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THE NEW PROCEDURES FOR THE EARNED INCOME TAX CREDIT

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Overview

The Internal Revenue Service plans to institute major changes in the procedures for applying for the Earned Income Tax Credit. The new procedures, which would be phased in over several years, could ultimately impose increased burdens on as many as 25 percent to 30 percent of all low-income working families with children applying for the EITC — or up to four to five million such families. (The IRS also plans to increase sharply the number of EITC claims subject to various types of other verification procedures; see the box on page 5.)

Under the IRS' plan, all EITC filers ultimately would be subject to these procedures other than married parents claiming their children for the EITC and a single female parent claiming her children. Thus, all low-income working grandparents, aunts, uncles, and other such relatives who are raising their grandchildren or nieces or nephews — as well as single fathers raising their children, stepparents, and foster parents — would be subject to the new procedures as a condition of receiving the EITC. (Note: a General Accounting Office study last year reported that Census data show that in 1997, some 1.3 million children lived with their grandparents without the presence of a parent and nearly 700,000 lived with other relatives without the presence of a parent.¹)

The IRS plans to apply the new procedures to 45,000 low-income working families with children in the 2004 tax filing season (i.e., next winter and spring, when tax returns for 2003 are filed; the IRS will send the pre-certification notices and forms to these families in advance, probably this August or September). The IRS has said that by the following year, it intends to apply these procedures to up to two million EITC filers. At a March 20 stakeholders' meeting, IRS officials indicated that within a few years, the IRS intends to reach a goal of applying these procedures to four to five million filers, although this goal appears to be under discussion within the IRS, and it is not clear what the ultimate scope of the initiative will be. The ultimate scope of the initiative is likely to be affected by the IRS' experience in implementing and administering the new procedures in the next year or two.

The IRS has said it will conduct an evaluation of the implementation of the new procedures in the 2004 filing season. The IRS has indicated, however, that it does not intend to await the results of the evaluation — including whether the new procedures do more to reduce participation among *eligible* families than ineligible ones — before moving ahead and expanding the scope of the initiative to as many as two million families the following year.

¹ General Accounting Office, *Earned Income Credit: Opportunities to Make Recertification Program Less Confusing and More Consistent*, April 2002, p. 12 (GAO-02-449).

The IRS has said it needs neither legislation nor regulations to institute these procedures. The IRS did send the new pre-certification forms and related documentation requirements to two IRS advisory committees for review and convened a meeting of “stakeholders.” The IRS recently stated it would allow a public comment period on the new forms and documentation requirements, as the IRS generally does for new tax forms. The comment period could be announced shortly.

Risks to Eligible Tax Filers

The latest available documents on the pre-certification initiative are draft IRS forms and instructions for the initiative, dated March 28, 2003. IRS officials have said that some changes have been made since then in these forms; a revised version of the forms is expected to be made available when the public comment period on the forms is announced. The analysis that is provided here of issues raised by the forms and requirements is based on the March 28 documents. This analysis will be updated when the revised version of the forms is released.

As reflected in the March 28 documents, the new procedures — known as “pre-certification” — pose risks of undermining the basic purpose of the EITC by imposing new documentation requirements that many eligible taxpayers may find difficult or impossible to satisfy despite their best efforts. The pre-certification requirements risk leading to significant reductions in the proportion of eligible working-poor families that receive the EITC. The new procedures are likely to work hardship on grandparents and other relatives who are raising children whose own parents cannot or will not do so. People who have limited literacy, speak a language other than English (and especially other than English or Spanish), or are required to secure documents that are available only from municipalities in foreign countries are likely to encounter particular difficulty.

Among the problems that the new requirements (as reflected in the March 28 documents) would create are the following:

- Many filers would be required to provide *marriage certificates* for marriages that occurred decades ago and that, in a number of cases, are for marriages between two *other* people (not the person who would be making the request for the marriage certificate). In addition, in a smaller number of cases, decades-old *birth certificates* for *other* people would have to be provided.

In many cases, these documents will not be obtainable. Some states have laws or rules prohibiting the provision of marriage and/or birth certificates to parties who are not immediate family members; as a result, some of the tax filers who would be required to supply these documents to the IRS will not have access to them. In addition, some state websites tell people requesting marriage certificates to expect a processing time of several months before such requests can be handled, which could prevent some tax filers from meeting IRS deadlines. Moreover, certificates for some marriages and births that occurred outside the United States may be impossible to secure on a timely basis, while within the United States, some states cannot routinely provide certificates for marriages that occurred before a certain date, such as 1965. Finally, in many states, to secure a marriage or birth certificate, the person requesting the certificate must supply detailed information that some of the EITC tax filers who would be required to furnish these

documents to the IRS may not possess — such as the city or county of the birth or the marriage in question, or the maiden name of the bride on the requested marriage certificate. In cases where the parties to the marriage or the person whose birth certificate is being sought are not members of the immediate family and cannot be located or are deceased, this information may not be readily available to the tax filer. For such reasons, no other major federal program demands that applicants furnish documents such as marriage certificates, allows no other documentation in lieu of such certificates, and denies benefits to otherwise eligible people who are unable to provide these documents. For example, federal food stamp regulations state that any document that provides reasonable verification must be accepted and “... no requirement for a specific type of document, such as a birth certificate, may be imposed.” Despite their best efforts, many honest EITC filers may not be able to satisfy these requirements.

- Most tax filers subject to pre-certification also will have to provide an affidavit from a third party, signed *under penalty of perjury*, attesting that the person completing the affidavit has “personal knowledge” that the tax filer and the child lived together at a specific address during certain months of the year. The problem here is that the IRS would strictly limit the types of people permitted to fill out the affidavit to people who often will *not* have this personal knowledge, and would bar many of the types of people who *will* have such knowledge from completing the affidavit. Only clergy, employers, landlords, school officials, certain child care providers, or an official of a social service agency or community-based organization would be allowed to complete the affidavit. If such officials do not visit the tax filer’s home periodically and do not have this personal knowledge, the tax filer could be denied the EITC. This is likely to be especially problematic for rural working poor families that live considerable distances from schools, churches, and medical clinics and own rather than rent their homes. (A majority of the working families with children in the United States who have incomes below twice the poverty line and live in non-metropolitan areas own rather than rent their homes; rental housing is not widespread in some rural areas.)

