

United States Senate

WASHINGTON, DC 20510

January 18, 2024

Dear Chair Khan, Commissioner Slaughter, and Commissioner Bedoya:

We are writing to request that the Federal Trade Commission (FTC) investigates potential abusive and deceptive advertising practices that have led to the Internal Revenue Service's (IRS) moratorium on processing employee retention tax credits (ERTC). As you may know, on September 14, 2023, the IRS announced its decision to cease processing of new ERTC claims due to rampant fraud in applications.¹ While this moratorium is meant to give the IRS time to investigate the scams impacting ERTC claimants, we urge the FTC to review whether “unfair or deceptive acts” or violations of advertising laws have occurred.

When Congress passed legislation that modified the ERTC, it sought to bolster businesses during challenging times, particularly in response to the economic impact of the COVID-19 pandemic. This tax credit was designed to encourage employers to retain their employees, offering financial support to help companies keep their workforce intact. The eligibility for such relief is explicit; businesses and tax-exempt organizations that qualify are those that:

- Paid qualified wages between March 13, 2020, and December 31, 2021, and
- Were shut down by a government order due to the COVID-19 pandemic during 2020 or the first three calendar quarters of 2021, or
- Experienced the required decline in gross receipts during the eligibility periods during 2020 or the first three calendar quarters of 2021, or
- Qualified as a recovery startup business for the third or fourth quarters of 2021.²

The IRS is still in the process of clearing its backlog, with nearly a million claims still unprocessed out of an estimated 3.6 million claims to the ERTC program.³ Yet, the IRS cannot do its job if it is complicated by the rampant levels of fraudulent and inaccurate claims, which creates longer wait times for legitimate claimants to receive relief. With over \$2.8 billion of

¹ “To Protect Taxpayers from Scams, IRS Orders Immediate Stop to New Employee Retention Credit Processing amid Surge of Questionable Claims; Concerns from Tax Pros,” Internal Revenue Service, September 14, 2023. <https://www.irs.gov/newsroom/to-protect-taxpayers-from-scams-irs-orders-immediate-stop-to-new-employee-retention-credit-processing-amid-surge-of-questionable-claims-concerns-from-tax-pros>.

² “Employee Retention Credit,” IRS, <https://www.irs.gov/coronavirus/employee-retention-credit>.

³ “IRS Announces Withdrawal Process for Employee Retention Credit Claims; Special Initiative Aimed at Helping Businesses Concerned about an Ineligible Claim amid Aggressive Marketing, Scams,” Internal Revenue Service, October 19, 2023, <https://www.irs.gov/newsroom/irs-announces-withdrawal-process-for-employee-retention-credit-claims-special-initiative-aimed-at-helping-businesses-concerned-about-an-ineligible-claim-amid-aggressive-marketing-scams#:~:text=The%20ERC%20is%20a%20complex,the%20course%20of%20the%20program>.

potentially fraudulent claims being made to the IRS, there is growing evidence that deceptive practices are used on claimants.⁴

A key part of this issue stems from possible deceptive marketing and advertising practices used by predatory tax promoters or preparers, including purported business advisors, to recommend ineligible businesses for ERTC relief. And for those that are eligible, such businesses charge “large upfront fees to claim the credit [or] fees based on a percentage of the refund.”⁵ While we cannot know for certain whether these deceptive tactics by these sources are responsible for the flood of fraudulent claims impacting the IRS, there is certainly a correlation between the prevalence of inaccurate or misleading advertisements and the rise in fraudulent claims to the IRS. ERTC scams went from not even being present on the IRS’s “dirty dozen”⁶ list of the worst tax scams to being the leading tax scam on the list in 2023.⁷ In a period running from October 2022 to May 2023, more than 9,000 advertisements regarding the ERTC ran on national and local television networks, with roughly three-quarters of these advertisements coming from one source.⁸

The IRS is already warning taxpayers of the aggressive marketing on ERTC. According to the IRS, “some [ERTC] mills are sending out fake letters to taxpayers from the non-existent groups like the “Department of Employee Retention Credit.” These letters can be made to look like official IRS correspondence or an official government mailing with language urging immediate action.”⁹ The predatory promoters of the ERTC “make broad arguments suggesting that all employers are eligible without evaluating an employer's individual circumstances.”¹⁰

⁴ *Ibid.*

⁵ “IRS alerts businesses, tax-exempt groups of warning signs for misleading Employee Retention scams; simple steps can avoid improperly filing claims,” Internal Revenue Service, May 25, 2023, <https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims>.

