taxnotes federal
Volume 182, Number 13 ■ March 25, 2024

Who Speaks Up About the Tax Regulatory Agenda?

by Emily Shi and Chye-Ching Huang

Reprinted from *Tax Notes Federal*, March 25, 2024, p. 2337

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In this report, Shi and Huang study three comment cycles of the IRS priority guidance plan to determine what types of commentators weigh in on the tax regulatory agenda, and they propose ways to address the apparent imbalance in who provides input.

All errors remain the authors'.

Table of Contents

I. Introduction 2337
A. Method 2338
B. Summary of Findings 2340
II. Goals of the Priority Guidance Plan 2340
III. Priority Guidance Plan: 2018 to 2021 2341
A. 2018-2019 2342
B. 2019-2020 2344
C. 2020-2021 2347
IV. Discussion 2350
A. Findings 2350
B. Limitations and Potential Future Research 2353

I. Introduction

Who weighs in on the federal government's tax regulatory agenda by commenting on the priority guidance plan, and what do they request?

That is a question that has received little attention. Research on who weighs in on tax regulations has focused on comments offered through notice and comment (and pre-notice comments) on specific substantive regulations, and it paints a clear picture of a process dominated by private and industry interests, with relatively slight public interest input. However, administrative law literature more generally highlights that even before substantive regulations are proposed, stakeholders can influence the regulatory agenda as a powerful tool for shaping desired regulatory outcomes.[1]

This report starts to fill the gap in the tax literature by beginning to document who weighs in on the priority guidance plan, which is meant to act as a tax-regulation-making roadmap or "business plan" for Treasury and the IRS. Input on the priority guidance plan, like substantive notice and comment, appears to be dominated by private and industry interests, with scant public interest input. Solutions offered by existing research to address imbalances in substantive tax notice and comment will need to be paired with measures to address imbalances in how the tax regulatory agenda is set in the first place.

[1] *See, e.g.*, John W. Kingdon, *Agendas, Alternatives, and Public Policies* (2011).

A. Method

To begin to answer the question of which participants weigh in on the tax regulatory agenda and what they request, we examined comments submitted in response to the administration's requests for suggestions of items to be included on the Treasury and IRS priority guidance plan for the years 2018-2019, 2019-2020, and 2020-2021. This period captures the three priority guidance plan cycles before the Democratic control of the presidency and both houses of Congress turned attention toward anticipating and then implementing the major reconciliation legislation enacted as the Inflation Reduction Act of 2022.[2] We examined comments submitted during the specified comment periods and published on regulations.gov.[3] Our full dataset is available in Excel at https://www.law.nyu.edu/sites/default/files/2018-2021%20PGP%20Comment%20Dataset.xlsx.

We follow and adapt the approach set out by Shu-Yi Oei and Leigh Osofsky in their study of comments on the proposed substantive regulations implementing section 199A,[4] and classified the commentators on the priority guidance plan into nine mutually exclusive categories[5]:

1. trade groups, such as insurance or manufacturers' associations;
2. industry interests, primarily private companies;[6]
3. professional organizations, such as the American Bar Association or the American Institute of CPAs, which have specialized expertise and are proficient in composing checklist-style comments covering a broad range of issues;[7]
4. law firms, accounting firms, or tax consulting firms, which sometimes submit comments on behalf of clients (with or without naming the clients);
5. government or quasi-governmental organizations,[8] such as the Internal Revenue Service Advisory Committee

[2]These are also priority guidance plan cycles that took place before the Tax Law Center began to comment on the priority guidance plan.

[3]In the years we examined, three comments submitted after the public comment period were published on regulations.gov, and we included them in our analysis: Norton Rose Fulbright US LLP, "Priority Guidance Plan — Section 118" (Aug. 13, 2018); Jeffery M. Kadet, "Notice 2019-30, 2019-2020 Priority Guidance Plan — Sourcing of Cloud Services Income" (Oct. 6, 2019); Groom Law Group, "SECURE Act — Recommended Guidance Priorities and Transition Relief" (May 4, 2020) (submitted by a commentator who also submitted a comment within the submission window).

[4]See also the prior work of Clinton G. Wallace reviewing all comments on all proposed tax regulations over the 2013-2015 period and classifying them into four categories: private interest, public interest, government, and individual: Wallace, "Congressional Control of Tax Rulemaking," 71 *Tax L. Rev.* 179 (2017).

[5]*See* Oei and Osofsky, "Legislation and Comment: The Making of the 199A Regulations," 69 *Emory L.J.* 209 (2019).

[6]Oei and Osofsky appear to use the terms "trade groups," "trade associations," and "trade and industry associations" interchangeably. *See id.* at 225, 234, 235, and Appendix Table 3. We treat trade groups and industry interests as separate categories. "Industry interests" mainly refers to private companies. Commentators who are generally not seen as industry interests are categorized as such if they submitted comments advocating for favorable treatments for their sector. For example, a coalition of higher education institutions, as the originators of income-sharing agreements, was categorized as industry interests when requesting favorable tax treatment for income-sharing agreement originators. *See* the Coalition of Purdue University et al., "Notice 2020-47: Request for Comments Regarding Recommendations for Items That Should Be Included on the 2020-21 Priority Guidance Plan" (July 22, 2020).

[7]Professional organizations in our analysis are primarily large organizations, such as the ABA and AICPA. We also included *EO Tax Journal*, an electronic publication focused on exempt organizations.

[8]We added "quasi-governmental organizations" to the "government" category used by Oei and Osofsky, *supra* note 5. We categorized commentators such as the Vermont Student Assistance Corporation, Pennsylvania Higher Education Assistance Agency, and Native American Finance Officers Association (NAFOA) as quasi-governmental commentators.

(IRSAC)[9] and the Information Reporting Program Advisory Committee (IRPAC);[10]
6. individuals, meaning members of the general public who identify themselves as individual taxpayers;
7. academics;
8. public interest commentators;[11] and
9. unidentifiable commentators.

Oei and Osofsky use two sets of categories for commentators: those that submitted correspondence directly to Treasury and the IRS before the official notice and comment period;[12] and those that submitted comments during the official period.[13] We combined those two sets of categories and adjusted them because priority guidance plan commentators are more diversified and less specialized than the section 199A commentators.[14]

Following Oei and Osofsky, we also classified the comments into four non-overlapping categories according to their main apparent purpose[15]:

1. requests for clarification or guidance;[16]
2. advocacy for taxpayer-favorable treatment;[17]

[9]IRSAC is an "advisory body to the Commissioner of Internal Revenue and provides an organized public forum for discussion of relevant tax administration issues between IRS officials and representatives of the public" and "proposes enhancements to IRS operations, [and] recommends administrative and policy changes to improve taxpayer service, compliance, and tax administration." *See* IRS, "Internal Revenue Service Advisory Council (IRSAC)" (Jan. 26, 2024).

[10]None of the organizations under the "government or quasi-government" category commented in all three cycles. Most of them appeared only once. From 2018 to 2021, IRSAC and IRPAC (now folded into IRSAC) made recommendations in two priority guidance plan rounds. In one round, IRSAC endorsed an industry request, and in another round, IRPAC included a series of recommendations, one of which also reiterated industry requests. *See* Comment from IRSAC (Jan. 23, 2020). During 2019-2020, IRSAC commented on dedicating resources to Tax Cuts and Jobs Act items in general. The comment from IRSAC was submitted outside the regular priority guidance plan submission window, which is discussed later in this report. *See also* IRPAC, "Comment Re: Notice 2018-43 Recommendations for Priority Guidance Plan" (June 22, 2018).

