

**Legislative Recommendation #52****Adopt a Consistent and More Modern Definition of “Qualifying Child” Throughout the Internal Revenue Code****SUMMARY**

- *Problem:* Numerous provisions in the IRC use the term “qualifying child,” but they contain several different definitions of the term. These inconsistent definitions are confusing to taxpayers. The different definitions make compliance difficult, causing some taxpayers to fail to claim tax benefits for which they qualify and other taxpayers to claim tax benefits for which they do not qualify, subjecting them to liability for additional tax, penalties, and interest. Furthermore, the relationship test embedded in the definitions has not been updated to reflect the rise of non-traditional families and childcare arrangements, preventing primary caregivers from receiving certain benefits.
- *Solution:* Adopt a consistent and more modern definition of the term “qualifying child” throughout the IRC by using a consistent age requirement, removing or replacing the relationship test to expand eligibility to modern families, and revising the definition of a “qualifying relative” to allow a taxpayer to claim the qualifying child of another taxpayer who is entitled to claim the child but does not do so.

**PRESENT LAW**

IRC § 152 broadly defines a “dependent” as a “qualifying child” or a “qualifying relative.”<sup>1</sup> The term “qualifying child” is further defined in IRC § 152(c). This definition was added to the IRC as part of the Working Families Tax Relief Act of 2004.<sup>2</sup> At that time, Congress concluded that the use of multiple definitions contributed to a lack of clarity.<sup>3</sup> Despite these efforts, there are still parts of the IRC that deviate from the uniform definition.

IRC § 152(c) is meant to provide a common definition of “qualifying child” for five tax benefits: (i) IRC § 2(b), head-of-household (HoH) filing status; (ii) IRC § 21, the Child and Dependent Care Credit; (iii) IRC § 24, the Child Tax Credit (CTC); (iv) IRC § 32, the Earned Income Tax Credit (EITC); and (v) IRC § 151, the dependency exemption. This “uniform” definition also affects eligibility for other provisions in the IRC like premature distributions from tax-favored accounts for education or medical treatment, dependent care assistance programs under IRC § 129, and family member fringe benefits under IRC § 132.

Several IRC provisions that use the term “qualifying child” adopt a different definition. For example, the EITC may be claimed with respect to children under age 19 (or under age 24 if a student) while the CTC may only be claimed with respect to children under age 17.<sup>4</sup> The term “qualifying child” and the relationships described in IRC § 152(c)(2) encompass different types of familial relationships, including grandchildren for purposes of the EITC. In the case of a taxpayer who is married but seeking to be treated as unmarried for purposes of claiming HoH filing status, however, only a son or daughter meets the definition of a “qualifying child” – grandchildren do not qualify.<sup>5</sup> This differs from the relationships covered by the term “qualifying relative” in IRC § 152(d). In addition, IRC § 152(d)(1)(D), as currently written, excludes children who could otherwise be claimed as qualifying children by another taxpayer.

1 IRC § 152 (a).

2 Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169-1165 (2004).

3 Toni Robinson, *Problems with the Uniform Definition of a Qualifying Child*, ABA SECTION OF TAXATION NEWS QUARTERLY, Vol. 26, No. 1 (Fall 2006).

4 IRC §§ 24(c)(4) and 152(c)(3).

5 IRC §§ 152 and 7703.

## REASONS FOR CHANGE

### Consistency Avoids Confusion and Eases Administration

The deviations from a uniform definition are needlessly confusing. Not surprisingly, many taxpayers do not understand the differences in requirements. They may assume that if a child is “qualifying” for purposes of one IRC provision, the child is qualifying for all IRC provisions. Conversely, they may assume that if a child is not qualifying for purposes of one IRC provision, the child is not a “qualifying child” for any IRC provisions.<sup>6</sup> This confusion can result in inaccuracies on their tax returns, which may lead to audits and additional tax liabilities, plus penalties and interest charges or loss of benefits intended by Congress. It can also result in a failure to claim tax benefits. For example, in tax year 2019, about 14 percent of taxpayers with children who were eligible to receive EITC benefits did not claim them.<sup>7</sup>

Confusion also increases the administrative burden on the IRS, as it must program its return processing systems using different definitions for different provisions, it must program its audit selection models to distinguish among conflicting definitions, and it must devote audit and collection resources to reporting inaccuracies that exist solely because taxpayers and even some tax preparers confuse the various definitions when filling out tax returns.

