May 8, 2017

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments on the Definition of Dependents [REG-137604-07]

Dear Commissioner Koskinen:

Enclosed please find comments on proposed regulations under sections 2, 32, 63, and 152 (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

William H. Caudill
Chair, Section of Taxation

Enclosure

cc:  William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
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AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS ON PROPOSED REGULATIONS UNDER
CODE SECTIONS 2, 32, 63, AND 152
[REG-137604-07]

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

Principal responsibility for preparing these Comments was exercised by Joseph Barry Schimmel. Substantive contributions were made by members of the Individual and Family Taxation Committee and the Pro Bono and Tax Clinics Committee, including Grace Allison, Jamie Andree, Bryan Camp, Stephanie Coleman, Jennifer Liguori, Robert Probasco, Nancy Rossner, Bree Stamper, Erin Stearns, Megan Sullivan, and Patrick Thomas. The Comments were reviewed by Phyllis Epstein, Chair of the Individual and Family Taxation Committee, and by Christine Speidel, Chair of the Pro Bono and Tax Clinics Committee. The Comments were further reviewed by George Willis of the Section’s Committee on Government Submissions; T. Keith Fogg, Council Director for the Pro Bono and Tax Clinics Committee; and Julian Y. Kim, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: May 8, 2017
EXECUTIVE SUMMARY

The Working Families Tax Relief Act of 2004\(^1\) (the “2004 Act”) replaced multiple definitions of “child” utilized for child-related tax benefits within the Code\(^2\) with a uniform definition of “qualifying child” (“UDOC”). Additional changes to the UDOC have been made since 2004, as part of the Gulf Opportunity Zone Act of 2005\(^3\), and through the Fostering Connections to Success and Increasing Adoptions Act of 2008.\(^4\)

The Section of Taxation previously provided extensive comments on the UDOC, expressing concerns with the UDOC and proposing both legislative and regulatory changes (“UDOC Report”).\(^5\) Some of these concerns were addressed by the Internal Revenue Service (the “Service”) in Notice 2006-86\(^6\) and Notice 2008-5.\(^7\) For the most part, the Service relied on pre-UDOC guidance, and clarification of the UDOC was left to the courts.

On January 19, 2017, the U.S. Department of the Treasury (“Treasury”) and the Service issued a notice of proposed rulemaking containing Proposed Regulations under sections 2, 3, 21, 32, 63, 151, 152, 6013, and 6109\(^8\) (the “Proposed Regulations”).\(^9\) The Proposed Regulations also withdrew existing proposed regulations relating to the definition of an authorized placement agency for adoption. When finalized, the Proposed Regulations would obsolete several revenue rulings and other guidance. The Proposed Regulations would apply to taxable years beginning after the date they are finalized. The preamble to the Proposed Regulations (the “Preamble”) states that taxpayers may choose to apply the Proposed Regulations in any open taxable years. These Comments are submitted in response to the request for comments in the Preamble.\(^10\)

Most of the members of the Section of Taxation contributing to these Comments have extensive experience in representing low-income taxpayers, through nonprofit or academic Low Income Taxpayer Clinics funded by the Service under section 7526. We collectively have seen thousands of examples of taxpayers who have struggled with the

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\(^2\) References to the “Code” refer to the Internal Revenue Code of 1986, as amended.
\(^7\) Notice 2008-5, 2008-1 C.B. 256.
\(^8\) References to a “section” are to a section of the Code, unless otherwise indicated.
\(^10\) Id.
UDOC. Consequently, we have reviewed the proposed rules with a primary view toward ease of comprehension for taxpayers, and ease of administration for the Service. We commend the Service for proposing regulations that simplify the application of the UDOC, and we appreciate the opportunity to provide these Comments. We anticipate that the final Regulations will increase taxpayer compliance and improve the Service’s ability to administer the dependent rules. Many of the examples in the Proposed Regulations illustrate the income tax consequences of non-traditional living arrangements and are a welcome recognition of 21st century realities. We believe that additional examples would further assist taxpayers and the Service, and we suggest situations in which additional examples would be helpful.
COMMENTS

1. Proposed Regulation Section 1.2-2, Definitions and special rules.

a. Proposed Regulation Section 1.2-2(b)(2), Qualifying child or dependent.

Section 2(b) defines a “dependent” by a series of references to section 152. Proposed Regulation section 1.2-2(b)(2)(ii) follows the statutory structure, but states that an individual is a dependent for the purposes of qualifying a taxpayer as “head of household” if “the individual is the taxpayer’s dependent, within the meaning of section 152 without applying section 152(d)(2)(H) (relating to an individual qualifying as a member of the household) and 152(d)(3) (relating to the special rule for multiple support agreements) for whom the taxpayer may claim a deduction under section 151.” We believe that this definition will confuse some taxpayers, practitioners, and Service employees, due to the multiple cross references. We recommend that the final Regulation include the following examples.

Proposed Example 1: Grandparent helps to support 3 qualifying individuals in her household. Grandchild 1 is her 7-year old granddaughter who lived with Grandparent for 7 months of the year. Grandchild 2 is her 10-year old grandson who lived with Grandparent for 7 months of the year. Child is an unrelated 8-year old who has lived with her all year. Also in the household is Friend who lived in the household all year and paid her own expenses plus 1/3 of Child’s living expenses. Grandparent pays 1/3 of Child’s living expenses. The remaining 1/3 of Child’s living expenses is provided by the State through welfare benefits. Grandparent and Friend sign a multiple support agreement providing that Friend will not claim Child as a qualifying child. Assuming all other criteria are met, Grandparent can claim 3 dependency exemptions. The two grandchildren qualify Grandparent for Head of Household filing status.

Proposed Example 2: All facts remain the same except Grandchildren lived with Grandparent for only 5 months of the year. Grandparent does not qualify for Head of Household filing status. Under section 2(b)(3)(B), Child does not qualify Grandparent for head of household filing status. Grandchildren may potentially be Grandparent’s qualifying relative dependents; however they did not share Grandparent’s principal place of abode for over half the year as required by section 2(b)(1)(A).

b. Proposed Regulation Section 1.2-2(b)(5), Marital Status.

The term “married” has different meanings within the United States. We recommend that final Regulation section 1.2-2(b)(5) acknowledge that the recently finalized Regulation section 301.7701-18 established general definitions of terms relating to marital status.\textsuperscript{11}

We note that some taxpayers, especially those who are victims of domestic violence, sometimes find themselves listed as a spouse on a married filing joint return without their permission. This also happens to unmarried individuals, when their names are added to a joint return without their knowledge or consent. By making reference to Regulation section 301.7701-18, the final Regulation would further protect these individuals from being held liable for the tax liabilities of either persons to whom they are not married or persons with whom they did not intend to file a joint return. Internal Revenue Manual 21.6.1.4.7, *Married Filing Jointly or Married Filing Separately is Invalid or Filed with Incorrect Status*, begins with the proposition that a joint return is potentially invalid if the individuals were not married. We agree with this position.

In Revenue Ruling 76-255, the Service concluded that the effect of a civil annulment is to change a couple’s marital status to single, retroactive to the date of the original marriage ceremony. We recommend that the Service take this opportunity to formally adopt the annulment rule in a regulation.

We recommend that Proposed Regulation section 1.2-2(b)(5) be modified when finalized to read as follows:

(5) **Marital Status.** For purposes of this paragraph (b), the marital status of a taxpayer is determined at the end of the taxpayer’s taxable year. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see § 301.7701-18 of this chapter. A taxpayer is considered married if the taxpayer’s spouse, other than a spouse who is a nonresident alien, dies during the taxable year. A taxpayer is considered not married if the taxpayer is divorced, if the taxpayer is legally separated from the taxpayer's spouse under a decree of divorce or separate maintenance, if at any time during the taxable year the taxpayer’s spouse is a nonresident alien, or if the provisions of section 7703(b) are satisfied, regardless of whether the taxpayer the taxpayer has ever filed a joint return. When considering whether taxpayers are married, the filing of a joint return is not dispositive. If a marriage is annulled under applicable state law, so that for purposes of applicable state law no valid marriage ever existed between the taxpayers, the taxpayers are considered for purposes of this paragraph (b) to have never been married.

