



CENTER ON BUDGET AND POLICY PRIORITIES

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To: Mark W. Everson
Commissioner
Internal Revenue Service

From: Robert Greenstein, Executive Director

RE: Earned Income Tax Credit Pre-Certification

Enclosed are comments we wish to submit in regard to the Earned Income Tax Credit Pre-Certification procedure announced in IRS Announcement 2003-40. We appreciate the opportunity afforded for public comment and look forward to working further with you on this matter.

Pre-certification May Deny the EITC to Many Eligible Workers

The proposed pre-certification procedure establishes requirements that many filers eligible to claim the EITC may find difficult to meet. This risks denying the EITC claims of eligible working-poor families. People who have limited literacy or speak a language other than English or Spanish may find the new procedures especially daunting.

There is a particular risk that 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.¹ In fact, according to the National Taxpayer Advocate, the IRS EITC Program Office reported that during the last three years more than 30 percent of taxpayers undergoing EITC correspondence audits either failed to respond to IRS notices or did not receive them. “The National Taxpayer Advocate is concerned about the magnitude of this problem and about the lack of IRS knowledge concerning the reasons for taxpayer non-response.”²

This history of direct IRS experience makes it essential that the pre-certification procedure have as a central component an extensive plan to assist taxpayers subject to the procedure. We are concerned that the existing IRS plan in this regard is not sufficient.

¹ National Taxpayer Advocate, FY 2002 Report to Congress, p. 194.

² National Taxpayer Advocate’s Report to Congress: Fiscal Year 2004 Objectives, p. 23

Lack of Assistance Available to Taxpayers

The IRS proposes to send out the new EITC pre-certification form this summer and ask for the form and the accompanying documents to be returned by December 31. Free tax preparation sites, and most commercial tax preparation sites as well, are not open during those months. Many EITC filers attempting to understand and respond to these new requirements are likely to encounter difficulty in securing assistance during these months (other than from the IRS itself). If filers are confused and submit inadequate documentation or are unable to respond, their EITC refunds will be delayed or denied. This is a significant penalty for those workers who actually are eligible.

Adding to these concerns, some eligible filers may fail to submit the form and required documentation in advance or with their tax returns because of literacy or language difficulties or because of confusion generated by the fact that while they were mailed the form, various friends and relatives of theirs who also receive the EITC did not get such a form, and the form was not included in their tax booklets.

Since nearly 70 percent of EITC claimants have their claims filed by a commercial tax preparer or free tax assistance site, many claimants are likely to have a minimal understanding of the EITC eligibility requirements. In some cases, they likely do not even realize they have claimed the EITC. The new verification requirements are likely to confuse or frighten some of these claimants; many eligible claimants may fail to respond, particularly since the usual source they rely upon for tax assistance is not likely to be available during this time period. Furthermore, other community agencies that might provide assistance are not trained on the EITC pre-certification requirements.

Taxpayers who receive these notices and do not submit the form and necessary documents by December 31 can still submit them when they file their tax returns, but some may not understand they should do so or may no longer have the form at the time they file their return. It seems unlikely the pre-certification form will be in the IRS tax booklets and is unclear whether Volunteer Income Tax Assistance (VITA) sites or commercial tax preparers will be provided with the form or have any way to know whether a taxpayer they are assisting is in the group subject to pre-certification. Because of the many difficulties in this area, the few resources in place to assist filers receiving pre-certification notices, and the little time remaining to develop such resources this summer, we believe the IRS should *delay implementation of pre-certification until the summer of 2004*.

Since the usual community resources for tax assistance are largely unavailable, particular segments of the categories of filers subject to pre-certification may be more likely to fail to respond. The additional documentation burdens may discourage some eligible working grandparents from pursuing a claim for the EITC, since they would be required to approach school officials, doctors or other officials in the community to obtain the necessary documentation. Grandparents who are not eligible for, or are reluctant to apply for, traditional entitlement programs because of their perception of a stigma attached to those programs may be reluctant to go through these new application hurdles to claim the EITC. Some foster parents and step-parents might also have concerns that the pre-certification process may in some way threaten their ability to retain the custody and care of the qualifying child. Of course, such fears

are misplaced. But the appropriate agencies to answer questions and allay these fears are not engaged in pre-certification.

In addition, many low-income households move frequently. EITC filers who receive pre-certification notices may receive them in a new community in which they are less likely to have sources of assistance to obtain the necessary documentation. If they have moved some distance, they may no longer have access to the agencies that could document their residency with a child earlier in the year, or to the person who prepared their prior tax return.

The fact that a filer may have moved since claiming the EITC for 2002 also raises the substantial possibility that the filer may not receive the IRS pre-certification notice if a change of address was not filed with the post office or has expired. We recommend that if the IRS notice is returned as undeliverable, several attempts to contact those filers by telephone be made by IRS. If follow-up efforts are not successful, those filers should be removed from the pre-certification pilot test group since they will not have received notice. It would be unfair for them to learn of advance verification requirements only after they file their 2003 tax return. The EITC refunds of such filers would inevitably be delayed, while the chances would be greatly increased that such filers, although possibly eligible, would be unable to comply and would be denied their refund. This would then also make them subject to recertification the following year. If such filers are not removed from the pre-certification pilot test group, their cases should be considered separately for research and evaluation purposes rather than grouped among those filers who received the notice and failed to respond in advance, and also grouped separately from those filers who failed to respond at all.

The pre-certification procedures also appear to assume that the EITC filers who receive notices have telephone service. Access to IRS help is primarily through the toll-free telephone number, particularly since some filers may not be familiar with the "Taxpayer Assistance Center" or Taxpayer Advocate Service referred to in the instructions to Form 8836. Since those filers who lack telephone service also will not have available to them during the summer and fall the usual tax assistance services that they may be accustomed to using, they may encounter particular difficulty. The emphasis in the IRS instructions on being able to assemble a combination of documents to supply the necessary verification also carries with it an assumption that filers can arrange to obtain these documents by making telephone calls to appropriate agencies and officials.

