

**GrayRobinson**

**July 27, 2023**

**Ellen Lamb**

**Re: House Ways & Means subcommittee hearing on the ERTC**

The House Ways & Means Subcommittee on Oversight held a hearing this afternoon on "[The Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud.](#)"

**Chairman David Schweikert** (R-AZ) called the hearing to order. He said that today's hearing would allow the Committee to hear from those directly affected by the challenges associated with the Employee Retention Tax Credit (ERTC).<sup>\*</sup> They would also hear from those helping employers to navigate the ERTC with the Internal Revenue Service.

Schweikert explained that the ERTC was a refundable tax credit create as part of the CARES Act, but it's complex to calculate correctly as many rules and regulations apply. They have already heard from stakeholders about the hardships caused by a significant processing backlog and by the IRS's failure to issue adequate guidelines and status updates.

He said that many taxpayers were waiting on the IRS to clear the backlog of applications for the ERTC. [Form 941-X](#) (this is actually not the application for the ERTC, but a report of adjusted income and claim for return) is a paper form that cannot be filed electronically. Some employers have been waiting months or even years for credits to be process, which is an immense burden, especially for small businesses.

Employers have no way of checking the status of their ERTC claims, which extends uncertainty and financial stress. Insufficient guidelines have made it hard for businesses that filed ERTC claims mistakenly or inaccurately to correct their filing.

ERTC scams and frauds have been increasing, and the IRS has been warning about them since Fall 2022. He noted that the IRS had added fraudulent ERTC promotions to its "Dirty Dozen" list of tax scams. Some are arguing for extensions for how long employers can claim the ERTC, but Congress never intended the ERTC to serve as a line of capital. It was meant to help businesses retain employees during the COVID-19 pandemic, which is now over.

The focus should be to eliminate confusion and clear the backlog of legitimate claims, Schweikert said. They also need to combat scams and frauds, and look for ways to improve the process for any future programs.

**Rep. Bill Pascrell** (D-NJ), the Subcommittee's ranking member, welcomed Ms. Czipo, his constituent. "We've worked very closely together over many years."

The ERTC was vital to keeping small businesses and nonprofits afloat during the pandemic. This relief was especially important in New Jersey, where the virus struck early. Nonprofits were on the front lines.

---

<sup>\*</sup> While the hearing refers to the provision as the ERTC, the IRS refers to it as the ERC. Symptomatic, one might say.

Everyone wants to make sure the ERTC gets to the employers who need it most, but the heart of the issue is resources — decades of attempts to sabotage and destroy the IRS’s ability to serve taxpayers and enforce the law.” Historic funding provided by Democrats has revitalized the IRS. Americans are finally getting their calls answered. Refund checks arrive on time. “Every Republican in Congress voted against making tax time easier.”

Thanks to the Inflation Reduction Act, this filing season was one of the most successful in years. The IRS has made enormous progress in call wait times, and backlogs of returns have been cleared. Now they are clearing the backlog of ERTC claims. In the past two months, nearly half a million refunds have been processed. 99% of claims are now less than three months old.

Most ERTC claims are filed on paper and processed by hand. The IRS has directed funding toward electronic filing and automated processing. This means quicker refunds and fewer errors.

They know that bad actors have targeted the ERTC. The IRS is already seeking criminal charges and recovering millions in stolen money. As they have cleared backlogs, they have added auditors. They are finally able to make tax collections fairer, as they have more resources to go after wealthy tax cheats. Every dollar spent on enforcement pays for itself and then some.

He scolded his Republican colleagues for trying to wipe out funding for tax collection and enforcement. “The sabotage risks our progress toward a functional tax system.”

**Rep. Jason Smith** (R-MO), Chairman of the full Committee, said that the ERTC had been an effort to help businesses keep employees on payroll when the government forced businesses to shut down because of COVID-19. “That time has passed.” President Biden announced the end of the pandemic almost a year ago.

Yesterday, IRS Commissioner Werfel said that the agency had shifted its efforts “after successfully clearing the backlog of valid claims.” But the IRS’s website says that as of July 19, they still have almost 500,000 forms to process. This reflects both how the ERTC has become plagued with fraud and how the IRS is failing to process legitimate claims in a timely manner.

