Unequal Burdens in EITC Compliance

Karie D. Davis-Nozemack, Georgia Institute of Technology
UNEQUAL BURDENS IN EITC COMPLAINCE

*Karie Davis-Nozemack*

ABSTRACT

Lower income means harsher treatment from the government for taxpayers who claim the Earned Income Tax Credit (EITC). EITC claimants are audited more often than any taxpayers other than the very wealthy. More concerning, however, is that the IRS audits EITC claimants by correspondence examination in a manner that unduly burdens access to this refundable tax credit, a credit that often keeps lower income workers out of poverty.

Improper payment law brings increased scrutiny to federal programs that issue erroneous payments. Because the EITC is alleged to have substantial improper payments, it is subject to federal improper payment law, which adds administrative process and burdens in hopes of diminishing erroneous payments. While other scholars have noted the relationship between improper payment law and the EITC, this article takes the unique view that improper payment law, instead of burdening EITC administration, could provide relief to the Service’s onerous EITC compliance methods.

INTRODUCTION

For the last three decades, income disparity within the U.S. has been widening. After the Occupy Wall Street protests, the nation is undoubtedly conscious of this growing disparity. It is unlikely, however, that the nation is conscious of the compliance burden disparity experienced by low and moderate income taxpayers. For taxpayers claiming the earned income tax

---

* Assistant professor of law and ethics at the Georgia Institute of Technology, College of Management. I would like to thank the participants of the Emory Law School’s Critical Tax Policy Conference, the participants of the Southeastern Academy of Legal Studies in Business conference, Professor Dorothy Brown of Emory Law School, and Professor Lucien Dhooge of Georgia Institute of Technology’s College of Management for their thoughtful input on these ideas.


2 Id.
credit (EITC), lower income brings with it harsher treatment by the government.\textsuperscript{5} In chasing increased efficiency while broadening audit coverage, the Internal Revenue Service (Service) has dramatically increased correspondence examinations, nearly tripling their usage since FY 2000.\textsuperscript{4} While sophisticated taxpayers with representation can navigate correspondence examinations with minimal difficulty,\textsuperscript{5} in earned income tax credit (“EITC”) examinations, 98% of taxpayers are unrepresented.\textsuperscript{6} Moreover, successful application for EITC is often complex and can require atypical documentation for nontraditional family living arrangements,\textsuperscript{7} which make EITC compliance ill-suited for the correspondence examination process and results in the Service’s declarations of ineligibility for eligible EITC claimants.\textsuperscript{8} The Service has struggled to successfully administer EITC for 30 years;\textsuperscript{9} however, seeking EITC compliance under

\textsuperscript{3} See infra text accompanying notes 113-230.


\textsuperscript{5} See Leslie Book, The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net, 81 OR. L. REV. 351, 390 (2002) (stating that “[w]hile the Service’s middle income constituency would be able to tackle these tasks, it provides a formidable obstacle for low-income taxpayers.”).

\textsuperscript{6} See NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS, Vol. II at 102 (2007) (stating that “the findings are based on a dataset containing 427,807 taxpayers. Of these returns only 7,688 (1.8 percent) were represented in the original audit.”).

\textsuperscript{7} See Book, IRS’s EITC Compliance Regime, supra note 5, at 369-72, 390-406 (noting complexity as a reason for EITC errors and discussing special circumstances of the working poor and specific barriers to effective EITC compliance action). See also Taxpayer Advocate Report and Low-Income Taxpayer Clinic Program: Hearing Before the Subcomm. on Oversight of the Comm. on Ways & Means, 107th Cong. 4-5 (Jul. 12, 2001) (written statement of Janet Spragens, Professor of Law and Director, Federal Tax Clinic, Washington College of Law, American University) (discussing documentation challenges that EITC taxpayers face).

\textsuperscript{8} See NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, Vol. II at i (stating “This study confirms what many low income taxpayer advocates have maintained for many years – that the manner in which the IRS conducts its audits of low income taxpayers impacts the audit outcomes. One can infer from the study that in many cases – 43 percent of 67,000 FY 2002 audit reconsiderations, or over 28,000 cases – taxpayers were entitled to virtually all of the EITC they claimed. That is, their original audit results did not accurately reflect their eligibility for the EITC. Rather, the audits merely show that the taxpayer flunked the IRS audit process.”).

\textsuperscript{9} See Gene Steuerle, Economic Perspective: Research Required for the EITC
the correspondence examination procedures is not a good answer. Administering the EITC in this manner burdens benefit distribution to low-income taxpayers.10

This is true particularly when the Service fails to offer basic support services for EITC correspondence exams. For example, the Service only answers approximately 70% of taxpayer phone calls it receives.11 Callers to the EITC phone line may find a phone line that is not staffed, and, for those who leave a voicemail message, anecdotal evidence suggests that they may have not receive a returned phone call.12 While this is frustrating and undoubtedly makes the navigating the credit more difficult, perhaps it is fortuitous that taxpayer needs are not adequately addressed by phone because correspondence examination cases are only assigned to an examiner after correspondence is received from a taxpayer.13 Accordingly, the taxpayer must correspond in writing with the Service to extricate themselves from an otherwise wholly automated system.14 Unfortunately, even if an EITC taxpayer writes the Service, the correspondence may be lost, incorrectly matched or experience significant delay before it is logged into the Service’s system, which could trigger the automated system to send inaccurate correspondence in response.15 An EITC taxpayer facing correspondence examination may experience some or all of these barriers before even attempting to provide the required document-intensive proof to verify their entitlement to the credit.16

Adding another layer of challenge to EITC administration is that EITC has been branded as a social benefit riddled with fraud.17 The Service

Precertification Process, 100 TAX NOTES 259, 259 (2003) (discussing that, even though the Service has administered the EITC since 1975, it still lacks knowledge about and research to substantiate its successes and failures).

10 See infra text accompanying notes 113-230.


12 See infra text accompanying notes 191-194.

13 See Landsmann, supra note 4 at slide 13 (“cases with no response are worked completely through an automated system.”).

14 Id.

15 See infra text accompanying notes 206-210.

16 See infra text accompanying notes 164-171.

reports between 23-28% of EITC payments as improperly made. This report is likely inaccurate but it forms the basis of subjecting EITC to heightened scrutiny under federal improper payment laws. While other commentators have noted the effect of improper payment laws on aspects of the ETIC, this article takes the unique view that improper payment law, instead of burdening EITC administration, could provide relief to the Service’s onerous EITC compliance methods.

Executive Order 13520 contributes to the landscape of federal improper payment law, but it could provide relief to EITC and its claimants. Executive Order 13520 requires federal agencies with programs...
representing the highest improper payments to submit plans to reduce these improper payments, but the plans may not “unduly burden program access and participation by eligible beneficiaries.”

Correspondence examinations, and more specifically the manner in which they are conducted, unduly burden access to EITC, and this contravenes the Executive Order 13520 requirement to refrain from an undue burden for program access.

This article is divided into six Parts to address the collision of EITC and the correspondence examination process with Executive Order 13520 and its kindred improper payment laws. In Part One, this article discusses improper payment laws, including Executive Order 13520. Part Two identifies the alleged EITC overpayment rate and comments on the trigger of improper payment program requirements. Part Two also highlights the fact that EITC is the only Department of Treasury or Service program subject to such scrutiny even though EITC comprises only 5% of the tax gap. Part Three discusses how the Service executes its compliance mission and function via the correspondence examination process, and Part Four offers evidence that the correspondence examination process often impedes legitimate claimant access to EITC. Part Five ultimately concludes that the Service’s use of correspondence examinations unduly burdens access to EITC in contravention of Executive Order 13520. Finally, in Part Six, the article examines possible solutions, including previous and current Service Pilot projects.

I. ACCOUNTABILITY VIA IMPROPER PAYMENT LAW

The US faces burgeoning spending and debt levels and lower revenue receipts due, at least in part, to the recent recession and sluggish national growth. In addition, there is heightened political rhetoric calling, in many
cases, for smaller government and, at the very least, more efficient government.\textsuperscript{32} One way to control spending and to reform governmental administration is to more closely monitor and control governmental payments to third parties.

It is not difficult to find political support for limiting and monitoring improper payments by the federal government.\textsuperscript{33} When couched in the terms of merely requiring the federal government to properly execute its duties and refrain from abetting activities that sound like fraud, improper payment legislation garners near unanimous support.\textsuperscript{34} Congress passed and the Presidents signed improper payment legislation in 2002 and 2010.\textsuperscript{35} President Obama added more process to the minimization of improper payments with Executive Order 13520 in 2009 and two Presidential memoranda in 2010.\textsuperscript{36} This legislation and manifestation of executive administrative power create a more systematic framework for improper payment identification, measurement, planning, and reporting. What follows is a brief overview of the legislative and Presidential contributions


\textsuperscript{33} See Jennifer Hickey, Properly Reporting Improper Payments, INSIGHT ON THE NEWS, Vol. 20, No. 4, at 10 (2004).

\textsuperscript{34} See Govtrack.us: Tracking the U.S. Congress, www.govtrack.us, (showing that, on July 9, 2002 and on November 12, 2002, the IPIA bill passed in the House of Representatives by voice vote, and on October 17, 2020, the IPIA bill passed in the Senate (with changes) by unanimous consent. On June 23, 2010, the IPERA bill passed in the Senate by unanimous consent, and on July 14, 2010, the IPERA bill passed in the House of Representatives with 414 Ayes, 0 Nays, 18 Present/Not Voting).


to improper payment law. While each offers contribution to the improper payment landscape, it is Executive Order 13520 that provides the possible opportunity change in EITC compliance.

A. Improper Payments Act of 2002 (“IPIA”)

Prior to the passage of the Improper Payments Act of 2002, there was no universal federal agency requirement to report or analyze wrongly made payments by the federal government. The IPIA began the process at the beginning by requiring “executive branch agencies to annually review all programs and activities to identify those that are susceptible to significant improper payments.” A program is at “significant” risk with $10 million of improper payments. Under the IPIA, $10 million is the trigger. If an agency has significant improper payments, IPIA requires the agency to estimate annual improper payment amounts and report on its actions for reducing these improper payment estimates.