Filers who do not submit the form and documents by December 31 may submit them when they file their tax returns. Some filers may not understand they should do so or may have misplaced or discarded the form in the intervening months. The IRS has indicated that it probably will *not* be able to include the pre-certification form in the tax booklets that the filers subject to these requirements will receive at the start of the tax filing season. We believe it is important that an additional message from the IRS to filers selected for pre-certification be sent at the same time as tax booklets are arriving in filers' mailboxes. It would be preferable that this message arrive as part of the tax booklet package. If this is not possible, there should be an alert sent separately noting that the IRS had earlier sent the filer a notice regarding additional verification necessary to file a claim for the EITC on their upcoming return. The alert should inform the filer that if he or she has not already responded by returning to IRS the Form 8836 and any additional documents necessary, that it will be necessary to do this at the time the tax

return is filed. (To the extent possible, those filers who have successfully pre-certified should be removed from the list receiving this supplementary notice.) The alert should include the Form 8836 and provide information about how to seek assistance from the IRS.

Finally, the new pre-certification requirements are being proposed at a time when, as we understand it, 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.³ While, as we discuss below, we concur with the National Taxpayer Advocate's recommendation to establish a grant program for comprehensive free tax preparation assistance, the reduction in the role of Taxpayer Assistance Centers seems contrary to the IRS' reliance upon these Centers to help filers selected for pre-certification. In addition, the IRS needs to devote more, rather than fewer, resources to providing strong training programs to VITA and TCE volunteers, as well as LITC programs to enable them to assist filers who are subject to pre-certification. The current IRS plan for VITA training, for example, is to devolve responsibility for the training to community partners. This poses particular problems in areas where community partners are unable to assume this role or where community partners are not able to provide adequate training on pre-certification.

Need for Evaluation before Expansion

The IRS now refers to the impending application of the pre-certification procedures to 45,000 filers as a pilot. The 45,000 number may exceed the number of filers needed to conduct a pilot that will produce statistically valid results. Earlier this year, the IRS indicated that the 45,000 level was chosen because that was the number of filers to which it could apply the pre-certification procedures in what would be an initial ramp-up toward two million filers next year. While the IRS now describes this year's pre-certification initiative as a pilot test, it has not changed the number of filers that will be subject to these procedures. Given that the effects of these procedures are not known and there is significant potential for sizeable numbers of eligible families to lose the EITC, the IRS should set the number of filers subject to pre-certification at the number needed for the pilot. If that number is smaller than 45,000, then the number of filers in the pilot should be reduced.

The IRS should not expand pre-certification beyond the initial group of 45,000 (or fewer) filers until a comprehensive evaluation has been completed that demonstrates that pre-certification is effective in reducing overpayments and can be conducted without significant harm to eligible filers. The IRS has indicated that an evaluation will include an examination of

³ National Taxpayer Advocate, *FY 2002 Annual Report to Congress*, Internal Revenue Service, December 2002, pp. 95-99.

filers who do not respond to pre-certification notices. The evaluation should determine what aspects of the pre-certification procedure deterred such eligible filers from participating.

On a related matter, members of the American Bar Association Committee on Low-Income Taxpayers have stated in comments to the IRS a view that we share. The ABA comments state: "... we are concerned that it would be easy for the Service to view any data regarding reduced rates of taxpayer participation in the EITC as having resulted from noncompliance and not from the impact of the precertification program on participation." We agree with the recommendation in the ABA comments that the IRS evaluation should include focus groups with filers selected for the pre-certification pilot, commercial tax preparers and free tax assistance programs, and individuals providing third-party affidavits.

Key elements of the evaluation should include determining how many filers obtain assistance in completing the form from commercial preparers, low-income taxpayer clinics, or free tax assistance programs, how many did not obtain assistance, and what differences in the response rate may be found. There may be a difference in response rates between filers for whom English is not a first language and those who speak neither English nor Spanish as a first language. Urban and rural community differences may also play a role in different rates of response.

Gene Steuerle recently recommended in Tax Notes a more exploratory approach to the design of the pre-certification pilot and its evaluation. In particular, we agree with the following point:

"From the start, the IRS must design the study so that it provides data on alternative and related procedures. For example, the process now contemplates asking for verifiable information from taxpayers on the basis of one form. In my view, it should develop alternative forms, rather than assuming from the start that whatever form it compromises on at the beginning is ideal and would necessarily be the same as what it would implement on a wider scale. One way to gather greater information is to adopt stricter and looser versions of the form, with the looser version asking for less information or simpler verification. A follow-up team of auditors could then contact a subset of taxpayers to provide fairly complete and similar sets of information that would be in excess of what any form required. One part of the follow-up study would then compare whether, based on the comprehensive information set, the strict form really did much better than the less strict form at reducing errors."⁴

The IRS should use such an evaluation to review the experience with the pilot *before* making any decision to expand it to a larger number of tax filers. The results of the evaluation should be made public and an opportunity for public comment should be provided on the next stage of implementation proposed by IRS. Treasury and IRS officials have acknowledged that, assuming the pre-certification pilot proceeds this summer, they will *not* yet have received these evaluation results by the spring of 2004. Accordingly, the IRS should defer its earlier announced plans to expand pre-certification to as many as two million filers in the summer of 2004. No

⁴ "Research Required for the EITC Precertification Procedure," Gene Steurele, Tax Notes, July 14, 2003, pp. 259-260.

decision on expansion should be made until evaluation results both on overpayments and on eligible filers are in hand, which evidently will not be until after next summer.