In our experience, taxpayers frequently encounter difficulty in documenting that they are not married when seeking to change their marital status from married to single or head of household for a particular year. Similarly, taxpayers for whom the Service has prepared a “substitute for return” under section 6020(b) encounter difficulty in establishing that they are not married, when they have previously have erroneously claimed to have been married. While we recognize that this problem is beyond the scope of the regulations, we recommend that the Service consider revising its procedures to enable taxpayers to document that they are not married, possibly by accepting the taxpayer’s declaration under penalty of perjury. Particularly when a taxpayer seeks to file

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an original tax return in place of a “substitute for return,” a taxpayer should not generally be required to produce documentation of non-married status.

c. Proposed Regulation Section 1.2-2(d), *Maintaining a household*

Proposed Regulation section 1.2-2(d)(1) would define when a taxpayer “maintains a household” for purposes of the “head of household” filing status under section 2. We recommend that the Proposed Regulations when finalized more explicitly describe the costs of maintaining a household.

First, the Proposed Regulation includes “property insurance” as a cost to maintain a household. We recommend that the final Regulation refer specifically to “renters’ insurance” and “homeowners’ insurance.”

Second, the Proposed Regulation includes “mortgage interest” as a homeowner’s cost of maintaining a household, but does not specifically mention mortgage principal payments. The Proposed Regulation does not distinguish between qualified residence interest (within the meaning of section 163(h)(3)) and other interest. Homeowners make periodic mortgage payments that consist of mortgage interest, mortgage principal, qualified residence interest and other interest, and mortgage insurance (which section 163(h)(3)(E) treats as interest), and that often also include escrow payments for property taxes and homeowners’ insurance. As homeowners are unable to opt to pay only part of the required mortgage payment, and as it may be impractical to allocate mortgage payments between costs to maintain a household and other costs (or between one year and another), we recommend that the Final Regulation clarify that the cost to maintain a household includes everything included in a taxpayer’s mortgage payment, incurred at the time of payment. For expenses paid through mortgage escrow, the Service could rely on the taxpayer’s mortgage statement rather than any separate documentation submitted by the taxpayer, so as not to count the expenses twice.

Third, the Proposed Regulation allows a taxpayer to treat a home’s “fair market rental value” as a cost of maintaining a household, instead of the sum of payments for property taxes, mortgage interest, and property insurance. We believe that neither the term nor the concept of “fair market rental value” is used elsewhere in the Code or Treasury Regulations for individual income tax purposes. We recommend that the Service provide guidance to taxpayers in determining and documenting “fair market rental value.”

Fourth, we recommend that taxpayers have the option to use the Service’s Collection Financial Standards as a reasonable approximation of the relevant total cost of maintaining the household. For example, if a taxpayer has evidence of making mortgage, insurance, and property tax payments that amount to over half the Service’s housing and utilities standard amount, but the taxpayer cannot establish the total cost of utilities because one of the accounts was in another person’s name, and the person is not cooperative, the Service should consider the total costs to be the standard amount. We recommend that the final Regulation make this an option on the part of the taxpayer.
Finally, the Proposed Regulation appears to use the terms “cost” and “expense” interchangeably. We recommend that the term “cost” be used consistently, to the exclusion of the term “expense.”

d. Proposed Regulation Section 1.2-2(d)(2), *Proration of costs*

Proposed Regulation section 1.2-2(d)(2) states:

(2) *Proration of costs.* In determining whether a taxpayer pays more than one-half of the cost of maintaining a household that is the principal place of abode of a qualifying child or dependent for less than a taxable year, the cost for the entire taxable year is prorated on the basis of the number of calendar months the qualifying child or dependent resides in the household. A period of less than a calendar month is treated as a full calendar month. Thus, for example, if the cost of maintaining a household for a taxable year is $30,000, and a taxpayer shares a principal place of abode with a qualifying child or dependent from May 20 to December 31, the taxpayer must furnish more than $10,000 (8/12 of $30,000 × 50 percent) in maintaining the household from May 1 to December 31 to satisfy the requirements of this paragraph (d).

Proposed Regulation section 1.2-2(d)(2) thus requires the proration of the taxpayer’s costs of maintaining a household for the entire taxable year. We support the general approach of this proposal in recognizing that, where a child resides in the household for less than the entire taxable year, the taxpayer must pay more than one-half of the cost of maintaining the home for the relevant period, as opposed to more than one-half of the taxpayer’s cost for the full year. However, the proposal does not account for the fact that certain costs of maintaining a household, specifically utilities and food consumed on the premises, will necessarily be higher during the months that a qualifying child or dependent resides in the household. We propose that the standard be simply based on the cost of maintaining the household for the months in which the dependent resided with the taxpayer. This test would better recognize the taxpayer’s efforts in maintaining a household *for the child*, and it would also minimize taxpayer burden.

We therefore recommend that Proposed Regulation section 1.2-2(d)(2) be modified when finalized to read as follows:

1.2-2(d)(2). *Part-year residence of qualifying child.* In determining whether a taxpayer pays more than one-half of the cost of maintaining a household that is the principal place of abode of a qualifying child or dependent for less than an entire taxable year, the cost of maintaining the household for the year is the cost of maintaining the household beginning with the date the taxpayer’s home became the principal place of abode of the qualifying child or dependent and ending with the date the taxpayer’s home no longer was the principal place of abode of the qualifying child or dependent. Thus, for example, if a taxpayer shares a principal place of abode with a qualifying child or dependent from May 20 to December 31, the taxpayer must furnish more than one-half of the cost of maintaining the household during that time period.
e. Proposed Regulation Section 1.2-2(d)(3), New household

Proposed Regulation section 1.2-2(d)(3) appears to provide that when a child becomes a part of a household or discontinues as part of a household, a new household is established. This is consistent with our recommended revision to Proposed Regulation section 1.2-2(d)(2). We agree that the final Regulation should not require the proration of costs between an old household and a new household.

However, we believe the Proposed Regulation will be difficult to apply in some circumstances. For example, consider the following fact pattern. Taxpayer A shares a principal place of abode with a qualifying child, C, from January 1 to August 31. On April 16, Taxpayer B moves into the abode, with B’s own qualifying child, D, together with a third child, E, who is also the child of A. On September 1, A and D move out of the abode. From April 16 through August 31, A, B, C, D and E formed one household; because E is the child of both A and B, A and B cannot have separate households under Proposed Regulation section 1.2-2(d)(5). We understand the Proposed Regulation to mean that, so long as A and B have each provided more than one-half of the cost of maintaining their own households (A with C, B with D) from January 1 to April 15, and from September 1 through December 31, the allocation of costs from April 16 to August 31 should be irrelevant. If this is not the intent of the Proposed Regulation, we recommend that the final Regulation clarify this issue.

f. Proposed Regulation Section 1.2-2(d)(4), Birth, death, adoption, or placement

Under this Proposed Regulation, a qualifying child appears to allow two taxpayers to qualify for head of household status for a single tax year: a biological parent that has the child for the first seven months, and a foster parent who has the child for the final five months. The Proposed Regulation does not reference the tiebreaker rules under section 152(c)(4). We note that application of the tiebreaker rules would have the unintended consequence of eliminating the foster parent from head of household filing status because a foster parent is not a parent under the tiebreaker rules. We recommend that the final Regulation clarify whether the tiebreaker rules apply to this provision.

