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## Permitting Abused Spouses to Claim the Earned Income Tax Credit in Separate Returns

Fred B. Brown

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PERMITTING ABUSED SPOUSES TO CLAIM THE EARNED  
INCOME TAX CREDIT IN SEPARATE RETURNS

FRED B. BROWN\*

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\* Associate Professor of Law and Director of the Graduate Tax Program, University of Baltimore School of Law; B.S. with high honors 1982, Rutgers University; J.D. summa cum laude 1985, Georgetown University; LL.M. 1986, New York University. I am so thankful to Margaret Johnson for bringing to my attention the difficulties encountered by married individuals subjected to domestic abuse in claiming the earned income tax credit, and for sharing her expertise on the law and policies concerning domestic abuse. I thank Margaret Johnson as well as Jack Snyder for reviewing and providing very helpful comments on a draft of this Article, as well as Leslie Book and Chuck Borek for providing their very helpful insight. I am very grateful to Stacey Morris for her excellent research assistance. I also thank the University of Baltimore School of Law for supporting this Article with a summer research stipend. Any errors are solely the responsibility of the author.

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## INTRODUCTION

The earned income tax credit (EITC) is a refundable tax credit for federal income tax purposes that is generally available to low-income taxpayers who have income from either employment or self-employment.<sup>1</sup> The EITC is currently the largest government program providing aid to low-income individuals.<sup>2</sup> The subsidy provided by the EITC is of particular importance to individuals subjected to domestic abuse, given that such individuals are often impoverished,<sup>3</sup> and the EITC can provide them with the financial resources necessary to improve, endure, or leave an abusive relationship.<sup>4</sup>

Despite the importance of the EITC, married individuals subjected to domestic abuse face serious difficulties in claiming the

1. See I.R.C. § 32 (2014).

2. See, e.g., Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 267 (2014); Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 182 (2015); Mary Leto Pareja, *Earned Income Tax Credit Portability: Respecting the Autonomy of American Families*, 117 W. VA. L. REV. 1, 2–3 (2014) [hereinafter Pareja, *EITC Portability*]; Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 797 (2014); *Helping Domestic Violence Survivors Claim the Earned Income Tax Credit*, ASSETS FOR INDEPENDENCE RES. CTR. [hereinafter *Helping Domestic Violence Survivors Claim the EITC*] (last visited Mar. 23, 2016), <http://idaresources.acf.hhs.gov/page?pageid=a047000000DfWcR> [<http://perma.cc/HPM4-FY4A>].

3. See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 143 (2012); *Helping Domestic Violence Survivors Claim the EITC*, *supra* note 2.

4. See *Helping Domestic Violence Survivors Claim the EITC*, *supra* note 2 (stating that the EITC can provide individuals subjected to domestic violence with the funds needed to leave an abusive relationship or help maintain financial independence after leaving the relationship); see also Johnson, *supra* note 2, at 173, 182 (mentioning the EITC among other resources that can provide individuals subjected to domestic abuse with security to improve the individual's overall well-being); cf. GOODMARK, *supra* note 3, at 187–91 (discussing microfinance as one example of a solution aimed at increasing an abused individual's economic strength, which can allow the individual to either leave an abusive relationship or decrease or stop the abuse in the relationship).

credit. Because married individuals are not permitted to claim the EITC on a married filing separate return,<sup>5</sup> such individuals are left with three return-filing options for claiming EITCs: (1) file a joint return, (2) qualify and file as a single taxpayer, or (3) qualify and file as a head of household.<sup>6</sup> As discussed in this Article, the first option may be undesirable given the particular circumstances surrounding the abuse, and the second and third options may be either unattainable or only attainable by taking steps that may not be in the best interests of an individual from the standpoint of overall well-being.

To address the difficulties in claiming the EITC encountered by married individuals subjected to domestic abuse, this Article proposes measures that will permit such individuals to claim the EITC in a married filing separate return. Under the proposed general rule, an abused individual would be able to claim the EITC using the filing status of married filing separately, but qualification for the credit would be determined by combining the income of the individual and her spouse as if a joint return had been filed. Because qualification for the EITC would be based on the combined income of both spouses, the proposed measure does not raise the concern that families with income amounts above the limits for receiving the EITC will be issued credits. This Article also recommends the consideration of a modification to the proposed general rule where the spouses are living apart as of the last day of a taxable year. Under the modified rule, the individual subjected to domestic abuse would still be able to claim the EITC using the filing status of married filing separately, but qualification for the credit would be based solely on the income of the individual. For spouses who are living apart, there is less indication that the spouses are pooling and sharing their income, which, along with other considerations, suggests that this modification may be appropriate.

Part I of this Article provides a brief primer on the EITC, which includes the mechanics of determining the credit and a discussion of the prohibition of claiming the EITC on a married filing separate return. Part II describes the difficulties in claiming the EITC encountered by individuals subjected to domestic abuse; namely, the possible undesirability of filing a joint return and the feasibility of filing as a single taxpayer or head of household. Part III then offers a solution to these difficulties by proposing a new framework that permits a married individual subjected to domestic abuse to claim the EITC on a married filing separate return. This Part also examines

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5. See I.R.C. § 32(d).

6. See *Earned Income Tax Credit; Do I Qualify?*, IRS (Jan. 2014), <http://www.irs.gov/uac/Newsroom/Earned-Income-Tax-Credit-Do-I-Qualify> [<http://perma.cc/7F4W-F3R3>].

potential concerns raised by the proposed general rule regarding tax administration and taxpayer privacy.

## I. THE EARNED INCOME TAX CREDIT

### A. Overview of the EITC

The EITC is a refundable tax credit,<sup>7</sup> which is generally available to low-income workers. The purpose of the EITC is threefold: (1) to offset the payroll taxes paid by low-income workers; (2) to provide an incentive for low-income individuals to work; and (3) to provide a subsidy to low-income workers in the place of welfare—especially those with children.<sup>8</sup> The EITC is currently the largest federal program providing aid to low-income individuals,<sup>9</sup> and despite certain perceived problems concerning administration<sup>10</sup> and behavioral effects,<sup>11</sup> it is often hailed as one of America's best programs for individuals confronted with poverty.<sup>12</sup>

Pursuant to section 32 of the Internal Revenue Code, the EITC is determined under an intricate mechanism that contains a general rule, a cap on the amount of the credit, and a reduction of this cap, or “phaseout,” for taxpayers with income above certain amounts.<sup>13</sup> In general, the EITC is computed by multiplying a taxpayer's compensation from employment, including self-employment, (“earned income”<sup>14</sup>) by a certain percentage (“credit percentage”<sup>15</sup>). The credit percentage increases if the taxpayer has one qualifying child,<sup>16</sup> and

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7. See *infra* note 24 and accompanying text.

8. Pareja, *EITC Portability*, *supra* note 2, at 7–8; see also Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 534 (1995).

9. See, e.g., *supra* note 2.

10. See Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 353, 369–73 (2002); Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J. L. REFORM 83, 104 (2010).

11. See, e.g., Alstott, *supra* note 8, at 547–48.

12. See, e.g., Book, *supra* note 10, at 419; Dylan Matthews, *America's Best Program for the Poor May Even Be Better Than We Thought*, VOX POL'Y & POL. (July 16, 2015, 9:00 AM), <http://www.vox.com/2015/7/16/8974745/eitc-study-hoynes-patel> [<http://perma.cc/B36P-J7UJ>].

13. I.R.C. § 32(b) (2014).

14. *Id.* § 32(c)(2).

15. *Id.* § 32(a)(1).

16. *Id.* § 32(b). A qualifying child for this purpose is, among other things, generally a child (or certain other relative) of the taxpayer that (i) “has the same principal place of abode in the United States as the taxpayer for more than one-half of [the] taxable year,” (ii) meets certain age requirements (under age 19 at the close of the taxable year, unless a student, in which case under age 24 at the close of the year), and (iii) “has not filed a joint return . . . with the individual's spouse . . .” *Id.* §§ 32(c)(1), 152(c)(3).

increases further if the taxpayer has two and then three or more qualifying children.<sup>17</sup> However, the EITC cannot exceed a certain cap—“the credit percentage of the earned income amount . . . .”<sup>18</sup> Like the credit percentage, the earned income amount increases based on whether the taxpayer has qualifying children and the number thereof.<sup>19</sup> To the extent that the taxpayer’s adjusted gross income (or earned income, if greater) exceeds a certain amount—the “phaseout amount”<sup>20</sup>—the cap on the EITC<sup>21</sup> is reduced by another percentage specified in the statute (the “phaseout percentage”<sup>22</sup>) of the excess of the taxpayer’s adjusted gross income (or earned income, if greater) over the phaseout amount.<sup>23</sup> The EITC is a refundable credit, meaning that to the extent it exceeds an individual’s tax liability, the taxpayer receives the excess in the form of a refund.<sup>24</sup>

As a result of the statutory scheme, the EITC increases up to a certain amount as a taxpayer’s earned income increases, reaches a plateau, and then decreases, ultimately to zero, as adjusted gross income (or earned income, if greater) exceeds a certain amount.<sup>25</sup> The relationship of the EITC to adjusted gross income (or earned income, if greater) thus resembles a pyramid.<sup>26</sup> In addition, because the credit percentage, earned income amount, and phaseout amount

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17. Specifically, the credit percentage is 7.65% for taxpayers with no qualifying children, 34% for taxpayers with one qualifying child, 40% for taxpayers with two or more qualifying children, and 45% for taxpayers with three or more qualifying children. *Id.* § 32(b)(1).

18. I.R.C. § 32(a)(2)(A).

19. Specifically, subject to inflation adjustments provided in section 32(j), the earned income amount is \$4,220 for taxpayers with no qualifying children, \$6,330 for taxpayers with one qualifying child, and \$8,890 for taxpayers with two or more qualifying children. *Id.* § 32(b)(2)(A). Thus, both the credit percentage and the earned income amount will increase based on whether the taxpayer has any qualifying children and the number thereof. *See id.*

20. The phaseout amount increases if the taxpayer has a qualifying child. Specifically, subject to inflation adjustments provided in section 32(j), the phaseout amount is \$5,280 for taxpayers with no qualifying children and \$11,610 for taxpayers with one or more qualifying children. I.R.C. § 32(b)(2)(A). The phaseout amount is also increased for taxpayers filing joint returns by \$5,000 (with an inflation adjustment). *Id.* § 32(b)(2)(B).

21. The cap is “the credit percentage of the earned income amount.” *Id.* § 32(a)(2)(A).

22. The phaseout percentage increases if the taxpayer has a qualifying child, with a further increase if the taxpayer has two or more qualifying children. Specifically, the phaseout percentage is 7.65% for taxpayers with no qualifying children, 15.98% for taxpayers with one qualifying child, and 21.06% for taxpayers with two or more qualifying children. *Id.* § 32(b)(1).

23. *Id.* § 32(a)(2).

24. Section 26, which limits the aggregate amount of certain credits to a taxpayer’s tax liability, does not apply to section 32. Specifically, section 26(a) applies to credits allowed by subpart A of part IV of subchapter A of chapter 1 of subtitle A of the Internal Revenue Code; section 32 is contained in subpart C. *See* I.R.C. § 26(a) (2014).

25. Alstott, *supra* note 8, at 541–42.

26. *Id.*

increase if a taxpayer has one or more qualifying children, the credit is larger for a taxpayer with one or more qualifying children than a taxpayer with none, assuming their earned income and adjusted gross income are equal.<sup>27</sup>

By generally increasing in amount as earned income rises, the EITC operates to incentivize work.<sup>28</sup> By decreasing in amount as adjusted gross income (or earned income, if greater) rises above a certain level, the EITC also functions as an income-transfer program by tailoring its benefits to those with the greatest perceived need.<sup>29</sup> As income rises, perceived need decreases; therefore, higher-income taxpayers receive smaller or no credits.<sup>30</sup> By further tailoring its benefits to taxpayers with dependent children, the design of the EITC reflects the greater needs of such families and the function that the credit can perform in alleviating poverty.<sup>31</sup>

In order to be eligible to claim the EITC, an individual must meet certain requirements.<sup>32</sup> A taxpayer who wishes to claim the EITC must have either a qualifying child; or, if not, he must have his principal place of abode in the United States for more than one-half of the taxable year, he or his spouse must be between the ages of 25 and 65 at the close of the year, and he must not be a dependent of another taxpayer for the year.<sup>33</sup> Other factors may disqualify a taxpayer who is otherwise eligible for the EITC: the taxpayer cannot be a qualifying child of another taxpayer for the year;<sup>34</sup> he cannot claim benefits under the foreign earned income exclusion;<sup>35</sup> he must be a U.S. citizen or resident alien for the entire taxable year;<sup>36</sup> he (and his spouse, if filing jointly) must have a valid social security number;<sup>37</sup> and his investment income for the year cannot exceed \$2,200.<sup>38</sup> Additionally, and importantly for purposes of this Article,

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27. *Id.*

28. *Id.* at 547–59 (analyzing the work incentives of the EITC).

29. *Id.* at 540–41.

30. *Id.* at 540.

31. H.R. REP. NO. 103-111, at 609 (1993).

32. I.R.C. § 32(c)(1)(A) (2014).

33. *Id.*

34. *Id.* § 32(c)(1)(B).

35. *See id.* § 32(c)(1)(C).

36. *Id.* § 32(c)(1)(D).

37. *See* I.R.C. § 32(c)(1)(E). To be valid for this purpose, the social security number must be valid for employment and not issued for the sole purpose of obtaining a federally funded benefit. *See id.* § 32(m). A qualifying child must also have a valid social security number. *See id.* § 32(c)(3)(D).

