

**HEARING ON THE EMPLOYEE RETENTION TAX  
CREDIT EXPERIENCE: CONFUSION, DELAYS,  
AND FRAUD**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT  
OF THE  
COMMITTEE ON WAYS AND MEANS  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED EIGHTEENTH CONGRESS  
FIRST SESSION

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JULY 27, 2023  
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\*Updated Location\*



United States House Committee on  
**Ways & Means**  
**CHAIRMAN JASON SMITH**

FOR IMMEDIATE RELEASE  
July 20, 2023  
No. OS-02

CONTACT: 202-225-3625

**Chairman Smith and Oversight Subcommittee Chairman Schweikert  
Announce Subcommittee Hearing on The Employee Retention Tax Credit  
Experience: Confusion, Delays, and Fraud**

House Committee on Ways and Means Chairman Jason Smith (MO-08) and Oversight Subcommittee Chairman David Schweikert (AZ-01) announced today that the Subcommittee on Oversight will hold a hearing on the backlog of the Employee Retention Tax Credit (ERTC) processing, Internal Revenue Service response to inquiries about ERTC credits, and the impact of fraud on those legitimately trying to claim the credit. The hearing will take place on **Thursday, July 27, 2023, at 2:00pm in 1100 Longworth House Office Building.**

Members of the public may view the hearing via live webcast available at <https://waysandmeans.house.gov>. The webcast will not be available until the hearing starts.

In view of the limited time available to hear the witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

**DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:**

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record can do so here: [WMSubmission@mail.house.gov](mailto:WMSubmission@mail.house.gov).

Please ATTACH your submission as a Microsoft Word document in compliance with the formatting requirements listed below, **by the close of business on Thursday, August 10, 2023**. For questions, or if you encounter technical problems, please call (202) 225-3625.

\*Updated Location\*

**FORMATTING REQUIREMENTS:**

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission but reserves the right to format it according to guidelines. Any submission provided to the Committee by a witness, any materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission not in compliance with these guidelines will not be printed but will be maintained in the Committee files for review and use by the Committee.

All submissions and supplementary materials must be submitted in a single document via email, provided in Word format and must not exceed a total of 10 pages. Please indicate the title of the hearing as the subject line in your submission. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. The name, company, address, telephone, and fax numbers of each witness must be included in the body of the email. Please exclude any personal identifiable information in the attached submission.

Failure to follow the formatting requirements may result in the exclusion of a submission. All submissions for the record are final.

**ACCOMMODATIONS:**

The Committee seeks to make its facilities accessible to persons with disabilities. If you require accommodations, please call 202-225-3625 or request via email to [WMSubmission@mail.house.gov](mailto:WMSubmission@mail.house.gov) in advance of the event (four business days' notice is requested). Questions regarding accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

**Note:** All Committee advisories and news releases are available on the Committee website at <http://www.waysandmeans.house.gov/>.

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**THE EMPLOYEE RETENTION TAX CREDIT  
EXPERIENCE: CONFUSION, DELAYS,  
AND FRAUD**

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**THURSDAY, JULY 27, 2023**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON WAYS AND MEANS,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 2:15 p.m., in Room 1100, Longworth House Office Building, Hon. David Schweikert [chairman of the subcommittee] presiding.

Chairman SCHWEIKERT. The Ways and Means Oversight Committee is ready to begin.

All right. Good afternoon, and welcome to today's Oversight Subcommittee hearing.

This is a hearing to allow members of the committee to hear from those directly impacted by the challenges associated with the Employer Retention Tax Credit, ERTC.

The hearing will also allow us to hear from those who are helping employers navigate the ERTC and the agencies that process and administer the credit, the Internal Revenue Service, our beloved IRS.

The ERTC is a refundable tax credit originally enacted as part of the Coronavirus Aid Relief and Economic Security Act, the CARES Act.

In March 2020, for businesses and tax-exempt organizations, the ERTC was designed to help businesses retain employees during the COVID-19 pandemic.

The ERTC, however, can be complex credit to calculate correctly, as there are many rules and regulations that make it difficult for small businesses to figure it out on their own.

What is worse is we have already and repeatedly heard from stakeholders about the hardship caused by—let me change the page—processing backlogs, how the IRS has not issued significant guidelines, and how the IRS does not provide updates to taxpayers about the status of their ERTC claims. These challenges create a lot of uncertainty for small businesses.

One of the challenges is the backlog of ERTC claims that the IRS still needs to process. Form 941-X, the form by which employers must file their ERTC claims is a paper form. The employers had to file many ERTC claims retroactively as a result of processing these claims by the IRS has been shown to create a massive backlog of unprocessed claims.

Some employers have been waiting months, if not years, for their credits, still have not actually been processed. This delay has created immense hardship for employers, particularly small businesses who desperately need the help in retaining their employees during the height of the COVID-19 pandemic.

To add to the frustration, employers are unable to check the status of their ERTC claims. Not only have such delays—not only have such delays—sorry, I didn't like this line—not only have such delays have the purpose of ERTC, but it has added prolonged and confusing continued financial stresses to the employers who do not know when their claims are going to be processed and when.

Moreover, insufficient guidelines from the IRS have left employers and taxpayers unsure how to do the right thing by correcting ERTC claims that were unintentionally filed inaccurately, either way with small simple mistakes or because they were misled as to whether their businesses legitimately qualified for the credit.

Lastly, ERTC scams and fraud have been increasing so much so that the IRS has been warning about these schemes since fall 2020, encouraging businesses to be wary of aggressive ERTC marketing.

The IRS noted various warning signs for continued consulting firms that may be bad actors: unsolicited ads; calls, emails, texts from unknown persons; statements suggesting that the consultant can determine ERTC eligibility and tax refund estimates within minutes; larger upfront fees to assist in determining the filing of the ERTC claims; and assistance provided under contingency fees that provide the consultant with a percentage of any ERTC-related tax refund.

In March 2023, the IRS added widely circulated promoter claims involving ERTC to the newly entered annual dirty dozen tax scam list. In addition, some are arguing for extensions for how long employers can claim the ERTC.

But there is a bottom line: Congress did not intend the ERTC to be used by businesses as a line of capital for years. The COVID-19 pandemic ended. The ERTC was meant to help businesses retain employers or employees during COVID-19 pandemic, which is now over.

The focus moving forward should be to eliminate confusion and clear the backlog of legitimate claims for businesses just trying to get their refunds they deserve. At the same time, we need to combat the increasing amount of scams, frauds, and examine ways to improve the process and to prevent similar challenges and hardships in the future.

All of these make exploring the ERTC worthwhile. And I thank the witnesses for being here today.

And with that, I would like to yield over to my friend, Mr. Pascrell.

Mr. PASCRELL. All right, Mr. Chairman, it is a good, beautiful day here in Washington.

Chairman SCHWEIKERT. A little sticky.

Mr. PASCRELL. Just like yesterday. I thank you. And I would like to first, Mr. Chairman, recognize and welcome Mrs. Linda Czipo, president and CEO of the New Jersey Center for Nonprofits. We have worked very closely together over many years.

I appreciate your testimony. I appreciate you being here today.

Employee Retention Tax Credit was vital to keeping America's small businesses and nonprofits afloat during the pandemic. This relief was especially crucial in New Jersey, where the virus struck early. Our state's nonprofits worked tirelessly on the front lines of pandemic response and recovery.

We all want to ensure the ERTC gets out the door to employers who need it most. But we need to get to the heart of the issue, resources. Decades of attempts to sabotage and destroy the IRS' ability to serve taxpayers and enforce the law. That is what we got to get to, and I am committed to get there.

You start funding enacted by Democrats has revitalized the IRS. Get the picture that the other side has pictured giving us of the IRS. We have guns at our doors. Give us your money while we are reduced by 80,000 employees, and we were almost successful under many more.

Americans are finally getting their calls answered by the IRS. That is good news, right? Wrong? And their refund checks are on time. That is either true or false.

I want to remind people, every Republican in Congress voted against making tax time easier. Every one of them. We are good friends on the other side, but they voted against us.

Why would you vote against that, making taxes easier to lawfully bring into the Treasury? Like the old saying goes: You get what you pay for.

Thanks to the Inflation Reduction Act, this filing season was one of our most successful in years, believe it or not. Under fresh leadership, the IRS has made enormous progress. Pull away times were slashed to under 5 minutes. It may not seem very important in this dreadful movements of life we have day to day. The backlog of returns was finally cleared.

Now the IRS is using the same playbook to tackle ERTC claims. In the past 2 months, we have seen nearly a half a million refunds processed. That is pretty amazing when you have seen what the IRS had to put up with 6 years prior, and what they were doing with the least amount of resources they had per population. Ninety-nine percent of claims are now less than 3 months old.

Most ERTC claims are filed on paper and processed by hand. So, the IRS wisely directed IRA funding towards electronic filing and automated processing. Bringing tax administration into the 21st century means quicker refunds, fewer errors.

We know bad actors target the ERTC. We know that. We can't deny that. The record will show it. The IRS is already seeking criminal charges and recovering billions in stolen money.

With the backlog cleared, the IRS is redoubling these efforts with additional orders. Wealthy tax chiefs have operated with impunity for years on the Democratic and Republican administrations. Look at the numbers. How could you conclude anything else?

Thanks to the IRA, the IRS is finally able to pursue fair enforcement by collecting what they owe—a fair tax system. You have talked about it, Mr. Chairman. I talked myself to sleep about it every day. If we don't have fair tax collections, we do not have enough money in revenue, and then we got to talk about taxing people for what they should not be taxed for.

Now, that may be an oversimplification. Check the records. Every dollar spent on enforcement pays for itself and then some.

There are some who continue to try and gut these efforts. They will not be successful. Some of you on the other side of the aisle, my good friends, even risk economic catastrophe to erase funds through auditing wealthy tax sheets for Heaven's sakes. It is a fact. Why deny it? Why say that is not as important as—the sabotaged risks are progress toward a functional tax system? It undermines the very efforts we are discussing in administrating the ERTC.

Thank you, Mr. Chairman, and I yield back.

Chairman SCHWEIKERT. Thank you, Mr. Pascrell, and to the overall committee chairman, Mr. Smith.

Chairman SMITH. Thank you, Chairman Schweikert and Ranking Member Pascrell for holding this hearing on the Employer Retention Tax Credit and challenges that businesses and tax preparers have faced with this credit.

As the government forced businesses to lock down, Washington temporarily helped businesses keep their employees on payroll. That time has passed. Almost a year ago, President Biden went on TV and told Americans that the pandemic is over.

Yesterday, IRS Commissioner Werfel said the agency has shifted efforts after successfully clearing the backlog of valid claims. Yet, according to the IRS' website, as of July 19, the agency still has almost a half a million forms left to process. This speaks both to how the ERTC has become plagued by fraud, and how the IRS is failing to process legitimate claims in a timely manner.

The problems at the IRS were present from the very beginning. For starters, the IRS forced all businesses to apply on paper and mail in the application. That has led to long delays. The IRS told my staff in May that 20 percent of claims have sat unresolved for more than 4 months. And we have heard from other businesses who say they have been waiting years.

For small businesses who filed legitimate claims, this has become a major source of frustration with the IRS. Businesses have found the IRS guidance confusing, particularly the rules about whether they are eligible or not. Some have raised concerns about how guidance has been insufficient and changed, forcing small businesses to spend more time with IRS rules that could be spent serving customers.

Just this week, after the Ways and Means Committee announced this hearing, the guidance changed again. The guidance changed again this week.

I hope this rule will help clarify who was eligible for this credit, but clear guidance should have been published a very long time ago. The lack of clarity and speed from the IRS created an environment where dishonest, third-party companies took advantage of businesses to either bend the rules or commit outright fraud.

The ERTC is on the IRS dirty dozen list of scams. Americans are bombarded by scammers all day every day—texts, spam calls, misleading mailers, emails. To be put on the list speaks to the severity of this issue. We have a system where taxpayers get ripped off by scammers, while legitimate claims go unanswered because of a backwards IRS system.

We have someone to testify today who has lived this issue day in and day out. Larry Gray is a fellow Missouri grad, a neighbor from back home—I think your farm is across the road from me—and he is a CPA who has spent decades helping families and small businesses in south-central Missouri navigate the Tax Code. He himself was the target of an ERTC scam, and he has lost clients to competing accountants because he refused to prepare fraudulent claims.

Thank you for coming to Washington to share your experience with this program.

I want to thank all of our witnesses for sharing your ideas and perspectives, to root out fraud, and ensure Washington is helping those who serve it.

I yield back, Mr. Chairman.

Chairman SCHWEIKERT. Thank you, Mr. Chairman.

A quick introduction. We are going to do the short versions for everyone.

Mr. Larry Gray is a partner at AGC, a CPA firm in Missouri and has been a government liaison for the National Association of Tax Professionals.

Mr. Roger Harris is the president of Padgett Associates—or Advisors. Sorry about that.

Pat Cleary is the president and CEO of the National Association of Professional Employer Organizations.

And Ms. Linda Czipo is the president and CEO of the New Jersey Center for Nonprofits.

Thank you for joining us today. Your written statements will become part of the record.

I am going to apologize to you now. As you know, today is a bit of a chaotic day with multiple votes. So, we are going to go through it. Somewhere during this, we are going to probably have a vote. You may see some of us moving back and forth. It is the chaos of the process.

Mr. Gray, please share with us your 5 minutes.

#### **STATEMENT OF LARRY GRAY, CPA, PARTNER, AGC CPA**

Mr. GRAY. That is first time I have talked and not heard. No, again, thank you, Chair, Ranking Member, neighbor, and members of the House Committee on Ways and Means Subcommittee on Oversight. I appreciate this opportunity.

You have already done the introduction, but I think some notes should be noted. For example, yesterday I spoke at the IRS tax forms in Atlanta on tax law. I have been doing this now over 45 years. But during that time period, one of the things I think is important is that I had participated in the tax system.

Throughout the years, starting in the late eighties until last year, I served on different volunteer advisory boards to the IRS. I believe in the tax system. And I think what is so important here today—and I have kind of got an introduction to the rest of the panel—and I think the unusual thing, you might be surprised how we are all on the same page. So, I am not going to read my testimony, but what I want to focus on is small business and small accounting firms.

With me teaching nationwide, when the pandemic happened, I was like everybody else, I couldn't go anywhere. So, I started doing YouTube. I am old-fashioned, but I learned something different. And the very first thing that I did three and a half years ago was a form 7200. There was a way to get a credit for your employer as an employer before you actually had to wait to do the quarterly return. That was a good idea. But what happened was when I had got done, I literally said to the IRS, I can't believe the fraud that is going to happen. See, it has been known.

And so, then what happens is that whenever you have a \$5,000 year credit, that is not going to make a big difference to the fraud. But when that becomes \$7,000—and then we got a lookback that you can qualify for ERTC and PPP, the paycheck protection both, as long as you don't double-dip in wages, that is whenever it started.

So, I serve on the National Public Liaison Monthly Meeting to the IRS. I have got a lot of good friends over there, and I will say this: Three years ago, they were understaffed, and they were underfunded. So, with that, what I look at is that I had no guidance. I am with the IRS sign—there was no guidance when this all started. It takes some time to get through counsel and all of that.

So I go on the internet, and so I wanted to see what other people were doing. So, all of a sudden Google doesn't—I started realizing these people aren't explaining the law correctly. So, I took a couple of my companies, small companies that I knew did not qualify, and so I started shopping the ERTC mills. Because I am teaching YouTube. I should understand the experience from the real world.

And so, with that, what would happen is that when I would look at the advertising, your CPA, your EA, your tax person doesn't know what they are doing. But yet, when I look at some of the contracts—here is one, Client acknowledges in a test that it is eligible.

Here is another one. The client acknowledges they are qualifying business entity. It sounds to me like I am paying 15 to 30 percent of that up to \$26,000 for somebody to do clerical assistance. Because what happens in it, they also say in those agreements, they don't do audits. Then also say in those agreements, maybe they will help you find somebody for the audit. I got a feeling they won't be here.

And here is what is sad. Anybody can put a number on a form and see, you don't have to put a reason why. There is two ways to qualify. You have to do a reason why.

But in that, I want to hopefully see an aggressive, open Q&A when we get to it.

But, in conclusion, going forward, we need to coordinate efforts by starting at the top, appointing a chief counsel, permanent. That has been vacant for, I understand, some years. Well, that is where I as a practitioner and the community, the taxpayer, looks at for guidance. We were getting no guidance. There should have been an ERTC implementation team to coordinate from the top down. We need education. We need guidance. The frequently asked questions are out of date. They say they are historical.

So, my time is about up, and I hope in questions I get the normal what you are asked. Thank you.

[The statement of Mr. Gray follows:]

Statement of Larry Gray, CPA, CGMA

Hearing on the Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud

United States House of Representatives

Committee on Ways and Means

Subcommittee on Oversight

July 27, 2023

2:00 PM

1100 Longworth House Office Building

Chairman Schweikert, Ranking Member Pascrell, and members of the House Committee on Ways and Means' Subcommittee on Oversight, thank you for this opportunity to testify. I believe the reason we are all here today is to see that the right amount of the Employee Retention Credit (ERC) gets into the hands of eligible employers, as Congress intended.

My name is Larry Gray. I am a partner in a CPA firm in rural Missouri and am a small business owner. I have been the Government Liaison for the National Association of Tax Professionals, attending National Public Liaison meetings at the IRS in DC for over 20 years. Additionally, I am an instructor on tax law, speaking nationwide.

While I still did local and state tax updates to my peers during the Pandemic, including Payroll Protection Program (PPP) and ERC, because of the mandated Covid-19 shutdown, I could not go on the road doing my normal national seminars, so I turned to YouTube to get the information out. At first, it was PPP education, but approximately three years ago, it became more of a focus on ERC.

The focus of my testimony today will be on being both a small business owner as well as a tax professional, and the impact ERC fraud is having on small businesses and small tax firms in America.

Through the end of 2020 when a small business could only get a PPP loan or an ERC, the limitation on the ERC was \$5,000 per employee per year. As a small business owner, I was not bombarded with ERC specialists offering to file my ERC and get me thousands of dollars. Then the rules changed.

Today we are dealing with aggressive and misleading ERC advertising in print, on the radio, and on television. It is everywhere.

I have gone through the process of contacting a few of the solicitors and have spoken with some of them on the phone. I have used actual information from one or more of my small businesses that I know for certain does not qualify for ERC, however this is not what I am being told by the 3<sup>rd</sup>-party ERC mills I have communicated with.

In general, they do not ask the right questions, based on the eligibility requirements to qualify as an eligible employer. Specifically, they ask nothing about any government mandated shutdown in my area, and in all cases, they say my business qualifies for ERC.

The following are excerpts from Service Agreements I have received from these 3<sup>rd</sup>-party ERC specialists.

**Bottom Line Concepts**

“By providing the information herein and signing below, **Client acknowledges and attests that it is eligible** to claim the Employee Retention Credit...

Client is directing Bottom Line Concepts, LLC to claim the Employee Retention Tax Credit on its behalf for qualified quarters during 2020-2021...as supplied by Client...”

**ERC Specialists, LLC**

“ERC Specialists, LLC **DOES NOT provide any legal or accounting** advice and users of this web site should consult with their own lawyer and C.P.A. for legal and accounting advice.”

**Jefferson Duke**

Service Agreement “**the client acknowledges they are a qualifying business entity** to claim the Employee Retention Credit (ERTC) according to the guidelines outlined by the United States government.”

I called Jefferson Duke. Frank C went through their qualification checklist. (See attached Exhibit). The following is their response:

**“Estimated ERTC Refund \$182,000.00  
Jefferson Duke Service Agreement**

Dear Larry Gray,

...Upon our initial discussion it looks like you may be entitled to an estimated \$182,000.00 ERTC refund on the number of employees and qualifying factors we discussed over the phone...”

Notably, these 3<sup>rd</sup>-party specialists are clear in their Service Agreements that they are not determining employer eligibility. By signing the Service Agreement, **the employer is attesting they are eligible.**

However, as a practitioner who prepares income, employment, and other tax returns for clients, I have a duty of due diligence to inquire of my clients with sufficient detail to ascertain the information necessary to determine my clients’ eligibility for the ERC and to claim the proper amount of the ERC on my clients’ returns.

With the complexity of the ERC and the aggressive marketing taking place, how many small business owners are aware of the liability and potential consequences of signing these Agreements and receiving this credit?

These employers are being told by ERC specialists that this is money they are entitled to. Unfortunately, this has gone on long enough now that many small businesses, whether they are an eligible employer or not, have received a large credit. Business owners converse, and if my

neighbor got the ERC, then I should also, is the sentiment I am hearing nearly every day in my office.

The taxpayer and the tax professional both need ERC Tools, as the tax professional is also being impacted by ERC fraud.

Recently I lost a couple of clients who chose to go with a 3<sup>rd</sup>-party ERC specialist, even though I explained to them multiple times why they are not eligible for the credit.

Unfortunately, the cash influx these businesses will erroneously receive places them at a financial advantage over my clients who are not eligible for and will not receive ERC. This has impact for years down the road.

I now have multiple clients whose Reps have told them that they are the only ones in their territories who have not received the ERC. Consequently, these clients have repeatedly asked me if I am certain they are not eligible. As you can imagine, this is negatively impacting my relationship with these clients, and two of them have been clients for nearly 40 years.

In the past few weeks, I have started to hear rumbles in the small practitioner community of tax professionals just giving up and saying they are done. That if they are going to lose their clients to these 3<sup>rd</sup>-party mills, they are just going to join them, make the money off ERC, and go on down the road. If they can make enough money, they can stop preparing returns.

To make matters worse, word is out that the IRS cannot audit their way out of this one and that if the taxpayer's income is under the \$400,000 threshold, there is little or no chance of audit. Once ethical practitioners and small business are weighing the odds of being audited vs the benefits of the influx of cash. It is coming down to them making a business decision, not a tax compliance decision.

This stands to jeopardize our voluntary tax system as we have known it.

**As practitioners, we need guidance.**

We need guidance to be able to show our clients clearly why they do or do not qualify.

In that effort, this is what an ERC search on IRS.gov provides today:

**Beware of ERC Scam Promotions**

- Warning signs of aggressive ERC marketing

**Eligibility**

- Shut down by a government order, or
- Decline in gross receipts during eligibility periods, or
- A recovery startup business

“For more information see the *Employee Retention Credit – 2020 vs 2021 Comparison Chart*.” This Notice refers to outdated Notices.

#### **Limitations**

One paragraph on limitations relating to ERC and PPP.

#### **Definitions of eligibility terms**

Notice 2021-20 is a very long Notice, last reviewed or updated March 12, 2021

Notice 2021-23 was last reviewed or updated April 16, 2021

Notice 2021-49 was last reviewed or updated August 20, 2021

#### **Need Help?**

“If you need help claiming the credit or correcting your tax return, see [tips for choosing a tax professional](#).”

#### **How to Claim**

File Form 941X.

“If you file Form 941X to claim the Employee Retention Credit...You may need to amend your income tax return...to reflect that reduced deduction.”

I believe this is where there is a disconnect. Claiming the credit and correcting the tax return are likely not done by the same people. You are referring taxpayers to a tax professional who is under the Return Preparers Office (RPO) for income tax returns. ERC is reported on a 941X, a payroll tax return. Many, if not most, tax professionals do not do payroll tax returns.

There is a disconnect between payroll tax returns and income tax returns. The ERC specialists assist employers with filing the 941X but do not assist with filing the amended income tax returns as a result of the ERC credit, leaving our clients looking to us to bring them compliant, yet we are ethically unable to if we know they are not eligible.

Another source for guidance is the Frequently Asked Questions. However, ERC FAQ's fall under **Historical Information**.

“These FAQs do not reflect the current status of the credit.”

So, there is no current guidance with FAQs.

After the tax professional community asked for specific guidance on an amended 1040X when the practitioner had not assisted or prepared the amended 941X, on March 7, 2023, Office of Professional Responsibility (OPR) released Issue Number: 2023-02, *Professional Responsibility and the Employee Retention Credit* which does clarify a tax professional's Diligence as to Accuracy by stating, “...Practitioners who prepare income, employment, and other tax returns

for clients have a duty of due diligence to inquire of their clients with sufficient detail to ascertain the information necessary to determine clients' eligibility for the ERC and to claim the proper amount of the ERC on the clients' returns...*If the practitioner cannot reasonably conclude (consistent with the standards discussed in this guidance) that the client is or was eligible to claim the ERC, then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit...*"

So, while I and my fellow tax practitioners are bound by our professional responsibilities under Circular 230, the 3<sup>rd</sup>-party ERC specialists are accountable to whom?

These 3<sup>rd</sup>-party mills are creating an unfair playing field in the tax community as they are playing the odds of not being caught.

And this does not even address the questionably unconscionable fees they are charging for doing many times nothing more than the clerical work of submitting an ERC claim.

What I see happening in the future, if these 3<sup>rd</sup>-party mills are not stopped and there are no consequences for their actions, those of us compliant tax professionals are going to be facing the backlash. Word will quickly spread from those businesses who erroneously got the ERC and were able to keep the funds without ramifications that the compliant preparers did not know what they were talking about. This has the potential to put compliant tax preparers out of business, or at best negatively impact our bottom line.

Again, this stands to jeopardize our voluntary tax system.

Because the bad players are always moving the bar, I am concerned the example below is what is coming next. Last week I received this email:

"Hi Larry, came across your company searching for the top Accountants on LinkedIn and your reputation stood out.

We help businesses secure Federal tax credits, particularly the Employee Retention Credit. We charge a 20% fee, and with an average credit of \$250,000, **you could earn \$12,500 per referral. One Accountant in our network made \$127K in just two months referring clients he knew would qualify!**

Open to a 13m call this week or next to discuss?

Thank you,  
Tim Parrish  
Owner, Founder  
Resolute Tax Credits"

In conclusion, going forward, we need a coordinated effort by all starting at the top. Education, communication, guidance, maybe even legislation, specifically addressing the unscrupulous that are taking advantage of the small business community and the tax system. Where will these 3<sup>rd</sup>

party mills be when small business owners are audited down the road? It will be left to the tax professionals to represent their clients, because the mills will likely not be here. Yet that is when small business needs specialists the most.

In the past few weeks, we are beginning to see a movement in the right direction by Treasury and the IRS. We have a new Commissioner, but we also need an IRS Chief Counsel appointment to move this forward.

Chairman SCHWEIKERT. Thank you, Mr. Gray.  
Mr. Harris.

**STATEMENT OF ROGER HARRIS, PRESIDENT, PADGETT  
ADVISORS**

Mr. HARRIS. Chairman Schweikert, Ranking Member Pascrell, members of the Oversight Committee, thank you for having us here today.

My name is Roger Harris of Padgett Business Services. We are an accounting and tax firm that has been in business almost 60 years serving small businesses across the country. We currently have a network of over 200—around 200 offices.

And this hearing couldn't come at a better time, because the employee retention credit, while it was a great opportunity and a much-needed lifeline to small businesses, it is fraught with fraud as we sit here today. And it is putting a challenge on all of us in the profession.

I think, however, we have to recognize that because of the pandemic, we did things quickly, and we did things maybe in a way that we wouldn't have done in normal times. And I hope that we can learn from these experiences and not repeat these mistakes.

