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January 15, 2021

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments Regarding Review of Regulatory and other Relief to Support
Taxpayers during COVID-19 Pandemic

Dear Commissioner Rettig:

Enclosed please find comments in response to the Notice and Request for Comments on regulations and other requirements that can be rescinded, modified, or waived to assist business and individual taxpayers with COVID-19 pandemic. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Joan C. Arnold
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Jeffrey Van Hove, Senior Advisor, Office of Tax Policy, Department of the Treasury
Michael J. Desmond, Chief Counsel, Internal Revenue Service
Sunita Lough, Deputy Commissioner, Services and Enforcement, Internal Revenue Service
Kenneth Corbin, Commissioner, Wage and Investment Division, Internal Revenue Service
Eric Hylton, Commissioner, Small Business/Self Employed Division, Internal Revenue Service
Darren Guillot, Deputy Commissioner Collection and Operations Support, Small Business/Self-Employed Division, Internal Revenue Service

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**RESPONSE TO COMMENT REQUEST CONCERNING REVIEW
OF REGULATORY AND OTHER RELIEF TO SUPPORT
ECONOMIC RECOVERY**

These comments (“**Comments**”) are submitted on behalf of the American Bar Association Section of Taxation (the “**Section**”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Les Book, Keith Fogg, and Nancy Rossner, of the Section’s Pro Bono & Tax Clinics Committee. These Comments were reviewed by Caleb Smith, a Co-Chair of the Pro Bono & Tax Clinics Committee, Joseph Barry Schimmel of the Section’s Committee on Government Submissions, and Kurt Lawson, the Vice Chair of Government Relations of the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: January 15, 2021

EXECUTIVE SUMMARY

These Comments are submitted in response to the Notice and Request for Comments published by the Internal Revenue Service (the “**Service**”) and the Department of the Treasury (“**Treasury**”) in the Federal Register on November 17, 2020 (the “**Notice**”).¹ The Notice requests comments on regulations and other requirements that can be rescinded, modified, or waived to assist business and individual taxpayers with the ongoing economic recovery from the Coronavirus Disease 2019 (“**COVID-19**”) pandemic. The Notice also requests suggestions for additional measures that the Service may take to assist those affected by the COVID-19 pandemic and further aid in the ongoing economic recovery from the pandemic.

The nation is facing an unprecedented crisis due to the COVID-19 pandemic. At a time when millions of Americans are struggling to meet basic necessities, the ability to receive an income tax refund can ensure access to funds for housing and utility, proper nutrition and medical care for those experiencing financial hardship. While the Service has discretionary authority to waive offsets and has developed some systematic waivers of offset as well as the individualized relief provided through its offset bypass refund (“**OBR**”) procedures, the OBR procedures are not well known and are burdensome for taxpayers and the Service alike.

To minimize burden on the Service and provide taxpayers with needed funds for relief and necessities, we recommend that the Service adopt systematic measures to allow for automatic OBRs, and apply them to three categories of individual taxpayers:

- 1) Taxpayers who claim earned income tax credits (“**EITCs**”) on their 2020 federal income tax return;
- 2) Taxpayers with incomes under 250% of the applicable federal poverty level (“**FPL**”); and
- 3) Taxpayers who have offers in compromise pending during 2020 or 2021 – both during the time the offer is pending and after acceptance.

¹ Proposed Collection; Comment Request for IRS Review of Regulatory and Other Relief To Support Economic Recovery, 85 Fed. Reg. 73,252 (Nov. 17, 2020).

COMMENTS

I. INTRODUCTION

The Section commends the Service for its response to Executive Order 13924, *Regulatory Relief to Support Economic Recovery*,² which directs departments and agencies to “consider the principles of fairness in administrative enforcement and adjudication” and consider rescinding, modifying, or waiving any regulations and other requirements that may inhibit the ongoing economic recovery from the COVID-19 pandemic “consistent with applicable law and as they deem appropriate in the context of particular statutory and regulatory programs and the policy considerations identified in section 1 of this order.” The Service faced a difficult task at a difficult time in our nation’s history, and took numerous steps to provide relief to individual and business taxpayers affected by the pandemic. These steps included the adoption of the “People First Initiative,”³ which paused compliance and enforcement activity with respect to millions of American taxpayers and provided much needed relief to the many taxpayers struggling as a result of the pandemic. The Section applauds the Service for continuing to examine ways in which it can assist taxpayers affected by COVID–19.

