

Center for Financial Privacy and Human Rights
Free markets are a necessary condition of liberty, prosperity and tolerance.

Written testimony of

J. Bradley Jansen

Submitted for the record to the

Internal Revenue Service

Hearing on

REG-146097-09

**Proposed Rulemaking Guidance on Reporting Interest
Paid to Nonresident Aliens**

May 18, 2011

**Internal Revenue Building,
1111 Constitution Avenue, NW,
Washington, DC.**

Thank you for allowing me the opportunity to submit testimony on this important question. My name is Brad Jansen, and I am the director of the Center for Financial Privacy and Human Rights. CFPHR was founded in 2005 to defend privacy, civil liberties and market economics and is part of the Liberty and Privacy Network, a Washington, DC-based 501(c)(3) organization. I am here also on behalf of the 60 Plus Association. Founded in 1992, the 60 Plus Association is a non-partisan seniors advocacy group with a free enterprise, less government, less taxes approach to seniors issues.

My main points can be summarized as follows:

- Database information is frequently abused,
- Expectations of privacy are often violated under the Bank Secrecy Act, which uses a questionable standard of "high degree of usefulness,"
- Information reporting contributes to identity fraud,
- There are considerable human rights implications involved in exchanging information with despotic governments, and
- Burdens for reporting regulations often fall most heavily on seniors and other vulnerable groups.

Unfortunately since I first publicly opposed this idea a decade ago, the problems I outlined then are worse today and the alleged benefits remain as illusory.

There are all too often press reports of abuses of database information. Perhaps the most spectacular recent example is the Epsilon case. Epsilon is a third-party vendor that provides marketing services to a number of companies. Millions of Americans had their data violated by companies that contracted with Epsilon. Explained CNET, "The list of Epsilon clients whose customer e-mail addresses were stolen is not complete, and is likely to grow. But so far Target, Kroger, TiVo, US Bank, JPMorgan Chase, Capital One, Citi, Home Shopping Network, Ameriprise Financial, LL Bean Visa Card, McKinsey & Company, Ritz-Carlton Rewards, Marriott Rewards, New York & Company, Brookstone, Walgreens, The College Board, Disney Destinations, and Best Buy have notified their own customers about the breach. Hilton Hotels and Ethan Allen are also said to be affected."¹ This proposal would mandate increased information sharing without adequate controls further threatening our data security.

These rules are promulgated under a false premise of "high degree of usefulness" standard. In a terrible series of court cases on the Bank Secrecy Act, the US Supreme Court permitted the sharing and selling of our personal information despite contractual, common law and constitutional (state and federal) prohibitions if the sharing met a "high degree of usefulness" standard for law enforcement. Since there is no alleged benefit for US law enforcement here, this rule makes no effort to meet the required tests and must be abandoned.

In fact the Congress is moving now to address information sharing concerns and update outdated laws and regulations. How will information be shared and transmitted under this proposed regulation? Just this week, Senate Judici-

¹ http://news.cnet.com/8301-31021_3-20050555-260.html#ixzz1MgpAa9fW

ary Committee Chairman Patrick Leahy introduced a bill to revise the Electronic Communications Privacy Act (ECPA). My center is part of the Digital Due Process Coalition that has been working to reform this law.² Care should be taken to make sure the sharing of sensitive personal and tax information is secure.

The information reporting contributes to identity fraud. As I explained to the House banking committee in 2005, “Today’s newspapers report both bank and state government employees selling information to identity theft rings—a mode of terrorist financing.”³ I expound on this point with more examples in my previous writings appended at the end of the statement (see especially “Information Exchange Dangers”).

There is no shortage of examples of governments abusing tax and bank information to violate political, civil and human rights. This proposal would not sufficiently address those concerns. Right now the IRS is under scrutiny because of the chilling of political speech by its audits of non-profit organizations. My own home state of Ohio illegally circumvented protections on political expression by the Socialist Workers Party by collecting dues payments from financial institutions to compile membership lists.⁴ It is no secret that Stalin, the Nazis and other tyrannical regimes in history have used bank and tax information for gross violations of human rights: Hitler’s first list of Jews for extermination was culled from insurance records, e.g. Until the IRS can guarantee that no information will

² <http://digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163>

³ <http://financialprivacy.org/2005/05/ron-paul-adds-cfphr-letter-on-financial-privacy-to-hearing-record/>

⁴ 459 U.S. 87 (1982). More on this idea in my speech here:

<http://financialprivacy.org/2005/05/jansen-presentation-on-bank-secrecy-and-sound-money/>

be shared with any country that will now or in the future may abuse the information, you must rescind this proposal.

