

118TH CONGRESS
2D SESSION

H. R. 9738

To increase the penalties applicable to persons facilitate fraud with respect to any COVID-related employee retention credit, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 2024

Mr. SCHWEIKERT introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To increase the penalties applicable to persons facilitate fraud with respect to any COVID-related employee retention credit, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. ENFORCEMENT PROVISIONS WITH RESPECT TO**
4 **COVID-RELATED EMPLOYEE RETENTION**
5 **CREDITS.**

6 (a) INCREASE IN ASSESSABLE PENALTY ON COVID—
7 ERTC PROMOTERS FOR AIDING AND ABETTING UNDER—
8 STATEMENTS OF TAX LIABILITY.—

9 (1) IN GENERAL.—If any COVID-ERTC pro-
10 moter is subject to penalty under section 6701(a) of

1 the Internal Revenue Code of 1986 with respect to
2 any COVID-ERTC document, notwithstanding
3 paragraphs (1) and (2) of section 6701(b) of such
4 Code, the amount of the penalty imposed under such
5 section 6701(a) shall be the greater of—

6 (A) \$200,000 (\$10,000, in the case of a
7 natural person), or

8 (B) 75 percent of the gross income derived
9 (or to be derived) by such promoter with re-
10 spect to the aid, assistance, or advice referred
11 to in section 6701(a)(1) of such Code with re-
12 spect to such document.

13 (2) NO INFERENCE.—Paragraph (1) shall not
14 be construed to create any inference with respect to
15 the proper application of the knowledge requirement
16 of section 6701(a)(3) of the Internal Revenue Code
17 of 1986.

18 (b) FAILURE TO COMPLY WITH DUE DILIGENCE RE-
19 QUIREMENTS TREATED AS KNOWLEDGE FOR PURPOSES
20 OF ASSESSABLE PENALTY FOR AIDING AND ABETTING
21 UNDERSTATEMENT OF TAX LIABILITY.—In the case of
22 any COVID-ERTC promoter, the knowledge requirement
23 of section 6701(a)(3) of the Internal Revenue Code of
24 1986 shall be treated as satisfied with respect to any
25 COVID-ERTC document with respect to which such pro-

1 moter provided aid, assistance, or advice, if such promoter
2 fails to comply with the due diligence requirements re-
3 ferred to in subsection (c)(1).

4 (c) ASSESSABLE PENALTY FOR FAILURE TO COMPLY
5 WITH DUE DILIGENCE REQUIREMENTS.—

6 (1) IN GENERAL.—Any COVID-ERTC pro-
7 moter which provides aid, assistance, or advice with
8 respect to any COVID-ERTC document and which
9 fails to comply with due diligence requirements im-
10 posed by the Secretary with respect to determining
11 eligibility for, or the amount of, any COVID-related
12 employee retention tax credit, shall pay a penalty of
13 \$1,000 for each such failure.

14 (2) DUE DILIGENCE REQUIREMENTS.—Except
15 as otherwise provided by the Secretary, the due dili-
16 gence requirements referred to in paragraph (1)
17 shall be similar to the due diligence requirements
18 imposed under section 6695(g).

19 (3) RESTRICTION TO DOCUMENTS USED IN
20 CONNECTION WITH RETURNS OR CLAIMS FOR RE-
21 FUND.—Paragraph (1) shall not apply with respect
22 to any COVID-ERTC document unless such docu-
23 ment constitutes, or relates to, a return or claim for
24 refund.

1 (4) TREATMENT AS ASSESSABLE PENALTY,
2 ETC.—For purposes of the Internal Revenue Code of
3 1986, the penalty imposed under paragraph (1) shall
4 be treated in the same manner as a penalty imposed
5 under section 6695(g).

6 (5) SECRETARY.—For purposes of this sub-
7 section, the term “Secretary” means the Secretary
8 of the Treasury or the Secretary’s delegate.

9 (d) ASSESSABLE PENALTIES FOR FAILURE TO DIS-
10 CLOSE INFORMATION, MAINTAIN CLIENT LISTS, ETC.—
11 For purposes of sections 6111, 6112, 6707 and 6708 of
12 the Internal Revenue Code of 1986—

13 (1) any COVID-related employee retention tax
14 credit (whether or not the taxpayer claims such
15 COVID-related employee retention tax credit) shall
16 be treated as a listed transaction (and as a report-
17 able transaction) with respect to any COVID–ERTC
18 promoter if such promoter provides any aid, assist-
19 ance, or advice with respect to any COVID–ERTC
20 document relating to such COVID-related employee
21 retention tax credit, and

22 (2) such COVID–ERTC promoter shall be
23 treated as a material advisor with respect to such
24 transaction.

