return, the last page for taxpayers to complete before pressing "submit" to file a return.

¹⁴⁶ *Id.* at 41. The part of the MOU in question is art. 4.32.2 pertaining to "Provision of Federal Return When Taxpayer Does Not Qualify for a Member Free File Offer Is Permitted," which Mitre mislabeled as "Permitted Sales, Limits on Ancillary Sales, and Selling Activity," a different part of the MOU. See art. 4.32.

¹⁴⁷ *Id.* at 40.

¹⁴⁸ Eighth MOU, *supra* note 2, at art. 4.32.4. For recognition of this long-standing practice, see Jacob Goldin, "Participation in the IRS Free File Program," *Tax Notes*, Oct. 23, 2017, p. 543 (discussing "the common practice of FFA companies marketing their commercial products to taxpayers who filed with them in the prior year through Free File").

selling activity, or electronic links to such activity.”¹⁴⁹ Rather, FFA companies may only “remind the taxpayer about the availability” of the companies’ Free File landing pages and offer to take them there.¹⁵⁰

As another example, Mitre (again, as far as one can tell from its report) failed to test or investigate whether FFA companies were complying with a provision dealing with prior-year Free File users visiting their FFA company’s commercial site the following year. In these situations, the taxpayer “must be given a first option to return to the Member’s Free File offer before receiving any other alternative choices for the Member’s publicly available commercial tax preparation products or services.”¹⁵¹

Both of these provisions aim to protect eligible Free File taxpayers from being tricked into purchasing FFA companies’ commercial products, actions that go to the heart of the public and congressional outrage over FFA companies hiding their Free File sites, luring Free File users to their commercial sites, and largely preventing taxpayers from entering the Free File program. Yet Mitre seems to have ignored both provisions in its review.

If that were not enough, Mitre vouched for the effectiveness of leaving FFA companies to their own devices and permitting them to police themselves and each other. Mitre also concluded that the IRS provides sufficient oversight of the Free File program by relying on a combination of FFA companies’ self-assessed compliance with the MOU and the IRS’s perfunctory reviews of the program.

As to FFA companies’ self-policing, Mitre observed favorably that “due to the competitive forces at work among FFA members, members are

compelled to police each other regarding MOU compliance.”¹⁵² In addition, “as part of the annual application for membership,” FFA companies “must complete and sign a questionnaire that certifies compliance with select provisions of the MOU. This self-attestation is shared with the IRS as evidence of compliance.”¹⁵³ Further, the FFA “contracts with an independent auditor to conduct a comprehensive audit of member sites to ensure member websites are in compliance with the provisions of the MOU.”¹⁵⁴ The result of the audit is shared with the IRS, which in turn works with the FFA’s independent auditor to “adjudicate findings” and “address deficiencies” in compliance.¹⁵⁵

Self-policing and self-reporting violations of the MOU, along with market incentives to rat out noncompliant competitor firms and oversight by an “independent” auditor, sound great in theory. But they haven’t worked. In fact, they’ve failed miserably. As we saw earlier, FFA companies made it virtually impossible during the 2019 filing season for eligible Free File taxpayers to find and use the Free File program by affirmatively hiding their Free File sites from internet searches, expending no resources to advertise or promote the existence of the IRS Free File website, and then paying millions of dollars to advertise their commercial sites by making them appear at the top of internet searches. So positioned, taxpayers were considerably more likely — indeed, 5.66 times more likely¹⁵⁶ — to visit these commercial sites where the taxpayer protections contained in the Free File MOU did not apply, where FFA companies expended considerable resources to make the sites appear as if they guaranteed free

¹⁵² Final report, *supra* note 42, at 56. Mitre also reported that FFA companies self-report potential issues of noncompliance to the FFA executive director. That procedure is not reassuring. The current executive director, Tim Hugo, a long-serving Virginia delegate (defeated in 2019), has held that position for nearly the entire history of the Free File program. During that time, Hugo has received political donations from organizations that do not necessarily have the best interests of low-income taxpayers at heart. These contributions include \$29,500 from Intuit and \$197,488 from various payday, fast-cash, check-cashing lenders that offer financial products such as RALs and refund anticipation checks to low-income persons, products that the Free File MOU expressly prohibits FFA companies from offering to eligible Free File users (*see supra* notes 137-139 and accompanying text).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See supra* note 77 and accompanying text.

¹⁴⁹ Eighth MOU, *supra* note 2, at art. 4.32.2.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at art. 4.14.

return preparation and filing, and where FFA companies could seduce eligible Free File taxpayers into purchasing free tax filing products through dark patterns and trickery.

For its part, the FFA's handpicked "independent" auditor did nothing to stop this misconduct and in fact may have facilitated it. In recent years, IRSAC has urged the IRS to unmask the FFA's auditor, and to share that auditor's review and findings with Congress and the public.¹⁵⁷ IRSAC has also recommended that the IRS replace the FFA's handpicked auditor with a truly independent third-party auditor, and to "expand the annual audit requirements of FFA members with a process that is objective and transparent, including a third-party audit of each member."¹⁵⁸ The IRS has refused to take action on these recommendations despite IRSAC's insistence that implementation would "enhance the accountability of the program."¹⁵⁹

In terms of the secret auditor facilitating FFA companies' noncompliance with the MOU, Mitre reported that the auditor annually conducts a "comprehensive audit of member sites, particularly in the area of web security, website links, search results, and source code."¹⁶⁰ That means the mystery auditor knew or should have known that FFA companies were actively hiding their Free File sites and buying paid search advertisements. It also means that the secret auditor knew or should have known that these tactics drove millions of eligible Free File users away from the Free File program and its related MOU protections to FFA companies' unregulated commercial sites and the companies' insatiable appetite for upselling paid products to low-income taxpayers. Did the FFA auditor in fact identify this behavior during the 2019 filing

season?¹⁶¹ If so, did it inform the IRS? In the event the IRS knew of this behavior, what did the tax agency do about it? And, in any event, why did it take the reporting of *ProPublica* to detect, investigate, and publicize the willful — and potentially illegal¹⁶² — actions of FFA companies to drive down participation in the Free File program and expose low-income taxpayers to FFA companies' dirty tricks?

In reaching its insufficiently substantiated conclusion that FFA companies were "overall compliant to the terms of the MOU,"¹⁶³ Mitre also relied on IRS oversight procedures of the Free File program.¹⁶⁴ Critics of the Free File program and of FFA companies' aggressive behavior toward eligible Free File taxpayers have slammed these procedures as being grossly deficient and harmful.

The national taxpayer advocate has identified Free File as the No. 4 "most serious problem" facing tax administration, in large part because of the IRS's woeful oversight.¹⁶⁵ The IRS "is devoting zero resources to oversight and testing of this program,"¹⁶⁶ according to the national taxpayer advocate, and its failure "to set new goals for the Free File program or allocate sufficient money towards it reveals how the IRS prioritizes the Free File program and hinders the program from improving the e-filing services the IRS endorsed for taxpayers."¹⁶⁷ Indeed, substandard oversight harms the Free File program's target population of low- and middle-income taxpayers. According to IRSAC, the IRS's "deficient oversight and performance standards put vulnerable taxpayers at risk, and make it difficult to ensure that FFA members are upholding their obligation to provide tax preparation and e-filing services 'to economically disadvantaged and underserved'"

¹⁵⁷ IRSAC 2018, *supra* note 40, at 18 ("The IRSAC understands that the FFA currently engages a private sector auditor to review FFA members' compliance with the terms and conditions of the program. However, the IRSAC also understands that this auditor's review and findings are not shared with the IRS, Congress or the public."). In 2019 IRSAC reiterated its prior-year recommendations and urged "full implementation." IRSAC 2019, *supra* note 123, at 48.

¹⁵⁸ IRSAC 2018, *supra* note 40, at 18. *See also id.* at 17 (recommending the IRS "develop more robust processes for reviewing best practices of the FFA and its members to ensure fairness, objectivity and transparency. One way to achieve this goal is through an annual independent audit of each member of the FFA.").

¹⁵⁹ *See* IRSAC 2019, *supra* note 123, at 51.

¹⁶⁰ Final report, *supra* note 42, at 56.

¹⁶¹ In 2019 the FFA auditor conducted in-season reviews of the Free File program and FFA companies. *See* IRSAC 2019, *supra* note 123, at 50 (reporting the IRS as confirming "additional in-season reviews of the members were performed in the Spring by the IRS and FFI's auditor").