Regulatory burdens fall disproportionately on smaller financial institutions (and tax preparers).⁵ This additional compliance cost would have the effect of further consolidating assets in the financial system (contributing to our “too big to fail” problem and greater taxpayer bailouts). The marginal effect reduce the number of credit unions and community banks (as well as increase the barrier to entry for new competitors).

Since seniors are more likely, relative to the general population, to hold accounts in multiple institutions (usually in an effort to conform to the FDIC insurance limitations on accounts), they would be the most adversely affected group along with racial and ethnic minorities (and other unbanked people here) that rely disproportionately on smaller institutions underserved by the larger money center banks.

In conclusion, the government-mandated information sharing regulations are the heart of our identity theft problem. This proposal would exacerbate this problem by sending US financial record information abroad without adequate controls--already some US financial regulators have abused access to our data, just imagine what the Russians, Chinese, Nigerians and Venezuelans have in store for us.

⁵ www.federalreserve.gov/pubs/staffstudies/1990-99/ss171.pdf

Thank you for the opportunity to comment. If you have any questions or need additional information, please do not hesitate to contact me by email at bjansen@financialprivacy.org.

Respectfully submitted,

A handwritten signature in black ink that reads "J. Bradley Jansen". The signature is written in a cursive style with a large, prominent initial "J".

J. Bradley Jansen, Director

Center for Financial Privacy and Human Rights

<http://financialprivacy.org/2011/04/cfphr-calls-for-financial-privacy-on-center-for-freedom-and-prosperity-letter-to-irs-april-7-2011/>

April 7, 2011

Hon. Timothy F. Geithner
Secretary of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Geithner:

We are writing to express our deep concern with an onerous regulation (REG-146097-09), proposed by the Internal Revenue Service, that would undermine American banks and the U.S. financial system by requiring the reporting of deposit interest paid to nonresident aliens.

This regulation is both contrary to existing law and is not needed to enforce tax law. This proposed rule, which is a retread of a rejected Clinton-era proposal, should be withdrawn.

There are many reasons why this proposed regulation faces strong opposition from Congress, private industry and public policy organizations. This initiative is an abuse of the regulatory process that seeks to overturn the law rather than to enforce it. Moreover, it will undermine our economy's performance by causing capital to flee the American banking system. This will have a negative impact on homeowners, consumers, and businesses.

The proposed regulation flouts statutory language and congressional intent. On several occasions, lawmakers have visited the issue of how to treat the interest income earned by nonresident aliens. In every case, the desire to attract capital to the American economy led legislators to decide not to tax the income and not to require that the income be reported to foreign tax authorities.

- The proposed regulation is not required to administer U.S. law. Interest income paid to nonresident aliens is not subject to tax. Other regulations and forms already ensure that citizens and/or resident aliens are not able to falsely claim nonresident alien status to benefit from this preferential tax status.
- The proposed regulation is not required by tax treaties. The IRS has openly admitted in the past that it wants to collect this data in order to provide the information to nations that have signed tax treaties with America. Tax treaties, however, only require the exchanging of information that is collected for purposes of domestic law enforcement. There is no obligation to impose additional regulatory burdens solely for the purpose of enforcing other nation's laws.

- The proposed regulation would impose significant damage on the U.S. economy. The IRS failed to perform an economic analysis or conduct any cost/benefit analysis. Nonresident aliens are estimated to have deposited over \$3 trillion in U.S. financial institution, yet if this regulation is approved, a substantial portion of this money will flee to competing institutions in other jurisdictions.
- The proposed regulation endangers human rights. Innocent people seeking to protect themselves and their assets from tyrannical, corrupt, and venal governments will be thwarted by this regulation. The unfortunate reality is that most of the world still lives in countries where there is persecution based on ethnic, racial, religious, economic and political characteristics. Sharing private financial information about U.S. bank deposits with thugs such as Venezuela's Hugo Chavez should not be the objective of the U.S. government.

The likely withdrawal of several hundred billion dollars from the U.S. economy would have a deleterious impact on many financial institutions. Borrowers also would suffer. Families seeking mortgages, consumers seeking car loans, and businesses seeking money to create jobs and expand operations all would be adversely affected. This means less economic growth at a time when policymakers are overwhelmingly focused on promoting economic recovery.

Because the proposed rule is irreparably flawed, we urge its immediate withdrawal.