Consider the following scenario: A taxpayer has a 2-year old daughter. Her daughter is removed from the home and placed into foster care as a result of domestic violence perpetrated by the taxpayer’s boyfriend. The child is placed with a foster family in August. Eventually, the taxpayer finds safe and secure housing, and is reunified with the child on January 1. If the tiebreaker rules do not apply, the child will qualify the foster parent, who has only had the child for five months, for head of household filing status. It is unclear what effect this has on the biological parent’s filing status. If the tiebreaker rules apply, the child qualifies the biological parent for head of household filing status but not the foster parent, nullifying, in many circumstances, the presumed intended effect of this subsection.
2. Proposed Regulation Section 1.32-2, Earned Income Credit

Dependency and the EIC for Childless Taxpayers

Proposed Regulation Section 1.32-2(c)(3)(ii), Application of tie-breaker rules.

An individual who is not treated as a taxpayer’s qualifying child due to the tiebreaker test under section 152(c)(4) should not be treated as that taxpayer’s qualifying child for any purpose under section 32. Therefore, we agree with the Proposed Regulation: assuming the taxpayer does not have another qualifying child, the taxpayer may claim the earned income credit (the “EIC”) for childless taxpayers if all other tests are satisfied.

This interpretation makes sense because it does not penalize low-income taxpayers for living in multigenerational households. In a 2011 study, *Family Matters: Multigenerational Families in a Volatile Economy*, the group Generations United found that economic difficulties are a significant factor in the formation of multigenerational households.13 Events precipitating individuals’ relocations to live with relatives included job loss and underemployment. This is consistent with our experience representing low-income taxpayers. It makes sense to allow the childless EIC to continue for household members who otherwise qualify for the EIC for childless taxpayers and would have claimed that credit prior to forming a multigenerational household.

In addition to encouraging the formation of multi-generational households, economic difficulties can lead to households made up of extended family members. Siblings who form a joint household, and who each have biological children in the household, should each be able to claim the EIC under section 32(c)(1)(A)(i), and we believe the Proposed Regulation is consistent with this. We do not believe the Proposed Regulation is intended to prohibit a taxpayer who “loses” a child under the tiebreaker rules from claiming the EIC based on another qualifying child. However, we recommend that the final Regulation clarify this point with an additional sentence and an example.

To clarify the eligibility of a taxpayer for the EIC under section 32(c)(1)(A)(i) when there is an additional qualifying child in the household other than the child subject to the tiebreaker rules, we suggest the following additions to Proposed Regulation sections 1.32-2(c)(3)(ii) and 1.32-2(c)(3)(iii) when finalized:

Section 1.32-2(c)(3)(ii) …. Thus, that taxpayer may be an eligible individual under section 32(c)(1)(A)(ii) and may claim the earned income credit for a taxpayer without a qualifying child if all other requirements are satisfied. That taxpayer may also be an eligible individual under section 32(c)(1)(A)(i) if the taxpayer has a different qualifying child and all other requirements are satisfied.

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Section 1.32-2(c)(3)(iii), Example 3. Brother, Brother’s child A, Sister, and Sister’s child B share the same principal place of abode for the taxable year. Child A and Child B meet the definition of a qualifying child under paragraph (c)(3)(i) of this section for both Brother and Sister (and no other person) for the taxable year. Brother claims the earned income credit with Child A as Brother’s qualifying child. Sister claims the earned income credit with Child B as Sister’s qualifying child. Brother and Sister are each an eligible individual under section 32(c)(1)(A)(i).

3. Proposed Regulation Section 1.63-3, Additional standard deduction for the aged and blind

Section 63(f)(1) provides additional standard deductions for the taxpayer or taxpayer’s spouse who has attained age 65 before the end of the year. This standard deduction was enacted under the Tax Reform Act of 1986,\textsuperscript{14} and replaced the additional exemption under prior section 151(c). Proposed Regulation section 1.63-3(b)(2), which replaces current Regulation section 1.151-1(c) without significant change, provides that “a person attains the age of 65 on the first moment of the day preceding his or her sixty-fifth birthday.” For calendar year taxpayers, a person born on January 1 is considered to have attained the age of 65 on December 31 of the year preceding his or her sixty-fifth birthday.

The Proposed Regulation is counterintuitive and does not appear to have any rational explanation other than its pedigree (i.e., the current Regulation was finalized in 1957). It is contrary to how similar rules work. Revenue Ruling 2003-72\textsuperscript{15} instructs that for purposes of sections 21, 23, 24, 32, 129, 131, 137, and 151, a child attains a given age on the anniversary of the date that the child was born. For example, a child born on January 1, 2000, attains the age of 19 on January 1, 2019, while a child born one day earlier, on December 31, 1999, attains the age of 19 on December 31, 2018.

The Proposed Regulation is, on its face, a taxpayer-friendly method of counting because it allows those who have birthdays on January 1\textsuperscript{st} to enjoy an additional year of the extra deduction. However, it creates another group of taxpayers who will now miss the deduction by one day: those born January 2\textsuperscript{nd}. There is no principled distinction to be taken between attaining age 65 one day before your actual birthday, and attaining age 65 two or more days before your actual birthday. Neither day is your birthday.

Perhaps in 1957 the Proposed Regulation could have been justified. A taxpayer attaining age 65 in 1957 would have been born in 1892 (or on January 1, 1893). At that


time, fewer than five percent of births occurred in hospitals, and birth certificates had not been standardized.17

The Proposed Regulation may create confusion for taxpayers who must determine their age under a situation that is not covered by a specific regulation. For example, regular withdrawals from individual retirement accounts must generally start in the year in which a taxpayer turns 70 ½ and no later than the following April after the year the taxpayer turns 70 ½.18 Using the normal rule for counting given in Revenue Ruling 2003-33, a taxpayer born on July 1st will attain the age of 70 on July 1st. Thus, a taxpayer who is born on July 1, 1950, will expect to turn 70 ½ on January 1, 2021. But under the rule given in the Proposed Regulation, one might conclude either that the taxpayer attained the age of 70 on June 30, 2020, and therefore attained the age of 70 1/2 on December 30, 2020, or that the taxpayer attained the age of 70 ½ on December 31, 2020, because that is the day before the sixth month after the taxpayer’s 70th birthday.

We recommend that the final Regulation adopt the “actual date of birth” method of determining age 65.

4. Proposed Regulation Section 1.152-1, General rules for dependents

a. Proposed Regulation Section 1.152-1(a), In General

Notice 2008-519 sets forth the rule that an individual is not a dependent of a person, if that person is not required to file an income tax return under section 6012(a)(1)(A) and either does not file an income tax return or files an income tax return solely to claim a refund of withheld taxes. Proposed Regulation section 1.152-1(a)(2)(i) would adopt and expand upon this rule, by providing that an individual is also not a dependent of a person who is not required to file an income tax return under section 6012(a)(1)(A) and files an income tax return to claim a refund of estimated taxes. Proposed Regulation section 1.152-2(f) would adopt a similar rule for individuals filing a joint return solely to claim a refund of withheld or estimated taxes.

The effect of this Proposed Regulation (and Notice 2008-5) is that an individual is not a “taxpayer” unless the individual has an actual income tax return filing requirement. Although this rule was suggested in the Section of Taxation’s UDOC Report,20 we recommend that the rule be expanded to reflect the possibility that an individual may file


18 See I.R.C. §§ 401(a)(9)(C), 408(a)(6).

19 Supra note 7.

20 Supra note 5.
a return for reasons other than to claim a refund of withheld or estimated taxes. As such, we recommend that the Proposed Regulation be expanded to include the following examples of situations in which an individual may file a return, while not required to do so under section 6012(a)(1)(A):

(1) To reduce the risk of defaulting on an installment agreement or offer in compromise,
(2) As in 2008, to claim the $300/$600 “stimulus” payments,
(3) For FAFSA reporting/compliance purposes,
(4) To qualify for certain loans,
(5) For public benefit eligibility purposes,
(6) For mortgage modification purposes,
(7) To correct identity theft issues,
(8) To correct a false ITIN, in order to receive credit for FICA, or
(9) To correct a false SSN, in order to correct earnings reported to the Social Security Administration

This list of examples is not intended to be exhaustive, and new examples may arise. To encompass other possible scenarios, we recommend that the rule simply state that an individual is not a dependent of a person if that person is not required to file an income tax return under section 6012(a)(1)(A).