¹⁶² *See supra* notes 11-22 and accompanying text; and *infra* notes 185-196 and accompanying text.

¹⁶³ *Supra* note 136.

¹⁶⁴ Final report, *supra* note 42, at 55-58.

¹⁶⁵ *See* TAS, *supra* note 81 (identifying and discussing the top 20 "most serious problems").

¹⁶⁶ *Id.* at 76.

¹⁶⁷ *Id.* at 69.

taxpayers.¹⁶⁸ In fact, IRSAC felt so strongly about increasing oversight over FFA companies that its 2018 annual report exhorted the IRS to “assume a more direct role in ensuring that the Free File program provides taxpayers a way to file their taxes in a free and secure manner. The IRS should also have an expanded role in ensuring the program does not unnecessarily expose Free File users to upselling of paid products by FFA members.”¹⁶⁹

To the extent the IRS exercises any kind of oversight over the Free File program and its private sector partners, the oversight is largely ministerial. For instance, the IRS conducts a clerical and perfunctory review of the program before the filing season and another during the filing season. The pre-season review merely entails verifying that FFA companies are capable of offering basic filing services, that they follow industry best practices respecting security and taxpayer privacy, and that their Free File offer covers not less than 10 percent and not more than 50 percent of the individual taxpayer population. Or, in the words of the national taxpayer advocate, the review “is mainly to ensure the software providers’ technical compliance with the Free File MOU, and does not evaluate the quality of the offerings from Free File software providers.”¹⁷⁰ The in-season review covers largely the same ground and includes ensuring that each FFA company is achieving a 75 percent acceptance rate for Free File returns.¹⁷¹

These perfunctory oversight responsibilities are carried out by just three full-time IRS employees. One of the employees devotes 100

percent time to the traditional Free File program, while the other two devote the “majority” of their time to the Fillable Forms component of Free File.¹⁷² That’s right, the IRS thinks so little of the traditional Free File program that it assigns less than two full-time employees to provide oversight of the program, while abdicating all meaningful supervision to its for-profit private sector partners. And yet Mitre concluded that the “IRS’s current program resource allocation—for relationship management, planned periodic reviews, and direct, transparent collaboration with FFA members—is appropriate for the current level of work required by the Free File program.”¹⁷³ Mitre reached this conclusion after previously concluding that FFA companies comply with the MOU,¹⁷⁴ a conclusion that this report refutes.

The rosy picture that Mitre painted of the integrity of the Free File program, of FFA companies’ compliance with the MOU, and of IRS oversight of the program and its private sector partners is unsubstantiated and ultimately unwarranted. Moreover, Mitre’s defense of FFA companies concealing their Free File sites from eligible Free File users and further obscuring those sites by paying millions of dollars to lure eligible Free File taxpayers to paid commercial sites belied the independence of its report. Indeed, while the behavior of FFA companies might in fact rise to the level of violating consumer protection laws, Mitre only saw “free market tactics” that it described as “common, legal business practices used in the private sector to generate business” and “remain competitive and increase revenue.”¹⁷⁵ But that’s a legal conclusion that Mitre was not in a position to adjudicate.

Certain “free market tactics” may be common, but whether they are legal or illegal is a job for

¹⁶⁸ IRSAC 2018, *supra* note 40, at 16. *See also id.* (recommending the IRS when negotiating the next MOU “insist upon more robust protection and oversight components to ensure a fair and transparent program”); and *id.* at 17 (recommending the IRS “develop standards for frequently and actively checking on FFA member websites during the filing season, including most importantly logging in as a taxpayer and going through the filing process on each FFA member’s Free File website”).

¹⁶⁹ *Id.* at 17. *See also* Dennis J. Ventry Jr., “The Failed Free File Program Should Be Reformed, Not Codified,” *Tax Notes*, July 16, 2018, p. 317, at p. 323 (“Rather than perform meaningful oversight of the program that bears its imprimatur, the IRS appears to rely solely on the unreliable assumption that FFA companies will police each other. In other words, the IRS has turned over responsibility for ascertaining filing season compliance or noncompliance with the terms and conditions of the Free File MOU to its counterparty in the MOU. That abdication of responsibility is illogical.”).

¹⁷⁰ TAS, *supra* note 81, at 69.

¹⁷¹ *See* final report, *supra* note 42, at 56.

¹⁷² *Id.* at 50-53 (reporting that the two employees spending the majority of their time on Free File Fillable Forms devote a combined 55 percent of their time on traditional Free File).

¹⁷³ *Id.* at 52. *See also id.* at 55 and 57.

¹⁷⁴ *Id.* at 55 (stating “given the level of the program’s current compliance with the MOU, IRS’s existing governance of the FF program is appropriate and effectively allows the program to fulfill the IRS’s currently articulated goals for the program”).

¹⁷⁵ Appendix A, *supra* note 62, at 26. *See also id.* at 35 (arguing “some actions of FFI members that critics have called deceptive are indeed common, legal business practices used in the private sector to improve brand recognition, increase exposure to new customers, and to highlight new products”).

agencies to investigate and courts to adjudicate. Taken too far, the “free market tactics” employed by FFA companies may have run afoul of the law.

In fact, there is evidence that some FFA companies possessed actual knowledge that they were victimizing taxpayer-consumers with their “free commercial” software offerings. For one example, *ProPublica* reported that “Intuit knows it’s deceiving its customers” through ads for “free” TurboTax. An internal Intuit analysis of customer calls in 2019 found that “customers are getting upset,” because Intuit’s “free commercial” site advertises “Free, Free, Free, and the customers are assuming their return will be free.”¹⁷⁶ Moreover, customer service agents “are suggesting an upgrade for customers when they don’t need it.”¹⁷⁷ When customers click the upgrade they “are moving to *Live* without knowing it,” and then “getting upset when they have to pay more for the upgrade and the only way to downgrade is to clear and start over.”¹⁷⁸ As another example involving Intuit, *ProPublica* reported that according to a former Intuit employee, “Steering customers away from TurboTax’s truly free option is a ‘purposeful strategy.’”¹⁷⁹ When taxpayers go to Intuit’s “free commercial” site, the employee continued, the Intuit “landing page would direct you through a product flow that the company wanted to ensure would not make you aware of Free File.”¹⁸⁰ In fact, Intuit’s “entire strategy” is designed to “make sure people read the word ‘free’ and click our site and never use a free product.”¹⁸¹ The strategy worked, according to the former employee, because the “vast majority of people who click [‘free’] will not pay \$0.”¹⁸²

The reality of Intuit’s “monetization strategy of the TurboTax Free Edition product”¹⁸³ conflicts with its “free, free, free” marketing campaign where the only word spoken by actors in a series of ads is “free” in various contexts, including: a game show, a spelling bee, a lawyer’s courtroom statement to the jury, a high school placekicker reminiscing about learning how to kick field goals as a child, the closing credits of an action movie, and an elderly couple struggling with answers to a crossword puzzle.

Notwithstanding Mitre exonerating FFA companies’ “common, legal business practices,”¹⁸⁴ those practices are at the center of numerous agency investigations and consumer lawsuits against FFA companies. The investigative and legal activity focuses on whether FFA companies engaged in unfair and deceptive trade practices and/or unfair methods of competition, as well as whether the companies conspired to further their allegedly illegal acts.

The breadth of this activity bears witness to the seriousness of the accusations and the strength of the available evidence. In May 2019 TIGTA initiated a top-to-bottom audit of the Free File program that was prompted by concerns that “taxpayers eligible for the program were being charged for returns or being diverted to preparation services that are not free.”¹⁸⁵ Release of the TIGTA audit is imminent. The FTC may be conducting its own investigation into the conduct of FFA companies at the behest of prominent members of Congress who were concerned that FFA companies’ affirmative acts to hide their Free File sites from internet searches violated federal law pertaining to unfair and deceptive trade practices and unfair competition and constituted a conspiracy.¹⁸⁶ Also, at least five state attorneys general are investigating Intuit and other FFA companies for similar concerns, albeit with respect to violations of state rather than federal

¹⁷⁶ Elliott and Kiel, “Inside TurboTax’s 20-Year Fight to Stop Americans From Filing Their Taxes for Free,” *ProPublica*, Oct. 17, 2019.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The internal document also expressed surprise that Intuit’s taxpayer-customers “seem to think if they click on Live Tax Advice they will get someone live to assist them.” *Id.*

¹⁷⁹ Elliott and Kiel, *supra* note 8.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* (quoting from the resume of a former Intuit senior product marketing manager, in which the manager also boasts of enhancing “TurboTax in-product upsell experiences”).