[11]In Oei and Osofsky, public interest commentators were limited to a think tank: the Washington Center for Equitable Growth. *See* Oei and Osofsky, *supra* note 5, at 238. We included organizations seeking to advance the interests of low-income communities such as the National Housing Law Project and the Coalition on Homelessness and Housing in Ohio in the category of public interest commentators. Besides directly categorizing commentators as public interest, Oei and Osofsky marked some commentators as "public interest" in Appendix, Table 4, "Notice-and-Comment Submissions on regulations.gov." These annotations indicated the public interest-oriented contents of comments submitted by commentators not themselves categorized as public interest groups (*e.g.*, an industry interest or academic commentator). We did not include those marks in our tables but discuss similar examples in our analysis in Section II.

[12]There are seven categories of commentators in the "before" set: (1) trade groups; (2) industry interests; (3) professional organizations; (4) law and accounting firms; (5) government; (6) individuals; and (7) public interest. Oei and Osofsky, *supra* note 5, at 234.

[13]There are 10 categories of commentators in the official notice and comment period: (1) individual "community bankers"; (2) trade and industry associations; (3) industry interests; (4) accountants (including CPAs, enrolled agents, firms, and individuals); (5) law firms; (6) professional associations (law and CPA); (7) unidentifiable individuals; (8) academic; (9) withdrawn; and (10) lobbying firms. *Id.* at 242.

[14]First, Oei and Osofsky include a category of "law and accounting firms" for direct pre-notice correspondence and two separate categories of "CPA/accountant/enrolled agent" and "law firms" for comments submitted during the official comment period. We used only the category of "law firms, accounting firms, or tax consulting firms." Second, we expanded the category of "government" to "government or quasi-governmental organizations." Third, we changed the category of "unidentifiable individuals" to "unidentifiable commentators," because anonymous commentators could be individuals or organizations.

[15]The IRS's stated criteria for what appears in the priority guidance plan are whether the recommended guidance resolves significant issues relevant to many taxpayers; whether the guidance may be appropriate for enhanced public involvement through the process described in Notice 2007-17, 2007-12 IRB 748; whether the recommended guidance promotes sound tax administration; whether the recommended guidance can be drafted in a manner that will enable taxpayers to understand and apply the guidance easily; whether the IRS can uniformly enforce the recommended guidance; and whether the recommended guidance reduces controversy or lessens the burden on taxpayers or the IRS. *See* Notice 2008-47, 2008-18 IRB 869.

[16]Oei and Osofsky used synonymous terms, including "request guidance and clarification," "asks for clarification," and "requests clear guidelines." We used "requests for clarification or guidance" in our analysis.

[17]Oei and Osofsky used synonymous terms, including "advocated certain positions," "advocated for positions favorable to their interests," "advocated for favorable tax results," "advocate for a specific position." We used "advocacy for taxpayer-favorable treatment" in our analysis.

3. requests for antiabuse rules or advocacy for closing potential loopholes;[18] and
4. suggestions on procedural or administrative matters.[19]

B. Summary of Findings

We found that the majority of comments on the priority guidance plan came from trade groups, industry interests, professional organizations, and law firms, accounting firms, or tax consulting firms. This is like the patterns found in prior studies of comments on substantive regulations.[20] These commentators often used strategies likely intended to increase their chances of success in influencing the government, including repetition of the same recommendations on the same issues over the years; apparent coordination by participants in an industry to submit a series of comments around the same time on the same issue; and use of multiple channels to communicate with policymakers, including contacts before the formal public comment period in addition to submitting a comment. Comments from trade groups, industry interests, and law firms, accounting firms, or tax consulting firms tended to advocate for taxpayer-favorable treatment and often focused on a narrow set of concerns that are relevant to their or their clients' business.[21]

Professional organizations offered comments that were more technical in nature and spanned a variety of tax issues.[22]

There was a general lack of input from public interest commentators. Fewer than three — sometimes zero — comments came from public interest commentators every year when there were about 50 to 80 comments submitted in total. Public interests that commented included the National Housing Law Project and the Public Justice Center. These participants have broader focus than tax, and their priority guidance plan submissions also requested attention for issues falling outside the tax regulatory process. Comments from public interest commentators tended to advocate for the general interests of low-income taxpayers and vulnerable groups. Government and quasi-governmental commentators and academic commentators occasionally submitted comments that recommended closing loopholes and reducing abuse of tax benefits, such as the abuse of Opportunity Zone funds on programs that do not provide direct and sustained benefit to local community but unintentionally displace or harm existing residents.[23]

This study builds on existing research that has shown that input into specific, substantive tax regulatory projects comes overwhelmingly from interested filers or industry groups that would be directly affected by the regulations.[24] It is perhaps unsurprising that the same types of commentators also dominate input into setting the tax regulatory agenda. Nevertheless, by beginning to describe the extent of this unbalance, this study adds to research focusing on specific tax regulations and provides helpful information and data for further studies in the field.

II. Goals of the Priority Guidance Plan

Each year, Treasury and the IRS publish a priority guidance plan listing their priorities for

[18] Oei and Osofsky included a further categorization of whether a comment addressed "foundational questions," "technical issues," or "anti-abuse rules." *See* Oei and Osofsky, *supra* note 5, at 227. Items listed in priority guidance plan comments are often quite short (sometimes just one sentence), making it difficult to determine whether the underlying substantive guidance requested is more technical or fundamental in nature, so we did not categorize comments by that measure. However, when classifying comments by their purposes, we reported how many comments "requested antiabuse rules" or advocated for closing potential loopholes.

[19] Procedural or administrative matters were not at the center of section 199A regulation making and thus were not a concept that frequently appeared in Oei and Osofsky's analysis. In their Appendix, Table 3, "Pre-Notice Comments," only one comment was relevant to "avoids administrative complexity." We added this category because priority guidance plan comments more frequently discussed procedural or administrative issues.

[20] *See* Wallace, *supra* note 4; and Oei and Osofsky, *supra* note 5. *See also* Wallace, "Centralized Review of Tax Regulations," 70 *Ala. L. Rev.* 455, 457 (2018).

[21] This finding is similar to the conclusion in Oei and Osofsky, *supra* note 5, at 225, 234, and 235.

[22] This finding is also similar to the conclusion in Oei and Osofsky. *See id.*, at 225, 234, and 237.

[23] *See* Dow Constantine, King County Executive, comment letter on 2018-2019 priority guidance plan (June 25, 2018); and Economic Development Council of Seattle and King County comment letter on 2018-2019 priority guidance plan (June 25, 2018).

[24] *See* Wallace, *supra* note 4; Oei and Osofsky, *supra* note 5; and Wallace, "Centralized Review of Tax Regulations," *supra* note 20.

tax guidance. It covers a variety of types of guidance projects, including regulations, revenue rulings, revenue procedures, and notices. According to Treasury and the IRS, the priority guidance plan is intended to focus resources on guidance items that are most important to taxpayers and tax administration.[25] These priorities are set for an annual cycle starting in July of one calendar year and going to June of the next. For example, the 2020-2021 priority guidance plan was intended to actively focus on priorities during the period from July 1, 2020, through June 30, 2021.[26] The development and maintenance of the priority guidance plan, however, is a continuous effort throughout the annual guidance cycle. Initial versions of the priority guidance plan are followed by three quarterly updates to the initial list as projects are completed, priorities shift, and circumstances change.[27]

Complex and constantly changing tax laws and the changing economic reality faced by filers mean that taxpayers, practitioners, and other participants in the tax system frequently seek guidance on a broad spectrum of issues.[28] Guidance explaining the administration's position on an issue can help reduce and avoid unnecessary uncertainty, disputes, and litigation for both filers and tax administrators.[29] Guidance projects can also be an opportunity for certain taxpayers to press for an interpretation of the law that affords them more favorable tax treatment,[30] or for the IRS to fill out its interpretation of the law in ways that prevent tax abuse or noncompliance.[31]

