DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2018 BUDGET PROPOSAL

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

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115TH CONGRESS, 1ST SESSION

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INTRODUCTION

This document,[1] prepared by the staff of the Joint Committee on Taxation ("Joint Committee staff"), provides a description and analysis of certain revenue proposals modifying the Internal Revenue Code of 1986 (the "Code") that are included in the President's fiscal year 2018 budget proposal, "A New Foundation for American Greatness," as submitted to the Congress on May 23, 2017.[2]

The President's May budget proposal provides that details of the Administration's reforms to individual and business taxes, including changes related to the proposed repeal of the Affordable Care Act, will be released at a later date. However, in some instances the budget proposal specifies proposed changes to the Code. For those proposed changes, the Joint Committee staff has prepared the following description and analysis.

This document also contains a reprint of the Joint Committee staff's previously published *Estimated Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2018 Budget Proposal*.

[1] This document may be cited as follows: Joint Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2018 Budget Proposal* (JCX-35-17), July 14, 2017.

[2] See Office of Management and Budget, *Budget of the U.S. Government Fiscal Year 2018: Analytical Perspectives* (H. Doc. 115-3, Vol. III), May 23, 2017, pp. 117-119.

A. Require a Valid Social Security Number to Claim the Child Tax Credit and the Earned Income Credit

Present Law

Earned income credit

Low and moderate-income taxpayers may be eligible for the refundable earned income credit ("EIC"). Eligibility for the EIC is based on the taxpayer's earned income, adjusted gross income, investment income, filing status, and work status in the United States. The amount of the EIC is based on the presence and number of qualifying children in the worker's family, as well as on adjusted gross income and earned income.

The earned income credit generally equals a specified percentage of earned income[3] up to a maximum dollar amount. The maximum amount applies over a certain income range and then diminishes to zero over a specified phaseout range. For taxpayers with earned income (or adjusted gross income ("AGI")), if greater) in excess of the beginning of the phaseout range, the maximum EIC amount is reduced by the phaseout rate multiplied by the amount of earned income (or AGI, if greater) in excess of the beginning of the phaseout range. For taxpayers with earned income (or AGI, if greater) in excess of the end of the phaseout range, no credit is allowed.

An individual is not eligible for the EIC if the aggregate amount of disqualified income of the taxpayer for the taxable year exceeds $3,450 (for 2017). This threshold is indexed for inflation. Disqualified income is the sum of: (1) interest (taxable and tax-exempt); (2) dividends; (3) net rent and royalty income (if greater than zero); (4) capital gains net income; and (5) net passive income (if greater than zero) that is not self-employment income.

The EIC is a refundable credit, meaning that if the amount of the credit exceeds the taxpayer's Federal income tax liability, the excess is payable to the taxpayer as a direct transfer payment.

Child tax credit

An individual may claim a tax credit of $1,000 for each qualifying child under the age of 17. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.

The aggregate amount of allowable child credits is phased out for individuals with income over certain threshold amounts. Specifically, the otherwise allowable aggregate child tax credit ("CTC") amount is reduced by $50 for each $1,000 (or fraction thereof) of modified adjusted gross income ("modified AGI") over $75,000 for single individuals or heads of households, $110,000 for married individuals filing joint returns, and $55,000 for married

[3] Earned income is defined as (1) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income, plus (2) the amount of the individual's net self-employment earnings.

individuals filing separate returns. For purposes of this limitation, modified AGI includes certain otherwise excludable income[4] earned by U.S. citizens or residents living abroad or in certain U.S. territories.

The child tax credit is allowable against both the regular tax and the alternative minimum tax ("AMT"). To the extent the credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the "additional child tax credit") equal to 15 percent of earned income in excess of a threshold dollar amount of $3,000 (the "earned income" formula).

Families with three or more qualifying children may determine the additional child tax credit using the "alternative formula" if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's Social Security taxes exceed the taxpayer's EIC.

As with the EIC, earned income is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings. Unlike the EIC, the additional child tax credit is based on earned income only to the extent it is included in computing taxable income. For example, some ministers' parsonage allowances are considered self-employment income and thus are considered earned income for purposes of computing the EIC, but the allowances are excluded from gross income for individual income tax purposes and thus are not considered earned income for purposes of the additional child tax credit.

Taxpayer identification number requirements

Any individual filing a U.S. tax return is required to state his or her taxpayer identification number on such return. Generally, a taxpayer identification number is the individual's Social Security number ("SSN").[5] However, in the case of an individual who is not eligible to be issued an SSN, but who has a tax filing obligation, the Internal Revenue Service ("IRS") issues an individual taxpayer identification number ("ITIN") for use in connection with the individual's tax filing requirements.[6] An individual who is eligible to receive an SSN may not obtain an ITIN for purposes of his or her tax filing obligations.[7] An ITIN does not provide eligibility to work in the United States or claim Social Security benefits.

Examples of individuals who are not eligible for SSNs, but potentially need ITINs in order to file U.S. returns include a nonresident alien filing a claim for a reduced withholding rate under a U.S. income tax treaty, a nonresident alien required to file a U.S. tax return,[8] an

[4] Sec. 911.

[5] Sec. 6109(a).

[6] Treas. Reg. Sec. 301.6109-1(d)(3)(i).

[7] Treas. Reg. Sec. 301.6109-1(d)(3)(ii).

[8] For instance, in the case of an individual that has income which is effectively connected with a United States trade or business, such as the performance of personal services in the United States.

individual who is a U.S. resident alien under the substantial presence test and who therefore must file a U.S. tax return,[9] a dependent or spouse of the prior two categories of individuals, or a dependent or spouse of a nonresident alien visa holder.

An individual is ineligible for the EIC (but not the child tax credit) if he or she does not include a valid SSN and the qualifying child's valid SSN (and, if married, the spouse's SSN) on his or her tax return. For these purposes, the Code defines an SSN as a Social Security number issued to an individual, other than an SSN issued to an individual solely for the purpose of applying for or receiving federally funded benefits.[10] If an individual fails to provide a correct taxpayer identification number, such omission will be treated as a mathematical or clerical error by the IRS.

A taxpayer who resides with a qualifying child may not claim the EIC with respect to the qualifying child if such child does not have a valid SSN. The taxpayer also is ineligible for the EIC for workers without children because he or she resides with a qualifying child. However, if a taxpayer has two or more qualifying children, some of whom do not have a valid SSN, the taxpayer may claim the EIC based on the number of qualifying children for whom there are valid SSNs.

Description of Proposal

The proposal provides that a taxpayer (including his or her spouse, if married, as well as each child claimed), must have a Social Security number that is valid for employment in the United States (that is, the taxpayer must be a United States citizen, permanent resident, or have a visa that allows him to work temporarily in the United States) in order to claim the CTC or the EIC. Under the proposal, taxpayers who receive Social Security numbers for non-work reasons, such as for purposes of receiving Federal benefits or for any other reason, are not eligible for the CTC or EIC.[11] A taxpayer, spouse, or child who uses an ITIN as his or her identifying number will not be eligible for either of these credits.[12]

The proposal is effective as of the date of enactment.

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[9] Such an individual would have a filing requirement without regard to whether the individual is lawfully present or has work authorization.

[10] Section 205(c)(2)(B)(i)(II) (and that portion of sec. 205(c)(2)(B)(i)(III) relating to it) of the Social Security Act.

[11] The estimated budgetary effect of this proposal can be found at Joint Committee on Taxation, *Estimated Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2018 Budget Proposal*, JCX-31-17 (July 2017), Item A, found in the back of this document.

[12] Under present law, this taxpayer would be eligible for the CTC but not for the EIC.

Analysis

Child tax credit proposal

Proponents of the child tax credit proposal may rely on two independent rationales in support of requiring the use of SSNs to claim the child tax credit.