Sincerely,

Andrew F. Quinlan ~ President, Center for Freedom and Prosperity Foundation
Grover Norquist ~ President, Americans for Tax Reform
Duane Parde ~ President, National Taxpayers Union
Thomas A. Schatz ~ President, Citizens Against Government Waste
James L. Martin ~ President, 60 Plus Association
Karen Kerrigan ~ President and CEO, Small Business & Entrepreneurship Council
John Berlau ~ Director, Ctr. for Investors and Entrepreneurs, Competitive Enterprise Institute
Carrie Lukas, Executive ~ Director, Independent Women's Forum
Phil Kerpen ~ Vice President-Policy, Americans For Prosperity
J. Bradley Jansen ~ Director, Center for Financial Privacy and Human Rights
Tom Giovanetti ~ President, Institute for Policy Innovation
Dick Patten ~ President, American Family Business Institute
Stephen J. Entin ~ President, Institute for Research on the Economics of Taxation
Lew Uhler ~ President, The National Tax Limitation Committee
Chuck Muth ~ President, Citizen Outreach

<http://financialprivacy.org/2001/06/information-exchange-dangers/>

Information Exchange Dangers

By J. Bradley Jansen

June 7, 2001

The Internal Revenue Service posted a ruling for comment period that could have serious unintended consequences for the United States. Promulgated in the final days of the Clinton Administration, the IRS proposed a rule on the "Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens." The rule should be withdrawn before it causes negative economic dislocations to the US by triggering massive withdrawals of foreign deposits from U.S. banks and, potentially, contributes to a new source of identity theft and other privacy violations.

Currently, U.S. financial institutions are only required to report the U.S. deposit interest, so called IRS Form 1042-S reporting, only on Canadian nationals. With the Canadians, we have a close working relationship, share a long, peaceful border, and are long-time friends and allies.

To expect the same kind of relationship with less stable countries that do not have a long history of respecting civil rights and civil liberties is a mistake that belies the message of the Statue of Liberty and our identity as a safe haven in the world.

As America's Community Bankers explained in their comment period on the rule, "It is one thing to share such information on the wealth of its citizens with the Canadian government; it is quite another to share that information with countries where the rule of law may be less well established - a group that includes some of our treaty partners. Nonresident aliens from unstable or repressive nations that have tax treaties with the United States could have a well-founded fear regarding IRS information sharing. As a result of IRS sharing of information, their wealth could be expropriated, and they - or their families - could be threatened with criminal prosecution, violence, or kidnapping from their home countries." The rule could impose a severe regulatory burden without identifying any greater, offsetting benefit. The IRS rule would also adversely affect some institutions unfairly at the expense of others.

The risks of information sharing should be obvious: from a privacy and security perspective, the more information is shared, and the more people that have information to that data, the risk-in fact, the likelihood-of the data being abused rises exponentially.

Just recently, an FDIC employee, Theresa A. Hill of Seat Pleasant, MD, was sentenced to five years of probation in connection with an identity fraud scheme. She was also ordered to pay \$87,531 in restitution. The scheme's victims included

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employees of the Federal Deposit Insurance Corporation and the Department of Health and Human Services' (HHS) Office of Inspector General (OIG).

Ms. Hill reportedly conspired with five others to purchase gift certificates, jewelry and electronic equipment among other goods and services in retail stores and order merchandise over the Internet. She and the others reportedly purchased these items on credit by using the names and personal information of unwitting victims. According to the FDIC, Ms. Hill admitted that the conspirators obtained fraudulent identification cards in the victims' names. In furtherance of the conspiracy, Ms. Hill checked the victims' credit status by applying for credit accounts using the victims' names, Social Security numbers and other identifying information.

The FDIC release says that the indictment alleges that the conspirators obtained personal information, including names, birth dates, Social Security numbers and home addresses, about victims who were employed by the FDIC and the HHS OIG. Ms. Hill was employed in the FDIC's finance division, where she allegedly had access to personnel records of FDIC employees. On another front, the Paris-based Organization for Economic Cooperation and Development is attempting to institute a type of reporting and data exchange requirement on their list of small, developing jurisdictions that have low taxes. This new reporting and data exchange requirement is similar to the IRS rule that many here oppose in this country.

In a related manner, the Financial Action Task Force aims to institute a global Know Your Customer regime that specifically targets the Internet and electronic commerce. The FATF report makes clear that their goal is to effectively deputize accountants, lawyers, notaries and others in the same way that the domestic Bank Secrecy Act regulations effectively deputized bank tellers as law enforcement agents against their customers.

Together, the reporting and data exchange requirements of the OECD and FATF are a blueprint for enabling identity theft and curtailing the benefits of the nascent electronic commerce. The next logical step for the FATF according to their February report would be to deputize Internet Service Providers and others involved in electronic commerce as government snitches. Recognizing the importance of public confidence in financial and electronic commerce must not be lost pursuing policies that are not cost effective - if they work at all.

These proposals for surveillance of bank accounts and information exchange need further consideration regarding privacy and security issues. What safeguards would be in place to protect sensitive personal information from being misused, abused, or compromised from technological security breaches? The recent sentencing of a former FDIC employee in an identity fraud scheme illustrates the dangers of identity theft and other potential problems with government

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data exchange. The privacy and security of our personal, private information is only as good as the worst safeguards of the others with whom it is shared.