The problems at the IRS were present from the beginning. First, they required all businesses to apply on paper and mail in their applications. That led to long delays. The IRS told Smith’s staff in May that 20% of claims had remained unresolved for more than four months. They have heard from businesses that have been waiting years to have their claims resolved. This has become a major source of frustration.

Businesses have found the IRS guidance confusing, particularly the rules about whether they are eligible. Some have raised concerns about guidance being insufficient and guidance changing<sup>†</sup>, which forced small businesses to spend more time on IRS rules. Just this week, after the Subcommittee announced this hearing, the guidance changed again. He hopes the rule will clarify who is eligible for the ERTC, but they should have published clear guidance a long time ago. The IRS’s lack of clarity and speed created an environment that fostered opportunities for fraud.

---

<sup>†</sup> The statutory parameters of the ERTC changed at least twice in laws passed after the CARES Act.

The ERTC's position on the IRS's "Dirty Dozen" list shows how severe this problem is. Taxpayers are getting ripped off by scammers while legitimate claims go unanswered because of a backwards IRS system.

One of today's witnesses has lived this issue day in and day out. Smith welcomed Larry Gray as "a fellow Missouri grad" and a neighbor, who has spent decades helping clients navigate the tax code. Gray was the target of an ERTC scam, and he has lost clients to competitors because he refused to help the clients file fraudulent claims.

**Chairman Schweikert** introduced and welcomed the witnesses:

- [Larry Gray](#), CPA, Partner, AGC CPA
- [Roger Harris](#), President, Padgett Advisors
- [Pat Cleary](#), President and CEO, National Association of Professional Employer Organizations (NAPEO)
- [Linda M. Czipo](#), President & CEO, New Jersey Center for Nonprofits

Schweikert apologized for "the chaos of the process," explaining that members would be coming and going as votes were called on the House floor.

## TESTIMONY

**Mr. Gray** said he had been working in this field for more than 45 years, and spoke yesterday at an IRS Tax Forum. He has served on voluntary IRS advisory boards since the 1980s, and said, "I believe in the tax system." Today's witnesses are all on the same page, he said.

Rather than read his written statement, he said he wanted to focus on small businesses and small accounting firms. During the pandemic, he could not do his usual work of teaching classes around the country, so he set up a YouTube channel. One of the first lessons he gave on YouTube was how to fill out Form 7200, the application for the Employee Retention Tax Credit, before filing the quarterly return. He told the IRS that he expected a lot of fraud. Raising the credit from \$5,000 to \$7,000, then allowing employers to claim ERTC for unforgiven portions of their PPP loans, attracted even more fraud.

Three years ago, he said, the IRS's National Public Liaison office was understaffed and underfunded. He had no guidance, and what he saw on the internet showed him that people really did not understand how this was supposed to work. He took a couple of his small companies that he knew did not qualify for the ERTC, and "started shopping the ERTC mills." He read from some of their contracts, which required the client to affirm that they were eligible for the ERTC. So these promoters are really just providing clerical assistance. They do not provide assistance with audits.

He said they need to coordinate efforts at the IRS by starting at the top and appointing a permanent Chief Counsel. There should have been an ERTC implementation team to coordinate from the top down. They need education, guidance, and updated FAQs.

**Mr. Harris** said that his accounting and tax business had been serving small businesses around the country for almost 60 years, through a network of about 200 offices. "This hearing couldn't come at a better time." While the

ERTC was a great opportunity and a much-needed lifeline for small businesses, it is fraught with fraud and challenging the whole profession.

Because of the pandemic, they acted quickly and in ways they would not have done in normal times. Harris said he hoped they could learn from their mistakes.

