June 9, 2023

Internal Revenue Service
Attn: CC:PA:LPD:PR
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Notice 2023-36, "2023-2024 Priority Guidance Plan"

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we write with comments on your notice and request for public comments on the Internal Revenue Service (IRS) 2023-2024 Priority Guidance Plan.

Introduction

NTU is the nation's oldest taxpayer advocacy organization, founded in 1969 to achieve favorable policy outcomes for taxpayers with Congress and the executive branch. For nearly as long, our experts and advocates have engaged federal policymakers on important questions surrounding tax administration, taxpayer rights, and IRS services.

After organizing a coalition on behalf of taxpayer rights legislation contained in the 1988 Technical and Miscellaneous Revenue Act, NTU served on the National Commission on Restructuring the IRS in 1996 and 1997, which later became the basis for the 1998 IRS Restructuring and Reform Act (RRA). NTU helped craft the codified taxpayer bill of rights included in the 2015 Protecting Americans from Tax Hikes (PATH) Act. More recently, we provided technical assistance to Congress for what became the Taxpayer First Act (TFA) of 2019 and worked with stakeholders across government to ensure its enactment into law.

This year our research affiliate, National Taxpayers Union Foundation, initiated the Taxpayers for IRS Transformation (Taxpayers FIRST) project, which draws on experts from government, academia, and the private sector to "assist IRS officials and policymakers so that the new

funding is spent effectively, improves taxpayer services, upgrades outdated technology, and helps efficiently reduce the tax gap while respecting and strengthening taxpayer rights and due process." [1]

Guidance is a Key Part of "Tax Certainty"

On May 16 of this year, NTU testified before the United States Senate Committee on Finance regarding the IRS's $80 billion infusion of resources provided in the Inflation Reduction Act of 2022, and the Service's subsequent Strategic Operating Plan outlining in limited detail the directions such funding would allow. There we noted:

> NTU applauds the Strategic Operating Plan's emphasis on providing guidance and certainty to taxpayers, including revision of notices 'by simplifying the language,' 'increasing the current rate from five to seven notices per year to as many as 500 per year,' 'develop[ing] additional, tailored tax certainty programs,' and growing 'capacity for addressing taxpayer issues through guidance interpreting the tax law.'[2]

NTU was likewise encouraged to learn that during his confirmation hearing before the Senate Finance Committee earlier this year, Commissioner Werfel expressed that "[c]larity is an important component of tax administration, ensuring taxpayers and stakeholders clearly understand their tax obligations. If confirmed, I look forward to working across the IRS, including with the Chief Counsel, and Treasury, to maximize, to the fullest extent possible, clarity in guidance …".[3] Several months later, according to *Bloomberg Daily Tax*, the Commissioner reiterated his interest in, "exploring 'safe harbors' and other possible initiatives to strengthen voluntary compliance with tax laws."[4]

Yet, turning these hopeful signs into an actual change of direction will take a great deal of commitment, effort, and financial resources on the part of the Service. The following recommendations range from the systemic to the specific.

Recommendations: Systemic Changes Needed for Guidance and Its Prioritization

Notice 2023-36 outlines seven criteria which the Service will employ in "reviewing recommendations and selecting additional projects for inclusion" in guidance development.

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[1] For additional background, see: https://www.taxpayers-first.org/.
[2] See https://www.ntu.org/publications/detail/ntu-testimony-to-senate-finance-hearing-on-irs-budget-and-oversight-compliance-not-enforcement-should-be-the-goal.
[3] See https://www.finance.senate.gov/download/responses-to-questions-for-the-record-to-daniel-werfel.
[4] See https://www.finance.senate.gov/download/responses-to-questions-for-the-record-to-daniel-werfel and https://news.bloomberglaw.com/daily-tax-report/irss-werfel-open-to-exploring-voluntary-compliance-initiatives.

While helpful in defining the scope of the Notice's request, these definitions of *what* should be prioritized do not by themselves permit a more comprehensive examination of *how* prioritization might be improved or implemented. The items in this section focus on the "how."

Measure the Impact of Guidance on Compliance and Paperwork Burdens More Carefully and Consistently.

For many years, National Taxpayers Union's research arm, NTU Foundation, has published an annual analysis of federal personal and business income tax system complexity, including estimates of paperwork burden hours based on Office of Information and Regulatory Affairs (OIRA) data.[5] Yet, the Foundation's analyses for individual and business filers do not include compliance costs or benefits associated with IRS subregulatory guidance.