Work authorization rationale

Proponents may argue that, because the refundable portion of the child tax credit is available only as a percentage of a taxpayer's earned income, a taxpayer should not be entitled to the benefit of the credit if that income was earned without valid work authorization. Because all taxpayers with valid work authorization are eligible to be issued an SSN, the proposal would affect only those taxpayers without valid work authorization.[13] A related argument is that the child tax credit is in essence a welfare program; individuals who use ITINs to file their taxes may be undocumented immigrants, and should not be entitled to Federal welfare programs.[14]

Proponents may point to the fact that the EIC, the only other refundable tax credit in the Code that is calculated based on a taxpayer's earned income, has an SSN requirement. The SSN requirement for the EIC was enacted in 1996,[15] and the legislative history of this addition to the EIC states that "[t]he Congress did not believe that individuals who are not authorized to work in the United States should be able to claim the credit."[16] By requiring an SSN for the child tax credit, Congress would create parity with the EIC, to the extent the child tax credit is calculated based on earned income.[17]

Opponents of the proposal might respond to this argument in a few ways. First, they may point to the fact that, while the refundable child tax credit is based on earned income, the child tax credit, as a general matter for those with positive tax liability, is not. That is to say, a

[13] The proposal's requirement that a taxpayer have an SSN that is valid for work would prevent not only those individuals who file returns with ITINs from claiming the credit, but also those individuals who may have lawfully received an SSN on a work-related visa, but who have since overstayed that visa, from claiming the credit.

[14] As a general matter, the Supplemental Nutrition Assistance Program, nonemergency Medicaid, Supplemental Security Income ("SSI"), and Temporary Assistance for Needy Families ("TANF") are not accessible to undocumented immigrants. However, undocumented immigrants are eligible for emergency Medicaid if they are otherwise eligible for their State's Medicaid program, public health programs providing immunizations and/or treatment of communicable disease symptoms, school breakfast and lunch programs, and every State has opted to provide access to the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"). Undocumented immigrants are also allowed certain other short-term noncash emergency disaster assistance and other in-kind services necessary to protect life and safety.

[15] Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, sec. 451(b).

[16] Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 104th Congress*, (JCS-12-96), December 1996, p. 394.

[17] The Joint Committee staff calculates that, in 2015, of ITIN filers claiming children on their return, 87 percent claimed the refundable child tax credit.

taxpayer is generally eligible for the child tax credit without regard to the nature of the taxpayer's income, provided he or she meets the requirements for claiming the credit. Given that there is no general requirement of having earned income to claim the child tax credit, opponents may challenge the application of the SSN requirement to the child tax credit writ-large (rather than just the refundable portion of the child tax credit). Other adjustments to tax liability not based on earned income, such as the standard deduction, the deduction for personal exemptions, and the deduction for home mortgage interest, do not require the taxpayer to have an SSN. In that sense, requiring an SSN in the case of the nonrefundable portion of the child tax credit is incongruous with the rest of the Code.

Additionally, opponents of the proposal may object to the policy underlying both the proposal and the present-law SSN requirement for the EIC. They may point to the fact that individuals who are working in the United States without authorization have a tax filing obligation like all taxpayers with U.S. source income. Denying such individuals the child tax credit would increase their overall tax liability, creating an inequity between them and otherwise similarly situated taxpayers. A significant number of unauthorized workers pay Social Security taxes, and may never receive Social Security benefits.[18] This existing horizontal inequity would be further exacerbated by a denial of the child tax credit.

Furthermore, opponents may argue that denying undocumented workers the child tax credit could cause such individuals to owe additional amounts to the Federal government upon filing tax returns. This may deter such individuals from meeting their tax filing obligations, especially if they did not have the cash to pay the resulting tax liability. Because, when applying for an immigration benefit or defending against deportation, filing taxes may be a means by which an individual can demonstrate "good moral character," opponents of the proposal may argue that the Congress should not further deter those who have worked illegally from filing.

Finally, opponents of the proposal may question why the proposal requires that both spouses must have an SSN in order to claim the child tax credit. For instance, it is possible that one spouse may have work authorization (and accordingly, a valid SSN), while the other spouse may simply be accompanying that spouse (and may possibly not be eligible for work authorization, although lawfully present).[19] Alternatively, one spouse may have work authorization (and a valid SSN) and may reside in the United States with one or more children, while the other spouse may be resident abroad. The U.S. taxpayer must file as a married

[18] The Joint Committee staff calculates that for tax year 2010, individuals filing returns where the filer (and spouse, if applicable) were associated with ITINs (*i.e.*, excluding returns that contained an SSN for one spouse and an ITIN for the other spouse), reported wages approximating $60 billion. Accounting for both the employee and employer-share of FICA taxes, this yields approximately $7.4 billion in Social Security taxes paid by such individuals in 2010. Because the data excludes returns containing both an SSN and an ITIN, this figure can safely be viewed as a lower-bound.

[19] For instance, if the spouse is present in the United States on an F-2 visa (accompanying a spouse present on an F-1 student visa), such spouse would not be eligible to receive an SSN. Similarly, a child accompanying the spouse would generally have the same visa classification as the spouse.

taxpayer; this taxpayer would not be able to claim the child tax credit unless the nonresident spouse was issued an SSN.

ITIN fraud rationale

Proponents of the proposal may point to evidence of the use of ITINs on fraudulent tax returns. For instance, the Treasury Inspector General for Tax Administration ("TIGTA"), in its review of 2011 tax filings, identified over 141,000 individual tax returns that had the characteristics of IRS-confirmed identity theft tax returns. TIGTA concluded that these returns resulted in approximately $385 million in potentially fraudulent tax refunds.[20] By preventing the child tax credit from being claimed for a taxpayer or child without an SSN, Congress would significantly reduce the value of a fraudulently obtained ITIN.

Opponents might argue that there have been significant programmatic and legislative changes regarding the issuance of ITINs since TIGTA's review of the 2011 tax filings, rendering ITINs less susceptible to fraud. Under a policy announced in November 2012 for ITINs issued on or after January 1, 2013, ITINs would automatically expire after five years of the issuance date.[21] That is, a taxpayer would be required to reapply for a new ITIN after five years if he or she still needed the ITIN for tax filing purposes. On June 30, 2014, the IRS announced that it was revising this policy. Under the revised policy, ITINs would be deactivated only if the ITIN was not used during any tax year for a period of five consecutive years.[22]

Responding to the IRS's reversal of its ITIN deactivation policy, in December 2015 Congress enacted changes to the ITIN program, designed to reduce the number of outstanding fraudulent ITINs and to provide for changes in ITIN issuance procedures.[23] Under that legislation, ITINs issued after December 31, 2012 expire if not used on a Federal income tax return for a period of three consecutive taxable years.[24] For ITINs issued prior to 2013, Congress established a schedule whereby all such ITINs would be phased out of circulation, providing that ITINs would be invalid as of the applicable date, in accordance with the following schedule:[25]

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[20] Treasury Inspector General For Tax Administration, Detection Has Improved; However, Identity Theft Continues To Result In Billions Of Dollars In Potentially Fraudulent Tax Refunds, Ref. No. 2013-40-122, (September 20, 2013). Available at https://www.treasury.gov/tigta/auditreports/2013reports/201340122fr.pdf.

[21] IR-2012-98 (Nov. 29, 2012), available at https://www.irs.gov/uac/Newsroom/IRS-Strengthens-Integrity-of-ITIN-System;-Revised-Application-Procedures-in-Effect-for-Upcoming-Filing-Season.

[22] IR-2014-76 (June 30, 2014), available at https://www.irs.gov/uac/Newsroom/Unused-ITINS-to-Expire-After-Five-Years%3B-New-Uniform-Policy-Eases-Burden-on-Taxpayers,-Protects-ITIN-Integrity.