To comply with IPIA, federal agencies typically report their findings in their agency performance and accountability reports (PARs), annual financial reports (AFRs), or annual reports. The IPIA’s process and reporting demands have, at the very least, allowed the federal government to have an increasingly more comprehensive picture of the universe of improper payments. It appears that that IPIA’s effect was not short lived. Every year since IPIA was implemented in 2004, “federal agencies have consistently identified new programs or activities as risk-susceptible and reported estimated improper payment amounts.”

IPIA and its implementation were not without their critics, however.

39 Id. at Q: “What are agencies required to do?”
42 See Payment Accuracy, available at http://paymentaccuracy.gov/about-improper-payments#q6 (commenting on the progress on improper payments).
43 Id.
After its passage, the Office of Management and Budget ("OMB") issued guidance for agencies implementing the IPIA.\textsuperscript{44} In its guidance, OMB augmented the IPIA’s statutory requirements. The guidance departed from the express IPIA provisions in two ways: dollar amount trigger and timing of reporting.\textsuperscript{45} Whereas IPIA requires reporting programs with improper payments exceeding $10 million, OMB guidance stated that reporting was only required for programs meeting the $10 million threshold and improper payments amounting to at least 2.5% of total program payments.\textsuperscript{46} Critics noted that the addition of the 2.5% threshold exempted a number of programs from IPIA requirements that would have met the statutory trigger.\textsuperscript{47} OMB guidance was also criticized because programs with substantial improper payments yet under the technical thresholds could avoid risk assessment planning with regard to improper payments, which, of course, defeated the purpose of the legislation.\textsuperscript{48} In other words, critics suggested that there was too little process for an agency’s improper payments that were less than $10 million and 2.5%. OMB guidance went even further by augmenting the IPIA reporting time periods. IPIA required annual reporting; however, OMB guidance allowed for every three reporting for “low risk” programs.\textsuperscript{49} While the IPIA and OMB’s guidance drew criticism, OMB was somewhat vindicated in that the Improper Payments Elimination and Recovery Act of 2010 codified some OMB guidance.\textsuperscript{50}

\textbf{B. Executive Order 13520 & Subsequent Presidential Memoranda}

While the IPIA served to highlight to federal agencies and the public the problem of agency improper payments, the law itself as well as OMB’s guidance failed to capture significant improper payments in the process and provided only a very basic framework for agency consideration of these payments. In late 2009, President Obama signed Executive Order 13520 to extended the IPIA by providing more process for reporting on improper payments. Specifically, Executive Order 13520 requires:

OMB to identify federal programs with the \textit{highest}

\textsuperscript{44} See Daniels, \textit{supra} note 38. Additional IPIA guidance was revised and incorporated into O.M.B. Circular A-123, Appendix C.

\textsuperscript{45} Id.

\textsuperscript{46} See \textit{HATCH & MCMURTRY, supra} note 37.

\textsuperscript{47} Id.

\textsuperscript{48} See Hickey, \textit{supra} note 33, at 10 (citing Letter from Senators Charles Grassley and Max Baucus, to O.M.B. Director Josh Bolten (Jan 2, 2004)).

\textsuperscript{49} See, \textit{HATCH & MCMURTRY, supra} note 37.

\textsuperscript{50} Id.
improper payments,

OMB to set reduction targets for those programs,

Agencies to designate an official accountable for meeting
the OMB reduction targets “without unduly burdening
program access and participation by eligible
beneficiaries,”

Agencies to report to their inspector generals regarding
measuring improper payments and the agency’s plan to
meet the reduction targets without unduly burdening
program access.\footnote{See Exec. Order No. 13520, supra note 23 (emphasis added).}

It should be noted that Executive Order 13520 has a different trigger than the
IPIA. Under Executive Order 13520, an agency’s “highest” payments
triggered the process, as opposed to the IPIA’s dollar and percentage
triggers. Because Executive Order 13520 does not change the IPIA and
only adds another layer of process, its different trigger subjects more
agencies and more programs to improper payment law.

Most significant, however, for the purposes of this article, is Executive
Order 13520’s additional recognition that an agency should not minimize
improper payments in manners that unduly burden beneficiary access and
participation in federal programs. This recognition was missing from the
IPIA and is also missing from the later Improper Payment Elimination and
Reduction Act.

In addition to Executive Order 13520, President Obama also issued two
presidential memoranda aimed at reducing improper payments. On March
10, 2010, the President issued Memorandum on Finding and Recapturing
Improper Payments, which expanded the use of payment recapture audits.\footnote{See Presidential Memorandum, Finding and Recapturing Improper Payments, supra note 36.}
On June 18, 2010, President Obama issued Memorandum on Enhancing
Payment Accuracy Through a “Do Not Pay List,” which required federal
agency crosschecking before making payments.\footnote{See Presidential Memorandum, Enhancing Payment Accuracy, supra note 36.}

\section*{C. Improper Payments Elimination \& Recovery Act of 2010 (“IPERA”)}

The Improper Payment Elimination and Reduction Act of 2010 codified
some of OMB’s extra-statutory IPIA guidance.\textsuperscript{54} IPERA also increased process requirements for identifying, estimating, and reporting agency improper payments, and added a recovery audit piece as well as consequences for agency noncompliance.\textsuperscript{55} Most significantly, IPERA requires the head on each Federal agency to review all the agency’s programs and identify activities that may be susceptible to significant improper payments ($10 million & 2.5% or $100 million), at least once every three years.\textsuperscript{56} This is the same trigger that OMB guidance suggested under IPIA. Because IPERA’s provisions became effective in fiscal year 2011, comprehensive results to determine its effectiveness are not yet available.\textsuperscript{57}

\textbf{D. Applying Improper Payment Law}

As explained above, federal improper payment law is drawn from two federal statutes,\textsuperscript{58} an executive order\textsuperscript{59} and two Presidential memoranda,\textsuperscript{60} but to what end? Currently OMB uses these to require a formal process for decreasing unnecessary and wasteful expenditures. These procedures certainly create additional work for federal agencies by requiring new processes as well as monitoring and reporting. This is new bureaucracy but it appears to be working. According to OMB, agencies payout $2-3 trillion annually to third parties.\textsuperscript{61} From fiscal year 2009 to 2010, there was a drop in in the improper payment rate from 5.65% to 5.49%, although the 2010 rate was still above the targeted 5.33%.\textsuperscript{62} These rates do not include the

\textsuperscript{54} See HATCH & MCMURTRY, supra note 37 at 14.
\textsuperscript{55} See U.S. GOV’T ACCOUNTABILITY OFFICE REPORT, supra note 40.
\textsuperscript{57} See U.S. GOV’T ACCOUNTABILITY OFFICE REPORT, supra note 40.
\textsuperscript{59} See Exec. Order No. 13520, supra note 23.
\textsuperscript{60} See Presidential Memorandum, Finding and Recapturing Improper Payments, supra note 36; Presidential Memorandum, Enhancing Payment Accuracy, supra note 36.
\textsuperscript{61} See OFF. FED. FINAN. MGMT. IMPROPER PAYMENTS, OFF. MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, available at http://www.whitehouse.gov/omb/financial_fia_improper/ (“Federal agencies make more than $2 trillion in payments to individuals and a variety of other entities each year.”)
\textsuperscript{62} See Payment Accuracy, supra note 42 (stating “‘Improper payments’ occur when funds go to the wrong recipient, the recipient receives the incorrect amount of funds (including overpayments and underpayments), documentation is not available to support a payment, or the recipient uses funds in an improper manner. For 2010, federal agencies reported a government-wide improper payment rate of 5.49%, a decrease from the 5.65% improper payment rate that was reported in 2009, but more than the original target of 5.33% established last year. Despite the lower improper payment rate, due to higher outlays
provisions of IPERA, which becomes effective in fiscal year 2011.

Despite only modest improvements in improper payment rates, a review of agency annual reports and agency inspector general reports illustrates that most agencies appear to be publicly reporting (and perhaps by extension paying more attention) to the level of improper payments.

With current implementation of IPERA in progress, the additional of more specific and mandatory processes should positively affect payments. It is possible, however, that these processes could initially have the opposite effect of flagging previously unknown improper payments. This could, at least temporarily, increase the known improper payment universe and give the impression that this improper payment regime is not successful.

II. EITC & IMPROPER PAYMENTS

While the previous Part offered an overview of improper payment law, Part Two seeks to briefly examine the EITC to lay a foundation for identifying and explaining the alleged level of EITC overpayments. Significant scholarship examining the EITC is available from a number of sources. Accordingly, this article only provides enough EITC information to advance an understanding of the EITC’s intersection with improper payment law.

A. What is the EITC?

The earned income tax credit (“EITC”) provides a refundable tax credit associated with the economic downturn, improper payments totaled approximately $125 billion in 2010 - an increase of $15 billion from 2009. For example, the Supplemental Nutrition Assistance Program (formerly known as food stamps), reported that outlays grew from $34.6 billion in 2009 to $50.4 billion in 2010.

63 The Postal Service and the Department of Transportation failed to report program risk assessments to comply with the provisions of the IPIA for fiscal year 2010. See Statement of Kay L. Daly, supra note 19 at 7.

64 See supra text accompanying notes 31-63.

65 See infra text accompanying notes 64-112.

to low-income taxpayers. A refundable credit is one that not only offsets a taxpayer’s tax liability but can also result in a cash payment in excess of tax liability. EITC increases with the amount of earned income a taxpayer reports thereby functioning as an incentive to work. Its design, as part direct payment and part tax offset, is consistent with its dual purpose as part social assistance payment and part work incentive. An attempt to make the EITC serve dual masters is at least partially responsible for its complex rules and administration.