¹⁸⁴ See *supra* note 175 and accompanying text.

¹⁸⁵ *Supra* note 13 and accompanying text. See also *supra* note 12.

¹⁸⁶ See *supra* note 11 and accompanying text.

law.¹⁸⁷ Moreover, one of the country's most formidable state regulators, the New York Department of Financial Services (DFS), is conducting its own investigation of Intuit, H&R Block, and other FFA companies over possible violations of the state's unfair and deceptive trade practices law by steering taxpayers away from their Free File products and toward their paid products.¹⁸⁸

The legal proceedings against FFA companies present equally serious challenges to the companies' business practices. The Los Angeles city attorney filed separate suits against Intuit and H&R Block alleging the companies violated California's unfair competition law.¹⁸⁹ As alleged, Intuit and H&R Block "defrauded the lowest earning 70 percent of American taxpayers . . . by actively undermining public access to the IRS's 'Free File' program, while simultaneously employing deceptive and misleading advertising and design schemes intended to induce taxpayers into unnecessarily purchasing expensive products."¹⁹⁰ Santa Clara County sued Intuit under California's false and deceptive advertising law alleging that Intuit made "false or misleading statements about TurboTax and taxpayers' ability to file their taxes for free, by causing such statements to be made and disseminated to the public, and by making statements that taxpayers could use TurboTax for free with the intent to charge most of those taxpayers to use TurboTax and/or to sell a different service than advertised."¹⁹¹ More than a dozen lawsuits brought by individual California residents (some purporting to represent a class of similarly situated Californians) were also filed against Intuit alleging violations of California's unfair

competition law,¹⁹² Consumers Legal Remedies Act,¹⁹³ false advertising law,¹⁹⁴ and general claims of fraud and unjust enrichment. Some of these suits have been consolidated into a large putative class action, which is proceeding in federal court in the Northern District of California.¹⁹⁵ Others have been dismissed, stayed, or are pending.¹⁹⁶

Thus, Mitre clearly spoke out of turn when it concluded that the actions of FFA companies that are the subject of these investigations and court proceedings were merely "common, legal business practices."¹⁹⁷

Proving the Lie in FFA's 'Philanthropy'

For years, the FFA and its member companies have been telling Congress, taxpayers, courts, and anyone who would listen that their participation in Free File is a "philanthropic endeavor."¹⁹⁸ In the words of Free File Executive Director Tim Hugo, FFA companies are "donating their services"¹⁹⁹ to reflect the program's "original philanthropic mission and intent."²⁰⁰ Individual FFA companies mime Hugo's narrative of philanthropy. As recently as December, Intuit's Goodarzi characterized his company's involvement in the FFA as, "We do this for good; this is a philanthropic effort."²⁰¹ Intuit has also been trying to convince courts of its philanthropy in the legal proceedings described earlier. According to company filings, Intuit and other return prep services firms "agreed with the IRS to donate" free versions of their commercial products to low-income taxpayers,²⁰² and that Intuit's Free File

¹⁸⁷ See Elliott, "TurboTax Tricked Customer Into Paying to File Taxes. Now Several States Are Investigating It," *ProPublica*, Dec. 19, 2019.

¹⁸⁸ See *supra* notes 14 and 193 and accompanying text.

¹⁸⁹ See *Intuit*, No. 19STCV15644 (Sup. Ct. of Cal., L.A. Cty 2019); and *H&R Block*, No. 19STCV15752 (Sup. Ct. of Cal., L.A. Cty 2019). For California's unfair competition law, see Cal. Bus. & Prof. Code section 17200 et seq.

¹⁹⁰ *Id.* at 1.

¹⁹¹ *Intuit*, No. 19-cv-354178, at 22-23 (Sup. Ct. of Cal., Santa Clara Cty 2019).

¹⁹² See *supra* note 189.

¹⁹³ See Cal. Civ. Code section 1750 et seq.

¹⁹⁴ See Cal. Bus. & Prof. Code section 17500 et seq.

¹⁹⁵ See *In re Intuit Free File Litigation*, No. 3-19-cv-02546.

¹⁹⁶ See, e.g., *Macklin*, No. 19-cv-347208 (stayed); and *Callaway*, No. 19-cv-354484 (dismissed without prejudice).

¹⁹⁷ See *supra* note 175 and accompanying text.

¹⁹⁸ See, e.g., Tik Root, "Millions of Americans Pay Unnecessary Tax Filing Fees — But They May Be Able to Get a Refund," *Quartz*, June 18, 2018. See also Max A. Cherney, "100 Million Americans Can File Their Taxes for Free, Yet Only 3 Million People Do It," *MarketWatch*, Apr. 17, 2017 (repeating FFA participation in Free File as "philanthropic endeavor").

¹⁹⁹ Root, *supra* note 198.

²⁰⁰ Andrea Coombes, "IRS Changes Free Web-Filing Rules," *The Wall Street Journal*, Nov. 1, 2015.

²⁰¹ Elliott, *supra* note 187.

²⁰² Memorandum in Support of Demurrer, *supra* note 91, at 6.

product was “created as part of Intuit’s public service initiative known as the Financial Freedom Foundation.”²⁰³

The FFA’s claim of acting philanthropically has always been a false narrative. But revelations over the last year that chronicled the lengths to which FFA companies have gone to (1) undermine the Free File program, (2) keep eligible Free File taxpayers from finding Free File sites where the MOU protected them from FFA companies’ upselling tactics, (3) lure eligible Free File taxpayers to “free commercial” sites, and (4) then trick them into paying for commercial products converts the already dubious claim to inconceivable. The FFA’s story of philanthropy mocks reality. Far from “donating their services” for free, FFA companies worked to “monetize free,”²⁰⁴ profiting off eligible Free File taxpayers at every turn.

Mitre’s report reinforced the hypocrisy of the FFA’s false narrative. According to Mitre, FFA companies participate in Free File purely for economic gain.²⁰⁵ “As private sector firms in a monopolistically competitive market,” FFA companies “operate in the interest of maximizing returns to their private investments.”²⁰⁶ To that end, FFA companies’ “participation in Free File is driven by the economic incentives such as preservation of market share, business development, greater revenues and profit, or a combination of the above.”²⁰⁷ Free File’s public-

private partnership “creates a value to the for-profit industry that provides the service.”²⁰⁸ “Without that value,” Mitre observed, “private companies may decline to participate.”²⁰⁹

At the end of the day, “The primary benefit of offering free services through Free File is that FFI members can earn additional business through the provision of free services.”²¹⁰ No source of revenue is off limits for these profit-maximizing private sector companies, including revenue generated from eligible Free File users. By participating in the Free File program, Mitre explained that FFA companies “benefit from the potential business generated for their commercial products from taxpayers who are ineligible for Free File as well as taxpayers who are eligible for Free File but choose to use the commercial versions.”²¹¹ This business model is part of FFA companies’ “‘free-to-commercial’ customer conversion strategy.”²¹²

Implementing this strategy requires FFA companies to be in a position to push their commercial products on eligible Free File users. Historically, that wasn’t a problem. The early MOUs contained few restrictions on the kind of ancillary and “value-added” products and services that FFA companies could cross-market and advertise on their Free File sites. These paid products and services included RALs, “value-add” buttons that linked to paid commercial products, state returns with hidden fees, and emails sent to prior-year Free Filers welcoming them back with a link to FFA companies’ commercial sites rather than to Free File sites. Over the years, however, the MOU has been altered to include more taxpayer protections to restrict FFA companies from marketing paid services directly to Free File users.²¹³

So FFA companies adapted. If it was harder to implement their “‘free-to-commercial’ customer

²⁰³ *Id.* at 9.

²⁰⁴ Elliott and Kiel, *supra* note 176 (quoting internal Intuit documents). See also Elliott and Kiel, *supra* note 8 (quoting former Intuit employee bragging about enhancing “monetization strategy of the TurboTax Free Edition product”).

²⁰⁵ Even non-monetary benefits for FFA companies can eventually be turned into monetary ones. As Mitre explained, “Public attention and reputation which affects how high the company website will appear on web searches” can “be turned into monetary benefits through additional business generation.” Appendix A, *supra* note 62, at 34.

²⁰⁶ *Id.* at 33.

²⁰⁷ *Id.* at 26. See also *id.* at 5 (“Alliance Members’ economic incentives to supply free tax preparation services is shown to be a function of the economic returns the private service providers expect to earn from their program investments.”); and *id.* at 33 (“The incentive for FFI to participate as Free File providers is tied to multiple benefits that align with these private sector incentives.”).

