



May 7, 2023

Stephanie Caden
Office of the Associate Chief Counsel
Employee Benefits, Exempt Organizations, and Employment Taxes
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044.

Re: IRS Notice 2023-13

Submitted electronically via the Federal eRulemaking Portal at www.regulations.gov

Dear Ms. Caden:

On behalf of the members of the National Restaurant Association, we appreciate the opportunity to comment on the proposed revenue procedure (Notice 2023-13) for the Service Industry Tip Compliance Agreement (SITCA) program. The restaurant industry has partnered with the Internal Revenue Service (IRS) to improve tip reporting compliance since 1993, achieving revenue gains for the government and reliable reporting tools for both employers and the restaurant workforce.

Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry, which comprises nearly 1 million restaurant and foodservice outlets and a workforce of 15 million employees. Together with 52 State Associations, we are a network of professional organizations dedicated to serving every restaurant through advocacy, education, and food safety.

The IRS and the restaurant industry work together to ensure current voluntary tip compliance agreements enhance tax compliance among tipped employees through education. The audit protections extended to employees and employers are key factors to demonstrate full compliance and good faith efforts. Through the Tip Reporting Alternative Commitment (TRAC), the Tip Rate Determination Agreement (TRDA), and the Employer-Designed Tip Reporting Program (EmTRAC), the IRS has improved revenue collection and transparency into tip compliance. As the IRS proposes to terminate these three programs in favor of the SITCA program, the National Restaurant Association urges the agency to:

- 1) Maintain audit protections for tipped employees.
- 2) Discard barriers for SITCA participation like the “Minimum Charge Tip Percentage” and differential threshold for cash.
- 3) Allow companies to rejoin the SITCA program after demonstrating one year of compliance.
- 4) Streamline participation for covered establishments in compliance with Federal employment tax laws.

I. Maintain audit protections for tipped employees.

Accurate tip reporting helps employees qualify for mortgages, car loans, unemployment insurance benefits, all while funding Social Security benefits. Education and compliance programs operated by employers are essential when employees report each dollar in tipped income, and significantly boost IRS revenue collections. For example, **the amount of tip income reported to the IRS rose by 68% from 1994 to 1999, once federal tip reporting programs were initiated.**

However, the SITCA program seeks to remove protection from tip income examination:

“No employee will have protection from tip income examination through their employer’s participation in a TRAC, TRDA, or EmTRAC agreement after the conclusion of the transition period described in section 13.02.”

Current tip reporting programs provide varying degrees of audit protection to employees whose employers participate in these programs. For example, under TRDA, the IRS specifically pledges not to examine any employee who reports tips at or above the tip rate established for the employee under the agreement. The EmTRAC and TRAC programs provide lesser degrees of audit protection for employees. Although we understand the IRS’s concern regarding the provision of employee tip audit protection to employees who may be underreporting their tip income, we believe that employee tip protection can be an important incentive for employees to properly report their tips and for employers to participate in the SITCA program. In situations where the employer participates in the SITCA program, we urge the IRS to provide employee tip examination protection for employees since their employer will still be required by the program to produce payroll reports for all tipped employees. The SITCA program itself requires extensive measures of tip reporting compliance, which will require the participation of employees, therefore employees should also benefit by receiving protection from audit. Participating restaurants will have major incentives to train, educate, and implement procedures for employees to accurately report tips.

Accordingly, we recommend the SITCA program provide directly tipped employees of “Covered Establishments” who report tip income at or above a minimum level be provided with protection from tip income examinations. To avoid the level at which audit protection is available becoming a de facto minimum tip reporting standard, the level at which protection is provided could be tied to a Covered Establishment’s overall tip reporting rate. A similar approach could be determined for indirectly tipped employees with a lower threshold. We recognize that such a system would require cross-referencing a Covered Establishment’s Form 8027 (upon which we believe the information required to demonstrate continuing eligibility for the SITCA program should be reported) with the employee’s reported tip income. Nonetheless, we believe that employee audit protection can serve as an important tool to increasing employer participation in the SITCA program and improving employee tip reporting compliance because employees will be aware that they will lose the audit protection if their reported tips are not consistent with those of their coworkers.

II. Discard barriers for SITCA participation like the “Minimum Charge Tip Percentage” and differential threshold for cash.