If the IRS proceeds with its pre-certification pilot now and does expand pre-certification next year despite the lack of evaluation results on the effect on eligible families, tens or hundreds of thousands of eligible EITC filers could lose the EITC or experience lengthy delays in receiving their refunds. IRS should assess the lessons from the pilot test before any expansion. The IRS can apply pre-certification to a second “treatment” group of EITC claimants in 2004 that is similar in size to the 2003 pilot group.

Other Approaches to Reducing EITC Errors

The definition of a child used to claim the dependent exemption and the Child Tax Credit differs from the definition of an EITC qualifying child. Legislation to create a Uniform Definition of Child, which has passed the Senate, would make the child definitions used in other parts of the tax code more closely conform to the EITC qualifying child definition. We urge IRS and the Treasury to work for enactment of this legislation, which originated in the Treasury under Secretary O’Neill.

Nearly 70 percent of EITC claims are filed using commercial tax preparers. There has been relatively little regulation of the private preparer market. Few tax preparers receive the small fines that can be levied for failure to exercise “due diligence” in submitting accurate claims for the EITC. IRS data show that error rates among returns filed by commercial tax preparers are as high as in self-prepared returns. Accordingly, a system for greater accountability and training of preparers should be developed, along the lines proposed by the National Taxpayer Advocate. We note that EITC errors by preparers who are not CPAs or enrolled agents are considerably higher than those committed on returns filed by other preparers and urge that action be taken to address this problem.

Pre-Certification Notice and Outreach

How will filers be notified that they must pre-certify? What the notice sent with the pre-certification form says about its purpose – and what will happen if the filer doesn’t pre-certify – is very important. Since filers receiving the form will already have received an EITC in calendar year 2003, some of them may believe their refund is evidence that the IRS has already found them eligible and mistakenly conclude they need not respond. Pre-certification is an unusual and unprecedented procedure that urges filers to provide information in advance for a tax return that will not be filed until a number of months later. The notice should state that if the filer wishes to claim a child for the EITC for tax year 2003, the completed form and *copies* of attached documents should be sent to the IRS by December 31, 2003, or the filer’s EITC refund may be delayed. Filers should be explicitly warned not to send originals of documents.

The notice should explain that a sample of tax filers was drawn from certain categories of filers for whom the IRS has generally had more difficulty verifying eligibility to claim a child for the EITC. It should be made clear that not all EITC claimants will receive the notice and that many are *not* subject to the pre-certification procedure. Otherwise, some other filers who see the notice may assume they are subject to it as well, may make a copy of it, and seek to collect documentation. The notice also should explain that being sent the notice is not evidence of

wrongdoing by the filer and is not an audit or review of eligibility for the EITC claimed for tax year 2002. The notice should stress that the IRS wants to present a variety of options through which the filer can verify that a child has lived with the filer for more than six months of 2003, before claiming the EITC for the child on his or her next tax return. The notice also should explain how the filer will be informed whether he or she has been pre-certified. Finally, the notice needs to emphasize how filers can obtain assistance from the IRS in understanding and completing the form. Some filers will be hesitant to call an IRS toll-free number because they do not know what help they can receive or because they have had a negative experience with the standard IRS toll-free assistance line.

The IRS notice also should contain a warning for filers who currently take advance EITC payments or contemplate doing so. The warning should state that since it is necessary for the filer to provide the additional verification required to claim the EITC for tax year 2003, the filer should be aware that if the IRS determines the filer is not eligible to claim the EITC, then any advance EITC amounts received would be considered overpayments by IRS to the filer. The notice might also state that if the filer wishes to cease taking advance payments until IRS has notified the filer of successful pre-certification, the filer may resume taking advance payments at any time.

Finally, the IRS notice should address the issue of family situations in which more than one worker may claim the same qualifying child. One objective is to warn filers that duplicate claims should not be filed. Another goal is to inform filers of how the tie breaker rules now apply, in case it is possible that another relative may claim the child if the filer cannot meet the eligibility requirements. Such information could be provided as an insert in the notice package.

It is difficult to provide comprehensive information in language that is appropriately pitched to be helpful and reassuring to filers with a low level of literacy. We recommend that the IRS seek comments on draft notices from low-income taxpayer clinics and organizations who conduct widespread EITC outreach programs.

Commercial tax preparers should be authorized to assist taxpayers in completing the pre-certification form and obtaining documents, so long as the filer signs the form. The form should provide a space for the tax preparer to sign, as well. Commercial preparers should be informed that assisting filers with this form falls under their EITC “due diligence” responsibilities. Preparers should receive detailed information about the pre-certification notice, procedures and form before taxpayers are sent a notice and form. IRS regional offices should invite preparers to training programs to describe the procedures and their responsibilities.

VITA volunteers and site managers should also receive training on the pre-certification notice, form and procedures, including guidance on how to assist filers and on where VITA sites may refer filers for further assistance.

IRS Outreach Efforts. Although the request for comments asks reasonable questions about the direction that IRS outreach on pre-certification should take, there is insufficient time to design an effective outreach and assistance system for the pilot group itself. This is another reason why we recommend the pilot be delayed until the summer of 2004 so there is sufficient

time to address this need more adequately. There are important differences between how outreach and assistance would be provided to a smaller pilot group compared to what would be required to deal with a much larger group of EITC claimants. Nevertheless, an initial careful design of an outreach program for a pilot group would provide important lessons in the techniques, planning and organization time that would be required in a larger-scale operation.