[23] Protecting Americans From Tax Hikes Act of 2015 ("PATH Act"), Pub. L. No. 114-113.

[24] Sec. 6109(i)(3)(A).

[25] Sec. 6109(i)(3)(B).

Year ITIN Issued	Applicable Date
Pre-2008	January 1, 2017
2008	January 1, 2018
2009 or 2010	January 1, 2019
2011 or 2012	January 1, 2020

Opponents of the proposal may thus point to the enactment of the PATH Act as obviating any need to limit further the use of ITINs as a fraud prevention method, as ITINs are now being issued with a more stringent application procedure, and older ITINs are being invalidated.

Earned income credit proposal

Under present law, a taxpayer may not claim the EIC using an SSN that was issued solely for the purpose of claiming Federal benefits. Prior to 2003, the Social Security Administration issued SSNs to individuals for reasons other than work authorization and claiming Federally funded benefits, such as to enable the recipient to apply for a State driver's license. Because such an SSN was not issued solely for the purpose of claiming Federal benefits, taxpayers who use such SSNs as their taxpayer identification number are not explicitly forbidden from claiming the EIC under present law.

The proposal would require any taxpayer claiming the EIC to have an SSN granting the taxpayer valid work authorization (*i.e.*, an SSN issued to an individual for any reason other than work authorization would no longer be a valid taxpayer identification number for purposes of claiming the EIC). Proponents of the proposal may argue that this is consistent with the underlying rationale of limiting the EIC to those taxpayers with an SSN, namely that the credit should be limited to those who are authorized to work in the United States.

Beginning in 2003, the Social Security Administration significantly curtailed issuance of SSNs for purposes other than work authorization and receiving Federally funded benefits, resulting in a gradual decline in the number of these SSNs outstanding, especially among children. Therefore, this proposal's revenue effect declines gradually throughout the budget window, because many individuals who may have received such SSNs are no longer able to be claimed as dependents on their parents' returns, and the number of working individuals with the SSNs in question declines over time.

B. Increase Oversight of Paid Tax Return Preparers

Present Law

Tax return preparers under the Internal Revenue Code

The Code broadly defines the term "tax return preparer" as any person who prepares for compensation, or who employs other people to prepare for compensation, all or a substantial portion of a tax return or claim for refund.[26] A person is considered a tax return preparer when the person prepares a substantial portion of a return, regardless of whether he or she signs the return.[27] There are no specific educational or professional credentials required to be subject to the rules applicable to tax return preparers.[28] Persons whose duties are merely mechanical or clerical (such as keying in data, typing schedules, printing, or producing copies) are excepted from the definition of tax return preparers, as are IRS officials acting in the course of their official duties and certain volunteers.

Tax return preparers under Treasury regulations

Neither the Code nor the related Treasury regulations require paid tax return preparers to meet any qualifications or competency standards before preparing tax returns or claims for refund.[29]

Title 31 authorizes the Secretary to regulate the practice of representatives before the Treasury.[30] Under this authority, the Treasury Department has issued regulations published in Title 31 of the Code of Federal Regulations, and reprinted as Treasury Department Circular No. 230 ("Circular 230"). Circular 230 provides that only attorneys, CPAs, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and certain other specified individuals who meet certain requirements may practice before the IRS.[31] Circular 230 authorizes the Director of the Office of Professional Responsibility to act on applications for enrollment to practice before the IRS, to make inquiries with respect to matters under the Director's jurisdiction, to institute and

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[26] Sec. 7701(a)(36)(A); Treas. Reg. sec. 301.7701-15(a).

[27] Treas. Reg. sec. 301.7701-15(b).

[28] Treas. Reg. sec. 301.7701-15(d).

[29] However, these tax return preparers may be subject to State educational or testing (or both) requirements if they practice in States that regulate tax return preparers as do California, Maryland, New York, and Oregon. See IRS Publication 4832, *Return Preparer Review*, December 2009, p. 18.

[30] 31 C.F.R. Part 10 (Rev. 6-2014).

[31] Circular 230 defines practice before the IRS to include all matters connected with a presentation before the IRS (or any of its officers or employees) relating to a taxpayer's rights, privileges or liabilities under laws or regulations administered by the IRS. This definition includes corresponding and communicating with the IRS, preparing and filing documents, and representing clients at hearings, conferences and meetings. Circular 230, sec. 10.2(a)(4).

provide for the conduct of disciplinary proceedings relating to practitioners and appraisers, and to perform such other duties as necessary to carry out those functions.[32]

Prior to 2011, Circular 230 did not apply to an individual tax return preparer unless that person was an attorney, CPA, enrolled agent, enrolled actuary, enrolled retirement plan agent, or other type of practitioner defined in Circular 230. Thus, any individual could prepare tax returns and claims for refund without meeting the qualifications and competency standards provided in Circular 230. In June 2009, the IRS initiated a review of tax return preparers to determine how to ensure consistent standards of conduct for all tax return preparers and to increase taxpayer compliance. During this process, the IRS received input from the public and provided its findings in a report recommending increased oversight of the tax return preparer industry through regulations.[33]

In 2011, the IRS implemented its recommendations by issuing regulations under Circular 230 to regulate paid tax return preparers who were previously not covered.[34] These regulations provide that only attorneys, CPAs, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and a new category, registered tax return preparers, may prepare tax returns for compensation.[35] Moreover, the regulations provide that any individual who is compensated for preparing or assisting with the preparation of all or substantially all of a tax return or refund claim is a practitioner appearing before the IRS, and therefore, subject to Circular 230 requirements, and subject to sanction for violating the requirements.[36] As a result, the regulations provide that any individual who prepares a tax return for compensation and who is not an attorney, CPA, or enrolled agent must obtain registered tax return preparer status.[37] A

[32] Circular 230, sec. 10.1.

[33] IRS Publication 4832, *Return Preparer Review*, December 2009.

[34] T.D. 9527, Fed. Reg. 32286, Vol. 76, No. 107, June 3, 2011. The regulations include a definition of "tax return preparer" that is consistent with the use of that term in the Code. The regulations also require all preparers to obtain a "preparer tax identification number" ("PTIN") and to use such number on all returns with respect to which the person is considered a tax return preparer. The use of a preparer tax identification number was specifically authorized in section 6109(a)(4), which provides that such number must be included on all returns or claims for refund, when required by regulations prescribed by the Secretary.

[35] Circular 230, sec. 10.8(a). Though these regulations remain, they were found to be invalid by the courts (as discussed below) and therefore were never implemented by the IRS. Rev. Proc. 2014-42, 2014-2 C.B. 192, July 14, 2014 (stating that these regulations are not in effect).

[36] Circular 230, sec. 10.8(a) and (c). In addition, if an individual who is subject to sanction under Circular 230 acts on behalf of an employer, firm, or other entity, that employer, firm, or other entity is subject to sanction if it knew or reasonably should have known of actionable conduct. Circular 230, sec. 10.50(c)(1)(ii).

[37] Any individual who is not an attorney, CPA, enrolled agent, or registered tax return preparer who prepares (or assists in preparing) returns or refund claims or any documents pertaining to any person's tax liability for submission to the IRS (or substantially all of the returns or claims, or a substantial portion of a document) for compensation is subject to Circular 230 rules and sanctions. Accordingly, even though such an individual is not authorized to prepare returns for compensation, he or she becomes subject to Circular 230 rules by reason of preparing returns for compensation. Circular 230, sec. 10.8(a), (c). The IRS has determined that individuals who are not attorneys, CPAs or enrolled agents may prepare and sign for compensation tax returns other than a Form

registered tax return preparer is any individual designated as such under Circular 230 who is not under suspension or disbarment from practice before the IRS.