²⁰⁸ Final report, *supra* note 42, at xviii. See also *id.* at 82 (same).

²⁰⁹ *Id.* at 58.

²¹⁰ Appendix A, *supra* note 62, at 32. See also *id.* at 26 (same).

²¹¹ *Id.* at 33. For why eligible Free File taxpayers “choosing” to purchase FFA companies’ commercial product is a false choice, see *supra* notes 126-132 and accompanying text.

²¹² *Id.*

²¹³ That is not to say the current MOU provides sufficient taxpayer protections, only that it provides more protections than in the past.

conversion strategy” with taxpayers starting out on Free File sites, FFA companies would simply hide those sites while making it easier to find and enter commercial sites. That is precisely what they did in anticipation of the 2019 filing season. As described earlier, FFA companies took affirmative acts to make it virtually impossible for eligible Free File taxpayers to find their Free File sites through internet searches while those companies were spending more than \$17 million to make it considerably easier for eligible Free File taxpayers to find their “free commercial” sites through web searches, and then making those sites appear to be offering free returns for low-income taxpayers with promises of “*FREE guaranteed. \$0 Fed. \$0 State. \$0 To File.*”²¹⁴

Once on these commercial websites, eligible Free File taxpayers felt the full force of FFA companies’ “‘free-to-commercial’ customer conversion strategy” as well as what Mitre described as the related “freemium” business model.²¹⁵ The idea of freemium is to offer customers both free and paid versions of a product or service, in this case return preparation and filing services. By design, the free versions include less functionality, which allows the company to convert free users to paid users of the companies’ premium versions of the same product through the allure of upgraded features. In the standard freemium business model, “the free version is available to everyone,”²¹⁶ sophisticated and unsophisticated consumers alike, such that all customers are subject to the aggressive “‘free-to-commercial’ customer conversion strategy.” But in the context of eligible Free File users, the free version is offered only to “economically disadvantaged and underserved” taxpayers,²¹⁷ the most vulnerable and least sophisticated taxpayer cohort. To the extent FFA companies are successful in converting these taxpayers to their paid products, the companies

“can use other marketing strategies to retain paying customers and potentially increase prices over time.”²¹⁸

By leveraging the combined power of the “‘free-to-commercial’ customer conversion strategy” and the freemium business model, FFA companies treat eligible Free File taxpayers no differently than other taxpayers. But eligible Free File taxpayers are vastly different from other taxpayers. For starters, they have an expectancy interest in receiving a free tax return. Both the government and FFA companies have promised them free tax return filing through Free File, while FFA companies have also promised them a free return on their free commercial sites. Given these assurances, eligible Free File taxpayers reasonably expect to file their returns for free. Nor are they in the market for commercial tax return preparation and filing services. These eligible Free File taxpayers are further dissimilar to other taxpayers because they are prequalified for a free return as economically disadvantaged and underserved persons as defined by the Free File MOU. They are composed of some combination of low-income, financially unsophisticated, nonnative English-speaking populations trying to find a free, safe opportunity to fulfill their return filing obligations.

The Free File program is supposed to provide that safe haven. But FFA companies have co-opted it for their own economic gain by extracting revenue from eligible Free File taxpayers. In the process, FFA companies have harmed (and continue to harm) tens of millions of economically disadvantaged and underserved persons they have pledged to help file returns “at no cost.”²¹⁹ So much for FFA companies’ participation in Free File reflecting a “philanthropic endeavor.”²²⁰

Warning the IRS Not to Challenge FFA Tactics

In both its final report and appendix on the economics of the Free File program, Mitre spent considerable time discussing the nature of the public-private partnership entered into by the

²¹⁴ See *supra* note 46.

²¹⁵ Appendix A, *supra* note 62, at 33 (emphasis in original).

²¹⁶ *Id.*

²¹⁷ Eighth MOU, *supra* note 2, at art. 2.

²¹⁸ Appendix A, *supra* note 62, at 33. See also final report, *supra* note 42, at 34 (same).

²¹⁹ Eighth MOU, *supra* note 2, at art. 2.

²²⁰ See *supra* notes 198-203.

IRS, the FFA, and individual FFA companies. In these discussions, Mitre emphasized that for the partnership to be successful, it required balancing the interests and goals of the IRS, the FFA's member companies, and the taxpayers that the partners have pledged to assist in preparing and filing tax returns for free.²²¹ According to Mitre, taxpayers were interested in a "lower economic cost of tax preparation and tax filing," while the government realized "lower administrative and oversight cost" and FFA companies derived "increased business development and revenue generation opportunities."²²² Moreover, Mitre assigned the job of performing the balancing act to the government. The IRS is "in a unique position of having to balance taxpayer expectations from the program," Mitre opined, "with the industry members' outlook for economic gains."²²³

Not all interests were created equal in Mitre's typology. The interests of FFA companies clearly predominated. The Free File public-private partnership calls for "a balance that serves the interests of the government and taxpayers," allowed Mitre, "but also creates a value to the for-profit industry that provides the service. Without that value," Mitre warned the IRS, "private companies may decline to participate."²²⁴

That FFA companies participate in Free File purely for economic gain is not newsworthy. It is well documented that FFA companies view Free File as a bundled "free-to-fee" marketing package with advertised free federal returns serving as the loss leader providing opportunities to sell "value added" services.²²⁵ The Mitre report confirmed and then broadened our understanding that FFA companies' "participation in Free File is driven by economic incentives,"²²⁶ and that FFA companies impose an aggressive free-to-commercial customer conversion strategy and freemium business model on eligible Free File taxpayers.²²⁷

More remarkable is the extent to which Mitre cautioned the IRS that exercising additional oversight of the Free File program might erode the revenue FFA companies extract from low-income taxpayers attempting to participate in the program. "It is beneficial" for FFA companies "to continue participating in the program as long as they can recover program costs through additional revenue generated via new business development opportunities. Additional FFI revenues are profit."²²⁸ The current MOU,²²⁹ Mitre offered, "leaves sufficient room for FFI [companies] to pursue marketing their commercial services to all taxpayers, including ones who are eligible for Free File, as long as the marketing is done outside of FFI landing pages."²³⁰ In other words, the current MOU

²²¹ See, e.g., final report, *supra* note 42, at 1 (stating Free File "is a partnership between IRS and industry that depends upon balance and cooperation to achieve success"); *id.* at 9 (the IRS must "balance taxpayer expectations from the program with the industry members' outlook for economic gains while ensuring that the agency remains cost-effective in implementing Free File"); *id.* at xviii (stating the "partnership requires a balance that serves the interest of the government and taxpayers, but also creates a value to the for-profit industry that provides the service"); and *id.* at 82 (same). For the pledge that the IRS and FFA make to eligible Free File users, see Eighth MOU, *supra* note 2, at art. 2 ("Members shall work in concert with the IRS to increase electronic filing of tax returns, which includes 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.").

²²² Final report, *supra* note 42, at 58.

²²³ Appendix A, *supra* note 62, at 6. See also *id.* at 37 (exactly the same); *id.* at 40 (exactly the same); and *id.* at 43 (exactly the same).

²²⁴ Final report, *supra* note 42, at 58.

²²⁵ See, e.g., Elliott and Kiel, *supra* note 176; Elliott, *supra* note 8; Elliott and Waldron, *supra* note 5; Dylan Matthews, "Why I'm Boycotting TurboTax This Year," *Vox*, Apr. 14, 2019; Root, *supra* note 198; Matthews, "Elizabeth Warren Has a Great Idea for Making Tax Day Less Painful," *Vox*, Apr. 14, 2018; Jessica Huseman, "Filing Taxes Could Be Free and Simple. But H&R Block and Intuit Are Still Lobbying Against It," *ProPublica*, Mar. 20, 2017; Chris Morran, "Why Isn't It Easier to File Your Tax Return for Free? Thank TurboTax, H&R Block," *Consumerist*, Mar. 20, 2017; Samantha Sharf, "You Call That Free? What TurboTax and the Free File Alliance Cost One Millennial," *Forbes*, Feb. 8, 2016; Liz Day, "TurboTax Maker Linked to 'Grassroots' Campaign Against Free, Simple Tax Filing," *ProPublica*, Apr. 14, 2014; and Laura Sanders, "Why 'Free File' for Taxes Isn't So Popular: Here's How to Navigate the Maze of Offerings and Avoid Charges," *The Wall Street Journal*, Jan. 30, 2014.

