



“Service to the Tax Profession”

**NATIONAL SOCIETY OF TAX PROFESSIONALS  
COMMENTS ON PROPOSED REGULATIONS  
FOR EIC DUE DILIGENCE PENALTY  
REG-140280-09**

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**Introduction**

On behalf of the National Society of Tax Professionals (NSTP), I would like to offer our organization’s comments on REG-140280-09, based on the views of our large and diverse membership. The National Society of Tax Professionals is a non-profit organization made up of tax practitioners with varying types of professional credentials and different levels of practice, including enrolled agents, CPAs, attorneys, and experienced unenrolled preparers. All of our members are required to abide by our Code of Professional Conduct.

The National Society of Tax Professionals appreciates the IRS’s efforts to reduce payments of improper Earned Income Tax Credit (EIC) claims and to improve the IRS’s ability to detect these claims. We believe EIC compliance is an important goal for both the Service and for tax professionals. However, we are concerned that the proposed regulations in combination with the new, higher EIC due diligence penalty place an inappropriate and unfair burden on tax preparers.

**Form 8867 Should Be Signed by the Taxpayer**

Under the proposed regulations, Form 8867 will be part of the tax return. Previously, although the regulations required that it be completed and retained in the tax preparer’s client file, the Form was basically a worksheet used to help the preparer evaluate the validity of an EITC claim and document the client’s responses. Requiring that the Form be submitted as part of the tax return raises its legal significance and subjects it to much greater scrutiny by the IRS. Since tax preparers rely on their clients to provide them with the information entered on the form, it is more appropriate for Form 8867 to be a stand-alone form that the taxpayer signs and submits as an affidavit of EIC eligibility. In short, the taxpayer should be attesting to their eligibility for the credit, not the tax preparer.

**Independent Verification of Taxpayer Information**

Part IV, Due Diligence Requirements, of Form 8867 asks tax preparers whether they have complied with the knowledge requirements. This question is perhaps the most disconcerting, especially when read with the “Knowledge” requirement contained in the current §6695 regulations. Existing Reg. §1.6695(2)(b)(3) essentially imposes an affirmative duty on preparers to investigate representations made to them by their clients “if the information furnished to the tax return preparer appears to be incorrect, inconsistent, or incomplete...”

There is little IRS guidance on how far this duty extends, and the proposed regulations do nothing to clarify the logical limits of this aspect of EIC due diligence. Are preparers required to independently investigate the claims of their clients? Must they demand and keep copies of birth certificates, drivers’ licenses, social security cards, school records, apartment leases, utility bills, etc., or other documents tending to prove family

relationships and a client's living situation? If a client is unable to furnish the above documents, to what extent does a preparer have to search for other sources of the information? We ask that the IRS add to the proposed regulations language that clearly states that a preparer is *not* required to independently verify EIC eligibility information given to the preparer by the client.

### **IRS Scrutiny and the Increased Penalty**

Now that Form 8867 will be part of the tax return submission, it is clear that the IRS will undertake to examine these forms in conjunction with its review of EIC claims and will more vigorously use this new tool to challenge preparers. With the recent penalty increase from \$100 to \$500 for each failure to perform the EIC due diligence properly, a preparer's innocent mistake or borderline uncertainty when answering the Form 8867 questions can bring dire financial consequences. The penalty increase provision was added to P.L. 112-41 as a revenue raiser to pay for the Korean trade bill. Obviously, there is a revenue number associated with the penalty increase that Treasury will have to reach by increased challenges to preparers' due diligence checklists. In short, tax preparers are left wondering whether the increased scrutiny is necessary to curb EIC fraud or whether the additional due diligence requirements are essentially just a revenue-raiser.

### **Costs of Compliance**

Taxpayers who are eligible to claim the EIC are those with lower incomes. The continued expansion of return preparer due diligence requirements relating to this credit combined with the dramatically increased due diligence penalties is pricing paid EIC return preparation out of the market. In short, return preparers will have to charge for their increased time spent investigating their client's EIC eligibility, obtaining verification documents, and storing all of these records. EIC-eligible taxpayers are the one who can least afford to pay increased fees, and, therefore, professional tax preparation will grow farther out of the reach of the working poor and will drive them to underground, nonsigning preparers.

### **Conclusion**

The proposed regulations make a significant change in the dynamic between the client and the preparer and between the preparer and the IRS. Requiring that Form 8867 be submitted with the return is intended to put further responsibility on the preparer to vouch for the client's financial information and family situation. This responsibility is misplaced. A tax return preparer is just that—someone who applies the tax rules to the client's facts to determine the proper reporting of income. It is not the preparer's responsibility to prove or disprove the client's facts. That task is properly left to audit.

The preparer is not an auditor and should not be put in an adversarial relationship with his or her client. Requiring that a preparer submit Form 8867, not attested to by the taxpayer, does just that. The tax return preparer has a strong incentive *not* to recommend claiming the EIC because the preparer is on the line for the client's accuracy in reporting eligibility information.

We respectfully request that the IRS reconsider the Form 8867 submission requirement or that the Form be turned into an attestation by the taxpayer that the taxpayer has provided the correct information to the preparer. We further ask that the IRS clarify the limits of the preparer's responsibility to independently verify EIC eligibility information given to the preparer by a client.

On behalf of the National Society of Tax Professionals, I want to thank you for the opportunity to present our organization's views on the proposed rules. I can be reached by phone at (800)367-8130 or by e-mail at [Bill@nstp.org](mailto:Bill@nstp.org) if you have any questions.

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