Demand for guidance now far outstrips IRS and Treasury capacity to undertake and complete guidance projects.[32] The process of creating and publishing the priority guidance plan is supposed to help gather input for prioritizing among competing demands for guidance[33] and to make transparent Treasury and the IRS's areas of focus. The priority guidance plan is not binding on the IRS and Treasury and is not intended to have legal significance: When taxpayers have pointed to it as a reason to expect a view from the IRS, courts have indicated that the IRS has no duty to accomplish the priority guidance plan items within a given time.[34] Items frequently carry over from one priority guidance plan to the next, and there has been much discussion about reasons for a backlog in guidance projects.[35]

The IRS and Treasury invite comments on items to be included in each year's priority guidance plan, stating that they use comments to help identify and prioritize issues for guidance. The IRS and Treasury typically call for submissions for inclusion in the initial plan for a year to be provided within a specified period. They ask that comments describe the guidance necessary to address issues identified in the comment. Commentators can suggest potential solutions to one or several issues and are encouraged to explain the benefits of any recommendation.

III. Priority Guidance Plan: 2018 to 2021

We analyzed comments on the priority guidance plans for 2018-2019, 2019-2020, and 2020-2021 posted on regulations.gov, and categorized the commentators and comments following the approach based on Oei and Osofsky

[25] *See, e.g.*, Notice 2020-47, 2020-27 IRB 7.

[26] *See id.*

[27] *See* IRS, "Priority Guidance Plan" (Oct. 5, 2023).

[28] John Keenan et al., "IRS Trends in Guidance Issuance," 13 *J. Tax Prac. & Proc.* 11 (2011-2012).

[29] *See, e.g.*, Jonathan Barry Forman and Roberta F. Mann, "Making the Internal Revenue Service Work," 17 *Fla. Tax Rev.* 725, 780, 781 (2015). *See also* Michelle Kwon, "Easing Regulatory Bottlenecks With Collaborative Rulemaking," 69 *Admin. L. Rev.* 585, 590 (2017).

[30] *See, e.g.*, Oei and Osofsky, *supra* note 5, at 215, 220, 231, and 253.

[31] *See, e.g.*, Osofsky, "The Case Against Strategic Tax Law Uncertainty," 64 *Tax L. Rev.* 489, 521 (2011).

[32] *See, e.g.*, Kwon, *supra* note 29, at 588 and 589.

[33] *See, e.g.*, Treasury, "2020-2021 Priority Guidance Plan" (Nov. 17, 2020).

[34] *See, e.g.*, *Himple v. Bank of America NA*, No. CV 14-6668, at n.3 (C.D. Cal. July 2, 2018).

[35] *See* Kwon, *supra* note 29, at 590. *See also* IRS, "Internal Revenue Service Inflation Reduction Act Strategic Operating Plan, FY2023-2031" (Apr. 5, 2023). The strategic operating plan for implementing the $80 billion of funding for the IRS in the IRA notes guidance as an area of focus.

as set out in the introduction. Below we discuss results first by year, and then across the three years in Section IV.

A. 2018-2019

Forty-nine comments for the 2018-2019 priority guidance plan, for which the comment period ran from April 27 to June 15, 2018,[36] were posted on regulations.gov. Table 1 classifies them by type of commentator, and Table 2 by type of comment.

Table 1. Year 2018-2019 — By Type of Commentator

Type of Commentator	Number of Comments	Percentage of All Comments
Trade group	15	31%
Law firm, accounting firm, or tax consulting firm	10	20%
Industry interests	6	12%
Professional organization	6	12%
Government and quasi-governmental organization	5	10%
Individual	3	6%
Public interest	2	4%
Academic	1	2%
Unidentifiable	1	2%
Total	49	≈ 100%
Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).		

Table 2. Year 2018-2019 — By Comment Purpose

Purpose of Comments	Number of Comments	Percentage of All Comments
Advocacy for taxpayer-favorable treatment	17	35%
Combination of request for clarification and advocacy for taxpayer-favorable treatment	14	29%
Request for antiabuse rules/advocacy for closing potential loopholes	5	10%
Request for clarification/guidance	4	8%
Combination of request for clarification/guidance and procedural or administrative suggestions	4	8%
Procedural or administrative suggestions	3	6%
Combination of advocacy for taxpayer-favorable treatment and procedural or administrative suggestions	1	2%
Combination of request for clarification, advocacy for taxpayer-favorable treatment, and procedural or administrative suggestions	1	2%
Total	49	≈ 100%
Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).		

As Table 1 shows, by type of commentator, 37 of these comments (76 percent of all comments) came from trade groups, industry interests,

[36] *See* Notice 2018-43, 2018-20 IRB 590.

professional organizations, law firms, accounting firms, or tax consulting firms.[37] Five comments (10 percent of all comments) came from government or quasi-governmental commentators. Only two comments (4 percent of all comments) came from public interests. Only one comment (2 percent of all comments) came from an academic.

Table 2 shows the purposes of the comments for year 2018-2019. Thirty-three of the comments (67 percent of all comments) either solely focused on advocacy for taxpayer-favorable treatments or combined that advocacy with other purposes.

Our full data, posted online, also allows for analysis of whether the purposes of comments varied by the type of commentator.

We found the following notable patterns.

1. The comments for 2018-2019 did not primarily focus on one single topic.

The comments for this cycle — unlike for 2019-2020 and 2020-2021 — covered a broad range of issues. Top issues by comment frequency include Notice 2016-36, 2016-25 IRB 1029; section 199A; section 965; section 170(e)(3); section 6055; Opportunity Zones; and employee benefits.

2. Different types of commentators were responsible for different types of comments.

Contrary to the possible assumption that comments on the agenda setting would be mostly neutral requests for clarification, our analysis of our full dataset posted online shows that commentators in the categories of trade groups, industry interests, and law firms, accounting firms, or tax consulting firms submitted 15 (88 percent) of the 17 comments focusing solely on advocacy for taxpayer-favorable treatment directly beneficial to the commentator's interest group, either by maintaining favorable rules or blocking rules that would eliminate their existing benefits.[38] Moreover, the above commentators and professional organizations together submitted 13 (93 percent) of the 14 comments combining requests for clarification or guidance and advocacy for taxpayer-favorable treatments.[39]

The comments from trade groups, industry interests, professional organizations, law firms, accounting firms, and tax consulting firms generally either focused on a narrow set of issues relevant to a specific type of business or industry or encompassed a wide range of technical issues. In this cycle, professional organizations always combined their requests for clarification or guidance with requests for taxpayer-favorable treatment, and normally the bulk of each of these comments focused on requesting clarification or guidance.[40] A notable governmental/quasi-governmental comment from IRPAC requested clarification of several aspects of the Tax Cuts and Jobs Act, and in one case explicitly endorsed industry requests.[41]

3. There was a lack of public interest-oriented comments.

Only five comments (10 percent of all comments) requested antiabuse rules or advocated for closing potential loopholes — and this was the largest number and percentage of comments requesting antiabuse rules or advocating for closing potential loopholes among the three submission cycles we analyzed. These comments concerned the low-income housing tax credit (LIHTC), Opportunity Zones, and the effectively connected income rules. They were submitted by public interest groups (two comments), a local government and its advisory council (two comments), and an academic and a retired tax professional who coauthored a single comment.

The two comments from public interest groups were (1) a comment from the National

[37] Whenever a law firm was the named submitter on a comment, we classified the commentator as "law firm," including in cases in which the comment stated it was being made on behalf of a named or unnamed client.