²²⁶ *Supra* note 207. See also *supra* notes 204-221 and accompanying text.

²²⁷ See *supra* notes 210-219 and accompanying text.

²²⁸ Appendix A, *supra* note 62, at 38.

²²⁹ See Eighth MOU, *supra* note 2, and Addendum to the Eighth Memorandum of Understanding on Service Standards and Disputes Between the Internal Revenue Service and Free File Inc. (Dec. 26, 2019) (addendum to MOU).

²³⁰ Appendix A, *supra* note 62, at 41.

acknowledges the legitimacy of FFA companies' free-to-commercial customer conversion strategy and freemium business model. But the willingness of FFA companies to continue participating in the MOU "depend[s] on the extent to which the IRS imposes restrictions on the business activities of tax software companies."²³¹ And just in case the IRS failed to understand Mitre's message, it enunciated that additional IRS oversight of FFA business practices "that impedes on business development and profit-making activities of tax software companies would drive out firms from participating in Free File."²³²

Mitre also warned the IRS against responding impulsively to the simmering outcry over FFA companies' business activities and their adverse effects on Free File participation and eligible Free File users. The IRS should resist the temptation to "alleviate taxpayer and public concerns" over FFA companies' perceived misconduct with changes to the MOU that "restrict or dictate FFA's business practices."²³³ Such added oversight "is not likely to have a significant influence on the free market actions" of FFA companies,²³⁴ and might induce some companies to walk away from Free File with others demanding concessions to stay.²³⁵ The IRS should further resist adopting the position of some critics that "one Free File eligible customer paying for tax preparation services is one too many."²³⁶ Far better to adopt a balanced approach to concerns over how the business practices of FFA companies suppressed Free File participation, damaged the program, or harmed taxpayers. "In the interest of reducing taxpayer burden and ensuring a greater number of eligible taxpayers actively use Free File," Mitre suggested, "the IRS can seek to make more effective use of the MOU to prevent FFI's actions that put downward pressure on Free File usage."²³⁷ But at the same

time, "to ensure participation of Free File service providers, the IRS needs to leave room for Alliance Members to benefit from the program."²³⁸

Mitre seemed to be telling the IRS that its only option is to grin and bear its private sector Free File partners, and that it should not counteract affirmative acts to suppress Free File usage by making it virtually impossible for taxpayers to find Free File websites. The same goes for circumventing the taxpayer protections contained in the MOU, purchasing paid advertisements to multiply traffic to "free commercial" sites, and overwhelming eligible Free File taxpayers with free-to-commercial customer conversion strategies and freemium business models. If the IRS restricted any of this activity, Mitre warned, it would be met by FFA companies' equal or greater counterpunch, including exacting other economic concessions from the program or walking away from the program altogether.

Mitre repeated this warning in the context of the underlying bargain the Free File program struck in 2002. That agreement pledged FFA companies to provide free tax return preparation and filing services "to economically disadvantaged and underserved populations at no cost to either the individual user or to the public treasury." In exchange, the IRS pledged "to not enter the tax preparation software and e-filing services marketplace."²³⁹ At the time, a government-run e-filing program posed an existential threat to private sector return preparation service firms, and the IRS's promise not to compete with private industry represented a valuable concession.²⁴⁰ But according to Mitre, the threat of a government-run e-filing program

²³⁸ *Id.* at 41.

²³⁹ Eighth MOU, *supra* note 2, at art. 2. *See also* original agreement, *supra* note 27, 67 F.R. at 67249 ("The Consortium will offer Free Services to taxpayers. The IRS will provide taxpayers with links to the Free Services offered by the Consortium Participants through a web page . . . which will be hosted at irs.gov accessible through firstgov.gov. During the term of this Agreement, the IRS will not compete with the Consortium in providing free on-line tax return preparation and filing services to taxpayers.")

²⁴⁰ *See* Elliott, *supra* note 187 ("Securing that noncompete pledge from the IRS was a major lobbying goal of Intuit and a key part of the company's broad strategy to shut down any attempts to increase the government's role in tax filing."); Elliott and Kiel, *supra* note 176 (the noncompete clause "was the culmination of years of lobbying," a "major victory in the war against encroachment"). For a history of the Free File program and FFA companies' efforts to keep the IRS out of the business of tax return filing and impose its "free-to-fee" model on eligible Free File taxpayers, see Elliott and Kiel, *supra* note 176.

²³¹ Final report, *supra* note 42, at 40.

²³² *Id.* at 62. *See also* Appendix A, *supra* note 62, at 40 (same).

²³³ Appendix A, *supra* note 62, at 37.

²³⁴ *Id.* at 41.

²³⁵ *See* final report, *supra* note 42, at 61; Appendix A, *supra* note 62, at 38-39 (same).

²³⁶ *Id.* at 62; *see id.* at 40 (same).

²³⁷ Appendix A, *supra* note 62, at 36. *See also id.* at 41 (proposing "the IRS can explore whether there is room within the MOU to increase taxpayer awareness of Free File without driving out FFI members with strict restrictions on their business practices").

has lessened considerably over the years with the value of the MOU's noncompete clause similarly eroding in value. "While theoretically possible," Mitre said, the "IRS's entry into the tax preparation industry is a non-credible threat to private companies."²⁴¹ Cost, implementation, administration, and maintenance of a government-run e-filing program make it a prohibitively "risky and costly endeavor" for the IRS.²⁴² Meanwhile, FFA companies bear the "bulk of the cost of program development and implementation."²⁴³ Thus, Mitre recommended that where the "IRS's entry into the [e-filing] market is not a credible threat," and where FFA companies bear a disproportionate burden of running the program, the original bargain struck between the IRS and its private sector partners "should be reevaluated."²⁴⁴ During that reevaluation, moreover, the IRS should be mindful that "existing FFI members have little incentive to offer free tax services unless these offerings lead to additional business opportunities."²⁴⁵

Without getting into the merits and demerits of a government-run e-filing program,²⁴⁶ it is enough to say that any threat of FFA companies walking away from the Free File program due to increased IRS oversight through changes to the MOU is hollow. Over the last year, we learned the extent to which FFA companies circumvent the MOU by hiding their Free File sites (where the MOU applies) while paying millions of dollars to direct eligible Free File users to their "free commercial" sites (where the MOU doesn't apply). Short of prohibiting FFA companies from engaging in these tactics or mandating that the

companies "down-sell" free products to taxpayers otherwise eligible to use Free File, the IRS could add almost as many restrictions to the MOU as it wanted and FFA companies would still participate.

Moreover, any talk of FFA companies demanding concessions from the IRS because the noncompete clause has lost all value is phooey. Indeed, Goodarzi told employees at a recent companywide meeting that he requested the IRS to remove the noncompete clause from the MOU. "There is something in the memorandum of understanding with the IRS Free File that says the IRS can't compete with us. We told them, remove that. We do this for good; this is a philanthropic effort."²⁴⁷ Goodarzi knows that the strategy to extract revenue from the Free File program these days takes place outside the MOU, almost completely beyond the control of the IRS. He also knows the value of remaining a member of the FFA, and of being able to claim that his company's participation in Free File "is a philanthropic effort."²⁴⁸

Deficient User Testing

As part of its report, Mitre conducted "taxpayer experience testing" on real taxpayers to determine the usability of the Free File program. It sent out invitation letters to 2,500 randomly selected taxpayers from six ZIP codes in Chicago, all of whom used the Free File program to file 2018 federal income tax returns.²⁴⁹ The 2,500 invitations yielded 141 responses from potential participants. Ultimately, Mitre whittled the participant pool to 29 taxpayers, all of whom participated in usability testing sessions that included debriefing questions and interviews with Mitre researchers.²⁵⁰

The usability tasks that these taxpayers performed included: (1) locating the Free File program with a web browser; (2) navigating the Free File landing page and selecting a Free File

²⁴¹ Appendix A, *supra* note 62, at 33.

²⁴² *Id.* at 32 n.33.

²⁴³ *Id.* at 42.

²⁴⁴ *Id.* at 25.

²⁴⁵ *Id.* at 32.

²⁴⁶ See, e.g., Jason Fichtner, William G. Gale, and Jeff Trinca, "Tax Administration: Compliance, Complexity, and Capacity," Bipartisan Policy Center (Apr. 2019) (funded by H&R Block); Ventry, *supra* note 169, at 329-330; Joseph Bankman, Clifford Nass, and Joel Slemrod, "Using the 'Smart Return' to Reduce Evasion and Simplify Tax Filing," 69 *Tax L. Rev.* 459 (2016); Ventry, "Americans Don't Hate Taxes, They Hate Paying Taxes," 44 *U.B.C. L. Rev.* 835, 850-875 (2011); and Jeffrey A. Eisenbach, Robert E. Litan, and Kevin W. Caves, "The Benefits and Costs of Implementing 'Return Free' Tax Filing in the U.S." (Mar. 2010) (funded by the Computer and Communications Industry Association).