These Comments respond to the Notice’s request for additional measures that the Service may take to assist those affected by the COVID–19 pandemic. In particular, these Comments focus on the Service’s policies regarding the issuance of OBRs and offset waivers more broadly.

II. BACKGROUND OF OBR PROCESS

Many low-income taxpayers rely on federal tax refunds to pay for basic and necessary living expenses, or to stave off disasters like eviction or utility shutoffs.⁴ However, when a taxpayer owes outstanding federal taxes, section 6402(a)⁵ allows the Service to credit (“offset”) it against the unpaid taxes. Section 6402(a) nevertheless gives the Service discretion to “bypass” this offset and disburse some or all of the refund to the

² 85 Fed. Reg. 31,353 (May 22, 2020).

³ IR-2020-59 (Mar. 25, 2020).

⁴ See Rebecca Thompson et al., *Evaluating Tax Time Savings Interventions and Behaviors*, Prosperity Now (2020), available at <https://prosperitynow.org/sites/default/files/resources/Evaluating%20Tax%20Time%20Savings%20Interventions%20and%20Behaviors.pdf>. On page 30, the report shows results from a survey of over 3,000 low- and-moderate income taxpayers detailing various hardships after filing their tax returns, including skipping bills, skipping rent, and skipping medical care.

⁵ Unless otherwise indicated, references to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”) and all “Treas. Reg. §” references are to the Treasury regulations promulgated under the Code, all as in effect (or, in the case of proposed regulations which remain outstanding, as proposed) as of the date of these Comments.

taxpayer.⁶ The Service exercises this discretion through an OBR when the taxpayer demonstrates financial hardship.⁷

As a matter of course, the Service will not issue an OBR unless the taxpayer timely and affirmatively makes a request demonstrating that the taxpayer is experiencing hardship or will experience it if the taxpayer does not receive the refund.⁸ Unfortunately, based on our experience the OBR process generally is not well known in the broader public or tax practitioner community. This might be due, at least in part, to the lack of publicity of its availability.⁹ We believe that, as a result, many taxpayers experiencing hardship fail to make such requests.¹⁰ Accordingly, where OBRs might have provided a means to avoid or escape hardship, many low-income taxpayers instead face evictions, electricity or heat shutoffs, or go further into debt just to pay for necessities. Even when they are issued, OBRs are narrow in the relief they provide, typically only resulting in a payment of the exact amount of the specifically demonstrated past due bill or other emergency.¹¹ This might provide only temporary relief when the taxpayer's hardship is a recurring expense, or when the hardship is one that is not easily quantified (for example, food insecurity).

While this is troubling during the best of times, it is particularly troubling during the present COVID-19 pandemic. Low-income taxpayers are disproportionately negatively affected by the pandemic. In one telling example, a Pew Research Center survey found that, since the COVID-19 outbreak, 46% of low-income respondents

⁶ I.R.C. § 6402(a) (using the permissive language that the Secretary “may credit the amount of such overpayment” against any internal revenue tax). The Service does not have discretion with regards to other non-federal tax debts under the statute. See I.R.C. § 6402(c), (d), (e) and (f). Accordingly, such debts are not subject to the procedures detailed throughout these comments. See I.R.M. 21.4.6.5.11.1(13) (11-08-2017) (OBR not to be issued if taxpayer has non-federal tax debts subject to Treasury Offset Program).

⁷ See I.R.M. 21.4.6.5.11.1 (11-08-2017); see also PMTA 2013-013 (June 11, 2013), available at https://www.irs.gov/pub/irsoia/pmta_2013-13.pdf. The Service generally determines whether financial hardship exists with reference to I.R.C. § 6343(a)(1)(D) and the regulations and associated guidance promulgated thereunder.

⁸ I.R.M. 21.4.6.5.11.1(8) (11-08-2017) (noting that in the absence of a freeze code placed on a taxpayer's account or clerical error, “an OBR must generally be issued before the tax assessment date or 23C date [of] the original return (TC 150) on which the overpayment was reported.”).

⁹ A search of the IRS.gov website for the terms “Offset Bypass Refund” or “OBR” yielded no results, as of December 19, 2020.