1 (e) COVID-ERTC PROMOTER.—For purposes of
2 this section—

3 (1) IN GENERAL.—The term “COVID-ERTC
4 promoter” means, with respect to any COVID-
5 ERTC document, any person which provides aid, as-
6 sistance, or advice with respect to such document
7 if—

8 (A) such person charges or receives a fee
9 for such aid, assistance, or advice which is
10 based on the amount of the refund or credit
11 with respect to such document and, with respect
12 to such person’s taxable year in which such per-
13 son provided such assistance or the preceding
14 taxable year, the aggregate gross receipts of
15 such person for aid, assistance, and advice with
16 respect to all COVID-ERTC documents ex-
17 ceeds 20 percent of the gross receipts of such
18 person for such taxable year, or

19 (B) with respect to such person’s taxable
20 year in which such person provided such assist-
21 ance or the preceding taxable year—

22 (i) the aggregate gross receipts of
23 such person for aid, assistance, and advice
24 with respect to all COVID-ERTC docu-
25 ments exceeds 50 percent of the gross re-

1 receipts of such person for such taxable year,

2 or

3 (ii) both—

4 (I) such aggregate gross receipts

5 exceeds 20 percent of the gross re-

6 cepts of such person for such taxable

7 year, and

8 (II) the aggregate gross receipts

9 of such person for aid, assistance, and

10 advice with respect to all COVID–

11 ERTC documents (determined after

12 application of paragraph (3)) exceeds

13 \$500,000.

14 (2) EXCEPTION FOR CERTIFIED PROFESSIONAL

15 EMPLOYER ORGANIZATIONS.—The term “COVID–

16 ERTC promoter” shall not include a certified profes-

17 sional employer organization (as defined in section

18 7705).

19 (3) AGGREGATION RULE.—For purposes of

20 paragraph (1)(B)(ii)(II), all persons treated as a

21 single employer under subsection (a) or (b) of sec-

22 tion 52 of the Internal Revenue Code of 1986, or

23 subsection (m) or (o) of section 414 of such Code,

24 shall be treated as 1 person.

1 (4) SHORT TAXABLE YEARS.—In the case of
2 any taxable year of less than 12 months, paragraph
3 (1) shall be applied with respect to the calendar year
4 in which such taxable year begins (in addition to ap-
5 plying to such taxable year).

6 (f) COVID-ERTC DOCUMENT.—For purposes of
7 this section, the term “COVID-ERTC document” means
8 any return, affidavit, claim, or other document related to
9 any COVID-related employee retention tax credit, includ-
10 ing any document related to eligibility for, or the calcula-
11 tion or determination of any amount directly related to
12 any COVID-related employee retention tax credit.

13 (g) COVID-RELATED EMPLOYEE RETENTION TAX
14 CREDIT.—For purposes of this section, the term
15 “COVID-related employee retention tax credit” means—

16 (1) any credit, or advance payment, under sec-
17 tion 3134 of the Internal Revenue Code of 1986,
18 and

19 (2) any credit, or advance payment, under sec-
20 tion 2301 of the CARES Act.

21 (h) LIMITATION ON CREDIT AND REFUND OF
22 COVID-RELATED EMPLOYEE RETENTION TAX CRED-
23 ITS.—Notwithstanding section 6511 of the Internal Rev-
24 enue Code of 1986 or any other provision of law, no credit
25 or refund of any COVID-related employee retention tax

1 credit shall be allowed or made after January 31, 2024,
 2 unless a claim for such credit or refund is filed by the
 3 taxpayer on or before such date.

4 (i) AMENDMENTS TO EXTEND LIMITATION ON AS-
 5 SESSMENT.—

6 (1) IN GENERAL.—Section 3134(l) of the Inter-
 7 nal Revenue Code of 1986 is amended to read as fol-
 8 lows:

9 “(l) EXTENSION OF LIMITATION ON ASSESSMENT.—

10 “(1) IN GENERAL.—Notwithstanding section
 11 6501, the limitation on the time period for the as-
 12 sessment of any amount attributable to a credit
 13 claimed under this section shall not expire before the
 14 date that is 6 years after the latest of—

15 “(A) the date on which the original return
 16 which includes the calendar quarter with re-
 17 spect to which such credit is determined is filed,

18 “(B) the date on which such return is
 19 treated as filed under section 6501(b)(2), or

20 “(C) the date on which the claim for credit
 21 or refund with respect to such credit is made.

22 “(2) DEDUCTION FOR WAGES TAKEN INTO AC-
 23 COUNT IN DETERMINING IMPROPERLY CLAIMED
 24 CREDIT.—

“(A) IN GENERAL.—Notwithstanding section 6511, in the case of an assessment attributable to a credit claimed under this section, the limitation on the time period for credit or refund of any amount attributable to a deduction for improperly claimed ERTC wages shall not expire before the time period for such assessment expires under paragraph (1).

“(B) IMPROPERLY CLAIMED ERTC WAGES.—For purposes of this paragraph, the term ‘improperly claimed ERTC wages’ means, with respect to an assessment attributable to a credit claimed under this section, the wages with respect to which a deduction would not have been allowed if the portion of the credit to which such assessment relates had been properly claimed.”.