38. I.R.C. § 32(g). More precisely, under this eligibility requirement, a taxpayer's aggregate amount of "disqualified income" cannot exceed \$2,200 (subject to inflation adjustments). *Id.* § 32(g)(i)(1), (j)(1). "Disqualified income" includes interest (including tax-exempt interest), dividends, net income from rents and royalties not derived from a trade or

an individual whose filing status is married filing separately cannot claim the EITC.<sup>39</sup> The prohibition of claiming the EITC on a married filing separately return is explored in the next Section.

### *B. The Married Filing Separately Prohibition of Claiming the EITC*

As mentioned above,<sup>40</sup> individuals who use the filing status of married filing separately are not eligible to claim the EITC. While the legislative history of the EITC does not state the reason for the married filing separately prohibition,<sup>41</sup> it seems clear that it is to prevent spouses who have combined income, in excess of the income limits,<sup>42</sup> from receiving the credit.<sup>43</sup> For example, if a husband with

business, the excess of capital gains over capital losses, and the excess of aggregate income from passive activities over aggregate losses from such activities. *Id.* §§ 32(g)(i)(2), 1222(9).

39. *See id.* § 32(d).

40. *See id.*

41. *See* H.R. REP. NO. 94-19, at 30–31 (1975); S. REP. NO. 94-36, at 35 (1975).

42. The income limits for receiving the EITC can be determined based on the statutory mechanism for computing the credit. *See supra* notes 13–23 and accompanying text. For 2014, these income limits are as follows: (i) for taxpayers with three or more qualifying children: \$46,997 (\$52,427 if filing a joint return); (ii) for taxpayers with two qualifying children: \$43,756 (\$49,186 if filing a joint return); (iii) for taxpayers with one qualifying child: \$38,511 (\$43,941 if filing a joint return); and (iv) for taxpayers with no qualifying children: \$14,590 (\$20,020 if a filing joint return). Instructions to IRS Form 1040, at 53 (2014).

43. *See, e.g.,* Mary Leto Pareja, *Beyond the Affordable Health Care Act's Premium Tax Credit: Ensuring Access to Safety Net Programs*, 38 *HAMLIN L. REV.* 241, 278 (2015) [hereinafter Pareja, *Premium Tax Credit*] (stating that although the legislative history of the premium tax credit is silent as to the reason for its prohibition on claiming the credit in married filing separate returns, it seems clear that this is to prevent a married couple from receiving a larger credit by filing separately as opposed to jointly); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 *N.Y.U. TAX L. REV.* 1, 53 (2000); *see also* Alstott, *supra* note 8, at 560–61, 563–64 (pointing out that basing the EITC on the separate incomes of married individuals would avoid creating a marriage penalty, but would eliminate “the tailoring of benefits to need based on family income,” with the result that high-income families could receive EITCs; thus, aggregate family income, rather than individual income, is a better measure of economic well-being); Tahk, *supra* note 2, at 799 (“Married couples may not file separately to avoid the phase-out amount and instead must file jointly.”); *cf.* James D. Bryce, *A Critical Evaluation of the Tax Crits*, 76 *N.C. L. REV.* 1687, 1706–07 (1998) (referring to this problem if married couples claimed the EITC on separate returns). One commentator speculates that the prohibition of married filing separately is to make the EITC simple to administer. *See* Michelle Lyon Drumbl, *Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting*, 4 *COLUM. J. TAX L.* 94, 130 n.210 (2012). Perhaps this recognizes that if taxpayers using married filing separate status were permitted to claim the EITC, there would need to be some mechanism for combining the spouses’ income for determining the credit. There also may be the concern that if spouses filing separate returns could claim the EITC, they could shift income and deductions between them in order to maximize the amount of the EITC. Alstott, *supra* note 8, at 564 n.121. *But see* Bryce, *supra* note 43, at 1706 (stating that for low-income couples eligible for the EITC, “[t]here would be few problems of assigning . . . income or deductions” if married couples claimed



one or more qualifying children has earned income and adjusted gross income of \$10,000, but his wife has earned income and adjusted gross income of \$500,000, the husband could qualify for a sizable EITC by filing separately.<sup>44</sup> This would be the case even though the combined adjusted gross income of the spouses well exceeds the income limits for receiving the credit.<sup>45</sup>

The apparent rationale for not allowing spouses to separate their income for purposes of claiming the credit is that spouses presumably pool and share their combined income.<sup>46</sup> Thus, to base the husband's EITC in the example above on his adjusted gross income alone would be to ignore the fact that the husband presumably also benefits from his wife's income, and thus in practical terms is not a low-income taxpayer for whom the EITC is designed.

The notion that spouses pool and share their income underlies the allowance of spouses to file a joint return,<sup>47</sup> which is based on the view that married couples with equal amounts of aggregate income should face the same tax burden—regardless of the manner in which it is earned.<sup>48</sup> That is, under what is referred to as “couples neutrality,”<sup>49</sup> if Couple A has an aggregate income of \$150,000, divided \$150,000 and \$0 between the spouses, and Couple B also has aggregate income of \$150,000, but divided \$75,000 and \$75,000 between the spouses, the two couples should incur the same tax liability by filing joint returns. The view that married couples with

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the EITC on separate returns due to their low-income status and as compared to higher earning couples).

44. See Bryce, *supra* note 43, at 1706–07 (providing a similar example); see also Alstott, *supra* note 8, at 564; Zelenak, *supra* note 43, at 53.

45. See *supra* note 42 for a list of income limits.

46. See Frederick J. Bradshaw, *The Earned Income Tax Credit and the Marriage Penalty: New Proposals in Light of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 54 TAX LAW. 701, 719 (2001) (analyzing whether married individuals should be required to file separate returns, and pointing out the problem that under such a system some taxpayers who share their spouse's high amounts of income would nevertheless qualify for the EITC); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 7, 25 (1980) (discussing the income-sharing rationale for the allowance of joint returns).

47. See Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1590 (1977) (stating that “equal-income couples should pay equal taxes, since each member of the couple will benefit more or less equally from the total available income without regard to the source distribution”); Zelenak, *supra* note 43, at 17 n.77 (referring to this rationale for joint returns); see also Gann, *supra* note 46, at 7, 25. Some commentators question the income-sharing rationale for the allowance of joint returns and instead argue for the filing of separate returns for all individuals. See, e.g., *id.* at 7, 25–27. Research suggests that total income sharing is present only for low-income couples, and that there is less sharing among high-income couples. *Id.* at 26.

48. See, e.g., McIntyre & Oldman, *supra* note 47, at 1590; Zelenak, *supra* note 43, at 17.

49. See, e.g., Zelenak, *supra* note 43, at 4.

equal incomes should pay equal taxes, and the presumed income-sharing that justifies this view, has dominated the income tax treatment of married individuals.<sup>50</sup>

Aside from the EITC, several other tax benefits are not available to individuals whose filing status is married filing separately. These include the premium tax credit (in general),<sup>51</sup> the credit for child and dependent care expenses,<sup>52</sup> the credit for the elderly or disabled (in general),<sup>53</sup> the adoption credit,<sup>54</sup> education credits (American opportunity and lifetime learning credits),<sup>55</sup> the exclusion for social security benefits,<sup>56</sup> the exclusion of interest on U.S. savings bonds that is used to finance qualified higher education,<sup>57</sup> the deduction for interest on student loans,<sup>58</sup> and the deduction for qualified tuition and related expenses.<sup>59</sup> Each of these tax benefits has an income limitation, and thus, like the EITC, the prohibition for individuals using the married filing separately status seems based on the policy that it is inappropriate to determine the particular tax benefit on the separate incomes of spouses who presumably pool and share their income.<sup>60</sup>

Some income-based tax benefits, however, do not exclude taxpayers who use the married filing separately status.<sup>61</sup> For example, the child tax credit permits taxpayers to claim the credit on married filing separate returns.<sup>62</sup> Although its legislative history is silent as to the reason it permits married filing separate taxpayers to claim the credit,<sup>63</sup> this may be a result of the tradeoffs involved between the child tax credit and the exemption for dependents. If a married couple, with combined income over the joint return limit for receiving the child tax credit,<sup>64</sup> files separately, and the lower-income

50. *See id.* at 9–10.

51. I.R.C. § 36B(c)(1)(C) (2014). As discussed below, certain married individuals who are victims of domestic abuse or spousal abandonment are permitted to claim the premium tax credit on married filing separate returns. *See infra* notes 195–97 and accompanying text.

52. I.R.C. § 21(e)(2).

53. *Id.* § 22(e)(1). An exception applies if the spouses live apart for the entire taxable year. *Id.*

54. *Id.* § 23(f)(1).

55. *Id.* § 25A(g)(6).

56. *Id.* § 86(c)(1)(C)(i).

57. *Id.* § 135(d)(3).

58. I.R.C. § 221(e)(2).

59. *Id.* § 222(d)(4).

60. *See Bryce, supra* note 43, at 1712 (stating that the reason for the married filing separately prohibition for other income-based tax benefits is the same as that for the EITC).

61. *See infra* note 62.

62. I.R.C. § 24. Other examples are the savers' credit (*see id.* § 25B) and dependency exemptions (*see id.* § 151(d)(3)(B)).

63. *See* H.R. REP. NO. 105-148, at 12 (1997).

64. This amount is \$129,001 for a married couple with a single child. I.R.C. § 24(b).

spouse claims one or more children as qualifying children, the tax benefit of the credit received by the lower-income spouse (a maximum of \$1,000 per qualifying child)<sup>65</sup> may well be offset by the tax cost of having the dependency exemption for the qualifying children go to the lower-bracket spouse. Further, the higher total tax liability typically incurred by couples with unequal incomes who file separately is another tradeoff that lends support to allowing spouses to claim the child tax credit on separate returns.<sup>66</sup> A similar trade-off would occur if the EITC could be claimed on a married filing separate return, given that a qualifying child is generally the same for EITC and dependency exemption purposes.<sup>67</sup> However, because of the comparatively large benefit for claiming a qualifying child under the EITC (a maximum investment income of \$3,340)<sup>68</sup> versus the child tax credit,<sup>69</sup> the tax cost of assigning the dependency exemption to the lower-income spouse could be substantially outweighed by the tax benefit of claiming the EITC on a separate return—especially since the child tax credit could be claimed as well. Perhaps more importantly, allowing a low-income individual with a high-income spouse to claim the EITC in a married filing separate return would be politically difficult for what is an “antipoverty program.”<sup>70</sup> In this regard, the child tax credit is not a measure that is expressly aimed at reducing poverty.<sup>71</sup>

## II. DIFFICULTIES FACED BY INDIVIDUALS SUBJECTED TO DOMESTIC ABUSE IN CLAIMING EITCS

The EITC is of particular importance to individuals subjected to domestic abuse. The rates of domestic abuse are higher for individuals

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65. *See id.* § 24(a).

66. Spouses with unequal amounts of income who file separately lose the income-splitting effect of filing a joint return, and thus are likely to have a higher total tax liability. Erik Baines, Comment, *Filing Status and Today's Families*, 47 U. RICH. L. REV. 729, 729 n.4 (2013); *see also* Pareja, *Premium Tax Credit*, *supra* note 43, at 263.

67. *See* I.R.C. § 32(c)(3)(A).

68. This is based on the 2014 Earned Income Credit Table contained in IRS Publication 596 (2014), which reflects inflation adjustments.

69. *See* Tahk, *supra* note 2, at 805 (pointing out that for the lowest-income taxpayers, the benefit provided by the EITC is larger than that provided by the child tax credit).

70. Zelenak, *supra* note 43, at 53.

71. The income limits for the child tax credit are considerably higher than the EITC limits. For a family with three children, the child tax credit is available for families with incomes of less than \$169,001 (I.R.C. § 24(b)(2)(C)), whereas the EITC is only available for families with income of less than \$46,997 (\$52,427 if filing a joint return) (*see* IRS Form 1040, *supra* note 42, at 53). Thus, many of the recipients of the child tax credit are not poor. *See* Tahk, *supra* note 2, at 805.

living in poverty as compared to higher-income individuals.<sup>72</sup> As the largest public assistance benefit currently available,<sup>73</sup> the EITC can provide individuals subjected to domestic abuse with the financial resources necessary to improve, endure, or leave an abusive relationship.<sup>74</sup> However, married individuals subjected to domestic abuse face serious difficulties in claiming the EITC.

As discussed above, claiming the EITC on a married filing separate return is not an option under current law. Thus, such individuals are left with three return-filing options for claiming EITCs: (1) file a joint return, (2) qualify and file as a single taxpayer, or (3) qualify and file as a head of household.<sup>75</sup> As analyzed below, the first option may be undesirable given the particular circumstances surrounding the abuse, and the second and third options may be either unattainable or only attainable by taking steps that may not be in the best interests of an individual from the standpoint of overall well-being.

#### *A. Possible Undesirability of Filing a Joint Return with an Abusive Spouse*

An individual subjected to domestic abuse may prefer not to file a joint return with her spouse because of a desire to gain a measure of financial independence from her abuser.<sup>76</sup> Abusive relationships

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72. *Helping Domestic Violence Survivors Claim the EITC*, *supra* note 2 (stating that women in households with income of \$7,500 or less experience domestic abuse at a rate seven times higher than women in households with incomes over \$75,000); *see also* GOODMARK, *supra* note 3, at 143 (referring to a study that found domestic violence rates of 9.5% for couples feeling high levels of financial strain and 2.7% for couples with low levels of financial strain).

73. *See supra* note 2 and accompanying text.

74. *Helping Domestic Violence Survivors Claim the EITC*, *supra* note 2 (stating that the EITC can provide individuals subjected to domestic violence with the funds needed to leave an abusive relationship or help maintain financial independence after leaving the relationship); *see also* Johnson, *supra* note 2, at 174 (discussing the importance of economic security as a resource that can provide individuals subjected to domestic abuse with security to improve the individual's overall well-being); *cf.* GOODMARK, *supra* note 3, at 186–91 (discussing microfinance as one solution aimed at increasing an abused individual's economic strength, which can allow the individual to either leave an abusive relationship or decrease or stop the abuse in the relationship).