⁶ “IRS Warns Taxpayers of ‘Dirty Dozen’ Tax Scams for 2022,” Internal Revenue Service, June 1, 2022, <https://www.irs.gov/newsroom/irs-warns-taxpayers-of-dirty-dozen-tax-scams-for-2022>.

⁷ “IRS Wraps up 2023 Dirty Dozen List; Reminds Taxpayers and Tax Pros to Be Wary of Scams and Schemes, Even after Tax Season,” Internal Revenue Service, April 5, 2023, <https://www.irs.gov/newsroom/irs-wraps-up-2023-dirty-dozen-list-reminds-taxpayers-and-tax-pros-to-be-wary-of-scams-and-schemes-even-after-tax-season>.

⁸ Alan Rappeport. “This Little-Known Pandemic-Era Tax Credit Has Become a Magnet for Fraud.” The New York Times, May 26, 2023, <https://www.nytimes.com/2023/05/26/us/politics/employee-retention-credit-tax-fraud.html>.

⁹ “Red flags for Employee Retention Credit claims; IRS reminds businesses to watch out for warning signs of aggressive promotion that can mislead people into making improper ERC claims,” IRS, September 14, 2023, <https://www.irs.gov/newsroom/red-flags-for-employee-retention-credit-claims-irs-reminds-businesses-to-watch-out-for-warning-signs-of-aggressive-promotion-that-can-mislead-people-into-making-improper-erc-claims>.

¹⁰ *Ibid.*

While businesses may only receive payment if a claim is deemed eligible, these are only a few examples of the exploitative practices that are causing a significant number of false claims. This not only diminishes the impact of a well-intentioned federal program but also takes funds from those who are entitled to them.

There is a risk that these third-party firms charge exorbitant fees to businesses for an otherwise free program. Likewise, a greater issue is the liability they can expose Americans to through confusing and misleading advertisements. Often, unknowingly, individuals apply for a program that they believe they are eligible for and then find themselves facing an IRS investigation and potentially massive fines.¹¹ IRS investigations are costly and time-consuming for all those involved, which creates an undue amount of stress and worry among those who have been led to believe that they are entitled to ERTC relief plans. These people who find themselves under investigation often get lumped in with those who are intentional fraudsters, but there is little recourse for these individuals to amend their situation.

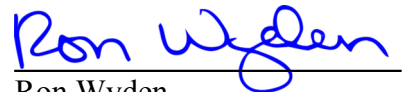
As the enforcer of federal consumer protection laws that prevent fraud, deception, and other unfair business practices, it is incumbent upon the FTC to prevent the very practices taking place that are causing Americans to place themselves unknowingly in trouble.¹² The FTC can and should work in conjunction with the IRS to combat the biggest offenders, as determined by the IRS, and, when necessary, punish them for providing misleading information to claimants. With FTC action, the pervasiveness of predatory advertisements pushing ineligible businesses to file for ERTC can be curbed, reducing the workload of the IRS and protecting these businesses from exposure to penalties.

Thank you for your attention to this important issue.

Sincerely,



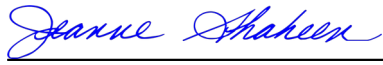
Catherine Cortez Masto
United States Senator



Ron Wyden
United States Senator

¹¹ Charles P Corsello. "Employee Retention Credit Fines and Penalties," Penalties of a Failed IRS ERC Audit: What to Know, September 22, 2023, <https://taxcure.com/tax-problems/tax-audit/erc-audit/penalties>.

¹² "About the FTC," Federal Trade Commission, July 5, 2023, <https://www.ftc.gov/about-ftc>.



Jeanne Shaheen
United States Senator



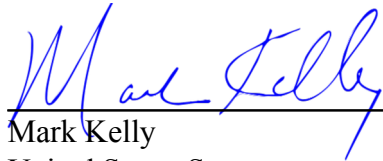
Benjamin L. Cardin
United States Senator



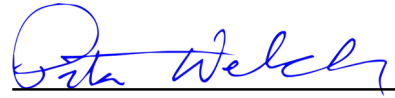
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