For most EITC claimants, EITC requires they prove, among other things, three primary items: earned income, relationship of qualifying children, and minimum residency of qualifying children. EITC is available to claimants without children but increases dramatically when a qualifying child resides with a claimant for more than half of the tax year. EITC further increases with the number of “qualifying children” who reside with the claimant. Prior to 2009, EITC payments plateaued for claimants with two qualifying children. In other words, a claimant did not receive any additional EITC for three (or more) children than for two children. Pursuant to the Tax Relief Act of 2010, EITC increased for claimants with three children. The third-child expansion is temporary for two years,

68 See Publication 596, supra note 67.
70 See Zelenak, supra note 22 at 1873-5 (discussing EITC as a hybrid tax-transfer program).
71 See Book, The IRS’s EITC Compliance Regime, supra note 5 at 352 (stating that “[t]he EITC is excessively complicated in its application . . . ).
72 See I.R.C. § 32(b) (listing the percentages for qualifying children), § 32(c)(2) (defining earned income), § 32(c)(3) (defining qualifying child). For example, in 2010 a single mother with $24,000 of earned income would be entitled to an EITC of $3440 for two qualifying children but only $1830 with one qualifying child. EITC plateaus at 3 children; there is no additional credit for a fourth qualifying child.
73 See I.R.C. § 32(b)(1) and (2).
74 Id.
75 American Recovery and Reinvestment Act of 2009 (ARRA) created the third child additional amount for tax years 2009 and 2010. The Tax Relief Act of 2010 extended the
which is in addition to the original two-year expansion under the American Recovery and Reinvestment Act of 2009. There has been discussion opining that the previous two-child maximum created an incentive for larger families to improperly allow others to claim their other children.

B. Consequences for Improperly Claiming the EITC

Like many social assistance programs, the EITC contains severe penalties for fraudulent claims or those made with reckless/intentional disregard. Taxpayers who are found to have fraudulently claimed the EITC may not receive it for ten years, even if they are otherwise eligible. EITC claims that are made recklessly or with intentional disregard of the rules render a taxpayer unable to claim EITC for two years, even if they too are otherwise eligible. Penalties for fraudulent, reckless, or intentionally improper EITC claims, however, are more severe than penalties for fraud in other social assistance programs. Benefits under TANF may be denied for an entire family for a month due to noncompliance, and repeated noncompliance may facilitate denial for up to 6 months. Food stamp programs have similar sanctions. In these other benefit programs, repeated abuse only garners sanctions for months, whereas comparable actions garner years long sanctions under EITC.

There are, of course, civil penalties for (non-EITC) reckless or fraudulent violations of the Internal Revenue Code. Non-EITC penalties, however, pale in comparison to the EITC civil penalties, and they do not bar

additional amount for two more years.

76 For 2011, EITC phases out at $49,078 of income for a married couple with at least three qualifying children. See http://www.eitc.irs.gov/central/Preview2009/.

77 See Book, Freakonomics, supra note 22 (stating “Poverty is more prevalent among larger families, and the EITC’s effectiveness is ‘poorly designed to address this pattern of child poverty.’ To address this inequity, low wage workers with more than two children are tempted to ‘share’ the benefits with related parties who may have earned income, but fewer than two qualifying children of their own.” (citing JASON FURMAN, CTR. ON BUDGET & POLICY PRIORITIES, TAX REFORM AND POVERTY 4 (2006), Dorothy Brown, The Tax Treatment of Children, supra note 17 at 789 (2005)).

78 See I.R.C. § 32(k) (disallowing EITC for taxpayers making fraudulent and reckless EITC for ten years and two years respectively).


81 See Zelenak, supra note 22 at 1893-5. (comparing EITC sanctions with those under TANF and food stamps and concluding that “[a]rguably, the EIC sanctions are even more severe . . .”).

82 Id. at 1894-5.

83 Id.

84 See I.R.C. § 6662 and 6663 (listing accuracy-related and fraud penalties).
future use of any code section for which a taxpayer is otherwise eligible. Indeed, with respect to EITC sanctions, “there are no analogous sanctions applicable to other improper positions taken on federal income tax returns.” Penalties for EITC abuse, criminal or civil, are significantly harsher than sanctions for other tax violations or other social benefit abuse. These heavier penalties are consistent with the impression that EITC is riddled with fraud.

C. Improper EITC Payment Rates

There certainly exists an impression of significant EITC fraud, and many interpret the government’s improper payment numbers to support this theory. The Treasury Department estimates total EITC program payments for fiscal year 2010 as $64 billion, and EITC overpayment rates of 23%-28%, or $15-18 billion. The estimated EITC overpayment rate has remained constant at 23%-28% for several years and is not expected change through 2013. The Service has argued that impending preparer regulation will shrink the future EITC overpayment rate, but in examining the

85 See Zelenak, supra note 22 at 1894.
86 Id.
87 See generally, supra note 17.
88 See e.g., David Nolte, IRS is Paying Tens of Billions of Fraudulent Refundable Tax Credits, Between the Numbers Blog, available at http://betweenthenumbers.net/2011/05/irs-is-paying-tens-of-billions-of-fraudulent-refundable-tax-credits/ (erroneously assuming that improper payments are all due to fraud); Ernest Istook, Congress Will Send Billions To Tax Cheaters, The Heritage Foundation, available at http://www.heritage.org/research/commentary/2008/02/congress-will-send-billions-to-tax-cheaters (attributing all EOTC improper payments to “fraud” by “cheaters” filing “phony” returns).
89 See U.S. DEP’T OF TREASURY, 2010 PERFORMANCE AND ACCOUNTABILITY REPORT, supra note 18, appendix B at 278.
90 See id. See also TREASURY INSPECTOR GEN. FOR TAX ADMIN., Ref. No. 2011-40-023, REDUCTION TARGETS AND STRATEGIES HAVE NOT BEEN ESTABLISHED TO REDUCE THE BILLIONS OF DOLLARS IN IMPROPER EARNED INCOME TAX CREDIT PAYMENTS EACH YEAR 3 (Feb. 7, 2011).
91 See U.S. DEP’T OF TREASURY, 2010 PERFORMANCE AND ACCOUNTABILITY REPORT, supra note 18, appendix B at 278. While Treasury expects EITC outlays to remain flat for fiscal year 2011, Treasury expects total outlays to shrink to $58 billion for fiscal years 2012 and 2013.
92 Other scholars have noted the possibility of reduced improper payment rates with preparer regulation. See Brown, The Tax Treatment of Children, supra note 17 at 781 and n.120 (noting that “[o]ne study suggests that regulating certain tax preparers could decrease the EITC error rate from 30% to 18%.” (citing Francine J. Lipman, The Working Poor are Paying for Government Benefits, supra note 66 at 494 (citing Michael A. O’Connor, Tax Preparation Services for Lower-Income Filers: A Glass Half Full or Half Empty, 90 TAX NOTES 231, 250 (2001))).
Service’s expectation the Treasury Inspector General for Tax Administration (“TIGTA”) found no evidence to expect a positive impact on the rate.\(^93\)

The annual EITC overpayment estimate of $15-$18 billion ranks it fourth in relative size of programs with improper payment estimates.\(^94\) When programs administered by state and local agencies with federal funds are removed and only federally-administered programs are examined, EITC overpayments are the second highest federal program overpayments.\(^95\) EITC’s ranking as one of the “highest dollar value” of government-wide improper payments triggers the application of Executive Order 13520’s required reduction targets and planning. IPIA and IPERA designation as a “susceptible program” is triggered, not by the EITC overpayment relative ranking against other federal program overpayments, but by passing the established thresholds of $10 million of improper payments and 2.5% of program outlays, or at least $100 million in improper payments.\(^96\) Designation under IPERA obligates an agency to perform risk assessments and report on plans to meet “measurable milestones.”\(^97\)

The Department of Treasury’s FY 2010 performance and accountability report (PAR) found EITC as the only program as a high-risk susceptible program under IPIA. That same report identified only EITC as a high priority program under Executive Order 13520. This is strange, particularly considering that EITC overpayments are estimated to be only 5% of the tax gap.\(^98\) Four times the EITC overpayment amount is attributable to underreported self-employment income.\(^99\) More than ten times the EITC amount is attributable to underreported business income.\(^100\) Other commentators have identified other tax credits that likely meet IPERA designation, including alternative fuel credits\(^101\) and research credits,\(^102\) and

\(^94\) See Statement of Kay L. Daly, supra note 19.
\(^95\) See Treasury Inspector Gen. for Tax Admin., Reduction Targets, supra note 90 at 1.
\(^96\) See IPERA, supra note 56.
\(^97\) Id.
\(^98\) See Holt, supra note 66 at 188 (estimating EITC tax gap).
\(^99\) Id. (comparing EITC tax gap with under-reported self-employment tax gap). See also Brown, The Tax Treatment Of Children, supra note 17 at 776 (noting the tax gap difference between EITC overpayments and underreported self-employment income).
\(^101\) See Nat’l Taxpayer Advocate, Fiscal Year 2012 Objectives Report to
still others have argued “that improper refunds of withholding and estimated tax payments” are subject to IPIA too. TIGTA estimates that the improper First Time Home Buyer Credits paid in 2009 and 2010 were hundreds of millions of dollars. Improper payments at these levels should be subject the credit to IPERA, at the very least. Other tax payments and preference items, including tax expenditures, should be subject to improper payment law; however, this is beyond the purview of this article.

D. The Service’s Actions to Combat Improper EITC Payments

In compliance with the IPIA and with its mission and requirements as the inspector general of the Service, TIGTA regularly audits the Service’s functions, including the administration of EITC and overpayments. In

See Nat’l Taxpayer Advocate, Fiscal Year 2012 Objectives, supra note 101 at 9.

See Zelenak, supra note 22 at 1896-8.


See Zelenak, supra note 22 at 1896-98 (discussing that the EITC is the sole Service program identified under the IPIA and noting that, for the purposes of improper payment law, EITC is treated like TANF and Food Stamp overpayments and unlike income tax overpayments). See also Brown, Race and Class Matters in Tax Policy, supra note 22 at 806-7 (noting that EITC is “only tax provision about which the OMB has requested improper payment information,” and speculating that “[t]he belief that EITC errors are the result of fraud and not complexity is a function of the mental connection between EITC recipients and welfare recipients.”).