The regulations require an individual who seeks to be a registered tax return preparer to pass a competency exam or otherwise satisfy standards prescribed by the IRS,[38] to attend continuing education courses,[39] to pass a compliance and suitability check,[40] and to possess a valid tax identification number ("PTIN") or other such number prescribed by the IRS in forms, instructions, or other guidance.[41]

Since 2011, however, the U.S. District Court for the District of Columbia in *Loving I* (and the U.S. Court of Appeals for the District of Columbia Circuit affirming on appeal in *Loving II*) has enjoined the Secretary of the Treasury from implementing these regulations on the grounds that the Secretary's authority to regulate practitioners is insufficient to permit regulation of paid tax return preparers whose practice is limited to return preparation.[42] These cases do not affect the requirement separately found under the Code and the regulations thereunder to possess a valid PTIN.[43]

Court cases related to application of Circular 230 to tax return preparers

In *Loving I*, the U.S. District Court for the District of Columbia was asked to determine if under the Supreme Court's two-step analysis in *Chevron*,[44] the Department of the Treasury

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1040, U.S. Individual Income Tax Return, without having to pass a competency exam or take continuing education. See Notice 2011-6, 2011-3 I.R.B. 315. These individuals may obtain a PTIN, sign the returns they prepare, and may represent the taxpayer before the IRS with respect to a return they signed. They may not represent themselves to the public or to the IRS as a registered tax return preparer or a Circular 230 practitioner, but by preparing a tax return they become subject to the rules and sanctions in Circular 230.

[38] See Notice 2011-6, 2011-3 I.R.B. 315; Circular 230, sec. 10.4(c).

[39] See Circular 230, sec. 10.6(f).

[40] See Circular 230, sec. 10.5(d). See also Circular 23, secs. 10.6 and 10.9 (requiring registered tax return preparers, enrolled agents, and enrolled retirement plan agents to take continuing education to satisfy renewal requirements).

[41] Circular 230, sec. 10.4(c).

[42] *Loving v. I.R.S.*, 917 F.Supp.2d 67 (D.D.C. 2013), (*Loving I)*, modified by *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014), (*Loving II*).

[43] Post *Loving I* and *Loving II*, preparers who were previously required to seek registered tax return preparer status are still required to obtain a PTIN under the authority of section 6109 of the Code and can prepare returns and appear before the IRS in connection with returns they have prepared. See Notice 2011-6, 2011-3 I.R.B. 315.

[44] The Supreme Court stated that ". . . legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984).

exceeded its statutory authority under Title 31 of the U.S. Code.[45] The Court held that the general authority of the Secretary to regulate conduct before the Department of the Treasury did not include tax return preparation within its scope.[46] The Court entered a preliminary injunction against enforcement of Circular 230 with respect to paid tax return preparers unless the paid tax return preparer is representing the taxpayer during an examination.

In *Loving II*, the U.S. Court of Appeals for the D.C. Circuit affirmed the judgment of the District Court after reviewing the decision *de novo*. The court rejected the IRS's argument that a paid tax return preparer is a "representative," citing the paid tax return preparer's lack of authority to legally bind the taxpayer. Additionally, the court rejected the IRS's argument that the meaning of "presenting a case" is irrelevant as scope of the statute is not so limited. The court ruled that the statute's granting of authority to regulate those that "practice… before the Department of the Treasury" could not be construed to encompass the preparing and signing of tax returns, and as such, "practice" only includes traditional adversarial proceedings.[47]

As a result of *Loving I* and *Loving II*, the IRS is enjoined from requiring attendance or collecting fees with respect to the testing and education programs of return preparers, and imposing penalties for failure to participate. Additionally, the plaintiffs in *Loving I* and *II* did not object to the IRS further regulating paid tax return preparers that represent taxpayers during an examination, and the court explicitly excluded such paid tax return preparers from its judgment.

In another case, *Brannen*, the Court of Appeals for the 11th Circuit determined the IRS's PTIN program along with the required user fee to be lawful.[48] On a yearly basis, all paid tax return preparers were required under this program to register with the IRS to obtain a PTIN. However, the U.S. District Court for the District of Columbia subsequently held that the IRS had no authority to impose user fees to obtain a PTIN.[49] In so holding, the court determined allowing the imposition of user fees would be equivalent to imposing a regulatory licensing

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[45] The first step of the *Chevron* analysis is to ask whether the intent of Congress is clear or ambiguous. If the intent of Congress is ambiguous, the reviewing court proceeds to the second step. The second step is to ask whether the agency's interpretation is a reasonable interpretation of the statute. *Loving I*, p. 8.

[46] *Loving I.*

[47] *Loving II*, p. 12. Using similar reasoning, a district court permanently enjoined the IRS from enforcing the ban in Circular 230 on the use of contingent fee arrangements to compensate preparation of refund claims. Although the plaintiff was a certified public accountant who could be subject to the regulations of Circular 230 generally, the Court held that preparation of refund claims did not constitute practice before Treasury, and thus fees for such services were not subject to regulation by Treasury. *Ridgely v. Lew*, 55 F. Supp. 3d 89 (D.D.C. 2014).

[48] *Brannen v. United States*, 682 F. 3d 1316 (11th Cir. 2012) (holding that the regulation imposing a user fee to obtain a PTIN was correctly established in accordance with section 9701); *Buckley v. United States*, (D.C. Ga. Dec. 4, 2013), 112 AFTR 2d 2013-7255. The District Court in *Buckley* came to a similar conclusion and upheld the IRS's authority to impose a fee on practitioners seeking a PTIN. It also found *Loving* — which at the time was a district court decision — inapplicable because it dealt with the IRS's authority to require competency testing and continuing education requirements for return preparers, which were not at issue in *Buckley*.

[49] The case was a class action representing all individuals and entities who have paid a PTIN. *Adam Steele, et al. v. United States of America*, Case No. 1:14-cv-01523-RCL (June 1, 2017).

scheme and the IRS does not have such authority. The ruling also requires the IRS to refund PTIN fees already paid by preparers. On June 5, 2017, the IRS announced that, as a result of the court's decision, it is immediately suspending PTIN registration and renewal.[50] On June 21, 2017, the IRS reopened its PTIN registration and renewal, but is not charging a user fee.[51] The IRS notes that the court decision upheld the IRS's authority to require the use of a PTIN such that anyone who prepares, or assists in preparing, all or substantially all of a Federal tax return for compensation is required to have a PTIN.[52]

IRS's voluntary approach

The IRS publishes on its website a directory of tax return preparers with PTINs that include a list of attorneys, CPAs, enrolled agents, enrolled actuaries and enrolled retirement plan agents, as well as practitioners who have received a "record of completion."[53] Practitioners can receive a record of completion if they (i) take an annual federal tax filing season refresher course that is administered by an IRS-approved continuing education provider; (ii) pass a test of the material presented during the course; and (iii) complete 18 hours of continuing education from IRS-approved providers.[54] To obtain the record of completion, the practitioner also has to agree to be subject to duties and restrictions relating to practice before the IRS imposed under subpart B and section 10.51 of Circular 230. A practitioner who is not an attorney, a CPA, an enrolled agent, or an enrolled actuary and who does not have a record of completion will not be permitted to represent a taxpayer before the IRS in connection with an examination of a return even though the practitioner prepared and signed the return.

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[50] Available at https://www.irs.gov/tax-professionals/ptin-system-down.

[51] *Ibid*.

[52] Available at https://www.irs.gov/tax-professionals/irs-reopening-preparer-tax-identification-number-ptin-system.

[53] Available at https://irs.treasury.gov/rpo/rpo.jsf.