In my written testimony, there are some details, but I want to talk about four main areas, and many of which have already been mentioned.

The beginning and the first problem was how we submitted claims to the IRS. There was no question that sending paper into buildings with paper already there and employees not working in them, that we were going to have a problem processing the claims, which led to the second large problem that we face today, and it is still ongoing, which is the delay in getting the money out to the people who need it. Any time you send paper to the IRS, things are going to take much longer.

We are in the beginning stages of a second problem that I think has not gotten the attention it deserves yet, is the law is written in such a way that it is going to require all of the businesses who receive an employee retention credit to amend tax returns.

This could be tax returns from 2020, tax returns from 2021. And if they are an S corporation or a partnership, it would also require all of the partners and shareholders to also amend their returns.

So, there could be millions of returns coming in for which penalties and interest will most likely be charged because it will be producing additional tax.

So we are going to further stretch the IRS resources for the small businesses to comply with their further obligation as the law requires, and it is going to cost small business money that I think we need to look—and we have talked about an alternate way to solve that problem—but that is starting, and it is going to continue get worse as time goes on and more people receive their funds.

The other thing that we are dealing with today, and you have heard it talked about by every speaker up to now is the fraud that is in the system. Any time this amount of money is being handed out through the tax system, the bad actors show up. And they have shown up in large numbers, very sophisticated. I don't think any

of us can turn on a TV or a radio without hearing an ad from these folks.

And it is stretching the relationship between their preparer and the mills, as we call them, because, as Larry has mentioned, we have had clients that we have dealt with for many years who have trusted our advice. But all of a sudden, when someone is telling them, your adviser doesn't know what they are doing, and if you will listen to me, I can give you a half million dollars.

It is very hard for us as the people who are working with these small businesses to win that argument, in many instances, because of the sheer amount of money that is being dangled in front of them.

And as we have heard, the IRS has no choice but to begin enforcement actions to try to correct this. And one of the—Larry mentioned, and Larry and I go a long way back, so we are going to talk a lot about the same things—is that we need help on how to deal with these businesses that come to us who took this money and weren't entitled to it.

And we are asking the IRS for some help of a real-world solution to give us the ability to try to bring these people back in compliance. Because there is no way in the world we are going to audit our way out of this problem. It is going to take a concerted effort by our industry, the practitioner community, to help solve this problem, because we are the people they are coming to today when they get the money. And we actually can't even amend the returns unless we believe the claim is correct. So, our only alternative is to say, well, we can make you give the money back.

But remember, they didn't get all the money. They paid huge fees. So, we need some real-world solutions to help our people do what you want us to do, which is to bring the small businessowner back into compliance because the IRS doesn't have the capability to do it.

In wrapping up, I do want to say one thing to credit the current Commissioner. As Larry mentioned, he and I were both in Atlanta at this IRS forum, and the Commissioner was scheduled to speak, which he did. But, unannounced, he asked for a meeting with some of the practitioners that were there that worked in the ERTC world, and asked us, what did they need? What did he need to do for us? What did we need from him? So at least the dialogue has started, and let's hope that it continues.

And I know my time is up, so I am going to refer you again for details of my comments in the written testimony. Thank you for having this hearing. Thank you for inviting us, and I look forward to your questions.

[The statement of Mr. Harris follows:]

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Statement of Roger Harris, President of Padgett Business Services

Hearing on the Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud

United States House of Representatives  
Committee on Ways and Means  
Subcommittee on Oversight

July 27, 2023

2:00 PM

1100 Longworth House Office Building



Chairman Schweikert, Ranking Member Pascrell, and members of the House Committee on Ways and Means' Subcommittee on Oversight, thank you for the opportunity to testify today regarding the Employee Retention Tax Credit (ERTC).

My name is Roger Harris, and I am the President of Padgett Business Services based in Athens, Georgia.

Padgett is a national accounting, advisory, and tax preparation company with approximately 200 offices across the U.S. that has served tens of thousands of small business clients for 60 years. Prior to becoming President of Padgett in 1992, I ran one of the largest Padgett franchises with the company for 10 years. I have long been passionate about the intersection of small business and taxation.

I had the honor of serving as chairman of the Internal Revenue Service Advisory Council (IRSAC) in 2002 and 2003 and always welcome the opportunity to provide feedback to Congress on how to improve our tax system for small businesses.

Throughout the pandemic, we all saw first-hand both the positive impacts and unintended consequences that many of the legislative changes had on small businesses and other taxpayers.

I want to thank the committee for holding this hearing and putting a brighter spotlight on the ERTC and its existing concerns and opportunities. In examining how the ERTC played out, I am first and foremost cognizant of the circumstances under which this tax credit came about. We were in the middle of a pandemic, small businesses were fighting for their survival, and the ERTC was developed to provide a lifeline to businesses and keep Americans employed. Congress and the IRS did not have the time to develop and implement the perfect program and I believe that would have been an unrealistic standard given the urgency of the situation. I do believe, however, that there are lessons from the ERTC implementation that we must learn from, as well as steps we can take moving forward to improve some of the current challenges.

Throughout the pandemic, Padgett had the privilege of helping small businesses secure relief funding and navigate many of the policy and regulatory issues that arose along the way. At Padgett, our daily work is primarily with what would be considered "mom and pop" small businesses. Our clients have on average less than 20 employees and come from a wide range of industries.

#### **Rollout of the ERTC and the Paper 941-X**

As this committee is well-aware, the ERTC was originally created by the Coronavirus Aid, Relief and Economic Security (CARES) Act and was later amended by the Consolidated Appropriations



Act (CAA), which Congress passed in December 2020. One of the changes made at the end of 2020 allowed a business to retroactively claim the ERTC even if the business had secured a Paycheck Protection Program (PPP) loan. Originally, under the CARES Act, businesses were forced to choose one relief program over the other. This change opened the opportunity for thousands of businesses that had received a PPP loan to go back and retroactively claim the ERTC for 2020.

While the change presented an additional lifeline for businesses, many of which continued to struggle due to the pandemic, it also created a challenge for the IRS which at the time was already struggling under the demands of the pandemic. One of the first critical decisions the IRS made in implementing the policy changes to the ERTC was that the retroactive credit needed be claimed on the 2020 tax returns, requiring businesses to amend their prior 941s in order to claim the credit. However, amended 941s (941-Xs) can only be filed on paper with no electronic option. Therefore, despite the warnings of many tax professionals, the decision by the IRS to not allow businesses to simply claim the retroactive credits on their upcoming quarterly 941 exacerbated an already massive paper backlog. In an attempt to reduce the backlog, suggestions were given to the IRS that they create a dedicated P.O. Box or a specific marking for these retroactive filings. Instead, the retroactive ERTCs were simply put in line with all the other 941-Xs, which already had a paper backlog of many months, therefore compounding the pre-existing problem.

#### **Delay and Backlogs**

At Padgett, we sought to help our eligible clients apply for the ERTC as soon as possible, helping to mitigate any delay. Many tax preparers, however, did not help their clients take this on immediately since they were in the throes of tax season. I think this delay by many in the tax professional community contributed to some of the issues we are seeing today.

Initially, most businesses had to wait 9-12 months to receive the credit aimed at helping them weather the pandemic. The wait soon became over a year or longer for some businesses. As many of us have witnessed, these backlogs have created an immeasurable amount of frustration for businesses as well as real financial harm.

#### **Another Amended Tax Form**

There are several additional issues beyond the initial claiming of the credit and backlogs that businesses have had to navigate in relation to the ERTC. As businesses began to receive the credit, many business owners and even some tax practitioners initially believed that once they received their money, they would be finished with the ERTC. However, a significant number of these businesses were required to amend their prior income tax return (1040) to account for the



credit in the year which they qualified. For example, if they received the credit for tax year 2020, then the 2020 1040 would need to be amended, even though the funds arrived much later. This requirement came after Treasury clarified that, based on the statute, the taxpayer must reduce the wage expense equal to the amount of ERTC credits received.

For pass-through entities with multiple partners or shareholders, each partner or shareholder would be required to amend their 1040. In some cases, this could lead to hundreds of individuals having to amend their tax returns because one entity received the ERTC.

Ideally, small business taxpayers would have had the option to amend their prior income tax return *or* include the refunds as income on their current return, removing cumbersome administrative work and additional costs. This approach would have especially made sense for small businesses who use the cash method of accounting, since they already report their income and expenses in the year funds are received or expenses are paid.

In addition to the burden of having to amend their 2020 tax returns, in most cases a penalty notice is automatically generated since the tax liability increases from the amended 1040 will show up in the system as late (due to no fault at all from the taxpayer). The IRS acknowledged the potential penalties and the need for relief in a statement on April 18, 2022. As solutions, the IRS reminded taxpayers that they can seek relief by showing reasonable cause or under the IRS's First Time Penalty Abatement program. However, these are labor intensive and often time-consuming processes that are not available to all taxpayers (i.e., those that have already used their first-time penalty abatement). These options also lead to more paperwork and back and forth than an agency that is already backlogged and overwhelmed can handle.

#### **Fraud Penetrates the Program and Complications Continue**

There has been increased attention in recent months around potential fraud that is occurring in the ERTC program. The IRS has spoken out aggressively against this fraud and has warned taxpayers to be wary of advertisements around the ERTC. The IRS listed scams involving the ERTC on their Dirty Dozen list of tax scams and made clear that they are stepping up enforcement around ERTC claims. The IRS has also repeatedly warned about third parties who continue to widely advertise their services targeting taxpayers who may not be eligible for the ERTC.

At Padgett, we have seen the complications that these third-party mills have caused businesses and tax professionals. With our own clients, we did a thorough assessment early after the ERTC passed and changes were made to see who qualified for the credit and who did not. Many of these businesses, that we advised did not qualify for the credit, have since been approached by third-



party mills who have erroneously asserted that the businesses actually qualify. A business may claim and receive a sizable ERTC without having to give any upfront justification to the IRS. Businesses simply must add the amount of the ERTC claim to their 941 filing. The lack of a documentation or certification requirement has fostered the environment we find ourselves in today.

One disadvantage for small businesses that use a third-party mill with questionable practices is that if they are eventually audited, they will be asked to furnish documentation on how they qualified for the ERTC and how the claimed credit was calculated. If this background documentation has not been provided to the business, then they could very likely be unable to demonstrate to the IRS how they qualified for and calculated the credit. As businesses are audited in future years, many of the third-party mills could very likely no longer be in existence.

#### **IRS Issues Guidance for Tax Professionals**

One area that has been particularly challenging for tax professionals involves the intersection between potential ERTC fraud and the need for businesses to reduce the wage expense equal to the amount of ERTC credits received in their 1040s. In a number of cases, Padgett has had businesses that used a third party to file for their ERTC come to us and request we amend their 1040 to adjust for the credit they received.

In guidance that was released by the IRS's Office of Professional Responsibility on March 7, 2023, it was stated, "[i]f the practitioner cannot reasonably conclude that the client is or was eligible to claim the ERC, then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit." In situations where the tax preparer is not completely comfortable or convinced that the ERTC should have been taken in the first place, this creates the uncomfortable situation of having to decline to amend the 1040 for the client. It could also end up costing the government money, as the amended 1040 would have resulted in a higher tax liability for the taxpayer.

#### **Returning ERTC and Deductibility of Fees**

This situation raises an additional tax issue related to how you treat the large fees that many small businesses paid to third-party mills that calculated and applied for the ERTC on their behalf. The fees charged by many of these third-party mills have been reported to be a significant percentage of the amount of the ERTC credits, amounting to tens of thousands of dollars for many small business taxpayers. There have and will continue to be situations where a tax professional, relying on the OPR guidance, will decide not to file an amended 1040 out of fear that it would perpetuate an improper credit, and will advise the client to return the original ERTC. The question then



arises, that if the client returns the ERTC received, can the fee paid to the third-party mills be claimed as a business deduction? One of the problems tax practitioners will confront in correcting an erroneous ERTC claim is that the taxpayer is asked to return 100% of the ERTC claimed when they only received a portion of the money because of the fees paid to the third-party mills. Not allowing the deduction only penalizes the small business owner who is trying to do the right thing and return an improper ERTC that they might have been initially misled to take. Additional guidance or clarification from the IRS on this deductibility issue is needed to help both tax practitioners as well as taxpayers.

#### **Conclusion**

The short history of the ERTC raises a wide range of issues and could serve as a case study for challenging and evolving tax policy. The credit was passed at a difficult time for both our country and the IRS and encompasses successes, challenges, and lessons learned. The ERTC has given thousands of businesses a lifeline and critical funds as they have come out of the pandemic. The wait, however, has been far too long for many businesses. The lack of controls when submitting for the credit have also led to excessive fraud.

Aspects of the ERTC remind us that failing to proactively address issues as they become apparent will only compound, making existing problems worse. The IRS must fundamentally change the way they address and get ahead of problems, including working with stakeholders and being willing to adapt and make changes in real time to overcome foreseeable obstacles. Leadership within the agency must set the tone and establish a culture that thinks strategically about potential problems in advance, rather than letting narrow decisions snowball into greater challenges for the agency.

I am pleased to say that Commissioner Werfel has begun taking those important steps. Since his confirmation in March, he has reached out to tax professionals and other stakeholders for input and has made addressing issues around the ERTC a top priority. He also understands the importance of modernizing IRS technology to help prevent these types of challenges in the future. I am hopeful that with Commissioner Werfel's leadership we will see real improvement at the IRS.

Chairman SCHWEIKERT. Thank you, Mr. Harris.

**STATEMENT OF PAT CLEARY, PRESIDENT AND CEO, NATIONAL ASSOCIATION OF PROFESSIONAL EMPLOYER ORGANIZATIONS (NAPEO)**

Mr. CLEARY. Thank you, Chairman Schweikert, Ranking Member Pascrell, members of the subcommittee.

Mr. Pascrell, I will begin with a personal observation. I began this life at St. Joseph's Hospital in Paterson, New Jersey. So, we both found our way down here to Washington eventually.

Mr. PASCARELL. One T.

Mr. CLEARY. One T. That is exactly right. Exactly.

I am Pat Cleary. I am president and CEO of NAPEO, the National Association of Professional Employer Organizations. We represent approximately 250 PEOs that provide payroll, benefits, risk management, regulatory compliance assistance, and other HR services to more than 173,000 small and mid-sized businesses employing more than 4 million people.

Our members account for more than 90 percent of the industry's \$273 billion in revenue. Almost 15 percent of businesses with between 10 and 99 employees partner with a PEO.

I am glad to be here today representing small and mid-sized businesses or SMBs, as they are called, especially the hundreds of thousands who are waiting for their ERTC funds.

PEOs are champions for their small business clients and their employees by providing payroll benefits and HR services and assisting with compliance issues under State and Federal law. PEOs allow small businesses to improve productivity and profitability, and to focus on their core mission and to grow.

Companies that use a PEO grow faster, have more engaged employees, have lower turnover, and twice the survival rate of companies that don't. Among many services provided by a PEO is guiding small businesses through the process of applying for the ERTC. That is why we are here today.

Also, through a PEO, the employees of small business gain access to Fortune 500 employee benefits such as healthcare, dental, vision care, life insurance, retirement savings plans, job counseling, et cetera, that they wouldn't normally get as employees of a small company.

Above all, though, I think what we are most proud of as an industry is in the dark days of the COVID pandemic, PEOs ensured that their clients stayed afloat by securing PPP loans, and later, loan forgiveness, managing employee leave, applying for available tax credits, allowing the businesses to focus on managing—on remaining viable and staying alive.

In fact, businesses that use the PEO during the pandemic were 60 percent less likely to permanently close than those that did not use a PEO during the pandemic. And they received PPP loans and loan forgiveness at nearly twice the rate of businesses that didn't use a PEO. In short, PEOs helped tens of thousands of businesses survive the pandemic. And, again, we are proud of that.

So, now we have got this new challenge. We have been sounding the alarm about this huge backlog of unprocessed ERTC claims for more than a year. We engaged when the backlog was around

200,000. We watched it grow to more than 1 million. It currently stands at 488,000, having grown again in the past month. In short, it is moving in the wrong direction. And don't think of these as mere numbers. These are businesses. These are people.

And the problem is much bigger than the numbers indicate. A lot of claims are filed on an aggregate basis, like ours. So, it means multiple small businesses claims are filed together on the same form. The IRS counts these as one case when there could be hundreds or thousands of businesses on that form, all stuck in the backlog, and waiting for these critical funds. For example, a PEO with 10,000 unprocessed claims is counted as one by the IRS.

A recent survey of only 43 of our 250-member PEOs revealed that 18,000 small business clients are still waiting for the IRS to approve almost \$3 billion worth of claims for ERTC credits that were filed before 2023. Almost 4,000 of these claims date back to 2020. It is completely unacceptable,

Yesterday, Mr. Smith referred to this, the IRS Commissioner said the backlog had been eliminated, adding that 99 percent of remaining claims are 3 months old. It is simply not true. As of a week ago, July 19, the IRS website said that the backlog was 488,000. You have got some context. Most, I was going to most, many States don't have 488,000 small businesses.

I know the big focus of today's hearing is on fraud. I don't know how many allies the IRS has had in its fight against fraud, but I can tell you that we have had a good relationship with the IRS, we have stood shoulder to shoulder with them on this issue to prevent fraud in this program, repeatedly warning our members, and giving them materials to help them warn their clients about so-called ERTC mills, which proliferated as the processing delays that the IRS continued, and the backlog grew.

But make no mistake, this backlog has been the single, biggest business development engine for the fraudsters and the mills. Had there not been a backlog, there would be no ERTC mills preying on small business. And Chairman Smith noted that they have created this environment for these mills to exist, and that is true. These companies are desperate for money they are promised.

It is funny, just as we were preparing to come down here, I made the mistake and pick up a call from a number you don't recognize. And it was some cheery person, Heather, calling to say, Hey, had you gotten your ERTC money yet? And I said, no, it is funny you should call. I am on my way to Capitol Hill to testify in a hearing that is going to put you people out of business. That is the thing.

So, crickets. So, there was dead silence on the phone. So, I mean, she didn't know what to do.

Chairman SCHWEIKERT. And they are always named Heather.

Mr. CLEARY. Heather. Why is that? Another hearing on that I think for this committee would be really important.

So, the IRS were trying to triage this problem. I would tackle the PEO claims first. PEOs should inspire a higher degree of trust and confidence. Because we have got ongoing relationships with established businesses that we work with, and they specialize in compliance—we specialize in compliance assistance. Compliance is what PEOs do. The IRS could pull out those claims today and process them with a high degree of certainty about their validity.

In fact, the Commissioner's lengthy statement and his lengthy statement yesterday, he identified the key indicators of fraud, like what to look out for. None of them—

Chairman SCHWEIKERT. And may have to come back to those.

Mr. CLEARY [continuing]. And none of them applies as it turns out. So, we know firsthand the hardship that the ERTC backlog is causing for small businesses across the country because we hear from them every day, every day. PEOs have longstanding relationships with many of their clients and have become invested in their success. Catalogs, most of these stories on ERTC delays hurts small business.

Chairman SCHWEIKERT. And with that, we are going to have to go way over time. Ms. Czipo.

Mr. CLEARY. I will stop and take questions later. Thank you. [The statement of Mr. Cleary follows:]



707 North St. Asaph Street  
Alexandria, VA 22314  
703-836-0466  
www.napeo.org

**The National Association of Professional Employer Organizations (NAPEO)  
Statement for the Record**

**Pat Cleary  
President and CEO**

**U.S. House of Representatives  
Committee on Ways and Means  
Subcommittee on Oversight**

**Hearing on The Employee Retention Tax Credit Experience: Confusion,  
Delays, and Fraud**

**July 27, 2023**

The National Association of Professional Employer Organizations (NAPEO) thanks Chairman Schweikert and Ranking Member Pascrell and members of the Oversight Subcommittee for holding this important hearing on the Employee Retention Tax Credit (ERTC). Today's hearing is critical in shining a light on and getting the Internal Revenue Service (IRS) to do more to ensure small businesses can fully realize the assistance Congress provided in the ERTC. Continuing delays in the IRS's processing of ERTC claims mean that some small businesses that did the right thing and retained their employees during difficult economic times are still waiting for the help they were promised.

NAPEO recently surveyed 43 of its professional employer organization (PEO) members and found among those respondents that nearly 18,000 small business clients are still waiting for the IRS to approve at least \$3 billion in ERTC credits that were filed before 2023. That is real money, owed to real employers, who retained real employees—and these figures represent only a fraction of all employers who have yet to receive their credits. How much longer do these small businesses need to wait?

NAPEO represents approximately 230 PEOs that provide payroll, benefits, risk management, regulatory compliance assistance, and other HR services to nearly 200,000 small and mid-size businesses employing four million people. Our members account for more than 90 percent of the industry's \$273 billion in revenue. Nearly 15 percent of businesses with between 10 and 99 employees partner with a PEO.

PEOs are champions for their small business clients and their employees. Through a PEO, the employees of small businesses gain access to Fortune 500 employee benefits such as: health insurance, dental and vision care, life insurance, retirement saving plans, job counseling, adoption assistance, educational benefits, and other benefits they might not typically receive as employees of a small company. And, by

providing payroll, benefits, and HR services and assisting with compliance issues under state and federal law, PEOs allow small businesses to improve productivity and profitability, to focus on their core mission, and to grow. We appreciate this opportunity to share our views on how to ensure small businesses finally get the critical help Congress provided to keep employees on the job during unprecedented economic turmoil.

### **Executive Summary**

Congress enacted the ERTC in March 2020 as part of the CARES Act to encourage businesses to keep employees on the payroll during the COVID-19 pandemic. Despite lawmakers' intent that the ERTC provide immediate tax relief to employers experiencing financial harm during the pandemic, tens of thousands of employers are still waiting for the IRS to process their ERTC claims. As most of the country moves on from the pandemic, these employers—many of whom are small businesses—remain in an untenable position as they continue to wait for the IRS to deliver the assistance Congress authorized more than three years ago and to which they are entitled under the law. ***In fact, many of those small businesses are still waiting, in some cases two years or longer (and counting), for their ERTC claims.***

NAPEO's PEO members have seen first-hand the harm that the IRS's long ERTC processing times have wrought on the small businesses they serve, because ERTC funds are vital to keeping the small business afloat. Making things even worse, our members have also witnessed many of their small business clients being preyed upon repeatedly by the so-called ERTC mills whose high-priced business models depend on perpetuating highly questionable—if not fraudulent—ERTC claims. We ***share and fully support*** the IRS's and this committee's efforts to root out and prevent ERTC fraud. Every fraudulent claim filed by ERTC mills further delays the IRS's ability to review and approve the legitimate ERTC claims NAPEO members have filed for their small business clients. However, 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.

NAPEO recognizes that the IRS is facing competing and very challenging demands. On the one hand, it is imperative that the IRS process the outstanding ERTC claims as quickly as possible so that businesses receive their much-needed tax refunds. On the other hand, we appreciate that the IRS has a responsibility to watch for potentially fraudulent ERTC claims, which slow processing times and could result in a small business being held liable for the ERTC mill's actions. NAPEO encourages the Oversight Subcommittee to work with the IRS to address both demands. Even more critical is holding the IRS accountable for continuing to ***dedicate additional resources to processing ERTC claims until all older claims filed from 2020-2022 are completely processed and resolved.*** While these fly-by-night mill operations continue to prey upon unsuspecting small businesses, PEOs rely on well-established business relationships their small business clients. In addition, the PEO industry has a strong relationship with the IRS, submitting billions of dollars of small business employee's payroll taxes in an accurate and efficient manner. Given these facts, plus the industry's working relationship with the IRS, the Service should prioritize the processing of amended PEO returns, knowing that the odds of fraud are very low, and that thousands of small businesses will be provided their ERTC. If the IRS wishes to help small businesses, they need look no further than processing PEO client ERTC claims.

Multi-year delays of this magnitude in the delivery of small business tax relief cannot be allowed to happen again. In addition to clearing the existing ERTC backlog, NAPEO urges Congress to secure a commitment from the IRS that it will implement the technology needed to prevent a repeat of what

occurred with the ERTC. This needs to include electronic filing and processing capabilities for all employment tax forms and related schedules, especially the amended employment tax returns that today are only available for filing with the IRS on paper.

### **Actions Needed Now to Prevent More Harm to Small Businesses**

While the pandemic is beginning to feel like a memory, the financial devastation experienced by many small businesses unfortunately continues. NAPEO respectfully asks the Oversight Subcommittee hold the IRS responsible for the following actions:

- **Maintain focus on clearing the existing ERTC backlog.** As the backlog numbers illustrated below indicate, the IRS made significant progress in reducing the ERTC backlog in recent months. But the recent uptick over the past few weeks is a cautionary tale that the backlog concerns are not over. We urge the IRS to continue dedicating additional resources to the backlog until all ERTC claims filed in 2020, 2021, and 2022 have been processed. Once that is accomplished, the IRS must continue to monitor the backlog to ensure that any ERTC claims filed in 2023 or later are being timely processed.
- **Prioritize and commit to fully resolving the oldest ERTC claims.** As discussed below, NAPEO members report that many ERTC claims filed in 2020, 2021, and 2022 remain unresolved, even as the IRS recently reduced the backlog by hundreds of thousands of applications. It is imperative that the IRS complete its review and processing of these older claims as soon as possible. *The IRS's work to clear the backlog of unprocessed returns is not over until the processing is complete.*
- **Help prevent and address bad actors promoting improper ERTC claims.** In serving their small business clients, NAPEO's members have too often had front-row seats in witnessing the many ERTC mills try to take advantage of small businesses by hounding them with promises of tax credits that are too good to be true. PEOs, as well as the many accountants and other tax professionals that serve small businesses, have sounded the alarm on these mills and cautioned their clients to seek trusted advice regarding a potential ERTC claim. NAPEO urges both Congress and the IRS to hold the mills accountable for any actions that harm small businesses and to take steps to reduce the mills' ability to exploit the tax laws in the future.
- **Take steps now to ensure that small businesses never again experience a similar delay in obtaining critical tax relief.** The pandemic laid bare many of the problems with having an antiquated IRS, not least of which are the ERTC delays that are largely attributable to employers having to file their ERTC claims on the paper-only Form 941-X. It is essential that the IRS prioritize making Form 941-X available for electronic filing, and to ensure that robust programming is in place to electronically process all employment tax forms and related schedules, including Schedule R.

### **ERTC & PEOs: Helping Struggling Small Businesses**

#### **What PEOs Do**

PEOs provide payroll, employee benefits, and human resource services to almost 200,000 small and mid-sized businesses (what are called "client employers") with four million employees nationwide. When a small business uses a PEO (including an IRS-certified PEO or "CPEO"), the small business no longer files

its own employment tax returns. Instead, the small business' employment taxes are reported together with those of the PEO's other client employers on an "aggregate" employment tax return (Form 941) that is filed by the PEO using the PEO's employer identification number (EIN).

#### **ERTC and How PEOs Support Small Employers**

Congress enacted the ERTC as part of the CARES Act to encourage businesses to keep employees on the payroll during extreme economic disruption during the COVID-19 pandemic. The ERTC is a credit against payroll taxes that was initially made available with respect to wages paid by eligible employers after March 12, 2020, and before January 1, 2021. The Consolidated Appropriations Act of 2021 (CAA) retroactively made the ERTC available to many more small businesses by eliminating the prohibition on employers claiming the ERTC if they received a covered loan under the Paycheck Protection Program. Congress further expanded and extended the ERTC in the American Rescue Plan Act of 2021 so that it was generally available for wages paid through September 30, 2021.