IRS should devote considerable resources in efforts to contact filers who have received pre-certification notices, but do not respond, or who send in documents IRS finds inadequate but fail to respond to a notice to supply additional information. IRS should use a system of several repeat reminder notices (in English and Spanish) sequenced with follow-up calls after each notice. This process may also be helpful in discovering and assisting filers who erroneously decide they should not file an EITC claim and thus do not complete Form 8836. Low-income taxpayer clinics frequently report that low-income filers who are audited and have an EITC claim denied are quite often ultimately found eligible when clinic staff is able to provide assistance. A major factor is the inability (and sometimes unwillingness) of the filer to communicate effectively with the IRS. As the National Taxpayer Advocate has pointed out, “This lack of communication leads to unnecessary frustration on the part of taxpayers and adds a significant expense to taxpayers who are least able to afford it. One Low Income Taxpayer Clinic reported to the National Taxpayer Advocate that 80 percent of the EITC taxpayers it represented before the Tax Court had their deficiencies reduced or abated. A recent review of EITC-related docketed appeals cases bears out the clinic’s experience.”⁵

We recommend providing resources for a grant program for free tax preparation assistance for low-income taxpayers, as the IRS’ National Taxpayer Advocate has recommended, and an increase in resources for low-income taxpayer clinics. The need for such assistance will increase as a result of pre-certification. The IRS should seek to increase the very small level of resources currently provided for these functions so 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. This should include providing assistance with preparation of the tax return forms themselves if the taxpayer seeks help with pre-certification at the time he or she needs to file a return.

These steps should help lower the rate of non-response among filers subject to the pre-certification requirements and reduce the incidence of problems the IRS experiences with the forms and documentation it receives.

When A Taxpayer Submits Pre-Certification Documents, How Will The IRS Respond?

Taxpayers who submit pre-certification documents should receive a letter acknowledging IRS receipt of the documents that provides an estimate of how long it will take the IRS to make a decision, and states how IRS will communicate with the taxpayer if it needs clarification or if it decides the documentation is sufficient. Taxpayers who successfully pre-certify should receive a

⁵ National Taxpayer Advocate, *FY 2002 Annual Report to Congress*, Internal Revenue Service, December 2002, p. 65.

document indicating this so they may retain it for their records and provide it to their tax preparer.

Taxpayers who submit documents but are not pre-certified should receive a notice clearly stating the reason prior to the tax filing season. The notice should inform them that this is not a determination by IRS that they are ineligible for the EITC, but that additional documentation of the residency of the qualifying child is needed before their claim will be accepted. Taxpayers should also be informed that if they do file a claim for the EITC without submitting additional information to verify their eligibility, the claim will be denied. The notice should describe what steps taxpayers should take if they wish to submit additional documentation at (or before) the time they file their tax return. Do such filers resubmit Form 8836 with additional documents at the time they file their return, or do they forward additional documents to add to their existing pre-certification file?

Taxpayers subject to pre-certification who do not successfully pre-certify apparently will fall under the requirements for EITC recertification if they submit an EITC claim that is denied because they did not pre-certify and do not provide the Form 8836 and adequate documentation at the time they file a return. An eligible filer who has not received or understood the pre-certification notice and routinely has a tax preparer complete a tax return could inadvertently fall into non-compliance. To avoid this result, it is crucial that IRS provide commercial tax preparers and free tax assistance services with the ability to determine at the time a tax return is filed whether a taxpayer is subject to pre-certification and has not successfully pre-certified. Electronically filed returns by such taxpayers should be immediately rejected with an error code informing the preparer that an EITC claim for a child may not be submitted without obtaining clearance from the IRS pre-certification unit. This will provide the filer an opportunity to submit the Form 8836 and documentation, and avoid the further documentation requirements and lengthy refund delay necessary for subsequent recertification. The preparer, with the taxpayer's permission, should be able to contact the unit to determine the nature of the problem in obtaining pre-certification.

The pre-certification indicator for e-filed returns also is extremely important to avoid taxpayers securing refund anticipation loans on their EITC claim, for which they will remain liable even if IRS subsequently rejects the EITC claim. In many communities, over half of EITC claims are made through a refund anticipation loan.

If two or more filers submit pre-certification documents for the same qualifying child, each filer should receive a notice to contact the IRS to resolve the issue.

Recommendations for Improvements to Form 8836

The instructions to Form 8836 contain a small section on how to get help from an 800 number or "IRS Taxpayer Assistance Center." This instruction should be more prominently featured in a box at the top of the instruction page and should describe in more detail what assistance can be obtained. Instructions should be provided on how to locate an IRS Taxpayer Assistance Center. Local telephone directories typically do not list "IRS Taxpayer Assistance Center" under the Internal Revenue Service, and local addresses or telephone numbers for IRS

offices are not commonly listed. Many rural and small town taxpayers are not within reasonable reach of such an office. It also will not be clear to many filers what the “Taxpayer Advocate Service” is, how it can assist a filer with pre-certification, or how to contact the local Taxpayer Advocate.

It is our understanding that the Form 8836 and all instructions (including the notice) are to be provided in both English and Spanish, but the IRS Announcement 2003-40 does not address this. We strongly recommend this step be taken. It is not sufficient, in our view, simply to provide a message that assistance may be provided Spanish-speaking filers at the IRS 800 line. Filers should have the opportunity to read the requirements and share them with local agencies they may trust to assist them. Spanish translations should be provided to a range of low-income taxpayer clinics and outreach organizations for comment on the comprehensibility of the materials to Hispanic filers with low levels of literacy in Spanish.

Although the IRS apparently does not have the current capacity to provide translations in other languages, some filers whose first language is neither English nor Spanish inevitably will be selected for pre-certification. Since they will be at a disadvantage, we recommend adding a line to the Form 8836 where the filer can indicate the language in which the filer needs to communicate to the IRS, in case the IRS has questions about the documentation the filer submits. The filer’s case record can be marked so that services of a translator can be secured by IRS staff prior to calling the filer.

Proving Residency by Providing Certain Documents

The form allows the filer one of three ways to provide verification of residency. It is not emphasized, however, that the taxpayer does not need to provide all three types of proof on Form 8836. Part III says, “Check the boxes below that apply and attach any required documentation.” The instructions should clearly state that taxpayers need not obtain and submit *each* form of proof listed, and need provide only those documents — alone or in combination — that show the child meets the residency requirement.