See e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., Reduction Targets, supra note 90; TREASURY INSPECTOR GEN. FOR TAX ADMIN., Ref. No. 2010-40-116, Actions Can Be Taken to Improve the Identification of Tax Return Preparers.
TIGTA’s February 2011 report, TIGTA noted certain the Service’s administration efforts and shortcomings. TIGTA identified that the Service had failed to establish reduction targets and strategies for reducing EITC overpayments. In response, the Service defended itself with the actions its takes to reduce improper payments. The Service’s defense relied almost exclusively on its return prepare initiative and identified it as its most promising avenue. As a rebuttal, TIGTA noted that the Service has undertaken a variety of education and public relations activities.

The responses of both TIGTA and the Service fail to acknowledge the power and process the Service undertakes to administer and police EITC. Their responses belie the Service’s toolbox, which includes the use of correspondence exams, use of math error power, and the use of civil penalties, and preparer penalties.

III. MANAGING EITC WITH CORRESPONDENCE EXAMINATIONS

In the previous Part, this article identified the alleged level of EITC overpayments. Part Three attempts to explain the process that identifies the alleged improper payments: the correspondence examination process. This Part will explain how returns are selected for examination, as well as how often and why the Service utilizes correspondence examinations to audit EITC taxpayers.

A. Return Selection for Correspondence Examination

The Service executes its taxpayer compliance function with the examination process. Typically, the Service utilizes a correspondence examination, office examination, or a field examination, which involve

---

109 Id.
110 Id.
111 Id.
112 Id.
113 See supra text accompanying notes 64-112.
114 See infra text accompanying notes 113-161.
escalating degrees of Service personnel involvement.\textsuperscript{116} With a limited budget and limited personnel, the Service uses “computer-based techniques . . . to classify and select returns for examination with the greatest potential for tax change and revenue yield.”\textsuperscript{117} Returns are chosen for audit by computerized scoring which “rates the potential for change based on past Service experience with similar returns.”\textsuperscript{118}

The Service has recently placed an emphasis on honing EITC audit selection, “spending millions [of dollars] developing probability filters to improve its selection of cases for audit using information contained in the Dependent Database.”\textsuperscript{119} The Service also uses prior audit information to inform its audit selection.\textsuperscript{120} More recently, the Service has increasingly used third-party information from non-Service sources, including the federal case registry, which is a database of custody orders for children receiving public assistance and custody orders from some private divorce cases, as well as information from the Social Security Administration databases to validate social security numbers and parents’ names for qualifying children.\textsuperscript{121} TIGTA believes that the Service is leveraging this technology to identify EITC improper payments.\textsuperscript{122} Even with all of these investments into EITC error detectors, however, the Service has made virtually no progress in limiting the EITC improper payments.\textsuperscript{123} As previously stated, overpayment rates are alleged to have hovered between 23\%-30\% for years and are predicted to remain at the same level for several more years.\textsuperscript{124} Other than some educational public relations activities\textsuperscript{125}

\textsuperscript{116} See Book, The IRS’s EITC Compliance Regime, supra note 5 at 375 (“the most common types of examinations are those conducted at a taxpayer’s place of business, at an IRS office, or by correspondence.”).

\textsuperscript{117} Id.

\textsuperscript{118} INTERNAL REVENUE SERV., THE EXAMINATION (AUDIT) PROCESS, located at \url{http://www.irs.gov/newsroom/article/0,,id=151888,00.html} (discussing scoring under the Discriminant Function System).

\textsuperscript{119} See TREASURY INSPECTOR GEN. FOR TAX ADMIN., REDUCTION TARGETS, supra note 90 (“Probability filters are characteristics of noncompliance the IRS has developed using historical data and are used to determine the likelihood that an EITC claim is erroneous. . . . The Dependent Database is a risk-based audit selection tool used by the IRS to identify EITC tax returns for audit.”).

\textsuperscript{120} See Landsmann, supra note 4 at slide 10, 11.

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{123} Id. (citing TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE EARNED INCOME TAX CREDIT PROGRAM HAS MADE ADVANCES, supra note 107).

\textsuperscript{124} See U.S. DEP’T OF TREASURY, 2010 PERFORMANCE AND ACCOUNTABILITY REPORT, supra note 18, appendix B at 281.

\textsuperscript{125} See TREASURY INSPECTOR GEN. FOR TAX ADMIN., REDUCTION TARGETS, supra note 90 at 14-15.
and the impending regulation of preparers,\textsuperscript{126} the Service has not committed to any new plans for reducing the EITC improper payment rate.\textsuperscript{127} It appears that the Service intends to continue using correspondence examinations as the primary compliance tool for EITC administration.

\textbf{B. Why Use Correspondence Examinations}

No doubt a primary driver for the Service’s choice of correspondence examinations to manage EITC claims is the low cost. Correspondence exams are less expensive because they are more automated, requiring less personnel labor, than office or field examinations.\textsuperscript{128} The Service estimates that its administration of EITC costs only 1\% of benefits distributed.\textsuperscript{129} The Service contrasts this with other social assistance program cost estimates nearing 20\% of benefits distributed.\textsuperscript{130} Ironically, the alleged overpayments of 23-28\% are strikingly similar to 20\% administrative cost of benefits, making the real cost administration of EITC comparable with other similar programs targeting the poor.\textsuperscript{131}

EITC administration is kept at this low 1\% cost by burdening the beneficiaries with administration costs.\textsuperscript{132} The EITC process leaves beneficiaries on their own to determine eligibility via the self-assessment

\textsuperscript{126} \textit{Id.}  
\textsuperscript{127} \textit{Id.}  
\textsuperscript{128} \textit{TREASURY INSPECTOR GEN. FOR TAX ADMIN., Ref. No. 2011-30-016, PROGRESS HAS BEEN MADE TO REENGINEER THE EXAMINATION PROGRAM, BUT ADDITIONAL IMPROVEMENTS ARE NEEDED TO REDUCE TAXPAYER BURDEN 1 (2011) (“In contrast to the more labor-intensive, face-to-face examination, the correspondence examination process is . . . more automated, and . . . correspondence examinations also enable the Service to reach more taxpayers at a lower cost . . .”).}  
\textsuperscript{129} \textit{INTERNAL REVENUE SERV., IRS EARNED INCOME TAX CREDIT INITIATIVES, ADDENDUM TO THE REPORT ON QUALIFYING CHILD RESIDENCY CERTIFICATION, FILING STATUS, AND AUTOMATED UNDERREPORTER TESTS, IMPLEMENTATION OF ALTERNATIVE APPROACHES TO IMPROVING THE ADMINISTRATION OF THE EITC 2 (2008).}  
\textsuperscript{130} \textit{Id.}  
\textsuperscript{131} \textit{See Olson House Testimony, supra note 69 (stating “Current administration costs are less than 1\% of benefits delivered. This is quite different from other non-tax benefits programs in which administrative costs related to determining eligibility can range as high as 20\% of program expenditures. For TY 2009, the IRS reports that it paid $55 billion in EITC claims. If this amount had been paid by another agency that spent 20 percent of program expenditures verifying eligibility, the administration costs to the government would have been $11 billion – nearly 100 percent of the amount of improper payments that the IRS estimates were made.”).}  
\textsuperscript{132} \textit{See Lipman, The Working Poor are Paying for Government Benefits, supra note 66 at 465 (discussing that EITC claimants manage the “inconceivable complexity” of the credit by hiring paid tax practitioners to assist them.).}
process. Scholars and practitioners have noted that the complexity of claiming the EITC is overwhelming.\footnote{George K. Yin, John Karl Scholz, Jonathan Barry Forman, Mark J. Mazur, Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program, 11 AM. J. TAX POL’Y 225 (1994) (“Both the program's eligibility rules and the paperwork necessary to file a claim are complex, particularly for the typical taxpayer eligible for the EITC benefit.”). See also Brown, Race and Class Matters in Tax Policy, supra note 22 at 797, 830 (“Numerous scholars have described the EITC as complex.”) (citing Anne L. Alstott, Limitations of Tax-Based Welfare Reform, 108 HARVARD L. REV. 533, 548 (1995); Anne L. Alstott, Work vs. Freedom: A Liberal Challenge to Employment Subsidies, 108 YALE L.J. 967, 1052-53 (1999); Book, The IRS's EITC Compliance Regime, supra note 5 at 397-98; Book, The Poor and Tax Compliance, 51 UNIV. KANSAS, L. REV. 1145, 1155 (2003); Brown, The Tax Treatment Of Children, supra note 17 at 788).} Indeed, completing a return with an EITC claim is “more challenging than completing a Form 1040 with itemized deductions.”\footnote{See Lipman, The Working Poor are Paying for Government Benefits, supra note 66 at 463 (citing AICPA, AICPA Submits Tax Simplification Recommendations, TAX NOTES INT’L, LEXIS 97 TNI 95-21 (1997)).}

Although some of the Service’s tools are available to help EITC claimants, most are underutilized. The Service has an internet guide to EITC\footnote{The Service offers an online EITC “Assistant”, available at http://www.irs.gov/individuals/article/0,,id=130102,00.html.} and the Service funds free EITC return preparation through its Volunteer Income Tax Assistance (VITA) program.\footnote{Internal Revenue Serv., Free Tax Return Preparation for You by Volunteers, available at http://www.irs.gov/individuals/article/0,,id=107626,00.html.} Very few EITC claimants utilize the free preparation options. Only 1.6% of EITC returns are prepared by VITA sites.\footnote{See Alan Berube, The New Safety Net: How the Tax Code Helped Low-Income Working Families During the Early 2000s, THE METROPOLITAN PROGRAM, THE BROOKINGS INSTITUTION 9 (2006).}

For most taxpayers, successfully claiming EITC requires professional assistance.\footnote{See Lipman, The Working Poor are Paying for Government Benefits, supra note 66 at 463 (stating “Congress has created and extensive anti-poverty program, which is impossible for the targeted families to obtain without professional assistance because it is too complicated to comprehend and claim.”)} For tax year 2008, 57.7% of all individual returns were prepared by preparers.\footnote{INTERNAL REVENUE SERV., SELECTED INFORMATION FROM RETURNS FILED, available at http://www.irs.gov/taxstats/article/0,,id=102886,00.html.} Over 70% of EITC claimants use preparers.\footnote{INTERNAL REVENUE SERV., Earned Income Credit Preparer Due Diligence at IRS Nationwide 2008 National Tax Forum at slide 5 (2008), available at http://www.irs.gov/pub/irs-utl/eitc_due_diligence_requirements.pdf.}
is evident that many of the costs of tax administration are transferred to taxpayers by virtue of self-assessment and code complexity, which, in many cases, requires professional assistance. This is certainly true for EITC administration, and the transfer of the cost for EITC administration are born by those least able to afford them.

