



# U.S. House of Representatives

COMMITTEE ON WAYS AND MEANS  
1139 LONGWORTH HOUSE OFFICE BUILDING  
Washington, DC 20515

October 3, 2023

The Honorable Daniel Werfel  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, D.C. 20224

Dear Commissioner Werfel:

We write to highlight continued concerns surrounding the Employee Retention Tax Credit (ERTC) (also referred to as the Employee Retention Credit) and ask that the Internal Revenue Service (IRS) provide the Committee on Ways and Means with the agency's plan to resolve the backlog of unprocessed ERTC claims, prevent fraud, and ensure hard working, eligible businesses receive the credit to which they are entitled in a timely manner. This is a time-sensitive matter given the agency's September 14, 2023, announcement of an immediate moratorium on processing new claims until 2024 and a longer expected waiting time for processing existing claims.<sup>1</sup>

While we appreciate efforts to protect taxpayers from scams, the announced moratorium will exacerbate wait times, worsen the existing backlog of claims, and prevent taxpayers with legitimate claims from receiving payments. For a program that has been plagued with a prolonged backlog, it remains to be seen what changes will be made during the moratorium to improve vetting measures for fraudulent claims while also making the processing time more efficient to lessen the backlog. It is worth noting that despite numerous public issues with the ERTC program, the IRS has yet to engage with Congress to provide potential legislative solutions for taxpayers.

As you are aware, members of the Committee wrote to you on March 23, 2023, following numerous constituent requests for assistance and concerns regarding lengthy delays in processing ERTC claims and a lack of information from the IRS regarding the status of submitted claims.<sup>2</sup> We appreciate the agency's cooperation in providing the requested briefing.

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<sup>1</sup> Internal Revenue Service, *To protect taxpayers from scams, IRS orders immediate stop to new Employee Retention Credit processing amid surge of questionable claims; concerns from tax pros* (Sept. 14, 2023), <https://www.irs.gov/newsroom/to-protect-taxpayers-from-scams-irs-orders-immediate-stop-to-new-employee-retention-credit-processing-amid-surge-of-questionable-claims-concerns-from-tax-pros>.

<sup>2</sup> Letter from Members of Congress, H. Comm. on Ways and Means, to The Hon. Daniel Werfel, Commissioner, Internal Revenue Service (Mar. 23, 2023), <https://www.experian.com/blogs/employer-services/wp-content/uploads/2023/04/Ways-and-Means-letter-to-Werfel-ERTC-update-3.23.23.pdf>.

On July 27, 2023, the Ways and Means Subcommittee on Oversight held a hearing titled “The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud.”<sup>3</sup> The hearing highlighted the large backlog of ERTC claims at the IRS and an alarming solicitation campaign by third party “mills” spreading misleading information and engaging in fraud.<sup>4</sup> The hearing also made it clear that repeated changes to ERTC guidance by the IRS and a lack of regular communication from the agency regarding the credit has exacerbated applicants’ frustration and fostered an environment ripe for fraudsters.

The ERTC “mills” have capitalized on the confusion and complexity of the program and are aggressively soliciting employers via phone calls, text messages, and a proliferation of television and radio advertisements. The marketers will often falsely promise eligibility to businesses and claim an ability to receive a lucrative refund for the employer in exchange for a fee and/or a percentage of the ERTC credit that the business receives.

Fraud in the ERTC program has become so prevalent that it earned a place on the IRS’s annual “Dirty Dozen” list of schemes and scams that make taxpayers vulnerable to personal and financial risk. In addition, you suggested at a public roundtable on July 25, 2023, that moving up the 2025 end date for the program may help with fraud, saying, “[w]e will work with Treasury to explore legislative solutions we can share with Congress to help address fraud and error, including potentially putting an earlier ending date for businesses to claim the credit. . . .”<sup>5</sup> While we want to work with you to consider action to support these proposals, we have yet to see any legislative proposal from the IRS for Congress to consider.

Moreover, the IRS has cited fraud as a reason that has contributed to the backlog of ERTC processing. Witness testimony during the Subcommittee’s July 27 hearing, however, noted that “it is the very fact of the delay that has breathed life into these ERTC mills. Absent the backlog, they would not exist, preying on small businesses desperate for the funds they were promised.”<sup>6</sup> On September 5, 2023, the IRS released a statement: “After clearing the backlog of 800,000 Employee Retention Credit claims, the IRS began intensifying our review and compliance work this summer given the ongoing issues with potential fraud, increased weekly filing of claims and inaccurate claims. The IRS has slowed our processing of these claims to guard against fraudulent or incorrect submissions as we work to enhance our procedures and controls to best protect small business owners and taxpayer dollars.” While we commend the IRS for its fraud prevention efforts, predatory practices cannot be the only reason for the years-long backlog of delivering refunds to eligible businesses, many of which have suffered financial harm while in processing limbo.

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<sup>3</sup> H. Comm on Ways and Means Hearing on The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud (July 27, 2023), <https://waysandmeans.house.gov/event/hearing-on-the-employee-retention-tax-credit-experience-confusion-delays-and-fraud-2/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> H. Comm. on Ways and Means Hearing on The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud (July 27, 2023), <http://waysandmeans.house.gov/wp-content/uploads/2023/07/Cleary-Testimony-1.pdf>.

