



User Name: JOHN PLECNİK

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**2017 TNT 24-2 TREASURY MAY LACK AUTHORITY ON DRAFT TRUMP
CHILD CREDIT ORDER. (Section 24 -- Child Credit) (Release Date:
FEBRUARY 06, 2017) (Doc 2017-1805)**

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Abstract:

A draft executive order from President Trump calls on the Treasury secretary to propose a rule to change eligibility requirements for the child tax credit to limit it to taxpayers and dependent children with Social Security numbers, but it's unclear whether Treasury would have the authority to do that.

Summary:

Published by Tax Analysts(R)

A draft executive order from President Trump calls on the Treasury secretary to propose a rule to change eligibility requirements for the child tax credit to limit it to taxpayers and dependent children with Social Security numbers, but it's unclear whether Treasury would have the authority to do that.

The executive order, designed to limit noncitizens' use of public benefits, would make those who file returns using an individual taxpayer identification number (ITIN) ineligible for the child credit. ITINs are provided to individuals with a filing requirement who are not eligible for an SSN, including resident and nonresident aliens, regardless of immigration status.

According to Joseph Henchman of the Tax Foundation, the draft executive order would do the same thing that the Treasury Inspector General for Tax Administration recommended in a 2011 report. In that report, TIGTA suggested that the IRS insist on documentation to verify eligibility of children from filers lacking SSNs, Henchman noted. "It's purely deterrence, by demanding documents some people (legal and illegal) don't have."

However, the IRS said in its response to TIGTA's report that it lacks the statutory authority to deny the additional child tax credit, the refundable portion of the child credit, to tax return filers without SSNs. The Internal Revenue Code doesn't require an SSN to claim the additional child credit, and while the Personal Responsibility and Work Opportunity Reconciliation Act, the 1996 welfare reform law, changed eligibility requirements for the earned income tax credit to require an SSN valid for employment, that law was enacted before the enactment of the additional child credit, according to the report. Also, the code doesn't grant the IRS math error authority to deny the additional child credit without an examination, the report said.

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Henchman said the IRS was correct in its response to the TIGTA report that it doesn't have the authority to disallow child credit claims without documentation. The statute indicates the taxpayer "must file the return and fraudulently represent residency and [that] the remedy is on the back end of the process only," he told Tax Analysts.

Vox and *The Washington Post* published the text of the draft executive order in January. The White House did not respond to requests for comment on the draft order. However, White House press secretary Sean Spicer told reporters January 30 to expect immigration generally and the visa program to be addressed through executive action and "comprehensive legislative measures."

Body

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Congressional Action Needed

Legislation is needed to make the change the executive order calls for, House Ways and Means Committee member Lloyd Doggett, D-Texas, told Tax Analysts. "On this and most other issues, Mr. Trump thinks that he can operate the government by executive fiat," he said. "And I think in this case, it would take legislation."

Christine Speidel, director of the low-income tax clinic at Vermont Legal Aid Inc., also said congressional action would be needed. "The draft executive order purports to direct the secretary of the Treasury to narrow eligibility for

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the child tax credit beyond the bounds set by the Internal Revenue Code," she said. "It is unclear how the secretary could forbid a taxpayer from claiming a tax credit allowed to him by Congress."

Robert Greenstein, president of the left-leaning Center on Budget and Policy Priorities, said his organization also believes Congress would have to make the change the draft executive order calls for. "We do not think that the Trump administration has the legal authority to change this by rule, by regulation," he said.

John T. ***Plecnik***, a professor at Cleveland State University's Cleveland-Marshall College of Law, said there are reasonable arguments on both sides of the debate over whether the IRS can require an SSN to claim tax credits without legislative action. Requiring an SSN could be deemed an appropriate way for the agency to use its authority to enforce tax laws, he said.

"On the other hand, one could argue that Congress knows how to require a Social Security number for claiming a tax credit when it wants to do so, given that it explicitly requires a Social Security number to claim the earned income tax credit under [section 32\(m\) of the Internal Revenue Code](#)," he said. "In the absence of Congress doing the same for the additional child tax credit, you can argue that it chose not to require a Social Security number to claim that credit."

Henchman said that if the executive order is signed, the issue could be decided by the courts. "I'm sure Trump can find an acting attorney general to make a case as to why he has the power to do this without legislative action, but I'm guessing this will be a whole lot of litigation," Henchman said.