75. *Earned Income Tax Credit; Do I Qualify?*, *supra* note 6; *see also* Pareja, *Premium Tax Credit*, *supra* note 43, at 263.

76. It should be pointed out that the benefit from the income-splitting effect of filing a joint return that is generally received by spouses with unequal amounts of income may not be that large for low-income spouses, as the couple may be subject to the lowest tax brackets regardless of whether they file joint or separate returns (although with a joint return, some income would be shifted from the 15% bracket to the 10% bracket). *See* Baines, *supra* note 66, at 743.

are often marked by the great degree of financial control that the abusive spouse exercises over the abused spouse,<sup>77</sup> and filing a joint return can contribute to this financial control in a few ways. First, because a joint return contains the income and expense items of both spouses, the abusive spouse would be certain to have access to such information of the abused spouse, either when the return is being prepared or at least when the spouses sign the return. If the return reveals that the abused spouse has interest, dividends, or other investment income, the abusive spouse can also determine the existence of bank accounts and investments maintained by the abused spouse. Armed with knowledge of the income and assets of the abused spouse, the abusive spouse may be in a better position to gain control of these items.

In addition, with the filing of a joint return, the abused spouse would likely not have the ability to receive separately a portion of any refund issued to the couple.<sup>78</sup> Thus, if the spouses are entitled to a refund as a result of the EITC, the entire refund may well end up in an account that the abusive spouse controls, either legally or practically.<sup>79</sup> Refunds on joint returns are generally paid either by a check issued to both spouses or by direct deposit to a single account.<sup>80</sup> Since the abusive spouse may have practical control over the funds in any joint account and legal control over any single account that is designated as the place for direct deposit, the abused spouse may not have control over any portion of a refund attributable to the EITC. Although spouses filing a joint return can elect to have a refund split between two accounts,<sup>81</sup> both spouses would need to agree to this election, as it must be done pursuant to a form attached to the joint return.<sup>82</sup> Therefore, the abusive spouse could

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77. See, e.g., Jacqueline Clarke, *(In)Equitable Relief: How Judicial Misconceptions About Domestic Violence Prevent Victims from Attaining Innocent Spouse Relief Under I.R.C. § 6015(f)*, 22 AM. U. J. GENDER SOC. POL'Y & L. 825, 854 (2014); Johnson, *supra* note 2, at 154–55 (referring to research that demonstrates that domestic abuse can take several forms, including economic abuse, where the abusive spouse creates financial dependence by preventing or restricting the abused spouse's access to money and other economic resources).

78. See Johnson, *supra* note 2, at 154–55.

79. See *id.*

80. See Instructions to IRS Form 1040, *supra* note 42, at 71. An exception is provided in the case of an injured spouse, who is an individual that has, or expects, her portion of a refund to be offset by her spouse's legally enforceable obligations, such as past-due federal tax, state income tax, or state unemployment compensation debts, child or spousal support, or a federal non-tax debt. An injured spouse can have the IRS determine her share of the refund, and have this amount issued directly to her, by providing the IRS with each spouse's allocable share of income, expenses, and credits for the year. See Instructions to IRS Form 8379, at 1 (2015).

81. I.R.S. Form 8888 (2014).

82. *Id.*

always veto such an election to split the refund. Thus, in a few ways, the filing of a joint return would hinder efforts by an abused spouse to establish or maintain a separate financial existence from the abusive spouse.

An abused spouse also may want to file separately in order to avoid being jointly and severally liable for any tax deficiencies attributable to the abusive spouse.<sup>83</sup> Such liability,<sup>84</sup> would occur in the absence of innocent spouse relief under section 6015.<sup>85</sup> Given the great degree of financial control that that the abusive spouse often exercises over the abused spouse,<sup>86</sup> the spouse subjected to domestic abuse may have little knowledge of the financial dealings of the other spouse. Therefore, the desire to avoid joint and several tax liability is particularly important in the domestic violence context.<sup>87</sup>

### *B. Feasibility of Filing as Single or Head of Household*

Assume for the reasons discussed above that an individual subjected to domestic abuse chooses not to file a joint return with her spouse, but instead files a separate return for a particular taxable year. Because of the prohibition on claiming the EITC for a married

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83. See Drumbl, *supra* note 43, at 130 (pointing out that if a married couple wants to avoid joint and several liability for tax obligations, they must file separately and thereby sacrifice their eligibility for the EITC).

84. See I.R.C. § 6013(d)(3) (2014).

85. See *id.* § 6015. Innocent spouse relief can be difficult to achieve without legal counsel, and the process can be quite lengthy and expensive. See Pareja, *Premium Tax Credit*, *supra* note 43, at 275; see also Drumbl, *supra* note 43, at 100. One commentator contends that a lack of expertise by U.S. Tax Court judges on the intricacies of abusive relationships has contributed to the problem and adversely affected the ability of abused individuals to receive equitable innocent spouse relief under section 6015(f). Clarke, *supra* note 77, at 856. Moreover, an abused spouse may forego seeking such relief out of concern that the abusive spouse may intervene in Tax Court proceedings (which is his right) or retaliate in some way. See, e.g., Pareja, *Premium Tax Credit*, *supra* note 43, at 275.

86. See *supra* note 77.

87. See Pareja, *Premium Tax Credit*, *supra* note 43, at 244. Even where the abused spouse is aware that the return is incorrect, she may still decide to sign the return out of fear that the abusive spouse will punish her for not signing. *Id.* An abused spouse may also doubt her suspicions that a return is incorrect due to a lack of self-esteem resulting from the abuse. *Id.* In this regard, the IRS rules for equitable innocent spouse relief pursuant to section 6015(f) recognize that an abused spouse may not want to challenge the treatment of items on a joint return for fear of retaliation by the other spouse, and thus permit such relief even where a requesting spouse knew or had reason to know of the erroneous items on the return. Rev. Proc. 2013-34, 2013-43 I.R.B. 397, § 1(7); see also Sapp v. Comm'r, T.C.M. (RIA) 2015-143 (2015) (granting equitable innocent spouse relief under section 6015(f) to an abused spouse who could not independently determine or question the items on her joint return, in addition to meeting other factors favoring relief). Nevertheless, innocent spouse relief for abused individuals may not always be available or sought. See *supra* note 85.

filing separate return,<sup>88</sup> such an individual would lose the ability to claim the EITC for that year unless she is considered not married for purposes of the prohibition, which is determined under section 7703.<sup>89</sup> This section provides that an individual is treated as not married for a taxable year if she is either: (1) legally separated from her spouse “under a decree of divorce or of separate maintenance” as of the last day of the year;<sup>90</sup> or (2) files a separate return for the year and qualifies as “head of household” by meeting the following requirements: (a) the individual maintains as her home a household that constitutes for more than half of the year the principal place of abode of a child for whom the individual is entitled to a dependency exemption; (b) the individual provides over half of the cost of maintaining the household for the year; and (c) during the last six months of the year, the individual’s spouse is not a member of the household.<sup>91</sup> If the individual qualifies as not married under the first option, above, she would file a return as a single taxpayer; if the individual qualifies under the second option, above, she would file as a head of household.

Thus, an individual subjected to domestic abuse who desires neither to file a joint return with her spouse, nor sacrifice her eligibility for the EITC, has limited options—each of which requires a significant change in circumstances—under current law. Divorce or maintenance of a separate household may not be feasible from a financial perspective, and qualifying as a head of household would be impossible absent a dependent child.<sup>92</sup> Furthermore, the requisite change may not be possible for the year in which the domestic abuse first occurs; it may be very difficult to obtain a decree of divorce or separate maintenance by the close of the particular year, and the requirement of living apart from the other spouse for the previous six months may preclude qualifying as a head of household.

More fundamentally, even if feasible, the change in circumstances necessary for EITC eligibility on a separate return may not be in the best interests of the individual from the standpoint of

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88. I.R.C. § 32(d).

89. *Id.* § 7703(a).

90. *Id.*

91. *Id.* § 7703(b). Although section 7703(b) does not mention qualifying as head of household, by meeting these requirements, an individual qualifies as head of household for purposes of filing status under section 2(b). *Id.* § 2(b)(1)(A).

92. In addition, it may be difficult for low-income taxpayers to satisfy the head-of-household requirement of providing over half of the cost of maintaining the household, given that such taxpayers may be receiving government-provided funds or living with extended family members, and thus may not be the source of a large portion of the funds used to pay household expenses. *See, e.g., Pareja, Premium Tax Credit, supra* note 43, at 271–72.

overall well-being.<sup>93</sup> As advocates and commentators have pointed out, remaining married to, and continuing to reside with the spouse who committed the domestic abuse may be better depending on the particular circumstances.<sup>94</sup> While some might want to separate from their abusive spouses for safety or other reasons, others may prefer to maintain their relationships based on their own assessment of certain factors, such as the economic security of their children, love and affection for their spouses, and whether the relationships can be fixed; and, according to some advocates and commentators, the abused individual should be the decision maker in this regard.<sup>95</sup>

### III. ALLOWING INDIVIDUALS SUBJECTED TO DOMESTIC ABUSE TO CLAIM EITCS AS MARRIED FILING SEPARATELY

#### A. Overview

To address the difficulties faced by abused spouses who do not want to file a joint return with their abuser and who do not qualify for head-of-household status, this Part proposes and considers measures that will permit such individuals to claim the EITC on a married filing separate return.<sup>96</sup> Under the proposed general rule, an individual subjected to domestic abuse would be able to claim the EITC using the filing status of married filing separately, but qualification for the credit would be determined by combining the income of the individual and her spouse as if a joint return had been filed. This Part also recommends the consideration of a modification to the proposed general rule where the spouses are living apart as of the last

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93. Cf. Johnson, *supra* note 2, at 173, 175 (proposing a security paradigm that promotes four types of security to prioritize, in addition to the physical safety of an abused spouse; unlike the “safety-at-all-costs” paradigm, the security paradigm “looks at all well-being indicia . . . her agency, dignity, liberty, and health”).

94. See, e.g., GOODMARK, *supra* note 3, at 96–98, 104–05, 152; Johnson, *supra* note 2, at 173.

95. See GOODMARK, *supra* note 3, at 96–98; Johnson, *supra* note 2, at 173.

96. See Johnson, *supra* note 2, at 193–94 (proposing and briefly discussing similar measures); cf. GOODMARK, *supra* note 3, at 144 (stating that laws and policies aimed at addressing domestic abuse should be “particularly attentive” to the needs of low-income individuals subjected to abuse, because such individuals are more likely to be abused and have fewer resources available to deal with the abuse). It should be noted that in other contexts, the tax law has appropriately responded to the difficulties encountered by individuals subjected to domestic abuse; namely, domestic abuse is taken into account in providing innocent spouse relief under section 6015 (see *infra* notes 99–100 and accompanying text) and issuing premium tax credits pursuant to the Affordable Care Act (see *infra* notes 193–96 and accompanying text).



day of a taxable year. Under the modified rule, the abused spouse would be able to claim the EITC using the filing status of married filing separately, but qualification for the credit would be based on her income alone. This Part discusses and examines these proposals.

*B. Definition of Domestic Abuse for Purposes of Proposed and Considered Measures*

Subject to a possible alternative, both the proposed and considered measures would require as a threshold matter that an individual experience domestic abuse.<sup>97</sup> For this purpose, it seems appropriate to use the same definition of domestic abuse that is used under section 36B for purposes of allowing abused spouses to claim premium tax credits on married filing separately returns.<sup>98</sup> This definition closely tracks that provided in Revenue Procedure 2013-34<sup>99</sup> for purposes of equitable innocent spouse relief pursuant to section 6015(f). Under this definition, domestic abuse:

includes physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently. All the facts and circumstances are considered in determining whether an individual is abused, including the effects of alcohol or drug abuse by the victim's spouse. Depending on the facts and circumstances, abuse of the victim's child or another family member living in the household may constitute abuse of the victim.<sup>100</sup>

There is also the issue of when the domestic abuse must occur in order to trigger the abused spouse's right to claim the EITC in a married filing separately return. While the proposal could require that an instance of domestic abuse occur during the taxable year for which a

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97. As discussed below, in connection with the proposed general rule, a possible alternative is to permit spouses to claim EITCs in married filing separate returns *without* certifications of domestic abuse. See *infra* notes 128–31 and accompanying text.

98. See *infra* notes 193–96 and accompanying text for a discussion of this provision.

99. Rev. Proc. 2013-34, 2013-43 I.R.B. 397. The definition of domestic abuse contained in Rev. Proc. 2013-43 also now appears in Prop. Treas. Reg. § 1.6015-1(o), for purposes of determining whether a spouse requesting innocent spouse relief (i) “meaningfully participated in a prior proceeding,” which would bar such relief pursuant to *res judicata*, or (ii) qualifies for an abuse exception to the actual knowledge limitation that applies for purposes of allocating deficiencies attributable to erroneous items under section 6015(d) for innocent spouse relief. Prop. Treas. Reg. §§ 1.6015-1(e)(1), (e)(3), (o); 1.6015-3(c)(2)(iv); 80 Fed. Reg. 72649, 72654 (proposed Nov. 20, 2015).