In 2020, eligible employers could claim a maximum ERTC of \$5,000 per employee. In 2021, the potential credit amount was increased significantly so that eligible employers could generally claim up to \$7,000 per employee per quarter (for a per-employee maximum ERTC of \$21,000 over Q1-Q3 2021). Apart from those limits, there was generally no aggregate cap on the amount of ERTC an eligible employer could claim. (Different rules applied for employers that met the definition of a "recovery startup business.")

#### *Claiming the ERTC*

Because the ERTC is a credit against payroll tax, it is claimed using the IRS's employment tax system. Instead of creating a separate tax form or process to help streamline ERTC claims, the IRS revised its existing employment tax returns (the quarterly-filed Form 941, for most employers), and required eligible employers to include any ERTC claims on their Form 941 for the applicable calendar quarter(s). Under this system, an employer that was eligible to claim the ERTC for each quarter would have generally needed to claim the credit on six separate Forms 941 (Q2 2020 through Q3 2021).

Unfortunately, many eligible employers were unable to determine their eligibility for the ERTC until after the deadline to file the Form 941. This meant the only option to claim the ERTC was to file an amended employment tax return (Form 941-X) for each quarter in 2020 and 2021 during which they were entitled to the ERTC. Unlike Form 941, which may be filed electronically with the IRS, **employers must file Form 941-X on paper.**

#### *Claiming the ERTC on Aggregate Returns*

As described above, many small businesses do not file their own employment tax returns and instead have their employment taxes reported on an aggregate Form 941, including when a small business hires a PEO. When a PEO claims a payroll tax credit on behalf of a client employer, IRS procedures generally require the PEO to file Schedule R (Form 941) to provide client-level information regarding the client employer's tax credit claim.

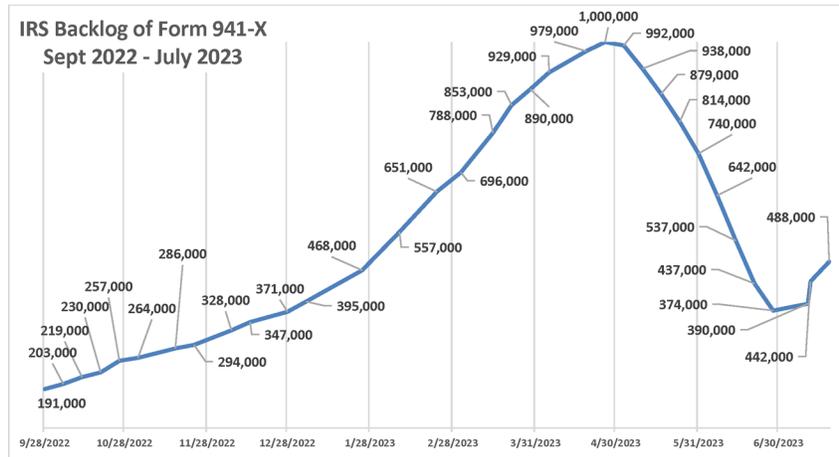
Because the IRS chose to incorporate the ERTC claims process into existing employment tax reporting procedures, small employers who use PEOs and other aggregate filers were required to claim the ERTC through the aggregate filer's Form 941/941-X. Similar to employers that file their own employment tax

returns, small businesses that use PEOs were often unable to determine their ERTC eligibility in time for the PEO to make a claim on the aggregate Form 941. This resulted in PEOs needing to file numerous aggregate Forms 941-X—sometimes even with respect to the same quarter—to assist their small business clients in claiming a refund for the ERTC.

**ERTC Backlog: Recent Numbers Don't Tell the Whole Story**

Employers' ERTC claims have led to the filing of unprecedented numbers of Forms 941-X with the IRS. The IRS's employment tax systems and procedures were simply not equipped to handle this influx, and it led to an immense backlog of unprocessed Forms 941-X that topped out at a staggering 1,000,000 in April 2023. The chart below illustrates the number of unprocessed Forms 941-X the IRS reported on IRS.gov from September 2022 through July 19, 2023.

*NAPEO-prepared chart based on data provided on [IRS.gov](https://www.irs.gov) (Sept. 28, 2022 – July 19, 2023)*



NAPEO appreciates that, in response to the alarming increase in the Form 941-X backlog throughout the early months of 2023, multiple members of Congress raised this concern with Commissioner Werfel and obtained a commitment from him that the IRS would make substantial progress on reducing the backlog in the coming weeks and months. As the chart above shows, the IRS initially made good on that commitment, reducing the backlog from a high of 1,000,000 down to 374,000 as of June 28, 2023. Since that time, however, the backlog has increased again by 114,000 to 488,000 as of July 19, 2023.

In addition to being concerned over the recent uptick in the backlog numbers, **NAPEO cautions that the significant reduction in the backlog that took place throughout May and June 2023 does not necessarily mean that the small businesses that have been waiting the longest on their ERTC claims have by now received a refund as a result of this effort.** In fact, NAPEO recently surveyed 43 PEOs and found that nearly 18,000 small business PEO clients are still waiting for the IRS to approve thousands of

claims for ERTC credits from filed in 2020, 2021, and 2022. ***That includes almost 4,000 claims from 2020 awaiting processing.*** Despite the IRS's commitment to processing the Form 941-X backlog on a first-in, first-out basis, this has not resulted in all the earlier-made ERTC claims being resolved first.

**NAPEO's Efforts to Help Small Businesses**

As early as May 2020, NAPEO reached out to the IRS and Treasury Department to sound the alarm on the filing complexity involved with the ERTC and other pandemic tax relief. By March 2021—before many employers had even filed a single ERTC claim—NAPEO was already urging the IRS to dedicate more resources to processing ERTC claims. The many employment tax experts at NAPEO's PEO members recognized at that point that normal IRS procedures on filing and processing employment tax would be insufficient to handle the anticipated ERTC claims.

*Congress Focused on Reducing ERTC Backlog*

NAPEO, its PEO members, and hundreds of small business clients of PEOs have been calling attention to the ERTC backlog, seeking assistance from the IRS, IRS Taxpayer Advocate Service, and members of Congress. Individual NAPEO members have been working with members of Congress to determine the status of ERTC claims. NAPEO members have written Congress and encouraged their clients to do the same – and more than 1,300 small businesses have written to express their frustrations with the delay in processing the ERTC. More than 70 NAPEO members took time from their jobs to visit their representative and senators to urge action on the backlog. Small businesses call NAPEO every day asking for assistance to get their ERTC claim processed. These small business owners are incredibly frustrated and angry. A process that was supposed to quickly get them much needed assistance has turned into a two-to-three-year wait with no way of finding out what happened to their claim.

Congress is likely to continue to use payroll tax credits to assist small businesses. While we are grateful that the IRS has put the necessary resources into clearing the backlog of 941-X filings, it should not have taken three years and a million unprocessed tax forms to get the IRS to act. The inability of the IRS to act quickly, to shift resources to processing these claims, to simplify their processing of these forms, and their allowing claims to go upwards of three years without action are inexcusable. The IRS needs to immediately clear out all the old ERTC claims, put into place safeguards against fraudulent claims, and put into place technology that quickly processes legitimate payroll tax credits in a timely manner.

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Once again, NAPEO thanks the Oversight Subcommittee for holding this hearing. We ask for your continued attention to the ERTC backlog until every small business, including those that use a PEO, has received the ERTC funds for which it filed a claim and to which it is entitled.

We hope the information provided in our written statement is helpful to the Oversight Subcommittee. Should you have any questions, please contact [Thom Stohler](#), NAPEO's Vice President of Federal Government Affairs.

Sincerely,

Pat Cleary  
President and CEO  
NAPEO

**STATEMENT OF LINDA M. CZIPO, PRESIDENT & CEO, NEW  
JERSEY CENTER FOR NONPROFITS**

Ms. CZIPO. Good afternoon, Mr. Chairman, Ranking Member Pascrell, members of the committee, thank you for the opportunity to be here today.

Again, my name is Linda Czipo. I am president and CEO of the New Jersey Center for Nonprofits. We are a statewide network champion and service organization for the charitable nonprofit community in New Jersey. We are ourselves a 501(c)(3) public charity, and we are part of the National Council of Nonprofits Network.

Our message is essentially the same as what you have heard. We are all here for the same reasons. We want to reduce confusion. We want to combat fraud. We want to eliminate the backlog.

I do want to underscore some points when pertaining specifically to the charitable community, because it is hard to—you can't overstate the essential role that charitable nonprofits have played in COVID-19 pandemic response and recovery. But it is also hard to overstate how important the ERTC has been for the ability of nonprofits to continue serving our communities.

Even before the pandemic, nonprofits were challenged by steadily rising demand with resources that were not keeping pace. And the prolonged health and economic crises spurred by the pandemic exacerbated this to an unthinkable degree, stretching organizations to the breaking point when your constituents were turning to them in record numbers.

We know that in this context programs like the PPP, like the ERTC have been absolutely critical for nonprofits to continue to serve people and communities that need them.

We know that participation in the ERTC is very high. We actually, our organization ourselves received an ERTC credit.

Our process was comparatively smooth. We filed electronically with the help of our accounting firm and payroll company. But we know that that is not the experience that every nonprofit had. One of the issues is of course complexity.

First, I want to thank Congress for structuring the ERTC as a payroll tax credit to allow nonprofits the opportunity to participate. But the sheer complexity, repeated changes to guidance, and in some cases guidance that didn't necessarily apply readily to nonprofits, created or exacerbated the confusion.

During 2020 and 2021, the criteria or guidance changed no fewer than four times. And think about this. It says in a climate where nonprofits are trying to work to save lives in the community. They are trying to grapple with frontline people, unprecedented demand for their services.

And in this kind of climate, trying to juggle meeting demand and trying to navigate these requirements was extremely difficult. They didn't have the human capacity or resources to be able to try to figure this out at the same time. So, what this meant was, of course, widespread confusion and, in some cases, missed opportunity for relief.

For every organization like ours that received ERTC, there are hundreds or perhaps thousands of others that were not aware of what the requirements were, or unable to take advantage of them because the process was perhaps too burdensome.

We, too, like everybody at the table, along with our network and counterpart association have tried to work to educate the community about the program, encourage eligible organizations to look into it, but also to be wary of fraud. We, ourselves, had the experience of an unscrupulous provider contacting our members, saying they were working with us when it just wasn't true.

So, we understand firsthand. And what this underscores is the need for ongoing communications, education from trusted resources in and outside of the government to ensure the program reaches employers as Congress intended.

So just a few recommendations on—again, we have a more detailed statement. I am happy to entertain questions.

Ensure that from the outset, relief programs are structured to ensure equitable access for charitable nonprofits—that means payroll tax credits—that structure was critically important, but also making sure that rural grassroots and organizations that address historically marginalized communities can participate. Simplify the eligibility process and application process at the outset so that smaller entities can participate. Provide ample opportunity and resources for education resources, training, and application assistance.

Because, again, in the charitable nonprofit community, organizations are immersed in service delivery and dealing with the crisis at hand, which doesn't leave a lot of time to analyze and navigate complicated systems.

And, of course, to the greatest extent possible, put safeguards in place to protect against predators and scam artists.

So, again, we thank the committee for the chance to be heard today. We stand ready to work with you on this important issue. Thank you very much.

[The statement of Ms. Czipo follows:]



**Testimony to the United States House of Representatives  
Committee on Ways and Means Subcommittee on Oversight**

**Written Statement of  
Linda M. Czipo, President & CEO, New Jersey Center for Nonprofits  
July 27, 2023**

***The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud***

Chairman Schweikert, Ranking Member Pascrell, and Members of the Subcommittee,

Thank you for the opportunity to share our perspective regarding the Employee Retention Tax Credit and its use and implementation in the New Jersey nonprofit community.

The New Jersey Center for Nonprofits, founded in 1982, is the statewide network, champion, and service organization for our state's charitable nonprofit community, including 400 nonprofit members and broader regular engagement with more than 5,000 charitable organizations in the state through subscriptions, trainings/conferences, and other programs. We are ourselves a nonprofit and a 501(c)(3) publicly supported charity, and we are part of the National Council of Nonprofits network.

New Jersey's charitable nonprofits play an integral role in strengthening our state's social, economic, and community fabric. Nonprofit organizations are vital contributors to the economic well-being of the state. There are more than 40,000 501(c)(3) organizations in New Jersey<sup>1</sup>, employing an estimated 330,000 people<sup>2</sup>—nearly 10% of the state's private workforce. The programs, services, and economic benefits provided by nonprofits are critical factors in making New Jersey a thriving place to live and work.

<sup>1</sup> Internal Revenue Service Business Master File of New Jersey Exempt Organizations, as of March 2023

<sup>2</sup> Johns Hopkins University, Center for Civil Society, Nonprofit Employment Data Dashboard, <http://ccss.jhu.edu/2020-np-employment-report-dashboard/>, and data from interactive website <http://ccss.jhu.edu/nonprofit-works/>

[njnonprofits.org](http://njnonprofits.org)

Tel 732.227.0800 | Fax 732.227.0087 | 3635 Quakerbridge Road, Suite 35, Mercerville, NJ 08619

*New Jersey Center for Nonprofits is a New Jersey nonprofit corporation and a federally recognized 501(c)(3) public charity.*

It's hard to overstate the essential role that New Jersey's nonprofits have played in COVID-19 pandemic response and recovery, providing life-saving care, social services, education, mental health counseling, job assistance and training, spiritual comfort, healing and inspiration, and countless other critical functions.

Even before the pandemic hit, nonprofits were facing ongoing challenges of meeting steadily rising demand for services with resources that had not kept pace. The prolonged public health and economic crises exacerbated these challenges to an unthinkable degree. The impact of cancelled programs, drops in donations, exponential increases in demand, and staffing shortages stretched thousands of organizations to the breaking point at a time when communities were turning to them in record numbers.

In this context, government support has been absolutely critical for nonprofits to continue to serve the people and communities that need them. In an [annual survey of New Jersey nonprofits](#) conducted by our organization in 2021,<sup>3</sup> two-thirds of respondents reported receiving COVID-19 relief from the government such as Paycheck Protection Program (PPP) forgivable loans, Small Business Administration Economic Injury Disaster Loans, the Employee Retention Tax Credit (ERTC), and others from federal and state government. Eighty-two percent of these said that this aid was either important or indispensable to their ability to maintain staffing and programs.

The Employee Retention Tax Credit is important in this context. With the potential for up to \$26,000 per employee depending on circumstances, it offered crucial economic relief for employers who kept their employees on the payroll even amidst devastating economic declines and program interruptions. Nationwide, surveys by the National Council of Nonprofits<sup>4</sup> and Nonprofit Finance Fund<sup>5</sup> indicated that at least 13-15% of nonprofits participated in the ERTC. We are certain that the ERTC helped hundreds, and perhaps thousands, of nonprofits in New Jersey retain staff that they otherwise would have had to lay off, amounting to potentially thousands of saved jobs.

Our own organization applied for the ERTC for the 3<sup>rd</sup> quarter of 2021 by filing an amended Form 941 in June of 2022. For our application, we were able to get assistance from an accounting firm to analyze whether and for which quarters we might be eligible for the credit, and we worked through our payroll service to electronically file an amended Form

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<sup>3</sup> Center for Non-Profits (now New Jersey Center for Nonprofits), *New Jersey Non-Profits: Trends and Outlook*, February 2021, available at <https://njnonprofits.org/wp-content/uploads/2021/10/2021AnnualSurveyRpt.pdf>.

<sup>4</sup> National Council of Nonprofits, *The Scope and Impact of Nonprofit Workforce Shortages*, December 13, 2021, <https://www.councilofnonprofits.org/sites/default/files/media/documents/2023/december-2021-nonprofit-workforce-shortage.pdf>

<sup>5</sup> Nonprofit Finance Fund, *2022 State of the Nonprofit Sector Survey*, full results downloaded from <https://nff.org/learn/survey>

941. We received the credit in the form of a refund check approximately 8 weeks after our amended 941 was submitted.

Ours is an example of where the process worked well. But even for us it wasn't completely smooth, and unfortunately, there are many instances in which nonprofits have been unable to gain the relief through this important program. Our statement centers on two of the focus areas of today's hearing: confusion and complexity surrounding the program's eligibility requirements and application procedures, and the proliferation of unscrupulous third-party providers that siphon much-needed resources away from nonprofit missions and community programs.

#### **Confusion regarding eligibility and application requirements**

It is worth noting that prior to the COVID-19 crisis, employee retention tax credits enacted by government in response to other disasters routinely took the form of corporate income tax incentives, effectively and unfairly excluding nonprofits from essential relief. Similarly, some initial drafts of the Paycheck Protection Program originally excluded nonprofit employers from eligibility as well. We are grateful to Congress for heeding the pleas of charitable nonprofits across the country and providing access to these relief programs – in the case of ERTC, structuring it as a payroll tax credit, thereby allowing nonprofits to participate. However, the sheer complexity of the program, repeated changes to guidance, and in some cases, lack of understanding of how nonprofits operate, created or exacerbated confusion and difficulty accessing the program.

During 2020 and 2021, eligibility criteria or implementation guidelines for the ERTC changed no fewer than four times. This included both positive changes such as broader eligibility and expanded benefits as part of the Taxpayer Certainty and Disaster Tax Relief Act and the American Rescue Plan Act, and negative changes such as Congress' decision to end the program one quarter early in 2021, after many organizations had budgeted financially for the credit. We recognize that the government was facing the extraordinary challenges of responding swiftly to an unparalleled crisis, but the many fluctuations translated into delays and confusion for legal and accounting professionals and nonprofits alike.

The written statement of the National Council of Nonprofits contains a more detailed description of these changes, but several stand out. First was that originally, it was impermissible for employers to receive both the PPP forgivable loans and the ERTC. This was later changed, of course, but by this time, thousands of nonprofits nationwide had already chosen to apply for the more generous benefits under the PPP, and many did not realize that the ERTC might be an option. On top of that, the definitions of "full or partial suspension" of services and gross receipts reductions under the ERTC were also

confusing and, in some cases, difficult to apply in a nonprofit context. Next, financial and payroll records had to be analyzed on a quarter-by-quarter basis to determine the feasibility of applying for ERTC.

Under the best of circumstances, this system would be challenging for many nonprofits, the overwhelming majority of which are small organizations with budgets of \$500,000 or less and employing fewer than 10 employees. But all of this was happening during an unprecedented pandemic that tested the resource and psychological limits for thousands of nonprofits, who simply didn't have the spare dollars or human capacity to try to figure out if they were eligible while responding to extreme crises in their communities.

For nonprofits, the result was widespread confusion and missed opportunities for relief that persist to this day. For every organization like ours that successfully navigated the process and received the ERTC, there are hundreds or thousands of others that are unaware or have determined that applying is just too burdensome or expensive.

#### **Unscrupulous Third-Party Vendors**

Unfortunately, this leads to the next huge area of concern: the proliferation of unscrupulous third parties who are preying on employers and capitalizing on the confusion and complexity of the system.

Our organization regularly shares educational information or hosts webinars and training sessions to inform nonprofits about the ERTC. Yet we still regularly receive communications from organizations who aren't aware of the credit; believe the application window has passed; are daunted by the complexity of the eligibility requirements; or who mistakenly think that nonprofits aren't eligible at all.

Unfortunately, despite ongoing educational efforts by the government, by reputable accountants and attorneys, and by organizations like ours across the country, the sheer magnitude and complexity of the system has also resulted in the proliferation of unscrupulous third-party providers who aggressively solicit employers, sometimes encouraging ineligible employers to apply for the credit, or charging exorbitant fees of 15%, 25% or more of the amount of the benefit. I personally receive dozens of these communications every month. One vendor actually took to contacting our member nonprofits and falsely implying that it was working with the New Jersey Center for Nonprofits to provide ERTC application services. This prompted us to issue another cautionary communication about unscrupulous vendors and reminding nonprofits to work with reputable accountants and payroll services that will charge modest fees.

This explosion of third-party vendors and predatory practices is siphoning much-needed ERTC resources away from small businesses and nonprofit programs for the community. Every dollar diverted to the pockets of these aggressive opportunists makes it harder for nonprofits to serve the community, and runs counter to Congress' intent for the program. As one of our members put it, "The ambulance chasing has to stop."

#### **Nonprofit Education Efforts and the ERTC**

Numerous organizations like ours across the country have engaged in repeated and ongoing efforts to educate nonprofits about the ERTC, and encourage them to explore the program and to apply if eligible. At the New Jersey Center for Nonprofits, for example:

- We partnered with accounting firms to present two webinars in 2021 and 2022 focused on the ERTC, including updated eligibility requirements, definitions, application procedures and more. These webinars were offered live with ample Q&A time, with recordings made available afterward.
- We sent multiple emails to our subscriber list of 5,000 to share updates about changes to the ERTC requirements and connect nonprofits with fact sheets and information from the IRS, the National Council of Nonprofits, and other experts. Viral redistribution expands the reach of these communications.
- We provide nonprofits with one-on-one information and referral via email and phone through our Nonprofit HelpDesk service.
- We continue to remind nonprofits regularly through various communications channels that there is still an opportunity to apply for the credit, and we have also cautioned nonprofits to be wary about solicitations from unscrupulous third-party actors.

We have no doubt that these and other outreach efforts helped eligible organizations that might not otherwise have done so to receive much-needed ERTC relief. However, even with comprehensive and multifaceted efforts by many organizations and experts nationwide, many charitable nonprofits still don't realize that the ERTC might be available to them. This underscores the need for ongoing communications and education from trusted sources in and outside of government to be sure the program reaches employers as Congress intended.

#### **Recommendations**

We would again like to stress that the ERTC has been a vital part of a critical comprehensive relief package that made it possible for nonprofits to keep their employees and continue their programs and services for the community under unfathomable circumstances. For many organizations, the ERTC and other aid were a lifeline that prevented them from having to close permanently.

But clearly there are lessons to be learned from the ERTC implementation that can be applied to future crises. In that spirit, and as partners with the government in serving the public good, we respectfully offer the following suggestions:

- Ensure that from the outset, relief programs are structured to ensure equitable access for charitable nonprofits, including rural, grassroots and those led by and serving historically marginalized communities and ensure that implementation requirements adequately reflect the realities of nonprofit operations.
- Simplify the eligibility and application process so that smaller and mid-sized nonprofits will not be deterred from participating. Not only will this maximize efficiency and direct more relief to community organizations and businesses, but it will also discourage the proliferation of predatory scam artists who have taken advantage of the complexities of the current program.
- Provide ample resources for outreach, education, training, and application submissions, keeping in mind that especially in times of extreme crisis, many nonprofits are immersed in service delivery and putting their communities and constituents first, leaving little time to analyze or navigate complicated systems.
- To the greatest extent possible, put safeguards into place to protect against predators and scam artists. Restricting or prohibiting commission-based fee structures and protecting nonprofits and small businesses from harassment-level campaigns and practices would make a big difference.

Past experience has shown that severe crises and the financial downturns that accompany them tend to hit nonprofits immediately, while economic recovery reaches the nonprofit community much later than other sectors. Nonprofits in New Jersey and across the country are still grappling with severe labor shortages that undermine their ability to meet continually escalating needs. Providing necessary tools and resources, including programs like the ERTC, will help to ensure that our communities can continue to access nonprofits for vital programs and services, now and in the future.

Thank you for your consideration and for the opportunity to share our views.

Respectfully submitted,  
Linda M. Czipo  
President & CEO

**New Jersey Center for Nonprofits**

[lczipo@njnonprofits.org](mailto:lczipo@njnonprofits.org)

**About the New Jersey Center for Nonprofits**

*[New Jersey Center for Nonprofits](#) is a statewide network, champion and go-to resource for and about New Jersey's nonprofit community. Founded in 1982, the Center exists to build the power of New Jersey's nonprofit community to improve the quality of life for all people of our state. We provide professional education, advocacy, resources, training and information to strengthen nonprofits and help them thrive in their work for the people, communities, and causes they serve. The Center is a New Jersey nonprofit organization and a 501(c)(3) publicly supported charity.*

**New Jersey Center for Nonprofits**

3635 Quakerbridge Road, Suite 35 | Mercerville, NJ 08619

732 227 0800

[njnonprofits.org](http://njnonprofits.org) | [center@njnonprofits.org](mailto:center@njnonprofits.org)

Chairman SCHWEIKERT. Thank you, Ms. Czipo.

As you are going to see, we are going to do some juggling because we are also going to have a vote series. Always remember you are on lots of televisions all over the campus. It is just the nature, so—and I was going to have Mr. Steube go first.

Mr. STEUBE. Thank you, Mr. Chairman.

My questions are for Mr. Harris.

Numerous employers have come forward with their stories about months, and even year-long delays, in processing their Employee Retention Tax Credits. In some cases, it is millions of dollars of these credits claimed by employers. How has the complexity of ERTC returns contributed to the backlog that employers are experiencing today?

Mr. HARRIS. Well, I think there has been a lot of factors that have contributed to it. I think we start with the way that we initially ask for the credit, which was just the filing and the paper. I think that is the biggest contributor.

Complexity has been a problem in many instances, particularly, with the retroactive and coordination with PPP loans. So those of us that have tried to do things correctly, it was a complex calculation, and it took some time. I can't speak to how some of the mills dealt with this, because I think they sometimes found shortcuts that we couldn't find.

But I think the real issue started with the fact that we knew—a lot of the problems in this program were predictable. They were things that we could see coming. Any time you ask paper to be sent—and as I said in my opening statement—into a building with nobody working and already paper backed up, delays shouldn't have been a surprise. But complexity is a problem in all of the Tax Codes, not just this.

Mr. STEUBE. And in your testimony notes, there were suggestions were given to the IRS to improve the ERTC processing. Can you elaborate on what those suggestions were and whether the IRS was implementing those suggestions?

Mr. HARRIS. We made a couple of suggestions, and others did, that, number one, recognizing the fact that these were going to be sent into bills, that we had to do paper. That there should be dedicated post office boxes, identifications. Some way of prioritizing these claims above the normal workload. Because, again, we were in the middle of a pandemic. These were funds to provide lifelines to small businesses, and yet they just fell in.

So, we did not see any of the suggestions that we may have taken. I know others had different things allowing them to be claimed on a current-year process return that could be filed electronically. So, I think we just fell back into the way it was always done, and in that case, we had great delays.

Mr. STEUBE. Do you have any other suggestions that would avoid some of the backlogs that we have seen in the future?

Mr. HARRIS. Well, I think, generally speaking, and again, if we have the time and we are not in a pandemic, we should always look for ways not to—today, what we are doing is solving a problem. I would like to find ways with the IRS to prevent the problem.

Mr. STEUBE. Right.

Mr. HARRIS. And I think one of the ways to do that is look for alternate ways; take advantage of electronic filing; take advantage of things that are currently being done; and be creative in terms of just being this is the way we always did it.

Mr. GRAY. If I may say something to add to that? I mentioned the 7,200, and it came out, and saw it was very fraudulent. It was a fax number end. In that case, the IRS did step up to the plate on it.