The instructions also should be clear that if an affidavit is submitted that properly attests to the child and filer residing together for more than half the year, then no additional documents or records need be submitted for pre-certification.

The first option is to provide documents such as school records, medical records, day care provider records, leases, utility bills, or social service agency records that, ideally, 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 many such records do not include this type of specific information regarding dates during which the children lived with the EITC filer at the same address. 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.

- This means an EITC filer may need to gather multiple documents. For example, if the address of the tax filer is not on the child's school records, the filer may also need to collect other documents, such as utility bills or social service agency records, to verify that the filer resided at the same address during the same time frame as shown on the documents collected for the child. Putting together the correct combination of documents may be daunting in many situations and may be even more complex if there are two qualifying children. The need to search out multiple documents and request they be provided to the filer may prove a time-consuming burden, which may also prove costly if the filer must take time during work hours to obtain documents. This may 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.
- Filers may run into particular complications obtaining documents that adequately show the dates the child lived with the taxpayer. We are concerned that many tax filers may put considerable effort into amassing these documents, only to have their documents rejected by IRS examiners on the grounds that the documents do not prove joint residency for more than half of the year. For example, what if a child's school records indicate a different address than the document provided to verify the filer's residency because the family moved during or after the school year? We note that the GAO has found glaring inconsistencies in how IRS examiners have responded to documents submitted by EITC claimants during examinations of their claims. In many cases, these are similar types of documents to those 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."⁶

The GAO also found that in other examinations of EITC claims, IRS examiners often rejected school records, since a school year, which may run from September of one year to May or June of the next year, is generally insufficient to document residency of the child for more than half of a January-December tax year. GAO found that "...some taxpayers may not easily discern that they need to obtain school records for 2 school years."⁷

- Form 8836 similarly falls substantially short in not providing sufficient clear direction on these matters. Instructions indicate generally that documents "when taken together" must show that the child and filer lived together at the same address for more than half the year. A filer might not understand that a school record covering January to June 15, for example, is not sufficient. The form and instructions need to be much clearer and more explicit on exactly what information must be present on the documents for the documents to be accepted.

⁶ General Accounting Office, (GAO-02-449), p. 20

⁷ Ibid. p. 11

Otherwise, filers will spend hours securing documents and submitting them in good faith, only to have IRS reject the documents because the documents do not meet a standard of which the filer was not informed. The ABA comments recommended specific language (on page 14) to address one aspect of this problem that we believe is helpful.

- The instructions also should be revised to provide an expanded section of examples that illustrate more combinations of documentation that can satisfy the requirements. The current examples provided, such as the “ACME Medical Clinic,” do not illustrate a situation in which one document establishes the filer’s residency and a different document establishes the child’s residency.
- The problems that these requirements may pose were underscored by the General Accounting Office in Congressional testimony on May 7.⁸ The GAO noted that the documentation requirements for the new pre-certification initiative bear similarities to the documentation requirements used in the 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.”

- Another concern is that the instructions are not specific that, in some circumstances such as foster care or a relative assuming care of child part-way through the year, the filer may not be able to document residency of a child sufficiently until later in the year, after the child has lived with the filer for more than six months. Filers should be instructed that they should wait to file the form and other documents until they have collected all documentation sufficient to demonstrate the child lived with them for more than six months of the current calendar year.

The second option that Form 8836 allows is 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, etc., 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

⁸ 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.

living arrangements of both the EITC filer and the child or children being claimed, and multiple letters may be required.

The Affidavit

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” or records that the EITC filer and the child lived together at a specific address from a specific day of a specific month to a specific day of another month.

Although there are significant problems in the current affidavit provisions, with changes, the affidavit should become the *first* option listed on Form 8836 rather than the third. The affidavit generally would be a preferable option to the daunting, time-consuming and expensive task that many filers will have assembling a combination of documents that is sufficient to satisfy IRS requirements under the first and second options.

In addition to the affidavit option being listed first, both the instructions for Form 8836 and the form itself should clearly state that if an affidavit is submitted which properly attests to the child and filer residing together for more than half the year, *no* additional documents or records need be submitted for pre-certification.

There are, however, major areas relating to the affidavit where the form and instructions are in need of improvement. The instructions for the affidavit should be expanded to provide more direction concerning which parties are permitted to sign an affidavit and to provide examples of situations in which more than one affidavit may be required, including when more than one affidavit may be required to provide sufficient verification of residency for one child. The affidavit instructions in Form 8836 are now quite brief. They leave the impression that the IRS would prefer to have filers provide records as documentation rather than the affidavit.

The major deficiency in the current affidavit provisions is that particular categories of people most likely to know that a filer and child resided together would not be allowed to complete the affidavit. Given the requirement for “personal knowledge” or records that the claimant and the child lived together for the period specified and the explicit perjury warning, most third parties are unlikely to be willing to complete this affidavit unless they have detailed first-hand knowledge of this information or possess specific records. In addition, the form indicates that the IRS may directly contact the person who signs the affidavit, which will further discourage potential signers who do not believe they possess detailed first-hand knowledge. Despite these safeguards, however, the IRS form continues to bar important categories of people who would have first-hand knowledge from filling out the affidavit. This is likely to make it much more difficult for many eligible families to fulfill this requirement.

The provision that individuals may sign the affidavit if they have records showing the filer and child resided together during these months is not likely to ease this problem much or to broaden to any great degree the pool of people who can sign the affidavit. The very purpose of the third-party affidavit is supposed to be to address circumstances in which school, medical or other such records do *not* contain this information. If a filer is unable to secure such records under the other two options on Form 8836, the fact that a third party can use records rather than personal knowledge to complete the affidavit is likely to be of little help. In short, there is no

substitute for a more reasonable set of rules regarding the type of third parties who may complete the affidavit.