[38] The other two comments came from NAFOA, a government or quasi-governmental commentator, and an individual. *See* NAFOA, "Re: 2018-2019 Priority Guidance Plan; IRS Notice 2018-43" (July 24, 2018). *See also* individual commentator (name omitted here), comments on 2018-2019 priority guidance plan (June 15, 2018).

[39] Professional organizations submitted two such comments. *See* American College of Trust and Estate Counsel (ACTEC), "Recommendations for 2018-2019 Priority Guidance Plan (Notice 2018-43)" (June 15, 2018); and National Association of Bond Lawyers (NABL), "2018-2019 Priority Guidance Plan" (June 25, 2018). The National Council of State Housing Agencies (NCSHA), a government or quasi-governmental commentator, submitted one such comment. *See* NCSHA, "Recommendations for 2018-2019 Priority Guidance Plan"(June 18, 2018).

[40] *See, e.g.*, ACTEC, *supra* note 39.

[41] IRPAC, "Notice 2018-43 Recommendations for Priority Guidance Plan" (June 22, 2018) ("IRPAC recommends that the IRS revise and finalize the guidance for paying agents under Notice 2017-09 to account for industry comments.").

Housing Law Project requesting regulations or guidance on the Violence Against Women Reauthorization Act of 2013 and the LIHTC program, addressing the provision of housing assistance (such as separate units) to survivors of domestic violence;[42] and (2) a collective comment from the National Housing Law Project, the Coalition on Homelessness and Housing in Ohio, Florida Legal Services, Legal Aid of Western Michigan, the Legal Aid Society of Southwest Ohio, the Michigan Poverty Law Program, the Public Justice Center, and Regional Housing Legal Services on the abuse of the LIHTC in situations in which the LIHTC-funded projects are strategically acquired after the credits were allocated to avoid the LIHTC use restrictions.[43] Again, these organizations are not tax-focused, and their comments also traversed issues outside of tax.

The Executive Office of King County, Washington, and its advisory council submitted comments requesting guidance to close the loopholes in the Opportunity Zone rules, citing the abuse of Opportunity Zone benefits.[44] The comment from an academic and a retired tax professional (affiliate instructor, not full-time academic) focused on how to strengthen IRS enforcement capabilities and reduce the potential for tax avoidance.[45]

4. Suggestions on procedural or administrative matters were common.

Nine comments (18 percent of all comments) provided suggestions or requested policy changes on procedural or administrative matters. Of those, three comments (33 percent) solely focused on procedural or administrative matters. For example, one comment from the American Payroll Association focused on the electronic capabilities for certain forms.[46]

Six comments (67 percent) combined other requests or advocacy with the suggestions on procedural or administrative matters. For example, one comment from an industry interest commentator focused on the issuance and consistency of instructions from Treasury and the IRS.[47] More specifically, it focused on the different levels of legal force of formal guidance and informal guidance such as the instructions attached to a tax form.[48] The comment also emphasized[49] the importance of public comment from taxpayers when Treasury and IRS chief counsel issue legal guidance.

B. 2019-2020

Treasury and the IRS called for submissions for the 2019-2020 priority guidance plan on April 24, 2019, with a deadline of June 7, 2019.[50] Seventy-nine comments were reflected on regulations.gov,[51] and of those, 26 comments (33 percent) were on the single issue of taxes on employer-provided parking under section 274(a)(4) and TCJA section 512(a)(7) (commuting comments). For this period, we examined those 26 commuting comments separately from comments on other issues.

Table 3 shows the commuting comments by type of commentator. It is unclear to what extent these commuting comments affect the formal priority guidance plan. The commuting issue was already on the previous year's (2018-2019) priority guidance plan, and no comments focusing on the relevant code sections were submitted. The commuting issue remained on the priority guidance plan for the following two cycles (2019-2020 and 2020-2021). However, the

42. *See* National Housing Law Project, "Internal Revenue Service Notice 2018-43, Recommendations for 2018-2019 Priority Guidance Plan" (June 18, 2018).

43. *See* National Housing Law Project et al., "Comments Regarding Internal Revenue Service Notice 2018-0043, Recommendations for 2018-2019 Priority Guidance Plan" (June 18, 2018).

44. *See* Constantine, *supra* note 23.

45. *See* Kadet and David L. Koontz, "Re: Notice 2018-43, 2018-2019 Priority Guidance Plan" (June 15, 2018).

46. *See* American Payroll Association, "Re: Public Comments Invited on Recommendations for 2018-2019 Priority Guidance Plan, Notice 2018-43" (June 18, 2018).

47. *See* Vizient Inc., "Re: Priority Guidance Plan; Public Comment Invited on Recommendations for 2018-2019" (June 15, 2018).

48. *See id.* The comment discussed the informal guidance issued by Treasury and the IRS and its impacts on taxpayers.

49. *Id.*

50. Notice 2019-30, 2019-20 IRB 1180.

51. Eighty comments are listed on regulations.gov, but one was a repeat submission.

issue was not included in the 2021-2022 and 2022-2023 priority guidance plans. Table 4 classifies the non-commuting comments by type of commentator, and Table 5 classifies them by type of comment.

Table 3. Year 2019-2020 (Commuting Comments) — By Type of Commentator

Type of Commentator	Number of Comments	Percentage of All Commuting Comments
Individual	16	62%
Trade group	5	19%
Government or quasi-governmental organization	3	12%
Unidentifiable	2	8%
Total	26	≈ 100%

Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).

Table 4. Year 2019-2020 (Non-Commuting Comments) — By Type of Commentator

Type of Commentator	Number of Comments	Percentage of All Non-Commuting Comments
Trade group	16	30%
Law firm, accounting firm, or tax consulting firm	10	19%
Professional organization	8	15%
Industry interests	5	9%
Unidentifiable	5	9%
Government/quasi-governmental organization	4	8%
Academic	3	6%
Individual	2	4%
Total	53	≈ 100%

Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).

Table 5. Year 2019-2020 (Non-Commuting Comments) — By Comment Purpose

Purpose of Comments	Number of Comments	Percentage of All Non-Commuting Comments
Advocacy for taxpayer-favorable treatment	15	28%
Combination of request for clarification and advocacy for taxpayer-favorable treatment	15	28%
Request for clarification/guidance	12	23%
Procedural or administrative suggestions	5	9%
Combination of request for clarification/guidance and procedural or administrative suggestions	2	4%
Request for antiabuse rules/advocacy for closing potential loopholes	1	2%
Combination of request for antiabuse rules/advocacy for closing potential loopholes and request for clarification/guidance	1	2%
Combination of advocacy for taxpayer-favorable treatment and procedural or administrative suggestions	1	2%
Combination of request for clarification, advocacy for taxpayer-favorable treatment, and procedural or administrative suggestions	1	2%
Total	53	≈ 100%

Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).

As Table 3 shows, the commuting comments came mostly from members of the general public (62 percent). Also, 19 percent (five) came from trade groups,[52] and 12 percent (three) came from government or quasi-governmental commentators. These comments addressed when and how to impose taxes on employer-provided parking under Notice 2018-99, 2018-52 IRB 1067, which resulted from TCJA section 13304.

As Table 4 shows, by type of commentator, 39 (74 percent) of those 53 non-commuting comments came from trade groups, industry interests, professional organizations, law firms, accounting firms, and tax consulting firms. A trade group submitted two comments during this submission cycle on different sets of issues.[53] The remainder of the comments were submitted by unidentifiable commentators (9 percent), government or quasi-governmental commentators (8 percent), academics (6 percent), and individuals (4 percent). None came from public interest commentators.