Despite entreaties to do so, the IRS has, to date, declined to accept recommendations that it allow various types of individuals who, in many cases, will be the only people who possess this personal knowledge to complete these affidavits, such as neighbors. In a speech on May 8, an IRS official stated that in the revised version of the forms that has not yet been released, the IRS continues to bar neighbors from completing the affidavit. Here, too, the IRS proposes to impose a requirement in a manner that no other federal program does; other programs encourage use of neighbors and other knowledgeable individuals as a source of third-party verification. (For example, food stamp regulations state that “Any documents or collateral contact [i.e., third party verification] which reasonably establish the applicant’s residency must be accepted, and no requirement for a specific type of verification may be imposed.” The food stamp regulations specifically list neighbors as an example of an acceptable source of third-party verification.)

The problems that these requirements may pose were underscored by the General Accounting Office in Congressional testimony on May 7.² The GAO noted that the documentation requirements for the new pre-certification initiative bear similarities to the documentation requirements used in a more targeted, ongoing EITC procedure known as “recertification,” which the GAO examined last year. The GAO testimony warned: “EIC forms and instructions that IRS used for similar attempts to determine qualifying child eligibility [i.e., as part of the recertification procedures] could be confusing to taxpayers and required documents that EIC claimants had difficulty obtaining.”

The GAO also expressed concerns about how IRS examiners would handle the documents that families subject to the new pre-certification procedures would provide. “In our 2002 report [i.e., the report on recertification],” the GAO said, “we noted that IRS examiners did not consistently assess documentation for qualifying children. For example, we asked 21 examiners to examine five EIC scenarios. The 21 examiners did not agree for any of the scenarios, and, in some cases, the examiners reached widely varying judgments about whether the evidence was sufficient to support an EIC claim.” (For further information, see the box on page 15.)

Finally, the GAO commented that “this initiative is a substantial undertaking with a relatively aggressive implementation schedule,” and expressed concern that “IRS must determine whether lessons from the first attempts to verify eligibility of relatively small numbers of EIC claimants can be learned and incorporated before the substantial expansions of the initiative in fiscal years 2004 and 2005.”

Adding to these problems is the fact that the IRS would send out the new EITC pre-certification forms each summer and ask for the forms and the accompanying documents to be returned by December 31, before the tax-filing season starts. Virtually all free tax preparation sites — and most commercial tax preparation sites, as well — are not open during those months. Many of the EITC filers subject to these difficult new requirements will have no place to go for assistance during these months. The IRS warns that if the new forms and required documents are not submitted by December 31, filers’ EITC payments will be delayed.

Filers who do not submit these forms and documents by December 31 may submit them when they file their tax returns. Some filers may not understand, however, that they should do so or may have misplaced or discarded the forms in the intervening months. The IRS has indicated that it probably will *not* be able to include the pre-certification forms in the tax booklets that the filers subject to these requirements will receive at the start of the tax filing season.

Those who are subject to these requirements but who do not submit the requisite forms and documents either in advance or with their tax returns will be sent a notice after they file their returns informing them that they have 60 days to file the forms and documents. (Many filers may fail to submit the forms in advance or with their tax returns because of literacy or language

² Statement of Michael Brostek, Director, Strategic Issues, General Accounting Office, “Compliance and Collection: Challenges for IRS in Reversing Trends and Implementing New Initiatives,” (GAO-03-732T), May 7, 2003.

Divergent Audit Rates Between Low-wage Filers and Other Filers

The *Wall Street Journal* reported in March that according to the IRS, just 0.57 percent of individual tax returns — or one of every 175 — were audited last year.³ Among filers claiming the EITC, the audit rate is significantly higher; about 1.5 percent to two percent of filers claiming the EITC have been audited in recent years.

Under the IRS' new EITC initiatives, the proportion of EITC filers subject either to examination or to various types of verification procedures will rise to much higher levels.

- The EITC pre-certification requirements would be extended by tax year 2004 to one of every eight EITC filers with children. If the IRS attains its goal of ultimately extending pre-certification to at least four million filers, then at least 20 percent of EITC filers — and at least one of every four EITC filers with children — will be subject to these procedures.
- Pre-certification is only part of the IRS' new EITC initiative. The IRS also plans to start requiring substantial numbers of EITC filers to verify their filing status or their level of income. In recent testimony on the IRS' plans, the General Accounting Office reported that by tax year 2004, the IRS plans to require 450,000 EITC filers a year to verify filing status and 470,000 filers a year to be subject to an examination of their level of income. Between 2 percent and 2.5 percent of EITC filers will be subject to each of these interventions.⁴

As a result, the rates at which EITC filers will be subject either to audit or to other documentation requirements and verification procedures will be sharply higher than the rates at which other filers are subject to scrutiny. According to the IRS' estimates of the losses that the Treasury suffers due to tax noncompliance, however, EITC overpayments accounted for only three percent of the total losses due to noncompliance in tax year 1998, the latest year for which the IRS has made these estimates.⁵

The disparity between the treatment of the EITC and the treatment of the much larger losses caused by noncompliance with other features of the tax code also can be seen in the attention paid to determining the level of such losses. As a recent paper by analysts in the Treasury's Office of Tax Policy reports: "The IRS has not conducted a comprehensive study of taxpayer compliance since the 1988 Taxpayer Compliance Measure Program study. However, the IRS undertook four studies on noncompliance among EITC claimants between 1993 and 1999."⁶ (The IRS estimates cited above of the losses due to noncompliance in tax year 1998 are estimates made by IRS analysts based in part on the findings of the study of noncompliance in 1988; the IRS has not collected new data on noncompliance in the tax code as a whole since then.) This failure to conduct comprehensive studies since 1988 on noncompliance is a result of action by Congress to bar the IRS from conducting further such studies, on the grounds that the tax filers selected for review when past studies of general noncompliance were conducted were subject to excessive burdens and intrusion. Congress continued, however, to encourage the IRS to conduct comparable studies of noncompliance among low-income EITC filers. (Congressional objections to studies of noncompliance in other parts of the tax code have recently been overcome, and the IRS plans to resume these studies in coming years in modified form.)