Experience also does not seem to offer assistance to alleviate the complexity and professional assistance problem. Recent studies indicate the changes to the EITC population may contribute to the long-term ineffectiveness of EITC education and public relations activities that the Service has undertaken.\textsuperscript{141} Sixty-one percent of EITC claimants from 1989-2006 claimed EITC for only one or two years at a time.\textsuperscript{142} The study indicated that only 20\% of EITC claimants used EITC for more than 5 consecutive years.\textsuperscript{143} Accordingly, efforts to educate an ever-changing population are likely ineffective. Moreover, any experience or knowledge helpful for claiming EITC is likely only useful to small number of repeat claimants.

C. Audit Rates and Reasons

With its limited resources for tax administration and compliance initiatives, the Service often takes the path of least resistance. In this case, the path of least resistance is auditing the “easy” returns. For the Service, EITC returns are easy returns: low-income returns tend to be simple with fewer items of income and few, if any, deductions;\textsuperscript{144} EITC claimants rarely respond to correspondence examination correspondence;\textsuperscript{145} nearly the entire process is automated and has limited Service personnel involvement;\textsuperscript{146} EITC claimants are unlikely to be able to afford or even secure free


\footnotesize{142} Id.

\footnotesize{143} Id.

\footnotesize{144} EITC is not available for taxpayers with over $2200 in investment income. I.R.C. § 32(i)(1).

\footnotesize{145} Hearing on the Tax Gap and Tax Shelters Before Sen. Comm. on Fin., 108th Cong. 17, n.43 (July 21, 2004) (written statement of Nina Olson, National Taxpayer Advocate) (“Data provided by the EITC Program Office to TAS for FY 2003 indicate nearly a 40 percent no response/undeliverable rate for EITC correspondence. The no response/undeliverable rate including Statutory Notice of Deficiency is 53 percent.”).

\footnotesize{146} See supra text accompanying notes 128-143. See also infra text accompanying notes 159-161.
representation. \(^{147}\) For the Service, EITC returns are the proverbial low-hanging fruit.

As a comparison to illustrate the over-emphasis on EITC audits, commentators often compare EITC and self-employed audits. \(^{148}\) Auditing self-employed taxpayers would likely yield more revenue than auditing EITC claimants, given that 20% of the tax gap is attributable to these taxpayers (as opposed to only 5% with EITC overpayments); \(^{149}\) however, such an examination would likely take significant time and personnel resources to produce revenue because discovering underreported income is much more labor-intensive \(^{150}\) than verifying documentation provided by an EITC taxpayer. Moreover, it would be more difficult to audit self-employed taxpayers via correspondence exam given the alleged levels of underreported income. The audit rate for self-employed taxpayers is 1.7%, and the audit rate for EITC taxpayers is 2.4%, \(^{151}\) which is nearly 30% higher.

The audit rate for taxpayers with less than $25,000 income is 1.18%, which is nearly double the rate for taxpayers with $25,000-$200,000, which is 0.64-0.78%. \(^{152}\) The audit rate does not rise to the level that the lowest-income taxpayers experience until income goes above $200,000. \(^{153}\) The audit rates for the “middle class” are a fraction of the level of the audit rate

\(^{147}\) See NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS, supra note 6.

\(^{148}\) See Brown, The Tax Treatment Of Children, supra note 17 at 776 (stating “[w]hile the IRS estimate of the EITC noncompliance rate is high, it is not the highest. The IRS estimates that taxes owed but unpaid by individual and corporate taxpayers is over $100 billion (the “tax gap”). In addition, the IRS states that its enforcement efforts only resulted in the collection of about 25% of the tax gap. Underreported income by self-employed taxpayers was nearly $30 billion of the tax gap. The estimated tax gap for the EITC exceeded $1 billion. The EITC therefore represents less than 1% of the tax gap. The IRS estimates that self-employed individuals generally underreport their income by 64%, and self-employed individuals who operate in a cash business underreport their income by 89%. Small corporations and sole proprietors constitute 29% of the tax gap. Thus, significant noncompliance areas that generate greater revenue losses than are estimated for the EITC go unaudited.”)

\(^{149}\) See BICKLEY, supra note 26 (discussing EITC and the tax gap).

\(^{150}\) Id. (stating “much of the gross tax gap for individual income tax filers is due to types of unreported income that are difficult to detect.”).

\(^{151}\) See INTERNAL REVENUE SERV., 2010 DATA BOOK, supra note 4 tbl 9a. (585,202 of 24,502,550 EITC returns, and 277,945 of 15,472,712 non-farm business individual returns).

\(^{152}\) Id. at tbl. 9b.

\(^{153}\) Id.
of those in poverty.\textsuperscript{154}

This should not be surprising given the history of resources specifically earmarked to police the earned income tax credit. Both scholars and reporters have noted the 1990s compromise between President Clinton and Congress that resulted in an increased the Service’s budget of $100 million specifically to audit EITC returns.\textsuperscript{155} The legacy continued in 2002 when Treasury Secretary Paul O’Neill stated, “[i]f you look at why we’re doing a relatively heavy audit of low-income [taxpayers], it is because we’ve been directed by the Congress to examine the devil out of the so-called earned income tax credit filers.”\textsuperscript{156} The overemphasis of EITC audits continues today.

Limited Service resources and Congressional will are not the only drivers of high EITC audit rates. Improper payment law requirements are certainly a driver, as they require the Service to demonstrate and execute a plan to bring down EITC improper payments. Other commentators believe that heavy EITC compliance initiatives are attributable to the perception that EITC is “welfare” and the cultural belief that “cheating on one’s income tax is less seriously wrong than committing welfare fraud.”\textsuperscript{157} Still others have suggested that EITC compliance initiatives may be driven by

\begin{footnotesize}
154 Id.
156 See Brown, Race and Class Matters in Tax Policy, supra note 22 at 807, n.103 (2007) (internal citation omitted).
157 See Zelenak, supra note 22 at 1899, n.142 (2005) (“In a survey of public opinion in twenty-nine countries, including the United States, M.D.R. Evans and Jonathan Kelley found that respondents in all twenty-nine countries considered cheating on one's income tax (by not reporting all of one's income) to be less seriously wrong than committing welfare fraud (by giving false information to the welfare bureaucracy). M.D.R. Evans & Jonathan Kelley, Are Tax Cheating and Welfare Fraud Wrong? Public Opinion in 29 Nations, 3 AUSTRALIAN SOC. MONITOR 93 (2001). Asked to classify each type of behavior as "seriously wrong," "wrong," "a bit wrong," or "not wrong," American respondents gave income tax cheating a mean characterization very close to "wrong," while their mean characterization for welfare fraud was roughly halfway between "wrong" and "seriously wrong." Id. at 97 tbl.1. The Evans and Kelley study appears to be the only one comparing public attitudes toward income tax underpayments and welfare overpayments, and there are no reported studies on how public attitudes toward EITC compliance compare with attitudes toward income tax and welfare compliance.”).
\end{footnotesize}
“the belief that EITC errors are the result of fraud [which] is a function of racial stereotyping about EITC recipients.”\textsuperscript{158} Regardless of why EITC claimants are chosen for audit, the numbers demonstrate that they are chosen for correspondence examinations at a higher rate.

\textbf{D. An EITC Correspondence Examination}

Once an EITC return is selected for audit via scoring, a letter is generated asking for information or documentation to verify one or more of the EITC requirements.\textsuperscript{159} The correspondence typically requests the EITC claimant to submit documentation to prove relationship to or residency of the qualifying children. A 2010 study by the Taxpayer Advocate Service (“TAS”) of 400 EITC cases noted that “[i]n 90 percent of the cases reviewed, the primary issue raised by the Service involved either the Relationship Test or the Residency Test under the uniform definition of a qualifying child.”\textsuperscript{160} These are the lynchpins in securing EITC, and they create proof issues during a correspondence examination. These proof issues are discussed below in Part IV.\textsuperscript{161}

\textbf{IV. CORRESPONDENCE EXAMINATIONS IMPEDE ACCESS TO EITC}

The previous Part addressed how, why, and how often EITC claimants are chosen for examination.\textsuperscript{162} The following Part will explore the conduct of EITC correspondence examinations and lay a foundation for the ultimate conclusion that the manner in which EITC correspondence examinations are conducted is unduly burdensome.\textsuperscript{163}

\textbf{A. Proof for EITC is Document-Intensive}

As stated above, the majority of EITC examinations address the Relationship Test, the Residency Test, or both.\textsuperscript{164} These can be very

\textsuperscript{158} See Brown, The Tax Treatment Of Children, supra note 17 at 780.
\textsuperscript{159} See Treasury Inspector Gen. for Tax Admin., Progress Has Been Made, supra note 128 at 1.
\textsuperscript{160} See Nat’l Taxpayer Advocate, Fiscal Year 2012 Objectives Report to Congress, supra note 101 at App. VIII, VIII-3 (discussing TAS-EITC no relief/no response case review).
\textsuperscript{161} See infra text accompanying notes 162-229.
\textsuperscript{162} See supra text accompanying notes 113-161.
\textsuperscript{163} See infra text accompanying notes 164-229.
\textsuperscript{164} See Holt, supra note 66 at 197 (“In the EITC Compliance study of Tax Year 1999, nearly 60% of the amount improperly claimed involved misapplication of the qualifying child and filing status rules.” (citing Internal Revenue Service, Compliance Estimates for Earned Income Tax Credit Claimed on 1999 Returns (2002))).
challenging to prove, particularly in non-traditional family arrangements. For example, an aunt caring for a niece must produce 3 birth certificates to satisfy the Relationship Test. She must produce the niece’s birth certificate to document her parentage as well as the niece’s mother’s birth certificate and aunt’s birth certificate to demonstrate that they have the requisite familial relationship. This may be challenging if the mother is not present in the home. It also may prove challenging for transient families, particularly those who have been evicted or are homeless. In addition, the Internal Revenue Manual lists only a very few items that are acceptable documentation to prove relationship.