Table 5 shows the purposes of the non-commuting comments in year 2019-2020 by percentage. Thirty-two of the comments (60 percent of all comments) either solely focused on advocacy for taxpayer-favorable treatments or combined that advocacy with other purposes.

We found the following notable patterns.

1. The 56 non-commuting comments covered a broad range of issues.

Those issues included section 199A, the LIHTC, section 163(j), and the charitable contribution of inventory under section 170(e)(3). Some of the comments asked for Treasury to follow through on past commitments (items on the priority guidance plan from prior years), and some comments requested to add new items to the list.

2. As in the previous submission cycle, different types of commentators made different types of comments.

Our analysis shows that trade groups, industry interests, and law firms, accounting firms, or tax consulting firms submitted 14 (93 percent) of the 15 comments solely advocating for taxpayer-favorable treatments.[54] Further, the above commentators and professional organizations together also submitted 12 (80 percent) of the 15 comments combining requests for clarification or guidance and advocacy for taxpayer-favorable treatments,[55] and 62 percent of the 12 comments solely requested clarification or guidance.

As in year 2018-2019, professional organizations submitted combined purpose requests but not pure advocacy requests. In the government/quasi-governmental category, a brief two-page comment from IRSAC explicitly reinforced industry requests, stating, "The IRSAC recommends the IRS continue to dedicate the resources necessary for areas of guidance needed that are identified by industry."[56] The comment from IRSAC was submitted and published on regulations.gov in January 2020, after the priority guidance plan submission window of April to June 2019.

3. Like in 2018-2019, public interest-oriented comments were rare.

Two comments submitted during this priority guidance plan comment cycle requested antiabuse rules or advocated for closing potential loopholes. The same academic and retired tax professional coauthors who submitted a comment in the 2018-2019 cycle requesting to close the loopholes related to the ECI rules submitted a

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[52] Oram Foundation is categorized as a trade group here. *See* Oram Foundation, "Comments to IRS re 2019-20 Priority Guidance Plan" (June 10, 2019).

[53] *See* Investment Company Institute, "Comment Re: Priority Guidance Plan Recommendations on Retirement Security Issues" (June 10, 2019); Investment Company Institute, "Comment Re: Guidance Priority List Recommendations" (June 10, 2019).

[54] The remaining one comment was submitted by an unidentifiable commentator. *See* "Public Comment on 2019-2020 Priority Guidance Plan" (May 14, 2019).

[55] The remaining three comments came from government or quasi-governmental commentators. *See* Vermont Student Assistance Corp., "Recommendations for 2019-2020 Priority Guidance Plan, Notice 2019-30" (June 10, 2019); Pennsylvania Higher Education Assistance Agency, "Recommendations for 2019-2020 Priority Guidance Plan, Notice 2019-30" (June 10, 2019); and NCSHA, *supra* note 39.

[56] Comment from IRSAC (Jan. 23, 2020).

similar comment advocating closing potential loopholes in that field.[57] The other comment from the same academic commentator analyzed different approaches to improving the source rules for cloud services income generated by multinational corporations.[58]

4. Suggestions on procedural or administrative matters were common.

Nine comments (17 percent of all comments) provided suggestions or requested policy changes on procedural or administrative matters. Among these, five comments (56 percent) solely focused on procedural or administrative matters. For example, one comment from a tax accounting and consulting firm, in addition to commenting on other tax procedural or administrative issues, requested modifications to Rev. Rul. 2010-4, 2010-4 IRB 309, concerning how much specific and tailored information tax return preparers can deliver to their clients, and an easier format for taxpayers to provide informed consent as required by section 7216.[59] Four comments (44 percent) combined other requests or advocacy with the suggestions on procedural or administrative matters. For example, one comment from a trade group, while advocating for changes to substantive code sections to favor taxpayers, requested to "eliminate unnecessary filings of Form 8971" ("Information Regarding Beneficiaries Acquiring Property From a Decedent").[60]

C. 2020-2021

The comment period for the 2020-2021 priority guidance plan was open from June 10 through July 22, 2020.[61] There were 59 comments in total posted on regulations.gov. Of those, 23 comments (39 percent) focused on the safe harbor in Notice 2016-36 addressing electricity generation and provision to public utility facilities. We examine those 23 Notice 2016-36 safe harbor comments separately from comments on other issues. Two years after these comments were submitted, the issue of safe harbor under Notice 2016-36 was included in the 2022-2023 priority guidance plan, but it is difficult to conclusively attribute this to the comments.

As Table 6 shows, 18 of the Notice 2016-36 safe harbor comments (accounting for 78 percent of the 23 comments) came from solar energy companies (industry interests), more than half of which are in Massachusetts and California. Several of the comments shared a template, making the same arguments and using similar language. Except for two earlier comments from a law firm and a solar energy company, all the comments, including those apparently using a template, were submitted on July 21 and 22, 2020, the last two days of the submission cycle. These comments focused on Notice 2016-36, which provides a safe harbor for contributions of properties by electricity generation and storage facilities to public utility facilities. A general reading of the notice may exclude the solar energy electricity generators because of their transmission method and type of facilities. The solar energy industry submitted the comments requesting clarification.

As Table 7 shows, 78 percent (28 comments) of the non-Notice 2016-36 safe harbor comments came from industry interests, trade groups, professional organizations, and law firms or accounting firms. Six comments (17 percent) came from individuals in the general public. One comment came from a government or quasi-governmental organization. One comment came from an academic commentator. There were no public interest commentators in this cycle.

As Table 8 shows, 36 percent (13) of the comments solely advocated for taxpayer-favorable treatments. Sixty-nine percent (25) of the comments either solely focused on advocacy for taxpayer-favorable treatments or combined that advocacy with other purposes.

[57] *See* Kadet and Koontz, "Comment Re: Notice 2019-30, 2019-2020 Priority Guidance Plan"(June 5, 2019). *See also* Kadet and Koontz, *supra* note 45.

[58] *See* Kadet, *supra* note 2. This comment both requested further clarification from Treasury and the IRS and provided ideas for closing the revenue gap and potential loopholes.

[59] *See* Capitol Tax Partners, "Comment Re: Guidance Plan Recommendation — IRS Notice - 2019-30" (Sept. 5, 2019).

[60] *See* American Bankers Association, "Comment Re: Notice 2019-30; Recommendations for 2019-2020 Priority Guidance Plan" (June 10, 2019).

[61] Notice 2020-47, 2020-27 IRB 7.

Table 6. Year 2020-2021 (Notice 2016-36 Safe Harbor Comments) — By Type of Commentator

Type of Commentator	Number of Comments	Percentage of Notice 2016-36 Comments	Percentage of All Comments (errors excluded)
Industry interests	18	78%	31%
Trade group	2	9%	3%
Law firm	1	4%	2%
Individual	1	4%	2%
Unidentifiable	1	4%	2%
Total	23	≈ 100%	≈ 39%
Note: The total number does not include three submissions in error (e.g., blank comments or duplicate submissions).			

Table 7. Year 2020-2021 (Non-Notice 2016-36 Safe Harbor Comments) — By Type of Commentator

Type of Commentator	Number of Comments	Percentage of All Comments
Trade group	14	39%
Law firm, accounting firm, or tax consulting firm	7	19%
Individual	6	17%
Professional organization	4	11%
Industry interests	3	8%
Government/quasi-governmental organization	1	3%
Academic	1	3%
Total	36	≈100%
Note: The total number does not include three submissions in error (e.g., blank comments or duplicate submissions).		