We support the language of Proposed Regulation section 1.152-1(a)(2)(iii), as it applies to adopted children. The Proposed Regulation provides, in part, that:

A taxpayer and the child have the same principal place of abode for the taxpayer's taxable year if the taxpayer and child have the same principal place of abode for the entire portion of the taxable year following the placement of the child with the taxpayer.

This sentence of the Proposed Regulation is very favorable to adoptive parents, yet it is not noted or explained in the Preamble. We recommend that the Preamble to the final Regulations confirm the Service’s intent with regard to this provision.

b. Proposed Regulation Section 1.152-1(b), Definitions.

i. Proposed Regulation Section 1.152-1(b)(1), Child.

A. Proposed Regulation Section 1.152-1(b)(1)(i), In general.

Proposed Regulation section 1.152-1(b)(1)(i) uses the terms “stepson” and “stepdaughter” but does not provide definitions. We recommend that the terms “stepson” and “stepdaughter” be defined, as there may not be common agreement on their meaning. For example, if a parent dies leaving a stepchild in care of a stepparent, and the stepparent remarries, will the stepparent’s new spouse also then qualify as a stepparent?
B. Proposed Regulation Section 1.152-1(b)(1)(ii), *Adopted child.*

Proposed Regulation section 1.152-1(b)(1)(ii) interprets section 152(f)(1)(B) to treat any child legally adopted by a “person” or any child who is placed by an agency with a “person” for legal adoption by an agency as a child by blood of that person for purposes of section 152. We agree that the use of the term “taxpayer” in section 152(f)(1)(B) should not be interpreted narrowly, and that a taxpayer other than the adoptive parent should be allowed to satisfy the relationship test if the taxpayer is related to the adoptive parent. The Federal Government has long recognized the impact adoption has on society and is supportive of pro-adoption tax policies and pro-adoption legislation.21 American jurisprudence has also held that an equitably adopted child could be considered a dependent for receipt of retirement benefits.22 The Proposed Regulation is consistent with these policies.

C. Proposed Regulation Section 1.152-1(b)(1)(iii), *Eligible foster child.*

Proposed Regulation section 1.152-1(b)(1)(iii) provides a limited definition of the term “eligible foster child” as used in section 152(f)(1)(C). We recommend that the final Regulation expand upon the definition, and provide examples. There are many different courts and types of orders concerning placement of foster children. The definition does not address court orders that do not use the word “foster.”

For example, a Juvenile and Domestic Relations Court may place physical custody of a child with an individual who is unrelated to the child. We recommend that the final Regulation provide that a child placed by a custody order will meet the definition of eligible foster child, so that the taxpayer entrusted with care of the child may claim the child for the EIC (assuming all other requirements are met).

We also recommend that the definition of eligible foster child also be expanded to include legal guardians of the person of a minor, including kinship guardianships. An increasing number of relatives are willing to provide care to related children on a long-term basis to prevent the children from entering or remaining in the foster care system with unrelated caregivers, yet in many cases these relatives are either unable or unwilling to seek termination of the legal relationships between the parent and the child—particularly when the relative’s own child or sibling is the parent. Thirty-seven states


22 *Williams v. Richardson*, 523 F.2d 999 (2d Cir. 1975) (allowing for the extension of benefits to grandparents through equitable adoption).
provide for guardianship with kin. A “kinship guardianship” statute suspends parental rights, but does not terminate them. A kinship guardian is granted permanent care, custody, and control of the child and assumes many of the rights and duties that customarily would reside with the child’s parents. We recommend that the term “eligible foster child” explicitly cover kinship guardianships and other guardians of the person, so that taxpayers and practitioners will not be misled into believing only a traditional foster child is eligible. This clarification would provide certainty that a child subject to a kinship guardianship order is a “qualifying child” even if (i) the child is placed late in the year (see Proposed Regulation section 1.2-2(d)(4)), or (ii) the child and guardian do not have a relationship otherwise described in Proposed Regulation section 1.152-1(b)(1).

We also recommend that the final Regulation define the term “placed with.” We recommend that a child be considered “placed with” a person from the date that a court grants custody or guardianship, even if the child is not in the physical custody of the person.

D. Proposed Regulation Section 1.152-1(b)(1)(iv), Authorized placement agency.

We strongly support the broad definition of “authorized placement agency,” and in particular the inclusion of references to Indian Tribal Governments.

ii. Proposed Regulation Section 1.152-1(b)(2), Student.

We agree with the inclusion of a definition for “student.” However, we believe that the requirement that a student be enrolled for some part of five calendar months is overly restrictive. Many U.S. universities remain on the “quarter” or “trimester” academic calendars, with the fall term beginning in September. High school graduates are increasingly likely to take a “gap year” before college, and a gap year student returning for the fall term may not satisfy the five-month requirement. We recommend

24 Id.
25 See, e.g., Cowan v. Commissioner, 109 T.C.M. (CCH) 1434, 2015 T.C.M. (RIA) ¶2015-085 (holding that a ward met the definition of “eligible foster child” of the legal guardian during the ward’s minority; upon reaching age 18, the ward ceased to be an eligible foster child).
26 Including prominent schools such as Northwestern University, University of California—Los Angeles, and University of Michigan—Ann Arbor.
that the final Regulation shorten the requirement to four calendar months, or provide for four consecutive calendar months as an alternative requirement.

5. Proposed Regulation Section 1.152-2, Qualifying child

a. Proposed Regulation Section 1.152-2(f), Joint return test.

Section 152(b)(2) excludes a married individual from the definition of “dependent” if the individual files a joint return with the individual’s spouse under section 6013. The Proposed Regulation would disregard a joint return filed “solely to claim a refund of estimated or withheld tax.” The Proposed Regulation does not clearly indicate whether “solely to claim a refund of estimated or withheld tax” applies only to the individual, or to both the individual and the individual’s spouse.

As discussed above with respect to Proposed Regulation section 1.152-1(a), there are many non-tax reasons that an individual—or an individual’s spouse—may file a return. An individual may be led to believe that a joint return is always required. We recommend that the final Regulation require only that neither the individual nor the individual’s spouse have a return filing obligation under section 6012(a)(1)(A). If this recommendation is not accepted, we suggest that the final Regulation clearly indicate that the joint return be filed solely to claim a refund of estimated or withheld taxes of the individual or the individual’s spouse.

In addition, the phrase “under section 6013” appears to be superfluous. We therefore recommend that the phrase “under section 6013” be omitted. We acknowledge that the phrase is set forth in section 152(b)(2).

b. Proposed Regulation Section 1.152-2(g), Child who is eligible to be claimed as a qualifying child by more than one taxpayer (the “Tiebreaker Rules”).

Proposed Regulation section 1.152-2(g)(1)(iii) addresses the situation where an individual may be the qualifying child of one eligible parent and at least one eligible non-parent. The Proposed Regulation contains a cross-reference to Proposed Regulation section 1.152-2(g)(1)(i), which applies where an individual may be the qualifying child of more than one eligible parent. Given that the two situations are mutually exclusive, we recommend that the final Regulation delete the cross-reference.

Proposed Regulation section 1.152-2(g)(2) addresses the determination of adjusted gross income (“AGI”) for individuals filing a joint return. The Proposed Regulation would include the full AGI shown on joint returns. We are concerned that this rule may encourage spouses to file joint returns when, for other reasons, they would be

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better off not filing joint returns. We acknowledge that, for administrative convenience, the Service may not wish to apportion AGI shown on joint returns for purposes of the UDOC rules.