¹⁰ The data are not clear on how many taxpayers request OBRs each year or how many requests are granted. A recent Treasury Inspector General for Tax Administration (“TIGTA”) report found that in calendar years 2017 and 2018 the IRS Taxpayer Advocate Service (“TAS”) processed at least 762 OBRs. See TIGTA Report, *Controls Over Offset Bypass Refunds Processed by the Taxpayer Advocate Service Should Be Improved to Reduce the Risk of Abuse and Allow for More Consistent Treatment of Taxpayers*, Ref. No. 2020-10-069 (Sep. 9, 2020) (hereinafter “**TIGTA Offset Bypass Report**”). However, these numbers did not include OBRs that were requested electronically by TAS. Further, a taxpayer may request an OBR without initiating the request through TAS. See I.R.M. 21.4.6.5.11.1(3) (11-08-2017).

¹¹ I.R.M. 21.4.6.5.11.1(14) (11-08-2017) (using the example of a taxpayer who needs \$600 to prevent being evicted receiving an OBR only to the extent needed to satisfy that amount).

reported having trouble paying bills, 35% relied on a food bank or related organization, and 32% had trouble paying their rent or mortgage.¹² Each of these categories traditionally would represent a “hardship” sufficient to warrant an OBR.

Below we make recommendations to improve the OBR process. Part III describes the overall benefits of issuing OBRs systematically, and Part IV identifies specific circumstances in which we believe they should be issued in that way. Our recommendations would change both the scope of OBRs and the process by which they are issued. We refer to this proposal as Expanded Offset Bypass Relief (“EOBR”).

III. BENEFITS OF ISSUING OBRs SYSTEMATICALLY

We believe that issuing OBRs systematically rather than on a case-by-case basis during the COVID-19 pandemic would have the following benefits.

First, we believe that it would reduce horizontal inequality, which is undesirable in tax administration and should be mitigated when possible.¹³ The Service’s current administration of OBRs suffers from inconsistencies,¹⁴ both in the submission processing and the acceptance criteria for OBRs.¹⁵ The absence of public-facing guidance from the Service on which taxpayers can rely in submitting OBR requests compounds these inconsistencies.¹⁶ In our experience, the procedure for requesting an OBR also can vary by locality. In some jurisdictions, the Local Taxpayer Advocate’s (“LTA”) office requires that the taxpayer attempt to resolve the problem with the Service through normal channels (*e.g.*, contacting the Service’s general phone line) before assistance from the LTA will be provided. Further, in our experience the amount of OBR that a taxpayer receives also might vary. Some taxpayers receive their full refunds upon showing hardship, whereas others receive only the portions necessary to pay for specifically demonstrated hardship events (*e.g.*, rent due). Thus, similarly situated taxpayers who submit or wish to submit an OBR request might be treated differently without compelling

¹² Kim Parker et al., *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, Pew Research Center (Sept. 24, 2020), available at <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>. Conversely, only 19% of middle-income respondents reported having trouble paying bills, 12% relied on a food bank or related organization, and 11% had trouble paying their rent or mortgage.

¹³ *E.g.*, HENRY C. SIMONS, PERSONAL INCOME TAXATION 30 (1938) (“[W]e may say that tax burdens should bear similarly upon persons whom we regard as in substantially similar circumstances . . .”).

¹⁴ See generally *TIGTA Offset Bypass Report*.

¹⁵ *TIGTA Offset Bypass Report* at 5 (noting that some Service employees required stricter supporting documents or Form 433 series financial information statements, while other Service employees did not).

¹⁶ See note 6, *supra*. While the Internal Revenue Manual provides guidance to Service employees on processing OBRs, it is not public-facing and is particularly unlikely to be useful for unsophisticated taxpayers.

policy reasons. Because OBRs are discretionary, taxpayers have no recourse if their OBR requests are denied.¹⁷

Second, we believe that it would obviate the need for a concerted public awareness campaign. We believe that, absent such a campaign, taxpayers who otherwise might be able to demonstrate hardship will have little or no awareness of the procedures necessary to receive an OBR. Any such campaign would create increased burdens for the Service, both in implementing the campaign and in responding to the resulting increase in OBR requests. Furthermore, even if taxpayers became more aware of the OBR procedures as a result, the COVID-19 pandemic might make it harder for them to gather the documents the Service might request to establish hardship.