²⁴⁷ *Supra* note 201. For why FFA companies' claims of participating in Free File for "philanthropic" reasons are specious, see above.

²⁴⁸ In December 2019 the IRS and FFA agreed to strike the noncompete clause from the MOU. See addendum to MOU, *supra* note 229, at Section II.

²⁴⁹ See final report, *supra* note 42, at 26.

²⁵⁰ *Id.* at 26-27.

offer from one of three FFA companies randomly selected by Mitre; and (3) completing a tax return with the selected FFA company's Free File software.²⁵¹ For purposes of the taxpayer experience testing, participants did not input their own taxpayer characteristics but rather those contained in the profiles of one of three fictitious taxpayer scenarios provided by Mitre.²⁵² Taxpayers used these scenarios to choose specific FFA companies' Free File offers, create an account with the selected FFA company, and prepare a tax return right up until pressing "submit" to file the return. The taxpayer scenarios included:

Eligible taxpayer "simple" scenario. A single taxpayer with no dependents, who has only income reported on a Form W-2. The taxpayer is eligible for Free File.

Eligible taxpayer "complex" scenario. A married filing jointly taxpayer, with a spouse and two dependent children. The taxpayer reports income from two jobs (two Form W-2s) and interest income on Form 1099-INT. The taxpayer is eligible for Free File.

Ineligible scenario. A single taxpayer who reports income from a Form W-2. The taxpayer is ineligible for Free File due to having wage income of \$74,000.²⁵³

Finally, the usability testing and interviews were designed to accomplish certain objectives. These objectives included: (1) understanding how taxpayers find the Free File program online and how they select a company's Free File product; (2) discerning any usability issues with IRS Free File websites or the Free File sites of the three randomly selected FFA companies; and (3) learning taxpayers' previous experiences with the Free File program.²⁵⁴

The above research design of Mitre's "user testing" exhibited several deficiencies.

First, the sample size of 29 taxpayers was disturbingly small, representing just 0.001238

percent of the 2,343,235 returns filed through the Free File program in 2019²⁵⁵ and 0.000018661 percent of the 155,402,000 individual income tax returns in 2019.²⁵⁶ Such a diminutive sample size is not representative of the Free File population that Mitre's taxpayer experience testing was purporting to study. Mitre explained the small sample size was due to "limitations of time," the same reason it gave for including only three out of 12 FFA companies in its user experience testing.²⁵⁷

Second, the sample population of taxpayers that Mitre selected to participate in its user experience testing had already successfully filed their returns during the 2019 filing season using Free File. Thus, they already knew how to search for Free File, how to select from multiple FFA companies' Free File offers, and how to complete and submit a Free File return. In other words, these taxpayers knew what was on the test and how they could earn an "A," because they had already navigated the three usability objectives that Mitre set out to test.²⁵⁸ And yet, these taxpayers still exhibited difficulty finding FFA Free File offers, selecting FFA offers, and navigating the workflow of FFA software.²⁵⁹

Third, the fictitious taxpayer scenarios that Mitre designed were softball scenarios. They reflected plain vanilla taxpayer characteristics and obvious eligibility/ineligibility criteria that should have posed no problems for, respectively, taxpayers selecting an FFA company's Free File offer and FFA companies discerning eligibility/ineligibility of the testing participants.²⁶⁰ Nonetheless, participants in Mitre's taxpayer experience testing still reported significant dissatisfaction with the IRS Free File landing page and FFA companies' Free File sites and software.²⁶¹ Mitre's fictitious taxpayer scenarios also ignored

²⁵¹ *Id.* at xiv, 26, and 71.

²⁵² *Id.* at xiv, 26-27, and 71.

²⁵³ *Id.* at 22-23.

²⁵⁴ *Id.* at 26.

²⁵⁵ *Id.*

²⁵⁶ IRS, "Filing Season Statistics for Week Ending November 22, 2019" (reflecting 155,402,000 individual income tax returns received by the IRS in filing year 2019).

²⁵⁷ See final report, *supra* note 42, at 26 n.46.

²⁵⁸ See *supra* note 250 and accompanying text.

²⁵⁹ See *infra* notes 262-270 and accompanying text.

²⁶⁰ Recall that Mitre used three taxpayer scenarios. See *supra* note 254 and accompanying text.

²⁶¹ Appendix A, *supra* note 62, at 72-76; Mitre, "Independent Review of IRS Free File Program, Appendix G: Taxpayer Experience Testing Report," at ii-iii (Sept. 13, 2019) (Appendix G).

common taxpayer characteristics that could render a taxpayer ineligible for Free File but would become apparent only after selecting a company's Free File offer and starting to fill out a return. These characteristics include, for example, certain education expenses that qualify for tax benefits; the receipt of small business income; incurring related small business expenses; and the receipt of unemployment, disability, or elderly benefits.

Nor did Mitre's fictitious taxpayer scenarios test for some important changes made to the MOU in 2018. For one example, FFA companies must alert taxpayers "at the earliest feasible point" when they become ineligible for that company's Free File offer and why they were deemed ineligible.²⁶² The same part of the MOU requires FFA companies to direct ineligible taxpayers back to the IRS Free File landing page as "the first and most prominent alternative action" so that ineligible taxpayers can consider Free File offers from other FFA companies.²⁶³ Thereafter, an FFA company may offer taxpayers to remain on its Free File site to complete and file a return for free, as long as the taxpayer is under the lowest 70 percent of taxpayers by AGI, or \$66,000 for tax year 2018.²⁶⁴ The final alternative allows FFA companies to offer an ineligible taxpayer the option of continuing on their Free File site and paying a fee (fully disclosed) to file a return.

It does not appear that Mitre attempted to determine if the three randomly selected FFA companies followed these procedures during the taxpayer experience testing. Mitre could have easily tested for compliance or noncompliance with these procedures for its third taxpayer scenario: a clearly ineligible Free File user due to disqualifying income of \$74,000.²⁶⁵ Further, Mitre was acutely aware of this form of noncompliance, because its data analysis of returns filed during the 2019 filing season and marked "Free File" by FFA companies revealed several hundred returns

where the Free File indicator incorrectly included returns with AGI exceeding \$66,000.²⁶⁶

Finally, to the extent Mitre's taxpayer experience testing produced meaningful results, it found that the Free File program confounded taxpayers on multiple levels, notwithstanding that these taxpayers had successfully submitted Free File returns only a few months earlier. A good portion of the confusion can be attributed to FFA companies hiding their Free File sites from eligible Free File users and then spending millions of dollars to funnel those taxpayers to the company's commercial sites decorated with promises of "free guaranteed" returns.²⁶⁷ Mitre neglected to make that connection or explore its implications for eligible Free File taxpayers.

Mitre found its test subjects "conflated the Free File program with other forms of filing taxes for free, including commercial software," a blurring of the lines that FFA companies have worked hard to achieve.²⁶⁸ Taxpayer-participants "mistook finding an e-file provider for finding a Free File software vendor,"²⁶⁹ and they "were unsure whether they had used Free File or a free commercial version in the past."²⁷⁰ Moreover, participants generally "seemed unclear on the relationship between the IRS and Free File," with some test subjects "express[ing] surprise that Free File vendors are commercial companies, not directly offered through the IRS."²⁷¹

Moreover, a high percentage of participants "ended their Free File search on a commercial vendor website" rather than on Free File landing pages.²⁷² Indeed, Mitre reported that nine of its 29 test participants "navigated to a commercial website as part of the process while they were searching for Free File," with four of them "ultimately stay[ing] on the commercial page, not

²⁶² Eighth MOU, *supra* note 2, at art. 4.19.2(i)-(ii). The IRS highlighted this change in a press release publicizing the new MOU. See IR-2019-2 and IR-2018-213.

²⁶³ *Id.* at art. 4.19.2(iii).

²⁶⁴ *Id.* at art. 4.19.2(v)-(vi).

²⁶⁵ See *supra* note 254 and accompanying text.

²⁶⁶ See final report, *supra* note 42, at xxi. See also *supra* notes 140 and 145-146 and accompanying text.