We support the inclusion of examples in Proposed Regulation section 1.152-2(g)(4). These examples are very helpful in tying related provisions of the Code together and clarifying their interaction. We believe that Example 5 could be improved in this regard. Example 4 involves a situation where Child’s parents, D and E, are married and live together with Child’s Grandparent. In Example 5, D and E divorce, and E moves into a separate residence and becomes the noncustodial parent. The example states that Grandparent would not be able to claim Child if D, who executed a Form 8332 releasing the dependency exemption and child tax credit to E, had claimed Child for the EIC.

We recommend that Example 5 be clarified to explain the consequences to Grandparent of D or E not claiming Child. As we understand the example, if D did not claim Child for the EIC, then Grandparent could claim Child for the EIC, provided only that Grandparent’s AGI was higher than D’s AGI. We believe that E’s AGI—and whether E claims the dependency exemption or child tax credit—is irrelevant to whether Grandparent can claim Child for the EIC. We also recommend that Example 5 be clarified to state that D may claim Child for purposes of head of household status.

6. Proposed Regulation Section 1.152-3, Qualifying Relative

a. Proposed Regulation Section 1.152-3(b), Qualified relative relationship test.

Proposed Regulation section 1.152-3(b)(1) uses several terms that are not defined, and for which there may not be common agreement on their meaning. Specifically, the terms “stepfather,” “stepmother,” “niece,” “nephew,” “aunt,” “uncle,” “brother-in-law” and “sister-in-law” are subject to multiple interpretations.

As mentioned above in the case of “stepson” and “step-daughter” under Proposed Regulation section 1.152-1(b)(1), if a parent dies, leaving a stepchild in care of a stepparent, it is unclear whether, if the stepparent remarries, the stepparent’s future spouse will also then qualify as a stepparent. The terms “niece” and “nephew” may refer only to the children of a taxpayer’s brother or sister, but they are also commonly used to refer to the children of a taxpayer’s spouse’s brother or sister, and may even refer to the step-children of a taxpayer’s brother or sister. The terms “brother-in-law” and “sister-in-law” each have two different meanings: the brother or sister of a taxpayer’s spouse, and the spouse of a taxpayer’s brother or sister. We recommend that the final Regulation provide clarification on these points.

29 The Section of Taxation’s UDOC Report, supra note 5, raised many of these issues.
b. Proposed Regulation Section 1.152-3(c)(2), *Income of disabled or handicapped individuals.*

We recommend that the title of this Proposed Regulation be renamed “*Income of individuals with disabilities.*” Although the heading of section 152(d)(4) retains the word “handicapped,” many consider the term offensive. Moreover, the text of section 152(d)(4), the text of the Proposed Regulation, as well as various schedules in Form 1040 (e.g., Schedule EIC, Schedule R) use the term “disability” rather than “handicap.”

c. Proposed Regulation Section 1.152-3(d)(2), *Certain income of taxpayer’s spouse.*

Proposed Regulation section 1.152-3(d)(2) provides that certain payments to a payee spouse are not treated as payments by the payor spouse for the support of any dependents. We recommend that the final Regulation state that such payments will be treated as support by the payee spouse to the extent used for support of any dependents.

d. Proposed Regulation Section 1.152-3(e), *Not a qualifying child test.*

As discussed above, section 32 provides for two types of EIC: section 32(c)(1)(A)(i) allows the EIC to a taxpayer with a qualifying child, and section 32(c)(1)(A)(ii) allows the EIC to a taxpayer without a qualifying child.

Section 152(d)(1)(D) provides that a “qualifying relative” cannot be a “qualifying child” of the taxpayer or of any other taxpayer. The second sentence of Proposed Regulation section 1.152-3(e) would clarify section 152(d)(1)(D) by providing that a “qualifying relative” is not a “qualifying child” of a person, if that person is not required to file an income tax return under section 6012(a)(1)(A), and files solely to claim a refund of estimated or withheld taxes.

We first reiterate our comment above under Proposed Regulation section 1.152-1(a) and repeat our recommendation that the final Regulation recognize additional non-tax reasons that a person may want or need to file an income tax return.

In addition, the policy underlying the EIC is to encourage taxpayers to work. This policy should permit individuals who have “qualifying children,” who do not claim them as dependents, and who are not themselves qualifying relatives, to claim the EIC under section 32(c)(1)(A)(ii).

The express language of section 32(c)(1)(A)(ii) allows an individual who meets certain age and residency requirements, who does not have a “qualifying child” and who is not a dependent, to be treated as an “eligible individual” for purposes of the EIC. We believe that section 32(c)(1)(A)(ii) is intended to treat an individual who has a qualifying child—but does not claim the qualifying child as a dependent—as being an “eligible individual.” We recommend that the individual be treated for all purposes like any other
taxpayer who does not have a qualifying child. We believe that this rule would be consistent with Proposed Regulation section 1.32-2(c)(3)(ii).

For the reasons discussed, we recommend that the second sentence of the final Regulation require only that the person not be required to file an income tax return under section 6012(a)(1)(A). If this recommendation is not accepted, we suggest that the phrase “or an earned income credit” be added to the end of the second sentence of the Proposed Regulation. 30

Proposed Regulation section 1.152-3(e)(2), Example 2, states that although C has earned income of $1,500, D is not treated as a qualifying child of C, provided that C files an income tax return solely to obtain a refund of withheld taxes and does not claim the EIC. We note that, based upon the facts, section 32(c)(1)(A)(ii)(III) would have barred C from claiming the EIC, as C is a dependent of B. We recommend that the Example be re-written to clarify this point. It would also be helpful for this Example to indicate that C, as a dependent of B, cannot claim a dependency exemption for D.

For the reasons stated above, we also recommend that Proposed Regulation section 1.152-3(e)(2), Example 3, be revised to indicate that C files an income tax return for the taxable year to obtain a refund of withheld taxes and claims the EIC for C’s qualifying child, D. It would be helpful if Example 3 or an additional example provided that (i) if C claims the EIC for taxpayers without a qualifying child under section 32(c)(1)(A)(ii), then (ii) B may claim the dependency exemption and EIC for D, because B has a higher AGI than any parent of D. This result is supported by section 152(c)(4)(C).

7. Proposed Regulation Section 1.152-4, Rules for a qualifying child and a qualifying relative

a. Proposed Regulation Section 1.152-4(a)(1), Support, In General.

The Proposed Regulations remove the discussion of support from the general rules for dependents in current Regulation section 1.152-1 to a new section—Proposed Regulation section 1.152-4. The Proposed Regulations include a more detailed discussion of what does and does not constitute support. We agree with the expanded discussion of support, particularly as the specific exclusion from the definition of support of an individual’s taxes, life insurance and funeral expenses eliminates any question about whether those items constitute support.

We recommend that the third sentence of Proposed Regulation section 1.152-4(a)(1) be clarified. The wording used to explain the formula for determining support, while technically correct, may be confusing to some taxpayers as well as to some of the

Service’s employees. Specifically, as written, the Proposed Regulation suggests that the support formula used for a qualifying child is the same as the formula for a qualifying relative. The sentence states:

In determining whether an individual provided more than one-half of the individual’s own support for purposes of § 1.152-2(e), or whether a taxpayer provided more than one-half of an individual’s support for purposes of § 1.152-3(d), the amount of support provided by the individual, or the taxpayer, is compared to the total amount of the individual’s support from all sources.