Third, we believe that it would eliminate the race against the clock created by the current procedures. Under those procedures, a taxpayer can submit an OBR request only upon the filing of a return showing a refund. However, any OBR request that is submitted after the offset occurs cannot be granted.¹⁸ Many taxpayers (and even practitioners, including volunteers at VITA sites) likely are not aware of the existence of OBR procedures and might not be aware of the existence or amount of a past due federal income tax debt until after taxpayers have had their refunds offset. E-filing exacerbates this problem.¹⁹

Finally, we believe that it would reduce burdens on the Service. Current OBR procedures impose significant burdens on the Service. The burdens include those associated with interacting with a taxpayer making a request (or inquiring about the possibility of such a request), reviewing and evaluating the merits of any request, and manually inputting appropriate codes on the taxpayer's account to ensure that the refund is issued if an OBR request is granted. These demands come at a time when Congress increasingly has placed its trust in the Service to deliver needed pandemic-related benefits to Americans, with the Service spending significant resources on, for example, publicizing the availability of economic impact payments to millions of vulnerable Americans and delivering over 160 million of those payments in excess of \$270 billion dollars.²⁰ As noted above, issuing OBRs systematically also would avoid the need for a Service-led public awareness campaign.

¹⁷ See I.R.C. § 6512(b)(4). If the taxpayer timely requests and has accepted an OBR, and the Service does not process it until after the offset occurs because of a clerical mistake, the IRS may still issue the refund. See PMTA 2013-013 (June 11, 2013), available at https://www.irs.gov/pub/irsoia/pmta_2013-13.pdf. However, there is no process for challenging the Service's judgment if it determines an OBR is not warranted.

¹⁸ PMTA 2013-013 (June 11, 2013), available at https://www.irs.gov/pub/irsoia/pmta_2013-13.pdf.

¹⁹ The vast majority of individual taxpayers submit their returns electronically. See Pub. 55-B (2019) (IRS Data Book) at 2. Of approximately 154.1 million individual returns filed in Fiscal Year 2019, approximately 137.2 million (89%) were filed electronically.

²⁰ *Oversight Subcomm. Hearing With the Commissioner of the Internal Revenue Service, Before the H. Ways & Means Comm.*, 116th Cong. ____ (Nov. 20, 2020) (statement of Charles Rettig,

We note that in recent legislation responding to the COVID-19 pandemic Congress itself has taken a systematic approach to offsets. As part of the CARES Act, Congress specifically exempted 2020 Recovery Rebate Credits from offset against other federal taxes and most other nonfederal tax debts subject to the Treasury Offset Program.²¹ We believe this reflects Congress’s policy determination that the pandemic warrants a systematic approach to allowing taxpayers to receive money to meet basic life needs. While current OBR procedures allow the Service to make case-by-case allowances for relief, we believe the financial and logistical complications of the pandemic warrant a systematic approach to the Service’s implementation of OBR procedures. By targeting this relief to populations that are most likely to be facing financial hardship, the Service could minimize burdens on taxpayers and itself, and provide a needed lifeline to the country’s most vulnerable. Further, by expanding the OBR program to issue full refunds rather than only amounts tied to specific past-due bills submitted by the taxpayer, we believe our recommended EOBR would ameliorate current logistical concerns and better provide relief for the full scope of taxpayers’ hardships.

IV. SPECIFIC OBR RECOMMENDATIONS

A. Waive Offsets of EITC-Based Refunds

For the reasons set forth below, we recommend that the Service waive offsets for taxpayers whose refunds are based on the EITC.²²

First, we believe that waiving offsets of EITC-based refunds would further the purpose of the OBR program. That is because the EITC is designed for taxpayers whom Congress already has recognized are in hardship situations and need additional help to lift them, and especially their children, out of poverty.²³ Waiving EITC-based refunds across the board would recognize the public benefit nature of those refunds and greatly assist families in need. By contrast, applying EITC-based refunds to satisfy tax obligations could punish the children the EITC seeks to lift out of poverty, by denying them opportunities for better food, housing, and other basic necessities, and might even

Commissioner of the Internal Revenue Service), *available at* <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2020FinalCPRtestimony.pdf>.