[54] Rev. Proc. 2014-42, 2014-2 C.B. 192. The AICPA raised concerns with the voluntary program in a letter to the IRS, available at https://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/AICPA-Letter-to-Comm-Koskinen-June-24-2014.pdf. The AICPA sued to enjoin the return registration program and the U.S. District Court for the District of Columbia has held on two occasions that the AICPA lacked standing, most recently in August 2016. *AICPA vs. IRS*, 199 F. Supp. 3d 55 (D.D.C. 2016). The case is currently on appeal in the U.S. Court of Appeals for the D.C. Circuit.

Description of Proposal

The proposal gives the Secretary of the Treasury the authority to regulate all paid tax return preparers.[55] The proposal is effective as of the date of enactment.

Analysis

Tax assessment and collection in the United States depends on the voluntary compliance of taxpayers. In recent years, many taxpayers have sought the advice and assistance of paid tax return preparers to prepare and file their tax returns. The number of individual returns increased from 130 million for tax year 2001 to 147 million for tax year 2013. Fifty-six percent of returns were completed by paid preparers for tax years 2001, 2002, and 2011 through 2013[56] Thus, the competence and professionalism of tax return preparers has an impact on taxpayer compliance.

In recent years, several groups charged with oversight, including the Government Accountability Office ("GAO") and the Treasury Inspector General for Tax Administration ("TIGTA") have identified errors and noncompliance related to the EIC on returns prepared by unlicensed paid practitioners.[57] For its study, the GAO noted that its findings were consistent with its earlier analysis of IRS's National Research Program ("NRP") database from tax years 2006 through 2009 which showed that tax returns prepared by preparers had a higher estimated percent of errors−60 percent−than self-prepared returns−50 percent.[58] A recent IRS research

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[55] The proposal does not specify whether any enacting legislation would amend the Code or Title 31. The estimated budgetary effect of this proposal can be found at Joint Committee on Taxation, *Estimated Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2018 Budget Proposal*, (JCX-31-17), July 2017, Item B, found in the back of this document.

[56] For the total number of returns, see Internal Revenue Service, *Statistics of Income−2014 Individual Income Tax Returns, Publication 1304, August 2016, Table A, All Returns: Selected Income and Tax Items in Current and Constant 1990 Dollars, Tax Years 1990-2014*, available at https://www.irs.gov/uac/soi-tax-stats-individual-time-series-statistical-tables#_grp4. For the number of returns with paid preparer signatures, see Internal Revenue Service, *Statistics of Income−Individual Income Tax Returns, Table 22, Number of Taxpayers Using Paid Preparers, Tax Years 2000-2013*, available at http://www.irs.gov/uac/SOI-Tax-Stats-Historical-Table-22. As the latter number only include tax returns that are signed by paid tax return preparers, it likely underestimate the number of Americans utilizing paid tax return preparers because many tax return preparers fail to sign tax returns, notwithstanding the penalty provided in section 6695(b).

[57] GAO and TIGTA have completed studies that analyzed the accuracy of returns prepared by unenrolled agents. In a study by GAO, two of the 19 tax returns prepared for the GAO showed the correct refund amount. Government Accountability Office, *In a Limited Study, Preparers Made Significant Errors* (GAO-14-467T), April 2014. In a study by TIGTA, 11 of the 28 tax returns prepared for TIGTA showed the correct refund amount. Inspector General for Tax Administration, Department of the Treasury, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors* (TIGTA 2008-40-171), September 2008. GAO conducted an earlier study in 2006 that yielded similar results. Government Accountability Office, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors* (GAO-06-563T), April 4, 2006.

[58] In addition, in a 2002 report, the GAO found that as many as 1.1 million taxpayers who used the services of a paid preparer are likely to have overpaid their taxes because they took the standard deduction instead of itemizing deductions. Government Accountability Office, *Tax Deductions: Further Estimates of Taxpayers Who May Have Overpaid Federal Taxes by Not Itemizing* (GAO-02-509), March 29, 2002.

paper using the NRP estimated that for returns claiming the EIC, unlicensed preparers had the highest error rates and over-claim percentages of all preparer types,[59] which is consistent with previous estimates by the National Taxpayer Advocate.[60]

Those who support new regulation of paid tax return preparers by the Treasury and IRS argue that errors by tax return preparers can be minimized by issuing appropriate standards.[61] They argue that under present law anyone is permitted to prepare a return for compensation, regardless of competence or adherence to ethical or professional standards. In addition, the oversight of tax return preparers as a group is not uniform because it differs based on a number of distinctions, such as whether the preparer is enrolled or unenrolled to practice before the IRS, whether the preparer is a CPA or an attorney, whether the preparer chooses to file electronically, and the jurisdiction in which the preparer practices.[62]

Supporters of regulation of paid tax return preparers point to requirements established in four States as possible models for Federal regulation. In the State of Oregon paid preparers that are not exempt (*i.e.*, attorneys, CPAs, etc.) are required to complete qualifying education courses, pass a state-administered examination, and register to be certified as a licensed tax preparer. In addition, preparers must complete 30 hours of continuing education and re-register in each subsequent year. In the State of California paid preparers that are not exempt are required to complete qualifying education courses and register to be certified as a licensed tax preparer. In addition, preparers must complete 20 hours of continuing education annually.[63] The GAO noted that Oregon's regulations may have led to more accurate Federal tax returns in that State but that

[59] Kara Leibel, Internal Revenue Service, Publication 5161, *Taxpayer Compliance and Sources of Error for the Earned Income Tax Credit Claimed on 2006-2008 Returns*, August 2014, p. 41.

[60] National Taxpayer Advocate, *2002 Annual Report to Congress*, pp. 216-230.

[61] IRS Publication 4832, *Return Preparer Review*, December 2009, p. 18; Senate Committee on Finance Report to Accompany S.1321, the "Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006," S. Rept. No. 109-336, September 15, 2006, p. 8 ("the Committee believes that the IRS's failure to provide more oversight over such tax return preparers contributes to noncompliance. The Committee also believes that tax return preparer regulation will improve the accuracy of tax return preparation and, therefore, will reduce government burden and intrusion on taxpayers through IRS enforcement efforts (such as collection and examinations").

[62] National Taxpayer Advocate, *2013 Annual Report to Congress*, pp. 61-74; National Taxpayer Advocate, *2009 Annual Report to In Congress*, pp. 41-69; National Taxpayer Advocate, *2008 Annual Report to Congress*, p. 503-512; National Taxpayer Advocate, *2006 Annual Report to Congress*, pp. 197-221; National Taxpayer Advocate, *2005 Annual Report to Congress*, pp. 223-237; National Taxpayer Advocate, *2004 Annual Report to* Congress, pp. 67-88; National Taxpayer Advocate, *2003 Annual Report to Congress*, pp. 270-301; National Taxpayer Advocate, *2002 Annual Report to Congress*, pp. 216-230; Fraud in Income Tax Return Preparation: Hearing Before the Subcommittee on Oversight of the H. Comm. on Ways and Means, 109th Cong. (2005) (statement of Nina E. Olson, National Taxpayer Advocate).

[63] IRS Publication 4832, *Return Preparer Review*, December 2009, p. 20.

California's regulations may not have had that effect.[64] In the State of Maryland paid preparers who are not exempted are required to register to be certified as a licensed tax preparer by passing a state-administered examination. In addition, preparers must complete eight hours of continuing education annually and re-register every two years.[65] In the State of New York individuals who prepare a substantial portion of any return for compensation who are not exempt must register to be certified as a licensed tax preparer and must re-register annually.[66] Paid preparers are not subject to qualifying education, continuing education or testing requirements.[67]

Supporters of the proposal further point to the GAO's study that current oversight of paid tax return preparers is challenging.[68] For example, the IRS named return preparer fraud as one of its Dirty Dozen Tax Scams,[69] and investigated paid tax preparers' criminal activity; and referred such criminal activity to the Department of Justice.[70] Due to resource limitations, however, the IRS Criminal Investigation Division is currently able to identify and investigate only the most egregious cases of paid return preparer fraud.[71]

On the other hand, opponents of regulation question whether the regulatory burden placed on return preparers by any particular regulatory scheme outweighs the potential benefits of such regulations.[72] They express concern that some paid tax return preparers will be forced to

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[64] Government Accountability Office, *Tax Preparers: Oregon's Regulatory Regime May Lead to Improved Federal Tax Return Accuracy and Provides a Possible Model for National Regulation* (GAO-08-781), August 15, 2008.