100. T.D. 9683, 79 Fed. Reg. 43622, 43627 (Jul. 28, 2014).

separate return is filed, a more flexible approach seems appropriate given the long-lasting effects of domestic abuse.<sup>101</sup> Accordingly, under both the proposed and considered measures, it is suggested that a spouse would be eligible to claim the EITC on a married filing separate return for a particular taxable year, provided that an instance of domestic abuse occurred within the previous three years. A three-year look-back period is reasonable based on both the long-term effects of domestic abuse, as well as the normal time period for retaining records or other evidence that underlies the statute of limitations for tax purposes.<sup>102</sup>

As with the provision for premium tax credits, abused spouses would need to certify on their separate return that they have been subjected to domestic abuse,<sup>103</sup> as well as retain any records relating to the abuse.<sup>104</sup> As with other assertions on a return, a certification of domestic abuse would be accepted by the IRS, subject to its right to examine the return. Examples of records relating to domestic abuse would include protective and/or restraining orders, police reports, reports of doctors, and statements from individuals who were aware of, or who witnessed, the abuse or its results.<sup>105</sup>

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101. See, e.g., Elizabeth Landau, *Abuse Victims Report Long-Term Poor Health, Depression*, CNN (Mar. 11, 2009, 10:13 AM), <http://www.cnn.com/2009/HEALTH/03/11/domesticviolence.personality> [<http://perma.cc/PAW5-VUNG>] (citing studies finding long-term effects of domestic abuse); Anuradha Paranjape et al., *Lifetime Exposure to Family Violence: Implications for the Health Status of Older African American Women*, 18 J. WOMEN'S HEALTH 171, 174 (2009) (finding that older African American women with high lifetime exposure to domestic violence had worse health statuses than peers without such exposure); see also Amy E. Bonomi et al., *Intimate Partner Violence and Women's Physical, Mental, and Social Functioning*, 30 AM. J. PREVENTIVE MED. 458 (2006) (finding more pronounced adverse health effects for women with recent domestic violence exposure (within the past five years) versus remote domestic violence exposure (more than five years ago), and finding significantly worse health outcomes for women exposed to domestic violence as compared to non-abused women).

102. In general, the IRS and taxpayers have three years after a return is filed to assert a tax deficiency or claim a refund on overpaid taxes, respectively. See, e.g., I.R.C. §§ 6501(a), 6213(a)–(b), 6511 (2014). With a three-year look-back period for claiming EITCs on married filing separate returns based on domestic abuse, an abused spouse would generally need to retain records relating to the abuse for up to six years: the three-year period before a return is filed plus the normal three-year limitations period following the filing of a return in which the IRS can assert additional taxes or the taxpayer can claim a refund. In this regard, while the normal statute of limitations is three years, the IRS has six years to assert additional taxes when the taxpayer has improperly omitted from gross income an amount in excess of 25 percent of the reported amount. *Id.* § 6501(e)(1)(A)(i).

103. See Treas. Reg. § 1.36B-2T(b)(2)(ii)(C) (July 28, 2014).

104. See I.R.S. Publ'n 974, 7 (Mar. 2015).

105. See, e.g., *id.* at 7–8 (providing examples of records of domestic abuse and abandonment for purposes of claiming premium tax credits on married filing separate returns).

*C. Proposed General Rule: EITC Eligibility for Married Filing Separately and Combining Income of Spouses for EITC Determination*

*1. Proposal and Rationale*

The proposed general rule is to permit individuals subjected to domestic abuse to claim the EITC on a married filing separate return but combine the income of both spouses for purposes of qualifying for the credit.<sup>106</sup> This proposal responds to a discreet problem that exists among victims of domestic abuse and enables them to claim the EITC on separate returns without qualifying as single taxpayers or heads of households. And because qualification for the EITC is based on the combined income of both spouses, the proposed rule does not raise concerns that families with income amounts above the income limits will receive EITCs.

*a. EITC Eligibility for Married Filing Separately*

As discussed previously,<sup>107</sup> an abused spouse may prefer not to file a joint return with her spouse because of a desire to gain a measure of financial independence and to avoid joint and several liability for any tax deficiencies attributable to her spouse. Although such an individual has, under current law, a few options for filing separately without sacrificing her EITC eligibility, each of these options requires a significant change in circumstances—such as divorce or maintenance of a separate household—which may not be feasible or even in her best interests.<sup>108</sup>

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106. Professor Michelle Lyon Drumbl proposes that taxpayers should be permitted to claim EITCs as well as other credits and deductions in married filing separate returns, with a combined income feature if they are living together, regardless of whether there is domestic abuse. Michelle Lyon Drumbl, *Joint Winners, Separate Losers: Proposals to Ease the Sting for Married Taxpayers Filing Separately*, FLA. TAX R. 42–48 (forthcoming) [hereinafter *Joint Winners*]; see also Drumbl, *supra* note 43, at 130, 130 n.210 (questioning why married individuals who file separately should be ineligible for the EITC if their combined income is within the prescribed limits, and concluding that it does not seem fair to deny the EITC on married filing separate returns). The additional burdens placed on the IRS for determining EITC eligibility using the combined income of spouses filing separately seem to counsel against such broad relief, however (see *infra* Part III.C.2.a.), and this Article generally limits relief for spouses filing separately to situations involving domestic abuse, where separate filing seems particularly important to the abused spouse. Nevertheless, certain concerns may justify eliminating the abuse certification requirement (see *infra* notes 129–32 and accompanying text). Moreover, this Article is limited in its scope to the EITC, although consideration should be given to extending its proposals to other tax benefits. *Infra* notes 206–14 and accompanying text.

107. See *supra* Part II.A.

108. See *supra* Part II.B.

Requiring such a significant change in circumstances in order to claim the EITC on a married filing separate return also violates the general policy of tax neutrality.<sup>109</sup> Although the tax law is sometimes used to encourage or discourage certain activities or behaviors for public policy reasons,<sup>110</sup> generally it should avoid influencing, either directly or indirectly, taxpayer actions.<sup>111</sup> Thus, absent a conscious attempt to incentivize spouses to leave, or legally separate from, their abusers—a questionable policy goal in any event<sup>112</sup>—the tax law should refrain from indirectly creating such incentives by conditioning EITC eligibility on the filing of a joint return, single return, or return filed as a head of household.<sup>113</sup>

By providing individuals subjected to domestic abuse with the ability to claim the EITC on a married filing separate return, the proposed measure may eliminate the difficult choices victims of domestic abuse currently face: whether to file a joint return and give up some financial independence, and, at the same time, risk personal liability for deficiencies attributable to her spouse; whether to undergo a significant change in circumstances in order to file as a head of household or single; or whether to file a married filing separate return and sacrifice EITC eligibility altogether. Of course, even with the proposed measure in effect, an abused spouse may still choose to file jointly—whether out of fear of retribution or for other reasons—but the proposed measure would at least offer the abused spouse another option. Thus, the proposed measure promotes an abused spouse's financial independence by allowing her to directly receive an EITC refund,<sup>114</sup> while at the same time minimizing the

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109. See *infra* note 111 and accompanying text.

110. The work incentive policy underlying the EITC is an example of this. See *supra* note 8 and accompanying text.

111. See, e.g., Pareja, *EITC Portability*, *supra* note 2, at 46; see also Fred B. Brown, *Proposal to Reform the Like Kind and Involuntary Conversion Rules in Light of Fundamental Tax Policies: A Simpler, More Rational, and More Unified Approach*, 67 MO. L. REV. 705, 708–10 (2002).

112. See *supra* notes 93–95 and accompanying text.

113. The decision to divorce or maintain a separate household is a significant one. Although the loss of the EITC could have some influence, such a loss is unlikely to be a major factor in an abused spouse's decision. The proposed general rule does not completely eliminate the tax incentive for an abused spouse to divorce or qualify as a head of household. However, compared to current law, the tax incentive to pursue either divorce or head of household status is reduced. Under the current law, an abused spouse who does not file a joint return is completely ineligible for the credit (absent divorce or qualifying as a head of household). Under the proposed general rule, an abused spouse could file separately and qualify for the credit—as long as the couple's combined income does not exceed the phaseout limit. However, under both current law and the proposed general rule, the pooling of income for calculating the EITC phaseout can be avoided only by divorce or qualifying as a head of household. In this way, the proposed general rule does not completely eliminate the tax incentive that currently exists.

114. The funds provided by an EITC refund could contribute to the economic resources

effects of the current tax law<sup>115</sup> on her decision to divorce or leave an abusive spouse at the expense of other considerations like personal and family well-being.<sup>116</sup> The proposed measure also prevents the denial of the EITC to individuals who are deserving of the credit based on their income and family status.

*b. Combining Income of Spouses for EITC Determination*

As discussed previously, the current prohibition on claiming the EITC in a married filing separate return is designed to prevent spouses with combined income in excess of the income limits from receiving the credit.<sup>117</sup> That is, if a husband with one or more qualifying children has earned income and adjusted gross income of \$10,000, but his wife has earned income and adjusted gross income of \$500,000, the husband could qualify for a sizable EITC if he was

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that an abused spouse may need to leave an abusive relationship, or to decrease or stop the abuse if she chooses to stay with her spouse. *See supra* note 74 and accompanying text.

115. *See supra* note 102.

116. It should be noted that permitting an abused spouse to claim the EITC in a married filing separate return may not result in receipt of the credit even if she satisfies the income requirements. In particular, it is possible that a child of the abused spouse may not be treated as her “qualifying child” for purposes of the EITC (*see supra* notes 16–25 and accompanying text for the significance of a qualifying child) and other tax benefits, such as the dependency exemption and the child tax credit. *See infra* notes 138–48 and accompanying text. This can occur when a child of the abused spouse is also a qualifying child of the abusive spouse (*see supra* note 16 for the definition of a qualifying child), and both spouses claim the same child on their separate returns for purposes of the EITC and/or other tax benefits. In this situation, under tiebreaker rules, the child will be treated as the qualifying child of the parent with whom the child resided for the longest period of time during the taxable year, or, if the child lived with each parent for equal amounts of time, the parent with the highest adjusted gross income for the taxable year. I.R.C. § 152(c)(4)(B) (2014). Thus, if both spouses claim the same qualifying child on their separate returns, the child lived with both spouses during the entire year, and the abusive spouse has the higher adjusted gross income, the child will be treated as the qualifying child of the abusive spouse as opposed to the abused spouse. This would be the case even if the abusive spouse were not eligible for the EITC (*see infra* Part III.C.1. for a discussion of EITC eligibility), so long as the abusive spouse claims the child for other tax reasons. *See* I.R.S. Publ’n 596, at 12 (2014). In this situation, not only would the abused spouse lose the benefit of claiming the child for EITC purposes (as well as any other tax purposes), but unless the abused spouse has another qualifying child (taking into account the tiebreaker rules), the abused spouse would not be eligible for the EITC; she would neither qualify as a taxpayer with a qualifying child, nor would she qualify as a taxpayer without a qualifying child. *See* I.R.C. § 32(c)(1)(A); IRS Publ’n 596, at 12 (2014) (clarifying that if an individual does not have a qualifying child pursuant to the tiebreaker rules, the individual is not eligible to claim the EITC using the rules for individuals who do not have a qualifying child). To prevent an abused spouse from being totally deprived of this credit, consideration should be given to revising the tiebreaker rules to permit an abused spouse to claim a qualifying child for purposes of the EITC in cases where the proposed general rule applies.

117. *Supra* notes 41–46 and accompanying text.

eligible for the credit when filing separately. This would be the case even though the spouses' combined income well exceeds the limits for receiving the credit, and the husband presumably benefits from the combined income.<sup>118</sup>

In light of the financial control typically exercised by an abusive spouse in domestic abuse cases,<sup>119</sup> it is possible that an abused spouse is not benefiting from the combined income. That is, the abusive spouse, perhaps equipped with exclusive access to and control over the pooled funds, could use the combined income to benefit only himself. In such situations, basing EITC eligibility and amount on the abused spouse's income, alone, would be appropriate. Nonetheless, an abusive spouse with such access and control should not be presumed to reap all benefits from the combined income; for example, an abused spouse likely benefits from the maintenance of a mutual residence. Indeed, if the spouses are living together, it would appear that at least some of their combined income is being pooled and used to cover joint expenses from which both benefit; and thus, for an abused spouse in this situation, it is not clear how a rule could be designed and implemented that would permit her to demonstrate otherwise.<sup>120</sup> Nevertheless, as discussed in Section D of this Part, consideration should be given to basing EITC eligibility and amount on the sole income of an abused spouse where the spouses are living apart as of the end of a taxable year, given that there is less indication that the spouses are pooling and sharing their income in this situation.

To prevent the receipt of an EITC by an individual whose combined income with her spouse is in excess of the phaseout

118. *Supra* note 46 and accompanying text.

119. *Supra* note 77 and accompanying text.

120. Perhaps an abused spouse could be given an opportunity to demonstrate that a substantial portion of the spouses' combined income was used solely for the benefit of the abusive spouse, in which case, the sole income of the abused spouse would be used in the EITC phaseout to calculate her credit refund. To make such a showing, the abused spouse could produce records indicating the amount and nature of family expenditures. It would be problematic, however, to use the regular return-filing procedure for this purpose, under which the IRS generally accepts the claims made, subject to its right to examine. A rule permitting abused spouses to certify a lack of income-sharing on their returns would demand that the IRS actively ensure these taxpayers' accuracy and truthfulness; otherwise, they could improperly increase their total credits. Such additional oversight by the IRS could perhaps require agents to randomly select returns for careful and detailed examination. The administrative burden produced by charging the IRS with deciding whether or not income-sharing has occurred would likely be preclusive; and there would be no way to guard against all improper claims. A better approach would be modeled on requests for innocent spouse relief: an abused spouse could request that her EITC be determined on the basis of her sole income by affirmatively demonstrating, through adequate documentation, a lack of income-sharing sufficient to warrant this tax treatment. *Cf.* I.R.S. Form 8857 (request for innocent spouse relief from joint tax liability "for an erroneous item or an underpayment of tax").

amount,<sup>121</sup> the proposed general rule would calculate the EITC phaseout using the combined adjusted gross income (or combined earned income, if greater) of both spouses.<sup>122</sup> Any investment income would also be combined for purposes of denying the credit to taxpayers with excessive investment income.<sup>123</sup> Accordingly, in the example above, the husband's EITC would be zero because his adjusted gross income for purposes of the EITC phaseout would be the couple's combined adjusted gross income of \$510,000. This feature of the proposed rule eliminates the concern that underlies the joint return requirement for married taxpayers claiming the EITC. Combining spousal income for determining EITC eligibility may raise administrative and privacy concerns, however; these are examined in Subsection 2 of this Section.