³ Tom Herman, "Tax Report," *Wall Street Journal*, March 27, 2003.

⁴ These interventions differ from pre-certification in an important way — they will target individual filers for whom IRS has specific reason to question their EITC claims. The filers who will be required to verify filing status apparently will be identified, at least in part, through ChoicePoint, a private firm with access to various data sets. The IRS may contract with ChoicePoint to identify filers who may be married but using other filing statuses. The IRS' automated underreporting system will be used to target its income verification initiative. These approaches differ from pre-certification, which will subject entire categories of filers — such as all grandparents filing for the EITC — to new documentation requirements rather than targeting filers for whom there is a specific reason to question information on the tax return. (The 450,000 and 470,000 figures cited above come from Statement of Michael Brostek, *op. cit.*)

⁵ IRS NHQ Office of Research, "TAX GAP MAP for Tax Year 1998, Feb. 13, 2003.

difficulties or because of confusion generated by the fact that while they were mailed the forms the previous summer, various friends and relatives of theirs who receive the EITC did not get such forms, and the forms were not included in their tax booklets.) If these filers do not provide the forms and documents within 60 days after receiving such a notice — perhaps because they are unable to secure the requisite documents or cannot get the documents within 60 days — they will be denied the EITC. If they do provide the forms and documents within the 60-day period, their EITC claims will be considered but may be subject to lengthy delays. IRS may reject some documents submitted and insist on other documents in their place. (The IRS routinely rejects some documents and asks for others when conducting audits of EITC filers. The National Taxpayer Advocate's most recent report to Congress cites IRS data indicating that the average length of time it takes to complete EITC cases selected for audits is 265 days.)

A group that may experience particular problems with these procedures consists of people filing for the EITC for the first time (such as people who have recently become eligible for the EITC because their income has dropped due to weakness in the economy and low-income families that have recently begun to raise a child of a relative). Since these first-time EITC filers will not have received the EITC in the past, they will *not* be sent the pre-certification forms the previous summer. New EITC filers who are in one of the categories of filers that is subject to pre-certification (such as grandparents raising children) will be expected to learn that they are subject to the pre-certification requirements and to submit the requisite forms and documents with their tax returns. If they do not do so, they will be among the EITC claimants who are sent a follow-up notice, given 60 days to respond, and denied the EITC if they cannot provide the documents in 60 days. In any event, they will likely be subject to delays in receiving their EITC's, because they will not have filed their pre-certification forms and documents in advance. (Note: no first-time EITC filers will be included among the 45,000 tax filers subject to pre-certification in the year ahead. The IRS plans to include them among the filers subject to pre-certification in subsequent years.)

Finally, the new pre-certification requirements are being proposed at a time when IRS' support for free tax preparation assistance to low-income filers has been declining. The most recent National Taxpayer Advocate report to Congress, issued in December 2002, notes that the IRS strategic plan for 2003 includes a 25 percent reduction in support for free tax preparation assistance provided through IRS Taxpayer Assistance Centers. The Taxpayer Advocate report also notes that the IRS has argued that free tax preparation sites run by non-profits and staffed by volunteers whom the IRS has trained can pick up the slack this funding reduction will create, but that a report by the Treasury's Inspector General states that there has been a reduction of approximately 1,000 of these volunteer-staffed tax preparation sites and that there are staffing shortages and inadequate computer equipment at the sites, as well as a shortage of IRS technical assistance for the sites.⁷

The Taxpayer Advocate report also notes that in 2000, only one percent of tax filers with incomes below the EITC income limit received free tax preparation assistance from either the

⁶ Janet Holtzblatt and Janet McCubbin, "Complicated Lives: Tax Administrative Issues Affecting Low-Income Filers, January 2003.

⁷ National Taxpayer Advocate, *FY 2002 Annual Report to Congress*, Internal Revenue Service, December 2002, pp. 95-99.

Will the New Procedures Reduce or Increase Burdens on Low-income Taxpayers?

Some IRS and Treasury officials have responded to criticisms of the proposed pre-certification procedures by arguing that the procedures will *reduce* burdens on low-income taxpayers. The reasoning appears to be that the documentation requirements that will be imposed under pre-certification are less onerous than the requirements that have been imposed in the past on EITC taxpayers selected for audit and that the number of EITC filers who are formally audited may be reduced if the pre-certification procedures are implemented.

The problem with this argument is that while 300,000 to 400,000 EITC filers are subject to audit each year,⁸ the IRS intends to impose the new pre-certification requirements on up to two million filers in tax year 2005 and possibly on as many as four million to five million filers in subsequent years. In addition, the IRS plans to select 450,000 EITC filers a year for verification of filing status and 470,000 EITC filers a year for more intensive verification of income. While the IRS may not term these procedures as audits, they are likely to contain some elements common to audits. As a result of this rather massive increase in the number of low-income filers subject to such requirements, burdens on low-income filers as a group are likely to increase sharply.

Moreover, as the number of filers subject to pre-certification and other forms of verification or examination grows, the *proportion* of filers subject to these requirements who are able to secure free or low-priced professional assistance to help them deal with the requirements will necessarily fall substantially. Resources for low-income taxpayer assistance clinics and free tax-filing preparation assistance are far too limited to enable more than a tiny fraction of those who ultimately would be subject to pre-certification to receive such help.

