

SUBMITTED VIA EMAIL

Andres Garcia
Internal Revenue Service, Room 6526
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Washington, DC 20224
pra.comments@irs.gov

RE: OMB Control No. 1545-0074: Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to U.S. Income Tax Return Forms for Individual Taxpayers

Dear Andres Garcia:

The language used in the instructions to IRS Form 1040 is unnecessarily gendered, leading to the inevitable misgendering of non-binary and intersexed individuals. This misgendering can burden taxpayers by negatively affecting their mental health; moreover, it is probably illegal, and it violates recent Policy Statement 25-4, signed by Commissioner Werfel on September 13, 2023. In that Policy Statement, Commissioner Werfel directs that “[a]ll IRS official communications and written materials (hardcopy and digital; internal and external) shall incorporate gender-inclusive language,” and “text should not contain unnecessary gendered language...” In this comment, I will focus on the 1040 instructions’ definitions of qualifying child and qualifying relative.¹

The Low Income Taxpayer Clinic at the Justice and Diversity Center of the Bar Association of San Francisco serves low-income individuals in the San Francisco Bay Area. We represent these individuals before the IRS and the US Tax Court, and we provide educational activities to this population. We have seen firsthand the harm caused by the gendered language of Form 1040 and its instructions.

The first part of the definition of qualifying child on page 17 states, “A qualifying child is a child who is your...[s]on, daughter, stepchild, foster child, brother, sister, stepbrother, stepsister, half brother, half sister, or a descendant of any of them (for example, your grandchild, niece, or nephew).” Likewise, the first part of the definition of a qualifying relative on page 19 states, “A qualifying relative is a person who is your...[s]on, daughter, stepchild, foster child, or a descendant of any of them (for example, your grandchild) or ... [b]rother, sister, half brother, half sister, or a son or daughter of any of them (for example, your niece or nephew) or ... [f]ather, mother, or an ancestor or sibling of either of them (for example, your grandmother, grandfather, aunt, or uncle) or ... [s]tepbrother, stepsister, stepfather, stepmother, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law or ... [a]ny other person (other than your spouse) who lived with you all year as a member of your household if your relationship didn't violate local law.”

The language used in the instructions differs from the language used in the authorizing sections of the Internal Revenue Code. Both definitions in the Form 1040 instructions refer to a

¹ As the draft instructions for Form 1040 for 2023 have not yet been released, I will refer to the definitions found for Form 1040 for 2022 on pages 17 and 19.

"son" or "daughter" of the taxpayer. However, in the definition of "qualifying child," IRC §152(c)(2)(A) refers to "a child of the taxpayer or a descendant of such a child," and the definition of "qualifying relative" in IRC §152(d)(2)(A) refers to "[a] child or a descendant of a child." Congress has shown that the Internal Revenue Code can be gender-neutral; there is nothing to prevent the IRS from following the same trend in the Form 1040 instructions.

Another fact that demonstrates that the use of gendered language is an arbitrary choice is that the definitions in the instructions are inconsistent in their use of gendered versus gender-neutral language, as they use terms like "son," "daughter," "brother," "sister," "father," and "mother," but also "stepchild," "foster child," "descendant," "ancestor," "sibling," and "grandchild." This inconsistency demonstrates that the choice between gendered and gender-neutral language is arbitrary and that the IRS could choose to use gender-neutral terms throughout. The IRS has shown that they can use gender-neutral language in the instructions, yet the IRS in other places has made the choice to use gendered language even where the statutory language is gender-neutral.

Why does this matter? The instructions state to enter the relationship of the dependent to the taxpayer on Form 1040 and appear to require that the taxpayer use one of the terms in the instructions. For the parent of a non-binary or intersexed child, neither the term "son" nor "daughter" apply. When a parent must choose one of those terms, they are thus forced to misgender their child. And while a parent is not forbidden from using the statutory term "child," the instructions do not mention that option, and as a result, most parents are *de facto* forbidden from using the term "child." Of the 160.6 million individual income tax returns filed for fiscal year 2022, 85.9 million were filed online by paid preparers, 3.3 million were filed using online free file, and 61.5 million were filed using other online software, for a total of 150.7 million filings requiring online tax preparation software, over 93% of all filings.² Of the 9.9 million paper-filed returns, an unknown but likely significant number were also prepared with the use of tax preparation software. As a tax professional, every tax preparation software I have encountered, both for retail users and for professional preparers, requires that the dependent's relationship to the taxpayer be picked from a pull-down list whose terms exactly match the terms used in the Form 1040 instructions. Thus, the instruction's use of gendered language gets written into the code of all tax preparation software and requires the parents of non-binary and many intersexed children to misgender their children.