His written testimony provided more details, but Harris highlighted four points:

1. It was obvious that filing paper claims would create a problem, especially because the paper claims were going to buildings whose employees were mostly working remotely.
2. This led to major delay in getting money back to the people the program was supposed to be helping.
3. The law is written in such a way that it will require all businesses that received the ERTC to amend their tax returns from 2020 and 2021 (depending on when they received the credit). For S corporations, all the partners and shareholders will also have to amend their returns. There could be millions of returns going in for which penalties and interest will likely be charged. This will further stretch IRS resources.
4. They have to deal with the fraud in the system. Any time this amount of money gets handed out, bad actors show up. Some of them are very sophisticated. Harris's firm has had long-trusted clients told they have money coming from this system. The IRS has no choice but to start enforcement actions, but businesses like Harris and Gray's need to know how they should advise their clients that took money they weren't entitled to. The CPAs are asking the IRS for a real-world solution that helps clients come back into compliance.

Harris had praise for IRS Commissioner Werfel, who had spoken at the recent program in Atlanta, but also asked to meet with ERTC practitioners about what they needed from him. "So at least the dialogue has started."

**Mr. Cleary** greeted Rep. Pascrell as a fellow native New Jerseyan, born in Paterson. His organization, NAPEO, represents approximately 250 organizations that provide payroll, benefits, risk management, regulatory compliance and other HR assistance to more than 173,000 small and mid-sized businesses. He said that hundreds of thousands of small and medium-sized businesses (SMBs) are still waiting for their ERTC funds.

He explained the role of professional employer organizations, which serve as champions for small businesses and ways for employees of small businesses to get access to employee health, life insurance, retirement, and other benefits. Companies that use PEOs grow faster, have lower turnover, and last longer.

Among the many services PEOs provide for their client companies is helping them apply for the ERTC. PEOs also helped their clients get Paycheck Protection Program (PPP) loans and loan forgiveness, apply for available tax credits, and manage employee leave. Businesses that used PEOs during the pandemic were 60% less likely to permanently close than those that did not use PEOs.

They have been sounding the alarm about the huge backlog of unprocessed ERTC claims for more than a year. When they first engaged, the backlog was about 200,000. It grew to more than a million, and currently seems to stand at 488,000, having grown again in the past month. "It's moving in the wrong direction." The numbers do not give the whole picture; many claims are filed on an aggregate basis. PEOs submit multiple business claims together on the same form. The IRS counts multiple businesses on a single form as one case.

A recent survey of 43 of Cleary's member PEOs found that 18,000 of their small business clients are still waiting for the IRS to approve almost \$3 billion in claims for ERTC filed before 2023. Almost 4,000 of these claims date back to 2020. "It's completely unacceptable."

Yesterday, the IRS Commissioner said this backlog had been eliminated, and that 99% of claims were less than three months old. "It's simply not true." As of a week ago, the IRS's own website said that the backlog was 488,000 applications.

When it comes to fraud, Cleary said, the NAPEO has stood shoulder to shoulder with the IRS. They have repeatedly warned their members against fraud, and have given them materials that warn about "ERTC mills." The IRS's backlog has been the biggest business development engine for fraudsters. Had there not been a backlog, there would be no ERTC mills preying on small businesses. The IRS created this environment.

Cleary said he had just recently gotten a phone call from "Heather" at an ERTC mill, asking whether Cleary had gotten his ERTC money yet.

The IRS is trying to triage this problem. Cleary recommended that they tackle the PEO submissions first, because those forms should inspire higher confidence as compliance is the PEOs' business. The backlog is causing hardships for businesses around the country.

**Ms. Czipo** said that her message was essentially the same as the other witnesses. They want to reduce confusion, fight fraud, and eliminate the backlog of ERTC applications.

She said it was impossible to overstate the role that charitable organizations had played during the COVID-19 pandemic, or how important the ERTC had been for nonprofits to continue serving their communities. Even before the pandemic, nonprofits were struggling to keep up with rising demand for services and limited resources. COVID-19 stretched many organizations to the breaking point.

Programs like the PPP and the ERTC were critically important to nonprofits as they continued to provide services during the pandemic. Nonprofit participation in the ERTC program was high; her own organization received an ERTC payment. Their process was comparatively smooth, and they were able to file electronically through their payroll company. That was not the experience for every nonprofit.