²⁶⁷ For discussion of these tactics, see accompanying text, *supra* notes 46, 102, and 213.

²⁶⁸ Final report, *supra* note 42, at 72. For discussion of these efforts, see text above.

²⁶⁹ *Id.*

²⁷⁰ *Id.* Nearly 30 percent of the 36 Free File taxpayers that Mitre deemed eligible to participate (*i.e.*, 10 taxpayers) were uncertain whether they previously used Free File or "free commercial" offerings. *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

realizing that they had *not* selected a Free File offer.”²⁷³ Taxpayer-participants expressed shared difficulty with “struggl[ing] to find the Free File landing page, including through IRS.gov,”²⁷⁴ a challenge whose origins can be traced to FFA companies’ substantial efforts to hide their Free File websites from internet searches and to superordinate their commercial sites through paid search advertisements.²⁷⁵

Much like the rest of Mitre’s “independent” review of the Free File program, its taxpayer usability testing failed to connect the dots between FFA companies’ behavior and eligible Free File users’ experience with the program. Indeed, the review amounted to a series of siloed observations with no meaningful analysis of the harm that FFA companies have done to the Free File program and to eligible Free File taxpayers.

IRS Complicity in FFA Tactics

Imagine a partnership with two partners. They open a soup kitchen in a depressed part of town to serve the community’s economically disadvantaged and underserved population. Partner A is a public interest lawyer specializing in poverty law, with experience operating meal centers. Partner B made a fortune in the payday loan business and is now dedicated to philanthropic endeavors. Under the partnership agreement, Partner A is responsible for day-to-day operations of the kitchen, while Partner B funds the business and provides a building free of rent. The business serves thousands of meals a day to persons dependent on the kitchen for food. Over time, Partner A learns that Partner B never gave up its old ways and has been hawking high-interest payday loans to patrons of the kitchen. The loans might violate state usury laws. Partner A confronts Partner B. They renegotiate the partnership agreement to prohibit the sale of financial products anywhere on the property housing the soup kitchen.

Shortly thereafter, Partner B moves the soup kitchen across town to another of Partner B’s buildings. In the old building, Partner B opens a business, “Partner B’s Free Pizza & Payday Loans,” where the pizza is “free” only for patrons who also take out loans. Patrons of the old kitchen try to find the new kitchen, but it is in a remote part of town inaccessible by public transportation. Meanwhile, they have to eat, and they often need money. So they eat pizza and incur debt they struggle to repay. Partner A keeps the relocated kitchen up and running with a monthly pittance from Partner B. The kitchen serves a fraction of the patrons it previously served. Partner A worries about Partner B illegally extending credit to vulnerable members of the community. Ultimately, Partner A turns a blind eye to Partner B’s questionable business tactics.

Now consider the Free File partnership.

Partner A and Partner B agree to offer free online tax return filing to tens of millions of disadvantaged and underserved taxpayers through the program. Partner A is a public tax agency, and Partner B is a consortium of private sector tax services firms. Under the partnership agreement,²⁷⁶ Partner A lends its name to the program and hosts its official website, while Partner B provides tax return filing software and hosts additional program sites. In the beginning, the agreement contained few restrictions on ancillary and value added products and services that Partner B could cross-market, advertise, and sell on its program sites. Over time, the agreement restricted Partner B’s ability to engage in these tactics. Recently, Partner A and Partner B renegotiated its agreement to make it harder for Partner B to generate revenue from taxpayers filing returns on program sites.

Shortly thereafter, Partner B took affirmative steps to remove program sites from internet searches. At the same time, Partner B spent millions of dollars to direct internet traffic to its “free commercial” sites where the terms and conditions of the program agreement did not apply, and where Partner B could aggressively impose its free-to-fee business model on

²⁷³ *Id.* at 75 (emphasis in original).

²⁷⁴ *Id.* at xv and 72-73.

²⁷⁵ Mitre ignored this obvious connection and instead took the opportunity to blame the IRS for the confusion. “This suggests that the IRS needs to plan for taxpayers to enter the Free File system from search query results, rather than from the IRS home page” *Id.* at 72.

²⁷⁶ The Free File “partnership agreement” is memorialized in an MOU into which the IRS and FFA entered “intending to be legally bound.” See *supra* notes 2 and 66 and accompanying text.

taxpayers in search of free return filing. News organizations discovered and publicized Partner B's tactics and their subversive effects on the program. The revelations induced investigations and lawsuits involving Partner B's potential violation of consumer protection laws. Meanwhile, Partner A stood by Partner B and even defended Partner B's actions. To quell public and political outcry, Partner A hired a company to review the program. Partner A has previously contracted billions of dollars in business with the company.

Both of the above partnerships started out with noble intentions. Both served economically disadvantaged and underserved populations. Both provided services at no cost that the target populations desperately needed: On one hand, food compelled by hunger, and on the other, tax return filing compelled by law. Both partnerships also promised to deliver those services for free. But one of the partners in each partnership (Partner B) saw an opportunity to exploit and then profit off the essentiality of the services and the target populations' lack of sophistication. At the same time, the other partner in each partnership (Partner A) did little to stop its partner from harming the respective target populations.

To be sure, both Partners A could have done more to protect their customers. But Partner A in the second scenario, the IRS, is more culpable. For starters, the IRS defended²⁷⁷ its Free File partners in the face of evidence that FFA companies undermined the Free File program by hiding their Free File sites from internet searches and luring eligible Free File taxpayers to their "free commercial" sites where they could flout the MOU and its taxpayer protections. Moreover, the IRS continues to exercise no meaningful oversight of its FFA partners' tactics,²⁷⁸ some of which are

under investigation for running afoul of the law.²⁷⁹ Nor does the IRS seem to care that its Free File partners knowingly victimize taxpayers through questionable tactics.²⁸⁰ The IRS also sends eligible Free File taxpayers to FFA companies' customer service agents for help with their Free File software and sites,²⁸¹ agents that the IRS knows or should know are on strict orders to steer callers away from free products to paid products.²⁸² Recently, evidence has also emerged that the IRS allows alterations to the MOU — ostensibly jointly negotiated between the IRS and FFA — to be written by the FFA.²⁸³

Further, the IRS allows FFA companies to trade on its good name to the distinct detriment of the agency. Indeed, yielding oversight of the Free File program (and perhaps the contents of the MOU) to the FFA and its member companies harms not just taxpayers but the IRS itself. As I have said elsewhere, when FFA companies engage in predatory behavior through Free File, it "reflect[s] negatively on the IRS," because in the eyes of taxpayers, the IRS "is an accomplice to the misconduct of FFA companies."²⁸⁴ Heck, it's the "IRS Free File" program, after all. The national taxpayer advocate has made the same observation. Because Free File software can be accessed through IRS.gov, "taxpayers may be under the false impression that the IRS endorses

²⁷⁹ See *supra* notes 11-17 and 185-196 and accompanying text.

²⁸⁰ See *supra* notes 175-182 and accompanying text.

²⁸¹ For the IRS sending eligible Free File taxpayers to FFA companies' customer service departments, see "About the Free File Program" ("Need help with an error or the software? Contact the company for free customer service."); "Know Your Protections Under the IRS Free File Program" ("If you need help when you are on the company's website and doing your taxes, you may refer to the company's Free customer service options.").

²⁸² For FFA companies instructing customer service agents to steer eligible Free File taxpayers to paid products, see Elliott and Kiel, *supra* note 176 (describing customer service agents pushing paid upgrades to callers who do not need them); Elliott and Kiel, *supra* note 8 (reporting on a former Intuit employee testifying that "steering customers away from TurboTax's truly free option is a 'purposeful strategy,'" and reporting "H&R Block explicitly instructs its customer service staff to push people away from its free offering").

²⁸³ See Elliott and Kiel, "The IRS Tried to Hide Emails That Show Tax Industry Influence Over Free File Program," *ProPublica*, Oct. 29, 2019 (reporting the IRS "has allowed the tax preparation industry to write the rules" of the Free File program). If true, this revelation contradicts Mitre's assertions that the MOU is a document reflecting mutual compromises by the IRS and FFA. See, e.g., final report, *supra* note 42, at iii ("the partnership is governed by a mutually negotiated" MOU); *id.* at 1 (same); *id.* at 6 (same); *id.* at 11 (same); and *id.* at 35 (same).

²⁸⁴ Ventry, *supra* note 169, at 328.

²⁷⁷ See *supra* note 34 and accompanying text.