Of particular concern is the risk that these burdens will cause large numbers of honest, eligible taxpayers to give up and to lose the EITC they have earned. Many filers who receive the pre-certification notices and forms may not respond to them. The most recent National Taxpayer Advocate report noted that many taxpayers eligible for the EITC “do not have access to representation, are often afraid to communicate with the IRS, or are unable to take time off from work to call, or do not understand the IRS notices they receive. The Service’s own studies show a high no-response rate for this population” when such filers are subject to additional IRS requirements.⁹ Similarly, the General Accounting Office, in its 2002 report on certain more narrowly targeted EITC procedures that are a precursor to the new pre-certification requirements, commented that those procedures “unnecessarily burden taxpayers” and that “as a consequence, taxpayers may be discouraged from claiming credits to which they are entitled.”¹⁰

IRS Taxpayer Assistance Centers or the volunteer sites. A majority of EITC filers use commercial preparers, no doubt in part because of the complexity of the EITC rules. The pre-certification requirements are likely to drive EITC filers to commercial preparers in still larger numbers and to increase the fees that preparers charge filers subject to pre-certification.

We now proceed to an examination of the particular issues that the new forms and documentation requirements present. This analysis then concludes with recommendations for how this initiative might be improved to reduce the risks it poses to eligible filers.

⁸ Another 120,000 EITC filers were subject to a burdensome procedure known as recertification in 1998, the latest year for which these data are available.

⁹ National Taxpayer Advocate, p. 194.

¹⁰ General Accounting Office (GAO-02-449), p.24.

The New Forms

Under pre-certification, certain groups of filers would be required to complete either or both of two new IRS forms and to submit certain documents with each form. Some 45,000 filers would be subject to pre-certification in the 2004 tax filing season. When pre-certification is in full effect, all of the categories of filers listed below would be subject to the pre-certification requirements.

- *Verifying the relationship of the child to the EITC filer:* A new form 8856 (entitled “Qualifying Child Relationship Statement”) and accompanying documents, which include marriage certificates in many cases, would have to be provided by *all EITC filers who are not the natural or adoptive parents or siblings of the children they are claiming for the EITC*. All grandparents, aunts, uncles, stepparents, foster parents, and the like who are raising children — and claiming them for the EITC — would be required to submit this form and the requisite documents. A tax filer would have to file this form once for a child he or she was claiming.
- *Verifying that the child resided with the EITC claimant for more than half of the year:* new Form 8836 (entitled “Qualifying Children Residency Statement”) and accompanying documents would have to be provided by *all EITC claimants other than the child’s natural or adoptive parents when the parents file jointly, and the child’s mother when she files by herself*. Fathers filing by themselves and claiming their children would be subject to these requirements, along with all grandparents, aunts, uncles, stepparents, and foster parents who are raising

Excerpts from the Analysis of the Taxpayer Advocate’s Report by the National Society of Accountants

The March 17 issue of *Tax Notes* includes an analysis of the National Taxpayer Advocate’s report to Congress by William Stevenson, Chair of the National Society of Accountants’ Federal Taxation Committee. Under the part of the article entitled “NSA View,” the article includes the following statements:

“Low-income taxpayers need special attention due to the critical nature of their financial problems. This population is relatively defenseless against the power of the IRS bureaucracy.”

“Quite often VITA and other services are not available to assist the [low-income] taxpayer if there is a post-filing problem.”

Both of these concerns are likely to be intensified by the pre-certification procedures. Also of note, in summarizing the findings of the Taxpayer Advocate report to Congress, the *Tax Notes* article states that the Taxpayer Advocate report listed the IRS’ “Lack of Response During EITC Exams” as one of the leading problems facing taxpayers. The article summarizes the Taxpayer Advocate’s findings on this matter as follows: “The lack of personal contact with an IRS examiner imposes an unnecessary burden on EITC filers. Taxpayers cannot get through to the IRS and calls are not returned.” If pre-certification requirements are extended to several million EITC filers, this problem could become very serious.

children and claiming them for the EITC. This form would have to be filed, and accompanying documents provided, every year.

Each of these two forms and the accompanying documentation requirements poses its own set of problems. What they have in common is that both require the provision of documents that it is likely to be impossible for some eligible tax filers to provide. We examine the issues that each of these forms present in turn.

The Problems with the New Forms and Procedures

Form 8856 - “Qualifying Child Relationship Statement”

When the pre-certification requirements are in full effect, this form ultimately will have to be completed by all EITC filers who are not the natural or adoptive parents or siblings of children they are claiming for the EITC. The March 28, 2003 draft version of this form — the latest version that is publicly available — lists 22 categories of claimants who will have to file it.

For 11 of these categories, filers would be required to provide marriage certificates. These marriage certificates often will be for marriages that occurred decades ago. Moreover, a significant number of the marriages for which marriage certificates would be required may have occurred outside the state or even outside the United States. For seven categories of filers, the marriage certificate that must be furnished is for a marriage between *two other people*, rather than the filer himself or herself.

Among the requirements related to Form 8856 are the following.

- If the claimant is the stepbrother or stepsister of a child claimed for the EITC (perhaps because the child’s parents are no longer alive), the stepbrother or stepsister must produce “a copy of the certificate of marriage between your parent and the qualifying child’s parent.”
- In some cases, certificates of marriage between the claimant’s parent and the qualifying child’s grandparent or great-grandparent — or, for one category of EITC claimants, between the claimant’s parent and the qualifying child’s great-great-grandparent — are required as a condition of receiving the EITC.

Unfortunately, in many cases, it is likely to be virtually impossible for the filer to get the marriage certificate (or to get it within 60 days).

- Some states do not routinely provide copies of marriage certificates to people other than the parties to the marriage itself.
- Some states do not provide marriage certificates for marriages that occurred before a certain year.
- Some states routinely take more than 60 days to process requests for marriage certificates.