But I think the other thing, the form being filed with just a number on it. See, there are two—there is a startup business—but the main way to do this—there are two ways to do it. If they would have at least put a code on there and said one is based on gross receipts, they already have that information on the income tax returns.

Where all the fraudsters have come from is not from the gross receipts tests and deficiency, which was the company hurting most, if they would have had to two pipelines just that in and of itself would have moved the companies with the biggest losses, because there was no decision on that other than a calculation. And the auto part was just to verify with income tax credit. So, all that got thrown in with the other.

And then, when the offer mills come along—but the most important thing if they this—put toward at least two codes, again, the company losing the most money would have been the first taken care of, which, to me, was very important.

Mr. STEUBE. Well, that kind of leads me to my next question. How has the fraud and the scams impacted the backlog that employers are facing today?

Mr. GRAY. I guess that was directed toward me. I think the big issue is the fact that you are getting all of these quarters with a number changed and no reason why. So how do you audit something?

And so, what happens, you know, the demand. And as I said in my printed statement, the reason why we are all here today is to get the right money to the right qualified employer. And we all want it to run faster.

So, I think the other thing would be is that Budge and I attend monthly meetings here in D.C. Three years ago, I seen the problem coming. But I think what happened was is when you are pulling off thousands of people in compliance over to take care of the EIP and the 1040 rebates and credits, then you have got a shortage of staff, and these papers are piling up.

It is amazing, for example, a 1040-X, and I believe 941-X also, even if you do that electronically—no it is a 940-X, you do an amended return, and you think you are e-filing it, they actually print it out and scan it in.

Chairman SCHWEIKERT. No.

Mr. GRAY. Okay. I do want to say, in my comments, I was—we do have a new Commissioner, and I think over the last few weeks, they are starting to listen.

Mr. STEUBE. My time has expired. Thank you, guys, for being here today. I appreciate it.

Chairman SCHWEIKERT. Thank you, Mr. Steube. Ranking Member Pascrell.

Mr. PASCARELL. Yes, I very much read the report that came out yesterday from the IRS, updated all the numbers that we have heard turn around here today. There is a summary for that report as well. It is a four-pager. In that summary, and in the report itself, the IRS is telling us that this problem started in 2019, and was seen throughout 2020. And they realized they had to do it. I would agree with Mr. Gray that Mr. Werfel is the guy right now. I think he knows what he is doing. He will not jump just to make us happy that things are happening. Because we want it not only to be a solution—one of you said this—we want it to sustain itself and try to reduce the amount of hesitancy that exists right now so people, the consumer doesn't have to wait so long.

Ms. Czipo, you stated that two-thirds of the respondents to a survey reported receiving COVID relief from the government. That is a lot of people. What type of education and outreach services did your organization conduct to make nonprofits aware of the ERTC? Be as brief as possible. I have got a number of questions.

Ms. CZIPO. Yeah, we did, along with our counterpart associations, workshops, webinars, recorded videos, emails, social media to try to reach our members, our network in New Jersey of 5,000-plus. And, of course, the reach of our counterparts across the country is very broad.

We wanted to make sure that organizations were aware of the programs, the changing requirements; also, quite frankly, the warnings against not falling for the scams. But we wanted to make sure of it—and we still do this to this day—we still hear from members that don't know that nonprofits are eligible for this program.

So that education is ongoing. And we know that we have reached a lot of organizations that might not have otherwise known about this.

Mr. PASCARELL. I agree with that. You discussed the need for more education and clearer processes to help nonprofits navigate the ERTC. How can education and streamlining the application, critical to what we are talking about here, help cut down on the scams targeting vulnerable organizations?

Ms. CZIPO. Well, that is really a key, key point because I think one of the biggest roots of the proliferation of the scam artist was the complexity of the program. You have got organizations, as we talked about, on the front lines trying to meet unprecedented demand for their services, but they also are dealing with lost revenue, canceled programs, and the like.

And so, you get somebody coming into your door, you are going to try to listen to them. Because this is not what you are specializing in. The simpler we can make this, the easier it is for organizations to deal with.

That is part of the reason why time, extra time to apply also matters. Because organizations have to analyze their systems and whatnot. And making that choice between am I going to serve the person who is at my door today, or am I going to be to stop and look at this morass of guidelines that may change next week is a really, really hard choice to put on a nonprofit.

Mr. PASCARELL. What did your organization experience when claiming and receiving the ERTC? And what type of information

did your organization need to gather and provide to your accountant? That is a tricky thing here we are talking about.

Ms. CZIPO. It is. And there is a reason we didn't apply right away either because we also—we are a small office.

Mr. PASCRELL. Right.

Ms. CZIPO. And we had to figure out if we might be eligible. And we had to work with our accountant and provide payroll records and provide our financial records so they could help us analyze whether our gross receipts had gone down enough.

And, of course, the moving target of the definition of gross receipts also was a problem for the charitable community. And then look at our payroll records. So, it is a multi-step process.

And that is part of the reason that we were also trying—we were in an emergency mode as well. And so, trying to navigate that was a lot bit challenging. And our process was a little smoother than some, but it definitely took some time. And there were a lot of steps.

Mr. PASCRELL. My final question, quickly, what lessons should Congress take away from the ERTC implementation that can guide the design of future tax relief programs for nonprofits?

Ms. CZIPO. The biggest message is the fact that this was structured as a payroll tax credit, which allowed nonprofits to participate. That was the huge, huge win for nonprofits. It really was a lifeline. Any further future programs, if they can be structured that way, that will make a huge difference for the community.

Mr. PASCRELL. Another question will lead you to about a two-hour answer, but it is a complicated process. But thank you for your testimony. Thank you for all your testimony. You have helped beyond what you even think.

Chairman SCHWEIKERT. Thank you, Mr. Pascrell. And if you are going to go vote, we will say nice things about you when you are gone.

Ms. TENNEY. Thank you, Mr. Chairman. Just thank you for holding this hearing. Thank you to the witnesses. We appreciate your testimony today. And I thought maybe I could follow up on Mr. Pascrell's question, maybe with Mr. Cleary.

What do you believe—we were just talking about how we would have made this program better. Do you believe that the way that the IRS calculated this program as a payroll tax credit? Is that something that you thought was in error, resource, or it could have been fixed? Just quickly because I am just curious about your response to that.

Mr. CLEARY. Yeah, I don't know. And the tax experts here would be in a better position to answer. But what I do know is when they did a surge and put a bunch of people on the case, the backlog came down. That is easy.

So whatever else was happening inside of the bubble, for us, it was just a matter of applying resources to the problem and trying to drive the backlog down. Because that is really our big problem. Many times, you have got 500,000 cases. We have got thousands and thousands and thousands of cases in that subset that are held up.

Ms. TENNEY. Well, let me ask you, while we are on the backlog, do you think that the way the IRS calculates the number of un-

processed Employee Retention Tax Credit claims is accurate—is it accurate the way they are processing it, in your opinion.

Mr. CLEARY. Well, no, because as I mentioned in my statement, for PEOs that—it could have a very small PEO may have 100 claims with the IRS. Large PEOs may have tens of thousands of claims. Each PEO is counted as one. So, if we get 250 members, that is 250 claims that the IRS counts when I have—

Ms. TENNEY. As one.

Mr. CLEARY. Yeah. It could be tens or hundreds or thousands of cases.

Ms. TENNEY. So, Mr. Cleary, I will stick with you for a minute. The IRS claims to have doubled the amount of Employer Retention Tax Credit claims that they process every week from processing 20,000 claims per week during the filing season down to 40,000 claims per week.

So just yesterday, the IRS issued a press release where Commissioner Werfel stated that the IRS had successfully cleared the backlog of valid ERTC claims. They even said it was 99 percent done. So, from your experience, and you just indicated this, does it seem like the ERTC backlog has been cleared?

Mr. CLEARY. No. And, in fact, their own website a week ago said that it was almost 500,000 in the backlog. So, they didn't clear that out in a week.

So that is the first problem that we are seeing occur with this. And you see again in the last week that it ticked back up by another few hundred thousand. So, it is almost at half a million. So, whatever the problem is, there is something out of whack with the count.

And I agree, we wish the Commissioner well. As I said, we have had a really good relationship with the IRS. But for his credibility, I think first shot out of the box he needs to be credible and truthful in terms of describing what the backlog is.

Ms. TENNEY. Well, we thank you for that, but the exact number is actually 488,000 right here. So, we know that there is a huge backlog. So, to claim that somehow these are done—and we appreciate what you do as PEOs as a small business owner.

Mr. CLEARY. Thank you.

Ms. TENNEY. We are dependent on PEOs and the great services they provide in helping us get through some of the confusion and difficulty in dealing with the IRS. And we understand the bureaucracy. We know it is difficult.

But this is real money. And we have low margins in small businesses. And we appreciate that what you do—and we appreciate that you on top of this. And when I have met with so many small businessowners, the first thing that everyone says is the 941-X form. Oh, you know, I just hear it, and it is problem, and the IRS needs to solve it.

And we appreciate the work you do to advocate for people who are in this position, especially the small businessowners that don't have the resources and the compliance teams and the lawyers and accountants to really make it happen.

So, we have work to do, and the IRS needs to clarify this. And it would be nice if the Commissioner would come out and admit that we have almost a half a million claims that are still out there

with businesses struggling to get this right and struggling to comply with the law.

Mr. CLEARY. That is right.

Ms. TENNEY. So, we appreciate all the witnesses. I think we have got to run to go votes. But thanks so much. And thank you to all of you again for your expertise and also for being willing to come here, as Mr. Schweikert said to be on national TV and have everybody on the Hill watching you guys.

Mr. CLEARY. Thank you.

Ms. TENNEY. Thanks so much.

Ms. VAN DUYNE [presiding]. The chair now recognizes the gentlelady from California, Ms. Chu, for 5 minutes.

Ms. CHU. Ms. Czipo, I want to thank you for your testimony, and I appreciate that you recognize that this credit was absolutely vital for many of the nonprofits and businesses who claimed it.

Congress created the ERTC on a bipartisan basis in the CARES Act. We asked the IRS to set up a new refundable credit at the same time that the agency was working remotely because of the pandemic and sending economic impact payments to every taxpayer.

The credit nevertheless provided absolutely critical support for establishments that were closed down or restricted by government orders to protect public health.

And because of that, and the other pandemic aid programs, like the Paycheck Protection Program, our economy bounced back faster and stronger than any of our peers.

But I recognize that the ERTC has faced immense challenges and has been a burden so far to too many entities instead of helping them.

And one of the lessons is that the IRS simply did not have the resources to properly administer this credit. They could not accept electronic forms. They did not have enough employees. Their systems were outdated and overburdened.

That is exactly why Democrats passed the Inflation Reduction Act and reversed over a decade of Republican cuts to the agency.

And the results are clear: The IRS just yesterday reported that they were able to add new staff to address the surge of filings and clear the backlog of old claims, giving them the ability to focus on new claims and fraud mitigation.

So, Ms. Czipo, can you talk about whether the increased resources for the IRS provided by the Inflation Reduction Act are helping nonprofits and businesses to get the help they need from the agency and whether you believe that cutting these funds for the agency would hurt taxpayers and hinder their ability to smoothly claim ERTC and other credits?

Ms. CZIPO. What I would say is yes. Certainly, the backlog—we were dealing with unprecedented crises certainly with the pandemic. That is the understatement. And more IRS resources means more ability to process applications, to provide guidance, to answer questions.

We certainly recognize that the changes in the guidance were the result of efforts to try to swiftly address an unprecedented crisis. So having more hands on deck, if you will, certainly makes the

odds of that process going more smoothly, it certainly increases that quite a bit.

So extra resources at the IRS, we think, is certainly a very strong and important aspect of making the program run smoothly now and in the future.

Ms. CHU. And let me address a specific issue, which is that businesses are required to file a 941-X form with the IRS on paper rather than electronically.

Fortunately, the IRS has said that they expect Form 941-X to be eligible for electronic filing starting next year. It is a commonsense improvement made possible by the resources that Democrats provided to the IRS under the Inflation Reduction Act.

So could you talk about how electronic filing will help nonprofits and businesses claim the ERTC and make other amendments to their quarterly taxes moving forward?

Ms. CZIPPO. Certainly. Electronic filing speeds up the process exponentially.

And we were actually able to file electronically. I was not aware of the point made that the IRS prints out the forms. But we filed our form electronically. Our process went smoothly. We had our credit back within 8 weeks.

So, we have seen firsthand that it can work very well. And I think the more the process can be streamlined and remedies, like electronic filing, clearer guidelines, more consistent guidelines from the outset, making sure that things are simple so that as many organizations, eligible organizations, can take advantage of this as possible, that is all really, really important.

Ms. CHU. And I heard from all of you about the unscrupulous vendors who targeted the small businesses, you also eloquently talked about that, and it pressured them to apply for tax credits that they may not qualify for just so that they could collect this commission.

I heard from CPAs that this problem is pervasive, and unlike the types of fraud we saw with other pandemic programs, oftentimes the applicants making the improper requests for aid are doing so with no ill intent, but simply because they were misled.

And I heard that the IRS is distributing information to make sure that we do not have these fraudulent claims and that we can identify them earlier. And I certainly hope that that can help in this process.

And I yield back.

Ms. VAN DUYNE. And the chair recognizes herself.

We have many roles here in Congress, and one that stands out the most important is providing constituent services and helping them weed through the never-ending bureaucratic tape.

But at the top of that list is the IRS. Nobody likes paying taxes, which is really made more painful when the IRS does not do its job. And that is what we are here looking at today.

Congress enacted the ERTC at the beginning of the pandemic to provide rapid tax relief to eligible employers who kept employees on the payroll despite being harmed by the pandemic.

The outdated IRS process that employers must use to claim the ERTC has not worked well, and it has contributed to the backlog of unprecedented unprocessed returns that resulted in many em-

ployers waiting 2 or more years, as we have heard today, for their claims to be processed.

And despite the fact that the IRS is making it difficult for legitimate claimants to receive their tax funds and tax returns, the IRS is doing a very poor job of preventing fraud. And, as of April 20, IRS Criminal Investigations initiated 122 investigations involving over \$1.2 billion of potentially fraudulent ERTC claims for tax years 2020 to 2022.

Mr. Cleary, you have got your Heather. I have got my Deb.

Oh, is she going to play? Oh, come on.

[Voicemail message played.]

Ms. VAN DUYNE. Who wouldn't call back on this?

Chairman SCHWEIKERT. Is her name Heather?

Ms. VAN DUYNE. Her name is Deb. I didn't have a Heather. I have a Deb.

But it is amazing to me how many of these calls I have gotten. And, by the way, I called back. You answered the phone. I called back today—or I called back, and they still keep me on the list. And I tell them who I am. And, yes, while I may have employees, I guarantee you I am not eligible. And they still keep me on that list.

So, we have learned that these ERTC mills have been approaching businesses and telling them that they qualify for the ERTC, even though some of these businesses were already told by their tax preparers that they don't qualify for the credit.

So how prevalent do you find this issue if I am getting calls and you are getting calls just this morning? And do you think it has led to an increase in improper ERTC claims?

Mr. CLEARY. A hundred percent. And to your question, like, who on Earth would call these people back? The answer is simple: desperate businesses.

Ms. VAN DUYNE. Yeah.

Mr. CLEARY. So, on our website, "ERTC delays hurt small biz," there are just scores and scores and scores of first-person accounts of people who closed their business, moved their manufacturing operation, shut it down, refinanced their homes, gave up their pensions, everything for this. They are desperate.

And that is why I said the easiest way to clear the—or get rid of the mills is clear out the backlog. People are desperate for the money. They need it to stay alive. And so, if I am going to wait and I don't know how long, because there is no way to find out where my claim is, then I am going to call Heather back and say, "What can you get me?"

Ms. VAN DUYNE. Yeah.

Mr. CLEARY. And that is real. That is what is happening out here.

Ms. VAN DUYNE. So, some of these ERTC mills offer refund anticipation loans, in which they loan employers a certain percentage of their expected ERTC refund and, in the meantime, charge them interest-only payments.

Would such a refund anticipation loan from an ERTC mill increase the level of risk that an employer is exposed to?

Mr. CLEARY. Well, sure, there is that.

And then the other problem we keep saying—and, again, we have been shoulder to shoulder with the IRS in warning our members and make sure they warn their clients, like, don't get in bed with these people.

Because the other issue—I think Roger alluded to it—is, where are these folks going to be in a year? So, when you get audited, where are they going to be? Gone.

Ms. VAN DUYNE. Gone. They got their money and now they are gone.

Mr. CLEARY. Absolutely. Cardboard stand in the airport, they folded the tent, and they went—

Ms. VAN DUYNE. I have a quick question. You had answered Ms. Tenney's questions a little bit about some of the struggles that they are going through to file their taxes. But just as a follow-up, when Commissioner Werfel was here before this committee, he claimed that the IRS would process oldest claims first.

Mr. CLEARY. Yeah.

Ms. VAN DUYNE. Have the PEO industry and their clients seen the oldest claims processed first?

Mr. CLEARY. No. We have 4,000 claims from 2020 that we know about and probably more than that. That is just a sampling of our members, less than half of our members that had 4,000 claims from 2020. So, no.

Ms. VAN DUYNE. What are they telling you? What does the IRS tell you when you call?

Mr. CLEARY. Not a lot.

Ms. VAN DUYNE. All right. Well, thank you very much.

Mr. CLEARY. Thank you.

Ms. VAN DUYNE. My time has expired.

Who am I recognizing next?

Oh, Mr. Schneider is recognized for 5 minutes.

Mr. SCHNEIDER. Thank you so much.

And thanks to the witnesses for sharing your stories. Obviously a lot here, and I appreciate you bringing your expertise to us.

I appreciate the work you do. I am the son of a CPA. I worked for him summers. I started my career at Pricewaterhouse on the consulting side, not the accounting or tax side.

Mr. GRAY. Smart move.

Mr. SCHNEIDER. But I know what it was like. I worked for a local firm in Chicago. It was then Blackman Kallick. So I appreciate this.

Mr. Gray, you put something in your written testimony that struck me, struck me to the core, because you are saying you are hearing practitioners—and my dad was a—he worked with a firm, started out of college, became a partner. They sold that firm to a bigger firm, but then he left and started his own firm again. So I know what your firm is like, and I know what your clients are like.

You said there are practitioners giving up, saying they are done, that they are going to lose to these corrupt mills, why not join them. And I know there are bad actors in every industry, but every accountant I worked with, know, I was pretty confident that they were straight shooters.

My dad raised me—I mean, if they overcharged me a penny on a check, I am going to make sure that they knew it. But if they undercharged me a penny, I was going to make sure I paid it.

Mr. GRAY. Yes.

Mr. SCHNEIDER. That is the accountant mindset.

Mr. GRAY. Yeah.

Mr. SCHNEIDER. Could you go a little bit more about these people who are joining rather than fighting the mills?

Mr. GRAY. I would say that, if we go back 3, 4 months, I would have never thought you would hear that.

But I think also part of the deal is by—I think part of it is the complexity of the law. And so what happens is, when you are trying to explain it to people, this party is not charging all of these great fees, but the thing about it, it has changed the definition of qualifying. And so partly the law itself is complex.

And, secondly, there is no guidance. When you think about it, you go to IRS.gov, and it will lead you to frequently asked questions. And when you pop it up, it says these are historical. Where do I go for guidance?

Mr. SCHNEIDER. Right.

Mr. GRAY. That is small business.

Well, now what happens is I had a friend in Illinois that she just lost her largest client. And the problem is that—here is a great big one I see a lot of pushback on.

If I as a CPA and you come to me and I have told you that you don't qualify and you go to the mill and get the money, then I can't—and it just got issued in March by OPR—

Mr. SCHNEIDER. Yeah, and I am sorry. I am going to have to reclaim just because of time, but I think that is a key point.

And, Mr. Harris, you kind of touched on this about how—and I am going to put it back to us on this committee—how can we find a way to help you and your franchisees in this case bring people back into compliance?

Mr. HARRIS. Well, we need real world solutions. We have people who—to Larry's point—they listen to us in the beginning until some very slick ad, like we have seen here, gets them on the phone, and all of a sudden, they have a half-million-dollar refund that they are due, of which they only get \$400,000 at least; \$100,000 goes to the person that did it.

So, they come to us, and we can't amend the returns because we have been told we are not allowed to. And yet you want us to pay back \$500,000 when we have only got \$400,000.

Mr. SCHNEIDER. Yeah.

Mr. HARRIS. We need to work together, our community with the IRS, and Congress, when necessary, to recognize that some small businesses have been trapped in a situation that all of us would have been tempted to be trapped in.

Mr. SCHNEIDER. I hear you, and I appreciate that.

And maybe I will turn to Mr. Cleary. Two questions.

The first one is, are your clients, because you are representing thousands of—your members represent thousands, tens of thousands of companies, are they applying multiple times for the ERTC? Are they applying and waiting and then going to these

mills? That is kind of the impression I have from what you are saying.

Mr. CLEARY. Oh, that is a great question.

No. I mean, it is either—you choose your lane. So, I mean, they throw in with their PEO, which they typically do, and say, “Hey, can you help me get this?”

Mr. SCHNEIDER. And then, because it is taking so long, they are not picking up the phone and talking to Heather or Deb and saying, “I want to do it again.” That is not what you are saying.

Mr. CLEARY. I hope not. I think—I am looking at these guys—that would be really dangerous if you had both of them going at once because then you are going to end up in—

Mr. SCHNEIDER. And I am short on time, so I will just wrap up.

The ERTC, as you guys have all noted, we were dealing with a wildfire, my analogy. We were throwing blankets on that fire. We knew there were holes in them. But the ERTC saved more than a million—1.3 million jobs—and we have grown the U.S. GDP by \$135 billion, we have seen over the last months. It slowed and then helped to staunch that fire. So I think it was critical.

Do we learn from it? Yes. Do we cut the backlog? Yes.

Mr. Cleary, you mentioned that the backlog is growing again. It is because people are applying again. And 500,000 is a big number.

Mr. CLEARY. Yeah.

Mr. SCHNEIDER. How many small businesses are in the United States?

Mr. CLEARY. Well, more than that. But remember, the 500,000 includes hundreds of thousands that are counted as one.

Mr. SCHNEIDER. It is almost 32 million.

Mr. CLEARY. But if you are one of those businesses, it is all the marbles.

Mr. SCHNEIDER. I get it. Every one—

Mr. CLEARY. It is all the marbles. That’s starfish.

Mr. SCHNEIDER. One, we need to cut it out and get it to zero, and that is the goal. But I don’t want to overstate the numbers. It is a significant number, but it is not the majority of businesses, as might have been implied.

I yield back.

Chairman SCHWEIKERT [presiding]. Mr. Feenstra.

Mr. FEENSTRA. Thank you, Mr. Chairman.

I just want to probably take a little different vein and a different approach. I am here to try to figure out solutions, what we can do.

I have 39 counties that I represent in Iowa, and they all are rural. They are all small Main Street businesses.

And this was a great thing, the Employee Retention Tax Credit. It did exactly what it did, it sounded like. It created payroll at a time when the government was requiring businesses to shut down. So, it was very critical.

And I get it. I mean, when you roll something out so fast, you are trying to resolve something, you are going to have a lack of clarity, you are going to have a struggle with eligibility, and stuff like that.

But think of how much time has gone past now since this actually occurred. I mean, it has been almost 18 months to 2 years.

And we still have businesses that have little guidance from the IRS, little education on who qualifies, and very little customer service, which all my small businesses are really struggling with.

So, my question is this. Mr. Gray, what can we do, solution? It seems like there is a lack of education or there is a lack of IRS guidance on the ERTC. And, obviously, it is creating fraud, related to fraud.

Do you have any solutions on what we can do in this area?

Mr. GRAY. Excellent question. I am glad you asked it. I will try to be quick.

Number one, like offshore accounts and they did with the cryptocurrency, send out some soft letters, send out. So, if they right now would send a letter to everybody that has got the credit and everybody in the future and in this letter say, "You need to file the amended return, the income tax return, here are the most common reasons," like they just issued this counsel memo on the supply chain—

Mr. FEENSTRA. Yeah.

Mr. Gray [continuing]. That right there, that letter yesterday changed a client.

So, communicate in this letter these are the most common mistakes that are being made, offer an amnesty program to where that if I—a not-for-profit yesterday in Atlanta, the woman is a volunteer. She signed it, and she now realizes it is wrong.

Mr. FEENSTRA. Right.

Mr. GRAY. But now she doesn't have any guidance on how to give it back.

Mr. FEENSTRA. Correct.

Mr. GRAY. So, when people want to come forward and say, "I made an honest mistake, I didn't know," allow an avenue to do that.

On the 941-X, start today and say there is going to be accountability to whoever is assisting and doing that clerical work, who are you, sign it, what is your fee—or how are you charging. But my point of it is, is that type of stuff is even bigger than the guidance.

And then, finally, IRS doesn't have a permanent chief counsel.

Mr. FEENSTRA. No.

Mr. GRAY. And that is who I look at and the taxpayer looks at to get guidance. So, what do you expect?

And that is why I said in my testimony it starts at the top. Who is in charge to make that appointment? And why take so long? I don't need to know the answer. Just get it done.

Mr. FEENSTRA. And, Mr. Gray, you are exactly right. I mean, frankly, it does start at the top, and it starts with the IRS. It starts with putting the right people in place. Just like any business. You have to answer, and you have to have customer service, and this is not happening.

Mr. GRAY. Yeah. It may even go higher than that.

Mr. FEENSTRA. Yes.

Mr. GRAY. Because who appoints the chief counsel?

Mr. FEENSTRA. I get it. I hear what you are saying. Yes. And why isn't that happening?

Mr. GRAY. It will help the IRS out. It will help the taxpayer out, the small business out, and our rural communities.

Mr. FEENSTRA. That is correct.

So, I have got another question. This is for Mr. Harris.

Mr. Harris, so I have a situation, a small business. It is a family-owned business. And they employed some of their family during this time. And we had multiple attempts by the owner, by our office, to figure out if they qualified or not.

And, ultimately, the IRS cited the Work Opportunity Tax Credit—and this is the quote—“conceptually designed to prevent family members from taking advantage of wage subsidies where there isn’t a true employee relationship.”

But all these small businesses on Main Street Iowa, Main Street USA, they employ family.

Mr. HARRIS. Exactly.

Mr. FEENSTRA. And this is my biggest problem.

So, my question to you, Mr. Harris, is do family-owned and operated businesses—how do they get some of these dollars and how can they provide documentation that proves that they are not fraudulently collecting for the ERTC?

Mr. HARRIS. Well, I want to say go to a mill, because they don’t care. But that is not the correct answer.

It is a challenge. And we got guidance on that partly into it. So, you had people who had already applied, and then we found out that family members have this rule. And now we are hearing that maybe they don’t have this rule.

This is another example of where we need clear, permanent guidance so that the people can rely on what they are doing, because honestly—and Larry can speak up—I don’t think they qualify under the IRS rules today, but I don’t know what it will be tomorrow.

Mr. FEENSTRA. Right. But they just need clarity.

Mr. HARRIS. They need clarity.

Mr. FEENSTRA. Bottom line.

Mr. HARRIS. Because then you don’t file.

Mr. FEENSTRA. They just need to know.

Mr. GRAY. If that is a hypothetical, they don’t qualify.

Mr. FEENSTRA. Thank you.

I yield back.

Chairman SCHWEIKERT. Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chairman.