*c. Whether to Allow the Other Spouse to Claim or Receive the EITC*

An important issue raised by the proposal is whether to allow the spouse who committed the domestic abuse to claim the EITC in a married filing separate return, or, alternatively, receive a portion of the credit upon an EITC claim by the abused spouse. On the one hand, allowing the abusive spouse to either claim or receive the EITC is reasonable; otherwise, the proposed rule would operate to deprive this spouse of any share of the credit, which he presumably would have been entitled to if a joint return had been filed (and the couple had qualified for the EITC). Despite the heinous and despicable nature of domestic abuse, it does not seem appropriate to use the tax law to punish the abusive spouse—especially because an abused spouse would be able to claim the credit under the proposed rule simply by certifying on a separate return that the abuse had occurred, rather than convincing a judge or jury of this fact.<sup>124</sup> Although the proposed measure would place the abusive spouse in no worse a position with respect to the EITC than if separate returns had been filed under current law, the proposed rule would empower abused spouses to refuse to file jointly because they no longer would be

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121. See *supra* note 20 for a description of the phaseout amount.

122. Cf. Zelenak, *supra* note 43, at 53–54 (suggesting as a possible option under a separate return filing system for married couples that would phase in the EITC based on the separate income of each spouse, and phase out the EITC based on their combined income).

123. See *supra* note 38 and accompanying text for the investment income limit on eligibility for the EITC.

124. See *supra* notes 103–16 and accompanying text. To claim the EITC in a married filing separate return, an abused spouse would need to certify that she had been subjected to domestic abuse and retain any records to that effect. The IRS would generally defer to such certifications, subject only to its right to examine the returns.

required to sacrifice their entitlement to the EITC. Moreover, allowing the abusive spouse to claim the EITC could relieve some of his economic stress, which may in turn positively influence his behavior and perhaps help reform his propensity for abuse.<sup>125</sup>

However, in order for the abusive spouse to be aware of his ability to claim the EITC on a separate return, he would have to be notified; such notification would necessarily alert him to the certification of abuse filed by his spouse. A revelation of this fact—either directly disclosed to the abusive spouse by his wife, or indirectly disclosed by an IRS notice regarding his EITC eligibility—could endanger the spouse subjected to domestic abuse.<sup>126</sup> Similarly, automatic receipt of a portion of the credit upon a claim by the abused spouse would place him on constructive notice of the certification of abuse. Absent such actual or constructive notice, the abusive spouse might never know whether the abused spouse claimed the EITC in a married filing separate return. Nevertheless, in situations where the abusive spouse is aware of past claims of abuse, if any, that the other spouse has made against him (e.g., the abused spouse has previously filed police reports or requested restraining and/or protective orders), the risk of potential danger to the abused spouse stemming from notice of a certification of abuse under the proposed rule may be very low. Moreover, research shows that individuals subjected to abuse are the best predictors of future harm;<sup>127</sup> thus, an abused spouse may be able to evaluate the danger posed by such a certification and decide accordingly whether to take advantage of the proposed measure. Of course, a decision not to claim the EITC on a married filing separate return that is motivated by fear and potential danger means that the abused spouse is deprived of the proposed measure's benefits. In sum, it is not clear whether the risk of added danger to an abused spouse and its impact on decisions to use the proposed measure outweigh concerns of fairness that result from denying the abusive spouse an opportunity to claim or receive the EITC.

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125. See, e.g., GOODMARK, *supra* note 3, at 191 (noting the correlation between economic stress and domestic abuse and claiming that increasing the economic opportunities available to abusive spouses is crucial to changing their behavior).

126. Cf. Dori Molozanov, *Proposed Tax Rule Would Help Domestic Abuse Survivors Get Affordable Health Coverage*, REG BLOG (Nov. 19, 2014), <http://www.regblog.org/2014/11/19/molozanov-tax-domestic-abuse> [<http://perma.cc/C5X5-MD4X>] (noting that a proposed regulation, which permits abused spouses to claim premium tax credits, raises concerns that a domestic abuse certification requirement could lead to retaliation against the victim by the abuser).

127. See, e.g., Johnson, *supra* note 2, at 151; see also GOODMARK, *supra* note 3, at 100 (stating that abused individual's perceptions of danger are deferred to and trusted).



To avoid these efficacy and fairness concerns, the EITC simply could be modified to allow married individuals to claim the credit in married filing separate returns without a certification of domestic abuse. Under this approach, all married individuals would have the separate return option for claiming the EITC, regardless of whether they were subjected to, or committed, domestic abuse. Such a scheme, however, would place even greater additional duties on the IRS for determining who qualifies and for what amount,<sup>128</sup> as the option to claim the EITC on a separate return would be available to more taxpayers. Nevertheless, as previously indicated, a married couple's tax liability is typically higher when filing separately as compared to jointly.<sup>129</sup> And the feature under the proposed rule of combining spousal income to determine the EITC phaseout should not produce greater total credits for married individuals filing separately rather than jointly.<sup>130</sup> Thus, allowing the EITC to be claimed on married filing separate returns without the certification of domestic abuse may not appreciably increase the number of taxpayers who take advantage of this option.<sup>131</sup>

However, there is a downside to any approach for claiming EITCs on married filing separate returns: it puts the abusive spouse on notice that the abused spouse is, or may be, claiming an EITC.<sup>132</sup> Armed with such information, the abusive spouse may force the abused spouse to hand over any EITC refund, given the financial control that an abusive spouse often exercises over the abused spouse.<sup>133</sup> This drawback would exist with both the "no certification" approach, as well as an approach that provides notice to the abusive spouse that a certification of domestic abuse has been made.<sup>134</sup>

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128. See Part III.C.2.a.i. for a discussion of the additional administrative duties that would fall on the IRS under the proposed general rule.

129. See, e.g., Baines, *supra* note 66, at 729; see also I.R.S. Publ'n 501, at 7–8 (2015); 17 West's Pa. Prac., Family Law § 33:9 (7th ed.).

130. See *infra* note 138.

131. Spouses in non-abusive relationships may, however, use this option to avoid the joint and several liability that would result from filing a joint return (see *supra* notes 83–85 and accompanying text) without sacrificing EITC eligibility. Moreover, as previously noted, the benefit from the income-splitting effect of filing a joint return, which is generally greatest for spouses with unequal incomes, may not be that great for low-income spouses. See *supra* note 76.

132. See, e.g., *infra* Part III.C.2.b.

133. See, e.g., *supra* note 77 and accompanying text.

134. If the spouse who committed the domestic abuse is not prevented from either claiming the EITC on a separate return or otherwise receiving the credit, an issue arises as to how the credit should be determined for the spouses. One possibility could be that each spouse would need to separately qualify for the EITC by stating a valid claim in their separate returns, but taking into account, along with their own tax attributes, the attributes of their spouse for purposes of the phaseout and investment income limit. This

## 2. *Potential Concerns*

### a. *Administrative*

Under the proposed general rule, an abused spouse could claim the EITC in a married filing separate return, which would include a completed Schedule EITC if the taxpayer has a qualifying child. Because her qualification for the credit would be based on the abusive spouse's adjusted gross income (or earned income, if greater) and investment income, in addition to her own, and the abused spouse likely would not have access to this information, the IRS generally would need to compute the abused spouse's EITC. To compute the abused spouse's EITC, the IRS would need to obtain the adjusted gross income and earned income (and investment income, if applicable) of the other spouse from his own separate tax return.<sup>135</sup>

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approach is consistent with the approach used when spouses file separate returns—for example, each spouse must separately qualify for exemptions for dependents. *See* I.R.C. §§ 151, 152(c)(4)(B); I.R.S. Publ'n 501, at 7, 17 (exs. 7–8) (2014). It should be noted that a separate approach for determining each spouse's EITC might require some means for reducing each spouse's credit, so that the total EITC received does not exceed what would have been received if a joint return had been filed. This is because spouses that file separately and claim EITCs under the proposed measure, who each claim one of their children as a qualifying child, could receive an aggregate EITC that is greater than the EITC that would be received if a joint return had been filed. For example, using the 2014 Earned Income Credit Table contained in IRS Publ'n 596 (2014) (which reflects inflation adjustments), spouses who each have \$9,700 of earned income (and adjusted gross income) would receive an aggregate EITC of \$6,610 with separate filing under the proposed measure (this amount is approximately 34% (the credit percentage for one qualifying child) of \$9,700, times two), whereas the couple would receive an EITC of \$5,460 with joint filing (40% (the credit percentage for two qualifying children) of \$13,650 (the earned income amount for two qualifying children)). To prevent this disparity, the total EITC received by spouses who file separately could be limited to the EITC that would have been received if the spouses had filed jointly, with each spouse's EITC reduced proportionately. Applying this approach to the previous example, each spouse's EITC with separate filing would be reduced to \$2,730, which is determined by multiplying each spouse's pre-reduction separate filing EITC (\$3,305) by the ratio of the joint return EITC (\$5,460) to the spouses' total pre-reduction separate filing EITC (\$6,610).

As an alternative to separate approaches for determining each spouse's EITC, under the proposed measure, the total EITC for a married couple could be based on the combined tax attributes of both spouses (e.g., earned income, adjusted gross income, qualifying children), and the total EITC could then be divided equally between the spouses. This approach is consistent with the rationale for using the spouses' combined income for purposes of the EITC phaseout—that spouses pool and share their income—and would yield aggregate EITC results for the couple that are the same as where a joint return is filed, thereby promoting similar treatment among couples filing jointly versus separately. This approach would also avoid the complexity of having each spouse separately qualify for the EITC and calculating separate EITC amounts for the spouses.

135. If the abused spouse has knowledge of the other spouse's adjusted gross income, earned income, and investment income, the abused spouse can use this information to determine her credit at the time of filing her return.

*i. Additional Duties for IRS*

The proposed general rule will undoubtedly increase the administrative responsibilities of the IRS, but these additional functions should not be overly burdensome. Under current law, taxpayers can choose to have the IRS calculate the EITC rather than compute the credit themselves.<sup>136</sup> Although the IRS likely would need to calculate the EITC in most or all cases arising under the proposed measure,<sup>137</sup> the rule should generate only a small percentage of total EITC claims, as it would be implicated only in cases where a taxpayer claims the EITC on a married filing separate return and provides a certification of domestic abuse (subject to a possible alternative).<sup>138</sup>

By requiring that the IRS account for the income of a person in addition to the one filing, the proposed rule diverges from the current EITC framework; however, similar procedures exist under current law. For example, where parents filing separate returns each claims the same qualifying child for EITC purposes,<sup>139</sup> and other tax purposes,<sup>140</sup> and the child lived with each parent for equal amounts of time during the taxable year, the IRS must determine which parent had the highest adjusted gross income for the year before such parent is entitled to treat the child as a qualifying child for tax purposes.<sup>141</sup> Similarly, for purposes of administering the EITC and other tax benefits,<sup>142</sup> if two or more taxpayers can claim a child and neither taxpayer is the child's parent, the child is treated as the qualifying child of the taxpayer with the highest adjusted gross income for that year.<sup>143</sup> In addition, a taxpayer who is not the parent can claim a child for purposes of the EITC, and other tax benefits,<sup>144</sup>

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136. See Instructions to I.R.S. Form 1040, *supra* note 42, at 56.

137. As noted above, in some cases a spouse may be able to determine the amount of her claimed EITC. See *id.*

138. Even if married individuals were permitted to claim EITCs on married filing separate returns without certifications of domestic abuse, the number of taxpayers using this measure may be relatively small, given that a married couple's tax liability is typically higher when filing separately as compared to jointly, and the total EITC received by the spouses should not be greater where separate returns are filed if the EITC is calculated based on pooled income, as proposed. See *supra* notes 128–31 and accompanying text.

139. This can occur where each parent claims the same qualifying child for EITC purposes on returns filed as single taxpayers, or returns filed by one parent as a single taxpayer and the other as a head of household.

140. These include the dependency exemption (I.R.C. §§ 151(c), 152(c)(1) (2014)); the child tax credit (*id.* § 24(c)(1)); the head-of-household filing status (*id.* § 2(b)); the credit for child and dependent care expenses (*id.* § 21(b)(1)(A)); and the exclusion for dependent care benefits (*id.* § 129).

141. *Id.* § 152(c)(4)(B).

142. See *supra* note 140 and accompanying text.

143. I.R.C. § 152(c)(4)(A)(ii).

144. See *supra* note 140.

if two conditions are met: (1) a parent can claim the child but no parent does in fact claim the child; and (2) the taxpayer's adjusted gross income is higher than that of the child's parents and any other person who can claim the child.<sup>145</sup>

Administration of the so-called "kiddie tax" is another instance that requires the IRS to account for a separate person's tax attributes in order to compute what is owed on a return.<sup>146</sup> Under this tax, an individual with unearned income above a certain amount is taxed on a portion thereof at the same rate that would apply to the child's parents if that portion were included in their income.<sup>147</sup> Thus, the IRS is currently required to consider the income of other taxpayers to determine eligibility for the EITC and other tax benefits, as well as for purposes of administering the kiddie tax. Extending this process to taxpayers claiming the EITC under the proposed rule does not seem unusual or overly burdensome.<sup>148</sup>

#### *ii. Delays for Taxpayers in Receiving EITCs*

Under the proposed measure, taxpayers claiming the EITC on married filing separate returns likely will experience greater delays in receiving their credit refunds than those claiming the credit on joint returns or returns filed as single taxpayers or heads of household.