- For marriages that occurred outside the country, especially in developing countries, securing these documents in a timely manner may be extremely difficult.
- Many states require that, to obtain a marriage certificate, the person requesting the certificate must provide the name of the city or county where the marriage occurred and the full names of the groom and bride, including the bride's maiden name. In some cases where the individual making the request is not a party to the marriage and the people who were married are deceased or cannot be located, the requester may not possess all of this information. (One state also requires providing the middle names of the bride and groom.)
- There are no marriage certificates for common-law marriages. (A sentence in the detailed IRS instructions accompanying Form 8856 states that if there is no certificate because it was a common-law marriage, the claimant should call an IRS 800-number to be instructed on what documentation to provide. It is unclear what the IRS will require a tax filer to provide in such circumstances.)
- Many states charge sizeable fees to provide copies of marriage certificates. This may be a significant problem for some poor filers, including filers who lack bank accounts and credit cards and may have to purchase money orders to obtain marriage certificates by mail.

A review of the procedures listed on state websites for obtaining marriage certificates indicates that the problems involved in meeting these IRS requirements will be legion. A selection of these problems (by no means an exhaustive list) is provided in the box on page 11.

Some filers are likely also to experience problems in securing birth certificates to meet other requirements of Form 8856. For 18 categories of filers, the form requires that the tax filer must provide either the social security number or the birth certificate for certain individuals. For example, a filer claiming the EITC for a grand-niece or nephew whom the filer is raising would have to provide this information for the niece or nephew who is the qualifying child's parent. Suppose the qualifying child was born out of wedlock and the niece who is the child's parent has abandoned the child. The claimant may not know the niece's social security number. And in such a case, the Social Security Administration will *not* provide the niece's Social Security number to the great aunt or uncle. In such cases, the great aunt or uncle would be required to provide the niece's birth certificate.

Here, as well, problems come into play.

- *California* requires that the requester of a birth certificate provide the county or city of the birth, the date of the birth, and the full maiden name of the mother of the person for whom the birth certificate is being sought. Such requirements are common across the states. The California state website also says it will take 10 to 12 weeks to provide the birth certificate if all of this information is provided, and up to 6 to 8 months if incomplete information is provided.
- *Florida* states that the only people who may request a birth certificate are the individuals themselves, people with a court order entitling them to this information, and parents, guardians, or legal representatives of the individual

Examples of Likely Difficulties in Securing Marriage Certificates

1. *Maryland* will issue marriage certificates only to parties to the marriage, a legal representative of one of the parties to the marriage who presents a notarized letter signed by the bride or groom, an attorney for the bride or groom, or a court. In *Massachusetts*, if either the bride or groom was born out of wedlock, the state will provide marriage certificates only to parties to the marriage, a parent or guardian, or a legal representative of the bride or groom. Other states with restrictions that would bar provision of a marriage certificate to various categories of individuals who would be required to supply such a certificate to the IRS include (but are not limited to): *Alaska, Delaware, Hawaii, Idaho, and Iowa*. A large number of additional states limit marriage certificate requests to narrow categories of individuals and will provide the certificate to other people only if they can show that a personal or property right is at stake. It is unclear whether needing a marriage certificate to meet EITC pre-certification requirements would meet this test.
2. *California's* website states that "Due to budgetary constraints, our processing time can take up to 2-3 years." The website states that counties should be able to process requests more quickly. This requires, however, that the person seeking the marriage certificate know the county in which the marriage occurred. If an individual is seeking a certificate for a marriage between two other individuals who may be dead or senile, or may have abandoned their family, the individual may not know the specific county in which the marriage occurred. Suppose, for example, that the person seeking the marriage certificate knows that the marriage occurred 30 years ago somewhere in the San Francisco Bay area. This marriage could have occurred in San Francisco County, Marin County, Alameda County, Contra Costa County, or San Mateo County. The state website also says that California has no records for the years 1987 to 1997 and 2000 to the present. If a marriage occurred in these years but the person requesting the marriage certificate does not know the county, it appears that the requester cannot get the certificate.
3. The website for the state of *Ohio* states that it can provide "marriage abstracts" but that it takes approximately 6 months to do so. It is unclear whether the IRS would accept a marriage abstract, which is not a certified document. Individuals can request marriage licenses from county probate courts. The time it takes to obtain marriage licenses from the county courts is not provided on the state website and probably varies across the state.
4. A number of states simply do not provide marriage certificates; they require applicants to make the request directly to the county where the marriage occurred. If the requester does not know the county, the requester cannot get the marriage certificate. In these states, restrictions on who may be provided a marriage certificate and how long it takes to process requests may vary by county.
5. *Texas* notes it can provide verifications of marriage only for marriages that have occurred since January 1966, and that it takes six to eight weeks to process these requests unless extra fees are paid. Marriage documents for years before 1966 are available only from the counties.
6. *Illinois* can provide "verifications" only for marriages since 1962 and "on average, requests are processed in 10 to 12 weeks." These "verifications" are not marriage certificates, and it is unclear whether the IRS would accept them. To obtain marriage certificates, requesters must go to the county.
7. *North Carolina* and *New Jersey* say it will take approximately 6 to 8 weeks to process requests. *Washington* state's processing time is eight weeks. *New Jersey* also asks that the requester provide the exact date of the marriage.
8. *New York State* doesn't provide marriage certificates for marriages that occurred in *New York City*. The City website says that the City will provide marriage certificates, but for marriages that occurred in the past 50 years, the City will provide a certificate only to the husband, wife "or someone with written authorization from them."

whose birth certificate is being requested. Many of the people who may need to secure a birth certificate in order to comply with Form 8856 do not meet these requirements. *Illinois* has similar restrictions. So does *Texas*, which states it will provide birth certificates only to an immediate family member by birth or marriage, a guardian, or a legal representative, and that it will take 8 to 10 weeks to provide the document.

- *Alaska* is still more restrictive: only the individual whose birth certificate is being sought or, in the case of a minor, the minor's parents, may request a birth certificate.

Maryland will provide birth certificates only to persons named on the certificate, a parent or guardian, or an authorized representative, and authorized representatives of such an individual must submit a court order or notarized statement signed by a person named on the birth certificate. *Oklahoma* limits birth certificate requests to persons named on the certificate, the immediate next of kin, or an authorized agent for the person named on the certificate. For out-of-wedlock births, *Maine* and *Massachusetts* will provide birth certificates only to the person whose certificate it is or a parent or guardian (or, in *Massachusetts*, to the individual's legal representative).