For support purposes, an individual is a qualifying child under Proposed Regulation section 1.152-2(e) if the individual did not provide more than one-half of his or her own support. If the individual had no income from any source, which is often the case for a child under age 17, the support test is met. An individual with no income or assets cannot provide more than one-half of his or her own support, so there is no reason to consider the individual’s total support to determine if the individual meets the support test to be a qualifying child. Yet, in our experience, it is common for low and moderate income taxpayers to be asked, during an audit, to document the total support paid for a child who has no income of his or her own and who otherwise meets the definition of a qualifying child. This unreasonably increases taxpayer burden and may lead to unnecessary appeals. To address this issue, we request that Treasury clarify that when a child has no indications of income, including Social Security survivor benefits, it is not necessary for the Service to compare support provided by anyone to the total amount of the child’s support.

One remedy for this confusion would be to divide the above-quoted sentence into several shorter sentences, as follows:

In determining whether an individual provided more than one-half of the individual’s own support for purposes of § 1.152-2(e), the amount of support provided by the individual is compared to the total amount of the individual’s support from all sources. However, when an individual has no income and provides none of his or her own support, it is not necessary to consider support from other sources to determine whether the individual is a qualifying child under § 1.152-2(e). In determining whether a taxpayer provided more than one-half of an individual’s support for purposes of § 1.152-3(d), the amount of support provided by the taxpayer is compared to the total amount of the individual’s support from all sources.

An additional way to avoid confusion would be to provide examples of when the total amount of support from all sources needs to be considered. Some possible examples are as follows:

Example 1: A is the grandmother of B. B is 5 years old, has no income or assets, and contributes nothing to her own support. Because B has no income and does not contribute to B’s support, B meets the support portion of the qualifying child test. It is not necessary to consider support from all sources to determine whether B is a qualifying child of A.
Example 2: C is the grandmother of D. D lives with C. D is 16 years old and has a part-time job at which D earns $3,000 for the tax year, all of which is spent on items of D’s support. C is employed and earns $20,000 during the tax year. C spends $10,000 on D’s support. E is D’s parent, who lives elsewhere, and contributes $1,000 during the tax year to D’s support. Because D has income and contributes to her own support, D’s total support from all sources must be considered. In this case, D’s total support is $14,000. D does not provide more than one-half of D’s own support. Therefore, D meets the support portion of the test to be C’s qualifying child.

Example 3: F is G’s cousin. F has no income and lived with G during the entire tax year. Although F does not meet the relationship test to be a qualifying child, F may be a qualifying relative. F’s total support from all sources must be considered. G earns $20,000 during the tax year and spends $12,000 on F’s support. F’s parents, H and J, live elsewhere and each contributes $2,000 to F’s support. F’s total support from all sources during the tax year is $16,000. Because G contributes more than one-half of F’s support during the tax year, F meets the support requirement to be G’s qualifying relative.

If the Service does not adopt our proposed language, we recommend a regulatory safe harbor for children under 16 (or some other given age) that have not received income reported on a Form 1099, Form W-2, or Schedule K-1. If the Proposed Regulation is finalized unchanged, we recommend that the Service revise its examination procedures to provide that, if a child has no outside sources of income (known to the Service), the Service will not inquire into whether the child provides more than one-half of the child’s own support.

We recommend that the final Regulation provide that transportation costs are excluded from the definition of support, for reasons of administrative convenience. We note that proof, valuation, and apportionment of transportation cost may be difficult.

Revenue Ruling 58-67 determined that “church contributions” paid by a dependent from his or her own income are considered items of support for purposes of determining dependency. We note that the Proposed Regulations would obsolete Revenue Ruling 58-67. If “church contributions” and other charitable contributions paid by a dependent are not to be considered items of support, we recommend that the final Regulation specifically state so.

b. Proposed Regulation Section 1.152-4(a)(3), Support, governmental payments.

The Proposed Regulation section 1.152-4(a)(3), e.g., would treat government payments and subsidies used by the recipient or other intended beneficiary of those government benefits to support another person as support provided by the recipient or

31 Including survivor benefits reported on Form SSA-1099.

other intended beneficiary, rather than as support provided by the government. We support this rule. Since this rule represents a change from prior policy, it would be helpful to include some examples, such as the one below.

Example 1: K has a chronic medical condition and receives Supplemental Security Income (SSI) benefits of $500/month. K is also employed, earning $500/month. L is K’s cousin and resides with K. Because the SSI benefits arrive on the first of the month, K uses them to pay rent for the apartment where she and L reside. Because the SSI benefits are used to pay the rent where L resides, they are considered support provided by K rather than support provided by a third party.

In addition, it would be helpful if the final Regulation clarifies that it is not necessary for the taxpayer who receives or is the intended beneficiary of a government benefit to demonstrate that every penny of the government benefit is spent to support another person, in order for the entire government benefit to be considered support provided by the taxpayer. It is clear from the Preamble that, in the interest of administrative convenience, the Service intended to avoid the need to trace the use of government benefits, as opposed to the use of other funds of the recipient, for the support of another individual.

Similarly, it would be helpful if the final Regulation clarifies that, when government benefits are paid to a specific individual but are designed to benefit the entire household of the individual, it is not necessary to trace the use of the entire government benefit in order for the government benefit to be considered support provided by the individual. Examples of such benefits include the Temporary Assistance for Needy Families (“TANF”) program and Supplemental Nutrition Assistance Program (“SNAP”—formerly “Food Stamps”). Under those programs, the benefit is paid to one individual for the benefit of the entire TANF or SNAP household.


We generally agree that government benefits based on a taxpayer’s earnings and contributions are support provided by the individual for whose benefit the payments are made, to the extent they are used for the individual’s support. However, Proposed Regulation section 1.152-4(a)(3)(ii)(B) would provide that Social Security Disability Insurance ("SSDI") benefits paid to or for the benefit of the child of a disabled parent are treated as support provided by the child. Consistent with the treatment of Social Security old age benefits under Proposed Regulation section 1.152-4(a)(3)(ii)(A), we believe that SSDI benefits paid to or for the child of a disabled parent should be treated as support provided by the parent (if surviving), and should in no event be treated as support provided by the child. A clarifying example would be helpful.
d. Proposed Regulation Section 1.152-4(a)(4), Medical insurance.

We agree with the Service’s longstanding approach to medical insurance, which is reflected in Proposed Regulation section 1.152-4(a)(4). Medical insurance premiums paid by the taxpayer should be treated as support; medical insurance proceeds should not.

Comments were requested on the appropriate treatment of premium tax credits and cost-sharing reductions under the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, 124 Stat. 119) (“ACA”). We recommend that neither be treated as support, and that both be disregarded in determining the amount of an individual’s total support.

Premium tax credits are akin to the subsidies provided to individuals with employer-sponsored health insurance. Indeed, eligibility for affordable employer-sponsored insurance disqualifies a taxpayer from the premium tax credit. An employer’s contribution to health insurance, which may be considerable, is not considered support, and neither is the tax benefit of an employee’s salary reduction arrangement. These subsidies dwarf premium tax credits in both dollar amount and number of affected individuals. Just as employer contributions to health insurance premiums are disregarded, we recommend that advance or net premium tax credit payments not be considered in the support test.

Many government benefit programs provide for recoupment of overpayments. Premium tax credits are not alone in this, although the method of recoupment is unique. For example, SNAP, SSDI, and supplemental security income (“SSI”) are all subject to overpayment recovery. The Service’s current approach to support considers amounts actually received by a taxpayer during a tax year. It does not consider whether those amounts were correct or were adjusted in a later tax year. We agree with this general approach, which looks at support on a cash basis for each tax year. It would be overly burdensome for the Service and for taxpayers to adopt an approach that required looking forward to a later tax year to account for underpayments or overpayments.

33 I.R.C. § 36B(c)(2).
35 See 7 C.F.R. § 273.18 (SNAP); 20 C.F.R. § 404.502 (SSDI); 20 C.F.R. § 416.570 (SSI).
Currently, government programs that reduce individuals’ out-of-pocket medical costs are not considered in determining support. We believe this approach should be maintained and that it is consistent with the language of the Proposed Regulation. It would be helpful if the Preamble to the final Regulation clarified this intent.