<http://financialprivacy.org/2001/10/jansen-et-al-letter-to-president-bush-regarding-anti-money-laundering-proposals/>

October 3, 2001

The Honorable George W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

We are writing to express our concerns about proposals that will undermine international cooperation in the fight against terrorism. Specifically, we are concerned that two pieces of legislation – Senator Kerry’s “International Counter-Money Laundering Act” (S. 398) and Senator Levin’s “Money Laundering Abatement Act” (S. 1371) – will discourage other nations from assisting the United States in the investigation and prosecution of universally recognized crimes such as the murderous attacks of September 11.

Law enforcement already has the authority to seize terrorist assets without trial. Section 11 of S. 1371 would allow the government to seize bank accounts without the government having to establish that they are traceable to a crime. Forfeiture practices are already generating serious abuses and should not be expanded without thoroughgoing review, especially when the proposal appears to have little to do with terrorism.

Section 101 of S. 398 would allow the Treasury Secretary unchecked authority with no due process protections to impose “special measures” on his own authority. These special measures would include his ability to require financial institutions and a long list of other businesses to disclose almost any information of any nature that he deems appropriate and gives the Secretary the ability to sever financial ties with any country or financial institution. This is an unprecedented, vast and broad degree of power to give one official. It represents the effective abolition of financial privacy and due process. It is inappropriate in a country dedicated to the rule of law.

Both S. 398 and S. 1371 create protectionist barriers and regulatory burdens that threaten political and financial ties with many nations. These jurisdictions, needless to say, will have little incentive to help our nation track down criminals and their illicit proceeds. To add insult to injury, both bills will drive capital out of the U.S. economy at a time when our economy is in need of more investment.

Fortunately, there is something that can be done to help law enforcement track down terrorists and others who violate the common laws of civilized nations. The United States should expand its network of mutual legal assistance treaties (MLATs). These international agreements create procedures for information sharing and other forms of assistance in the investigation and prosecution of crime. MLATs, along with other cooperative bilateral accords, are effective tools in the fight against crime.

Unfortunately, the United States has MLATs – either in force or awaiting ratification – with only about 50 nations. The negotiation, ratification, and implementation of additional MLATs should be part of our anti-crime agenda. This approach also will reveal nations that are unwilling to help and deserving of sanctions, ei-

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ther because they refuse to negotiate a MLAT or because they fail to comply with one that is in force.

To eliminate a barrier to the expansion of MLATs, we also encourage the immediate withdrawal of the tax harmonization initiatives of the European Union and Organization for Economic Cooperation and Development. Many low-tax jurisdictions with financial service centers want MLATs with America and other nations, but they correctly refuse to be bullied into “information exchange” proposals that would force them to put the tax laws of other nations above their own.

Policy makers should unite behind proposals that will help America track down terrorists and other criminals. Mutual legal assistance treaties are a proven, effective tool for international cooperation. The Levin and Kerry bills, by contrast, would destroy financial privacy and due process protections afforded the American people and others, undermine international cooperation, and drive capital out of the U.S. economy.

Sincerely,

Grover Norquist, President, Americans for Tax Reform

John Berthoud, President, National Taxpayers Union and Foundation

Richard Rahn, Senior Fellow, Discovery Institute

Dan Mitchell, Senior Fellow, The Heritage Foundation

Andrew Quinlan, President, Center for Freedom and Prosperity

Stephen Moore, President, The Club for Growth

Thomas A. Schatz, President, The Council for Citizens Against Government Waste

Larry Hunter, Chief Economist, Empower America

Karen Kerrigan, Chair, Small Business Survival Committee

Singleton, Senior Analyst, Competitive Enterprise Institute

Christian Josi, Executive Director, American Conservative Union

J. Bradley Jansen, Deputy Director, Center for Technology Policy, Free Congress Foundation

Lewis K. Uhler, President, National Tax Limitation Committee

David Burton, Senior Fellow, Prosperity Institute

Paul Craig Roberts, former Assistant Secretary of the Treasury

Jim Martin, President, 60 Plus Association

Duane Parde, Executive Director, American Legislative Exchange Council

Adrian Day, President, Global Strategic Management

Tom DeWeese, President, American Policy Center

Robert Funk, Executive Director, American Shareholders Association

Bert Ely, Banking Consultant, Ely & Company, Inc.

Joe Eldred, President and Founder, God Bless America

Dr. Jane Orient, Association of American Physicians and Surgeons

Gordon Jones, President, Association of Concerned Taxpayers

Ken McEldowney, Consumer Action

Alan Gottlieb, Citizens Committee for the Right to Keep and Bear Arms

Audrey Mullen, Independent Women’s Action Project

Christopher Whalen, The Whalen Consulting Group

Erik Johnson, National Chairman, Young Americans for Freedom

*Organizations listed for identification purposes only.