In the tax realm, there are far more impositions on the private sector than filling out forms. NTU Foundation's Joe Bishop-Henchman recently wrote,[6] "[i]f the IRS analyzes the compliance or economic costs of its subregulatory guidance, it does not release its analysis publicly."[7]

Why should this matter? For one, the Service will find it difficult, if not impossible, to objectively determine if its work regularly meets criterion Number 2 of this Notice: "Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the IRS." Furthermore, careful and consistent measurement of the performance of guidance allows for "course corrections" that prevent wasted resources on repetitive attempts to better explain the same issue. Finally, while the IRS may survey individual or focus groups of taxpayers on the quality, timeliness, and courtesy of answers to tax questions, this is by no means equivalent to gathering systematic measurable evidence on whether or how guidance has impacted compliance burdens, for better or worse.

Such a task would not be impossible. Starting with the estimated total information collection burden of a given tax form, the Service could disaggregate that burden into lines or instructions of that form which have required the most taxpayer time and effort. The Service could then issue guidance, in the form of a safe harbor, revenue procedure, or new instruction, designed to target and improve the comprehensibility of those lines or instructions. Then, controlling for other factors such as changes in economic circumstances of the filing population, or the tax laws themselves, the net effect of the guidance on reducing the taxpayer time and effort could be reasonably, even if not perfectly, estimated.

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[5] See, for example, Brady, Demian. "6.5 Billion Hours, $260 Billion: What Tax Complexity Costs Americans." National Taxpayers Union Foundation. April 17, 2023. https://www.ntu.org/foundation/detail/65-billion-hours-260-billion-what-tax-complexity-costs-for-americans.

[6] See Bishop-Henchman, Joseph. "Transforming the Internal Revenue Service." Cato Institute Policy Analysis No. 942, April 11, 2023. Retrieved from: https://www.cato.org/policy-analysis/transforming-internal-revenue-service.

[7] Bishop-Henchman refers readers to the following for more information on subregulatory compliance burden measurement at Treasury: Hickman, Kristen and Dooling, Bridget. "A Study to Evaluate OIRA Review of Treasury Regulations," George Washington University Regulatory Studies Center, January 5, 2022. And see, Dudley, Susan and Katzen, Sally. "The Story behind the IRS's Exemption from Oversight," *Wall Street Journal*, February 22, 2018.

Of course, other tools would need to accompany an evaluative exercise such as this one. "A/B" tests that would allow specific guidance improvements to be measured comparatively with each other through taxpayer samples, would be helpful. The challenge here is the same one often facing tax form information collection burdens: IRS staff calculating the impact of tax filings often receive a handful of (or even no) public responses to requests for taxpayer input on the difficulty of completing tax forms.[8] The Service could, and should, consider devoting additional resources from the Inflation Reduction Act to compensate taxpayers for participating in such vital research.

Consultation with consumer-facing financial entities in the public and private sectors on developing additional measurements of effectiveness, based on their experience, would likewise aid this process, including the most basic one: deploying the most effective words in instructions, whether in English or other languages. While the IRS engages in some of this consultation, a systematic review of a robust sample of current guidance, coordinated by an oversight body, would provide useful feedback going forward. Such a task would be ideally suited to the currently dormant IRS Oversight Board; in its absence, an entity such as the IRS Advisory Council, the Taxpayer Advisory Panels, or the National Taxpayer Advocate, could assist.

AI Guidance Is a Good Tool, But Only If Used Properly.

The deployment of Artificial Intelligence, underway in several forms for the past few years at the IRS, has the promise to aid a significant number of taxpayers in need of guidance that stretches somewhat beyond the "Tax Topics" and additional items available from the Service online or through other methods. Nonetheless, the need for constant evaluation of AI's effectiveness is apparent.

To give one example, on June 1 the Center for Taxpayer Rights held another of its "Tax Chat!" series featuring experts on tax administration. The topic was "Artificial Intelligence, Taxpayer and Privacy Rights Protections; Data Ethics; Protecting against Bias; and the Use of Automated Guidance."[9] During that session, Josh Blank of the School of Law at University of California, Irvine, perceptively discussed what he calls "symplexity," or the use of "plain language to explain complex law" that can sometimes misconstrue the actual law. He noted that the IRS provides some automated legal guidance via an interactive tax assistant, which has proven competent at answering basic questions, but has fallen short with certain responses. The automated assistant provides very concise replies but often with little explanation. Blank mentioned one instance whereby a taxpayer asks whether hiring a home health aide is deductible

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[8] Brady, Demian. "Public Comments on IRS Tax Forms Can Help Ease Filing Burdens." National Taxpayers Union Foundation, March 17, 2022. Retrieved from: https://www.ntu.org/foundation/detail/public-comments-on-irs-tax-forms-can-help-ease-filing-burdens.

[9] NTU strongly encourages review of the entire "Tax Chat!"; many video recordings of the sessions may be accessed online via https://taxpayer-rights.org/transforming-tax-admin/.

as a health expense. The automated assistant answers that it is not a deductible expense, even though there are laws that provide for deductibility in some cases, e.g., a chronically ill taxpayer.