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145. I.R.C. § 152(c)(4)(A)(ii), (c)(4)(C).

146. *Id.* § 1(g).

147. *Id.* § 152(c)(4)(A)(ii), 152(c)(4)(C).

148. Similar to what can occur pursuant to the other provisions that also take into account another taxpayer's income in determining a taxpayer's tax liability, if the abusive spouse were to file an amended return that adjusts his income, or if such an adjustment occurred pursuant to an IRS examination, the EITC of the abused spouse may need to be adjusted as well.

In addition to the duties discussed above, the proposed measure and the considered modification (discussed in Part III.D) will likely increase the instances where the IRS needs to determine which spouse is entitled to claim a qualifying child on a married filing separate return. As discussed previously, where both spouses claim the same qualifying child on their separate returns for purposes of the EITC and other tax benefits, the IRS is required to apply tiebreaker rules, under which the child will be treated as the qualifying child of the parent with whom the child resided for the longest period of time during the taxable year, or, if the child lived with each parent for equal periods, the parent with the highest adjusted gross income for the year. *See, e.g., supra* note 116. With the proposed and considered measures in effect, it is likely that more married individuals will be filing separate returns, and thus there will be more occasions where the IRS will be required to apply these tiebreaker rules to determine the spouse entitled to claim the qualifying child. There are also situations where both spouses claim the same child as a qualifying child on their separate returns, but the child is the qualifying child of only one of the spouses, because, for example, the child lived with only one of the spouses during the year. The IRS needs to sort out these situations as well, and situations of this type will also likely increase with the proposed and considered measures in effect (and the resulting increase in married filing separate returns).

Accessing and accounting for the other spouse's income for purposes of determining EITC eligibility under the proposed rule surely will result in processing delays. Indeed, if a taxpayer using the proposed measure has an unpaid tax liability apart from the EITC, the taxpayer would need to pay this amount when the return is filed before any credit refund could be determined.<sup>149</sup> Additional delays in a spouse's receipt of the refund would result if the other spouse was late in filing his return. Such delays could be quite pronounced where the other spouse fails to file his return altogether, in which case the abused spouse's EITC could not be refunded (or even calculated) until the IRS accessed and assessed an alternative source of his tax information pursuant to a substitute for a return,<sup>150</sup> an IRS settlement document,<sup>151</sup> or a court decision.<sup>152</sup> Although such delays in receiving EITC refunds under the proposed rule could rarely be avoided, they are necessary to provide abused spouses the option to claim the credit on married filing separate returns—an option they can always decide to forgo.

*b. Privacy*

The proposed general rule also raises privacy concerns because the amount of the refund received by a spouse indirectly provides information about the other spouse's income. In general, section 6103 provides that a taxpayer's "return information" should not be disclosed to any other person.<sup>153</sup> Return information includes the amount of a taxpayer's income, among other items.<sup>154</sup> Under the proposed general rule, neither spouse would receive any direct information from the IRS on the amount or character of the other spouse's income—whether earned income, adjusted gross income, or investment income. However, as explained below, the amount of an EITC refund would allow the recipient to determine roughly the adjusted gross income, earned income, and/or investment income of her spouse. Although this effective disclosure would appear not to violate section

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149. As mentioned previously, if the spouse subjected to domestic abuse has knowledge of the other spouse's adjusted gross income and earned income (and investment income), the abused spouse can use this information to determine her claimed EITC at the time of filing her return. See Part III.C.2.b.i.

150. See, e.g., I.R.C. § 6020(b).

151. See, e.g., I.R.S. Form 870 (2007) (modification of agreement form).

152. See, e.g., I.R.C. § 6214(a).

153. *Id.* § 6103(a). Violations of section 6103 can result in liability for civil damages for unauthorized inspection or disclosure by a government employee. *Id.* § 7431. Section 6103 does permit the IRS to disclose return information to other persons in certain situations. *Id.* § 6103(e).

154. *Id.* § 6103(b)(2).

6103,<sup>155</sup> especially if the proposed general rule is enacted into law,<sup>156</sup> it may, as a policy matter, be inconsistent with the privacy protections underlying the provision.

*i. Ability of One Spouse to Determine the Income of the Other Spouse*

As discussed previously, the EITC is generally determined by multiplying a taxpayer's earned income, up to a certain amount (the earned income amount), by the credit percentage; however, the credit cannot exceed the excess, if any, of (a) the credit percentage of the earned income amount over (b) the phaseout percentage of the excess (if any) of the taxpayer's adjusted gross income (or earned income, if greater) over the phaseout amount.<sup>157</sup> Under the proposed rule, a spouse's EITC could be determined by using only her income for purposes of the general EITC determination, but the combined income of both spouses for purposes of determining the EITC phaseout.<sup>158</sup> As demonstrated below, a spouse receiving an EITC under the proposed measure could, based on the amount of the credit, infer information about the other spouse's adjusted gross income, earned income, and investment income.

For example,<sup>159</sup> assume that a spouse has earned income and adjusted gross income of \$10,000, no investment income, and one qualifying child, and, pursuant to the proposed measure, receives an EITC of \$2,152.20. The EITC here is equal to the earned income

155. In this regard, while "disclosure" is defined broadly as "the making known to any person in any manner whatever a return or return information" (*id.* § 6103(b)(8)), it is not clear whether this encompasses information that is inferred from other information that is disclosed. In any event, a taxpayer (i.e., the abused spouse) generally has the right to receive her own return information (i.e., the amount of the EITC) (*see* I.R.C. § 6103(e)(1)(A)(i)), and this seems to be the case even if the information constitutes return information of another taxpayer. *See, e.g.,* *Emerging Money Corp. v. United States* (*Emerging Money II*), 16 F. Supp. 3d 80, 86–87 (D. Conn. 2014).

156. Even if the issuance of an EITC pursuant to the proposed measure would constitute a disclosure of return information that does not fall under the existing exceptions permitting disclosure, the fact that the credit would be issued pursuant to a statutory amendment to section 32 specifically allowing for such should remove any concern that section 6103 is being violated. Alternatively, section 6103 could be amended to specifically provide that the issuance of an EITC pursuant to the proposed change to section 32 is not a prohibited disclosure of return information.

157. *See supra* notes 13–23 and accompanying text.

158. As noted previously, if the spouse who committed the domestic abuse is not prevented from either claiming the EITC on a married filing separate return or otherwise receiving the EITC, another scheme for determining the spouses' EITCs could be to base the total credit received by the spouses on their combined tax attributes, and then divide the total credit evenly between them. *See supra* note 134.

159. This and the other examples in Part III.C.2.b.i. ignore the inflation adjustments to the earned income amount, phaseout amounts, and investment income limit under section 32(j).

amount, which is \$6,330 for an individual with one qualifying child, multiplied by the credit percentage, which is 34 percent for an individual with one qualifying child. This is the maximum credit that an individual with one qualifying child can receive. Thus, the EITC here is not reduced by the phaseout percentage of any excess of the spouses' combined adjusted gross income (or combined earned income, if greater) over the phaseout amount. Consequently, the spouse receiving the EITC here could determine that the spouses' combined adjusted gross income (or combined earned income, if greater) does not exceed the phaseout amount of \$16,610.<sup>160</sup> Since the spouse knows that her earned income and adjusted gross income are \$10,000, she can determine that the other spouse's adjusted gross income and earned income cannot exceed \$6,610.<sup>161</sup> The spouse receiving the EITC can also determine that the other spouse's investment income does not exceed \$2,200.<sup>162</sup> If the spouse instead receives an EITC of \$0, which is \$2,152.20 below the maximum credit amount for an individual with one qualifying child, the spouse can determine that either (i) the spouses' combined adjusted gross income (or combined earned income, if greater) is at least \$30,078.09,<sup>163</sup> and that the greater of the other spouse's adjusted gross income or earned income is at least \$20,078.09,<sup>164</sup> or (ii) the other spouse's investment income exceeds \$2,200. Thus, where the spouse receives either the maximum EITC or no EITC, the recipient can determine that elements of the other spouse's income either cannot exceed, or are at least equal to, a certain amount, as the case may be.

If in the example above, the spouse receives an EITC of \$1,033.60, which is \$1,118.60 below the maximum credit amount for an individual with one qualifying child, the spouse can determine that the spouses' combined adjusted gross income (or combined earned income, if greater) exceeds the phaseout amount of \$16,610

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160. This equals the phaseout amount of \$11,610 for individuals with one qualifying child, plus the \$5,000 increase in the phaseout amount for taxpayers filing a joint return. *See supra* note 20. Although a joint return is not being filed by the spouses, it is assumed that the proposed measure would be applied with this increase in the phaseout amount because the spouses' combined adjusted gross income is used to determine the EITC phaseout, as in the case of a joint return.

161. \$16,610 minus \$10,000 equals \$6,610.

162. The fact that she receives an EITC indicates that the spouses' combined investment income does not exceed the investment income limit of \$2,200, and her investment income is \$0.

163. The \$2,152.20 reduction in the credit divided by the applicable phaseout percentage of 15.98% equals \$13,468.09. Therefore, the spouses' combined adjusted gross income (or combined earned income, if greater) exceeds the phaseout amount of \$16,610 by at least \$13,468.09, and thus is at least \$30,078.09.

164. Since the spouse knows that her earned income and adjusted gross income are \$10,000, she can determine that the greater of the other spouse's adjusted gross income or earned income is at least \$20,078.09 (\$30,078.09 minus \$10,000 equals \$20,078.09).

by \$7,000,<sup>165</sup> and therefore equals \$23,610. Since the spouse knows that her earned income and adjusted gross income are \$10,000, she can determine that the greater of the other spouse's adjusted gross income or earned income is \$13,610.<sup>166</sup> Thus, where a spouse receives an EITC that is less than the maximum credit, the recipient can precisely determine the greater of the other spouse's adjusted gross income or earned income.<sup>167</sup>

### *ii. Policy Analysis*

The information indirectly revealed to one spouse about the other spouse's income raises privacy concerns. Privacy is not an absolute right in either the tax law context or any other legal context, as important governmental policies justify and legitimate certain infringements on privacy.<sup>168</sup> Thus, in general, a person's right to

165. The \$1,118.60 reduction in the credit divided by the applicable phaseout percentage of 15.98% equals \$7,000.

166. \$23,610 minus \$10,000 equals \$13,610. The spouse receiving the EITC can also determine that the other spouse's investment income does not exceed \$2,200. *See supra* note 164.

167. If a spouse's EITC is determined under the proposed measure—by using the combined tax attributes of both spouses to determine a total credit that is then divided evenly between the spouses (*see supra* note 134)—a spouse receiving an EITC can similarly use her amount of earned income and adjusted gross income to infer information about the other spouse's adjusted gross income and earned income. However, as compared to the results under the scheme for determining the EITC discussed above, the conclusions would be less certain where less than the maximum credit is received, provided the spouse receiving the credit has earned income that is less than the earned income amount. For example, assume that a spouse has \$0 of earned income and adjusted gross income, no investment income, one qualifying child (between her and her spouse), and, pursuant to the proposed measure, receives an EITC of \$1,000. Knowing that the total EITC received by the spouses is divided evenly between them, the spouse can determine that the total credit received by the spouses is \$2,000. A \$2,000 EITC can be produced by earned income of \$5,882.35 (34%—the credit percentage for one qualifying child—of \$5,882.55 is \$2,000), provided that adjusted gross income does not exceed \$17,562.44, and thus the limit on the EITC is not less than \$2,000. 34% of \$6,330 (the earned income amount for one qualifying child), reduced by 15.98% (the phaseout percentage for one qualifying child) of the excess of \$17,562.44 over \$16,610 (the phaseout amount for one qualifying child), equals \$2,000. Since the spouse knows that her earned income and adjusted gross income is \$0, she may conclude that the other spouse has earned income of \$5,882.35 and adjusted gross income of no more than \$17,562.44. However, there is another possibility: an EITC of \$2,000 can also be produced by earned income of at least \$6,330, provided that the greater of adjusted gross income or earned income is \$17,562.44. To explain, with earned income being at least equal to the earned income amount of \$6,330, the EITC will be based on the limit for determining the credit. With the greater of adjusted gross income or earned income equaling \$17,562.44, the limit on the EITC is \$2,000. Therefore, the spouse may alternatively conclude that the other spouse has at least \$6,330 of earned income and that the greater of the other spouse's adjusted gross income or earned income is \$17,562.44. Consequently, a spouse in this situation would only be able to conclude the results that the two possibilities have in common: that the other spouse has earned income of at least \$5,882.44 and adjusted gross income or earned income, whichever is greater, of no more than \$17,562.44.

168. *See infra* note 169 and accompanying text.



privacy in a particular situation is often governed by weighing certain factors, which include the nature and extent of the privacy intrusion and the government's specific interest that is furthered by such intrusion.<sup>169</sup> Within the narrower context of tax privacy, the impact of government disclosure of taxpayer information on compliance with the voluntary assessment system is also considered.<sup>170</sup>

With regard to the extent and nature of privacy intrusions under the proposed general rule, as demonstrated above, the information indirectly revealed about the other spouse's income may be nonspecific; that is, that the other spouse's adjusted gross income or earned income (or investment income) falls within a certain range.<sup>171</sup> However, where the spouse receives an EITC that is less than the maximum credit, the spouse can precisely determine the greater of the other spouse's adjusted gross income or earned income.<sup>172</sup> In no case is the source or the nature of the income revealed, and in no case is information on other tax attributes, such as deductions and credits (generally),<sup>173</sup> revealed.