On July 26, 2023, one day before the Oversight Subcommittee's ERTC hearing, the IRS issued a press release claiming that the ERTC backlog of valid claims had been cleared.<sup>7</sup> Yet, the IRS' own website noted that as of late July, there were still nearly 500,000 Forms 941-X that needed to be processed,<sup>8</sup> and as of August 16, 2023, the figure increased to approximately 521,000.<sup>9</sup> The September 5, 2023 statement also began by claiming the previous ERTC backlog had been cleared. It is concerning that the agency claimed a false victory over a backlog that has not been resolved.

The July 27 hearing also revealed that the ERTC backlog figure undercounts how many claims have yet to be processed. When the President and CEO of the National Association of Professional Employer Organizations (NAPEO) was asked, "Do you think that the way the IRS calculates the number of unprocessed ERTC claims is accurate?" he responded: "Well no because... a small PEO [Professional Employer Organization] may have a hundred claims with the IRS; large PEOs may have tens of thousands of claims. Each PEO is counted as one."<sup>10</sup> The IRS's inaccurate counting method clouds the scope of the backlog. If each small business claim represented by the PEO who filed the claim was counted individually, the ERTC backlog figure would likely be much larger.

In May, it was reported that the IRS had already processed \$152 billion in ERTC refunds.<sup>11</sup> Additionally, the Wall Street Journal reported on September 4, 2023, "[t]otal payments through July could be \$220 billion, with another \$120 billion in the pipeline, according to a recent Piper Sandler estimate."<sup>12</sup> This total cost estimate is six times higher than the original Congressional Budget Office estimate of \$55 billion.<sup>13</sup>

This credit was created to help businesses retain employees when state and local governments closed businesses during the COVID-19 pandemic, yet, years after the pandemic

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<sup>7</sup> Internal Revenue Service, *IRS Commissioner signals new phase of Employee Retention Credit work; with backlog eliminated, additional procedures will be put in place to deal with growing fraud risk* (July 26, 2023), <https://www.irs.gov/newsroom/irs-commissioner-signals-new-phase-of-employee-retention-credit-work-with-backlog-eliminated-additional-procedures-will-be-put-in-place-to-deal-with-growing-fraud-risk>.

<sup>8</sup> Internal Revenue Service, *IRS Operations: Status of Mission-Critical Functions*, <https://www.irs.gov/newsroom/irs-operations-status-of-mission-critical-functions> (last visited July 19, 2023). The IRS notes that while not all of these returns involve a COVID-19 credit, the inventory is being worked at two sites—Cincinnati and Ogden—that have trained staff to work possible COVID-19 credits.

<sup>9</sup> Internal Revenue Service, *IRS Operations: Status of Mission-Critical Functions*, <https://www.irs.gov/newsroom/irs-operations-status-of-mission-critical-functions> (last visited Aug. 16, 2023).

<sup>10</sup> H. Comm. on Ways and Means Hearing on The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud (July 27, 2023), <https://waysandmeans.house.gov/event/hearing-on-the-employee-retention-tax-credit-experience-confusion-delays-and-fraud-2/>.

<sup>11</sup> Alan Rappeport, *This Little-Known Pandemic-Era Tax Credit Has Become a Magnet for Fraud*, THE NEW YORK TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/us/politics/employee-retention-credit-tax-fraud.html>.

<sup>12</sup> Ruth Simon and Richard Rubin, *Inside a Sales Army Turning a Tax Break Into a Modern-Day Gold Rush*, THE WALL STREET JOURNAL (Sep. 4, 2023), <https://www.wsj.com/business/entrepreneurship/inside-a-sales-army-turning-a-tax-break-into-a-modern-day-gold-rush-3741fa42>.

<sup>13</sup> H.R. 748, CARES Act, Public Law 116-136, Congressional Budget Office (Apr. 16, 2020), <https://www.cbo.gov/publication/56334>.

Letter to The Honorable Daniel Werfel

October 3, 2023

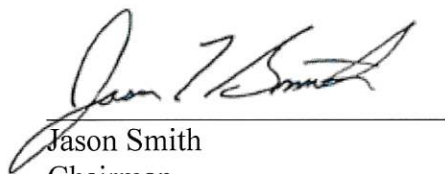
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ended, businesses are still waiting for answers. As such, we request that you provide responses to the following questions as soon as possible, but no later than 5 p.m. on October 17, 2023:

1. What steps will the IRS take to ensure legitimate ERTC claims filed before the moratorium beginning September 14, 2023 are processed in a reasonable amount of time?
2. How fast will existing ERTC claims be processed under this new moratorium?
3. What data points led you to implement the recently announced moratorium?
4. What is the most up-to-date total dollar figure of ERTC refunds that have been processed?
5. The IRS counts PEO claims as one claim, even though they may represent hundreds or thousands of claims by different small businesses. How many PEO claims are in the ERTC backlog?
6. When does the IRS expect the current backlog to be eliminated in its entirety?
7. What steps will be taken to expedite processing times of legitimate ERTC claims filed during the moratorium, which the IRS will begin processing no earlier than January 1, 2024?
8. What fraud prevention measures will the IRS take during the moratorium to be better equipped to combat fraud when processing new claims begins in 2024?
9. What legislative proposal is the IRS considering to address ERTC fraud as referenced in your July 25, 2023 remarks, and when do you plan to share this with Congress for consideration?
10. Is the IRS considering the creation of a “status check” portal for applicants to receive up-to-date information regarding their claim? Why or why not?

If you have any questions or wish to discuss the request, please contact the Majority staff of the Ways and Means Committee. Thank you in advance for your attention to this inquiry.

Sincerely,



Jason Smith  
Chairman  
Committee on Ways and Means



David Schweikert  
Chairman  
Subcommittee on Oversight