Table 8. Year 2020-2021 (Non-Notice 2016-36 Safe Harbor Comments) — By Comment Purpose

Purpose of Comments	Number of Comments	Percentage of All Non-Notice 2016-36 Safe Harbor Comments
Advocacy for taxpayer-favorable treatment	13	36%

Table 8. Year 2020-2021 (Non-Notice 2016-36 Safe Harbor Comments) — By Comment Purpose *(Continued)*

Purpose of Comments	Number of Comments	Percentage of All Non-Notice 2016-36 Safe Harbor Comments
Combination of request for clarification/ guidance and advocacy for taxpayer-favorable treatment	9	25%
Request for clarification/ guidance	4	11%
Procedural or administrative suggestions	3	8%
Combination of request for clarification/ guidance and procedural or administrative suggestions	3	8%
Combination of request for clarification, advocacy for taxpayer-favorable treatment, and procedural or administrative suggestions	2	6%

Table 8. Year 2020-2021 (Non-Notice 2016-36 Safe Harbor Comments) — By Comment Purpose *(Continued)*

Purpose of Comments	Number of Comments	Percentage of All Non-Notice 2016-36 Safe Harbor Comments
Combination of advocacy for taxpayer-favorable treatment and procedural or administrative suggestions	1	3%
Request for antiabuse rules/ advocacy for closing potential loopholes	1	3%
Total	36	≈ 100%

Note: The total number does not include submissions in error (e.g., blank comments or duplicate submissions).

We found the following notable patterns.

1. Like the two previous submission cycles, the comments cover a broad range of topics.

Besides the Notice 2016-36 safe harbor, the most frequently raised comment topics were required minimum distribution rules under section 401 and impacts of Notice 2020-23, 2020-18 IRB 742, charitable contributions under section 170, the Setting Every Community Up for Retirement Enhancement (SECURE) Act, and the research tax credit.

2. Again, different types of commentators were responsible for different types of comments.

Trade groups, industry interests, and law firms, accounting firms and tax consulting firms submitted eight (62 percent) of the 13 comments that solely advocated for taxpayer-favorable treatments. Further, those commentators and professional organizations together submitted eight (89 percent) of the nine comments combining requests for clarification or guidance with advocacy for taxpayer-favorable treatments.[62] Unlike the previous two submission cycles, in which professional organizations did not submit comments solely advocating for taxpayer-favorable treatments, a professional organization did in year 2020-2021.[63]

3. Public interest-oriented comments were scarce.

Only one comment requested antiabuse rules or advocated for closing potential loopholes in international taxation, including the ECI rules, and it was submitted by the same academic commentator (affiliate instructor, not full-time academic) from year 2018-2019 and year 2019-2020 on similar issues.[64]

4. Suggestions on procedural or administrative matters were common.

Nine comments (25 percent of the comments) provided suggestions or requested policy changes on procedural or administrative matters. Of these, three comments (33 percent) solely focused on procedural or administrative matters. For example, one comment came from a trade group focused on the potential duplication and burden of forms 1099-MISC and 1099-NEC.[65] Six comments (67 percent) combined additional requests or advocacy with the suggestions on procedural or administrative matters. For example, one comment from a foreign trade group, while advocating for taxpayer-favorable treatments and requesting clarification and guidance, argued for allowing e-signatures for Form W-9.[66]

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[62] The one comment that did not come from the categories listed above was submitted by an individual commentator. *See* Monte A. Jackel, "Top Suggestions for Partnership Guidance," *Tax Notes Federal*, Sept. 9, 2019, p. 1755.

[63] *See* NABL, "Re: 2020-2021 Priority Guidance Plan" (July 22, 2020).

[64] *See* Kadet, "Re: Notice 2020-47, 2020-2021 Priority Guidance Plan" (July 20, 2020).

[65] *See* Direct Selling Association, "Re: IRS 2020-2021 Priority Guidance Plan (IRS 2020-0015)" (July 20, 2020).

[66] *See* Investment Industry Association of Canada, "Re: Request for Comments Regarding Recommendations for Items That Should Be Included on the 2020-2021 Priority Guidance Plan (Notice 2020-47)" (July 22, 2020).

IV. Discussion

A. Findings

Over the three priority guidance plan cycles we examined, we considered 187 comments in total, including commuting comments and Notice 2016-36 safe harbor comments.

First, by type of commentator, we saw that the bulk of comments were made by trade groups, law firms, accounting firms, tax consulting firms, professional organizations, and industry interests. Few came from public interest, government, or academics. This is similar to the findings in the prior academic research on substantive regulations. Individuals made a greater share of comments on the priority guidance plan over three years than on the substantive regulations that others have analyzed, but engagement by individuals fluctuated greatly and seemed to be driven by particular issues, as discussed below.

Trade groups, law firms, accounting firms, tax consulting firms, professional organizations, and industry interests submitted the most comments among all participants. Excluding the commuting comments and Notice 2016-36 safe harbor comments that were both submitted by a group of commentators (for Notice 2016-36 comments, using similar or the same templates) focusing on a single issue within the same comment cycle, there were 138 comments in total over the three comment cycles.

Figure 1 shows that 75 percent (104) of those comments came from trade groups, law firms, accounting firms, tax consulting firms, professional organizations, and industry interests. Professional organizations submitted 17 percent (18) of these comments. Professional organizations did not submit any comments concerning the commuting issue or Notice 2016-36 safe harbor. We also found that several commentators on the priority guidance plan also commented on the section 199A regulation-making process studied by Oei and Osofsky,[67] including professional organizations such as the ABA and AICPA, and certain law firms and accounting firms. None of the organizations in the government or quasi-governmental category commented in all three priority guidance plan cycles, and most commented only once. For instance, IRSAC and IRPAC were notable governmental/quasi-governmental commentators that did not comment on the substantive section 199A regulations, and each commented once over the three priority guidance plan cycles that we examined.

Figure 2 shows the composition of the 187 total comments when including the 26 commuting comments and the 23 Notice 2016-36 safe harbor comments. Comments on those two issues increase the share of individual commentators across the three priority guidance plan cycles from 8 percent to 17 percent.

Second, over the three priority guidance plan cycles we examined, 65 percent (90) of comments sought taxpayer-favorable treatment, either as the sole request or together with a request for clarification, guidance, or suggestions on procedural or administrative matters.[68] Requests for guidance alone made up 14 percent (20) of the comments, while only 6 percent (eight) of the comments requested antiabuse rules or advocated for closing potential loopholes.[69] Moreover, 20 percent (27) of the comments either solely provided suggestions on procedural or administrative matters or combined those suggestions with other requests or advocacy.[70]

Third, our full dataset posted online shows some relationships between the type of commentator and the form, focus, and type of request made in their comments.

Looking at the breadth of issues that different types of commentators focused on, almost all commentators except for professional organizations made comments classified as focusing on either (1) one code section, Treasury regulation, IRS notice, private letter ruling, tax form, or other substantive or procedural rule; or (2) one or two sets of issues that are generally related to each other (normally focusing more on substantive rules). Our full dataset online shows

[67] *See* Oei and Osofsky, *supra* note 5, at Appendix.

[68] These results excluded the commuting comments in year 2019-2020 and the Notice 2016-36 safe harbor comments in year 2020-2021.