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169. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (addressing the constitutionality of taking and analyzing a cheek swab of an arrestee's DNA by weighing "the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy'")); *Downing v. Kunzig*, 454 F.2d 1230, 1232 (6th Cir. 1972) (addressing the constitutionality of inspecting individuals' packages upon entering federal buildings by considering "the threat to federal property as well as to the safety of federal personnel performing essential functions of Government"); I.R.S. Publ'n 4639 (Oct. 2012) [hereinafter *Disclosure & Privacy Law Reference Guide*] (Page 1-9 therein refers to Congress's reasons for amending section 6103 in 1976, which included an attempt to balance the interests of the government and the citizen's right to privacy). It should be pointed out that the information indirectly revealed under the proposed general rule should not raise any constitutional issues, given that the IRS (a third party) is already holding this information. In this regard, section 6103 permits the IRS to disclose return information to other persons in certain situations. *See, e.g.*, I.R.C. § 6103(e) (2014); *infra* note 180 and accompanying text. Nevertheless, the courts' approach to determining the constitutionality of certain privacy intrusions are instructive as a matter of policy on when privacy intrusions should or should not be permitted.

170. *See, e.g.*, *Disclosure & Privacy Law Reference Guide*, *supra* note 169, at 9 (referring to Congress's reasons for amending section 6103 in 1976). In this regard, there is controversy among tax scholars as to whether taxpayer privacy is essential to promote and achieve taxpayer compliance, or whether the opposite—disclosure—is essential to promote compliance. *See, e.g.*, Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 *EMORY L.J.* 265, 280–84 (2011) (comparing a tax privacy theory with public access theories for improving tax compliance).

171. *See supra* notes 159–64 and accompanying text. As noted previously, under an alternative scheme for calculating EITCs, a spouse receiving the credit could determine that the other spouse's income falls within a certain range. *Supra* note 167.

172. *Supra* notes 165–67 and accompanying text.

173. These would be credits other than the EITC if each spouses' EITC is determined by first computing a total EITC based on their combined tax attributes and then splitting the amount equally between the spouses. *Supra* note 134.

The potential privacy invasions that could arise under the proposed rule each involve revealing indirectly to one spouse certain limited tax attributes of the other spouse; as such, a taxpayer's information is not disclosed to an unrelated taxpayer, but instead, any disclosure of taxpayer information would occur between the two spouses. Although married individuals who file separate returns are separate taxpayers for purposes of the tax law and its attendant privacy concerns, such individuals would seem to have lower expectations of privacy between themselves where they are members of the same household.<sup>174</sup> As spouses sharing a residence are the most likely to benefit from the additional filing option under the proposed rule,<sup>175</sup> the privacy intrusion would not seem substantial.

The governmental interest that underlies the proposed general rule, on the other hand, is significant, and it likely would be sufficient to justify an invasion of the abusive spouse's privacy.<sup>176</sup> As previously discussed, the proposed measure is designed to promote an abused spouse's financial independence, and, at the same time, prevent tax incentives from unduly influencing her ultimate decision of whether to divorce or leave at the expense of more salient considerations—namely, personal and family well-being.<sup>177</sup> In addition, the feature of the proposed rule that bases the credit on the spouses' combined income operates to prevent spouses with aggregate income in excess of the phaseout amount from receiving the credit.<sup>178</sup>

An analogous situation in which an important governmental interest justifies an intrusion on taxpayer privacy arises during administration of the kiddie tax.<sup>179</sup> To the extent necessary for a child to comply with this tax, the child (or the child's legal representative) has the right to inspect the return filed by the child's parents on his behalf.<sup>180</sup> The public policy reason which justifies the attendant privacy intrusion in this context is to guard against a form of

174. See *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996) (stating that “[a]lthough a person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons, such is not the case here where the spouses were estranged and living separately”).

175. If the spouses were living apart as of the end of the taxable year, then a modified rule could be extended to such taxpayers. *Infra* Part III.D.

176. If both spouses were eligible to claim the EITC under the proposed general rule (*supra* Part III.C.1.c.), then, upon receipt of the credit refund, the abusive spouse would also indirectly receive income information about the other spouse. However, unless the spouses have the right to claim the EITC on married filing separate returns without a certification of domestic abuse (*supra* notes 128–31 and accompanying text), the decision to certify the occurrence of such abuse would rest with the abused spouse, and thus would indicate her constructive consent to any privacy intrusion.

177. *Supra* Part III.C.1.a.

178. *Supra* Part III.C.1.b.

179. I.R.C. § 1(g) (2014); *supra* note 146 and accompanying text.

180. *Id.* § 6103(e)(1)(A)(iii).

tax evasion accomplished by transferring income-producing property, and thereby shifting investment income from parents to their children<sup>181</sup>—a policy that does not seem demonstrably more important than the policy supporting the proposed general rule. Moreover, the privacy intrusion attendant to administering the kiddie tax is greater than that which would occur in connection with the proposed measure; access to detailed and precise information concerning a parent's taxable income is required for a child to comply with the kiddie tax.<sup>182</sup> Furthermore, a higher expectation of privacy likely exists between parents and their children than between spouses, even when the marriage is tainted by domestic abuse, given the intimate relationship that often exists.<sup>183</sup>

*D. Modification for Spouses Living Apart at End of Year: EITC Eligibility for Married Filing Separately Without Combining Income of Spouses for EITC Determination*

Where the spouses are living apart as of the last day of a taxable year, a modified rule allowing the abused spouse to claim the EITC on a separate return, but *without* combining the income of the spouses for purposes of calculating the credit, should be considered.<sup>184</sup> Thus, under the proposed modification, only income of the abused spouse would be used to determine EITC eligibility.<sup>185</sup>

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181. STAFF OF THE JOINT COMM'N ON TAXATION, 100TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 1253 (1987).

182. See I.R.C. § 1(g). However, the entire return will not normally be made available to a child making a request under section 6103(e)(1)(A)(iii) because the entire return would not be necessary to comply with section 1(g) in most cases. See Disclosure & Privacy Law Reference Guide, *supra* note 169, at 2.

183. *Supra* note 174. Another analogous situation permitting a taxpayer privacy intrusion is where two parents who do not file a joint return each claim the same qualifying child, and under the tiebreaker rules, the IRS treats the child as the qualifying child of the parent with the highest adjusted gross income for the year. *Supra* notes 139–41 and accompanying text. Through the IRS examination process, a parent may discover by implication that the other parent's adjusted gross income is either higher or lower.

184. It should be pointed out that even though the spouses would be living apart on the last day of the taxable year, there still may be obstacles to claiming the EITC in a return filed as a single taxpayer or head of household. Regarding the latter, head-of-household status for a spouse may not be possible for the particular year because the spouses may not have lived apart for the last six months of the year, or the spouse seeking such status may not have a dependent child. See, e.g., *supra* note 91 and accompanying text. It is also worth noting that the undesirability of filing a joint return with an abusive spouse may be even greater where the spouses are living apart at the end of the particular year. This is because an individual subjected to domestic abuse who is living apart from her spouse may fear contacting the abusive spouse for purposes of filing a joint return because of a risk of injury or trauma; such contact may also be legally prohibited if the abusive spouse is subject to a restraining order. See I.R.S. Notice 2014-23, 2014-16 I.R.B. 19; see also Pareja, *Premium Tax Credit*, *supra* note 43, at 275.

185. Given that EITCs can be larger under the modified rule compared to the general rule, as spousal income is not combined for purposes of the EITC phaseout under the

### 1. *Rationale*

The policy rationale for combining spousal income under the proposed general rule is that each spouse presumably benefits from the combined income; thus, basing the EITC on each spouse's separate income could result in credits being issued to spouses who are not, in practical terms, low-income taxpayers.<sup>186</sup> However, where the spouses are living apart as of the last day of the taxable year, this policy rationale does not apply with equal force. Where spouses are living apart, there is much less indication that income is being pooled and shared. Of course, simply living apart on the last day of the taxable year does not ensure that the spouses did not pool and share a substantial portion of their income during the previous twelve months. Nonetheless, living separate and apart is a reasonable proxy for a lack of such income-sharing, as these living arrangements could suggest that a serious breakdown in the relationship occurred many months prior, which in turn could suggest a lack of income-sharing dating back to that earlier time. Therefore, a modified rule under which EITC eligibility is based on the abused spouse's income alone, seems appropriate where the spouses are living apart as of the last day of a taxable year, as less evidence exists of income-sharing.

Alternatively, EITC claims under the modified rule could be restricted to those cases in which the spouses were living apart for the *entire* taxable year;<sup>187</sup> this variation would better police against

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modified rule, taxpayers may try to take advantage of the modified rule to receive (or increase) EITCs. To prevent this, an abused spouse must be living apart from her spouse on the last day of the taxable year, and provide clear and convincing evidence to establish this fact before she may qualify for the credit under the modified provision. *Cf.* Treas. Reg. § 1.7703-1(b)(5) (2009) (providing that spouses must maintain separate places of abode for the requisite time as a requirement to be considered “not a member of the household during a taxable year”). In this regard, a temporary absence due to special circumstances (e.g., illness, education, business, vacation, or military service) from a common abode of both spouses should be disregarded. *Cf. id.* (providing this in connection with whether spouses have separate places of abode for the requisite time in order to be considered unmarried); *accord* I.R.S. Publ'n 501, at 8 (2014).

186. *Supra* Part III.C.1.b.

187. In this regard, while the credit for the elderly or disabled generally cannot be claimed on a married filing separate return, an exception applies if the spouses live apart for the entire taxable year. I.R.C. § 22(e)(1) (2014). Likewise, a married individual filing a separate return cannot use the exception to the passive activity loss rules for rental real estate activities with active participation if the individual does not live apart from her spouse at all times during the particular year. *Id.* § 469(i)(5)(B). Also relevant are tax rules that provide the same benefits to spouses who live apart for an entire taxable year as compared to those who are not married. For example, Rev. Proc. 2013-34, which, for purposes of applying factors for granting equitable innocent spouse relief under section 6015(f), treats a spouse requesting such relief as not married if she was not a member

income-sharing and ensure that spouses not entitled to the credit are not receiving it.<sup>188</sup> As a significant percentage of married couples (mostly low-income) choose to live in separate households for many years before obtaining a divorce or legal separation, this variation on the modified rule would allow these individuals to claim EITCs that better reflect their available income.<sup>189</sup>

Other considerations may also counsel against combining the income of the spouses for purposes of determining the EITC in the circumstances covered by the modified rule. Under the unmodified version of the proposed general rule, an abused spouse who is living apart from the abusive spouse at the end of the year may prefer to file a joint return with her spouse rather than claim the EITC on a separate return in order to avoid the likely processing delays.<sup>190</sup> In addition to the unavoidable delays caused by increased IRS oversight, delays might be exacerbated by an uncooperative spouse who files late or not at all.<sup>191</sup> By filing a joint return with her spouse, an abused spouse would likely receive the EITC-based refund sooner. However, contacting an abusive spouse to coordinate filing might place the abused spouse at an increased risk of physical injury or other trauma.<sup>192</sup> With the considered modification, the spouse subjected to domestic abuse could avoid filing a joint return and its

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of the same household as the other spouse at any time during the twelve-month period ending on the date the IRS makes its determination. Rev. Proc. 2013-34, § 4.03(2)(a)(iv), 2013-43 I.R.B. 397. Similarly, for purposes of obtaining relief from joint and several liability under section 6015(c) (which limits an individual's liability to the portion of a deficiency properly allocable to her), an individual is generally eligible to elect such relief if the individual was not a member of the same household as the individual with whom she filed a joint return at any time within the twelve-month period ending on the date the election is filed, or if the individual is no longer married to, or is legally separated from, the other individual. I.R.C. § 6015(c)(3)(A)(i). It also should be pointed out that, although the spouses would be living apart for the entire taxable year under this variation of the modified rule, the abused spouse still may not meet the requirements for head-of-household status. *See supra* note 91 and accompanying text.

188. Another variation on the modified rule could be a requirement that the spouses live apart for some period that is less than the entire taxable year. *Cf. Drumbl, supra* note 106, at 43–44 (proposing that spouses who file separately and live apart for at least a 90-day period that includes the last day of a taxable year use their sole income in determining their eligibility for credits and deductions for the taxable year).

189. Pareja, *Premium Tax Credit, supra* note 43, at 273 (citing research that found as many as 15% of separated couples stay separated for at least ten years without divorcing, and that couples in such separations are predominantly “low-income racial and ethnic minorities with [young] children”).

190. *Supra* Part III.C.2.a.ii.

191. *Id.*

192. Nevertheless, as mentioned previously, research shows that individuals subjected to abuse are the best predictors of future harm. *See Johnson, supra* note 2, at 151. Thus, an abused spouse may be able to evaluate the danger posed by first contacting her estranged spouse and then proceeding accordingly.

attendant risks, as well as avoid the delays and uncertainty produced under the general rule.