A Recommendation Made to the IRS

Because of the problems outlined on the preceding pages, an EITC advisory committee that the IRS has established and to which it provided the pre-certification forms for comment in late February or early March — the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee — submitted comments to the IRS in March strongly recommending *against* the requirements for marriage and birth certificates. The advisory committee urged the IRS to allow an affidavit from a knowledgeable third party concerning the relationship between the EITC claimant and the child being claimed, in lieu of marriage and birth certificates. The Committee termed the requirements for such certificates “unnecessarily burdensome,” noting that “it is unnecessarily burdensome to require a taxpayer other than a party to a marriage to provide the marriage [certificate]....A taxpayer other than a party to a marriage could not be expected to be in possession of a marriage certificate.” The Committee also noted that some states recognize common law marriages, for which no marriage certificate exists, and that marriage certificates may not be readily available — or available at all — if the marriage occurred in a foreign jurisdiction. In addition, the advisory committee warned: “In most cases, a taxpayer other than a biological parent could not be expected to be in possession of a birth certificate, and with increasing precautions being taken against identity theft, obtaining the birth certificate of another might prove impossible.”

Similarly, at a meeting of stakeholders on the pre-certification requirements, which the IRS convened on March 20, stakeholders asked for tax filers to be allowed to submit a third-party affidavit attesting to the filer's relationship to the child, in lieu of marriage and birth certificates. Stakeholders noted that when the IRS makes its case about the need for EITC pre-certification on Capitol Hill, the IRS sometimes cites the much lower error rate in the food stamp program — which verifies certain information — as evidence that more documentation and verification is needed in the EITC and would reduce errors. Yet federal food stamp regulations bar requiring a single, specific type of document such as a birth or marriage certificate and denying benefits to families that are unable to produce such a document.

- Other states with restrictions that could deny birth certificates to some categories of people who may need them to satisfy the requirements of Form 8856 include: *Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Iowa, Michigan, Minnesota, Montana, Oregon, Pennsylvania, South Carolina, Texas and West Virginia.* (A number of other states limit the provision of birth certificates to specified categories of people, including people who can demonstrate that a personal or property right is at stake. If having to furnish a birth certificate to satisfy Form 8856 does not qualify under the personal or property right criteria, then there are a number of additional states, beyond those named here, in which some categories of people who may need a birth certificate for Form 8856 probably will not be able to secure it.)

Form 8836 – “Qualifying Children Residency Statement”

This form is to be filed by EITC claimants *other than* the child’s natural or adoptive parents (when filing jointly) and the child’s mother filing by herself. This form is supposed to verify that the claimant lived with the child for more than six months during the current tax year.

The form allows the filer one of three ways to provide this verification. For many filers, however, *none* of the three types of documentation may be available. As a result, here as well, significant numbers of eligible low-income working families may be denied the EITC because they are asked to provide documents that it is not possible for them to secure. (Here, too, this analysis covers the draft March 28, 2003 version of the form.)

The first option is to provide school records, medical records, licensed day care provider records, leases, or social service agency records that show the name of the EITC filer, the name of the child, the address at which the filer and the child lived, and the exact dates during which the child and the EITC filer lived together at this address.

- The problem here is that most such records do not include this type of specific information regarding dates during which the children lived with the EITC filers at the same address. For example, school records typically indicate the child’s dates of attendance and the address provided for the child, but they do not normally document dates during which the child lived with the individual or individuals who are raising the child or these persons’ addresses.
- As a result, tax filers who submit school records, medical records, or the like risk having their documents rejected by IRS examiners. A GAO report issued in 2002 on a procedure known as EITC “recertification” (see box on page 15) indicates that the IRS frequently has rejected such records in the past when those records have been submitted by EITC filers who have been asked to verify residency; IRS examiners often have ruled that the records submitted did not specifically demonstrate that the filer and the children resided together for at least half of the year. The GAO report explains that IRS examiners will refuse to accept school records as verifying that a child resided with the tax filer unless the records include both an address for the child *and* an address for the tax filer. The GAO report states that the IRS examiners whom the GAO interviewed said that school

records submitted by EITC tax filers who have been asked to verify a child's living arrangements "often do not have both the child's and taxpayer's address" and hence are often rejected.

- The same GAO report also comments that many low-income taxpayers are uninsured and lack ongoing medical care. "Considering the medical coverage of low-income taxpayers," the GAO wrote, "obtaining medical records that provide enough information to demonstrate that the taxpayer's and child's addresses were the same for at least one-half a year may not be easy." The GAO repeated this point in the testimony it delivered on May 7, 2003, explaining that in its examination of IRS' recertification procedures, it found that "EIC claimants, could, for example, use medical records to prove a child's residency with them...[but] EIC claimants faced difficulty in providing such records. Low-income working families are less likely to have stable relationships with medical service providers and the children are less likely to have routine medical care."
- In addition, the GAO's report on recertification found that the IRS refuses to accept information confirming that a child resides with the individual filing for the EITC when a child care provider who supplies the corroborating information is a relative. The GAO noted that this creates difficulties for low-income taxpayers who cannot afford commercial child care and have little alternative but to use relatives. "Refusing to accept child care statements from relatives can pose a hardship for low-income taxpayers who use relatives for child care," the GAO said. The GAO cited a Census Bureau report on child care arrangements that found that preschoolers in poor families were 50 percent more likely to be cared for by grandparents or other relatives than preschoolers in non-poor families."¹¹ (It may be noted that the IRS' rigidity in this area seems inconsistent with other IRS practices. Tax filers who claim the Child and Dependent Care Tax Credit are allowed to claim expenses paid to caregivers who are neighbors or relatives, except for caregivers who are spouses or dependents of the tax filer or the filer's child if under 19.)

The second option that Form 8836 allows is simply a variant of the first option. Under the second option, a tax filer may attach a letter on official letterhead from the child's school, health care provider, landlord, or a member of the clergy that contains the same information as is required under the preceding option. Once again, many of these agencies will not have specific information on the living arrangements of the EITC filer and the child or children being claimed.