And thanks to all of you for being with us today. I appreciate it.

I first wanted to share a quote from a restaurant owner in my district about the impact of the ERTC on his business during COVID.

Parker Sjolander, who owns a restaurant in Bellevue, stated that his business, quote, “relied on the ERTC to keep the lights on and our workers on payroll. While ERTC refunds took almost a year for many restaurant operators to receive, it was incredibly important to help sustain operators during mandatory shutdown orders and pandemic-related challenges,” end quote.

So while the ERTC provided many small businesses with necessary resources to keep their businesses running and employees on payroll throughout the pandemic, we know that many experienced significant delays and attempts to defraud them, as has been discussed.

This is a clear example of why we need to make sure that the IRS also has the resources to effectively combat potential fraud and abuse and ensure timely processes of refunds. They can't do it if they don't have people and resources.

I wanted to start with you, Mr. Harris. In your experience, can you describe how fraudulent applications impact small businesses that unknowingly worked with ERTC mills?

Mr. HARRIS. Well, it will eventually if they are subject to an audit. It could ruin them. Because by the time the IRS comes in and makes the determination that they weren't qualified, this huge sum of money that is probably being infused back into the business is no longer sitting in the checking account. And yet the solution is you have to pay that back and most likely with penalties and interest.

So, I mean, it could—the joy of getting the money could very quickly be replaced with the terrifying reality that because you weren't eligible, you could be put out of business because of the amount of money you now owe back to the Federal Government.

Mr. GRAY. If I might add to that. That example of that not-for-profit person yesterday realizing she had been hooked, crooked, whatever, and she wants to pay it back, don't let that interest and penalty run. Have that amnesty. Have a process of how to come clean.

The other thing, if she would have got that—if at the time it was filed, if she had had to provide documentation on qualifying on that 941-X, maybe the money would have never went out and saved that business.

Ms. DELBENE. Thank you.

Mr. GRAY. Thank you.

Ms. DELBENE. Thank you.

Ms. Czipo, can you describe how additional resources for ERTC education and outreach would have helped nonprofits and small businesses that were seeking relief?

Ms. CZIPO. Sure. I mean, the first thing is they would be aware of the program.

Secondly, we still hear from nonprofits that think that because they got PPP, they are not eligible for the ERTC. Of course, that was the case at the beginning, but then it was changed.

Better, more clarity with respect to what those eligibility requirements are, what it means to have reduction in gross receipts, all of that, the more information they have at the outset that is clear, then they are more equipped to apply and get the relief that they need sooner.

There is no question that education is absolutely key to this process, and it will help to stave off all of the bad actors that we have been talking about.

Ms. DELBENE. And just to follow up on that, does the IRS' focus on increased ERTC auditing disproportionately impact some businesses, like disadvantaged or minority-owned small businesses?

Ms. CZIPO. It could. I mean, part of the issue is there are some organizations that, because of the complexity, were perhaps shut out of the process or less inclined to apply because they didn't have the resources to hire a reputable accountant, or they just didn't have the bandwidth to look into the complexity of the rules.

And, of course, the fear of an IRS audit or there are certain organizations that may deal with constituencies that may be a little bit more reluctant to apply.

So, again, it goes back to making sure that there is good education and that the program is structured so that maximum access is allowed for organizations at the grassroots, at the rural level, organizations serving marginalized constituencies, and a lot of other folks that might be shut out.

Ms. DELBENE. Thank you.

Thank you, Mr. Chairman. I yield back.

Chairman SCHWEIKERT. Mr. Fitzpatrick.

Mr. FITZPATRICK. Thank you, Mr. Chairman. I want to thank the chairman for holding this hearing.

The volume of casework that my office has received on ERTC issues since January alone has been mind-boggling. The inquiries my office submitted were on behalf of a whole host, a range of organizations, including veterans organizations, small businesses, senior homes, just to name a few.

And one of my constituents was owed almost \$300,000 and needed it immediately in order to keep their business doors open. Another constituent had difficulty getting the IRS to even confirm that they had received their application.

Lastly, my office received—this is one instance—a complaint from a constituent who had applied for ERTC for the years 2020 and 2021 but never even received a credit until the end of 2022.

Most small businesses do not have the luxury of time when it comes to these issues.

As you all know, the ERTC touches just about every sector of our businesses and our local economies, and there are dozens more stories like the ones I just referenced in districts across America.

Our small business owners deserve better. They deserve better customer care and better service from the IRS.

I will start just with you, Mr. Gray. If you could describe, specific to your experiences, in communicating with the IRS over ERTC claims.

Mr. GRAY. Okay. In communicating with them, I have, like Roger, an unusual opportunity as a small practitioner that I get to come to D.C., and it was virtual.

The communication, it is open. We communicate through the national public liaison. I work with local liaisons. You can work with the Taxpayer Advocate.

I think one of the things that is missed by the small preparer in the small communities is that the Taxpayer Advocate actually will assist the tax professional. But they are being overrun with requests.

So, I think, one, there was not enough communication. There was not enough guidance. Some of us at the table have been asking for what we call the soft letter to get out there for a couple of years. FAQs communication are not being updated.

A real quick example. There was a memo from counsel on the supply chain. I used that yesterday to convert a person that was going to get a million dollars. That one communication stopped a million dollars going out that, as Roger referred to, when the IRS would show up for an audit, could put them out of business.

But more communications, more channels, more outreach. But until they get guidance, until the IRS communications, liaisons, until they get guidance, they can't put it out. So, if it doesn't exist, there is no communication, no matter how many times we have a conversation.

Mr. FITZPATRICK. And I will leave it to the rest of you on the panel. Any feedback you have for us regarding specifically what the IRS can be doing differently when it comes to their ERTC challenges, in terms of the structure of the IRS, the manpower at the IRS, the resource allocation?

Mr. CLEARY. Well, the big thing, and you hear it a lot today—and I am sorry Ms. DelBene left. I was going to volunteer her, given her technology background. They need technology.

I mean, we mail stuff. Our members mail stuff, and they fax stuff. And when we come and talk to your young staffs about the problems we have, we have to tell them what a fax machine is first and then go from there.

So, they are using fax machines and mail and not email. I mean, that is just a first shot out of the box, I think, to improve technology.

Mr. HARRIS. And I would agree with that. As Larry mentioned, we are fortunate that at our level that we can have one-on-one discussions with people here in Washington. But I think it is impossible for a small business owner to pick up the phone and call the IRS and find the status of their claim, because it wasn't a priority.

We have to put technology in place and understand that when people send things in, they expect them to be logged somewhere and a status report being available.

So, technology is a huge part of what the IRS needs to embrace and use it to improve customer service, not just their own ability to do certain things better.

Ms. CZIPO. I would just also add that people power matters too. Certainly the IRS has an exempt organization office that in some cases, when it has been better staffed, was a godsend, to just be able to help, talk to a human being, ask questions about guidance.

And in this particular circumstance, when you have such a complex web of rules and regulations, having somebody to talk to about your own situation—the FAQs absolutely—but having a human being also helps too.

Mr. FITZPATRICK. Okay. My time has expired. But I want to thank you all for your time today. Thanks for being here.

I yield back.

Chairman SCHWEIKERT. Thank you, Mr. Fitzpatrick.

Ms. Moore.

Ms. MOORE. Thank you so much, Mr. Chairman.

I just want to thank this panel for the master class. And I forgot who said it, but when you spend this much money in the middle of a pandemic and you must push the money out very fast, the fraudsters just show up. They are just there.

And I also appreciate the fact that you talked about, I mean, the IRS was also one of the agencies where people weren't at work. I mean, people were sending in mail to empty desks.

With that being said, I just can't resist mentioning that the request for \$80 million to add to the IRS, this is a perfect reason why

we ought to do it. Because the Employee Retention Credit is not the only kind of fraud we have to deal with the IRS. We also have to deal with the fraud of people who know that their tax returns are so complicated, so complex, that they can't be caught and won't be audited because we don't have those resources, notwithstanding the fact that you mentioned the technology. I mean, I have been on the phone with the IRS and able to cook an entire chicken dinner meal while I wait on the phone.

I am happy to know that the IRS, they have seen more than 2.5 million claims since the program was enacted, and that they have caught up with the backlog. As of the week ending July 24, more than 99 percent of the cases are current, meaning that they are 3 months old or less. And they are seeing—doing 70,000 claims each week.

I did meet some of the mills. They came right into my office this week. And I shared with them that I was unhappy that they were in operation. And so I think they left my office willingly.

I just want to say while I have the mike that it is heartbreaking to know that we are still working to get people their money, many small businesses, and to think about how eager we were to claw back money in healthcare and money that children needed and the rescissions that we made, and we did not even think twice about lending more time to those programs.

So I am happy to know that there are 500 ERC-trained examiners and auditors, and so we are looking forward to them catching up.

I would like to yield time to my CPA's son. And that is child abuse, by the way, to make them work.

Mr. SCHNEIDER. I will tell stories.

Let me just ask real quick questions, because I think we are wrapping up.

Raise your hand if you think more effective compliance by the IRS would lead to less fraud?

Okay. Just to make it easy, everyone raised their hand.

Raise your hand—and I think we have heard this today—if we had greater capacity to process returns at the IRS, that would be a good thing.

Everyone agrees, so it is unanimity.

And capacity is really a function of having people with training and technology tools so that we should be investing in our people and our technology. Raise your hands if you think that is a good idea.

So this is a setup. Does anyone want to raise your hands to say it is a good idea that we take money away from the IRS?

I don't see any hands raised. I think the point being is we in the last Congress made sure that the IRS was getting the funds to begin the process of bringing on more people with the skills to do their work more efficiently and give them the technology tools to do so.

I hope that we can take from this hearing the lessons that it is time for us to work together, Republicans and Democrats, to make sure that the IRS is serving the American people, giving them the guidance and information they need to file timely, giving their advisers, like you on this panel, the information you need to give the

advice to your clients to file timely, and having the technology in place that we can process those returns, get the refunds to our citizens, and make sure that we have the best, most efficient, most capable IRS possible.

I yield back.

Mr. CLEARY. Mr. Schneider, if I may, after that setup, because it was brilliant. It really was good.

I spent 10 years in the Federal Government in the executive branch, and nobody ever has enough resources, ever. And so, you have to triage. You have to. And you have to prioritize. In this case, again, when the Commissioner put a surge staffing on this, the numbers started going down.

So, our request today is keep that surge in place until that number is zero.

Mr. SCHNEIDER. I will share that with the Commissioner because I agree with you.

I yield.

Chairman SCHWEIKERT. You yield to Ms. Moore.

Ms. Moore—

Mr. SCHNEIDER. I yield to Ms. Moore. Thank you.

Ms. MOORE. I have to yield back. I did know that.

Chairman SCHWEIKERT. No. I just—and thank you for—you have actually tolerated a couple of our hearings today, and I really appreciate you.

Ms. MOORE. I am so hot and so tired. If I could make it on August 1, I would do it.

Chairman SCHWEIKERT. I am just upset you have never invited any of us to your chicken dinner.

Ms. MOORE. Listen, just hook up with one of my grandkids, they will get you there.

Chairman SCHWEIKERT. All right.

Panel, a handful of things I want to get my head around, and there is actually a reason I waited till the end.

First off, I have one thing here. It says the IRS considers 6 months within the window of still being timely. I had someone say 3 months.

Do any of you know what the IRS' running definition is of something that is still timely?

No? And that may go back to Mr. Gray's comments of some of the things, that we just desperately are hungry for information.

Mr. GRAY. Right. And the other thing to think about, as we move technology—as the IRS moves through better technology, the other thing is the IRS a lot of times has got to think non-paper, because a lot of times they will take a new technology, but they keep the old process. And sometimes that is not the most efficient.

Chairman SCHWEIKERT. That is fair. But look—I have no idea what is beeping over there.

Look, there is a number of us, and since my time on the Ways and Means Committee, we are trying to get the IRS off of its own servers, off of its own storage. If the Department of Defense can use an encrypted world out there, the IRS can too.

I will give them one credit. It is not a non sequitur. They actually did a small experiment with a ChatGPT type model of call-ins, and it worked. And there is a model actually here of instead of an

army of human beings to actually be picking up the phone, sometimes you need someone who will stay on the phone with you for 45 minutes to help you fill out the forms. Turns out that they had a really good, positive experience with that limited experiment.

And so, for many of us, the constant debate here is sometimes it is: What is resources? Is it the next-generation technology to do it better, faster, and to mine data to find bad actors? Or is it an army of people that functionally become very expensive when I have to figure out how to finance the pensions and healthcare and those other things? It is just the reality of my world.

But there is a handful of things I really want to get my head around.

Okay. Right now, let's actually say how many—what is your estimate of how many of these ERTC claims are still to be processed? What is, from your expertise, what is out there?

Mr. CLEARY. Well, the IRS would say about 500,000. But, again, remember the 250 that are PEO claims represent probably—I mean, I wouldn't even guess—but tens or maybe a hundred thousand additional claims.

Chairman SCHWEIKERT. Okay. So, 500 plus 100?

Mr. CLEARY. Yeah, ballpark. That would be a good ballpark number.

Chairman SCHWEIKERT. So, 600.

Gentlemen, would you all agree that there may be 600,000 out there.

Mr. HARRIS. I think that probably is the right number. The Commissioner in his meeting in Atlanta—and I can't remember what day.

Mr. GRAY. The day before yesterday.

Mr. HARRIS. The day before yesterday also said that typically when programs like this are created, that you see this arcing down of claims, and yet they are not seeing that, and they are attributing that to the mill.

So, I think the wildcard in this is how much of this fraudulent activity is causing these numbers to stay inflated when naturally these programs at this point in time would have been declining.

Chairman SCHWEIKERT. Gentlemen, if there was a technology, what could we do—I have heard the discussion of grabbing one of the proper forms and requiring that, some gross receipts on part of the app.

What would be the fastest way to quickly shut down the bad actors?

Mr. GRAY. First, do an amnesty, because there are people out there wanting to pay it back.

But here is what happened—

Chairman SCHWEIKERT. We are going to get to the amnesty.

Mr. GRAY. Okay. Well, in the deal, make a deal with that small business to say help us find more of them. Because in this you are going to get a lot more bang for your buck if you can get some cooperation from the LLP, so they can start finding the bad actors and have a way to take action against them. Because there is a due process and the bad actors are going to lawyer up, and it could be 10 years from now.

Chairman SCHWEIKERT. Well, that is sort of the second part.

But, Mr. Harris, if I had to stop for those folks who were getting solicited today who have not filed, what could the IRS do almost immediately in rules, requests, and RFQs, those sorts of things, to stop bad actors?

Mr. HARRIS. Yeah. They are obviously losing the PR battle in the marketplace. That is hard for them to win. They don't turn to IRS, small businesses, first for information.

I think you are going to have to empower the community that Larry and I work in. That is where the businesses are coming to when they are getting solicited.

And it is hard to say this, but enforcement is ultimately what slows down the cheaters, the fear of getting caught. And right now, there is not a great fear.

I think the system is being overwhelmed by the bad actors to the point that everybody thinks they can take a chance because the chances of getting caught are nothing. And that has to be changed somehow.

Mr. GRAY. Right now, it is a business decision, not a compliance decision.

Mr. CLEARY. Yeah, I agree with that. And, again, it seems oversimplistic, but if you clear out the backlog, the mills are going to dry up.

Ms. CZIPO. And there is also the issue of penalties, just making sure that there are—right now there are not a lot of disincentives for the scammers that are out there. So upping the penalties.

I don't know, I am not an attorney, so I don't know if it is possible to put guardrails around the payment structures, the exorbitant loans, the exorbitant contingencies, all of that.

So those are just some of the things that I would add to the mix.

Chairman SCHWEIKERT. Interesting. Because as we were having a discussion here, Mr. Pascrell and I were actually trying to discuss, oh, heaven, we may now actually have how many thousands, tens of thousands of small businesses that answered that call and now all of a sudden realize they have gotten a check either dramatically more than they should have or shouldn't have gotten one at all, they don't actually qualify. How do you unwind it?

And, okay, so let's say you do an amnesty. We do a policy set saying here is our amnesty. Is an amnesty where you credit back the contingency fee they paid? Or if they prepaid, as we have had some folks contact our office saying, "Hey, I am being asked to pre-pay a retainer fee."

Any brilliant ideas on how you would unwind the number of small businesses out there that have functionally been scammed, but it is also the American taxpayers who have been scammed?

Mr. HARRIS. Right. We have all.

Yeah, I think you do have to recognize—and the Service has said they are recognizing the fact that a large percentage of the money they did not receive. So, we have to come up with some way of acknowledging that money you didn't receive is either paid back later, not paid back at all.

I think also you have to make this amnesty have a very firm deadline to create an urgency to come forward and know that if you don't come forward by a certain date, you lose this benefit, to flush

out what is in the system, if you will, by creating an urgency to deal with it.

Chairman SCHWEIKERT. Okay.

Mr. HARRIS. But you have to deal with the fact that they gave up 20 to 25 percent of that money and never saw it.

Mr. GRAY. And also, I think it is one of those look back, lesson learned. I worked 20 years ago on a project for voluntary compliance to switch for small business. I should be paying wages, but I am not.

Well, what they did, the amnesty there was to say if we get there—if you come and volunteer and you have been doing 1099s, you can flip over to W-2 wages, and they literally almost forgot most of that money.

But the point is first look at lessons learned to process. When there was the offshore stuff, there was a way to come forward, but it was through the soft letter.

So, again, I go back to if part—you could actually look at paying this out faster as long as you had more of a—you are getting the money, but you are also agreeing to this additional compliance.

Chairman SCHWEIKERT. Okay. So, if we were to do, immediately off the top of our heads, our checklist, we need a whole bunch more rules checklist, so you could go on the website and say, look, here are your compliance rules. Requests that when filing for your forms that there is some tags on that that actually have information that would be—

Mr. GRAY. Here would be a great one: documentation. A lot of these mills are providing no documentation.

And so, if I am the mill and this is my small business person that participates, if you send him a letter saying, “Do you have the following documentation?” Roger is going to go, “No.”

Well, if you don’t believe you do, don’t call the IRS. Go to a trusted tax preparer. Because then there is opportunity.

Because there are a lot of people that have been innocently getting this. I don’t think the taxpayer—the small business themselves is not—for the most part, they are the innocent one.

Chairman SCHWEIKERT. We, obviously, have the concern of awarding the bad actors.

Also, electronic portal. The form is electronic. You put it in. You can immediately see it because it makes it dramatically easier to track.

Mr. GRAY. Yeah. And see, right now the IRS has started the online taxpayer account, but they haven’t really stood up the online business account.

So, there is where, if technology was set in there, then any communication, that would help free up human resources because they could be pushing this.

Where is this? We have received your application. We have questions on the application. That could be pushed electronically and tracked instead of, again, having these paper files.

Chairman SCHWEIKERT. All right. What else would you add to the checklist?

Mr. CLEARY. I mean, to me, all roads lead to technology.

Mr. GRAY. Yeah. But the documentation, the one yesterday, the lady said, “They didn’t give me any documentation.” So, if I have no documentation, that is the first indicator.

If you have had to pay 15 to 30 percent, that is another indicator.

So, I think, again, the communication—which they already have systems set up to do that. That communication to everybody that got one of these credits, both in the past and in the future, but in the future to clip it off and stop it is to say send certain—have a checklist. Do you have this kind of documentation? Here is what we are going to be looking for in an audit.

And the fear of the audit will have more impact than the audit because the IRS does not have the resources to audit out of this.

Chairman SCHWEIKERT. With some of this there are some mechanisms to do the audit electronically or through data mining.

Mr. GRAY. Yes.

Chairman SCHWEIKERT. But you are absolutely correct. And I fear—I despise the concept that the fraudsters get away with this and the small businesses actually end up in the position of being punished.

Mr. GRAY. One of the—when I was doing these YouTubes and shopping the market, so to speak, to find out the bottom line, was one of them said, “Well, IRS is not auditing.”

“Is your income under 400,000?”

You know where they are going? I am getting a double free pass.

This is getting—this is much bigger than the issue on the table today. Downstream compliance, there is going to be so many—what about the income tax amended return? Right now, with what OPR issued in March, I, as a CPA, if I first have to determine if Roger went to somebody else to do the 941-X, Roger says, “Larry, I would like for you to do my return,” and I either don’t understand the rules or I have advised him not to do it, I cannot help to get up to a third of that money back in the Treasury from the income tax adjustment.

So, I am now saying best client, the one that I referred to earlier in southern Illinois, it was the fact that she lost her best client because she said that—so there is more to this than just the credit. It is impacting downstream compliance for years to come.

Chairman SCHWEIKERT. Okay. I am going to do something a little awkward because I still have one or two more things I want to touch on. But Ms. Malliotakis was kind enough to come back and spend some time with us.

Your 5 minutes.

Ms. MALLIOTAKIS. I feel like I am seeing you too much today. We started the day—

Chairman SCHWEIKERT. Yes, I get that a lot from my spouse.

Ms. MALLIOTAKIS [continuing]. A lot of hearings today.

Well, thank you. Thank you all for coming today. And I appreciate and have the opportunity to read the testimony.

While the ERTC’s intent to support these struggling businesses during what was a challenging time is commendable, the lack of sufficient guidance and regular updates from the IRS has led to uncertainty and vulnerability for small businesses to be exploited by fraudsters and predatory practices of scammers. And I know that you touched on this.

Lack of clarity in the IRS guidance has led to confusion, left many small businesses in the dark. They are unsure of how to properly assess their eligibility or navigate the complexities of claiming the credit.

Lack of communication and status updates from the IRS adds another layer of uncertainty for small businesses. Businesses are relying on outdated information, leading to inadvertent errors in their claims or even missed opportunities to access the support that they desperately need.

The absence of a clear procedure to correct unintentionally inaccurate claims exacerbates the situation. Small business owners who make genuine mistakes in their ERTC claims face the risk of penalties and additional burdensome paperwork. And this discourages some of our entrepreneurs from even attempting to claim the credit, fearful of potential repercussions of unintended errors.

Regrettably, the combination of insufficient guidance, lack of updates, and unclear procedures has created an environment ripe for fraudsters to exploit these vulnerable small businesses.

And as a legitimate business struggles to understand the intricacies of the credit, bad actors may take advantage of the confusion, leading to false claims, misuse of funds, and fraudulent activities.

This not only diverts critical resources away from those who genuinely need them, but also undermines the integrity of the ERTC program as a whole.

In light of these changes, the IRS must take immediate action to address these issues, providing clearer, more comprehensive guidance on ERTC eligibility. And clean procedures, as well as regular updates, are imperative to ensure that small businesses can access the support that they deserve and that they are warned that there are these fraudsters out there.

Equally as important is the establishment of a transparent and efficient process for correcting unintentionally inaccurate claims.

The ERTC's effectiveness in aiding businesses that struggled through the pandemic depends on the IRS' commitment to providing sufficient guidance and regular updates.

Without addressing these issues promptly, we risk perpetuating uncertainty and leaving these small businesses vulnerable to the exploitation by fraudsters.

So, I will start with Mr. Gray.

I am extremely concerned about the small businesses in my district that were misadvised by aggressive ERC promoters and improperly claimed the credit. It seems like those businesses may get hit with a double financial whammy. The business is going to have to pay the IRS back on the improper claims; and then, second, those businesses may not be able to recoup the fee, which was probably substantial, that they paid to the ERC promoter.

Can professional tax practitioners, like CPAs, help businesses now that unintentionally claimed an unsubstantiated ERC, or is it too late? What would you advise?

Mr. GRAY. Well, the first thing is what I just referred to a couple of minutes ago. This notice from the Office of Professional Responsibility, I have to comply with that. The fraudster doesn't have to. And in that statement, it says that if I assist an income employ-

ment or excise tax in order to assist, I have to be knowledgeable of the ERC.

And ERC is a payroll question, and a lot of practitioners, especially small practitioners, may not do payroll tax, so they are not aware of the rules. But yet they are coming forward and saying, "I need help with the 1040 tax return."

Based on that rule, if I follow the guidance, my answer is, "I can't help you." And that is a sad day, because I ethically, through my standards, through AICPA, my standards are that I am to help get people right. So, if somebody comes—because what is it, Roger? It says if we do that, we might be—

Mr. HARRIS. Perpetuating the claim.

Mr. GRAY [continuing]. Perpetuating the claim, if we are helping to put money in the Treasury.

The other thing would be to be able to get the guidance. In April, I think it was, that they had within the IRS an audit and CI, they were going to get a team together and do something.

Roger, have you heard back from that?

Mr. HARRIS. Not yet.

Mr. GRAY. Me neither.

So back to how many months. We continuously ask at the table, let us—include us not in the communication out, but we will work with you working on the project to help solve the problem systematically.

So, I think letting practitioner groups, associations, payroll, income tax, all the organizations, we have offered to help. Please take our offer because then we can work to answer your question much better.

Ms. MALLIOTAKIS. Yeah. Just one more question, if the chairman allows. Now that he is busy, let me ask.

The IRS is going to find clear instances of fraud, but also probably going to find cases where a well-intentioned business or nonprofit was misled by an ERC credit mill into taking a larger credit than they were eligible for or cases where the ERC mill has produced large volumes through baseless—though baseless report on why a small business or nonprofit qualified for the ERC.

How at all do you anticipate the IRS will distinguish these different cases? I mean, do you think the IRS has the resources to be able to distinguish between clear cases of fraud and cases that aren't so clear?

I guess your last answer kind of said, if they couldn't get you this information, it has been months, I imagine that will be—

Mr. GRAY. Roger, I will follow you.

Mr. HARRIS. They are not going to be perfect in it because it is one of these facts and circumstances cases.

They do that somewhat routinely in terms of allowing deductions, charging fraud versus things. But it is not going to be perfect.

I think what we have to ensure is that if a taxpayer, a small business owner, believes that they have been found improperly, that they have the proper process for appealing that because it is going to be left up to a facts and circumstance in an individual case.

Mr. GRAY. And that is why there has to be a due process so that—because if that taxpayer on the first contact has no representation, like myself, then they should be able to have, “Hey, can we appeal this, or can I talk to a manager?” That process is in place on examination.

But, again, I think the sooner there is inclusion of practitioner groups more involved in setting up the way to go.

See, if we could go back three and a half years, normally you would have seen an ERC implementation team. And the reason why that didn’t happen is because the pandemic was going on, they were working at home. So, it wasn’t like they had all the resources.

But it is never too late, as the chairman said, to snip it, and we are here to work with the IRS to snip it.

Ms. MALLIOTAKIS. Thank you.

Chairman SCHWEIKERT. Thank you, Ms. Malliotakis.

And as being someone who is about to run to the airplane.

Mr. GRAY. Don’t get in front of me.

Chairman SCHWEIKERT. Thank you for being here today.

I am going to request something from all of you and anyone that is out there listening. This is something we are going to have to try to persuade the IRS, and with our—through memos or whatever, we need a solution. You brought something to us that I am not sure I was completely mentally prepared, is how do we unwind the charities, the small businesses that have functionally been scammed?

Mr. GRAY. And, again, I am going to say, we have an opportunity. We have got a new Commissioner. There is no blame.

Chairman SCHWEIKERT. But the scale of it is my great concern, is I don’t know if I had enough practitioners to actually unwind the scale. So, some of this may be guidance. How do I use technology? How do I automate? How do I do it quickly? And how do I stop the hemorrhaging?