The approach currently available to abused spouses under the Affordable Care Act, for purposes of claiming premium tax credits,<sup>193</sup> provides additional support for the modified rule. In general, married individuals filing separate returns are not eligible to claim premium tax credits.<sup>194</sup> However, a married individual is permitted to claim a premium tax credit on a married filing separate return if the following three conditions are met: (1) the individual is living apart from her spouse at the time she files her tax return; (2) the individual is unable to file a joint return because she is a victim of domestic abuse or spousal abandonment; and (3) the individual certifies on the return that conditions (1) and (2) are met.<sup>195</sup> Under this rule, only the income of the spouse subjected to domestic abuse, increased by any income earned by her dependents who are required to file a return, is used to determine eligibility for the credit.<sup>196</sup>

According to the IRS, the special premium tax credit rule was designed to combat the obstacles that victims of domestic abuse face in filing joint returns as well as the difficulties in qualifying for head-of-household status.<sup>197</sup> Nonetheless, a perceived lack of income-sharing by spouses in the situations covered by the special premium tax credit rule was likely a factor as well. The general prohibition of claiming premium tax credits on married filing separate returns is presumably based on the same policy reasoning that underlies its ban in the EITC context: that each spouse benefits from the combined

193. I.R.C. § 36B.

194. *Id.* § 36B(c)(1)(C); Treas. Reg. § 1.36B-2T(a)(2).

195. Temp. Treas. Reg. § 1.36B-2T(a)(2)(ii). This procedure may be used by a taxpayer for no more than three consecutive years. *Id.* at (v). This rule is now contained in Prop. Reg. § 1.36B-2(b)(2)(ii), having first appeared in Notice 2014-23, which applied the rule for calendar year 2014. I.R.S. Notice 2014-23, 2014-16 I.R.B. 942.

196. In determining eligibility for the premium tax credit, and the amount thereof, a taxpayer's "household income" is used. I.R.C. § 36B(c)(1)(A), (b)(3)(A). Household income is the sum of the taxpayer's modified gross income and the aggregate modified gross income of individuals for whom the taxpayer receives an exemption under section 151, provided that such individuals are required to file a tax return for the particular year. I.R.C. §§ 36B(d)(1), (2), 151(b). A taxpayer whose filing status is married filing separate receives an exemption under section 151 for her spouse for a particular year only if the spouse could not be claimed as a dependent by another taxpayer and had no gross income for the year (§ 151(b)); in this case, the spouse would not be required to file a return for the particular year. Consequently, a taxpayer who files a married filing separate return and claims a premium tax credit pursuant to the domestic abuse/spousal abandonment rule would not include the income of her spouse in determining her household income. Instructions to IRS Form 8962, at 4 (2014) (computing a taxpayer's household income by taking into account the taxpayer's adjusted gross income, as modified, along with the adjusted gross income, as modified, of the taxpayer's dependents who are required to file a return).

197. See IRS Notice 2014-23, *supra* note 195.

income of the spouses, and that basing eligibility for premium tax credits on each spouse's separate income could result in credits being issued to spouses who, in practical terms, are not lower-income taxpayers.<sup>198</sup> The fact that spouses are living apart at the time the return is filed counters perceptions of income-sharing between them; and this fact, together with the factors proffered by the IRS in support of the special premium tax credit rule,<sup>199</sup> all support the modified rule for determining EITC eligibility.<sup>200</sup>

Finally, not combining the spouses' incomes for purposes of determining the EITC under the considered modification obviates the additional duties placed on the IRS under the proposed general rule, as the IRS would be neither required to compute EITCs for taxpayers using this measure,<sup>201</sup> nor would it be required to take into

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198. See, e.g., Pareja, *Premium Tax Credit*, *supra* note 43, at 278 (stating that although the legislative history of the premium tax credit is silent as to the reason for the prohibition of claiming the credit on married filing separate returns, it seems clear that this is to prevent a married couple from receiving a larger credit by filing separately as opposed to jointly).

199. In this regard, the perceived lack of income sharing by the spouses for the taxable year at issue is stronger under the considered modification as compared to the rule for premium tax credits, given that the former requires that the spouses live apart at the end of the particular year, whereas the latter requires that they live apart at the time that the abused spouse files her return for the year. On the other hand, the obstacles to filing a joint return in the situations covered by the considered modification are not as compelling as those in the situations covered by the premium tax credit rule; even without the modified rule, an abused spouse in a situation covered by the modification could always refrain from filing a joint return and still claim the EITC under the proposed general rule. Such a spouse would not have this option for claiming the premium tax credit. If, however, the proposed general rule were not adopted, then support for the considered modification would appear to be at least as strong as that for the domestic abuse/spousal abandonment rule for premium tax credits.

200. Indeed, one commentator has recommended that the domestic abuse/spousal abandonment rule for premium tax credits should be extended to other tax benefits, in particular, the EITC. Pareja, *Premium Tax Credit*, *supra* note 43, at 282, 284. This commentator also recommends that consideration be given to expanding the categories of taxpayers that are eligible to claim tax benefits on married filing separately returns, and suggests an approach that distinguishes between spouses who are and who are not part of the same household. *Id.* at 281–82, 284. Another commentator has raised the question of whether the IRS would extend the domestic abuse rule for premium tax credits to other credits, such as the EITC. Leslie Book, *ACA and Victims of Domestic Abuse*, PROCEDURALLY TAXING (Apr. 3, 2014), <http://www.procedurallytaxing.com/aca-and-victims-of-domestic-abuse> [<http://perma.cc/9MVW-VBP5>]. Yet another commentator has recommended a more comprehensive approach that would treat abused spouses who have left their abusive spouses as of the last day of the taxable year as single taxpayers for purposes of claiming credits and deductions available to low-income taxpayers. Lori Atherton, *Prof. Nicole Appleberry: Helping Domestic Violence Survivors Navigate Tax Issues*, UNIV. MICH. L. SCH. (Feb. 10, 2014), [http://www.law.umich.edu/newsandinfo/features/Pages/appleberrytaxwork\\_021014.aspx](http://www.law.umich.edu/newsandinfo/features/Pages/appleberrytaxwork_021014.aspx) [<http://perma.cc/X5KS-E9LP>].

201. As under current law, a taxpayer would still have the right to have the IRS compute the EITC. See Instructions to IRS Form 1040, *supra* note 42, at 56.

account the income of the other spouse in determining the credit. The modification also avoids the delays and other inconveniences that taxpayers would likely experience under the proposed general rule.<sup>202</sup> Additionally, privacy concerns are mooted under the modified rule because the EITC received by a spouse is based solely on the income and other tax attributes of that spouse.<sup>203</sup>

## *2. Whether to Allow the Other Spouse to Claim or Receive the EITC*

As with the proposed general rule, an important issue raised by the modified rule under consideration is whether to allow the spouse who committed domestic abuse to claim the EITC on a married filing separate return, or, alternatively, receive a portion of the credit upon a claim made by the abused spouse. The basic arguments for and against permitting the abusive spouse to claim or receive the EITC are the same as those discussed in connection with the proposed general rule.<sup>204</sup> On the one hand, permitting the abusive spouse to either claim or receive the EITC is reasonable; otherwise, the modified rule would work to deprive this spouse of any share of the credit refund, which he presumably would have been entitled to if a joint return had been filed (and the couple had qualified for the credit). Although the considered modification would place the spouse who committed the domestic abuse in no worse a position with respect to the EITC than if separate returns had been filed under current law, with this measure in effect, it would be more likely that an abused spouse would refuse to file a joint return because of her option now to claim the EITC on a married filing separate return. On the other hand, an abusive spouse's receipt of an EITC refund that was separately claimed by the abused spouse would serve as constructive notice that the abused spouse certified the occurrence of domestic abuse—a necessary prerequisite if the abusive spouse is permitted to claim or receive the EITC—and such notice could endanger the abused spouse further.

A few additional points can be made here. In the situations covered by the considered modification, the potential danger to the spouse subjected to domestic abuse may not be as great as that posed by the situations covered under the proposed general rule, given that the spouses would be living apart (at least as of the last day of the taxable year). However, there is still the concern that the

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202. *Supra* Part III.C.2.a.ii.

203. *Supra* Part III.C.2.b (explaining privacy concerns).

204. *See supra* Part III.C.1.c.



abusive spouse may retaliate against the abused spouse for certifying that domestic abuse had occurred.<sup>205</sup> In addition, denying the abusive spouse the ability to separately claim the EITC in the situations covered by the modified rule would likely be easier to overcome than such denial in the situations covered by the general rule; because the spouses would be living apart at the end of the year, it would be more likely that the abusive spouse could qualify as a head of household. Nonetheless, as with the spouse subjected to domestic abuse, head-of-household status may still be difficult to achieve.<sup>206</sup>

A possible solution that was offered in the context of the proposed general rule—permitting married individuals to claim the EITC on married filing separate returns without a certification of domestic abuse—may be problematic in the context of the modification under consideration. This is because, unlike the proposed general rule, spouses could achieve a larger total EITC under the modified rule vis-à-vis filing jointly, as spousal income would not be combined for purposes of the phaseout. Therefore, absent a certification requirement, taxpayers might take advantage of this provision in order to receive (or increase) their credit refunds. Nonetheless, the spouses still would be required to be living apart as of the close of the taxable year to be eligible under the modified rule.

However, if the “no certification” approach were to be adopted under the proposed general rule, it would be possible to continue to use this approach for the abusive spouse even where the modified rule is invoked by the abused spouse. That is, the abusive spouse could have his EITC determined pursuant to the proposed general rule by combining both spouses’ income for purposes of the EITC phaseout, while the EITC of the abused spouse would be based solely on her income alone under the modified rule. This hybrid approach responds to the dilemma discussed above: the abusive spouse would be neither deprived of the EITC, nor put on notice that the other spouse had certified the occurrence of domestic abuse, as his receipt of the credit would not require such certification under the general rule.

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205. In this regard, comments on the proposed regulations permitting abused spouses who live apart from their spouses to claim premium credits in married filing separate returns raised concerns that because of the domestic abuse requirement, the domestic abuse survivor may face retribution from her abuser. *See, e.g.*, Molozanov, *supra* note 126.

206. It is worth noting that the rule that permits abused spouses to claim premium tax credits in married filing separate returns provides no such relief for the spouses that committed the domestic abuse. *See* Temp. Treas. Reg. § 1.36B-2T(a)(2)(ii). Arguments similar to those above can be made in the premium tax credit context as well, and thus it appears that the IRS and Treasury Department favor the reasons for denying the abusive spouse the right to claim these credits in a married filing separate return.

## CONCLUSION

To address the difficulties in claiming the EITC faced by married individuals subjected to domestic abuse, this Article proposes measures that will permit such individuals to claim the EITC on a married filing separate return. Under the proposed general rule, an individual subjected to domestic abuse would be able to claim the EITC using the filing status of married filing separately, but the EITC would be determined by combining the income of the individual and her spouse for purposes of the EITC phaseout and investment income limitation. This Article also recommends that consideration be given to modifying the general rule where the spouses are living apart as of the last day of a taxable year; under this modification, the individual subjected to domestic abuse would be able to claim the EITC using the filing status of married filing separately, but qualification for the credit would be solely based on the income of the individual.

Although this Article is limited in its scope to the EITC, its proposals and underlying rationales apply in other contexts with similar force. Therefore, permitting individuals subjected to domestic abuse to claim other tax benefits<sup>207</sup> on married filing separate returns also should be considered.<sup>208</sup> Although premium tax credits can be claimed on married filing separate returns under the domestic abuse/spousal abandonment rule,<sup>209</sup> the proposed general rule and considered modification could be extended to premium tax credits,<sup>210</sup> and other valuable tax benefits, such as education credits,<sup>211</sup> and credits for child and dependent care expenses.<sup>212</sup> Similar reasons to those in support of the proposed and considered measures in the EITC context seem to support their extension to

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207. See *supra* notes 51–59 and accompanying text for other tax benefits that are not available to individuals whose filing status is married filing separate.

208. Cf. Pareja, *Premium Tax Credit*, *supra* note 43, at 282, 284 (recommending that the domestic abuse/spousal abandonment rule for premium tax credits be extended to other tax benefits).

209. *Supra* notes 193–96 and accompanying text.

210. Extending the proposed general rule to premium tax credits would permit an abused spouse to claim a premium tax credit in a married filing separate return in those cases, currently barred under the domestic abuse/spousal abandonment rule, where the abused spouse continues to live with the abusive spouse. If the proposed general rule was extended to premium tax credits, the need for the current domestic abuse/spousal abandonment rule for premium tax credits would be lessened, given that even without the current rule, an abused spouse would not need to file a joint return to be eligible for a premium tax credit; however, applying the considered modification to premium tax credits may be appropriate for the reasons expressed in Part III.D.1.

211. See I.R.C. § 25A(g)(6) (2014).

212. See *id.* § 21(e)(2).

other tax benefits.<sup>213</sup> However, extending the proposed general rule to other tax benefits would presumably increase the number of taxpayers affected, thereby placing an even greater administrative burden on the IRS,<sup>214</sup> and may engender heightened privacy concerns;<sup>215</sup> these considerations would need to be weighed in the analysis.

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213. One difference with respect to the premium tax credit is that an individual can automatically receive it upon purchasing health insurance; an estimated credit is paid in advance directly to the individual's insurance company and applied to the insured's monthly premiums. See Patient Protection and Affordable Care Act, 42 U.S.C. § 18082(a)(3) (2010); *Questions and Answers on the Premium Tax Credit*, IRS (Sept. 30, 2015), <https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Questions-and-Answers-on-the-Premium-Tax-Credit> [<http://perma.cc/5Y7R-KHVS>]. Consequently, one of the reasons in support of allowing abused individuals to claim the EITC on a married filing separate return pursuant to the proposed general rule—that if a joint return is required and filed, the refund resulting from the EITC would likely end up in an account controlled by the abusive spouse (*see supra* notes 78–82 and accompanying text)—would not apply where a premium tax credit is claimed on a joint return but an advanced premium tax credit has been received by the abused spouse. Nevertheless, other reasons in support of the proposed general rule seem to apply to the premium tax credit with equal force. *Supra* Parts II, III.C.1.a.–b.

214. *Supra* Part III.C.2.a.i.

215. *Supra* Part III.C.2.b.