She thanked Congress for structuring the ERTC as a payroll tax credit, but said that its sheer complexity, repeated changes to guidance, and guidance that didn't necessarily apply readily to nonprofits created or exacerbated the confusion. The criteria/guidance changed four times over the course of 2020-2021, in an environment where nonprofits were grappling with unprecedented challenges. The result was widespread confusion, and in some cases, missed opportunities for relief.

Her organization and the Network have tried to educate the community about the program and encourage eligible organizations to apply, but also to be wary of fraud. Her own organization had an unscrupulous provider contacting their members and claiming to be working with them, when that was not true. This underscores the need for ongoing communication and education from trusted sources inside and outside the government.

She made a few recommendations:

- Ensure that from the outset, relief programs are structured to ensure equitable access for charitable nonprofits. Payroll tax credits are a critically important way to do that.
- Ensure that rural, grassroots, and historically underserved community organizations can participate
- Simplify the eligibility and application process at the outset so smaller organizations can participate more easily
- Provide ample opportunities for education, resources, training, and application assistance
- Put safeguards in place to protect against predators and scam artists

## Q&A

**Chairman Schweikert** reminded the witnesses that they were in the middle of votes, so many members were watching this hearing on television. He deferred to Rep. Steube.

**Rep. Greg Steube** (R-FL) asked Mr. Harris about long processing delays, sometimes for millions of dollars. How has the complexity of ERTC returns contributed to the backlog?

Mr. Harris said that a lot of factors contributed to the backlog, starting with the paper filing. That is probably the single biggest contributor. Complexity has been a problem in many cases, especially with the retroactive coordination with PPP loans. For organizations like his that were trying to get it right, this took time; he does not know whether the mills took that much time. But a lot of the problems in this program were predictable. Complexity is a problem in all the tax code, not just this program.

Steube said that Harris's testimony said he had made suggestions to the IRS for improving the ERTC program. What were those suggestions, and how did the IRS respond?

Harris said that his company and others had made a few suggestions. First, they suggested that the IRS use dedicated post office boxes to receive the paper forms for this specific program, so they could prioritize these claims. The IRS did not take any of their suggestions.

Steube asked for suggestions to prevent future backlogs. Harris said that while they were trying to solve a problem today, they should always be looking for ways to prevent these problems in the first place. Taking advantage of technology is one way to do that.

Mr. Gray said that the IRS had made changes in response to his flagging the original Form 7200, which could be faxed in. They also should have required that form to include gross receipts, a number the IRS already had for each company through previously filed income tax returns. That would have been an easy way to screen for fraud. That information would also let the IRS prioritize the companies that were losing the most money.

Steube asked how the frauds and scams had affected the backlog. Gray said the issue was that they were getting all these quarterly forms with numbers that had changed, but no reason why. How can the IRS audit that? They want to get the right money to the right employers faster.

He said again that the IRS had been short-staffed, and had pulled people off compliance to work on the Economic Impact Payments. Also, the IRS is so technologically challenged that they have to print out some electronically submitted forms and scan them into their system. He thinks the new Commissioner is listening to the industry.

**Rep. Pascrell** agreed that “Mr. Werfel is the guy,” and he thinks Werfel will fix a lot of the IRS’s problems. They want a system that sustains itself and inspires consumer confidence.

Pascrell noted that Ms. Czipo’s testimony reported that about 2/3 of charitable nonprofits received some kind of COVID relief from the government. What types of outreach services did her organization conduct to make nonprofits aware of the ERTC?

Ms. Czipo said that they and their counterpart organizations ran workshops, recorded videos, sent out emails, and posted on social media. Their New Jersey network is more than 5,000 organizations. They wanted to make sure everyone was aware of the program, the changes to the program, and the scams that were operating. They are still communicating about this.

Pascrell asked how education and streamlining the applications could help cut down on the scams targeting vulnerable population.

Ms. Czipo said this was “a key, key point.” The complexity of the program was one reason for the proliferation of scams. Organizations on the front lines were trying to meet unprecedented demands for their services, but they were also dealing with lost revenue, canceled programs, etc. They welcomed outside advice. The simpler they make this, the easier it is for organizations to apply. This is also why extra time matters.

Pascrell asked what Ms. Czipo’s organization had experienced in claiming and receiving the ERTC, and what information her organization had needed to gather and provide to their accountant.