(2) APPLICATION TO CARES ACT CREDIT.—Section 2301 of the CARES Act is amended by adding at the end the following new subsection:

“(o) EXTENSION OF LIMITATION ON ASSESSMENT.—

“(1) IN GENERAL.—Notwithstanding section 6501 of the Internal Revenue Code of 1986, the limitation on the time period for the assessment of any amount attributable to a credit claimed under this

1 section shall not expire before the date that is 6
2 years after the latest of—

3 “(A) the date on which the original return
4 which includes the calendar quarter with re-
5 spect to which such credit is determined is filed,

6 “(B) the date on which such return is
7 treated as filed under section 6501(b)(2) of
8 such Code, or

9 “(C) the date on which the claim for credit
10 or refund with respect to such credit is made.

11 “(2) DEDUCTION FOR WAGES TAKEN INTO AC-
12 COUNT IN DETERMINING IMPROPERLY CLAIMED
13 CREDIT.—

14 “(A) IN GENERAL.—Notwithstanding sec-
15 tion 6511 of such Code, in the case of an as-
16 sessment attributable to a credit claimed under
17 this section, the limitation on the time period
18 for credit or refund of any amount attributable
19 to a deduction for improperly claimed ERTC
20 wages shall not expire before the time period
21 for such assessment expires under paragraph
22 (1).

23 “(B) IMPROPERLY CLAIMED ERTC
24 WAGES.—For purposes of this paragraph, the
25 term ‘improperly claimed ERTC wages’ means,

1 with respect to an assessment attributable to a
2 credit claimed under this section, the wages
3 with respect to which a deduction would not
4 have been allowed if the portion of the credit to
5 which such assessment relates had been prop-
6 erly claimed.”.

7 (j) EFFECTIVE DATES.—

8 (1) IN GENERAL.—Except as otherwise pro-
9 vided in this subsection, the provisions of this sec-
10 tion shall apply to aid, assistance, and advice pro-
11 vided after March 12, 2020.

12 (2) DUE DILIGENCE REQUIREMENTS.—Sub-
13 sections (b) and (c) shall apply to aid, assistance,
14 and advice provided after the date of the enactment
15 of this Act.

16 (3) LIMITATION ON CREDIT AND REFUND OF
17 COVID-RELATED EMPLOYEE RETENTION TAX CRED-
18 ITS.—Subsection (h) shall apply to credits and re-
19 funds allowed or made after January 31, 2024.

20 (4) AMENDMENTS TO EXTEND LIMITATION ON
21 ASSESSMENT.—The amendments made by subsection
22 (i) shall apply to assessments made after the date of
23 the enactment of this Act.

24 (k) TRANSITION RULE WITH RESPECT TO REQUIRE-
25 MENTS TO DISCLOSE INFORMATION, MAINTAIN CLIENT

1 LISTS, ETC.—Any return under section 6111 of the Inter-
2 nal Revenue Code of 1986, or list under section 6112 of
3 such Code, required by reason of subsection (d) of this
4 section to be filed or maintained, respectively, with respect
5 to any aid, assistance, or advice provided by a COVID-
6 ERTC promoter with respect to a COVID-ERTC docu-
7 ment before the date of the enactment of this Act, shall
8 not be required to be so filed or maintained (with respect
9 to such aid, assistance or advice) before the date which
10 is 90 days after such date.

11 (l) PROVISIONS NOT TO BE CONSTRUED TO CREATE
12 NEGATIVE INFERENCES.—

13 (1) NO INFERENCE WITH RESPECT TO APPLICA-
14 TION OF KNOWLEDGE REQUIREMENT TO PRE-EN-
15 ACTMENT CONDUCT OF COVID-ERTC PROMOTERS,
16 ETC.—Subsection (b) shall not be construed to cre-
17 ate any inference with respect to the proper applica-
18 tion of section 6701(a)(3) of the Internal Revenue
19 Code of 1986 with respect to any aid, assistance, or
20 advice provided by any COVID-ERTC promoter on
21 or before the date of the enactment of this Act (or
22 with respect to any other aid, assistance, or advice
23 to which such subsection does not apply).

24 (2) REQUIREMENTS TO DISCLOSE INFORMA-
25 TION, MAINTAIN CLIENT LISTS, ETC.—Subsections

1 (d) and (k) shall not be construed to create any in-
2 ference with respect to whether any COVID-related
3 employee retention tax credit is (without regard to
4 subsection (d)) a listed transaction (or reportable
5 transaction) with respect to any COVID-ERTC pro-
6 moter; and, for purposes of subsection (j), a return
7 or list shall not be treated as required (with respect
8 to such aid, assistance, or advice) by reason of sub-
9 section (d) if such return or list would be so re-
10 quired without regard to subsection (d).

11 (m) REGULATIONS.—The Secretary (as defined in
12 subsection (c)(5)) shall issue such regulations or other
13 guidance as may be necessary or appropriate to carry out
14 the purposes of this section (and the amendments made
15 by this section).

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