The voluntary tip reporting programs rely on extensive restaurant industry adoption, training, and operational commitment. When consolidating three voluntary tip compliance programs into the SITCA program, the IRS must ensure these important programs maintain both functionality and access. **In this spirit, the Association strongly recommends that the *Minimum Charge Tip Percentage* be eliminated and other barriers like the proposed cash differential of 2 percent be increased. This will ensure that restaurants with strong tip compliance procedures and practices – designed to support voluntary employee tip reporting – are able to participate in the SITCA program.**

Currently, a restaurant’s sales transactions with an actual Charge Tip Percentage are recorded in a point-of-sale (POS) system. For even small restaurants, thousands of these transactions are digitally logged within a restaurant’s system each month, precluding any ability of an employee to underreport Charged Tips. As such, there is no reason for the SITCA program to require a restaurant to use a Charge Tip Percentage more than what is actually recorded in the POS system in order to estimate Cash Tips and create a new barrier for participation.

When calculating the threshold for Minimum Tip Percentage, the IRS likely used data from *IRS Form 8027* to estimate the difference between the average cash tip percentage and the average Charge Tip Percentage, i.e., the “Cash Differential.” However, the Form 8027 offers incomplete data. All tips (regardless of whether they are cash tips or charged tips) on off-premise sales (takeout and delivery) are reported only on Line 4 (tips reported by directly and indirectly tipped workers) of the Form 8027. In other words, charged tips on off-premise sales are not reported on Line 1 of Form 8027. This results in the charged tips on off-premises sales appearing to be cash tips. Also, the receipts from off-premise sales are non-allocable receipts, and as a result those receipts are not reported on the Form 8027 at all. **This distorts the apparent cash tip rate. In sum, data does not provide a sound basis to determine an appropriate differential between charge tip rates and cash tip rates.**

Both cash and charged tip rates for off-premise sales are generally far less than traditional on-premise sales within a full-service restaurant. These off-premise sales remain fluid, especially with the increase in off-premise sales during 2020 and 2021. Currently, there is no data on which to make a sound determination of the appropriate tip rate, stiff rate, and other information for off-premise sales, and **it is premature to include carryout receipts and reported tips on off-premise transactions into any criteria for eligibility in the SITCA program.**

III. Allow companies to join or rejoin the SITCA program after showing one year of compliance.

The proposed revenue procedure would require a restaurant to demonstrate that it satisfies eligibility criteria for three years in order to join the SITCA program. This approach limits the pool of potential program participants. Due to COVID-19, many restaurants have experienced and continue to experience rapidly changing business conditions. Many restaurants have seen a significant increase in the proportion of their business that constitutes off-premise sales. A significant number of restaurants have had severe

disruptions to their workforces, including large-scale layoffs and subsequent challenges in rehiring and retaining staff in the post-COVID economy. A three-year look back for initial eligibility in the SITCA program would include, for many restaurants, years in which their business remained seriously disrupted. Looking only at the most recent calendar year would serve the purpose of ensuring that only restaurants with appropriate tip reporting procedures are able to participate in the SITCA program without unnecessarily excluding many restaurants from this important program.

In addition, the SITCA program must permit a Covered Establishment to be reinstated after demonstrating that it meets necessary criteria for the most recently completed calendar year. The proposed revenue procedure would preclude a restaurant from participating for three years if the IRS removes it from the SITCA program as a result of failing to meet the eligibility criteria for a single year. This result is overly harsh and would likely result in a number of restaurants deciding to forgo participation entirely, serving as an roadblock to the program's goals. As the IRS seeks efficiencies when streamlining three programs into one, **establishing a one-year exclusionary period can both help the agency administer the SITCA program by attracting new participants and encourage restaurants to update needed data for the new program.**

The SITCA program should allow covered establishments that fail to meet the minimum tip standard in a calendar year the opportunity to satisfy criteria in the next calendar year before removal from the program. This will encourage restaurants to take appropriate remedial steps quickly, returning to compliance and avoiding exclusion from the SITCA program.

IV. Simplify participation for covered establishments in compliance with Federal tax laws.

The SITCA program should simplify eligibility by allowing participation of any restaurant in compliance with Federal law. The IRS has the insight and ability to quickly monitor and verify compliance with the laws it administers, as a participating restaurant works diligently to be in good standing with the agency. However, many state and local assessments can take years to resolve due to antiquated systems or lack of clarity in local regulations. We urge the IRS to remove the requirement that a SITCA participant must be in compliance with state and local tax laws in order to be eligible to participate in the program.

On behalf of the National Restaurant Association, we appreciate the IRS's efforts to improve tip income reporting by working directly with the restaurant industry. We look forward to partnering with the agency to improve the revenue procedure proposal ahead of its implementation and ensure the SITCA program remains as viable and productive as its predecessors.

We appreciate your efforts and attention.

Sincerely,



Aaron Frazier
Vice President of Public Policy