So please send us ideas.

And the last thing they always have me read is, please be advised that members have 2 weeks to submit written questions to be answered later in writing. Those questions and your answers will be made part of the formal hearing record.

And with that, please send us your ideas.

And thank you for staff. You have been very patient in helping put this together and everything is appreciated.

And with that, let’s all run to the airport.

[Whereupon, at 4:11 p.m., the subcommittee was adjourned.]

**PUBLIC SUBMISSIONS FOR THE RECORD**

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Response of Larry Gray, CPA, CGMA

Hearing on the Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud

United States House of Representatives

Committee on Ways and Means

Subcommittee on Oversight

Held July 27, 2023

2:00 PM

Chairman Schweikert, Ranking Member Pascrell, and members of the House Committee on Ways and Means' Subcommittee on Oversight, thank you for your time and interest regarding ERTC, and specifically for your desire to establish ERTC guidelines to aid small business employers and the tax professional community as we navigate through the process of righting this wrong.

Following is my response to questions asked during the Hearing on the Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud, held July 27, 2023.

During this Hearing, I heard four primary questions.

- What can the IRS do?
- How does IRS distinguish fraudulent ERC claims from Eligible Employer claims?
- What would be the fastest way to quickly shut down the bad actors?
- How do we unwind it?

My recommendations will address the systemic situation of assisting small businesses to be tax compliant but will address these questions.

First, I want to thank IRS and Commissioner Werfel for the recent guidance. In the past few weeks, they have released updated Frequently Asked Questions and a General Legal Advice Memo AM 2023-005. These have certainly helped the tax professional and the small business communities, but they are just the beginning of the guidance needed.

For several months, both within our firm and in conversations with my peers, there was a common theme; we are losing our clients to the ERC mills.

This recent guidance from the IRS is making a difference. We are beginning to see our clients understand ERC Employer eligibility, saying they were debating signing the 941X, but with the new guidance, have decided not to. This is an important development. I've already seen clients decide not to submit credits worth several million dollars.

Other clients are saying they have received the money but with the new guidance, now agree they were not eligible, and are wanting to know how to repay. One client even wants to withdraw their 941X claim for the credit.

Now that the ball has started rolling, it is even more important that the IRS accelerates guidance and actions. We need clear communications of where this is going, and specifics on how to get there.

I believe IRS is now taking a direction. On July 26, 2023, they posted IRS-2021-0012-0004 which replaced the temporary regulations with final regulations.

In these final regulations IRS is in the process of addressing the issue of erroneous ERC claims by allowing to treat erroneous refunds of pandemic-related employment credits such as ERC, paid sick leave, or paid family leave, as tax underpayments subject to assessment and administrative collection procedures.

These have been helpful, but we need more guidance from the IRS.

While I do not have all the answers, following are suggestions addressing the questions asked:

- Begin with additional outreach to the small business community with current guidance, which might include:
  - A reminder of the ERC eligibility requirements and reference to the new ERC FAQs.
  - Specific repayment options.
  - Electronic forms to accommodate filing requirements. (Suggestions to follow below in “Online Services”)
  
- Immediately set up an IRS amnesty program – or something similar where employers can voluntarily withdraw without penalty. This will allow well-intentioned employers to have an easy way to get compliant and reduce their risk. (Suggestions to follow below in “Online Services”)
  
- Send a soft/correspondence letter, to employers who have received ERC communicating:
  - They will need to file an amended federal tax return for the tax years the credit applied.
  - The employers will not receive any information reporting forms (1099s) on the amount of the credit to report, which may allow millions of dollars to go unreported on their prior year income tax returns.
  - Remind the employers that any fees paid related to the ERC claim are deductible in the year paid.
  - Remind these employers that they will need to issue a 1099-NEC for any fees they paid to a 3<sup>rd</sup>-party to assist with filing for ERC.
  - Suggest the employers **begin now** to prepare for filing their 2023 tax return by getting the information from the ERC specialist that assisted or prepared the 941X that will be needed to issue the 1099-NEC. (Suggestions to follow below in “Online Services”)
  - Communicate that even if the employer cannot get the Federal ID number for the 3<sup>rd</sup>-party ERC specialist, they are still required to file the 1099-NEC with as much ERC specialist identifying information as is possible.
  - Remind employers that even though they went through an ERC specialist to file their 941X, they are still the taxpayer, responsible for signing under perjury that the information is correct.
  - Communicate to employers who have received ERC and question their eligibility to seek advice from a reliable tax professional, someone who understands ERC and who asks the right eligibility questions.

Given the right ERC guidance, forms, and tools to become compliant, it will be easier to be able to distinguish the bad actors from those small businesses who were scammed. Compliance will be the test, but IRS must simplify the compliance process.

Initially, many of the above-mentioned suggestions will have to be done through letters and phone calls. But the IRS should look at other options.

#### Online Services

- Develop an interactive ERC webpage.
  - Give amnesty qualifications and procedures
    - Must give 3<sup>rd</sup>-party ERC assistance information to qualify for amnesty to help the IRS track down ERC mills.
    - Set time limits for employers to qualify for amnesty to encourage them to take immediate actions
  - Give employers repayment options
  - Give employers an option to withdraw a submitted 941X
  - If employer believes claim for credit is correct, provide ability to submit explanation why

Once the webpage is up

- Begin a short but aggressive marketing campaign to the public regarding the ERC Eligibility Requirements. Work cooperatively with the tax professional community on this effort.
- In this campaign, list specific instances of ERC criminal investigations currently underway, as well as recent ERC related indictments. Enforcement and advertisement of enforcement results is critical. As mentioned in the Hearing, the threat of enforcement ultimately slows down the bad actors.

Moving forward, the IRS needs a dedicated Service wide Team, to include representation from tax and payroll professional groups. With IRS guidance, these professionals are the ones to assist small business clients in getting ERC compliant.

I believe the tax professional community stands ready to help the IRS combat this threat to employers and our current tax system. We've seen progress by the IRS since Ways and Means held its hearing, but more needs to be done.

Larry Gray, CPA, CGMA



Padgett

August 9, 2023

The Honorable David Schweikert  
Chairman  
Subcommittee on Oversight  
House Ways and Means Committee  
1139 Longworth House Office Building  
Washington, DC 20515

The Honorable Bill Pascrell  
Ranking Member  
Subcommittee on Oversight  
House Ways and Means Committee  
1129 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Schweikert and Ranking Member Pascrell:

I am writing today to follow up on the House Committee on Ways and Means' Subcommittee on Oversight's July 27, 2023, hearing entitled, Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud. I want to thank both of you for convening this important hearing on the Employee Retention Tax Credit (ERTC) and for giving me the opportunity to testify.

Padgett Business Services is a national accounting, advisory, and tax preparation company with approximately 200 offices across the U.S. that has served tens of thousands of small business clients for 60 years. As discussed in the hearing, Padgett has worked with the ERTC on behalf of our clients since it was created and has sought from the beginning to provide constructive policy feedback to Congress and the IRS on its implementation.

In response to Chairman Schweikert's request at the end of the hearing, I wanted to provide several suggestions that could help to address some of the current confusion around the ERTC as well as the rampant fraud that is occurring. While implementing these changes will not undo all the challenges that the ERTC has created for the IRS and for businesses thus far, they could substantially mitigate issues moving forward.

In order to streamline the process of claiming the ERTC as well as ease the burden on legitimate small businesses that received the credit, the IRS and Congress should consider the following actions:

1. Starting immediately, all amended 941 forms (941-Xs) claiming the ERTC should have a dedicated mailing address or an identifier so they can be identified and receive priority processing. While the majority of filings claiming the ERTC have likely already been made, this simple step would help streamline future processing and reduce the backlog of 941-Xs moving forward.

2. Under current law, taxpayers receiving an ERTC must reduce their deduction for wages by the amount of the credit for that same tax period. Therefore, they may need to amend their income tax return (for example, Forms 1040, 1065, 1120, etc.) to reflect that reduced deduction. For pass through entities with multiple partners or shareholders, each partner or shareholder is required to amend their 1040. In some cases, this leads to hundreds of individuals having to amend their tax returns due to one entity they are involved in having received the ERTC. Congress and the IRS should reverse this and allow businesses the option to amend their prior income tax return *or* include the refunds as income on their current return, removing cumbersome administrative work and the additional burden of disputing penalties and interest. This approach especially makes sense for small businesses who use the cash method of accounting, since they already report their income and expenses in the year funds are received or expenses are paid.
3. In guidance that was released by the IRS's Office of Professional Responsibility on March 7, 2023, it was stated, "[i]f the practitioner cannot reasonably conclude that the client is or was eligible to claim the [ERTC], then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit." In situations where the tax preparer is not completely comfortable or convinced that the ERTC should have been taken in the first place, this creates the uncomfortable situation of having to decline to amend the 1040 for the client. It could also end up costing the government money, as the amended 1040 would have resulted in a higher tax liability for the taxpayer. The IRS should reverse the guidance that preparers cannot amend the returns and provide an avenue for them to disclose to the IRS the name or firm that prompted unsuspecting businesses to file an ineligible ERTC claim.

In an effort to reduce fraudulent ERTC claims, as well as to make it easier for small businesses that received bad advice to come into compliance, the IRS and Congress should consider the following actions:

1. All future ERTC claims (whether through a 941 or 941-X) should require a statement indicating the basis for the business's qualification and a list of employees and the amount of their wages that are being used to claim the ERTC. Currently, businesses do not have to provide any upfront justification to the IRS and simply must add the amount of the ERTC claim to their 941 filing. By requiring signed documentation with details on the calculation and eligibility, limited to what would be readily available to anyone following the rules and calculating the amount, the IRS can dramatically decrease fraud moving forward.
2. In order to address the large number of businesses who have been taken advantage of or did not fully understand the eligibility requirements when they initially claimed the ERTC, the IRS needs to create a favorable repayment plan for taxpayers who come forward to repay the ERTC monies they have received that they now believe they were not qualified for. In addition, the fees charged by many of these third-party mills have been reported to be a significant percentage of the amount of the ERTC credits, amounting to tens of thousands of dollars for many small business taxpayers. Potential terms for a safe harbor for businesses could include:

1. Taxpayer will have no penalties or interest if they repay the full amount, including ERTC mill fees, within 12 months of their application to repay.
  2. Taxpayer can repay only the amounts they receive, net of ERTC mill fees, with no penalties and interest over 12 months and then they will have an additional 12 months to pay back the ERTC mill fees with on interest being charged.
  3. If, in either of these cases, the IRS can recover any money from the mills the taxpayer would receive a credit for their proportional amounts.
3. One disadvantage for businesses that use a third-party mill with questionable practices is that if the business is eventually audited, the business will be asked to furnish documentation on how they qualified for the ERTC and how the claimed credit was calculated. If this background documentation has not been provided to the business, then they could be unable to demonstrate to the IRS how they qualified for and calculated the credit. As businesses are audited in future years, many of the third-party mills could likely no longer be in business. Accommodations should be made to assist these businesses, such allowing them to qualify for special repayment terms.

Thank you for the opportunity to provide feedback to Congress on this issue. We look forward to working with this committee as we seek to improve the tax administration system.

Sincerely,



Roger Harris  
President  
Padgett Business Services

cc: Chairman Jason Smith, Committee on Ways and Means  
Ranking Member Richard Neal, Committee on Ways and Means  
Commissioner Daniel I. Werfel, Internal Revenue Service



**WRITTEN STATEMENT  
OF  
THE AMERICAN INSTITUTE OF CPAs  
SUBMITTED FOR THE RECORD OF THE  
JULY 27, 2023  
HEARING OF  
THE UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON WAYS AND MEANS  
SUBCOMMITTEE ON OVERSIGHT  
ON  
THE EMPLOYEE RETENTION TAX CREDIT EXPERIENCE: CONFUSION, DELAYS  
AND FRAUD**

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## **INTRODUCTION**

The American Institute of CPAs (AICPA) appreciates the leadership taken by the House Subcommittee on Oversight in raising ongoing issues that taxpayers and practitioners are experiencing with the employee retention credit (ERC).

The AICPA is the world's largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

## **CREATION AND EVOLUTION OF THE EMPLOYEE RETENTION CREDIT**

The ERC was created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act,<sup>1</sup> which passed in response to the COVID-19 pandemic ("pandemic"), to financially assist employers struggling to pay wages to employees. Subsequently, on December 27, 2020, the Consolidated Appropriations Act, 2021,<sup>2</sup> which included the Taxpayer Certainty and Disaster Relief Act of 2020 (TCDDRA), was signed into law. Section 206 of the TCDDRA extended and enhanced the provisions of the ERC and allowed Paycheck Protection Plan (PPP) loan borrowers to retroactively take advantage of the credit. The ERC was further extended to December 31, 2021, and enhanced by the American Rescue Plan Act of 2021,<sup>3</sup> until it was ended early on September 30, 2021, for most employers, by the Infrastructure Investment and Jobs Act.<sup>4</sup>

Since the creation of the credit, the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) have released various pieces of guidance in the form of frequently asked questions, notices, news releases and a generic legal advice memorandum, to assist taxpayers in implementing the credit.

## **CONCERNS AND RECOMMENDATIONS**

### **1. General**

Since the inception of the credit, the AICPA has diligently and consistently advocated on behalf of taxpayers and CPAs to Treasury and the IRS regarding the following ERC-related topics of concern:

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<sup>1</sup> P.L. 116-136.

<sup>2</sup> P.L. 116-260.

<sup>3</sup> P.L. 117-2.

<sup>4</sup> P.L. 117-58.

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- Requested authoritative guidance<sup>5</sup> on numerous topics related to the implementation of the ERC;
- Urged the IRS to reduce the backlog of unprocessed returns, including those containing ERC claims,<sup>6</sup> and
- Raised awareness of the alarming trend of unscrupulous third-party vendors promoting improper and fraudulent ERC claims.

The advocacy efforts of the AICPA resulted in some, if not all, of the following actions taken by the IRS related to the ERC:

- Special processing of certain payroll tax returns on which an employer claimed the ERC;
- Increased number of audits of payroll tax returns on which an employer claimed the ERC;
- Public acknowledgment of unscrupulous third-party ERC vendors;
- Communication to the public on how to report bad actors; and
- Inclusion of ERC on the 2023 “Dirty Dozen” list of tax scams.

## 2. Backlog of Employee Retention Credit Processing

The IRS has faced numerous challenges which have severely impacted its ability to timely process returns, including those containing ERC refund claims. Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, which is the amended payroll tax return used to claim most ERC refunds, must be paper filed. The paper filing of these returns coupled with added responsibilities related to the pandemic (e.g., the responsibility of the IRS to issue billions of dollars in economic impact payments and advance child tax credits to taxpayers during 2022 as a result of legislation passed by Congress in response to the pandemic),<sup>7</sup> led to a monumental backlog of payroll tax returns for the IRS to process. This backlog led to delays in taxpayers receiving ERC refunds for over one year in the majority of cases throughout 2021 and 2022. The extensive wait time to receive desperately needed financial assistance created frustration and increased financial hardship for employers.

Recently, IRS Commissioner Daniel Werfel (“Commissioner”) stated that “the IRS has shifted efforts after successfully clearing the backlog of valid ERC claims.”<sup>8</sup> While our members have

<sup>5</sup> AICPA letters, “[Request for Guidance Related to the Employee Retention Credit Provisions of the Coronavirus Aid, Relief, and Economic Security \(CARES Act\)](#),” April 17, 2020; “[Request for Guidance related to the Employee Retention Credit Provisions of the Coronavirus Aid, Relief, and Economic Security \(CARES Act\)](#),” October 8, 2020; “[Employee Retention Credit – Sections 206 of the Taxpayer Certainty and Disaster Relief Act of 2020 \(Division EE of the Consolidated Appropriations Act, 2021\)](#),” January 15, 2021; and “[Employee Retention Credit – Sections 206 of the Taxpayer Certainty and Disaster Relief Act of 2020 \(Division EE of the Consolidated Appropriations Act, 2021\)](#),” February 15, 2021.

<sup>6</sup> AICPA letters, “[Additional Measures to Address Backlog](#),” July 11, 2022; and “[IRS Operational Plan for Resources Included in the Inflation Reduction Act of 2022](#),” March 28, 2023.

<sup>7</sup> IR-2023-82, April 14, 2023.

<sup>8</sup> IR-2023-135, July 26, 2023.

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seen a tremendous improvement in wait times for the receipt of refunds from valid ERC claims, they are still experiencing delays of up to six months. In addition, some members have indicated that they have resorted to working with the National Taxpayer Advocate's office to help resolve long-pending claims filed earlier in the pandemic. However, we do agree with the Commissioner's statement that "the further we get from the pandemic, we believe the percentage of legitimate claims coming in is declining."<sup>9</sup>

#### Recommendation

To ensure that the unprecedented backlog of paper returns resulting from the pandemic is not repeated, the AICPA urged<sup>10</sup> the IRS to take immediate steps to increase the types of returns that can be electronically filed and to automate the processing of paper returns in addition to other forms, statements, elections, and documents.

We are pleased with the unveiling of the IRS Paperless Processing Initiative,<sup>11</sup> on August 2, 2023, which will allow taxpayers the option to go paperless for IRS correspondence by the 2024 Filing Season, and for the IRS to achieve paperless processing for all tax returns by the 2025 Filing Season. This initiative is expected to eliminate up to 200 million pieces of paper annually, cut processing times in half, and expedite refunds by several weeks. This initiative has been made possible given that Congress provided the IRS with \$80 billion of additional multi-year funding.

#### 3. Internal Revenue Service Response to Employee Retention Credit Inquiries

The pandemic and related tax legislation overwhelmed existing systems and processes for individuals, businesses, and the IRS. The IRS was not able to assume its new responsibilities pursuant to the newly enacted legislation as quickly as needed by taxpayers and tax practitioners, which resulted in taxpayers and tax practitioners being unable to reach the IRS to inquire about ERC claims.

Additionally, our members have experienced issues with lost ERC refund checks requiring interaction with the IRS on behalf of their clients. While taxpayers have the option to apply the ERC as a credit for the period in which the Form 941-X is filed, rather than request a refund check, taxpayers normally request a check when filing ERC refund claims given it provides more certainty than the credit process. There is no option for taxpayers to have the funds directly

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<sup>9</sup> Ibid.

<sup>10</sup> AICPA letter "[Acceptance of Electronic Signatures and Electronic Filing for All Returns and Other Documents Submitted to the IRS](#)," May 9, 2023.

<sup>11</sup> Press release, Department of the Treasury, [IRS Launches Paperless Processing Initiative](#), August 2, 2023.

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deposited. Many checks are being lost and the process for check replacement is cumbersome, resulting in further delay in taxpayers receiving refunds. When filing the necessary forms to assist clients to track down their checks, our members have seen further delays from errors in processing Form 3911, *Taxpayer Statement Regarding Refund*, and Form 8822-B, *Change of Address or Responsible Party – Business*.

Recently, the IRS has responded to phone inquiries on the practitioner's priority service line more quickly and has been helpful in addressing ERC-related inquiries. The ability to access tax account transcripts online has resulted in more expeditious resolution of issues.

4. Impact of Employee Retention Credit Fraud on Taxpayers

As the national, professional organization for all Certified Public Accountants, the AICPA's mission is to power the success of global business, CPAs, CGMAs, and specialty credentials by providing the most relevant knowledge, resources and advocacy, and protecting the public interest. Ensuring that tax preparers are competent and ethical is critical to maintaining taxpayer confidence in our tax system. These goals are consistent with the AICPA's own Code of Conduct and enforceable tax ethical standards.

Unfortunately, the pandemic and the resulting legislation, which funneled unprecedented amounts of government funds into the economy through small businesses, resulted in many unscrupulous actors promoting "free money" to unwary businesses. Many of these bad actors do not properly evaluate a business' classification as an eligible employer able to claim the ERC. While the IRS has certain protocols in place to catch fraudulent or otherwise insufficient ERC claims prior to their payout (e.g., comparing claims to certain information previously filed on the employer's income tax returns and payroll tax returns), they are not sufficient to stop a significant amount of erroneous claims prior to issuing refunds. Upon audit, employers may have to repay most or all of the ERC and pay penalties and interest. They will also likely be unable to recoup the large contingency fee paid to the ERC promoter, placing taxpayers that struggled financially through the pandemic, and believed that they were legitimately eligible to claim the credit, in a precarious financial position, possibly leading to financial ruin.

For the last two years, the AICPA has diligently and consistently advocated on behalf of taxpayers and CPAs to Treasury and the IRS regarding unscrupulous third-party vendors promoting improper ERC claims. The ERC has been exploited by unethical credit mills and other bad actors submitting claims on behalf of businesses that are either ineligible to claim the credit or eligible for a much smaller credit, charging contingency fees equal to as much as 30 percent of the claimed credit. Taxpayers are willing to pay these amounts even though many claims will be filed without paid preparer signatures.

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The AICPA has provided [resources and information](#) to its members to help educate members and their clients about misconceptions around ERC as well as warning them of red flags that indicate a vendor may not be qualified to determine whether their business is eligible for the ERC. The diligent and consistent outreach by the AICPA to the IRS about the unscrupulous practices of third-party ERC promoters has led to a robust communication campaign by the IRS warning the public about these third-party ERC promoters.

We also commend Commissioner Werfel for being a positive force to help combat fraud via high levels of communication and significantly increased ERC-related audit activity.

#### Recommendations

##### *a. Regulation of Paid Tax Return Preparers*

The AICPA is a long-time advocate of providing appropriate and well-defined authority to Treasury to regulate paid tax return preparers. Ensuring that tax preparers are competent and ethical, and that the IRS has the tools it needs to conduct appropriate oversight, is critical to maintaining taxpayer confidence in our tax system and protecting the interests of the American taxpayer. Based on extensive feedback from our membership, and IRS warnings, many preparers holding themselves as ERC “experts” or “tax professionals” were unqualified to give tax advice. Thousands of small businesses and nonprofits will learn that their unqualified ERC preparer improperly prepared their ERC claim. For those entities having consulted with an unscrupulous credit mill or ERC promoter could result in a devastating financial hit (repayment of the refund coupled with the inability to recoup the fee paid to the incompetent preparer).

The looming wave of ERC fraud makes the need clear for IRS oversight of the return preparation industry. The AICPA with a diverse coalition of external stakeholders have endorsed H.R. 4184, the Taxpayer Protection and Preparer Proficiency Act of 2021 (117<sup>th</sup> Congress).<sup>12</sup> H.R. 4184 gives appropriate authority to the IRS to regulate paid tax return preparers to address incompetent and unscrupulous tax return preparers. H.R. 4184 also allows CPAs, attorneys and enrolled agents to maintain their high standards through licensing by state boards of accountancy or state courts or being awarded credentials by the IRS. The AICPA stands ready to work with Congress to advance H.R. 4184.

##### *b. Mitigation of Marketplace Confusion*

Some taxpayers are already confused by the different qualifications of tax return preparers and the varying practice rights that they individually possess. That confusion was magnified by bad actors

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<sup>12</sup> Strausfeld, Dave, J.D., Journal of Accountancy, [“Proposed Bill to Regulate Tax Preparers has AICPA Support.”](#) June 30, 2021.

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promoting the ERC. Along with providing authority to the IRS to regulate paid tax return preparers, Congress should also direct the IRS to take steps to mitigate that confusion on their website, in their publications and in any public-facing database of preparers. Prior to *Loving v. IRS*,<sup>13</sup> the IRS recognized the potential for marketplace confusion when they required the currently unenrolled community be made subject to the guidance in Notice 2011-45, 2011-25 IRB 886, with regard to advertising restrictions. To mitigate marketplace confusion, we have strongly recommended<sup>14</sup> that currently-unenrolled PTIN holders using any paid advertising involving print, television, radio, or other medium in which the individual represents themselves as a PTIN holder, a registered tax return preparer or some type of a new IRS category of return preparer, to display or broadcast a statement explaining the differences between the different type of preparers (e.g., qualifications) and, most importantly, educating the public that the IRS does not endorse any particular type of tax return preparer.

*c. IRS Communication of Existing Taxpayer Relief*

Upon audit by the IRS, ERC claims deemed to not meet the ERC requirements will result in the taxpayer having to repay the funds, in some cases with interest and penalties. To ease the financial burden on taxpayers exploited by unethical credit promoters and other bad actors, the IRS should make clear via a communications campaign that meaningful relief may be available to taxpayers acting in good faith. For example, the IRS may want to communicate the fact that certain penalties and interest will not apply to taxpayers who self-correct if the tax due (i.e., the amount of the ERC) is paid with the amended return (e.g., Form 941-X). Penalty relief for reasonable cause, determined on a case-by-case basis considering all relevant facts and circumstances, will also be available. In addition, taxpayers required to pay back large ERC sums should be eligible to pay back the money with an installment plan if their business would be jeopardized by large negative cash flow.

5. Amended Federal Income Tax Returns

An employer's deduction on its federal income tax return for qualified wages, including qualified health plan expenses, must be reduced by the amount of the ERC claimed. This wage reduction must take place in the year the qualified wages were paid or incurred. Therefore, the filing of an amended payroll tax return to claim the ERC triggers the need to amend the corresponding federal income tax returns to reduce the amount of wages deducted on the originally filed return by the amount of the credit.

ERC promoters preparing amended payroll tax returns to claim the ERC often do not inform employers of the need to amend federal income tax returns. This negligence exacerbates an already complex problem for employers, CPAs and other tax preparers who understand the requirement. We have heard from members of our organization who have had difficult conversations with their

<sup>13</sup> 917 F. Supp.2d 67, 74-75 (D.D.C. 2013), *on appeal*, No. 13-5061 (D.C. Cir).

<sup>14</sup> AICPA letter "[Tax Return Preparer Competency Act of 2015 \(H.R. 4141\)](#)," December 4, 2015.

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clients about the need to amend the federal income tax returns and the associated fees to do so.

In addition, some of our members are concerned that signing an amended income tax return to disallow the deduction for the amount of the ERC is acknowledging that as a paid preparer they are agreeing with the erroneous ERC claim. This belief was the result of a communication from the IRS Office of Professional Responsibility, which appeared to suggest that a preparer signing an income tax return disallowing deduction of the credit amount is "perpetuating" an improper credit.<sup>15</sup> These concerns have delayed some taxpayers from amending income tax returns, amplifying the fiscal impact of potentially improper claims.

#### **CONCLUDING REMARKS**

The ERC was a welcome and necessary financial lifeline provided by Congress to businesses during the pandemic. While many taxpayers have experienced the positive impacts of the credit that Congress intended, other taxpayers and CPAs have experienced substantial negative, unintended consequences brought on by the complexity of the credit coupled with the need to paper file amended payroll tax returns. The complexity of the credit coupled with a confusing marketplace of various types of tax return preparers allows ERC promoters to use aggressive marketing tactics to lure businesses into making fraudulent ERC claims while collecting exorbitant fees based on the amount of the credit claimed. Also, the unprecedented backlog of unprocessed returns at the IRS has resulted in eligible businesses waiting up to a year or more to receive their refunds.

We are hopeful that the lessons learned regarding the ERC will serve as a springboard for the changes recommended in our testimony. We acknowledge that in recent months, the IRS, under the leadership of the Commissioner, has taken steps to communicate to the American public about the unscrupulous third-party ERC vendors, and put into place increased protocols to clear the backlog of unprocessed returns and detect fraudulent ERC claims.