In its comment submitted to the IRS on pre-certification, members of the American Bar Association's Committee on Low-Income Taxpayers made the following recommendation, with which we strongly concur. "We applaud the Service's willingness to allow a third-party affidavit as verification. However, we disagree with the apparent assumption reflected in the form that only certain categories of third parties are reliable enough to verify residence. In the experience of many LITCs, there are many other types of third parties who have more personal knowledge than those in the categories listed on the form. For example, school bus drivers, neighbors, public librarians, attorneys who handle custody or divorce matters for a taxpayer, and co-tenants (roommates) who are unrelated to the taxpayer are examples of reliable third parties who have more knowledge of where a child lives than a medical doctor who may see the child once or twice a year. We recommend that more categories of third parties be allowed to provide the third party affidavit."

The IRS is proposing 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 IRS' proposed restriction would prohibit some of the individuals most likely to have first-hand knowledge that the worker and child lived together from filling out the affidavit and could lead to loss of the EITC by substantial numbers of eligible families.

The following categories of individuals also should be permitted to sign the affidavit as long as they have personal knowledge of the taxpayer's living arrangements:

1. Neighbors of the taxpayer. For many taxpayers, neighbors may be the only individuals with personal knowledge that the taxpayer and child have lived together during a particular period of the year. This is particularly important for rural working poor families. As noted above, the ABA comments also include this recommendation.
2. Neighbors and relatives who provide child care. Child care providers represent the only category of individuals permitted to sign an affidavit in which being a neighbor or relative of the EITC claimant is a *disqualifying* factor (unless the individual is a licensed or regulated child care provider). A minister may sign an affidavit because this person qualifies as a member of the clergy; the minister is not disqualified if he or she is a neighbor. But a child care provider *is* disqualified if the provider is a neighbor or relative of the filer. This disqualification is unreasonable and is likely to lead to the denial of significant numbers of eligible filers. Data and research indicate that low-income workers are much more likely than higher-income parents to rely upon neighbors and relatives for child care. In many cases, such providers are not licensed or regulated; licensed care tends to be

more expensive, and many low-income workers can't afford it. Such workers may trade child care responsibilities with other parents, pay a neighbor for their child care, or have their child care provided by a relative. This restriction would bar some of the individuals most likely to have first-hand knowledge that the worker and child lived together from signing the affidavit.

There are many reasons why low-income families may use neighbors or relatives for child care, including the fact that it may be the only type of care that is affordable to them. Licensed care tends to be more expensive, and many low-income workers cannot afford it. In addition, some low-income workers must work nights or weekends, and they may find that neighbors or relatives are the only available or affordable source of "off-hours" care. Furthermore, some low-income non-English speaking families may want to place their children with neighbors or relatives who speak their native language.

Federal Child Care and Development Fund regulations recognize these realities; they emphasize "choice" by parents and guardians in selecting the type of care most appropriate for their children, including unlicensed relative and neighbor care. Accordingly, significant amounts of federal and state child care funds are provided to child care providers who are not licensed or regulated and who are neighbors or relatives of children placed in their care. Similarly, tax filers who claim the Child and Dependent Care Credit or use child care tax preferences associated with cafeteria plans are permitted to use child care providers who are not licensed or regulated and who are neighbors or relatives. The IRS rule that would bar child care providers who are neighbors or relatives from completing the EITC pre-certification affidavit thus is unduly restrictive, as well as being inconsistent with other parts of the Internal Revenue Code and other federal programs.

One additional factor that underscores the necessity of the approach that federal and state child care programs and the child care provisions of the tax code take is that many states simply do not license or regulate small family day care providers. Studies indicate that 75 percent to 80 percent of family day care providers in the nation are not licensed. Urban Institute data show that in 2001, some 27 percent of children receiving a government child care subsidy were in legal care that was neither licensed nor regulated.

This restriction also means that a worker whose neighbor provides child care every day in her home next door or down the block may *not* have her child care provider sign the affidavit, while a worker who must get on the bus every morning while it is still dark to take a child to a child care provider miles away across town would be able to have that provider complete the affidavit, even though that provider has less immediate information regarding the worker's living circumstances.

Exacerbating this problem, the IRS form and instructions provide no definition or clarity on what a "neighbor" is. Is a neighbor someone who lives next door, on

the same street, or “in the neighborhood?” What is a “neighborhood?” What constitutes a neighbor if you live in a rural area?

The GAO has noted in reviewing other IRS procedures relating to the EITC that IRS' refusal to accept statements from relatives who provide child care 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.”⁹

The form should be changed to allow any day care provider over age 18, who is not a spouse or dependent of the taxpayer, to sign the affidavit.

3. Clarify the instructions to define “landlord or property manager.” Many filers are likely to be unfamiliar with the term “property manager” or unclear exactly what it means in this context. We assume the IRS intends the term to include a building superintendent or concierge as well as a rental agent, but this isn’t made clear, and some filers may assume a building superintendent or concierge doesn’t qualify. We think that “landlord, building superintendent or rental agent” is more inclusive than “landlord or property manager” and should be the category listed on the affidavit.
In addition, comparable officials — such as housing authority officials — should be permitted to fill out an affidavit. It would not make sense to allow a private rental agent or property manager to fill out the form but to disallow a comparable public agency official. The instructions to Form 8836 should both expand the term “property manager” and provide a definition of “property manager” so that it is clear that the various types of individuals just mentioned do qualify. (The same step should be taken if “landlord, building superintendent, or rental agent” is used instead, as we recommend.) Finally, homeowners should be able to have alternatives — such as a bank official or insurance agent with personal knowledge of a child's residency — who are permitted to sign the affidavit. Otherwise, this will discriminate against homeowners and be problematic for the rural working poor. Census data show that 55 percent of rural working families with children that have incomes in the EITC income range (below twice the poverty line) are homeowners.
4. Pharmacist. “Health Care Provider” should be broadened to allow pharmacists to complete the affidavit. Prescriptions for a child usually contain the child’s name, address and date of the prescription, which may be valuable records to establish residency.