²¹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201(d), 134 Stat. 281, 335 (2020).

²² I.R.C. § 32. EITC benefits vary depending on a tax filer’s income and the number of children in the household. For example, a jointly filing married couple with two children earning a combined \$23,000 per year was eligible to receive a maximum credit of \$5,920 in tax year 2020. *See* MARGOT L. CRANDALL-HOLLICK, ET AL., CONG. RESEARCH SERV., THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT (Oct. 5, 2020), <https://fas.org/sgp/crs/misc/R43805.pdf>.

²³ Research shows that receipt of refundable credits like the EITC are positively correlated with better educational and health outcomes for children. *See, e.g.,* David Simon, et al., *The Earned Income Tax Credit, Poverty, and Health*, Health Affairs, (Oct. 4, 2018), *available at* <https://www.healthaffairs.org/doi/10.1377/hpb20180817.769687/full/>.

adversely affect the health and welfare of children and others most likely to be suffering from the effects of the COVID-19 pandemic.

Second, we believe that waiving offsets of EITC-based refunds would be consistent with the way that similar anti-poverty disbursements are treated. Professor Michelle Drumbl discusses this in her book, “Tax Credits for Working Poor.”²⁴ She compares offsets of the EITC with offsets of similar anti-poverty disbursements:

The Debt Collection Improvement Act of 1996 (DCIA)^[25] requires federal dispersing agencies to offset certain federal payments in order to collect outstanding debts owed to the United States.

Certain federal payments are statutorily exempt from the DCIA, and for other federal payments, the amount that can be offset is limited by the statute. For example, the DCIA provides that up to \$9,000 of certain payments (most notably social security retirement and disability benefits) shall be exempt from offset. This is an annual figure that is prorated monthly, meaning the first \$750 of a social security recipient’s monthly benefit is exempt from offset. The DCIA leaves open the possibility for exemptions other than those specified by statute: It provides that the Secretary of the Treasury *shall* exempt from administrative offset payments under means tested programs when requested by the head of the respective agency. For this purpose, the Department of Treasury defines a means-tested program as “those programs for which eligibility is based on a determination that income and/or assets of the beneficiary are inadequate to provide the beneficiary with an adequate standard of living without program assistance.” The Department of Treasury notes that examples of such programs include, but are not limited to, food stamp programs, SSI programs, and TANF programs.²⁶

While the EITC generally is described as a “means-tested” program, it does not satisfy the DCIA standard of means-tested with respect to every recipient; however, it clearly does with respect to single parents in minimum wage jobs. Although the DCIA definition is not a fit every EITC recipient, it is a fit for a high percentage of them, and

²⁴ MICHELLE LYON DRUMBL, *TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM* (CAMBRIDGE UNIV. PRESS) (2019).

²⁵ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Title III, Chapter 10, 110 Stat. 1321, 1321–358 *ff.*, *codified at* 31 U.S.C. § 3716(c) (the “DCIA”).

²⁶ *Id.* at 186-87 (footnotes omitted). In addition to the discussion quoted here, the book devotes most of chapter 7 to this topic, providing a strong resource for understanding the history of the EITC – a program which started as a credit to offset employment taxes, and changed over time to a credit designed to assist qualifying dependent children of low income families. *See also* MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R44825, *THE EARNED INCOME TAX CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY* (2018), available at <https://fas.org/sgp/crs/misc/R44825.pdf>.

especially for those who receive significant amounts of EITC and have little or no tax liability for the years at issue.²⁷

Third, we believe that waiving offsets of EITC-based refunds would be consistent with the EITC's favorable status in other, analogous areas. For example, an individual's EITC is not taken into account as a resource for purposes of determining eligibility for federal benefits or assistance, and bankruptcy courts generally have concluded that EITC payments meet the requirement for exemption from the bankruptcy estate.²⁸ Section 6409 provides that refundable credits such as the EITC shall not count as income or assets in determining eligibility for assistance or benefits. In the Consolidated Appropriations Act, 2021, Congress also expressed significant concern about the ability of taxpayers to receive the EITC, creating a carryover provision allowing prior income to be used on a 2020 tax return for purposes of EITC eligibility so that low-income taxpayers would not lose the EITC because of their inability to work in 2020 as a result of the COVID-19 pandemic.²⁹