The AICPA appreciates the opportunity to submit this written statement for the record.

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<sup>15</sup> Alert from the Internal Revenue Service, Office of Professional Responsibility, [Professional Responsibility and the Employee Retention Credit, Issue Number 2023-02](#), March 7, 2023.



United States House Committee on Ways and Means  
1139 Longworth HOB  
Washington, D.C. 20515

July 26, 2023

Dear U.S. House Committee on Ways and Means,

The July 27th hearing on the Employee Retention Tax Credit focuses on, [in the Committee's words](#), "confusion, delays, and fraud." This is an unsettling description of the program, especially considering how small and medium businesses are relying on it for much needed and well deserved money. Boston Growth Partners, LLC, works firsthand to mitigate and prevent the aforementioned "confusion, delays, and fraud," as a consulting firm that specializes in the ERTC. Through Boston Growth Partners' unique understanding of the ERTC, we can offer the following insight:

#### *Confusion*

The ERTC was designed to be accessible for businesses, even if they had not been completely shut down by COVID-19 restrictions. In order to reach as many businesses as possible across many industries and states, the ERTC's language is vague. Unfortunately, this caused confusion among business owners and tax preparers alike. Even the name is misleading: it's not actually a tax credit, but instead based on the payroll of the business. There are few consulting firms that specialize in the ERTC, since it's such a new program, meaning it can be difficult for businesses to get sound advice on whether or not they qualify for the ERTC. The confusion amongst business owners can make them reluctant to apply at all. To make matters worse, the confusion amongst consulting firms that do not specialize in the ERTC can mean that businesses' applications could be prepared poorly, and/or not ask for the full amount that they're entitled to. The IRS's warnings to exercise caution when choosing a firm to help one apply for the ERTC are certainly not unreasonable, but they only further business owners' confusion and frustration. The IRS has good reason to warn business owners against fraudulent and predatory ERTC "tax mills," but has not provided much clear guidance on how businesses can and should find credible consultants.

#### *Delays*

Delays by the IRS are out of business owners' control, and to an extent, inevitable with such a large program. But a well-prepared and accurate form can reduce the amount of time the IRS needs to spend reviewing a business's application and parsing through details. Again, clearer guidance by the IRS on how to prepare the forms and/or how to find a credible consulting firm would result in more thorough, clearer applications, and potentially streamline the workload for the IRS once they receive the applications.

#### *Fraud*

Like with any program that offers financial benefit, the ERTC has invited fraud. The vast majority of business owners are not trying to commit fraud through the ERTC, and may be reluctant to



apply at all for fear of being investigated for fraud. The best way to avoid inadvertent fraud under the ERTC is to thoroughly prepare one's application. The more accurate and clear details demonstrating a business's eligibility, the better — but as mentioned before, many businesses are unsure of how they qualify and how to prove it. Further, the IRS's warnings about fraud, which have been picked up by major news outlets and read by prospective ERTC recipients, have generated fear and confusion. An article by a newspaper cautioning against fraud committed through the ERTC is unlikely to stop a determined fraudster who has already decided to commit the act, but will deter honest business owners from applying to the ERTC when they deserve it. While the warnings by the IRS are important, there should be further guidance aimed at business owners who are honest and in great need of the ERTC's benefits.

*Suggested Questions for Witnesses*

The following are questions that Boston Growth Partners has generated, based on the company's experience with preparing ERTC forms for business owners.

1. Why are tax preparers solely being asked by the Agency to assess COVID-19-related eligibility? Are there better options for business owners, who need advice on real-world pandemic experience, particularly supply-chain interruptions, which are likely outside the skill and experience of the average tax preparer?
2. Why hasn't the Agency issued more authoritative guidance with more examples of how entities would legitimately meet the test of being partially suspended due to limitations in commerce, travel restrictions, group meetings, and an inability to obtain critical goods?
3. Since most small entities do not have the time or experience to prove eligibility and assess their impacts in a way that meets the vague standards, how would you suggest that the administrative burden be reduced thereby making the benefits more accessible?

We hope that this letter has stimulated productive discussion about the Employee Retention Tax Credit, as it is an important program for business owners and the American economy as a whole. We appreciate you taking the time to engage with our ideas, and look forward to seeing the results of this hearing.

Sincerely,

Michael Grosberg, President  
Boston Growth Partners, LLC  
25 Old Coach Road, Sudbury, MA 01776  
mgrosberg@bostongrowthpartners.com

**Comments for the Record**  
**United States House of Representatives**  
**Committee on Ways and Means**  
**Subcommittee on Oversight**  
**Hearing on The Employee Retention Tax Credit Experience:**  
**Confusion, Delays, and Fraud**  
**Thursday, July 27, 2023 at 2:00 PM**

By Michael G. Bindner  
 The Center for Fiscal Equity

Chairman Schweikert and Ranking Member Pascrell, thank you for the opportunity to submit these comments for the record to the Subcommittee on this topic. In March of this year, we provided comments to the Subcommittee on Work and Welfare on how Welfare is Broken: Restoring Work Requirements to Lift Americans Out of Poverty. We have attached these comments as an attachment.

Our main comment was that work must pay. In order to do so, wages must be adequate (including the minimum wage), family support through the child tax credit should be adequate (because the free market cannot guarantee an adequate family income - because businesses cheat), education is the answer to upward mobility, the homeless should be served with housing first, unemployment insurance must be less punitive (no fault), and automatic cost of living adjustments should be by equal dollars, not equal percentages.

If tax policy, training opportunities and wage inequality were handled correctly, no special tax credit would be required to retain workers. They would have the ability and access to the kind of education that will keep them interested and make them want to work. If pay and inflation adjustments are designed so as not to increase inequality, corporate tax credits could not do so - although the evidence indicates that they do not do so anyway.

When I was in high school and working as a dishwasher, I was presented with the form for receiving this credit. I clearly did not qualify as I lived in a middle class household and did not plan to make a career of restaurant work. No tax credit would have kept me there, as I was already bound for college.

This credit should go away. As we commented to the Tax Committee earlier this month, **corporate income taxes as a whole should be abolished and a two stage Fair Tax enacted in its place.** *We propose channeling a Fair Tax style subsidy through two taxes, a (credit) invoice value added tax (turning the deduction for sales taxes paid into a full credit - which is the essential the difference between a VAT and income tax based collections) and a subtraction value added tax to channel subsidies for health care and the child tax credit through employers rather than the Social Security Administration (as proposed for the Fair Tax).*

Please see our second attachment which shows how to shift away from income taxation to consumption based taxes.

As we stated to the Work and Welfare Subcommittee in a separate hearing, enacting a subtraction VAT allows ending TANF and Food Stamps as well.

Thank you for the opportunity to address the committee. We are, of course, available for direct testimony or to answer questions by members and staff.

**Attachment: Making Work Pay, March 29, 2033**

The short answer to using work to lift families out of poverty is to make work pay, which sounds like a good topic for a hearing before this Subcommittee. Indeed, there is a term for making people go to work for inadequate pay: slavery.

**First and foremost, wages must be adequate.** In 2021, the House proposed increasing the minimum wage to \$15 per hour as part of reconciliation. Until the Senate Parliamentarian ruled that this was out of order and the votes did not exist to overrule her, the Republican Minority counter-offered a \$10 per hour.

American workers would appreciate putting that counter-offer back on the table, while ending the tipped wage subminimum rate. American customers are not nearly generous enough for this to be at all just. Wherever either (or both) options are proposed as ballot initiatives, they pass. In some states, higher minimums have been enacted and more economic activity, rather than less, has occurred. The reason is obvious - when lower income people have more income they spend it all back into the economy. When wealthier people get a tax cut, they take it out of the economy and into Wall Street speculation. The sad irony is that it is in the so-called "Red States" where the minimum wage has not been raised where the economy lags.

Franchise holders have a history of paying low wages and justifying their opposition to wage increases because their wages would be squeezed out. This is not the case because, again, sales will increase to compensate. That being said, the conditions of franchise employment and franchise agreements deserve attention, as well as the tactic of using the franchise system to avoid unionization and paying for such things as health insurance. If the onus on providing health care and voting for representation is shifted to the franchisor, some firms will decide that turning franchise and gig employment into full-time employment is better. That would be a socially desirable outcome.

**The second way to make work pay is to increase the already existing Child Tax Credit.** To increase the incentive to work and grow the economy, the credit must be made fully refundable. People do not seek out low wage jobs because the credit is too generous. Just the opposite is true. When family wages are adequate, people make investments in themselves, like further education and skills training, so that they can move up the economic ladder.

The President's Budget proposes that the Child Tax Credits enacted as part of the American Recovery Plan Act be restored. During that period, payment of the child tax credit was in advance of the annual tax filing. This is appropriate and will change the culture of such credits, which should be for continuing support, not an annual bonus.

We agree with increasing the CTC to at least American Rescue Plan Act levels and refundability. We would make it \$1,000 per month and phase it out from the median income to the 90th percentile. During the pandemic, the IRS managed payments. This had the "stink of welfare" that even some Democratic Senators objected to, which led to its discontinuance.

I submit that, over the long-term, it would be more acceptable to distribute them either through other government subsidies, such as Unemployment Insurance, Disability Insurance, or a training stipend OR through wages.

For middle income taxpayers whose increased credits are less than their annual tax obligation, a simple change in withholding tables is adequate. Procedures are already in place to deliver refundable credits to larger families.

Employers can work with their bankers to increase funds for payroll throughout the year while requiring less money for their quarterly tax payments (or estimated taxes) to the IRS. The main issue is working out those situations where employers owe less than they pay out. This is especially true for labor intensive industries and even more so for low wage employers. A higher minimum wage would make negative quarterly tax bills less likely.

Tax reform can be used to facilitate this process. Instead of having each family file to collect their child tax credits and EITC (as an end of the year bonus), enact an employer paid subtraction value added tax and make child tax credits and health insurance tax benefits an offset to the payment of this tax and remove most families from having to file at all. Tax offsets could also be created to fund paid family medical leave, sick leave and childcare provided through employers.

**The government should not be the national paymaster for every family.**

When I graduated from Loras College and began graduate studies at the American University, the Washington Area Consortium of Universities held a conference on poverty. **Every speaker in every topic area cited education as the key avenue to upward mobility.**

Poor people need to work longer hours to make ends meet. Their opportunity costs to seek education are, therefore, high because education cost is competing with food and shelter (both of which are inadequate for workers and their families at current wage levels). If the Subcommittee is serious about getting people to work their way out of poverty, it must give them the tools to do so, which means paid educational opportunity.

Providing minimum wage pay to attend school will assure that, when the wage is increased, those without skills will not be priced out of the economy - as some fear when opposing raising the wage. One reason to raise the minimum wage is precisely so no one lives only on their child tax credit proceeds. There are some in both parties who believe that the child tax credit should have a work requirement. I agree if that work includes being paid to go to school.

Paid training must be provided to those whom the education system and the former culture of dependency has failed. The caricature of the welfare cheat was never reality, however those who were and are trapped in poverty usually have educational deficits, as well as a history of family incarceration due to the war on drugs and its disproportionate penalties for Black and Hispanic men.

Paid training must not only make failed students whole, but advance all students to either vocational training or the completion of the first two years of college (both community and residential). Students with families would also receive the child tax credit. In either case, wages, the CTC payment, health insurance (rather than Medicaid) and any social services, should be delivered through the training provider.

English as a Second Language should not only be free, but workers should be paid to attend, irrespective of immigration status. Part-time workers should also be eligible for this benefit.

Technical training should be covered as well at both public and accredited private schools, including religious schools. In *Espinoza v. Montana*, prohibitions on funding private schools (Blaine Amendments) were found to be unconstitutional. New (and existing) funding should reflect that fact.

**The homeless find it impossible to get jobs and hard to get benefits.** This is why the "housing first" approach is essential to getting people back into the workforce or to channel them into the appropriate educational program - including those associated with drug court and

disability insurance. Such individuals should be required to attend either long term recovery programs, occupational therapy or psychiatric rehabilitation programs - but be paid to do so.

With a higher minimum wage, payment for training and rehabilitation and a decent sized child tax credit, housing will be affordable without additional subsidies (save possibly for those with permanent disability - but even they should be paid to attend training and such training should not be time limited by payment through Medicaid).

What will society gain for all of this generosity, aside from higher economic growth? This should be obvious - indeed, it has even been proposed by the Senator from Utah - albeit clumsily. Food Stamps, TANF and even Medicaid for the non-elderly poor, as well as governmentally provided case management could be abolished in the vast majority of cases. Dependency would not only end - it would be both impossible and unnecessary.

**To encourage work in good jobs, unemployment insurance must be less punitive,** particularly where younger workers are concerned. In lower wage jobs, the preference is to find potential supervisors (whose compensation is usually subpar as well) and keep a file of infractions to justify firing workers who do not work out. A punitive work environment that does not exactly make any kind of work attractive.

In certain circumstances, unemployment compensation should be available on a no-fault basis. Better still, employees should be allowed to voluntarily leave firms with a history of quickly dismissing employees without penalty. There should be no expendable jobs or workers.

**Lastly, to make work pay better, quit overpaying the few through inflation adjustments.** Households making under the 90th percentile have been losing ground for almost half a century, while incomes above that amount have increased on a regular basis.

The source of inequality, aside from abandoning the 91% top marginal tax rate, is granting raises at an equal percentage rather than by an equal amount. When the 91% rate was repealed, incomes were fairly equal, so it was not an issue.

The federal government plays an outsized role in how salaries are determined through percentage based cost of living adjustments to government workers, beneficiaries, government contractors. The government can change this with the stroke of a pen. The private sector will follow suit with a higher minimum wage, adequate child tax credits (as described below) and paying individuals in training from ESL to community college the minimum wage to pursue their studies.

From here on in, adjust for cost of living on a per dollar an hour rather than on a percentage basis (or dollars per month or week for federal beneficiaries). Calculate the dollar amount based on inflation at the median income level. No one gets more dollars an hour raise, no one gets less dollars per hour in increases. Increase the minimum wage as above and consider decreasing high end salaries paid to government employees and contractors. Even without decreases, simply equalizing raises will soon reduce inequality. Why is this necessary?

Prices chase the median dollar. The median dollar of income is actually at the 90th percentile, rather than the 77th percentile (which is about where the median is). This strategy will reduce inflation in both the long and short terms as prices adjust to decreases in higher salaried income. **Let me repeat this - prices chase income dollars, not income earners.**

### Attachment - Consumption (Fair) Taxes

**Subtraction Value-Added Tax (S-VAT).** Corporate income taxes and collection of business and farm income taxes will be replaced by this tax, which is an employer paid Net Business Receipts Tax. S-VAT is a vehicle for tax benefits, including

- Health insurance or direct care, including veterans' health care for non-battlefield injuries and long term care.
- 
- Employer paid educational costs in lieu of taxes are provided as either employee-directed contributions to the public or private unionized school of their choice or direct tuition payments for employee children or for workers (including ESL and remedial skills). Wages will be paid to students to meet opportunity costs.
- 
- Most importantly, a refundable child tax credit at median income levels (with inflation adjustments) distributed with pay.

Subsistence level benefits force the poor into servile labor. Wages and benefits must be high enough to provide justice and human dignity. This allows the ending of state administered subsidy programs and discourages abortions, and as such enactment must be scored as a must pass in voting rankings by pro-life organizations (and feminist organizations as well). To assure child subsidies are distributed, S-VAT will not be border adjustable.

**Invoice Value-Added Tax (I-VAT).** Border adjustable taxes will appear on purchase invoices. The rate varies according to what is being financed. If Medicare for All does not contain offsets for employers who fund their own medical personnel or for personal retirement accounts, both of which would otherwise be funded by an S-VAT, then they would be funded by the I-VAT to take advantage of border adjustability.

I-VAT forces everyone, from the working poor to the beneficiaries of inherited wealth, to pay taxes and share in the cost of government. As part of enactment, gross wages will be reduced to take into account the shift to S-VAT and I-VAT, however net income will be increased by the same percentage as the I-VAT. Inherited assets will be taxed under A-VAT when sold. Any inherited cash, or funds borrowed against the value of shares, will face the I-VAT when sold or the A-VAT if invested.

I-VAT will fund domestic discretionary spending, equal dollar employer OASI contributions, and non-nuclear, non-deployed military spending, possibly on a regional basis. Regional I-VAT would both require a constitutional amendment to change the requirement that all excises be national and to discourage unnecessary spending, especially when allocated for electoral reasons rather than program needs. The latter could also be funded by the asset VAT (decreasing the rate by from 19.25% to 13%).

**Contact Sheet**

Michael Bindner  
Center for Fiscal Equity  
14448 Parkvale Road, Suite 6  
Rockville, MD 20853  
240-810-9268  
fiscalequitycenter@yahoo.com

**Committee on Ways and Means**  
**Subcommittee on Oversight**  
**Hearing on The Employee Retention Tax Credit Experience:**  
**Confusion, Delays, and Fraud**  
**Thursday, July 27, 2023 at 2:00 PM**

All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears:

This testimony is not submitted on behalf of any client, person or organization other than the Center itself, which is so far unfunded by any donations.

July 21, 2023

Christopher N. Moran, Esq.

T 410.244.7604  
F 410.244.7742  
[CNMoran@Venable.com](mailto:CNMoran@Venable.com)**VIA ELECTRONIC SUBMISSION**  
**[WMSubmission@mail.house.gov](mailto:WMSubmission@mail.house.gov)****Re: Subcommittee Hearing on the Employee Retention Tax Credit Experience**

To Whom It May Concern:

I have worked with many churches and places of worship on assessing eligibility for the employee retention credit (“ERC”) and determining the amount of qualified wages eligible for the credit. Churches and places of worship were significantly impacted by COVID-19 restrictions limiting gathering sizes, establishing capacity limits, social distancing rules, and other limitations on gatherings. In addition, many churches and places of worship experienced significant financial difficulties. However, based on the definition of “qualified wages” and “wages” in the CARES Act and Section 3134(c)(4)(A) of the Internal Revenue Code (the “Code”), churches and places of worship are not able to benefit from the ERC in the same way that secular nonprofit organizations, businesses, and certain governmental employers can.

Churches and places of worship are uniquely disadvantaged by the definition of “qualified wages” for purposes of the ERC. Section 2301(c)(5) of the CARES Act and Section 3134(c)(4)(A) of the Code define “wages” by cross-reference to Section 3121(a) of the Code, which in turn defines “wages” as “remuneration” for “employment.” Service as a minister is not considered “employment” under Section 3121(b)(8) of the Code. Therefore, the salary a church or place of worship paid to a minister does not fit within the definition of “wages” used for purposes of the ERC.

FAQs the Internal Revenue Service posted in June 2020 included an example stating that a salary and housing allowance paid to a minister who is a common law employee of a church “are not qualified wages for purposes of the Employee Retention Credit.”<sup>1</sup> These FAQs are non-binding, were not published as guidance in the Internal Revenue Bulletin and have since been withdrawn because they do not reflect changes in law since the enactment of the CARES Act. Notably, the Internal Revenue Service did not include this example in any of the employee retention credit guidance published in the Internal Revenue Bulletin.

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<sup>1</sup> [FAQ 58](#) (updated June 19, 2020).

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Oversight Committee  
July 21, 2023  
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The historical development of Social Security and the exemption for remuneration paid to ministers indicates that Section 3121(b)(8) is designed to allow ministers with a conscientious objection to social security to exempt themselves from coverage.<sup>2</sup> The vast majority of ministers do not have a conscientious objection to coverage. Oftentimes, churches withhold additional taxes from a minister's paycheck to cover the minister's self-employment tax obligation and may "gross up" the minister's salary or housing allowance for the self-employment taxes. In these cases, the church effectively pays the self-employment tax on behalf of the minister and substantively, the arrangement is no different than if the minister's salary was "wages" in Section 3121(a).

Other COVID-19-related tax credits such as the credit for paid sick leave in Section 3131 of the Code and the payroll credit for paid family leave in Section 3132 of the Code define wages by reference to Section 3121(a), without regard to the exclusions from employment in paragraphs (1) through (22) of Section 3121(b) of the Code. In December 2020, Congress extended and amended the employee retention credit to permit certain governmental employers to be treated as "eligible employers."<sup>3</sup> Because service provided to a governmental employer is not considered "employment" under Section 3121(b), Congress also amended the definition of "wages" such that salaries paid by governmental employers that are "eligible employers" could be claimed as qualified wages for the ERC. However, because Congress did not amend or correct the definition of "wages," churches and places of worship at a major disadvantage compared to secular nonprofit organizations, small businesses that do not employ ministers, and governmental employers.

For example, consider a small church that employs two ministers at an annual salary of \$50,000 and does not have any other employees. Based on the definition of "wages" in Section 2301(c)(5) of the CARES Act and Section 3134(c)(4)(A) of the Code, the church, even if it was an "eligible employer" for all periods from March 13, 2020 to December 31, 2020 and in the first three calendar quarters of 2021, does not have any qualified wages and therefore cannot claim the ERC. Meanwhile, a secular nonprofit organization or a small business with two employees earning an annual salary of \$50,000 would be eligible for a credit of \$52,000 for this same period.

In its implementation of another piece of vital COVID-19 relief legislation, the Paycheck Protection Program ("PPP"), the U.S. Small Business Administration ("SBA") first reversed pre-existing SBA policy that precluded religious organizations from receiving loans or other

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<sup>2</sup> The original Social Security Act of 1935 excluded ministers working for a church from coverage. Social Security Act of 1935, § 210(b)(7), 49 Stat. at 625. The Social Security Amendments of 1954, Pub. L. No. 83-761, § 210(d), 68 Stat. 1052, 1054 permitted ministers to elect to participate in the social security system on an individual and voluntary basis by treating the income they received in the performance of their ministry as self-employment income. In 1967, Congress changed social security coverage for ministers from voluntary with an option to participate in the program, to mandatory, with an option to file an exemption certificate based on conscientious or religious objection. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1967); S. REP. NO. 90-744 (1967), reprinted in 1967 U.S.C.A.N. 2834, 2887-88.

<sup>3</sup> Section 207 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020).

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July 21, 2023  
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benefits under SBA programs.<sup>4</sup> The SBA further recognized that even if churches and places of worship could receive PPP loans, many churches and places of worship would not be able to obtain forgiveness of these loans if they could not claim the salary paid to clergy as “payroll costs.” To qualify for forgiveness of these loans, at least 60 percent must have been used for payroll expenses. Many churches and places of worship have little or no payroll costs aside from the salaries paid to clergy and therefore would not be able to obtain forgiveness of these loans if clergy salaries could not be claimed as payroll costs. The SBA recognized this issue and declared that PPP loans could be “used to pay the salaries of ministers and other staff engaged in the religious mission of institutions.”<sup>5</sup>

The SBA’s announcement was consistent with the U.S. Supreme Court’s 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.<sup>6</sup> Subsequent decisions interpreting the Establishment Clause and Free Exercise Clause, have established a broad nondiscrimination principle.<sup>7</sup> When the government establishes a generally available benefit program, such as the PPP and the ERC, religious organizations must have equal access to these programs. Congress’s cross-reference to Section 3121(a) of the Code to define “wages” for purposes of the ERC places religious organizations at a major disadvantage compared to secular organizations. The Treasury Department and the Internal Revenue Service should announce that churches and places of worship that are eligible employers may claim the salaries paid to ministers as wages for the ERC.

Thank you for your consideration of this submission. If you have any questions about this matter, please do not hesitate to call me at (410) 244-7604.

Sincerely,



Christopher N. Moran

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<sup>4</sup> U.S. SMALL BUS. ADMIN., [FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM \(PPP\) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM \(EIDL\)](#) 1 (2020).

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

<sup>6</sup> 137 S. Ct. 2012, 2017 (2017).

<sup>7</sup> See *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022).



17220 KATY FRWY, STE. 350  
HOUSTON, TEXAS 77094  
TEL: (713) 784-1181  
FAX: (713) 784-2705

July 27, 2023

House Committee on Ways & Means  
[WMSubmission@mail.house.gov](mailto:WMSubmission@mail.house.gov)

**Re: Hearing on The Employee Retention Tax Credit (ERTC) Experience and Related IRS Processing Backlog**

To Whom It May Concern:

My name is Stephen Calvert, and I am the Chief Legal Officer at G&A Partners. G&A is a large Professional Employer Organization (PEO) headquartered in Houston, Texas with offices and clients across the United States. PEOs partner with small and medium size businesses (SMBs) throughout the country to provide outsourced payroll, benefits, and human resource services through the co-employment model. G&A currently has thousands of such SMB clients and provides PEO services to roughly 90,000 worksite employees.

Data shows SMBs that partner with PEOs have better success and growth rates versus their peers, and that was particularly true during the pandemic crisis in 2020 and 2021. PEO-supported SMBs were more likely to stay in business and to keep people employed. One of the complex items that PEOs helped SMBs navigate during the pandemic crisis was the ERTC process. While PEOs were highly successful in assisting their SMB clients in filing the required returns, the backlog of processing such returns by the IRS has caused substantial harm to tens of thousands of SMBs in this country, including those who partner with PEOs. And that harm persists today.

On July 27, 2023, the President of the National Professional Employer Association (NAPEO), Pat Cleary, is testifying about the impact of the ERTC backlog on SMBs and PEOs during a House Ways and Means Subcommittee on Oversight. The purpose of this correspondence is to provide a statement for the record on behalf of G&A in support of Mr. Cleary's testimony.

While the ERTC processing backlog has receded from its high-water mark of roughly one million a couple of months ago, it is still hovering near 500,000 and the processing rate is still inadequate. And because of the IRS's ongoing delays, SMBs are having to lay off workers, take on additional loans, or consider closing entirely.

Of the tens of millions of dollars in ERTC outstanding for the SMB client companies of G&A, only a very small fraction has been processed by the IRS. We receive inquiries and complaints on a weekly basis from concerned SMB clients who are depending on the ERTC funds to remain in business. They followed the rules, filed for the credits in a timely basis through their PEO partnership with G&A, and are still waiting two years later for the necessary funding.

Several factors have contributed to the ongoing backlog of these unprocessed returns. One is that the IRS did not immediately begin processing the relevant forms—Forms 941-X. Another is that the IRS lacks trained staff, particularly staff that understand the PEO and co-employment relationship, which has caused additional delays and mishandling of claims. Another is that there was already a backlog of claims processing before the ERTC filings started to mount.

When SMBs and PEOs try to reach an IRS agent, by phone or in writing, to help sort through their issues, there is no response at all or a wholly inadequate response.

On behalf of PEOs and SMBs in general, and specifically on behalf of G&A and the thousands of clients and tens of thousands of American employees we serve, G&A adds this statement in support of NAPEO President Pat Cleary's testimony and urges the Committee to continue to bring appropriate oversight and pressure on the IRS to resolve the extensive ERTC backlog so that the SMBs that power this great nation can begin to thrive again.