Czipo said this was why they hadn’t applied right away. They’re a small office, and they had to figure out whether they were eligible and what payroll and financial records they needed to give their accountant. They had to determine whether their gross receipts had gone down enough, and the definition of “gross receipts” was a moving target. It was a multi-step process, and it took time.

Pascrell asked what lessons Congress should take away from the ERTC implementation that could guide future tax relief programs for nonprofits.

Czipo said the biggest thing was structuring the program as a payroll tax credit, which allowed nonprofits to participate. “It really was a lifeline.”

**Rep. Claudia Tenney** (R-NY) asked Mr. Cleary what he thought of making this a payroll tax credit, and what he thought of how the IRS had calculated it.

Cleary said this would be more of a question for the tax accountants. What he did know was that when the IRS committed a surge of resources to the program, the backlog came down. Their big problem is with the backlog.

Tenney asked whether the way the IRS calculates the number of unprocessed claims is accurate.

Cleary said no, PEOs submit dozens, even hundreds of claims on a single form, but the IRS counts that as only one claim.

Tenney said the IRS had claimed to be doubling the number of claims it was processing every week, and just yesterday, the IRS Commissioner issued a [press release saying the backlog had been resolved](#). Does that seem accurate?

Cleary said no, and that the IRS's own website said there was a backlog of almost 500,000 claims a week ago.

Tenney said the exact number was 488,000 (she had a giant graph showing the backlog of Form 941-X).<sup>‡</sup> She said she had heard a lot of distress about Form 941-X from her small business constituents.

**Rep. Judy Chu** (D-CA) said she was glad to hear the witnesses recognizing how vital the ERTC had been for the businesses that needed it. That said, the program presented a lot of challenges to the businesses that applied, and many of those challenges had to do with the IRS's lack of resources. They couldn't accept applications electronically, they didn't have enough employees, their systems were outdated and overburdened. This is why Democrats passed the Inflation Reduction Act, reversing more than a decade of cuts. The results are already clear; the IRS announced yesterday that they've been able to add staff and clear backlogs.

She asked Ms. Czipo whether these additional resources were helping nonprofits get the support they needed from the IRS.

Czipo said the pandemic was an unprecedented crisis, and more resources for the IRS mean greater ability to process applications and provide guidance. The changes in guidance were efforts to address an unprecedented crisis quickly, but they were confusing.

Chu said the IRS had announced that Form 941-X should be eligible for electronic filing next year. This is a commonsense improvement made possible by the Inflation Reduction Act. She asked how electronic filing would help nonprofits.

Czipo said that electronic filing speeds up the process exponentially. They were actually able to file their form electronically, and they received their credit within eight weeks. The more the process can be streamlined and simplified, the better.

Chu said she had heard that many of the companies applying for the ERTC at the urging of fraudulent promoters don't realize that they're not eligible, and that the IRS is trying to get the word out about this.

---

<sup>‡</sup> Mr. Cleary and Commissioner Werfel may be talking about two separate backlogs. The IRS considers Form 7200 to be the operative form for the ERC, while 941-X is an amended income statement/request for refund. Tuesday's IRS webinar did not explain how these two forms interact. Werfel may have been talking about Form 7200.



**Rep. Beth Van Duyne** (R-TX), in the chair, said that constituent services were one of Congress's most important roles, and that the IRS tops the list of constituent requests. She believes that the current situation is one of the IRS not doing its job. They're also "doing a very poor job of preventing fraud."

She played a voice mail message she had received about getting an additional tax refund for her business for the years 2020-21. The message told her she was scheduled to receive "about \$26,000 for every W-2 employee" on payroll.

"Who wouldn't call back on this?" she asked. Van Duyne said she had received several of these calls, and that even though she calls them back and tells them who she is, she is still getting the calls. "I guarantee you I'm not eligible."

These mills are telling businesses that they qualify, even though the businesses' own tax accountants have told them that they are not. How prevalent are these scams?

Mr. Cleary said that desperate businesses are calling these people back. The way to clear out these mills is to get rid of the backlog.