While one instance of misgendering might not be devastating, each instance counts as a drop in a downpour of misgenderings that can have serious consequences. According to Dr. Sabra L. Katz-Wise, co-director of the Harvard SOGIE (Sexual Orientation and Gender Identity and Expression) Health Equity Research Collaborative, being repeatedly misgendered is both exhausting and demoralizing, and when it happens daily, it becomes a burden that negatively impacts a person's mental health and their ability to function in the world.³

The number of people affected is in the millions and probably growing. A 2021 study by the Williams Institute at the UCLA School of Law found that 1.2 million adults aged 18 to 60 in the United States identify as non-binary, and of those, 76% are between the ages of 18 and 29,

² 2022 IRS Data Book Tables 3 and 4.

³ Katz, S. L. (2021, July 23). *Misgendering: What it is and why it matters*. Harvard Health. Retrieved October 7, 2023, from

<https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553>

suggesting that growing numbers of younger people identify as such.⁴ Research has shown that roughly 1.7% of the population is born intersex, the equivalent of about 5.6 million U.S. residents.⁵

Finally, the gendered language of the instructions to Form 1040 is likely illegal sex discrimination. IRM §1.20.4.2(1) states, "The Internal Revenue Service prohibits discrimination against taxpayers based on race, color, national origin (including limited English proficiency), sex, religion, disability and age in its programs, activities and services." In *Bostock v. Clayton County, Georgia*, June 15, 2020, 590 U.S. —, 140 S.Ct. 1731, the Supreme Court determined that the term "sex" as used in Title VII of the Civil Rights Act of 1964 includes discrimination based on sexual orientation and gender identity. The Court explained that when an employer fires a person for being homosexual or transgender, the employer fires that person "for traits or actions [the employer] would not have questioned in members of a different sex."⁶ A Department of Justice (DoJ) memo⁷ concludes that the reasoning in *Bostock* also applies to the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Violent Crime Act, and the Violence Against Women Reauthorization Act. This means that the DoJ will consider prohibitions against discrimination based on sex in those acts to also prohibit discrimination based on sexual orientation and gender identity. The same reasoning should apply to the wording of the Form 1040 instructions. By *de facto* forcing different people who each have a dependent who identifies as non-binary to choose different terms to describe them based solely on the dependents' sex traits, the instructions to Form 1040 are forcing discrimination based on gender identity. The same DoJ memo also determined that the *Bostock* holding applies with equal force to discrimination on the grounds of intersex traits.

Policy Statement 25-4 states, "These practices will be integrated when establishing new or revising existing policies, operating procedures, technical documents and other materials." The instructions for Form 1040, the "signature" form of the IRS, are revised annually, and the current request for comments implies an intent to revise where possible. Now is the time to switch to gender-neutral terms in the instructions to Form 1040 as a first step in implementing the Policy Statement's directive to switch to gender-neutral terms in all IRS forms, instructions, and publications.

Please do not hesitate to contact me if you would like to discuss this issue further. You can

⁴ Wilson, B. D.M., & Meyer, I. H. (2021, June). *Nonbinary LGBTQ Adults in the United States*. Williams Institute. Retrieved October 8, 2023, from

<https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>

⁵ Fausto-Sterling, Anne (2000). *Sexing the Body: Gender Politics and the Construction of Sexuality*. New York: Basic Books. ISBN 0-465-07713-7, Associated Press. (2023, July 27).

How many transgender and intersex people live in the U.S.? NBC News. Retrieved October 8, 2023, from

<https://www.nbcnews.com/nbc-out/out-news/many-transgender-intersex-people-live-us-rcna96711>

⁶ 140 S. Ct. at 1737.

⁷ U.S. Dep't of Just., Opinion Letter on the Interpretation of *Bostock v. Clayton County Regarding the Nondiscrimination Provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act* (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download>

[\[https://perma.cc/D6N8-7S4Y\]](https://perma.cc/D6N8-7S4Y).

email tcarter@sfbar.org or call (415) 782-8977. Thank you for this opportunity to comment on this important issue.⁸

Sincerely,

A handwritten signature in black ink that reads "Timothy Roscoe Carter". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Timothy Roscoe Carter
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⁸ I am grateful for the feedback and suggestions about this comment I received from Barbara Heggie, Supervising Attorney of the Low Income Taxpayer Project at 603 Legal Aid, Anna Gooch, ABA Christine A. Brunswick Fellow at the Center for Taxpayer Rights, and Prof. Charles Upchurch, Chair of the Advisory Board of the Women's Gender, and Sexuality Studies Program at Florida State University.