Respectfully Submitted,



Stephen Calvert

Chief Legal Officer  
G&A Partners



HEXT & ASSOCIATES, P C  
An Integrated Professional Services Firm  
Certified Public Accountants  
Management Consultants

5001 Spring Valley Road, Ste. 850W  
Dallas, TX 75244-3913  
O: (972) 644-7112 F: (972) 680-8685  
[www.hextfinalgrou.com](http://www.hextfinalgrou.com)

**To whom it may concern:**

**We are writing today to express our frustration and concern with the ERTC process and the impact that the IRS processing time has had on our small business.**

**As of today, we have been waiting for our ERTC for 17 months. Our company has experienced financial hardship and could and would benefit drastically from receiving these funds. There was no indication that processing would take as long as it has when we started this process. Because we are under a PEO, we must go through the PEO to process our ERTC, and are now at the mercy of the IRS as to when they will finally approve our credit.**

**We urge decision makers to please help small businesses like us to speed up the time for this processing.**

**Sincerely,**

**Hext & Associates, P.C.**





**Champions for  
the public good**

Hearing before the House Committee on Ways and Means  
Subcommittee on Oversight

**THE EMPLOYEE RETENTION TAX CREDIT EXPERIENCE:  
CONFUSION, DELAYS, AND FRAUD**

July 27, 2023

Written Statement of the

**National Council of Nonprofits**

The National Council of Nonprofits (NCN) welcomes this opportunity to provide testimony to the House Committee on Ways and Means' Subcommittee on Oversight regarding the experiences of charitable nonprofits in accessing the Employee Retention Tax Credit (ERTC). Our nationwide networks of organizations welcome this hearing, "The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud."

In this statement, we review the history of this important tax incentive, share common challenges charitable nonprofits have experienced, identify some of the causes for these challenges, and recount numerous steps taken by our network and others to overcome confusion, delays, and fraud. Our comments are informed by the experiences of thousands of charitable organizations nationwide, most notably by smaller, frontline organizations that might not still be in operation but for the ERTC.

At the outset, we emphasize that the Employee Retention Tax Credit provided essential relief that enabled thousands of charitable nonprofit employers to retain employees and continue serving their communities during extremely harsh times. Confusion arose from the many changes in the law and qualification requirements. Delays in the receipt of checks threatened the ability of employers to keep workers on staff and maintain operations. Fraud, always a threat with a new or confusing law, remains a reason for employers and the government to remain vigilant. But despite these challenges – all of which can be remedied or avoided through conscientious lawmaking and rulemaking – the Employee Retention Tax Credit must be respected as a successful, vital, and appropriately measured response to disastrous health and economic crises.

We stand ready to assist all Members on the Committee in identifying concerns and connecting with impacted charitable organizations in their states.

**Common Challenges in Accessing the ERTC**

The ERTC served as a vital lifeline for many charitable nonprofits as it provided a financial incentive for nonprofit employers to keep their employees on their payrolls, enabling them to continue delivering important services to the public during the pandemic and in its immediate aftermath. The underlying public policy of the ERTC is sound. In practice, however, there have been problems with confusion, delays, and the appearance of fraud that need to be addressed in the future. These challenges will be discussed in turn.

**1. Confusion: Complying with a Constantly Moving Target.**

While beneficial, the ERTC has confused many employers, accountants, and regulators, partly because Congress changed the policy several times over an 18-month period. Everyone recognizes that Congress was attempting to improve the program; Congress needs to know why so many people were so confused.

The refundable payroll tax credit, enacted in Section 2301 of the **Coronavirus Aid, Relief, and Economic Security (CARES) Act**, originally applied only to employers that did not receive forgivable loans under the Paycheck Protection Program, also enacted in the CARES Act. For the period of March 12, 2020, through December 31, 2020, the law allowed a 50% credit of qualified wages (up to a maximum of \$10,000 per employee), or a credit of up to \$5,000 per employee. In most cases, the economic benefits of a potential forgivable PPP loan of up to \$10 million provided a greater economic benefit than the ERTC.

<b>ERTC Summary</b>		
	<b>2020 Rules</b>	<b>2021 Rules</b>
<b>Credit Type</b>	<i>Refundable</i> Payroll Tax credit to eligible employers	<i>Refundable</i> Payroll Tax credit to eligible employers
<b>Credit Applicability</b>	Qualified Wages paid after March 12, 2020 and or before December 31, 2020	Qualified Wages paid after December 31, 2020 and or before September 30, 2021
<b>Credit Amount</b>	50% of Qualified Wages (Maximum of \$10,000 per employee per year)	70% of Qualified Wages (Maximum of \$10,000 per employee per quarter)
<b>Maximum Credit</b>	\$5,000 per employee	\$21,000 per employee

(Credit ERTC against employer social security taxes before reducing other employment taxes-Credit can reduce all payroll tax deposits with reconciliation on Form 941)

Amendments to the ERTC made by section 206 of the **Taxpayer Certainty and Disaster Tax Relief Act** of 2020 broadened the scope of the ERTC and allowed additional nonprofits and other employers to

qualify for additional needed relief beyond the scope of two rounds of PPP loans. Specifically, the ERTC was extended through June 30, 2021, and improved to apply the credit to 70% of qualified wages up to a maximum of \$10,000 per employee per quarter, or a credit of up to \$7,000 per quarter. The amendments also allowed employers that had received Paycheck Protection Program funds to also qualify for the ERTC with respect to wages that were not paid for with forgiven PPP proceeds. Because the ERTC was calculated based on calendar quarters (12-13 weeks in length) and PPP loans cover 8-week periods, most employers should have credit-eligible wages for either 2020 or 2021.

The Section 9651 of the **American Rescue Plan Act** extended the ERTC even longer, allowing employers to claim the credit for wages paid after June 30, 2021, and before January 1, 2022. However, Title VI, Section 80604 of the **Infrastructure Investment and Jobs Act** (also known as the “Bipartisan Infrastructure Law”) terminated the ERTC for calendar quarters ending after September 30, 2021, creating additional confusion both for employers and the IRS. The retroactive repeal of the tax credit meant that many nonprofit and for-profit employers owed payroll taxes on *advance payments* received under the ERTC for the fourth quarter (Q4) of 2021 and on *reduced payroll tax deposits* withheld by the employer in anticipation of qualifying for the ERTC. The IRS issued [Notice 2021-65](#) to provide guidance to employers, but it did not provide a waiver of penalties for payments due after December 20, 2021.

In sum, the ERTC changed numerous times between March 2020 and November 2021, involving revisions that affected eligibility, application, and obligations. It should be no wonder that people got confused. As will be seen, many organizations, including the networks of the National Council of Nonprofits, engaged in vigorous education and outreach programs to help ensure employers, employees, and communities could effectively benefit from this important tax incentive.

#### **A Few Thoughts About ERTC Qualification Criteria**

Qualification criteria for the ERTC have also been a source of confusion to employers in both the for-profit and nonprofit sectors. Credit eligible entities needed to be “active trades or businesses” within the definition of the Internal Revenue Code (see generally IRC section 162). To qualify for the ERTC for a specific calendar quarter, an eligible employer had to meet either a full or partially suspension test or experience a reduction in gross revenue test. Both the full or partial suspension and the gross receipts test have been problematic in their application, especially for nonprofit organizations.

In the case of full or partial suspension, the requirement that operations suspend in response to orders from a government authority limiting commerce, travel, or group meetings due to COVID-19 required organizations to parse through numerous city, county and state proclamations and orders, as well as react to potential judicial decisions. In addition, such local government orders had to be read in relation to voluminous interpretations from the Internal Revenue Service that attempted to rationalize the operation of such orders in practice. The result has been a patchwork of qualification standards that could vary from jurisdiction to jurisdiction, making it difficult for organizations to determine

whether or not they qualified for the credit. And as noted below, overly aggressive advertisements and unscrupulous “professionals” may be resulting in fraudulent ERTC claims.

The reduction in gross receipts test also has been problematic for nonprofit organizations. In addition to a significant change in the eligibility percentage, there have been multiple interpretative questions regarding the proper definition of nonprofit “gross receipts,” which differs from the definition of gross receipts for purposes of PPP. This challenge appears to have been most frequently experienced by arts and cultural organizations.

Further confusing matters, most nonprofits do not compute gross receipts on the basis of calendar quarters as required by the ERTC. In sum, all of these changes and computational complexities explain why it has been difficult for nonprofits and other employers to determine whether they qualify for the credit for calendar quarters in 2020 and 2021.

## **2. Delays: Undermining the Intent of Congress.**

Charitable nonprofits have been vocal in their concerns that the promise of the Employee Retention Tax Credit is frustrated when bureaucratic delays result in employers having to wait for more than half a year or longer to receive checks. The delays for nonprofit and for-profit employers were very long in 2021 and 2022, a fact raised repeatedly during the [Senate confirmation process for IRS Commissioner Daniel Werfel](#) earlier this year.

The explanations typically given for why the backlog had grown so significantly were lack of in-person staff in the early days of the pandemic, the labor-intensive process required to review paper tax returns, and the crush of additional new burdens, such as processing millions of Child Tax Credits and Economic Impact Payments. Anecdotally, we believe that many long-waiting organizations have received the relief to which they are eligible at this point.

In the early days of the pandemic, charitable organizations reported to NCN that they found the ERTC process relatively straightforward and quick. Many nonprofits shared in 2020 that they had received checks within eight-to-ten weeks after submitting the proper paperwork. Over time, however, delays in receiving ERTC checks became a significant burden for nonprofit employers. The National Council of Nonprofits joined with many in the charitable nonprofit sector in reaching out to the IRS and to Congress seeking administrative or legislative solutions.

As an organization, the National Council of Nonprofits experienced a 21-month delay in receiving a small ERTC payment that may prove instructive. Like many organizations, NCN has contracted out some of its human resources operations to a professional employer organization (PEO). As a result, NCN could not apply directly for ERTC relief, but had to work through the PEO that had both legal and internal rules that frustrated the application process. First, unlike most charitable employers that enjoy the benefit of electronic filing, PEOs are required to file tax returns via paper forms. This, of

course, put NCN's application in the pile of paper forms that took the longest amount of time to process.

Also, many PEOs, ours included, adopted precise rules for when and how they would file amended tax returns on behalf of their clients. These *sui generis* rules, combined with the frequently changing law on the ERTC, meant that some deadlines were missed, revisions to forms were required, and delays grew even longer. Some organizations that were eligible for the ERTC missed out completely because of deadlines imposed by PEOs to be part of their amended return, even though the deadline for the program itself still had months to go.

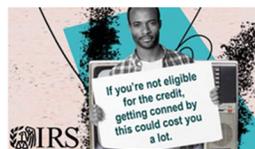
### 3. Fraud: Scam Artists Are Proliferating.

Through extensive educational outreach efforts by many nonprofit organizations, discussed in the next section, we believe the occurrence of intentional fraud in the nonprofit sector is extremely low. Indeed, NCN is not aware of improper activities or allegations of fraud against legitimate organizations.

However, individuals cannot listen to the radio, go online, or watch broadcast TV without being bombarded with ads claiming that employers are entitled to free money. Bogus ERTC claims, promoted by entities seeking to charge exorbitant fees, clog the IRS processing pipeline and exacerbate the delays suffered by legitimate employers.

Nonprofits have shared with NCN that some of these promoters have aggressively pushed their services long after being told no, filling inboxes with solicitations, making repeated calls, and seeking to secure signatures on contracts that promise quick results while charging high processing fees. These actors do a disservice to the public and improperly call into question the otherwise sound policy underlying the ERTC as a refundable payroll tax credit.

We believe the IRS was right to include “[aggressive marketing schemes](#)” to promote the ERTC on the [Dirty Dozen list of tax scams](#) for 2023. The IRS has publicized “blatant attempts by promoters to con ineligible people to claim the credit,” denouncing “schemes from promoters who have been blasting ads on radio and the internet touting refunds involving Employee Retention Credits.” The IRS has also posted a series of videos on the threat to the ERTC: *Don't Fall for Employee Retention Credit Scams* in [English](#) | [Spanish](#) | [ASL](#) | [Chinese](#) | [Korean](#) | [Vietnamese](#) | [Haitian Creole](#) | [Russian](#). NCN has publicized this information in two publications, our biweekly [Nonprofit Champion](#) and our monthly [Nonprofit Essentials](#), posted warnings on our website, and raised awareness through social media posts.



### Education and Fraud Prevention

Starting within days of passage of the CARES Act, the National Council of Nonprofits has taken every opportunity to inform the charitable nonprofit community about the availability of the ERTC and multiple other relief programs that would enable organizations to continue to advance their missions during the severe public health and economic emergencies. These actions have ranged from hosting nationwide webinars for audiences of thousands to publishing articles and presenting lectures and webinars for state- and subsector-specific audiences. Here is a sample of educational materials focusing on the ERTC:

- [Nonprofits, Don't Overlook Your Potential Refund Under the Employee Retention Tax Credit](#)
- [Attention Nonprofit Employers: Did You Forget to Claim Refundable Tax Credits from the IRS?](#)
- [COVID-Related Tax Credits Available to Nonprofit Employers](#)

In late 2021, the networks of the National Council of Nonprofits conducted a [survey of workforce shortages](#) in the sector. Fifteen percent of responding nonprofits reported having claimed the ERTC, suggesting that the word did indeed get out. Interestingly, ERTC utilization in some states was considerably higher, according to survey responses, including Kentucky (24%), North Carolina (24%), and Oregon (21%).

The point of sharing these activities is to show that the charitable nonprofit community had access to accurate, high-quality information about the ERTC. These outreach efforts continue and, we trust, the outcome of today's hearing will provide further clarity and reduce the prevalence of fraud by unscrupulous profiteers.

### A Closing Comment of Appreciation for the Revised ERTC

The current version of the Employee Retention Tax Credit (ERTC), in effect for parts of calendar years 2020 and 2021, is the solution to a tax incentive that unfairly excluded millions of employers in the United States. During the past two decades, Congress has established a variety of tax incentives in response to a series of human and natural disasters beginning with the terrorist attacks in New York and DC on 9/11. Congress later granted employee retention tax credits in response to several natural disasters including Hurricanes Katrina, Rita, and Wilma in 2005. See generally Internal Revenue Code (IRC) Section 1400R. These temporary incentives helped profitable for-profit employers keep workers on the payroll in the aftermath of disasters that otherwise would have forced mass layoffs and greater economic distress. The credits were claimed as part of and subject to the limitations of the general business credit under IRC Section 38.

The fundamental problem with the older version of the ERTC was that it provided neither relief nor incentives for the 1.3 million charitable nonprofits that are exempt from income taxes and their 12.5 million employees or for businesses without income tax liabilities. For more than a decade, charitable

organizations advocated for improvements to the ERTC to ensure that the very organizations on the scene in natural disasters received the same assistance as their for-profit counterparts. When the Covid-19 pandemic hit, Congress converted the ERTC to the refundable payroll tax credit at issue in today's hearing. Structuring the ERTC as such finally ensured that all employers, regardless of their tax status or profitability, could qualify for the economic relief provided by the credit when they retained their workforce during the pandemic.

### Conclusion

The Employee Retention Tax Credit, when implemented in the form of a refundable payroll tax credit, has been a vital lifeline of support for charitable organizations, their employees, and the individuals and communities they serve. This unqualified statement is true despite the delays and the risks of confusion and fraud. The ERTC was borne of a need to extend relief to employers who are exempt from income taxes but pay other taxes, namely payroll taxes, as they contribute to society through dedicated public service. While this hearing may shed light on unanticipated challenges that arose when the ERTC was included in the CARES Act, the unmistakable truth is that the ERTC saved nonprofits and businesses, reduced unemployment and hardship, and helped alleviate untold suffering that would have occurred in our communities. Improvements should always be envisioned and analyzed, but the public and tax policy foundation of the ERTC has proven to be sound.

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Respectfully submitted,

David L. Thompson  
Vice President of Public Policy  
**National Council of Nonprofits**  
[dthompson@councilofnonprofits.org](mailto:dthompson@councilofnonprofits.org)

### About the National Council of Nonprofits

Communities thrive when nonprofits succeed. For more than 30 years, the National Council of Nonprofits has mobilized the largest network of nonprofits in the United States to achieve transformative results. We focus on the 97% of charitable nonprofits with budgets under \$5 million – food banks, neighborhood health clinics, community theatres, domestic violence shelters, senior centers, and more – the organizations whose absence would leave huge voids in their communities. We champion, inform, and connect nonprofits to get things done for nonprofits and the people and communities they serve. Learn more at [www.CouncilofNonprofits.org](http://www.CouncilofNonprofits.org).



July 27, 2023

The Honorable Jason Smith  
Chair  
Committee on Ways and Means  
United States House of Representatives  
1139 Longworth House Office Building  
Washington, D.C. 20515

The Richard Neal  
Ranking Member  
Committee on Ways and Means  
United States House of Representatives  
1139 Longworth House Office Building  
Washington, D.C. 205105

Dear Chairman Smith and Ranking Member Neal:

Thank you for the opportunity to submit these comments on behalf of the National Tooling and Machining Association (NTMA) and Precision Metalforming Association (PMA) regarding the Ways and Means Oversight Subcommittee hearing on The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud. Combined, our associations represent nearly 2,000 businesses manufacturing components, tooling, and dies for the automotive, aerospace, agribusiness, defense, electrical, and medical device industries, among others. Most of our members are family-owned businesses.

Our members are small and medium-sized manufacturers averaging roughly 50 employees and are typically classified under the North American Industrial Classification System (NAICS) as 332 (Fabricated Metal Product Manufacturing) and 333 (Machinery Manufacturing). These classifications combined include 80,000 manufacturing establishments with 2.6 million employees.

The National Tooling and Machining Association's 1,100 member companies design and manufacture special tools, dies, jigs, fixtures, gages, special machines and precision-machined parts. Some firms specialize in experimental research and development work as well as rapid prototyping. Many NTMA members are privately owned small businesses, yet the industry generates sales of over \$40 billion a year. NTMA's mission is to help members of the U.S. precision custom manufacturing industry achieve business success in a global economy through advocacy, advice, networking, information, programs and services.

The Precision Metalforming Association is the full-service trade association representing the \$137-billion metalforming industry of North America—the industry that creates precision metal products using stamping, fabricating, spinning, slide forming and roll forming technologies, and other value-added processes. Its more than 850 member companies also include suppliers of equipment, materials, and services to the industry. PMA leads innovative member companies toward superior competitiveness and profitability.

Small businesses are vital to the U.S. economy, accounting for 46 percent of American jobs and 44 percent of U.S. economic activity. However, most smaller firms have little or no financial cushion and struggled to weather the economic impacts of the pandemic. Millions of small businesses, including our members, were able to do the right thing and keep their employees on the payroll

during the height of the pandemic due to the ability to claim the Employee Retention Credit (ERC). However, businesses continue to wait months to receive the refundable tax credit because of the excessive backlogs at the IRS.

A recent NTMA/PMA survey showed 41 percent of association members that submitted a refund request under the ERC were still waiting for the refund to be processed, with 16 percent having waited longer than 12 months. As stated in the National Taxpayer Advocate Service's 2022 Annual Report to Congress (2022 TAS Report), "for business taxpayers, delays in providing congressionally authorized pandemic relief may have required some businesses to lay off workers or even to shutter operations." With approximately 537,000 unprocessed applications as of June 14, 2023, the backlog is trending in the right direction, but small businesses, such as our members continue to feel the economic impacts of the COVID-19 pandemic due to this processing backlog.

Thank you for your consideration of these comments.

Sincerely,



David Klotz  
PMA President



Roger Atkins  
NTMA President



July 27, 2023

The Honorable Jason Smith  
Chair  
Committee on Ways and Means  
United States House of Representatives  
1139 Longworth House Office Building  
Washington, D.C. 20515

The Richard Neal  
Ranking Member  
Committee on Ways and Means  
United States House of Representatives  
1139 Longworth House Office Building  
Washington, D.C. 205105

Dear Chairman Smith and Ranking Member Neal:

On behalf of the Precision Machined Products Association (PMPA), please accept these comments concerning the Ways and Means Oversight Subcommittee hearing on “The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud.” The PMPA believes it is vital that the Internal Revenue Service (IRS) continue to work to reduce the backlog of unprocessed Forms 941-X to ensure that small manufacturers, like our members, receive the funds they are entitled to and can continue to support their employees as well as invest in and grow their businesses.

PMPA is a national trade association representing over 440 member companies involved in the production of highly engineered, precision machined components used in advanced automotive, aerospace, electrical, construction, and medical technologies. PMPA’s members include metal producers, machining and manufacturing companies, machine tool builders, and producers of tooling, software and accessories, and metalworking fluids. The precision machining industry is best described by NAICS code 332721 and accounts for over 103,200 jobs with payrolls of \$5 billion and shipments of over \$16.9 billion. PMPA members typically average 35-50 employees per shop with annual sales of \$12 million. The mission of the PMPA is to provide the information, resources, and networking opportunities to advance and sustain its members while advocating for manufacturing throughout the United States.

We recognize the critical role small businesses play in the U.S. economy, accounting for 46 percent of American jobs and 44 percent of economic activity. However, these smaller enterprises often lack significant financial reserves, making it challenging for them to withstand the economic impact of unforeseen crises, such as the recent pandemic. During the height of the COVID-19 pandemic, many small businesses, including our members, did their best to retain their employees on the payroll by leveraging the Employee Retention Credit (ERC). Unfortunately, the processing delays at the Internal Revenue Service (IRS) have been causing significant challenges for these businesses, as they have had to wait for months to receive their refundable tax credits.

A recent survey of PMPA members revealed that 33 percent of those who submitted a refund request under the ERC were still awaiting the processing of their refund. As highlighted in the National Taxpayer Advocate Service’s 2022 Annual Report to Congress (2022 TAS Report), delays in providing congressionally authorized pandemic relief have forced some businesses to lay off workers or even cease operations. Though the IRS has made progress in reducing the backlog of unprocessed

applications, with approximately 537,000 still pending as of June 14, 2023, small businesses, including our members, continue to bear the economic consequences of this processing backlog, hindering their ability to invest in their growth and support their employees.

In light of this situation, we urge the IRS to continue its efforts to reduce the backlog of unprocessed Forms 941-X promptly. By doing so, small manufacturers, like our members, will receive the funds they are rightfully entitled to, allowing them to continue supporting their employees and investing in their businesses' growth. The well-being of our industry and the livelihoods of our employees depend on efficient and timely access to the support provided through the ERC.

Small manufacturers, particularly those in the precision machining industry, play a crucial role in the economic landscape, and their resilience is vital for the nation's recovery. On behalf of the precision machining industry and small manufacturers across the country, thank you for your consideration of these views and we welcome the opportunity to answer any questions you may have.

Sincerely,

*John L. Habie, IV*

John Habie, IV  
President, PMPA  
President, Metal Seal Precision, Ltd. – Mentor, OH

**The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud****Comment Letter Submission**Extend the ERC Assessment Statute to Ten Years

Congress should follow the path of HR7352 again with ERC. This bill extended the statute of limitations against PPP fraud to ten years. Many have been emboldened by the IRS's historically low audit rate and the relatively limited assessment statutes for the Employee Retention Credit. These statutes expire 4/15/24 and 4/15/25 for ERC claims related to tax years 2020 and 2021, respectively (with the exception of Q3/Q4 2021 which was extended to 5 years via the ARPA). However, most of the fraudulent activity and spike in ERC mills came in 2022 and continues with filings today. This leaves the service with inadequate time to address the program through examinations.

Those claiming COVID relief funds improperly should not be afforded the protection of short statutes of assessment due to their late-filed, amended claims. Congress should send a warning that improper COVID relief payments will be dealt with by the IRS. Congress should extend the ERC assessment statute to ten year to match the PPP and EIDL bills HR 7352 and HR 7334.



FOR YOUTH DEVELOPMENT®  
FOR HEALTHY LIVING  
FOR SOCIAL RESPONSIBILITY

February 21, 2024

The Honorable David Schweikert  
Chairman  
Ways and Means Subcommittee on Oversight  
United States House of Representatives  
Room 460, Cannon House Office Building,  
25 Independence Avenue, SE  
Washington, DC 20515-0301

The Honorable Bill Pascrell  
Ranking Member  
Ways and Means Subcommittee on Oversight  
United States House of Representatives  
Room 2409, Rayburn House Office Building  
50 Independence Avenue, SW  
Washington, DC 20515-3009

RE: 7/27/2023 Hearing on The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud

Dear Chairman Schweikert, Ranking Member Pascrell,  
and House Ways and Means Oversight Subcommittee Members:

Thank you for your committee's oversight of the administration of the Employee Retention Tax Credit (ERTC) and for holding the hearing regarding issues related to the ERTC. I respectfully submit these comments on behalf of the YMCA of Greater Monmouth County in New Jersey.

The YMCA of Greater Monmouth County serves people of all ages, incomes and backgrounds in Monmouth and parts of Middlesex and Ocean Counties. The Y provides safe and high-quality preschool, before- and after-school programming, arts enrichment, summer day camp, college-readiness and civic engagement programs; water safety, health and wellness activities and disease prevention initiatives; and behavioral health services, including individual, group and family counseling.

The YMCA of Greater Monmouth County is extremely grateful for its eligibility and receipt of the ERTC, while at the same time mindful of the challenges that a number of YMCAs and nonprofit organizations have had in terms of the delay in payments and confusion about initial eligibility. The ERTC, as well as other COVID relief programs, were a critical lifeline to our YMCA, allowing us to retain our employees and serve our community throughout the pandemic.

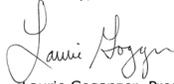
Thanks to the ERTC funding coupled with federal COVID relief support, the YMCA of Greater Monmouth County was able to respond to the vital needs of our community, providing more than \$735,000 in relief services. Our YMCA quickly became approved sites for emergency childcare for essential workers, began using our buildings for food drives and blood drives, and partnered with community organizations to distribute food and crisis relief boxes. We partnered with the Visiting Nurse Association of Central New Jersey's Community Health Centers to offer COVID-19 testing and vaccinations at our Red Bank Family YMCA. The Y was the first community-based satellite COVID-19 vaccination site in New Jersey. We provided more than 770 hours of emergency childcare to working parents on the frontlines; served over 40,000 meals; conducted 1,572 wellness checks with vulnerable seniors in quarantine to ensure they were safe; and collected over 80,000 diapers, wipes, and baby essentials to distribute to struggling families. Our Counseling & Social Services Branch remained open and ready to support children and families during unprecedented and trying times, providing more than 107,000 interactions to support mental health, addiction recovery and other social service needs.

While we understand that unscrupulous characters have engaged in fraudulent activities and have seen these programs as a target for fraud...we are appreciative of Congress for rooting out these bad actors, holding them accountable and preventing them from doing further harm. We appreciate your attention to this problem and are hopeful your work will help to ensure these criminals are punished and that this important resource be reserved for those who are truly deserving.

We are grateful for the live testimony of Linda M. Czipo, President & CEO, New Jersey Center for Nonprofits during your hearing. We are in full agreement with her comments and recommendations, particularly the point regarding the importance of the ERTC using a payroll credit—not an income tax credit—so that it is applicable to nonprofit sector employers, as well, and that this point/structure also be kept in mind of any suggested improvements for future utilization or for other relevant tax credits for employers.

Thank you for providing the ERTC and understanding what a critical tool it was during a most critical time as our YMCA and other YMCAs across New Jersey and America served our communities to mitigate the impact of the pandemic, and, as a result, are still here to continue to serve.

Sincerely,



Laurie Goganzer, President & CEO  
YMCA of Greater Monmouth County