### The Relationship Test Prevents Primary Caregivers From Receiving Certain Tax Benefits

Eligibility rules for EITC and certain other tax credits were written when two-parent households predominated. Living arrangements have evolved. A 2016 study by the Tax Policy Center found that only 51.6 percent of children living in families with incomes at or below 200 percent of the Federal Poverty Level were in families headed by married couples.<sup>8</sup> Low-income children were more likely to live with a single parent or in a multigenerational household, a cohabiting household, or a family with at least one non-biological child, as compared with higher income families.<sup>9</sup>

When children are raised or informally fostered by nonqualified relatives or family friends, EITC and CTC cannot be properly claimed.<sup>10</sup> Taxpayers can only receive the child-related portion of EITC and CTC when they have a “qualifying child,” not a “qualifying relative.”<sup>11</sup> The IRC § 152(c)(2) relationship test for a qualifying child restricts eligibility to only a few close relatives.<sup>12</sup> This test mainly excludes children who live in low-income households.<sup>13</sup> The relationship test excludes two million children for purposes of some CTC benefits.<sup>14</sup> A child who does not live with a sufficiently close relative cannot be claimed by anyone.<sup>15</sup>

6 Elaine Maag, H. Elizabeth Peters, and Sara Edelstein, *Increasing Family Complexity and Volatility: The Difficulty in Determining Child Tax Benefits*, URBAN INSTITUTE, (Mar. 3, 2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>.

7 Combined EITC/CP09-27 recipient files, CPS ASEC, Form 1040, and Form W-2, tax year 2019. Release authorization CBDRB-FY2022-CES010-010.

8 Elaine Maag, H. Elizabeth Peters, and Sara Edelstein, *Increasing Family Complexity and Volatility: The Difficulty in Determining Child Tax Benefits*, URBAN INSTITUTE, (Mar. 3, 2016), <https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits>.

9 *Id.*

10 Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

11 IRC §§ 24, 32, and 152.

12 IRC § 152(c).

13 Jacob Goldin and Katherine Micheltore, *Who Benefits from the Child Tax Credit?*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Oct. 2021), <https://www.nber.org/papers/w27940>.

14 *Id.*

15 IRC §§ 24(c), 152(c); Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

Similarly, the relationship rules where a taxpayer is seeking to be treated as unmarried for the purposes of HoH filing status prevent the taxpayer from claiming grandchildren.<sup>16</sup>

Congress can address these shortcomings by modernizing and adopting a uniform definition of a qualifying child, as the current definition often no longer reflects real-life living arrangements. The definitions of a qualifying child should be amended to encompass more types of families. The closely defined relationship test of IRC § 152(c)(2) should be removed entirely or replaced with a holistic primary caregiver standard.<sup>17</sup> The residency test and other requirements should remain in place to ensure the tax benefits are going to taxpayers providing care to children in their household.<sup>18</sup> The tiebreaker rules of IRC § 152(c)(4) should also remain in place for situations where two or more taxpayers could claim the same qualifying child.

To allow heads of non-traditional families to claim the dependency exemption with respect to children they care for, another amendment to the current IRC § 152 rules would make a significant difference – adding the words “claimed as” to IRC § 152(d)(1)(D) so that the term “qualifying relative” means an individual “who is not *claimed as* a qualifying child of such taxpayer or of any other taxpayer for any taxable year in the calendar year in which such taxable year begins.” That language would also conform to the language used in IRC § 152(c)(4)(C) regarding when two or more can claim the same qualifying child. If the parents may claim a qualifying child but neither parent does so, the child may be claimed as the qualifying child of another taxpayer if the adjusted gross income of that taxpayer is higher than the highest adjusted gross income of either parent of the individual.<sup>19</sup>

## RECOMMENDATIONS

- Adopt a consistent and more modern definition of “qualifying child” throughout the IRC.
- Use a consistent age when defining “qualifying child.”
- Modernize the definition of a qualifying child in IRC § 152(c) to reflect evolving family units by removing IRC §§ 152(c)(1)(A) and 152(c)(2).
- Replace the relationship test of IRC § 152(c)(1)(A) and IRC § 152(c)(2) with a primary caregiver standard.
- Amend IRC § 152(d)(1)(D) so that the term “qualifying relative” means an individual “who is not *claimed as* a qualifying child of such taxpayer or of any other taxpayer for any taxable year in the calendar year in which such taxable year begins.”

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<sup>16</sup> IRC §§ 2(b), 152(f)(1), and 7703(b).

<sup>17</sup> Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, YALE LAW JOURNAL FORUM, Vol. 131, (Oct. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3941495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3941495).

<sup>18</sup> IRC §§ 152(c)(1)(B)-(E).

<sup>19</sup> IRC § 152(c)(4)(C).