⁹ General Accounting Office, (GAO-02-449), pp. 15-19.

In both the Part III Proof of Residency and Part IV affidavit section of the face of Form 8836, the terms “community-based organization” and “social service agency” are used. Some filers may not know what kinds of agencies the IRS considers included in these terms, or in other terms used on the face of the form. Some filers may not automatically search the instructions for examples. We urge that there be a direction on the face of form 8836, situated closed to the list of individuals who can complete the affidavit, directing filers to refer to the instructions to find examples of individuals and agencies that are included within the terms used on the face of the form.

We also note above our agreement with the recommendation in the comments submitted by the ABA that a variety of other third-parties should be able to complete an affidavit. To assist filers to explore the list of acceptable parties ultimately listed in the instructions, the affidavit should have a final box for “Other Acceptable Individual (see Part III of the Instructions).” The instructions should then list some other types of acceptable affiants, including (as recommended in the ABA comments) attorneys handling custody or divorce matters for the filer, school bus drivers and possibly mail carriers.

Other Affidavit Issues

The affidavit should be improved in other ways as well. The affidavit section of Form 8836 asks signers to attest under penalty of perjury to having personal knowledge or records indicating that a child lived between specific dates with the taxpayer at a specific address. While signers may feel confident the child lived with the taxpayer for most of the year, they may not have such specific knowledge of the *particular day of the month* on which the residency began.

In addition, if the taxpayer and child moved during the year within the same community, the affiant may know the taxpayer and children resided together but not know the specific dates of the moves. Other questions arise here as well. Is a separate affidavit required for each address? Suppose the affiant can attest to two periods during each of which the filer and child resided together at a different address, which taken together document residency for more than half of the year? The affidavit does not provide space for more than one period of time and address. Would separate affidavits be required for separate time periods? The form and instructions need to be both clearer and simpler on these matters.

Some third parties who do have knowledge that the filer and child resided together may be intimidated from attesting, under penalty of perjury, to knowledge of such specific dates at specific addresses, fearing they could be in error. Accordingly, the affidavit should be revised to ask questions enabling signers to state that the child and taxpayer lived together during a particular time period — between certain months, not specific days — and to indicate at which address *or addresses*. The form should be designed in a manner that encourages those with this information to provide it, rather than intimidating them.

Penalty of Perjury Language

We also believe the “under penalty of perjury” language goes beyond what is needed. While other federal programs commonly use third-party statements for verification, *none* require these statements to be submitted under penalty of perjury. The penalty of perjury language is likely to intimidate some people who do have knowledge the filer and child lived together from

signing the affidavit. Instead of penalty of perjury language, the affidavit should instruct signers that they are providing information to assist the IRS to enforce tax laws and that they are responsible for the truthfulness of their statements. The fact that this is an IRS form which states the IRS may contact those filling out the affidavit should be sufficient to protect the integrity of this process.

We noted earlier our agreement with Gene Steuerele's recommendation that the IRS use alternative forms to explore whether a narrow, more rigid approach to verification is actually more effective at reducing errors without deterring eligible filers than approaches that will be easier for many filers to use. He recommends testing different approaches on subsets of the filers selected for the pilot test and comparing the results. This point is particularly applicable to the concern that the current penalty of perjury language and format of the affidavit may intimidate some third-parties who could verify the residency of a child with the filer. The IRS could test variants of the form that do — and do not — contain the penalty of perjury language.

We believe that the IRS should also test as part of the pilot an alternative approach to third-party verification recommended in the ABA comments, which would enable filers to list third-parties that the IRS could contact and interview, rather than submit a third-party affidavit.

On another issue, Part IV of Form 8836 is entitled "Third Party Affidavit." Many EITC taxpayers may not understand the term "third party affidavit." The note that follows, "to be completed by third party," probably won't help. This could be changed to something like "statement from someone outside your immediate family."

Finally, no information is provided on Form 8836 or the instructions to the third party explaining the purpose of the affidavit and that a completed Part IV is in fact the affidavit. This, too, is needed. The instructions should contain a section specifically for third-parties and should direct them to contact the IRS at a specific telephone number, such as the 800 pre-certification assistance line, for more information. This should be supplemented, as the members of the ABA Committee on Low-Income Taxpayers have proposed in what we believe to be an excellent recommendation, with a section of the IRS website containing more detail about acceptable affidavits and documents and expanded examples. If this is done a reference to this section of the website should be included in the instructions.

Is an Audit Standard the Appropriate Standard for Pre-Certification?

As the foregoing comments indicate, we are concerned that many filers may spend hours (possibly missing time from work) to gather what they believe to be appropriate documentation, only to have IRS examiners reject it because it does not conclusively *prove* the filer and child lived together for more than half of the year. We are equally concerned that many eligible filers may be unable to find someone who can complete the affidavit due to the restrictions on who can sign the affidavit.

Underlying these issues is the question of whether the standard for the documentary evidence required for a filer to be pre-certified should be the standard used in IRS audits, essentially requiring conclusive proof of the matter at hand, or should be something less than an audit standard. Based on our longstanding experience with verification and documentation requirements and procedures in other means-tested programs, we urge that the "audit standard"

not be applied here. Such a standard is not used in verification procedures in other means-tested programs that have achieved much lower error rates than the EITC has, and it would be both impractical and counterproductive here, as it likely would lead to deterrence or rejection of EITC claims from substantial numbers of eligible filers. Such standards may be used in audits that are applied to one or two percent of filers under conditions in which many of the filers in question secure representation. Such standards should not be applied in connection with a procedure being designed for potential ultimate application to much larger numbers of filers, most of whom will not have such representation.