Residency of more than six months of a qualifying child can be even more challenging to prove, particularly when the Service only accepts certain documentation. Only copies of records from certain places (e.g. schools, medical providers, child care providers or social service agencies) can be used as acceptable documentation. While in theory school records should be easily used to prove residency in the EITC claimant’s home, the practice does not work well. School records document residency during a school year, which usually runs August – December (five months) and January- May (five months). Both parts of a school year are less than the six months necessary to prove EITC residency, which is measured on a tax year basis.

165 See Olson House Testimony, supra note 69 at 13 (“Assume Granduncle claims the EITC with respect to Grandnephew. Assume further that the IRS questions the claim based on the relationship requirement. To document his relationship to the qualifying child, Granduncle may be required to produce his own birth certificate, a birth certificate for his sibling showing common parents, a birth certificate for his niece showing that Granduncle’s sibling was the niece’s parent, and a birth certificate for Grandnephew showing that the niece was Grandnephew’s mother. That is four birth certificates in all. Depending on the states in which these four individuals were born and the restrictions those states impose on who may obtain birth certificates, it may be extremely time-consuming or even impossible for Granduncle to obtain the requisite substantiation. As a result, the IRS may deny the claim even though it was legitimate.”).

166 INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 4.19.14.5.5 and 4.19.14.5.7 (listing acceptable documentation to prove relationship to a qualifying child, including “birth certificates or other official documents of birth, marriage certificates that verify your relationship to the child, letter from an authorized adoption agency, letter from the authorized placement agency or applicable court document”).

167 Id. (listing acceptable documentation to prove the residency of a qualifying child, including, “photocopies of school (no report cards), medical, childcare provider (provider can’t be a relative) or social service records, a letter on official letterhead from a school, a health care provider, a social service agency, placement agency official, employer, Indian tribal official, landlord or property manager, or a place of worship that shows the name of child’s parent or guardian, child’s address and the dates that they lived with taxpayer”).

168 Id.
The atypical documentation that claimants often must submit can prove challenging during correspondence exams for a number of reasons. The type of documents used to prove the relationship and residency tests are not the types of documents that the Service specializes in dealing with, such as W2s, 1099s, and other returns. With respect to traditional documentation, the Service has established processes for data matching and analysis. The Service struggles, however, to data mine atypical documentation. The Service’s struggle to administer the First Time Homebuyer Credit illustrates this point well.169 This program required the Service to consider and examine home purchase settlement statements, new documentation for the Service. The Service also used new Form 5405. Unfortunately, the Service’s difficulty in processing settlement statements and the new Form 5405 led to errors in FTHBC administration that easily could have been discovered through appropriate processing.170 Moreover, the novelty of these forms hampered the Service from accepting settlement statements electronically.171 These types of atypical documentation present an even greater challenge when the production is conducted via automation, as is the case with EITC correspondence examinations.


170 See Treasury Inspector General for Tax Administration, Ref. No. 2011-41-035, supra note 104 (“ . . . the IRS had not developed and implemented examination filters to identify potentially erroneous claims for the Homebuyer Credit.”). TIGTA identified the following: “Taxpayers claimed Homebuyer Credits although they had not made home purchases but reportedly would in the future. These taxpayers listed home acquisition dates on their Forms 5405 that were subsequent to the dates the claims were processed by the IRS. . . . Taxpayers claimed Homebuyer Credits for homes for which at least one other taxpayer also claimed the Credit and the combined amounts for each address exceeded $8,000. . . . Some taxpayers claimed Homebuyer Credits for homes purchased before April 9, 2008, the effective date of the HERA legislation. . . .”

171 See Hearing on First-Time Homebuyer Tax Credit: Taxpayers’ Use of the Credit and Implementation and Compliance Challenges Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 111th Cong. 5-6 (2009) (written testimony of James R. White, Gov’t Accountability Office). See also Hearing on Filing Season Update: Current IRS Issues Before S. Finan. Comm. 5 (2010) (written testimony of Nina Olson, National Taxpayer Advocate) (“ . . . the FTHBC involve enhanced documentation that prevents taxpayers from electronically filing their tax returns, causing administrative problems for the IRS.”).
B. The Service’s Correspondence Issues

EITC claimants selected for audit face difficult proof burdens; however, these difficulties pale in comparison to the challenges in navigating the EITC examination process itself. Simply put, dealing with the Service during a correspondence examination is difficult.

EITC claimants chosen for audit have virtually no alternatives to the correspondence exam process. Once a claimant is chosen under the computerized system, the claimant is nearly certain of facing a correspondence examination. Nearly 97% of audited EITC returns were undertaken with correspondence examination. Under regulation, a taxpayer may petition to change the venue, which could mean changing from a correspondence examination (aka campus examination) to a face-to-face office examination. This regulation gives the Service the discretion to grant the request after considering six factors. Despite the list of factors, “[m]any IRS service centers take the view that correspondence examinations will be transferred only in instances of hardship.”

The ability to take advantage of the very slim opportunity to transfer from a correspondence examination turns on the taxpayer’s ability to understand the correspondence sufficiently to find the regulation to transfer, comprehend the availability of the option and successfully argue for

172 See supra text accompanying notes 164-171.
173 See infra text accompanying notes 174-210
174 Id.
175 See INTERNAL REVENUE SERV., 2010 DATA BOOK, supra note 4 tbl 9a.
176 Id.
177 Treas. Reg § 301.7605-1(e)(1).
178 Id. (“The Service will consider, on a case-by-case basis, written requests by taxpayers or their representatives to change the place that the Service has set for an examination. In considering these requests, the Service will take into account the following factors—

(i) The location of the taxpayer's current residence;
(ii) The location of the taxpayer's current principal place of business;
(iii) The location at which the taxpayer's books, records, and source documents are maintained;
(iv) The location at which the Service can perform the examination most efficiently;
(v) The Service resources available at the location to which the taxpayer has requested a transfer; and
(vi) Other factors that indicate that conducting the examination at a particular location could pose undue inconvenience to the taxpayer.”).
179 Joe B. Marchbein, Managing an IRS Correspondence Audit, JOURNAL OF ACCOUNTANCY (August 2011).
transfer. Ironically, these are the precise skills that a taxpayer needs to successfully navigate a correspondence exam. If the taxpayer lacks these skills to begin with, there is virtually no chance they will successfully argue for a more navigable and comprehensible examination.

Assuming that a taxpayer is chosen for correspondence examination, navigation of the process hinges upon communication with the Service. Interpreting the Service’s correspondence is not easy for any taxpayers (and many practitioners) but particularly difficult for low-income taxpayers who are more likely to have functional literacy\textsuperscript{180} and financial literacy\textsuperscript{181} challenges.\textsuperscript{182} The Service’s correspondence suffers from deficiencies in basic readability. The systems that the Service uses to generate taxpayer correspondence are admittedly antiquated.\textsuperscript{183} While some EITC

\textsuperscript{180} Literacy Coordinating Council, available at \url{http://lcc.deped.gov.php} at FAQ (defining functional literacy as “Functional literacy is a range of skills and competencies – cognitive, affective, and behavioral, which enables individuals to live and work as human persons; develop their potentials; make critical and informed decisions; and function effectively in society within the context of their environment and that of the wider community (local, national, global) in order to improve the quality of their lives and that of society.”)

\textsuperscript{181} Organization for Economic Cooperation and Development (OECD), \textit{The Case for Financial Literacy in Developing Countries: Promoting Access to Finance by Empowering Consumers} at 2 (2009), available at \url{http://www.oecd.org/dataoecd/35/32/43245359.pdf} (“Financial literacy is the combination of consumers’/investors’ understanding of financial products and concepts and their ability and confidence to appreciate financial risks and opportunities, to make informed choices, to know where to go for help, and to take other effective actions to improve their financial well-being.”)

\textsuperscript{182} See Book, \textit{The IRS’s EITC Compliance Regime}, supra note 5 at 396 (discussing literacy issues with low-income taxpayers); Lipman, \textit{The Working Poor are Paying for Government Benefits}, supra note 66 at 471 (2003) (“literacy limitations are sharply higher among low-income adults.”)(citing Jeffrey S. Gold \textit{Proposed IRS Consortium Deal for Return Pep and e-Filing is Flawed}, 96 tax Notes 1645 (2002)). See also \textit{THE NATIONAL TAXPAYER ADVOCATE, FISCAL YEAR 2006 OBJECTIVES REPORT TO CONGRESS} 34-35 (2007) (“Financial literacy plays an important role in tax compliance because taxpayers who do not understand basic financial transactions are unlikely to understand the difference between employee and independent contractor status or the EITC’s complex eligibility rules.”).