[65] IRS Publication 4832, *Return Preparer Review*, December 2009, pp. 20-21.

[66] *Ibid.*, pp. 21-22.

[67] *Ibid.*, pp. 21-22; Government Accountability Office, *In a Limited Study, Preparers Made Significant Errors* (GAO-14-467T), p. 7, April 2014

[68] Government Accountability Office, *Tax Administration, Most Taxpayers Believe They Benefit from Paid Tax Preparers, but Oversight for IRS is a Challenge* (GAO-04-70), October 2003.

[69] Internal Revenue Service, *IRS Summarizes "Dirty Dozen List of Tax Scams for 2017*, IR-2017-37, February 17, 2017; Internal Revenue Service, *IRS "Dirty Dozen" Series of Tax Scams for 2017 Includes Return Preparer Fraud; Choose Reputable Return Preparers*, IR-2017-23, February 6, 2017; see also Department of Justice, *Justice Department Warns Dishonest Return Preparers Face Criminal Prosecution and Civil Injunction*, April 2017, available at https://www.justice.gov/opa/pr/justice-department-warns-dishonest-return-preparers-face-criminal-prosecution-and-civil.

[70] Internal Revenue Service, *Things to Remember When Choosing a Tax Preparer*, IRS Tax Tip 2017-05, January 30, 2017, available at https://www.irs.gov/uac/things-to-remember-when-choosing-a-tax-preparer.

[71] For example, in fiscal year 2016, the IRS Criminal Investigation Division only initiated 252 investigations. Internal Revenue Service, *Statistical Data − Abusive Return Preparers*, available at https://www.irs.gov/uac/statistical-data-abusive-return-preparers.

[72] American Institute of Certified Public Accountants ("AICPA"), Letter to Chairman Hatch and Ranking Member Wyden, "Chairman's Mark of a Bill to Prevent Identity Theft and Tax Refund Fraud," September 15, 2015, pp. 5-6, available at http://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/2015-09-15-Prevent-ID-Theft-and-Tax-Refund-Fraud-Comment-Letter-FINAL.pdf (AICPA expressed that it has concerns about granting the IRS

either raise their prices or close their businesses due to the burden of complying with regulations and that these effects will be most keenly felt by tax return preparers serving low-income clients.[73] They argue that the real beneficiaries of any regulation are those who generate profit from preparing returns such as large, established companies. Under this argument, some small businesses may be unable to bear the costs of complying with the rules and as a result may close. As a result, opponents argue that regulating preparers will increase the costs for tax preparation for middle and low-income taxpayers as fewer and only costlier choices will survive.

unlimited authority to regulate tax return preparers and requested that the IRS's authority to issue PTINs be limited and that unenrolled PTIN holders who use advertising explain the qualifications of different tax preparers and explain that the IRS does not endorse any particular return preparer); "Regulation of Tax Return Preparers," 2011, p. 12, available at https://www.aicpa.org/InterestAreas/Tax/Resources/IRSPracticeProcedure/DownloadableDocuments/PTIN_article_final.pdf (AICPA questions whether the cost will result in raising the competency and professional standards of unlicensed preparers).

[73] In *Loving*, one of the plaintiffs argued that she would have to increase prices and would likely lose customers. The other two plaintiffs asserted that they would likely be forced to stop preparing tax returns. *Loving v. IRS*, 917 F. Supp.2d 67 (D.D.C. 2013), ("Loving I"), modified by *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), ("Loving II").

C. Provide the IRS With Greater Flexibility to Address Correctable Errors

Present Law

The Federal income tax system relies upon self-reporting and assessment. A taxpayer is expected to prepare a report of his liability[74] and submit it to the Internal Revenue Service ("IRS") with any payment due. The Code provides general authority for the IRS to assess all taxes shown on returns,[75] other than certain Federal unemployment tax and estimated income taxes.[76] The assessment is required to be made by recording the liability in the "office of the Secretary" in a manner determined under regulations.[77] If the IRS determines that the assessment was materially incorrect, additional tax may only be assessed within the applicable limitations period.[78]

The authority to assess additional tax may be subject to certain restrictions on assessment known as the deficiency procedures.[79] A deficiency of tax occurs if the amount of certain taxes[80] assessed for a period, after reduction for any rebates of tax, is less than the liability determined under the Code. If the IRS questions whether the correct tax liability has been assessed against a taxpayer, the IRS generally first informs the taxpayer by letter. Most discrepancies in liability identified by the IRS are resolved through such "correspondence audits." In the case of a correspondence audit, if the taxpayer does not comply after receipt of the initial letter, an examining agent reviews the return and any additional information provided by the taxpayer and determines whether an adjustment in tax is required. The determination by the examining agent that an adjustment to the return is required results in a notice to the taxpayer that provides an opportunity for the taxpayer to invoke rights to an administrative appeal or to agree to the adjustments within 30 days. If the taxpayer disputes the adjustments and invokes appeal rights, the case is referred to an independent administrative appeals officer for review. In most administrative appeals, the taxpayer and the IRS agree on the merit or lack of merit of the adjustments proposed. If the parties do not reach agreement administratively or the taxpayer did not invoke administrative appeal rights, the IRS must issue a formal notice of deficiency to a taxpayer,[81] which begins a period within which a taxpayer may petition the U.S. Tax Court.

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[74] Sec. 6011 and 6012.

[75] See section 6201(a), which authorizes assessment of tax computed by the taxpayer as well as amounts computed by the IRS at the election of the taxpayer, under section 6014.

[76] Sec. 6201(b).

[77] Sec. 6203.

[78] Sec. 6204.

[79] Secs. 6211 through 6215.

[80] The taxes to which deficiency procedures apply are income, estate and gift, and excise taxes arising under chapters 41, 42, or 44. Secs. 6211 and 6213.

[81] Sec. 6212.

During that period, as well as during the pendency of any proceeding in Tax Court, assessment of the deficiency is not permitted.[82]

There are several exceptions to the restrictions on assessment of taxes that are generally subject to the deficiency procedures.[83] One of the principal exceptions is the authority to make a summary assessment of tax without issuance of a notice of deficiency if the tax is a result of a mathematical or clerical error, generally referred to as math error authority. Purely mathematical or clerical issues are often identified early in the processing of a return, prior to issuance of any refund; they are not typically uncovered as a result of a deficiency procedure examination of a return.

If the mistake on the return is of a type that is within the meaning of mathematical or clerical error, the IRS assesses the additional tax due as a result of correcting the mistake and sends notice of the math error to the taxpayer. The issuance of a notice of math error begins a 60-day period within which a taxpayer may submit a request for abatement of the math error adjustment, which then requires the IRS to abate the assessment and refer the unresolved issue for examination under the deficiency procedures.

This exception to the restriction on assessment originally was limited to mathematical errors, was expanded to include clerical or transcription errors, and then was further expanded to address various specific cases, to reach the 17 categories of errors within the scope of the exception.[84] Many issues covered by the math error authority relate to rules regarding refundable credits.[85] Math error authority is used to deny a claimed credit, either during initial processing of a return on which the credit is claimed or in an examination of the return after the refund has been issued, and immediately assess any additional tax due as a result without issuing a notice of deficiency first. For example, in 2015, the math error authority was expanded to cover situations for which: (1) a taxpayer claimed the earned income credit, child tax credit, or the American opportunity tax credit ("AOTC") during the period in which a taxpayer is not permitted to claim such credit as a consequence of having made a prior fraudulent or reckless claim; and (2) there

[82] Sec. 6213(a). If a taxpayer wishes to contest the merits in a different court, the taxpayer may agree to assessment of the tax, reserving his or her rights to contest the merits, pay the disputed amount, and pursue a claim for refund reviewable in a suit in Federal district court or Court of Federal Claims.