Medical cost-reduction programs are similar to health insurance proceeds, in that certain medical payments to providers are made by the program (sometimes through an insurance company intermediary) rather than by the individual. These include the Medicare Savings Programs, the Medicare Part D Low-Income Subsidy (also known as Extra Help), and programs for individuals with specific medical conditions, such as HIV or breast cancer.\textsuperscript{36} There are also private pharmacy discount programs.\textsuperscript{37}

Like these older government programs, cost-sharing subsidies under ACA reduce an individual’s out-of-pocket medical costs. We believe the Service’s current approach to this issue makes sense and should be maintained for all programs that reduce an individual’s out-of-pocket medical costs. Amounts a taxpayer spends for medical expenses are considered in determining support, but government or private discounts are not considered. Taxpayers can reasonably be asked what they spend; however, depending on the program it can be very difficult to figure out what the unsubsidized cost of a procedure or medicine would have been. The current approach is administratively efficient and logical.

e. Proposed Regulation Section 1.152-4(c), \textit{Principal place of abode}.

The Proposed Regulation generally provides helpful clarification of the term “principal place of abode” and when an individual is considered to reside with a taxpayer. The circumstances discussed here are also relevant to the definition of “custodial parent.” This definition is currently located in Regulation section 1.152-4(d)(3), which is redesignated in the Proposed Regulation as section 1.152-5(d)(3), but otherwise unchanged. Like Proposed Regulation section 1.152-4(c), redesignated Proposed Regulation section 1.152-5(d)(3) contains guidance regarding when a child resides with a parent, treatment of temporary absences, and parents who work at night. However, Proposed Regulation section 1.152-4(c) now contains more detail and guidance that is absent from redesignated Proposed Regulation section 1.152-5(d)(3). One example is the guidance on temporary absences at Proposed Regulation section 1.152-4(c)(2). To avoid confusion and to simplify the regulations, we recommend that, when finalized,

\footnotesize


f. Proposed Regulation Section 1.152-4(c)(1), In general.

The Proposed Regulation provides that a person’s principal place of abode need not be the same physical location throughout the taxable year and may be temporary lodging. We support the rule that the same principal place of abode need not be the same physical location throughout the tax year, and the acknowledgment that temporary lodging may include, in particular, homeless shelters and relief housing resulting from displacement caused by a natural disaster. These changes reflect the reality that taxpayers may be transient and face periods of temporary housing, and they will be helpful to taxpayers going through the Service’s examination process.

If the final Regulation provides examples of temporary lodging, we recommend that they also include domestic violence shelters. Inclusion of this example would support the Service’s longstanding commitment to addressing issues of domestic violence as they impact tax administration, and would be helpful to taxpayers who encounter this issue.

g. Proposed Regulation Section 1.152-4(c)(2), Temporary absence.

The Proposed Regulation provides that the taxpayer and an individual have the same principal place of abode despite a temporary absence by either person because of special circumstances, and that an absence is temporary if the person would have resided at the place of abode but for the absence and, under the facts and circumstances, it is reasonable to assume that the person will return to reside at the place of abode. We agree that the reasonableness test is appropriate for most temporary absences. It would be helpful to provide examples involving conflicting claims on the principal place of abode, applying the temporary absence exception.

We support inclusion of the example of the infant who must remain in the hospital for a prolonged period after birth, which is in the current Regulations. It would be helpful if the final Regulation includes examples for other situations, such as:

i. College students

Our experience representing low-income and transient taxpayers raises some concerns regarding the application of the reasonableness test to college students. It is difficult to know whether a college student will live at home after graduation. The application of the reasonableness test to determine whether an individual will return to reside at the abode is fact-intensive and occurs often. It would be helpful if the final Regulation applies a “change in residence” test for college students. A student’s driver’s license or voter registration may be among the factors considered. If the college student continues to be supported by the taxpayer, still uses the taxpayer’s address as the student’s home address, and has not legally changed permanent residence since
commencing college, then it is reasonable to assume that the student will return to reside at that place of abode.

ii. Institutionalized adults and children

We also recommend clarifying the language in the final Regulation regarding taxpayers who, due to serious illness or disability, are absent from their principal place of abode. In *Hein v. Commissioner*, the Tax Court held that the taxpayer’s sister was temporarily absent from her former principal place of abode with the taxpayer because she would return to live with him if she were ever released from institutionalization. This was so even though it was unlikely she would ever be well enough to be released.

The Proposed Regulation specifically addresses institutional care for a totally and permanently disabled child as a temporary absence, but does not address such institutionalized care for an adult dependent. For the case of dependents in institutionalized care, the proposed language “reasonable to assume the person will return to reside at the place of abode” seems to contradict the conclusion of *Hein*. Indeed, in a case like *Hein*, it is objectively unreasonable to assume that an individual will return to the prior abode. However, it is certainly reasonable to assume that, were the disability cured, the individual would return to that abode.

We recommend that the final Regulation follow *Hein*, and specifically address when institutionalized adult dependents are considered temporarily absent from their principal place of abode. To the extent that the Proposed Regulation is intended to overrule the analysis in *Hein* that an institutionalized individual may be considered temporarily absent from their principal place of abode even when actual return is unlikely, we recommend that this be explicitly stated.

iii. Incarcerated taxpayers

Finally, we recommend that the final Regulation clarify how the temporary absence rule applies to incarceration. In *Rowe v. Commissioner*, the Tax Court held that incarceration after arrest but before conviction is a temporary absence.39

h. Proposed Regulation Section 1.152-4(c)(3), *Residing with taxpayer for more than one-half of the taxable year.*

Proposed Regulation section 1.152-4(c)(3) provides that an individual has the same principal place of abode as the taxpayer for more than one-half of the taxable year if

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38 *Hein v. Commissioner*, 28 T.C. 826 (1957)

39 *Rowe v. Commissioner*, 128 T.C. 13 (2007). See also *Binns v. Commissioner*, T.C. Summ. Op. 2016-90 (holding that post-conviction incarceration was a temporary absence, where the taxpayer expected to return to the household during the taxable year, and supported the household with pre-incarceration earned income).
the individual resides with the taxpayer for at least 183 nights during the taxpayer’s taxable year. It is conceivable that a child could live with one parent for 183 nights or more, and also spend 183 days or more with another parent who regularly worked the night shift. It would be helpful if the final Regulation clarifies how this scenario would be resolved. We recommend language or an example referring to the tiebreaker rules under section 152(c)(4).

We recommend that the heading of Proposed Regulation section 1.152-4(c)(3)(ii)(C) be changed from “Exception for a parent who works at night” to “Exception for a taxpayer who works at night.” The Proposed Regulation also applies to taxpayers who are not parents.

8. Proposed Regulation Section 1.152-5, Special rule for a child of divorced or separated parents or parents who live apart

Current Regulation section 1.152-4(e)(2) requires that a noncustodial parent (“NCP”) claiming a child as a dependent “must attach a copy of the written declaration to the parent’s return for each taxable year in which the child is claimed as a dependent.” The current regulation is silent on the question of whether the declaration must be filed with an original return, or may be filed with an amended return or at another time. Also, the current regulation does not mention when the written declaration may be submitted as substantiation of a dependency exemption claim.