\textsuperscript{183} See Jodi Patterson, Director of IRS Office of Taxpayer Correspondence, \textit{INTERNAL REVENUE SERV.}, \textit{Making a Noticeable Difference at the Monthly PLAIN Meeting} at Slides 1-3, (Mar. 9, 2011), available at \url{www.plainlanguage.gov/news/files/IRS_PLAINpresentation.ppt}, (illustrating issues with the Service’s correspondence). See generally Gene Berrett, Fred Goldberg: \textit{Shaping A More Responsive IRS}, \url{www.allbusiness.com}, (“[Fred Goldberg, Former IRS Commissioner 1989-1992] has made clearer correspondence his principal goal for this year. Specifically, he speaks of “things like more readable letters, containing the name and number of a real human being at the IRS for the affected taxpayer to call.””), available at \url{http://www.allbusiness.com/professional-scientific/accounting-tax/131724-1.html}. 
correspondence\textsuperscript{184} have been redesigned to address readability issues, many others have not and continue to appear in the same, unchanged form.\textsuperscript{185} The typeface, layout and whitespace make it difficult to read old, unchanged correspondence.\textsuperscript{186} The aesthetics compound the substance readability problems. The sentence are complex and not written in plain language and, worse, the letters use Service and tax jargon that means nothing to the average taxpayer.\textsuperscript{187} In a study of EITC taxpayers, more than 70\% thought that examination correspondence was difficult to understand.\textsuperscript{188} The tone of the Service’s correspondence is often overly harsh and overly legalistic,\textsuperscript{189} which tends to frighten taxpayers. The most concerning results of the EITC audit correspondence study were the conclusion that, after reading the Service’s correspondence, nearly a quarter did not understand that the Service was auditing their return and another quarter did not understand what documents to send to the Service.\textsuperscript{190} The failure to understand the substance of the Service’s correspondence makes it nearly impossible to comply with its requests.

\textbf{C. The Service’s Phone Issues}

Confusing correspondence prompts taxpayers to call the Service for clarification and assistance. Unfortunately, phone contact with the Service creates a host of additional issues. In Fiscal Year 2008, the Service’s level of service (LOS) for its toll-free lines was 53\%.\textsuperscript{191} Almost half of taxpayers who called the Service in FY 2008 were not helped. Since then, the Service’s phone LOS has been “in the low 70\% range.”\textsuperscript{192} The Service’s goal is only to answer 80\% of its calls, and the IRS Oversight Board believes that even getting to the 80\% level, where a full 20\% of taxpayers


\textsuperscript{185}To view sample correspondence, see INTERNAL REVENUE SERV., UNDERSTANDING YOUR IRS NOTICE OR LETTER, available at http://www.irs.gov/individuals/article/0,,id=96199,00.html (note the new forms for correspondence CP-11A, CP-12, and CP-13A but older forms for other correspondence).

\textsuperscript{186}See Patterson, supra note 183 at slides 1-3.

\textsuperscript{187}See NATIONAL TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS, supra note 6 at 104 (stating 42.7\% of the study participants “did not understand some words/terms”).

\textsuperscript{188}Id.

\textsuperscript{189}Id. (16.4\% of study participants agreed that “tone of the letter scared taxpayer”)

\textsuperscript{190}Id.

\textsuperscript{191}See Olson Senate Testimony, Current IRS Issues, supra note 145 at 2.

\textsuperscript{192}INTERNAL REVENUE SERV. OVERSIGHT BOARD, FY 2012, supra note 11.
are not assisted when they call, will cost another $100 million.\textsuperscript{193}

The Service’s failure to answer the phone when taxpayers call is a significant issue. An inability to reach the Service to qualify questions causes taxpayers to give up, often failing to respond at all.\textsuperscript{194} Inaction by an EITC taxpayer will cause them to lose, in many cases, thousands of EITC dollars that may be keeping their family out of poverty.

\textit{D. Access to Examiners}

Correspondence examination cases are only assigned to an examiner after correspondence is received from the taxpayer.\textsuperscript{195} Cases in which a written response is not received are “worked completely through an automated system.”\textsuperscript{196} The correspondence examination process is designed to minimize contact with the Service’s personnel, which is how the cost savings are realized.

A taxpayer who calls the Service does not necessarily trigger the Service’s filters as a “responsive taxpayer” and can find him or herself on the receiving end of additional correspondence stating that they have failed to contact the Service along with a notice of deficiency.

This is a problem when, as a study suggests, 90\% of EITC audited taxpayers attempt contact the Service about their audit, with nearly 75\% of them calling or personally visiting the Service.\textsuperscript{197} As noted above, however, these are not the actions that get a correspondence case assigned to a person.\textsuperscript{198} These EITC claimants are contacting the IRS because they do not understand the letter or are having difficulty with the documents the Service seeks.\textsuperscript{199}

Until very recently, the Service’s initial EITC correspondence did not designate an employee who could be contacted about the examination.\textsuperscript{200} Even now, the correspondence only designates a supervisor, and callers are

\begin{flushleft}
\footnotesize
\textsuperscript{193} Id.
\textsuperscript{194} See Olson Senate Testimony, Current IRS Issues, supra note 145 at 3.
\textsuperscript{195} See Landsmann, supra note 4 at slide 13.
\textsuperscript{196} Id.
\textsuperscript{197} See NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS, supra note 6 at 3.
\textsuperscript{198} See Landsmann, supra note 4 at slide 13.
\textsuperscript{199} Id.
\textsuperscript{200} See TREASURY INSPECTOR GEN. FOR TAX ADMIN., PROGRESS HAS BEEN MADE, supra note 128 at 2.
\end{flushleft}
routed to any available employees, assuming that the call is even answered. Evidence indicates that phone line where EITC calls were routed was not staffed, and callers were forced to leave a message. Anecdotal evidence suggests that return calls were rarely made from the EITC voicemail.

E. Document Logging and Matching

Even when EITC claimants understood correspondence or were able to receive clarification about the documents sought, forwarding the documents to the Service often made little difference in the audit. Document matching is a serious problem for the Service. The Service has significant delays in mail routing and serious delays in reading received mail. If mail isn’t logged into the Service’s system correctly or timely, the automated correspondence system continues actions based on the belief that the taxpayer has not responded or submitted the requisite substantiation. The Service has admitted the premature issuance of statutory notices of deficiency based on mail handling problems. Although some areas of the Service’s barcode correspondence for documents matching purposes, the EITC area in Small Business/Self Employed does not and has refused to implement such a provision. While the Service claims to have addressed its mail handling issues, this author believes that problems with logging, matching and processing correspondence remain and result in denial of

---

201 See Marchbein, supra note 179 (“Correspondence from the IRS bears only the name of a supervisor. If the practitioner calls the supervisor, the IRS typically refers the call to whatever employee is available.”). See also TREAURY INSPECTOR GEN. FOR TAX ADMIN., PROGRESS HAS BEEN MADE, supra note 128 at 2 (“practitioners shared that the IRS did not designate, in the various letters, an employee who could be contacted to further define the issues or answer taxpayer questions.” (citing INTERNAL REVENUE SERV. OVERSIGHT BOARD 2008 ANNUAL REPORT TO CONGRESS)).

202 See supra text accompanying 191-194.

203 See TREAURY INSPECTOR GEN. FOR TAX ADMIN., PROGRESS HAS BEEN MADE, supra note 128 at 2.

204 Id.

205 Id.

206 See Marchbein, supra note 179 (“Also, correspondence tends to not be reviewed for several months, resulting in the IRS’ sending letters advising the taxpayer that it needs additional time to review it. When the IRS finally issues reports, in some cases the proposed adjustments are incorrect because it has not properly considered and evaluated documents and substantiation furnished by the taxpayer or his or her representatives.”).

207 Id.

208 See Landsmann, supra note 4 at slide 21.

209 In 2011, SB/SE rejected a Taxpayer Advocacy Panel request to implement a barcoding system for mail matching and logging purposes.

210 Id.
EITC taxpayer rights.

F. Studies Shows EITC Audit Failure, Not Necessarily Claimant Failure

Given all of the audit barriers that EITC claimants face, it would not be surprising that EITC claimants who should be entitled to the EITC are unable to claim it. In 2004, Taxpayer Advocate Service (“TAS”) published a study211 in which TAS examined 679 random EITC audit reconsideration cases. Audit reconsideration is a Service appeals process in which a taxpayer asks to have their examination reviewed for accuracy.212 Between 40%-45% of EITC claimants whose EITC claim was denied or reduced during the correspondence examination process received additional EITC upon audit reconsideration.213 In other words, nearly half of EITC claimants failing the audit process were in fact eligible for EITC. It follows that being declared ineligible during the correspondence examination process is not necessarily indicative of ineligibility. Research from TAS “suggest that the EITC claims of many taxpayers are denied for lack of documentation even if they could meet applicable residence and relationship requirements.”214

A lack of response cannot be viewed as indicative of a lack of ineligibility either. In the same TAS study, 42% of the taxpayers were categorized as “late response” or “no response”; however, nearly half of these taxpayers ultimately received favorable outcomes.215 In other words, they received some amount of EITC. This outcome rate to be comparable to taxpayers who were responsive.216 Extrapolating these findings would cut the alleged improper payment rate nearly in half.

In 2005, TAS further researched the challenges EITC claimants face during examination.217 This study underscored many of the findings of the 2004 TAS Audit Reconsideration Study, particularly that barriers, not necessarily ineligibility, inhibit EITC claimants. The 2005 study notes that EITC claimants often do not understand examination correspondence nor do they understand what they need to prove during a correspondence audit to

211 NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, supra note 8.
212 INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 4.13.1.2 (defining audit reconsideration).
213 NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, supra note 8.
214 See NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2012 OBJECTIVES, supra note 101 (citing Olson House Testimony, supra note 69).
215 NAT’L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS, supra note 8.
216 Id.
claim EITC. While the study attributes this to challenging correspondence, the study also notes that the personal characteristics of some claimants (limited financial and actual literacy, transient homes) impact EITC accessibility. The study suggested that “the majority of their clients were truly eligible for EITC, but . . . have difficulty assembling the requested documentation and just give up, forgoing the credit.”