IRS officials acknowledge that many people subject to these requirements will not be able to secure the documents required under options one or two. Such people must try to use the third option. Unfortunately, it has serious shortcomings as well.

- Under the third option, the tax filer would submit an affidavit from a third party who declares *under penalty of perjury* that the third party has "personal knowledge" that the EITC filer and the child lived together at a specific address

¹¹ General Accounting Office, (GAO-02-449), pp. 15-19.

EITC Recertification: Not a Promising Model to Build On

The new pre-certification procedures are based in part on an existing IRS procedure known as EITC *recertification*. For the past several years, families that have applied for the EITC but been denied it for certain reasons are required to be recertified by the IRS before they are permitted to resume receiving the EITC. In tax year 1998, 119,000 filers who claimed the EITC were required to recertify. (These data come from a GAO report on EITC recertification.¹²)

On paper, the concept of recertification makes sense. Unlike the new pre-certification procedures, the recertification requirements are applied only to families that have previously made certain types of invalid EITC claims. But in practice, recertification has turned out badly. Both the General Accounting Office and the IRS National Taxpayer Advocate have found serious problems with IRS' implementation of recertification.

- In an April 2002 report critical of the recertification process, the GAO noted that “IRS asks taxpayers to submit certain information as part of the process that can be difficult for some EITC claimants to obtain...” The GAO reported that for low-income taxpayers such as those who move for job reasons, are uninsured, and rely on relatives for free child care, obtaining the kind of school, medical, and child care records the IRS seeks can be quite difficult. This is significant because, as the GAO indicated in recent Congressional testimony, the types of records that the IRS has demanded in such cases are similar to the types of documents that tax filers who will be subject to the new pre-certification requirements will need to provide under Form 8836 if they are unable to find someone who can complete the third-party affidavit.
- The GAO also found glaring inconsistencies in how IRS examiners responded to the documents that were submitted to meet EITC recertification requirements, which in many cases are similar to the documents that would be required under EITC pre-certification. The GAO found that IRS “examiners are inconsistent in how they assess supporting documentation provided by taxpayers. We asked 21 IRS examiners how they would evaluate 5 different sets of supporting documents submitted by potential taxpayers seeking recertification. For none of the 5 scenarios did all 21 examiners agree, and, in some cases, the examiners reached widely varying judgments about whether the evidence was sufficient to support an EITC claim.”

The problems for low-income taxpayers that have plagued the recertification procedures are reflected in IRS data. Of the 312,000 previous EITC filers who were required to recertify to receive the EITC in tax year 1998, some 119,000 claimed the EITC. Of these filers, only 65,000 provided the appropriate forms; the rest had their EITC claims rejected outright. Furthermore, a significant share of those who attached the forms appear to have been rejected subsequently because the accompanying documents were not considered good enough by IRS examiners.

from a specific day of a specific month (which the person providing the affidavit fills in) to a specific day of another month. Given the requirement for “personal knowledge” that the claimant and the child lived together for the period specified, and the perjury warning, most third parties will not complete this affidavit unless they have detailed first-hand knowledge of this information. *But the IRS form bars many of the people who would have such first-hand knowledge from filling out the affidavit.* The only people who would be allowed to complete the affidavit are: a member of the clergy, an employer, a health care provider, a school official, a licensed day care provider, a landlord, or an official of a social service agency,

¹² General Accounting Office (GAO-02-449).

who is willing and able to attest under penalty of perjury that he or she has personal knowledge that the EITC filer and the child resided together during the period in question.

- This is likely to be especially problematic for rural working poor families, such as families living in hollows in rural Appalachia or in frontier regions in the Dakotas or some of the Rocky Mountain states. Census data show that a majority of the rural low-income working families in the United States that have incomes below twice the poverty line (roughly the income limit for the EITC) own their homes and consequently have no landlords. (Rental housing can be hard to find in many poor rural areas; many of the rural working poor own poor quality housing instead.) Moreover, these rural working poor families may live considerable distances from schools, employers, and the like, heightening the chances that officials of such agencies have not been to their homes or not been there frequently enough to attest under penalty of perjury to the precise living arrangements of the tax filer and the child.
- These issues were covered at the meeting of stakeholders that the IRS held on March 20. The IRS was asked at least to allow neighbors, apartment building managers and superintendents, as well as landlords — groups more likely to have the “personal knowledge” required — to be allowed to fill out the affidavit. Here again, the Food Stamp Program provides a useful contrast: it allows and encourages third-party statements from neighbors and other such individuals in food stamp verification.¹³
- Moreover, many poor families do not use licensed child care providers, which tend to be more expensive. Legal child care consists of several different types of care: “licensed” care; in some states, “regulated” or “registered” care that is not licensed; and care that is legal but is neither licensed nor regulated.

Some states do not *license* family day care providers but do certify such providers to receive state child care payments. In addition, some child care that is provided by faith-based or tribal organizations may not be licensed in some states. Also, some parents may trade child care responsibilities with other parents, pay a neighbor or a nanny to care for the child, or have their child care provided by a relative. Urban Institute data show that in 2001, some 27 percent of children

¹³ The IRS has apparently rejected the recommendations that it allow neighbors to complete the affidavits. *Tax Notes* reported that in a speech on May 8, the IRS Taxpayer Advocate, Nina Olson, stated (apparently referring to the latest, not-yet-public version of the forms and requirements): “The IRS didn’t want to allow residency affidavits to be based on the personal knowledge of neighbors and relatives, Olson said. Because the types of people listed as eligible affiants may lack personal knowledge of the taxpayer’s residency, the form allows the statement to be based on the affiant’s books or records.” Full assessment of this aspect of the requirements must await release of the revised forms, but this does not appear to address the problem. If the only people allowed to sign the affidavit are people who lack personal knowledge that the tax filer and child resided together for more than six months during the year, it is unlikely that these individuals’ books or records will be of help. Indeed, the purpose of the third-party affidavits is supposed to be to address circumstances in which school, medical, or similar records do *not* contain this information. (See “Taxpayer Advocate Explains EITC Pilot,” *Tax Notes*, May 9, 2003.)

receiving a government child care subsidy were in legal care that was neither licensed nor regulated.