Van Duyne said that many of these promoters are offering short-term loans based on the expectation of an ERTC refund. Do those loans increase a business's risk?

Cleary said yes, and they have been working with the IRS to warn their clients about this. The other question is where these promoters will be in a year, when these businesses get audited.

Van Duyne said that Commissioner Werfel had told the Committee the IRS would process oldest claims first. She asked Mr. Cleary whether his members had seen this happening. Cleary said no; they are aware of 4,000 claims dating back to 2020.

**Rep. Brad Schneider** (D-IL) thanked the witnesses and said he appreciated their work, as the son of a CPA. He said he had been upset to see Mr. Gray's written testimony describe how honest CPAs are so discouraged that they are ready to join some of these corrupt businesses.

Gray said he had never thought he would hear this until three or four months ago. He thinks the complexity of the law is part of the problem. The definition of "qualifying wage" changed. The law itself is complex, and there is no guidance. The FAQ about the ERTC has not been updated. He has a friend in Illinois who just lost her biggest client.

Schneider asked Mr. Harris how Congress could help bring people back into compliance.

Harris said they need real-world solutions. Their clients listen to them at the beginning, but are lured away by the promise of huge refunds. When they discover they do not qualify for the refund after all, they have to return it, but they have already given 10% to the promoter, and they're not allowed to file amended returns.

Schneider asked Mr. Cleary whether his members' clients were applying for the ERTC and waiting, or applying and being rejected, before turning to these mills.

Cleary said that businesses generally chose their lanes; their members' clients who applied for the ERTC during the pandemic did so through their PEOs.

Schneider said that the ERTC saved more than 1.3 million jobs, so it was critically important. They need to learn the lessons from this program.

**Rep. Randy Feenstra** (R-IA) said that all the counties in his district were rural, and the ERTC was great for many of his Main Street businesses. But now it's 18-24 months since the COVID lockdown, and businesses are still waiting for guidance.

He asked Mr. Gray what Congress should do.

Gray said the IRS should send out a letter to everyone who received the ERTC explaining that they need to file amended returns, and listing the most common mistakes. They should offer an amnesty program for people who made honest mistakes and are now returning funds. They need to create accountability for preparers of Form 941-X — preparers need to sign those forms and provide identifying information. Finally, the IRS needs a permanent Chief Counsel.

Feenstra asked Mr. Harris about the case of a small business who employed family members, and was denied the tax credit. How can family-owned and -operated businesses prove that family members are legitimate employees?

Harris said this was a challenge, and they had not received guidance about this until the program was already underway, so some people had applied for credits they were not eligible for. It is another example of where they need clear, permanent guidance.

**Rep. Suzan DelBene** (D-WA) quoted a restaurant owner from her district about the impact of the ERTC on his business: he "relied on the ERTC to keep the lights on and our workers on payroll." It took almost a year for many restaurants to receive these credits, but it was incredibly important to help them get through the mandatory shutdowns.

That said, DelBene added that they know many businesses have experienced significant delays and attempts to defraud them. This is why they have to make sure the IRS is adequately resourced.

She asked Mr. Harris to describe what will happen to the small businesses that have unknowingly applied for ERTC through one of these mills even though they do not qualify.

Harris said that if they are subject to an audit, it could ruin them. They would have to repay everything the IRS sent them, plus penalties and interest.

Mr. Gray said they had heard about this from a volunteer nonprofit executive yesterday. She wants to pay the money back. This is why they need to put some kind of amnesty in place.

DelBene asked Ms. Czipo how additional resources for education and guidance for nonprofits and small businesses would have helped them seek relief.

Ms. Czipo said that first of all, it would have made them aware of the program. They are still hearing from nonprofits that think that because they got PPP, they are not eligible for the ERTC — that was true in the beginning, but then it changed.<sup>5</sup> More clarity about the eligibility standards would have helped. More information and clearer information would have encouraged more organizations to apply and get relief sooner — and would also have helped to stave off the bad guys.

DelBene asked whether the IRS has increased auditing of ERTC recipients that would disadvantage some businesses more than others.

Czipo said it could. Some organizations were shut out of the process or less inclined to apply because they didn't have the resources to hire a reputable accountant or advisor, or they didn't have the bandwidth. Programs need to be structured for maximum access.