[69] *Id.*

[70] *Id.*

Figure 1. Composition of PGP Comments From 2018-2021 — By Type of Commenters (excluding commuting comments and Notice 2016-36 safe harbor comments)

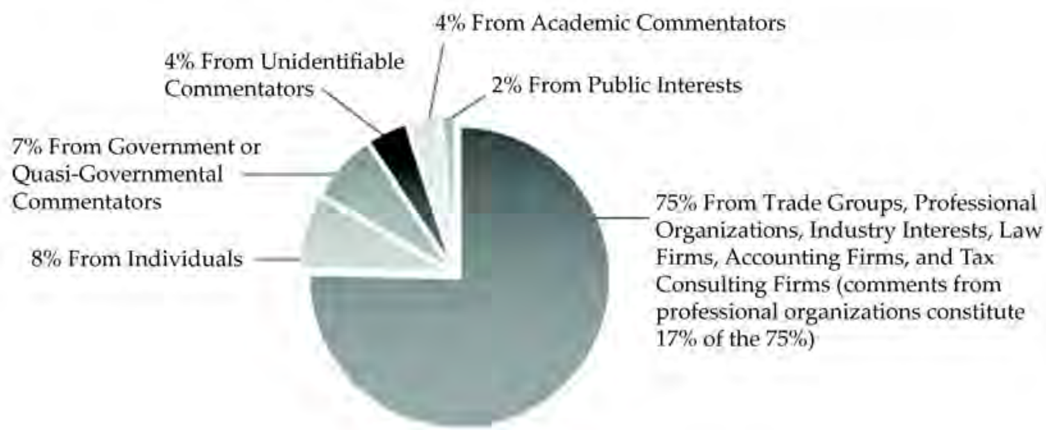
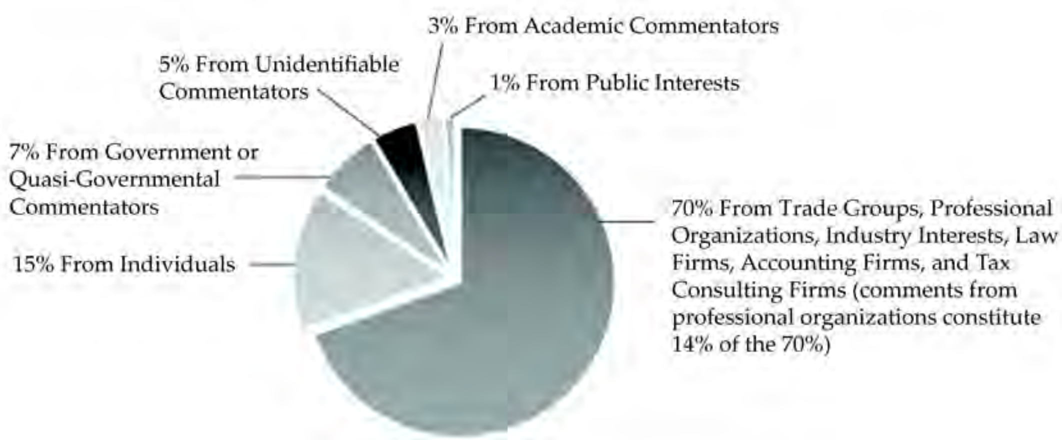


Figure 2. Composition of PGP Comments From 2018-2021 — By Type of Commenters (including commuting comments and Notice 2016-36 safe harbor comments)



that commentators either advocating for taxpayer-favorable comments or closing loopholes mainly focused on the issues that are relevant to them or the issues they are particularly interested in. Professional organizations submitted comments classified as covering a long list of items and a broad range of issues. Trade groups also submitted several comments of that type.

Comments from trade groups, law firms, accounting firms, tax consulting firms, professional organizations, and industry interests were typically formal letters submitted as attachments that clearly detailed taxpayer concerns. Some of these commentators submitted comments in every priority guidance plan cycle — sometimes on the same issues — related to preexisting projects, citing their previously submitted comments or letters submitted outside the formal public comment period. (Priority guidance plans frequently carry over regulatory projects from prior years.)

Among these commentators, trade groups, law firms, accounting firms, tax consulting firms, and industry interests frequently submitted comments proposing a favorable solution and justifying their preferred resolution as being efficient and fair. For example, for the 2019-2020 priority guidance plan, two trade groups, one industry interest commentator, and a law firm submitted comments on potential guidance projects related to section 170(e)(3), concerning when donations of inventory items should qualify for the charitable deduction.[71] Three of them explicitly advocated for a treatment that allows a larger deduction and uses the cost of goods sold to determine basis.[72] No other parties, such as nonprofits who may receive the items, scholars, or tax professional organizations submitted comments on this issue.

Professional organizations occasionally included a few items advocating for taxpayer-favorable treatments in their long lists of requests, but submitted comments that are mainly technical and focused on requesting clarifications or guidance or providing suggestions on procedural or administrative matters. These comments weighed in most comprehensively on the IRS's full regulatory agenda.[73]

Comments from the general public (individuals) were less sophisticated than the comments from the types of commentators above. Individual comments were less formal, were generally written directly into a comment box on regulations.gov, and varied in length from a few sentences to a few paragraphs. The comments spanned a wide range of topics — from a call to simplify the entire taxation system so that an individual's income is easier to determine,[74] to a request to put the Social Security calculator back on the IRS website.[75]

The number and share of individual comments fluctuated across the years: While there were only three individual comments (6 percent) in year 2018-2019, 16 individual comments accounted for 62 percent of Notice 2018-99 commuting comments in year 2019-2020.

Academics submitted five comments in total over the three priority guidance plan comment cycles we analyzed: one for 2018-2019, three for 2019-2020, and one for 2020-2021. The comments generally offered thorough analysis of technical issues and provided Treasury and the IRS with recommendations for how to address these issues,[76] or asked for guidance focused on strengthening tax compliance and reducing potential loopholes.[77]

Input from other public interests was scarce. Over the three comment cycles, public interest commentators submitted only two comments in year 2018-2019,[78] and those came from organizations that were not focused solely on tax and used the comments to raise nontax issues. No comment came from public interests in years 2019-2020 and 2020-2021.

Fourth, we saw variation over the three priority guidance plan cycles we examined. In each year, there were comments spanning a wide range of issues. But in two of the years, specific issues (commuting and Notice 2016-36 safe harbor comments) were a substantial share of all comments and drove changes in the composition of commentators, as noted above.

Fifth, we also observed inputs outside the announced comment period. We found letters and proposals submitted to Treasury and the IRS

[71] *See* National Retail Federation, "Comment Re: Inclusion of Section 170(e)(3) Guidance Project on 2019-2020 Priority Guidance Plan" (July 17, 2019); U.S. Chamber of Commerce, "Comment Re: Comments on Notice 2019-30: Priority Guidance Plan" (July 17, 2019); Darden Restaurants Inc., "Comment Re: Inclusion of Section 170(e)(3) Guidance Project on 2019-2020 Priority Guidance Plan" (June 5, 2019); Miller & Chevalier Chtd., "Comment Re: Recommendation for the 2019-2020 Priority Guidance Plan Pursuant to Notice 2019-30" (May 24, 2019).

[72] The comments submitted by the National Retail Federation, Darden Restaurants, and Miller & Chevalier explicitly advocated for taxpayer-favorable treatments.

[73] The debate on whether professional organizations are considered as acting in the public interest, representing client interests, or both, stretches back (at least) to Stanley Surrey's criticism of the tax bar's capacity to engage in tax policy in the public interest. *See* Joseph J. Thorndike and Ajay K. Mehrotra, "Who Speaks for Tax Equity and Tax Fairness? The Emergence of the Organized Tax Bar and the Dilemmas of Professional Responsibility," 81 *Law & Contemp. Probs.* 203 (2018).

[74] *See* individual commentator (name omitted here), "Comment Re: 2019-2020 Priority Guidance Plan" (Apr. 30, 2019).

[75] *See* unidentifiable commentator, "Comment Re: 2019-2020 Priority Guidance Plan" (Apr. 30, 2019).

[76] *See* F. Ladson Boyle, "Comment Re: Notice 2019-30: Priority Guidance List" (May 14, 2019).