Greenstein agreed. "I think it is likely that if the administration proceeds with such a rule . . . and begins to deny people the credit based on the rule, I think it's virtually certain they will be sued on the grounds they have exceeded their legal authority by taking away that eligibility," he said.

Not the First Time

This question has come up before, Greenstein said. The 2015 spending and tax extenders law (Doc 2015-28019) included several provisions related to refundable credits, including the child credit.

"During the negotiations on Capitol Hill, the question arose of whether to include in the legislation a statutory change that would take away eligibility for the child credit from people that file with ITINs," he said. "It was entirely discussed in the context of 'If you want to change this, you need a statutory change.'"

Ultimately, negotiators chose to retain the current law allowing use of an ITIN to claim the child credit but to also "include in the legislation provisions that the IRS is now implementing that tighten up on the issuance of ITINs," Greenstein said. Those provisions, designed to ensure ITINs' continued validity, include the requirement that old ITINs be renewed, he said.

Doggett also noted that the Ways and Means Committee has considered the issue raised by the draft executive order before. "From the last time we considered it, I didn't think it had merit, but we'll take a look at it," he said.

Ways and Means member Sam Johnson, R-Texas, has sponsored legislation on the issue five times over the past several years, most recently in 2016 with the Refundable Child Tax Credit Eligibility Verification Reform Act (H.R. 4722 (Doc 2016-5605)), which would require SSNs for claimants of the refundable child credit. Rep. Gus M. Bilirakis, R-Fla., introduced the Stop Handouts to Unauthorized Taxpayers (SHUT) Act (H.R. 192 (Doc 2015-1795)) in 2015 (and years prior), a measure that would deny the refundable child credit to taxpayers who don't include their SSNs or otherwise fail to demonstrate they are authorized to be employed in the country.

Voluntary Compliance Trade-Off

The child credit provision is just one piece of a sweeping draft executive order that would require all executive departments and agencies to list as "federal means-tested public benefits" every federal benefit under their control for which the eligibility or the amount received is determined by income, resources, or financial need, in order to

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determine immigrants' eligibility for them under the welfare reform law. Agencies would also have to notify the Department of Homeland Security whenever they provide any immigrant with any federal means-tested public benefit and to seek reimbursement from sponsors who sign affidavits of support for the costs of means-tested benefits, and to go to court if needed to get that reimbursement.

While the order only explicitly mentions the child credit, Henchman said he expects it will "spark continued discussion on the benefits and cost of immigration." But to him, the evidence shows immigrants pay more in taxes than they receive in benefits.

Francine J. Lipman of the William S. Boyd School of Law at the University of Nevada, Las Vegas, said the draft order runs contrary to the country's values, and like Henchman, said immigrants pay more in taxes than they receive in benefits.

"Undocumented immigrants pay about \$ 12 billion annually into Social Security and Medicare but do not qualify for any benefits under these two programs," she said. "They also pay federal excise and income taxes, as well as about \$ 12 billion a year in state and local sales, property, and other taxes and receive very few state and local benefits."

The impact the draft order would have if implemented isn't clear, Speidel said. That's because current law "restricts immigrants' eligibility for federal means-tested public benefits, and the law already provides for sponsor liability if an immigrant receives a means-tested benefit." Tax credits have never been part of the definition of federal means-tested public benefits, she said.

Paul Harrison, tax clinic director with the Center for Economic Progress in Chicago, said that given the Trump administration's actions thus far, the order's scope is "a slippery slope." He said, "The impact will unquestionably be to drive more taxpayers underground, reducing overall tax compliance, increasing enforcement costs for the IRS, and undermining the integrity of the U.S. tax system."

While the draft order would reduce the incentive for unauthorized immigrants to file returns because they would be less likely to receive refunds, it could substantially reduce tax credit fraud, Plecnik said. The order is "consistent with the ongoing crackdown" on such fraud, he said.

"To me, it indicates that President Trump, like presidents [George W.] Bush and Obama, is likely to continue the push for more enforcement activity in this area," he said.

Alex Nowrasteh, immigration policy analyst with the Cato Institute, agreed that voluntary tax compliance for illegal immigrants would decline under the draft order but said that will be a positive fiscal result for the government, "especially if the illegal immigrants are low-skilled workers who don't pay much in taxes anyway."

"Furthermore, many unlawful immigrants have their Social Security, FICA, and other taxes deducted from their paychecks, and that is unlikely to be affected by this order," he said.

References

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