The Urban Institute data do not break out what portion of the 73 percent of children who were in licensed or regulated care were in care that was licensed; this percentage clearly is less than 73 percent. Furthermore, many low-income working families receive no government child care subsidy, and those who receive no subsidy may be less likely to be able to afford licensed care, which tends to be more costly.

- Finally, while other federal means-tested programs virtually all use third-party statements in verification, *none* require that these statements be made under penalty of perjury. The IRS appears unyielding in its insistence that such statements made in conjunction with the verification of children’s residency for the EITC must be in the form of an affidavit made under penalty of perjury. This risks intimidating some third parties from being willing to provide such affidavits.

Problems for People Not Fluent in English

An issue that applies to both Forms 8836 and Form 8856 is how tax filers who do not speak or read English will cope with these burdensome requirements, especially during months from July through December when tax preparation assistance generally is not available. The IRS has said that it hopes to provide the new forms in both English and Spanish. Many low-income families, however, speak neither English nor Spanish. The IRS acknowledged (in IRS comments contained in last December’s National Taxpayer Advocate report) that Census data show that 29 percent of the population with limited English proficiency does not speak Spanish.¹⁴ In its report, the National Taxpayer Advocate noted that IRS notices and letters “are difficult or sometimes impossible for taxpayers with limited English proficiency to comprehend. As a result, many do not respond to letters or notices, and are thus unaware of and suffer the consequences of not responding.”¹⁵

Recommendations

If the IRS wishes to move forward with the pre-certification initiative, we recommend that four steps be taken. These steps should increase the chances that the initiative will succeed in achieving what all parties agree to be the goal — reducing EITC payments to ineligible filers without causing harm to, or deterring participation by, eligible working families.

1. *Allow a public comment period on the forms and documentation requirements and consider the comments before the forms are sent to 45,000 filers.* The comments that the IRS would receive would likely result in improvements in the

¹⁴ The Center on Budget and Policy Priorities has coordinated an EITC “outreach” campaign since the late 1980s, in which it provides information and sample posters and flyers for social service, religious, and other agencies and community based organizations seeking to notify working-poor families of the EITC and how to apply for it. The Center has found it necessary to make some of these materials available in 20 languages.

¹⁵ National Taxpayer Advocate, pp. 89-90.

forms and documentation requirements. The IRS has indicated it will have a public comment period. The timing of the comment period remains unclear. The IRS also should test the forms and instructions before sending them to the 45,000 filers. (The IRS may already be planning to do this.) A recent GAO report finds that testing tax forms and instructions may improve their clarity and reduce errors and that this appears particularly true of forms and instructions related to the EITC and the Child Tax Credit.¹⁶

2. *Make the documentation requirements reasonable.* The IRS should modify the documentation requirements so that filers are not required to produce documents that they cannot reasonably obtain. As noted, some filers would be required to secure marriage certificates — and in a smaller number of cases, birth certificates — that it is not possible for them to secure. Many filers subject to pre-certification also will have to provide an affidavit, signed under penalty of perjury, that the person completing the affidavit has “personal knowledge” that the tax filer and the child lived together at a specified address during specified months of the year. But the draft March 28 forms call for limiting the types of people allowed to fill out the affidavit to individuals who often *will not have* this personal knowledge, and bar various types of people (such as neighbors) who would have such knowledge from completing the affidavit.

Many honest filers will not, despite their best efforts, be able to satisfy these requirements. The IRS’ own advisory panel has recommended that tax filers subject to these requirements be allowed, as an alternative to producing marriage and/or birth certificates, to provide an affidavit from a person who can attest to the relationship between the tax filer and the child whom the filer is claiming for the EITC. The IRS should adopt this recommendation. IRS also should allow knowledgeable parties to complete the third-party affidavit, including neighbors and building managers and superintendents. Adult child care providers (other than spouses or dependents) also should be permitted to complete the affidavit. The part of the March 28 forms that would reject corroborating information from legal child care providers who are not licensed providers, as well as from any provider who is a relative, is overly restrictive and should be revisited.

3. *Pilot test the new procedures before instituting them on a large scale.* The IRS and Treasury have made clear that an evaluation of the new procedures is planned. It is important that the evaluation examine the effects of the pre-certification procedures both in reducing overpayments and on eligible filers. The evaluation should determine to what extent those who do not respond to pre-certification notices (or respond but give up part way through what could be a lengthy and burdensome process) and lose the EITC as a result are *eligible* filers, and what aspects of pre-certification deterred the eligible filers from participating. The IRS should not expand pre-certification beyond roughly the 45,000-filer level until the evaluation has been completed, it has been determined that pre-certification is effective in reducing overpayments and can be conducted in a

¹⁶ General Accounting Office, *IRS Should Reassess the Level of Resources for Testing Forms and Instructions*, April 2003 (GAO-03-486).

manner that does not result in harm to significant numbers of eligible filers, and appropriate changes in pre-certification rules and procedures have been made, based on the evaluation findings.

4. *Provide resources for a grant program for free tax preparation assistance for low-income taxpayers, as the IRS' National Taxpayer Advocate has recommended, and increase resources for low-income taxpayer clinics.* The need for such assistance is likely to burgeon if the pre-certification procedures are implemented. The IRS, Treasury, OMB, and the Congressional appropriations committees should act to increase the very small level of resources currently provided for these functions so that more of the taxpayers subject to pre-certification may receive assistance. The IRS also should clarify that low-income taxpayer clinics can assist tax filers with the pre-certification requirements; it is unclear, under current IRS rules, whether clinics would be permitted to provide such assistance. These steps should help to lower the rate of non-response among filers subject to the pre-certification requirements and to reduce the incidence of problems that the IRS experiences with the forms and documentation it receives.