[77] *See* Kadet and Koontz, *supra* note 45; Kadet and Koontz, "Re: Notice 2019-30, 2019-2020 Priority Guidance Plan," *supra* note 57; Kadet, *supra* note 58; and Kadet, *supra* note 64.

[78] *See* National Housing Law Project, *supra* notes 42 and 43.

concerning the priority guidance plan before the public comment period.[79] In some circumstances, these commentators would submit another comment during the public comment period, sometimes referencing their prior comment.[80] Research has noted that communication with tax policymakers outside formal public comment periods is common.[81] Oei and Osofsky found that inputs before the public comment period provided more sophisticated opinions and had significant influence on the proposed regulations.[82] Such communication is perhaps less surprising in the context of the priority guidance plan since the IRS's process of updating it is continuous.

Sixth, it is not uncommon to see some agenda items remain on the priority guidance plan list for years, even over a decade. Commentators also submit comments repeatedly on certain items across different submission cycles.

B. Limitations and Potential Future Research

The priority guidance plan is released annually and updated quarterly. It could be a useful tool to prioritize the most critical guidance, including guidance important to filers who do not have substantial resources, and guidance important to broad public interest aims. We found that in the three priority guidance plan cycles we examined, there was a noticeable lack of public interest input. It appears that it is not only substantive tax regulations that lack input from these perspectives but also the process of setting the agenda of what substantive guidance projects are undertaken.

The works on input into substantive tax rulemaking processes catalog some obvious explanations.[83] Individual filers without substantial resources and public interest organizations may lack knowledge of the comment process, its stakes, or how to engage in it effectively. Well-resourced private interests have access to tax professionals who can help them navigate these public comment channels. Major players can also participate in less public ways.

There may be added barriers to engaging with the priority guidance plan for those without a deep understanding of the tax system or resources. The stakes of the priority guidance plan are less clear and direct than a rulemaking on an issue that more explicitly affects a particular stakeholder group. In substantive rulemaking, Treasury and the IRS frequently cite and refer to the original comments that influenced the regulatory details.[84]

Of note, the relatively large share of individual commuting comments in the 2020-2021 cycle appear to have been generated by industry interests giving individuals comment templates to help them engage in the priority guidance plan. Those comments were then submitted over the last two days of the comment cycle. Further, unlike a specific rulemaking, which often provides background on the legislative and preexisting regulatory framework within the proposed guidance to be commented on, the priority guidance plan provides no background for its high-level overview of the tax law. Therefore, commenting on it requires independent knowledge of the of tax policy and law changes that might motivate a guidance project.

As has been noted in the prior research on comments on substantive regulations, constructing categories for comments and interpreting the results stirs some long-standing debates about the roles of specific types of

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[79] *See, e.g.*, American Bankers Association, "Comment Re: Need for Additional Tax-Related Guidance and Reporting Compliance Relief Due to COVID-19," at 4 (May 21, 2020). This comment was submitted in May 2020, while the submission cycle for the 2020-2021 priority guidance plan started in June 2020. We found these letters and proposals mainly by searching Tax Analysts' database for documents containing key words such as "PGP" or "guidance plan" submitted to Treasury. That database does not provide exhaustive coverage of every communication between outside parties and Treasury. There are likely more communications, either on paper or in person, but they are not searchable using a public database.

[80] *See, e.g.*, NABL, *supra* note 63; and NABL, "Comment Re: NABL Suggestions to Congress and the Department of the Treasury Relating to Impacts on Tax-Advantaged Bonds of COVID-19" (Apr. 9, 2020). *See also* Vizient Inc., Comment Re: Priority Guidance Plan; Public Comment Invited on Recommendations for 2018-2019 (May 22, 2018) and attached letters from 2011 and 2014.

[81] *See, e.g.*, Cary Coglianese et al., "Transparency and Public Participation in the Rulemaking Process: Recommendations for the New Administration," 77 *Geo. Wash L. Rev.* 924 (2009).

[82] Oei and Osofsky, *supra* note 5, at 214 and 253.

[83] *See id.*; Wallace, *supra* note 20, "Centralized Review of Tax Regulations"; and Kwon, *supra* note 29.

[84] Oei and Osofsky, *supra* note 5, at 216 and 247.

stakeholders. For example, as Oei and Osofsky note, there is a long-standing debate about the extent to which professional organizations such as bar associations can and do play a public interest role given client and tax industry interests.[85] We follow Oei and Osofsky in analyzing professional organization submissions in a separate category, in light of those debates.

The role of IRSAC and related IRS advisory councils (classified as governmental/quasi-governmental organizations) may also be subject to similar inquiries as professional organizations. In the three priority guidance plan rounds we identified, IRSAC submitted a brief comment explicitly endorsing a request industry had already made, while IRPAC included a brief list of requests that also included an endorsement of an industry request. The Tax Law Center has previously noted the need to improve the composition of viewpoints on IRSAC.[86] In 2019 IRPAC was folded into IRSAC, along with the Advisory Committee on Tax Exempt and Government Entities.[87]

Further, because classifying comments into the chosen categories may not be straightforward in some cases, we also follow the prior research in providing our full data online to allow others to examine specific categorizations.

This is a first, limited attempt to describe inputs into the priority guidance plan, so there are substantial limitations to this research and what implications can be drawn from it. But we hope that it spurs future research to address these gaps.

Crucially, it is unclear to what extent formal comments on the priority guidance plan influence the tax guidance agenda. The priority guidance plan itself does not note whether or which comments influenced the prioritization or development of any particular substantive guidance project. This makes it even more difficult for stakeholders to understand the implications of engaging in the priority guidance plan or how much difference would be made by additional comments reflecting broad public interests or the interests of less well-resourced filers. It is unclear, for example, the extent to which IRS processes take into account that requests for guidance appear systematically skewed toward input from sophisticated and well-resourced private players, and how the agency adjusts its process for setting the priority guidance plan accordingly.

Also, we focused on formal written comments on the priority guidance plan. Further work could more closely examine other forms of input and their impact. For instance, it is impossible to conclude from public information whether the comments focused on commuting and Notice 2016-36 caused the inclusion of projects in these areas in a subsequent priority guidance plan.

Another limitation of this research is that it covers only three priority guidance plan cycles between two intense periods of rulemaking implementing major tax legislation (the TCJA and the IRA), and before recent administrative law decisions put further pressure on the guidance pipeline by requiring the IRS to revisit certain older guidance.[88] Extensions could examine other years to detect patterns across time and their determinants, and they could take into account relevant recent developments. For example, in implementing the IRA, Treasury and the IRS made discrete calls for requests for guidance involving specific areas of IRA implementation projects and, as part of those calls, provided substantial background on each topic area and conducted outreach to a variety of stakeholders, including the public.[89]

Items can also sit on the priority guidance plan list for years — even over a decade — without further resolution, which may affect the extent to which stakeholders prioritize input into the priority guidance plan.

Understanding the pros and cons of different approaches to soliciting and considering broad input in shaping a guidance agenda has renewed importance as the IRS absorbs nearly $59 billion in new funding and considers a reinvigorated guidance agenda to clear backlogs, implement the IRA, and achieve its transformation goals.[90] ■

[85] *Id.* at 262 and 263.

[86] *See* Tax Law Center at NYU Law, Tax Law Center Letter on IRSAC Appointments (July 8, 2021).

[87] *See* IR-2018-212.

[88] *See* REG-106134-22 (proposed Dec. 8, 2022); and REG-109309-22 (proposed Apr. 11, 2023).

[89] *See* Chye-Ching Huang, “Modernizing Tax Regulatory Review,” *Yale J. on Reg.* blog (June 29, 2023).

[90] *See* IRS, *supra* note 35, at 32.