[83] Section 6213 provides that a taxpayer may waive the restrictions on assessment, permits immediate assessment to reflect payments of tax remitted to the IRS and to correct amounts credited or applied as a result of claims for carrybacks under section 1341(b), and requires assessment of amounts ordered as criminal restitution. Assessment is also permitted in certain circumstances in which collection of the tax would be in jeopardy. Sections 6851, 6852 or 6861.

[84] Secs. 6213(g)(2)(A) through (Q).

[85] Math error authority currently applies to certain errors related to the earned income credit, the child tax credit, and the American opportunity tax credit.

was an omission of information required by the Secretary relating to a taxpayer making improper prior claims of the child tax credit or the AOTC.[86]

Description of Proposal

The proposal expands IRS authority to assess tax, notwithstanding the restrictions on assessments, to include cases where: (1) the information provided by the taxpayer does not match the information contained in government databases; (2) the taxpayer has exceeded the lifetime limit for claiming a deduction or credit; or (3) the taxpayer has failed to include with his or her return, certain documentation that is required by statute.[87] The proposal is to be effective upon date of enactment.

Analysis

The proposal presents the issue of how to balance the need for efficient allocation of government resources with the need for adequate taxpayer safeguards. Under current law, the IRS has the authority to correct math or clerical errors, *i.e.*, arithmetic mistakes, on a return using summary assessment procedures. When it makes such a summary assessment, taxpayers cannot obtain judicial review before satisfying the proposed tax liability, unless they respond to an IRS math error notice requesting an abatement.[88]

The efficiency argument reasons that by avoiding time-consuming examination and possible judicial review of issues that are readily identified mistakes (*e.g.*, transposition of numbers, addition errors) that a taxpayer cannot reasonably challenge, the IRS conserves its resources. At the same time, the proposal arguably threatens taxpayer safeguards in that the expansion of the summary assessment authority in two of the three cases specified − discrepancies between returns and government databases and failure to provide statutorily required documentation − is potentially overbroad and may lead to assessment of tax in cases where tax is not due.

First, it is not clear from the proposal that all governmental databases may be considered sufficiently reliable to warrant a conclusion that a mismatch between a database and information on a return is a case that should be added to math error authority. The premise that a discrepancy between information in a government database and a return is adequate grounds on which to permit a summary assessment is contrary to other provisions in the Code that suggest that the

[86] Secs. 6213(g)(2)(K), (P), and (Q). Pub. L. No. 114-113, Div. Q, sec. 208.

[87] The estimated budgetary effect of this proposal can be found at Joint Committee on Taxation, *Estimated Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2018 Budget Proposal*, (JCX-31-17), July 2017, Item C, found in the back of this document.

[88] Sec. 6213(b)(2).

mere inclusion of information in a government database is insufficient to support a potential adjustment to a return.[89]

Next, failure to provide statutorily required documentation underlies several of the exceptions to the present-law deficiency procedures, all of which are now tied to specific credits or deductions. As such, it is unclear what is intended in the proposal by "certain documentation that is required by statute," but it could extend to all required documentation. With such a potentially broad definition, unintended consequences are possible. For example, if adequate guidance is not provided to IRS employees regarding all instances of required documentation, mistakes may be made in determining whether documentation is required.

The expanded scope of math error assessment authority and the manner in which it is used by the IRS has generated discussion among oversight agencies, both for and against further expansion of math error authority. The National Taxpayer Advocate identifies improper use of math error authority as one of the most serious problems in tax administration,[90] and proposes legislative restrictions on its use.[91] The National Taxpayer Advocate also notes that the current IRS' math error notices do not provide a clear explanation of the alleged error, such that it is difficult for taxpayers to determine what the IRS is proposing to change on their returns and whether they should accept the adjustment or request a correction.[92] By contrast, the Government Accountability Office focuses on the need to avoid erroneous issuance of refunds and proposes that math error authority be expanded to permit better administration of refundable credits.[93]

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[89] See section 6201(d), which requires reasonable verification of information returns in any Court proceeding if a taxpayer asserts a reasonable dispute with respect to any item of income on an information return.

[90] National Taxpayer Advocate, *2014 Annual Report to Congress*, vol. 1, pp. 163-171 (Most Serious Problem No. 16: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights); National Taxpayer Advocate, *2011 Annual Report to Congress*, vol. 1, pp. 74-92 (Most Serious Problem No. 4: Expansion of Math Error Authority and Lack of Notice Clarity Create Unnecessary Burden and Jeopardize Taxpayer Rights).

[91] National Taxpayer Advocate, *2015 Annual Report to Congress*, pp. 329-339 (Legislative Recommendation No. 2: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances) (arguing that Congress should consider expanding math error only in one of the situations described in the Administration's proposal which is where there is no doubt that the taxpayer has claimed amounts in excess of a lifetime limitation based on information shown on the return as could be the case with the American opportunity tax credit); National Taxpayer Advocate, *2011 Annual Report to Congress*, vol. 1, pp. 524-530 (Legislative Recommendation No. 3: Mandate that the IRS, In Conjunction with the National Taxpayer Advocate, Review Proposed Expanded Math Error Authority to Protect Taxpayer Rights).

[92] Statement of Nina E. Olson, National Taxpayer Advocate, Oversight Subcommittee of the House Committee on Ways and Means, "IRS Reform: Perspectives from the National Taxpayer Advocate," May 19, 2017, available at https://www.irs.gov/pub/tas/nta_written_testimony_irs_reform_nta_perspectives_5_19_2017.pdf.

[93] Government Accountability Office, *IRS Dealt with Challenges to Date, but Needs Additional Authority to Verify Compliance* (GAO 11-481), March 2011. In testimony before the Oversight Subcommittee of the House Committee on Ways and Means, GAO recommended that the IRS be provided math error authority to use prior years' tax return information to ensure that taxpayers do not improperly claim credits or deduction in excess of applicable lifetime limits. Statement of Michael Brostek, Director Strategic Issues, Government Accountability

The National Taxpayer Advocate proposes four factors be weighed before an issue is added to the list for which math error authority is permitted: The issue is not factually complex; the adjustment can be determinable by reference to a reliable government database; no analysis of facts and circumstances is required; and there is not an historically high abatement rate with respect to the issue.[94] Some may say that the first three factors proposed by the National Taxpayer Advocate can be condensed into one − the adjustment should be clearly supported by highly credible information that is not subject to misinterpretation or ambiguity. Based on these factors, the National Taxpayer Advocate supports expansion similar to that advocated by GAO, in order to enforce lifetime limits on the HOPE scholarship credit under section 25A and the residential energy credit, because the data relied upon to adjust the credit would be IRS records of the prior returns filed by the taxpayer claiming the credit.[95]

The opposing viewpoints for and against expansion of math error authority can be understood as different evaluations of where the balance lies between efficiency gains and possible curtailment of taxpayer protections. The increasing number and complexity of refundable credits and the constraints on IRS access to information needed to verify eligibility for such refunds at the time the return is filed has led to issuance of erroneous refunds, which are difficult to recover. The need to issue refunds promptly in order to avoid paying interest on the refund[96] adds to the pressure to resolve questions during processing in favor of issuing a refund during the filing season.