**Rep. Brian Fitzpatrick** (R-PA) said that the volume of casework his office had received on the ERTC since January had been mindboggling, and it's coming from a broad spectrum of organizations — veterans' groups, small businesses, senior homes. One constituent was owed \$300,000 and needed it immediately in order to keep their business open. Another had trouble even getting the IRS to confirm they had received their application. One constituent applied for credits in 2020 and 2021, but did not receive that credit until the end of 2022. Most small businesses do not have the luxury of time.

Small businesses deserve better service from the IRS, Fitzpatrick said. He asked Mr. Gray to describe some of his experiences in communicating with the IRS about the ERTC.

Mr. Gray said that both he and Mr. Harris had unusual access to the IRS because of their roles on advisory groups. They have open communication through the National Public Liaison, which has local offices; he works with the local liaisons. He also works with the Taxpayer Advocate, which is a resource a lot of small preparers do not fully appreciate.

He said that he and some of his colleagues had been asking for a "soft letter" to clarify guidance, and for updated FAQs. Gray used a recent Counsel letter about supply chains to stop someone who was going to apply for ERTC worth \$1 million, showing that person that they are really not qualified.

Fitzpatrick asked for specific feedback about what the IRS could be doing differently.

Cleary said that the IRS was in desperate need of updating its procedures and adopting new technologies. They are still using fax machines and USPS mail.

---

<sup>5</sup> It did change, but only to the extent that the PPP loan was not forgiven, as far as we can tell. This is one of the complications.

Harris agreed with this. It is impossible for a small business owner to call the IRS about the status of their claim. They have to put technology in place that meets people's expectations. The IRS has to embrace technology for customer service, not just internal operations.

Ms. Czipo said, "People power matters, too." The IRS has an Exempt Organization Office that used to be a godsend, when it was better staffed. It makes a huge difference to be able to talk to a human being about your own situation.

**Rep. Gwen Moore** (D-WI) thanked the panel for "a master class." When you push so much money out so fast, the fraudsters show up. And the IRS was full of empty desks, so when the mail arrived, no one was there to receive it. But this is "the perfect reason" they should be adding \$80 million to the IRS budget. The ERTC fraud is not the only fraud the IRS is dealing with. She agreed on the need for technology upgrades, saying she had been able to cook a whole chicken dinner while on the phone with the IRS.

She noted that the IRS had processed more than 2.5 million claims since the program was enacted, and repeated the claim that they had caught up on the backlog. She said she had met with some of the "mills" in her office this week, and had expressed her unhappiness with them.

It is heartbreaking to know that small businesses are still waiting for the money they needed, Moore said, especially when Congress has been so eager to claw back funding for healthcare and children. She is glad there are 500 ERTC-trained examiners and auditors ready to go after the fraudsters. She yielded to Rep. Schneider.

**Rep. Schneider** asked the panel to raise their hand if they thought more effective compliance by the IRS would lead to less fraud. Everyone raised their hands.

He asked whether they all thought it would be a good thing if the IRS had more capacity to process returns. They all did.

Capacity is a function of having trained personnel and technology, Schneider said. He asked whether anyone thought it was a good idea to take money away from the IRS. Nobody did.

He said he thought they could take from this hearing the lesson that it's time to work together to make sure the IRS can serve taxpayers effectively and efficiently.

Mr. Cleary said that nobody ever has enough resources, so they have to triage. When the Commissioner put a personnel surge on the ERTC applications, the backlog declined.

**Chairman Schweikert** thanked Rep. Moore for participating in two of his committee hearings that day.

She said, "I'm so tired."

"I'm just upset that you've never invited any of us to your chicken dinner," Schweikert said.

He said he had waited to the end of the hearing to ask his questions because he needed to get his head around some things. He asked whether the IRS's definition of "timely" is three months or six months.

No one on the panel knew. Schweikert said this was an example of the IRS needing to be clearer in its guidance.

Mr. Gray said that as the IRS improves its technology, they would need to update their processes accordingly, because most of their processes are still assuming they are using paper and mail.