²⁷ See Report: *The Earned Income Tax Credit Boosts Work, Reduces Poverty, and Provides Other Benefits for Working Americans*, H. Comm. On the Budget (Nov.30, 2018), available at <https://budget.house.gov/publications/report/earned-income-tax-credit-boosts-work-reduces-poverty-and-provides-other-benefits>, which states that:

Independent studies estimate the EITC lifted 4.1 to 5.8 million people out of poverty in 2016, including up to 3 million children. The EITC reduced the severity of poverty for another 18.7 million people in 2016, including 6.9 million children. According to the Census Bureau's Supplemental Poverty Measure, the EITC and the refundable portion of the child tax credit together lifted 8.3 million people out of poverty in 2017, including 4.5 million children.

See also *Policy Basics: The Earned Income Tax Credit*, Center on Budget & Policy Priorities (Dec. 10, 2019), available at <https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit#:~:text=In%202018%2C%20the%20EITC%20lifted,includin%20about%203%20million%20children.&text=In%20combination%20with%20the%20Child,workers%20and%20by%20rewarding%20work> (last visited Dec. 30, 2020). In 2018, the EITC lifted about 5.6 million people out of poverty, including about three million children. *Id.*

²⁸ See, e.g., *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018) (finding that, in a chapter 13 bankruptcy, the EITC should be prorated in calculating monthly disposal income), discussed in Keith Fogg, *Proper Treatment of Earned Income Tax Credit in Calculating Disposable Income*, *Procedurally Taxing* (Oct. 12, 2018), available at <https://procedurallytaxing.com/proper-treatment-of-earned-income-tax-credit-in-calculating-disposable-income/>; *In re James*, 406 F.3d 1340 (11th Cir. 2005). See also *Hardy v. Fink*, 787 F.3d 1189 (8th Cir. 2016) (involves exempting additional child tax; decision based on analysis of state public benefit statute and purpose of statute), discussed in Marilyn Ames, *Tax Refunds and the Disposable Income Test*, *Procedurally Taxing* (Sep. 8, 2020), available at <https://procedurallytaxing.com/tax-refunds-and-the-disposable-income-test/>; cf. *Matter of Diaz*, 972 F.3d 713 (5th Cir. 2020) (also a chapter 13 case allowing debtor to retain refund based on EITC but with strong policy discussion of the role of EITC), discussed in Marilyn Ames, *Tax Refunds and the Disposable Income Test*, *Procedurally Taxing* (Sep. 8, 2020), available at <https://procedurallytaxing.com/tax-refunds-and-the-disposable-income-test/>.

²⁹ Pub. L. No. 116-260, Div. EE – Taxpayer Certainty and Disaster Tax Relief Act of 2020, § 211, 134 Stat. _____, ____.

B. Waive Offsets for Individual and Joint Filers with Incomes Under 250% of the Applicable Federal Poverty Level

We recommend that the Service waive offsets for individual and joint filers with incomes under 250% of the FPL.

We believe that, as in the case of the EITC-based refunds discussed in section III.A, this would further the purpose of the OBR program. That is because taxpayers making less than 250% of the FPL face very difficult economic situations. The Code and several administrative provisions recognize this fact. For example, section 7526 creates a grant for low-income tax clinics to serve taxpayers making less than 250% of the FPL. And section 7122(c)(3) waives the user fee for offers in compromise for taxpayers making less than 250% of the FPL.³⁰ For most of these taxpayers, the amount the Service would forgo also would be low.

Many of the taxpayers at this level of income could receive an offset waiver based on the EITC recommendation discussed in section III.A above; however, some low-income taxpayers do not qualify for EITC because they have no qualifying child dependents or their circumstances present other bases for disqualification.³¹

The Service could program this waiver into its system for individual filers making less than \$31,900 and joint filers making less than \$43,100 (representing 250% of the FPL at the time of these Comments), based upon the gross income on their returns as filed, and not spend time making decisions regarding which of these taxpayers deserved a waiver. We acknowledge that, for households with children or other dependents, using the cut-off point of 250% of the FPL based on a household of one or two persons might fail to reflect the economic hardships that some families are experiencing. This is especially true for households with incomes far less than 250% of the FPL. However, we recognize that a proposal that is based on associating income levels with household size would raise implementation issues, including determining household income from the face of a tax return as well as the proper composition of a household. We therefore recommend that the Service adopt our EOBR proposal as described above, but also consider whether EOBR should reflect income levels and household size in the same manner as other targeted provisions directed at low-income taxpayers.³²

³⁰ See also Treas. Reg. § 300.3(b)(1)(iii).