Recent law changes accelerating the due date of information returns and delaying the refund date for the earned income credit and the additional child tax credit may ease some of this pressure.[97] First, the filing of information on wages reportable on Form W-2 and nonemployee compensation is now due by January 31, generally the same date as the due date for employee and payee statements. Nonemployee compensation generally includes fees for professional services, commissions, awards, travel expense reimbursements, or other forms of payments for

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Office, Oversight Subcommittee of the House Committee on Ways and Means, "Enhanced Prerefund Compliance Checks Could Yield Significant Benefits," (GAO-11-691T), May 25, 2011, available at https://waysandmeans.house.gov/UploadedFiles/Brostek_Testimony.pdf.

[94] The Taxpayer Advocate makes these recommendations in her 2015, 2014, and 2011 reports. National Taxpayer Advocate, 2015 Annual Report to Congress, vol. 1, pp. 329-339 (Legislative Recommendation No. 2: Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctible Errors Only in Appropriate Circumstances); National Taxpayer Advocate, *2014 Annual Report to Congress*, vol. 1, pp. 275-310, 284 (Legislative Recommendation No. 1: Taxpayer Rights: Codify Taxpayer Bill of Rights and Enact Legislation that Provides Specific Taxpayer Protections); *2011 Annual Report to Congress*, vol. 1, pp. 524-530 (Legislative Recommendation No. 3: Mandate that the IRS, In Conjunction with the National Taxpayer Advocate, Review Proposed Expanded Math Error Authority to Protect Taxpayer Rights).

[95] Government Accountability Office, *IRS Dealt with Challenges to Date, but Needs Additional Authority to Verify Compliance*, (GAO 11-481) March 2011.

[96] Sec. 6611(e) (interest otherwise required to be paid on overpayments of tax does not accrue during a 45-day grace period after a return is filed or deemed filed).

[97] Pub. L. No. 114-133, Div. Q, sec. 201. Effective for returns and statements relating to calendar years beginning in 2016.

services performed for the payor's trade or business by someone other than in the capacity of an employee. Next, no credit or refund for an overpayment for a taxable year is to be made prior to February 15th of the year following the calendar year to which the taxes relate, if the taxpayer claimed the earned income credit or the additional child tax credit on the tax return.[98] These recent law changes may result in IRS access to documents that are sufficiently clear to identify those cases in which questions are appropriate, but not necessarily so clear-cut that summary assessment authority is appropriate.

Prior to the law change, most information returns were not available to the IRS until late in the filing season. As a result, in many cases, errors on returns were readily flagged by document matching programs only after the refunds have been issued. How and when to determine whether the issues flagged by matching programs are suitable for assessment without need for examination presents a number of difficult policy choices. The documents used in the various document matching programs are information returns submitted by third parties, including other governmental agencies as well as private entities.[99] Some sources of information returns are more reliable than others, in terms of the accuracy of the preparer of the information returns. Other returns, such as basis reporting (Form 1099-B) or reporting by schools on qualified tuition and related expenses (Form 1098-T), capture information that is relevant to but not determinative of the recipient's tax liability. The recent move to require additional documentation with either the income tax return or with the information returns may result in IRS access to documents that are sufficiently clear to identify those cases in which questions are appropriate, but not necessarily so clear-cut that summary assessment authority is appropriate.

As explained above, the restrictions on assessment generally assure a taxpayer access to administrative review and a pre-payment judicial forum (*i.e.*, the U.S. Tax Court) for reviewing disputed adjustments proposed by the IRS. Assessments made in reliance on math error authority bypass those protections unless the taxpayer requests abatement of the assessment within 60 days. The extent to which affected taxpayers understand this relief from the summary assessment is not clear. According to TIGTA, taxpayers seldom challenge math error assessments but those who do generally prevail. Few cases requesting abatement are subsequently referred to examination.[100] These data support the contention that math error authority is efficient and operates without prejudice to rights of taxpayers. Information developed by the National Taxpayer Advocate, however, suggests the contrary. The failure to challenge a math error adjustment may not signify agreement with the adjustment, but may instead be a result of taxpayers' failure to understand and timely exercise their rights. After reviewing numerous examples of explanatory paragraphs included in IRS notices sent to taxpayers to inform them that math error adjustments had been made to their income tax returns, the National Taxpayer Advocate office determined that many were inadequate. Lack of clarity

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[98] Secs. 6071(c) and 6402(m). Pub. L. No. 114-113, Div. Q, sec. 201.

[99] The existence of an information return in the records of the IRS is a basis for an examination, but is not, in itself, sufficient to sustain an adjustment. Reasonable verification of information returns is required. See section 6201(d).

[100] See Treasury Inspector General for Tax Administration, *Some Taxpayer Responses to Math Error Adjustments Were Not Worked Timely and Accurately*, (TIGTA-2011-40-059) July 7, 2011.

in the notices, whether as to the substance of the adjustment or the availability of any means of recourse, may lead the recipient to allow his or her rights to lapse, and should not be equated with agreement with the adjustment.

ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S BUDGET PROPOSAL

JOINT COMMITTEE ON TAXATION
July 10, 2017
JCX-31-17

ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2018 BUDGET PROPOSAL [1]

Fiscal Years 2017 - 2027

[Millions of Dollars]

Provision	Effective	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2017-22	2017-27
A. Require a Valid Social Security Number ("SSN") to the Claim Child Tax Credit ("CTC") and Earned Income Credit ("EIC")														
1. Require a valid SSN to claim the CTC [2]	tyba 12/31/17	---	107	3,594	3,454	3,395	3,316	3,258	3,199	3,151	3,159	3,176	13,866	29,809
2. Require a valid SSN to claim the EIC [2]	tyba 12/31/17	---	7	140	114	91	75	61	50	41	33	27	426	638
B. Increase Oversight of Paid Tax Return Preparers - explicitly provide that the Secretary has authority to regulate all paid return preparers [2]	DOE	[3]	6	12	13	14	15	16	17	18	19	20	60	149
C. Provide the Internal Revenue Service ("IRS") With Greater Flexibility to Address Correctable Errors [2]	DOE	[3]	[3]	28	29	30	30	31	32	33	34	35	116	283
NET TOTAL		**[3]**	**120**	**3,774**	**3,610**	**3,530**	**3,436**	**3,366**	**3,298**	**3,243**	**3,245**	**3,258**	**14,468**	**30,879**

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding. The date of enactment is generally assumed to be August 1, 2017.

Legend for "Effective" column: DOE = date of enactment tyba = taxable years beginning after

[1] This document provides revenue estimates of certain proposals modifying the Internal Revenue Code of 1986 that are included in the President's fiscal year 2018 budget proposal, "A New Foundation For American Greatness," as submitted to the Congress on May 23, 2017. The President's May budget proposal provides that details of the Administration's reforms to individual and business taxes, including changes related to the proposed repeal of the Affordable Care Act, will be released at a later date.

[2] Estimate includes the following outlay effects [4]:	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2017-22	2017-27
Require a valid SSN to claim the CTC	---	---	-3,061	-2,932	-2,867	-2,783	-2,714	-2,644	-2,587	-2,578	-2,577	-11,643	-24,743
Require a valid SSN to claim the EIC	---	-5	-107	-87	-68	-56	-46	-38	-31	-25	-20	-323	-483
Explicitly provide that the Department of Treasury and IRS have authority to regulate all paid return preparers	[5]	-2	-4	-4	-5	-5	-5	-6	-6	-6	-7	-20	-50
Provide the IRS with greater flexibility to address correctable errors	[5]	[5]	-17	-18	-18	-19	-20	-20	-21	-21	-22	-73	-177
Total Outlay Effects	[5]	-7	-3,189	-3,041	-2,958	-2,863	-2,785	-2,708	-2,645	-2,630	-2,626	-12,059	-25,453

[3] Gain of less than $500,000.

[4] The outlay effects are preliminary and subject to change.

[5] Decrease in outlays of less than $500,000.