²⁷⁸ See *supra* notes 164-174 and accompanying text.

the Free File products available there, and thus a poor experience with Free File may reflect poorly on the IRS and can erode taxpayers' trust in fair tax administration."²⁸⁵

Now more than ever, the IRS has some explaining to do. We need to know what the IRS has to say about Mitre's characterization of FFA companies' participation in Free File as being "driven by economic incentives."²⁸⁶ We also need to know if the IRS endorses FFA companies subjecting eligible Free File taxpayers to the companies' free-to-commercial customer conversion strategy and freemium business model.²⁸⁷ We further need to learn whether the IRS is less concerned about "a target number of participants" using the Free File program, and more concerned about "maximizing awareness to ensure people recognize it as a choice."²⁸⁸ If the answer is yes to this last query, we need to know what the IRS thinks about its private sector partners taking affirmative acts to decrease rather than increase awareness of the program, thereby making the "choice" of participating in Free File a false choice. Further, we need to know what the IRS thinks about the FFA's assertion that taxpayers are not considered Free File taxpayers — and thus not protected by the MOU from FFA companies' free-to-fee tactics — unless and until they come to the program through the IRS Free File landing page.

In late December 2019 the IRS answered some of these questions in an addendum to the Free File MOU.²⁸⁹ According to the IRS, the addendum amended the MOU to "help make the Free File program more taxpayer-friendly while strengthening consumer protections in several key areas."²⁹⁰ Most notably, the amended MOU now prohibits FFA companies from "engaging in any practice that would cause the Member's Free

File Landing Page to be excluded from an organic internet search."²⁹¹ The IRS and FFA should be commended for adding this provision to the MOU; it is an undeniably beneficial change. So, too, are new provisions that require FFA companies to conduct customer satisfaction surveys throughout the filing season and to deliver quarterly summaries to the IRS that can be shared publicly;²⁹² to standardize the name of companies' Free File offers reflected on the IRS Free File website as well as on their own Free File landing pages;²⁹³ and to ensure that the Free File indicator appears only on tax returns that meet eligibility criteria of FFA companies' Free File offers.²⁹⁴ The addendum also struck the noncompete clause in the MOU that from the program's inception prohibited the IRS from "enter[ing] the tax return software and e-file services marketplace."²⁹⁵

At the same time, the addendum leaves enforcement of these new provisions to the self-reporting and self-attestation procedures that previously failed to rein in FFA companies' harmful behavior.²⁹⁶ It also affirms the effectiveness of the FFA's "independent auditor,"²⁹⁷ the same auditor that knew or should have known FFA companies were actively hiding

²⁹¹ Addendum to MOU, *supra* note 229, at Section I.

²⁹² *Id.* at Section VII.

²⁹³ *Id.* at Section I. The required naming convention will be, "IRS Free File program delivered by (Member company name or product name)." The standardization attempts to mitigate taxpayer confusion by alerting them that they are in fact on an FFA company's Free File site rather than on a company's "free commercial" site. At the same time, those taxpayers will have already navigated to a company's Free File site, and, as we have seen, the primary challenge for eligible Free File taxpayers involves getting to FFA companies' Free File landing pages in the first place.

²⁹⁴ *Id.* at Section III.

²⁹⁵ *Id.* at Section II. Practically speaking, this change to the MOU is not as valuable as it sounds given current and foreseeable budget constraints on the IRS, the agency's historical lack of enthusiasm for offering its own e-filing program, and the predictable lobbying effort from return preparation service firms against such an effort.

²⁹⁶ See, e.g., *id.* at Section III (leaving FFA companies to "ensure that all Free File returns e-filed with the IRS through the Free File program are set with the Free File indicator only when taxpayers meet the eligibility requirements of the Member's Free File offer" and when "no fees associated with federal return preparation and e-file" have been assessed); *id.* at Section VII (leaving FFA companies to design the customer satisfaction surveys).

²⁹⁷ See, e.g., addendum to MOU, *supra* note 229, at Section V.

²⁸⁵ TAS, "NTA Blog: The Free File Program Is Failing to Achieve Its Objectives and Should Be Substantially Improved or Eliminated" (Mar. 15, 2019).

²⁸⁶ *Supra* note 207.

²⁸⁷ *Supra* note 212-218.

²⁸⁸ Final report, *supra* note 42, at xvi and 80.

²⁸⁹ See addendum to MOU, *supra* note 229.

²⁹⁰ IR-2019-214.

Free File sites and buying paid search advertisements during the 2019 filing season.²⁹⁸ Who will enforce the new provision that FFA companies refrain from concealing their Free File sites? Or placing the Free File indicator on returns for taxpayers who do not meet Free File's eligibility requirements or who end up paying for their "free" return? Or alerting ineligible taxpayers "at the earliest feasible point" that they are in fact ineligible for that company's Free File product and that they can return to the IRS Free File landing page via a prominently displayed link?²⁹⁹ If the answer to these and similar questions is "FFA companies and the FFA's independent auditor," the recent amendments to the MOU designed to protect taxpayers are worthless.

In fact, there is already cause for concern that the amendments will harm rather than help taxpayers. The addendum to the MOU memorializes the right of FFA companies to unleash their the free-to-commercial customer conversion strategy and freemium business model on eligible Free File taxpayers who engage FFA companies on their "free commercial" sites rather than on their Free File sites. "Nothing in this Addendum, the MOU, or the IRS Agreement limits or changes the right of Members to engage in any business activity outside the IRS Free File Program . . . including without limitation all marketing, advertising or promotion of commercial tax preparation software or services offered at no cost or for a fee outside of the Free File Program offering to any taxpayers."³⁰⁰ And while FFA companies can no longer actively hide their Free File sites from internet searches, they can still spend millions of dollars on paid search advertisements that make their "free commercial" sites overwhelm organic searches for the IRS Free File program. Moreover, they can still make their

"free commercial" sites appear to be free with misleading promises of "Free Federal. Free State. Free to File. *FREE guaranteed.* \$0 \$0 \$0."³⁰¹ In other words, they can still trick eligible Free File taxpayers into paying to file federal and state returns they should be getting for free.

By expressly endorsing FFA companies' aggressive free-to-fee strategies, the IRS is complicit in the harm that FFA companies cause economically disadvantaged and underserved taxpayers. These are the taxpayers that the Free File program aims to help and that the Free File MOU aims to protect. The IRS needs new Free File partners to help these taxpayers. It needs partners dedicated to delivering truly free return filing services to eligible Free File users. Continuing to stand by its current partners will continue to implicate the IRS in those partners' abusive and potentially illegal³⁰² behavior. ■

³⁰¹ *Supra* note 46.

³⁰² *See supra* notes 11-22 and 156-198 and accompanying text. The Addendum contains a provision that seems to indicate the IRS is concerned about being implicated in FFA companies' misconduct. Section X states in total, "FFI and its Members are not agents for the IRS and the IRS is not an agent for FFI or any Member." Addendum to MOU, *supra* note 229, at Section X. Combine that "CYA" language with the fact that in what has become a putative class action against Intuit currently proceeding in the Northern District of California (*see In re Intuit Free File Litigation*, No. 3-19-cv-02546 (N.D. Cal.)), the court last year asked the parties to consider whether the IRS was a necessary or essential party to the litigation — and whether the IRS considered itself a necessary or essential party — as a result of the "contract" the IRS had signed with the FFA to offer and operate the Free File program. Ultimately, the parties, the IRS (through the local U.S. attorney's office), and the court agreed that the IRS was not a necessary or essential party. *See Brianna Simohui v. Intuit Inc.*, Transcript of Proceedings, No. C 19-02546 CRB, at 10-11, 14, 43 (N.D. Cal. Aug. 16, 2019). In that context, Section X of the Addendum to the MOU appears to represent an effort not only to put some fiduciary distance between the IRS and its FFA partners, but also some liability distance. Of course, language like that contained in Section X does not prevent courts from finding a principal-agent relationship. For example, a court could still find agency if one of the parties behaved in ways that made it an agent and the principal did not stop the behavior, or a court could find implied agency if the party in the best position to stop the offending behavior failed to do so.

²⁹⁸ For the ineffectiveness of the FFA's handpicked auditor, see *supra* notes 157-162 and accompanying text.

²⁹⁹ Addendum to MOU, *supra* note 229, at Section VI. This amendment is itself curious, because art. 4.19.2 of the existing MOU already imposes the same obligation on FFA companies.

³⁰⁰ *Id.* at Section VIII. This new provision also explicitly indicated that FFA companies are under no obligation to advertise, promote, or market the Free File program. *Id.*