Other Issues

The instructions should include brief summary descriptions of EITC eligibility and the rules for a qualifying child. These could be similar to the descriptions in the Schedule EIC and Form W-5. Referring taxpayers to the fifty-page IRS publication 596 is not very helpful to those who are unlikely to be familiar with tax rules, have limited reading ability or limited English proficiency. The instructions should provide an arrow between the initial reference to the residency test and the adjacent “Residency Test” section of the instructions.

Title to Form 8836. There should be a clearer title at the top of the form. "Qualifying Children Residency Statement" is complicated jargon. While there is a view that the form should not be labeled as relating to EITC, so that taxpayers aren't embarrassed to approach someone to sign an affidavit, realistically a taxpayer will need to explain the purpose of an affidavit. The form instructions, which are explicit about the EITC (and should have a section focused on the responsibilities of a third-party who signs an affidavit), are the best way to do this. A title such as "Verification of Residence of Child for Earned Income Credit Claim" is clearer and more direct.

A sub-head to the title of the Form 8836 could provide a warning to the filer not to fill out the form if the child did not live with the filer for more than six months of 2003, since the filer does not qualify to claim the child for the EITC.

When To File. The instructions refer to “two different time periods” for filing Form 8836. If the form is filed before January 1, 2004, the instructions indicate a delay in the refund may be avoided. If the form is filed with the tax return, the instructions warn the refund will be delayed. In a later note under “Where To File,” the instructions direct where Form 8836 should be sent after December 31, 2003. It is unclear whether Form 8836 will be accepted after December 31, 2003, but before the tax return is submitted. It isn't clear whether the refund will be delayed equally if the form is filed with the tax return or whether there is an advantage to filing it as early as possible even if this occurs after December 31, 2003.

Social Security Numbers. The instructions mention that the child must have a valid SSN. They should also specifically state that an Individual Taxpayer Identification Number (ITIN) for children ineligible to obtain an SSN is not acceptable to claim the EITC. Also, the instructions should explain that the child's name and SSN entered on the form should match the child's name exactly as it appears on the Social Security card.

Originals of documents. Form 8836 should contain a much more prominent warning not to send originals of any official records or documents. Documents can be very time-consuming and expensive to obtain. Taxpayers may not think about the risks of the documents being lost in the mail or in IRS processing. The current instructions do not warn against sending originals of documents, but simply refer (sometimes) to attaching copies.

Number of forms. It is confusing whether or not a separate Form 8836 must be completed for each qualifying child. This is necessary only under some circumstances, according to the instructions. It also is possible that a taxpayer may have to complete more than one form even for just one child. (If one individual signing an affidavit can only attest to a period of time of less than half the year, another affidavit may need to be signed by another person with information about the residency of the child for the remaining necessary months.) The form and instructions should be clearer on these issues.

Privacy Act Notice. The Privacy Act and Paperwork Reduction Act Notice found at the end of Form 8836 has troubling implications. Although it is language similar to that on the last page of the 1040 tax booklet, it is likely to receive greater attention from filers who receive the Form 8836 since it is appended to the instructions of that form. This particular language is not commonly found on other tax forms. We believe it may intimidate some filers and cause them concerns about their privacy that may affect their ability or willingness to respond.

We consider the wording of the notice to have a generally intimidating effect since it will be read in the context of a form that many filers will view as a challenge to their right to claim the EITC. Terms are used that many filers will not recognize, such as: “taxpayer identification number,” “valid OMB control number,” and “nontax criminal laws.” All this sets a certain tone to Form 8836 that may prove unhelpful. In addition, many filers don't realize the extent to which the IRS may share tax return information with cities, states, Committees of Congress, federal benefit programs, etc.

This language also includes the following: “Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law.” It is not clear to us what this is telling the filer to do or to expect the IRS to do. If the information contained in this notice is considered essential to add to the instruction section of Form 8836, we think it needs to be worded in simpler, clearer language.

Of particular concern is that the documents a filer may potentially provide the IRS to demonstrate EITC eligibility are of a kind that is not normally considered "tax return information." If filers choose medical records to comply with pre-certification, will they be uncomfortable with the information that IRS may share such records with the Department of Justice, or with "cities, states...and U.S. commonwealths or possessions...?" Similarly, will filers have qualms that religious records they may use to comply with pre-certification could be made routinely available to a wide range of city, state and federal agencies and their staff? The pre-certification initiative seems to be breaking new ground for the IRS in this area because of the types of documents filers are asked to submit.

This raises a major question: Once thousands (or perhaps eventually millions) of filers provide their documentation for pre-certification to the IRS, how is that documentation handled and secured, and who has access to it for what purposes? The IRS needs to indicate what its policy and procedures will be in this area.

Finally, the notice warns: "If you do not file a return or give fraudulent information, you may be charged penalties and be subject to criminal prosecution." We understand that the segment of this instruction regarding filing a return applies to filers who have a tax liability. However, many EITC filers reading this notice may not recognize this. This may prove confusing to EITC filers without income tax liability who are not subject to penalties, much less criminal prosecution, if they do not file a return. Some low-income filers subject to pre-certification, such as grandparents or foster parents, may have previously recognized that the only reason for them to file a return was to claim the EITC since they earned too little to owe income tax. Some filers who receive pre-certification notices may not intend to file an EITC claim for 2003 or a tax return, because (for example) they no longer have a foster child or will not claim a grandchild. The wording of the notice appears to warn any filer to file a tax return. The language could be made clearer, perhaps by splitting the current sentence: "If you owe tax and do not file a return you may be charged penalties. If you give fraudulent information, you may be charged penalties and be subject to criminal prosecution."