Schweikert said they were trying to get the IRS off its own server and off its own storage — "If the Department of Defense can use an encrypted world up there, the IRS can too." They did a small experiment with a ChatGPT-style response to call-ins, and it worked. So the question is, "What is resources?" Is it human employees, or next-generation technology?

Schweikert asked for a best estimate of ERTC claims remaining to be processed.

Cleary repeated his previous answer — 500,000, plus the multiple applications included in single forms from Cleary's members.

Harris said that was probably close to accurate. He said that the IRS Commissioner had told them they had not seen the expected arcing-down of claims, and they are attributing that to the mills. What they do not know is how many pending claims are fraudulent.

Schweikert asked what the fastest way to shut down the bad actors would be.

Mr. Gray repeated that they need to set up an amnesty for people who want to repay ERTC refunds they are not eligible for, in exchange for the small business cooperating to bring down the mills.

Schweikert asked how they could stop these mills before their targets apply for the ERTC.

Harris said the IRS is losing the PR battle in the marketplace. People do not turn to them for information first. Congress needs to empower the community of accountants to spread the word, but ultimately, enforcement is what slows down the cheaters. Right now, the bad actors are overwhelming the system, and they are not afraid of getting caught.

Cleary said that the mills would dry up once the backlog is cleared.

Ms. Czipo said they need to increase the penalties on these promoters, because they do not have much disincentive. She wondered whether it would be possible to put up guardrails around how these businesses get compensated, or administer their refund advance loans.

Schweikert said that he and Rep. Pascrell had been talking about the potential universe of tens of thousands of businesses that have responded to solicitations and now realize they should not have received the refunds they got. How should they unwind this? What should an amnesty include?

Harris said the IRS is recognizing that businesses that have fallen for this scam do not actually receive a lot of the money the IRS pays out. So they have to come up with a way to forgive or defer repayment on at least that much of the money. Any amnesty would have to have a firm deadline, so businesses feel a sense of urgency to come forward.

Gray said there was a "first look, lessons learned" precedent here, as when the government cracked down on 1099 employers.

Schweikert said that they need an online checklist where people can check to see whether they have complied with the requirements. They need to require preparer information on these forms for tax relief.

Gray said that a lot of these mills are providing no documentation at all.

Schweikert continued his list of needed changes: electronic portals.

Gray said that while the IRS has set up online taxpayer accounts for individuals, they have not created online business accounts yet. That would free up human resources, as well as allow for confirmation.

Cleary said all these changes were technology related.

Gray said they should publicize a list of red flags: no documentation, a required commission, an advance payment, etc.

He warned, though, that some people would see the announcement that people with incomes under \$400,000 are not getting audited as a free pass.

**Rep. Nicole Malliotakis** (R-NY) said that the lack of sufficient guidance and updates from the IRS about the ERTC had caused confusion and left many small businesses in the dark. She read a long statement about the need for the IRS to clarify its guidance.

She asked Mr. Gray whether professional practitioners could help small businesses that were victimized by the ERTC scammers.

Gray said that he has to comply with the IRS's Office of Professional Responsibility rules, which the fraudsters do not. The ERTC is a payroll tax, which a lot of small practitioners are not familiar with. Based on OPR guidance, Gray cannot help smaller practitioners who are trying to get their clients out of an ERTC jam, because the OPR standards consider this helping to perpetuate a fraud. This actually conflicts with the AICPA standard. The IRS was supposed to be working on this in April, but he has not heard of any progress.

Malliotakis asked whether the IRS would be willing or able to distinguish between businesses that were genuinely deceived or mistaken and businesses that deliberately committed fraud.

Mr. Harris said they do this routinely in other situations, "but it's not going to be perfect." They are going to be facts-and-circumstances cases.

Gray said this is why there has to be due process, so that if a taxpayer comes to the IRS with no representation, they can repeal a decision later. This process is in place for examinations.

**Chairman Schweikert** thanked the witnesses. He said they would have to persuade the IRS to find a solution to this. "The scale of it is my great concern." He asked them to send him ideas. Members have two weeks to submit questions in writing for the record. The hearing was adjourned.