G. EITC Overpayment Rate is Likely Incorrect

In the 2004 TAS audit reconsideration study “over 40% of all taxpayers with representation emerged from their audit with their full EITC in tact.” Another way of looking at this is that of a subset of 427,807 taxpayers claiming EITC who received payment and were later audited (the Service would call these improper payment post-audit), a substantial portion, perhaps even as many as 40%, may not in fact be improper, if they had access to representation during audit. Without the extraordinary efforts relating to this study, the Service would have considered those 40% in the EITC improper payment calculation. Taking it a step farther, if, as in the TAS study, 40% of EITC audits are not improper payments, and assuming we could translate this to the overpayment rate, then the EITC annual overpayment rate drops to 14-17%.

A potential criticism is that this calculation cannot be extrapolated because the sample population was arguably a motivated subset of individuals who felt they were wrongly denied access to EITC. Admittedly, this is not a representative sample. It is nonetheless indicative of the existence of serious, widespread and systematic barriers for claiming the EITC. Even if the 40% error found for EITC improper payments in the TAS Study cannot be directly applied because of methodological issues, it establishes that the 23%-28% improper payment rate is suspect. The National Taxpayer Advocate has come to a similar conclusion, stating, “[s]ignificant statistical questions about the IRS estimates remain.”

The EITC improper payment data is erroneous for other reasons too. First, the rate is based on three studies of EITC errors that considered a claimant’s inability to document EITC as overpayment, which (as shown by

---

218 Id.
219 Id.
220 Id.
221 See NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS, supra note 6.
222 See Olson House Testimony, supra note 69.
the TAS study) may “reflect premature and incorrect judgments.”

Second, the error rate does not consider underpayments. In a February 2011 report, TIGTA demonstrated that the Service ignores EITC underpayments in its improper payment calculation, in contravention of the OMB guidance. Additionally, in cases where the incorrect parent may have claimed EITC, the Service doesn’t research, calculate or include the possible underpayment (or lack of payment) to the appropriate EITC parent.

The actual rate of EITC improper payment is probably not nearly as high as the Service reports. In addition, several commentators have discussed the role of unintentional error due to complexity as a significant contributor to the reported improper payment rate. As Professor Book has stated, “[e]ven though the IRS has studied and reported on EITC extensively there is very little data regarding how much EITC noncompliance relates to intentional conduct and how much relates to unintentional error.”

V. CONTINUED USE OF CORRESPONDENCE EXAMINATIONS CONTRAVENES EXECUTIVE ORDER 13520

The previous four Parts have attempted to explain the intersection of improper payment law, the earned income tax credit and correspondence examinations. The ultimate conclusion should be obvious: the manner in which the Service uses correspondence examinations to administer the EITC unduly burdens access to EITC for many low income taxpayers, and this undue burden is contrary to Executive Order 15320.

A critical look at EITC correspondence examinations suggests that many eligible EITC claimants fail to succeed during the correspondence examination process, albeit not necessarily because of their ineligibility. These failures to document EITC within the narrow confines allowed in the Internal Revenue Manual are the measurement for EITC improper payment.

223 See Greenstein and Wancheck, supra note 100.
224 Id.
226 See Greenstein and Wancheck, supra note 100.
227 Id.
229 See Book, Preventing The Hybrid From Backfiring, supra note 66.
230 See supra text accompanying notes 31-229.
The burden is on the taxpayer to read the voluminous instructions, determine EITC eligibility (with virtually no Service assistance) and correspond in writing (with limited telephone access to Service personnel). Executive Order 13520 is clear in its direction that agencies must minimize improper payments without unduly burdening program participation. The current use of correspondence examination inhibits lawful EITC participation. Continued Service use of correspondence examinations, as undertaken with full automation and nearly no access to Service personnel for clarification or assistance, to manage EITC improper payments contravenes Executive Order 13520.

VI. POSSIBLE SOLUTIONS

The most obvious solution is to simplify eligibility for EITC so that claiming and verifying EITC eligibility are accessible and possible for the low-income taxpayers EITC is designed to help. This, of course, requires Congressional action. The current polarized political climate, as shown by the current struggle within Congress to agree to any tax compromises and Congress’s decade-long propensity for brinkmanship in tax legislation, limit hope for this solution. As is typical with tax issues on which Congress cannot or will not take action, it falls to the Service to address the problem.

It is not the intent of this article to cast the Service as the lone villain in the EITC examination story. Service actions are problematic but the Service is faced with its own burdens of revenue collection with a tight budget and antiquated systems that have not been fully modernized. The Service has periodically undertaken pilots in an attempt to study possible changes to EITC administration. Some have been unsuccessful but others show promise and, more importantly, reflect the possibility that the Service is aware of the EITC’s examination undue burden.

A. Precertification Pilot

Given the pressure on the government to reduce expenditures, it is hard to foresee the Service willingly discarding its inexpensive (albeit arguably ineffectual) correspondence examination process or the minimal staffing it uses with correspondence examinations. This realization, that change is unlikely to emerge on its own, informs the purpose of this article, which is to suggest the possibility of a legal catalyst to force change.
The Service has undertaken certain pilot programs for EITC, which evidence the Service’s recognition of the undue burden that correspondence examinations create for EITC taxpayers. Just a few years ago, the Service piloted an EITC precertification program to minimize improper payments.\footnote{\textit{Internal Revenue Serv., IRS Earned Income Tax Credit Initiatives, Addendum to the Report on Qualifying Child Residency Certification, Filing Status, and Automated Underreporter Tests, Implementation of Alternative Approaches to Improving the Administration of the EITC} 2 (2008).} Unfortunately, precertification merely added another layer of burden for EITC claimants. The Service ultimately concluded that, despite a variety of alternatives, precertification deterred EITC participation by eligible beneficiaries.\footnote{\textit{Id.}}

\section*{B. State Data Pilot}

Just last year the Treasury Department began a pilot to assess the ability to use state SNAP and TANF data to assist in validating EITC eligibility.\footnote{\textit{Id.}} The pilot has dual goals of minimizing improper EITC payments and reducing barriers to EITC access.\footnote{\textit{Id.}} While the Treasury Department identified claimant privacy and consent as possible issues to implementation,\footnote{\textit{Id.}} a bigger concern is that erroneous state data will create another possible barrier for claimants and serve as a basis for more audits or improper denials during audit.

\section*{C. Examiner Contact Pilot}

The Service has recently begun two pilots that have much less risk for harm and also reflect a better understanding of the burdens of EITC examinations. The Service is piloting a modified correspondence exam process for a selected set of EITC claimants.\footnote{See Olson House Testimony, supra note 69 at 19.} In this study, the National Taxpayer Advocate and Low Income Taxpayer Clinic directors will train a group of correspondence examiners who will make personal phone calls to audited EITC claimants twice during the examination process to answer questions.\footnote{\textit{Id.}} This pilot is essentially a pilot of a non-correspondence audit process. Based on previous EITC claimant success in the TAS Audit Reconsideration Study, EITC claimants likely will have far more success in

\begin{thebibliography}{99}
\footnotesize
\bibitem{footnote1} \textit{Internal Revenue Serv., IRS Earned Income Tax Credit Initiatives, Addendum to the Report on Qualifying Child Residency Certification, Filing Status, and Automated Underreporter Tests, Implementation of Alternative Approaches to Improving the Administration of the EITC} 2 (2008).
\bibitem{footnote2} \textit{Id.}
\bibitem{footnote3} \textit{Partnership Fund for Program Integrity Innovation, Assessing State Data for Validating EITC Eligibility,} available at http://partner4solutions.gov/pilots.
\bibitem{footnote4} \textit{Id.}
\bibitem{footnote5} \textit{Id.}
\bibitem{footnote6} \textit{See Olson House Testimony, supra note 69 at 19.}
\bibitem{footnote7} \textit{Id.}
\end{thebibliography}
this pilot than if they were left to the typical unresponsive automated system. Improvement in the EITC claimant success rate in this pilot would evidence that solely automated correspondence exams are a bad match for EITC compliance, and in fact impede access to program benefits. Success in this study would be evidence that Service personnel personal involvement is necessary to administer the EITC examination process.

D. Affidavit Pilot

In another pilot, the Service is testing an expansion of the very limited list of acceptance proof during an EITC correspondence examination.\textsuperscript{238} In addition to the list of official records and select few letters on official letterhead, examiners will also accept third-party affidavit evidence to prove qualifying child relationship and residency,\textsuperscript{239} which are two of the largest proof hurdles. The Service has already concluded, during its precertification study, that affidavits are “easier for taxpayer to obtain than official documents or letters . . . and had a higher acceptance rate than the other two types of documents.”\textsuperscript{240} This study can also help alleviate some of the proof burden for EITC claimants.

E. Future Possibilities

If expanded for all 26 million EITC claimants,\textsuperscript{241} these two pilots have the possibility to alleviate some of the burdens of EITC correspondence examinations: a lack of personal contact with Service personnel, and documentary proof issues. These two pilots are not, however, a panacea for all of the ills of this process. They do not address, for example, that establishing eligibility for the credit is still far too document intensive, Service’s telephone LOS is likely to remain at abysmally low 70-80\% levels, or the troublesome document logging and matching problem. A more looming reality is that, even if these pilots are successful, the Service is extremely unlikely to secure funding for the universal expansion of telephone contact for all EITC examinations. The economic and political climates make that funding extremely unlikely. Without it, the EITC correspondence examination process will continue as an unfair and undue burden.

\textsuperscript{238} Id. at 20.
\textsuperscript{239} Id.
\textsuperscript{240} Id. (citing \textsc{Internal Revenue Serv.}, EITC Initiative Report, \textit{supra} note 231 at 14.
CONCLUSION

Correspondence examinations have proven insurmountable for many EITC claimants. According to a TAS study, many EITC claimants just give up because proving their eligibility and navigating the correspondence examination process is too daunting. Such barriers to program participation are precisely what Executive Order 15320 proscribes in its attempts to limit improper payments. Two current Service pilots, to expand access to Service personnel during an EITC correspondence examination and to accept affidavit evidence to document qualifying children, have promise to lessen the burden of these audits. Unfortunately, the personnel expansion necessary for examiner contact during all EITC correspondence examinations is unlikely to receive funding, even if the pilot is successful. Accordingly, it may fall to Executive Order 15320 to become the necessary legal lever for change.