³¹ For example, a taxpayer without qualifying children who is under 25 or over age 65 is unable to claim the EITC. I.R.C. § 32(c)(1)(A)(ii)(II).

³² This consideration would benefit from data associated with offsets, including information concerning the household size and income levels associated with taxpayers whose overpayments are offset under I.R.C. § 6402(a).

C. Waive Offsets for Taxpayers with Offers in Compromise Pending or Accepted During 2020 or 2021

We recommend that the Service waive offsets for taxpayers with pending offers in compromise during 2020 or 2021, both during the time the offer is pending and after acceptance.

We believe that, as in the case of taxpayers entitled to EITC-based refunds discussed in section III.A and individual and joint filers with incomes under 250% of the applicable federal poverty level discussed in section III.B, this would further the purpose of the OBR program. That is because taxpayers seeking to compromise their tax liabilities generally are experiencing significant economic difficulties. The Service already recognizes that fact to a limited extent: As noted in section III.B above, it waives the user fee for offers in compromise for taxpayers making less than 250% of the FPL.³³ It also waives the 20% deposit requirement for taxpayers making less than the FPL.³⁴ We believe this is true as a general matter, and not just for these taxpayers. Despite this, under current procedures the Service continues to offset the taxpayer's tax refunds generated while the offer is pending.³⁵ Taking their refunds can have the effect of further depressing their economic situations and making it harder for them to find the resources necessary to fund their offers. This contrasts with the Service's policy on offsets while innocent spouse requests are pending.³⁶ Yet in both cases, the taxpayers seek to resolve their tax liabilities through a statutorily sanctioned process.

The situation becomes even more difficult for taxpayers whose offers are accepted. Under current procedures, not only does the Service take the taxpayer's refund while the offer is pending, but it also can take any refund for the year in which it accepts the offer.³⁷ The latter often occurs months, maybe even a year or more, after acceptance of the offer.³⁸ There are, however, exceptions for offers that are accepted based on "Doubt as to Collectibility" or "Effective Tax Administration," both of which require limited resources.³⁹ By including these exceptions, the Service already acknowledges that taking a refund can create significant economic difficulties for the neediest of taxpayers whose offers are accepted. Our proposal merely extends that reasoning to all taxpayers during the COVID-19 pandemic. In all of these cases, taking the refunds can have dire consequences for the taxpayers and their children. In the case of a taxpayer

³³ See text accompanying note 30, *supra*.

³⁴ I.R.C. § 7122(d); Notice 2006-68, § 4.02, 2006-2 C.B. 105; I.R.M. 8.23.1.4.1(7) (04-18-2016).

³⁵ I.R.M. 5.19.7.10 (07-09-2020). See also Form 656, *Offer in Compromise*, section 7(e).

³⁶ See I.R.M. 25.15.18.5.1.3.1 (03-20-2019).

³⁷ See Form 656, *Offer in Compromise*, Section 7(e).

³⁸ See Christine Speidel, *Offers in Compromise and Tax Refunds – Part One*, Procedurally Taxing (Mar. 14, 2019), available at <https://procedurallytaxing.com/offers-in-compromise-and-tax-refunds-part-one/>; Christine Speidel, *Offers in Compromise and Tax Refunds – Part Two*, Procedurally Taxing (Mar. 15, 2019), available at <https://procedurallytaxing.com/offers-in-compromise-and-tax-refunds-part-two/>.

³⁹ Form 656, *Offer in Compromise*, section 3.

with qualifying children the refunds can be a substantial portion of the taxpayer's annual income because of the impact of refundable credits such as EITC and the additional child tax credit. As discussed above, the refund also plays a significant role in preventing childhood poverty.⁴⁰ We believe it would be preferable for the Service to forego offsets in these situations and allow the taxpayers to make fresh starts.

⁴⁰ See text accompanying notes 23-26, *supra*.