The Section has comments and suggestions on two aspects of this regulation: the timing of when the NCP may provide the written declaration; and the requirements imposed on both parents when the CP claims a dependency exemption but also signs Form 8332 releasing the exemption to the NCP.

a. Timing

Proposed Regulation section 1.152-5(e)(2)(i) states:

A noncustodial parent must attach a copy of the written declaration to the parent's original or amended return for each taxable year for which the noncustodial parent claims an exemption for the child. A noncustodial parent may submit a copy of the written declaration to the IRS during an examination to substantiate a claim to a dependency exemption for a child.
We support the provision of the Proposed Regulation permitting the NCP to provide the written declaration to the Service on an original or amended return, or during an examination. We recommend that the final Regulation clarify the phrase “during an examination.” The “during an examination” language, if strictly interpreted, could impose undue and perhaps unintended limitations on taxpayers. We are concerned that limiting the time for submitting a written declaration to when taxpayers are in examination is too narrow in scope. It is not clear from the Proposed Regulation whether a taxpayer would be allowed to submit a written declaration after the Service has issued a Statutory Notice of Deficiency but during Tax Court proceedings challenging the proposed assessment. We recommend that the final Regulation permit the NCP to provide the written declaration at any time that the NCP would be able to file an original or amended return claiming a refund of taxes withheld or paid, including during an examination or while a Tax Court petition for redetermination of deficiency is pending. This would be consistent with section 152(e)(2)(B)’s requirement that the NCP attach the written declaration to the NCP’s return.

Similarly, Proposed Regulation section 1.152-5(e)(3)(iii) deals with revocation of a written declaration signed by the custodial parent (“CP”), and provides that “A parent may submit a copy of a revocation to the Service during an examination to substantiate a claim to a dependency exemption for the child.” We recommend that the final Regulation clarify the phrase “during an examination” for the same reasons described above.

b. Requirements when CP Previously Claimed Exemption to Which NCP is Entitled

Proposed Regulation section 1.152-5(e)(2)(i) also states:

A copy of a written declaration attached to an amended return, or provided during an examination, will not meet the requirement of this paragraph (e) if the custodial parent signed the written declaration after the custodial parent filed a return claiming a dependency exemption for the child for the year at issue, and the custodial parent has not filed an amended return to remove that claim to a dependency exemption for the child.

(Emphasis added.)

The language quoted above conditions the success of the NCP’s claiming a dependent after the due date of the returns, in certain circumstances, upon the CP’s willingness to amend his or her return. As a practical matter, the same CP who is willing to sign Form 8332 (or who is ordered to sign by a state court) may be unwilling to file an amended return as it would require that the CP invest time and financial resources to prepare and file this return. Low-income taxpayers in particular often cannot afford the cost of preparing an amended return. Additionally, the language of the Proposed Regulation suggests that if the CP promises to amend his or her return, but ultimately does not, then the NCP must bear the burden of that broken promise.

In situations where the CP and NCP both claim a dependency exemption, the party who loses may seek to challenge the Treasury Regulations. We believe that
restrictions related to competing claims would have stronger statutory support if reframed and placed in another subsection of the Regulations. Section 152(e)(2)(A) authorizes Treasury to impose restrictions on the form and manner of the CP’s written declaration waiving the right to claim a child as a dependent. We do not believe that section 152(e)(2)(B) or any other section of the Code authorizes Treasury to impose additional restrictions on the use of the CP’s written declaration. While the intent of the new language is to provide greater certainty, a consequence of the language would be to leave the NCP who secured a Form 8332 from the CP with virtually no recourse against the CP for the Service’s denial of his or her claim for dependency exemption(s). While theoretically the NCP could go to state court to seek a contempt order against the CP, crowded court dockets and lack of enforcement of contempt orders in state courts could render the proceedings both prohibitively costly and practically ineffective. An NCP who has secured a signed Form 8332 from the CP should be able to rely on this written declaration.

Section 152(e)(2)(B) requires that the NCP attach the Form 8332 to the NCP’s return, but does not require that the Form 8332 be attached to the NCP’s original timely filed return. Other aspects of the UDOC rules do not require that a tax benefit be requested on the taxpayer’s original return. While section 152(e)(2)(B) could be read to require that the Form 8332 be attached to the return that claims the dependent (a requirement not contained in the Proposed Regulation), it cannot be read to require that the dependent be claimed on the NCP’s original timely filed return. In the absence of such a statutory requirement, we do not believe that the Secretary is authorized to make the NCP’s right to claim the dependent conditional upon the CP filing an amended return.

In our experience, many taxpayers, family law practitioners, and state court judges are unaware that Form 8332 alone determines whether an NCP can claim the dependency exemption. Taking into consideration the language of section 152(e)(2), together with the Service’s need for administrability, we recommend that Treasury amend current Regulation section 1.152-4(e)(1) (re-designated as Proposed Regulation section 1.152-5(e)(1)), to provide that the Form 8332 is ineffective if it is signed after the date the CP files a return claiming the dependency exemption, unless the CP first amends the CP’s return in such manner and form as the Secretary may prescribe. This would place the rule in the appropriate portion of the Regulations, and would focus the rule more appropriately on the CP’s ability to provide an effective written declaration. Assuming that, in many cases, the CP has been forced by the applicable family court to execute the

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40 Compare I.R.C. §§ 24(e), 25A(i)(6), and 32(m). Prior to the enactment of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, Div. Q, 129 Stat. 2242 (the “2015 Act”), a taxpayer could claim the child tax credit under § 24, the American Opportunities Tax Credit under § 25A(i), and the EIC, provided that the required taxpayer identification number was included on the taxpayer’s tax return. Taxpayers were permitted to obtain the required taxpayer identification number retroactively. The 2015 Act added the requirement that the required taxpayer identification number have been issued by the due date for filing the taxpayer’s return. See 2015 Act, §§ 204-206.

41 See, e.g. Cappel v. Commissioner, 112 T.C.M. (CCH) 216, 2016 T.C.M. (RIA) ¶ 2016-150; Armstrong v. Commissioner, 139 T.C. 468 (2012), aff’d, 745 F.3d 890 (8th Cir. 2014).
Form 8332, our recommendation (and appropriate changes to the Form 8332) would be more likely to make the family court aware of the need to order the CP to amend the CP’s return.

We note that it is possible for the assessment statute of limitations to expire for the CP prior to the CP’s amendment of their return. The Proposed Regulations do not address this issue, implying that the Service is accepting the risk that a tax deduction will be taken twice. We believe this is the appropriate approach. Where the NCP is clearly entitled to the dependency exemption, the CP’s improper claim should not be an obstacle to that claim, even if the Treasury potentially loses out in a small number of cases. The equities of this situation strongly favor the NCP. The tax system should not allow a CP to frustrate their obligations under a state court judgment or block the NCP from claiming a deduction to which they are entitled under such a judgment.

To that end, we also suggest creating a streamlined amended return process for the CP. As we described above, the requirement to amend a tax return will be a barrier for many CPs. To facilitate the amendment, we recommend that current Regulation section 1.152-4(e)(1) and Form 8332 be revised to provide that the signing of a Form 8332 and delivery to the NCP constitutes the CP’s amendment of his or her previously filed tax return to remove the claimed dependency deduction, and consent for the Service to assess the tax due. Form 8332 could include a checkbox, jurat, and signature line constituting a simplified amended return. This would enable the NCP to easily obtain the amendment from the CP, including in a family court contempt proceeding.

c. Effective Date

The Preamble states: “[p]ending the issuance of the final regulations, taxpayers may choose to apply these Proposed Regulations in any open taxable years.” However, this option is not incorporated into the text of the Proposed Regulations themselves. The applicable date provisions of the Proposed Regulations restrict their application to years beginning after the date the regulations become final. See, for example, Proposed Regulation section 1.152-5(h)(2). It is unclear how the tiebreaker rules under Proposed Regulation section 1.152-2(g), or the Form 8332 rules under Proposed Regulation section 1.152-5(e), could be applied consistently, if one taxpayer chooses to apply the Proposed Regulation, and a conflicting taxpayer does not. We recommend that the Preamble be edited to be more consistent with the Proposed Regulations themselves.

The examples provided in Proposed Regulation section 1.152-5(e)(2)(ii) refer to a dependent claimed for tax year 2015. To avoid confusion, we recommend that the examples be modified to refer to tax years beginning after the date on which the regulations are published as final Regulations in the Federal Register.