This potential for inaccurate advice, which could exist in numerous complex tax situations (e.g., Earned Income Credit eligibility, or deductibility of "Miscellaneous" items in Publication 529), raises an important equity question. The original Taxpayer Bill of Rights enacted in 1988 (Subtitle J, PL 100-647) required the "abatement of penalty or additional tax attributable to erroneous written advice of IRS if the advice was requested in writing, was relied upon by the taxpayer, and the taxpayer provided adequate information."[10]

How would an AI-based "assistant," providing electronically "written" advice as a representative of the IRS, be held accountable in a situation such as the one described in the "Tax Chat!" above? While it may be tempting for the Service to simply assert time and again that the fault was not with the advice but with the information provided by the taxpayer, this will be neither credible nor just in every instance. The Service needs to develop, in consultation with the National Taxpayer Advocate and if necessary, Congress, a "hold harmless" standard for taxpayers receiving erroneous government advice from AI that comports with Subtitle J of PL 100-647.

Consider Guidance's Role Holistically.

As the IRS notes on its own website, "guidance" can take many forms, ranging from revenue procedures to technical advice memoranda to notices.[11] NTU would contend that these are not the only elements of the compliance universe that can help taxpayers to achieve a better understanding and certainty of the law. For example:

- Consistent and responsive taxpayer service representatives via telephone, online, and walk-in venues, along with Low Income Tax Clinics and the Volunteer Income Tax Assistance program, can provide highly personal forms of pre- and post-filing tax assistance to supplement what is formally defined as "guidance."
- Collaborative efforts, such as the annual IRS-Tax Policy Center Joint Research Conference on Tax Administration,[12] along with tools such as Job Aids, provide opportunities for interaction between the Service and tax community professionals that can impact guidance or even function in a similar way to guidance. NTU has long recommended that the Job Aid model be put to greater use for myriad issues, among them calculating valuation discounts in family shares for estate tax purposes[13] and appraisals in Section 170 (h) deduction cases.

[10] For background, see https://www.finance.senate.gov/download/1988/03/29/taxpayer-rights-and-excise-tax-collection-procedures-report-100-309 and https://www.gao.gov/assets/ggd-92-23.pdf.
[11] See https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer.
[12] See https://www.taxpolicycenter.org/sites/default/files/program_-_irs_tpc_conference_2023.pdf
[13] See, for example, https://www.ntu.org/publications/detail/irs-considering-backdoor-death-tax-hike.

- Settlement initiatives can provide a type of guidance to taxpayers finding themselves in similar circumstances regarding a given tax controversy. In our testimony before the Senate Finance Committee from May 16, we explained:

> Pioneered over 40 years ago under then-IRS Commissioner Roscoe Egger, this concept allows the IRS to offer limited-time legal settlements to taxpayers in cases with no litigation hazard and where there are no precedents to be set or compliance problems in the absence of a trial. Depending on the issue at hand, a taxpayer might be able to keep a fraction of their deduction or credit in question, or could be limited only to their 'cash outlays' in claiming a tax benefit. In the years that followed, settlement initiatives were successful in clearing numerous cases from crowded court dockets on matters such as the amortization of intangibles, a targeted jobs tax credit, and perhaps most successfully, in 2008, the lease-in/lease-out and sale-in/lease-out (LILO/SILO) controversy. Both the government and taxpayers benefited from reduced time and litigation costs, while the Treasury recovered tens of billions in revenues that might otherwise have entailed considerable effort and risk to recover.[14]

The point we wish to emphasize is the importance of avoiding "siloing" in the issuance of guidance. Just as the Service has recently (and commendably) embraced the holistic concept of the "taxpayer experience" in retooling its managerial processes, guidance can benefit from this approach as well. One additional way to begin doing so, besides those mentioned above, is to utilize the Administrative Procedure Act's (APA) notice and comment procedures more frequently when proposing subregulatory forms of guidance. As our colleague at NTU Foundation Joe Bishop-Henchman recently wrote, guidance, much like formal regulations, can often suffer from a dearth of APA input:

> The bland names of these documents often understate their importance. For instance, Revenue Procedure 2019-48 sets the annual business travel per diem amounts; Revenue Ruling 2019-13 establishes taxability rules for distributions by dissolving S corporations; TAM 2019-03017 answers whether the value of meals and snacks provided by employers

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[14] For background, see Gomez, Armando, and Barral, Roland. "It's High Time to Clear Out the Tax Court's Easement Backlog." *Tax Notes Federal*. Volume 179, April 10, 2023. https://www.taxnotes.com/exempt-organizations/conservation-easements/its-high-time-clear-out-tax-courts-easement-backlog/2023/04/25/7g8xx. The authors note, perceptively:

> New IRS Commissioner Daniel I. Werfel has a lot on his plate, including delivering on a plan to effectively deploy the $80 billion in supplemental funding provided to the IRS through the Inflation Reduction Act of 2022. With numerous emerging compliance issues, the agency doesn't need to keep spending precious time and resources litigating yesterday's problems. The time has come for a creative settlement initiative that will clear out the backlog of cases so that the IRS can move on and address other priorities. Moreover, offering a settlement program designed to yield a large proportion of takers will bring in billions of dollars in revenue with limited further effort, allowing the IRS to claim victory and show Congress that the increased funding is paying dividends.

to employees is taxable; and Notice 22-03 sets the standard mileage deduction rate. None went through APA notice-and-comment procedures.[15]

If the Service is to reach the goals outlined in the Strategic Operating Plan of providing earlier, more quantitative, and better-quality guidance to achieve "pre-compliance" with the law, then the resources provided by the Inflation Reduction Act should be directed toward expanding the use of APA.

Why do so for such apparently mundane items that would seemingly need only minor updates from previous years? A big reason is that the rigors of public input (besides better measurement of burden reductions mentioned above) can improve the quality and ease the workload of the Service in the future. Setting mileage deduction rates would seem to be a mere exercise in addition and subtraction, by consulting various economic cost indices for automobiles. On the other hand, taxpayers may have valuable advice on factors like conditions of roads, supply chain shortages of particular spare parts, or even the accuracy of mileage tracking applications, to fine-tune the mileage rate. Employers could impart real-world advice on "de minimis" amounts for the taxable value of snacks or regional variations in per-diem expenses beyond what federal government employees may be seeing. Taxability rules for S Corporation distributions are even more complex and could have benefited from public consultation.

Look to Previous Successes for Future Guidance Improvements.

In order to fulfill Commissioner Werfel's apparent vision of an IRS that is more open to the "safe harbor" concept in providing guidance, it is beneficial to study previous safe harbors that have met goals of providing simplicity, certainty, and compliance. As you know, safe harbors are "how-tos" that the Service offers taxpayers who may seek to avail themselves of a given tax provision, but would wish to do so with some assurance that their method of compliance is acceptable to the government and not subject to enforcement action if followed correctly. Just a few historical examples are:

- The home office deduction. The IRS's "simplified option" helped many taxpayers to balance recordkeeping and other compliance tasks with the benefit of a genuine tax deduction for the cost of doing business. It created a flat per-square-foot deduction amount, which could be claimed solely on one schedule rather than apportioned.[16]
- After passage of the Tax Cuts and Jobs Act of 2017, the Service created seven safe harbor calculations for purposes of the casualty loss deduction. These include de minimis

[15] For background, see Bishop-Henchman, Joseph. "Transforming the Internal Revenue Service." Cato Institute Policy Analysis No. 942. April 11, 2023, pp. 5-6, 13-14. https://www.cato.org/policy-analysis/transforming-internal-revenue-service.
[16] See https://www.irs.gov/businesses/small-businesses-self-employed/simplified-option-for-home-office-deduction.

and other methods for personal-use residences and personal belongings, even for situations where records reconstruction is difficult to achieve.[17]
- In 2019, the IRS issued a second round of clarification on 401K hardship distribution safe harbors for expenses connected with "immediate and heavy financial need," providing more flexibility to the benefit of taxpayers. This shows how, with experience, safe harbors can be adjusted for evolving conditions and understanding of the law.[18]

A useful exercise would be a study of these and many other "safe harbors" to determine common factors for both successes and failures (again, measured against a common set of benchmarks) of safe harbors – "guidance for guidance" that could make future prioritizations more productive.

Recommendations: Specific Guidance Priorities Must Combine Old and New

Notice 2023-36 contains seven criteria for defining and determining what constitutes "priority guidance," among them whether the recommendation "reduces controversy and lessens the burden on taxpayers," "resolves significant issues relevant to a broad class of taxpayers," or "promotes sound tax administration." In some instances, however, priorities for guidance may reflect some or all of the seven criteria in different, less obvious ways. The following are important examples that NTU would recommend for inclusion as priorities.

1099-K Reporting and Filing.

To be clear, NTU opposed the dramatic expansion of 1099-K filing requirements provided in the American Rescue Plan Act and is working to modify or repeal this provision through several legislative approaches.[19] Nonetheless, the reality facing taxpayers and the IRS is the end of a temporary reprieve from instituting full reporting and remittance requirements. Now, millions of taxpayers who may be completely new to the tax system (e.g., students selling used textbooks or unused concert tickets) will have considerable recordkeeping and possibly reporting and payment obligations. Among the problems NTU has identified:

- The current IRS guidance notes what to do if a taxpayer is selling an item at a loss or with a gain. It doesn't provide information on what to do if the taxpayer sold something that was purchased years in the past and no longer has a receipt or other record indicating what was paid. What should a taxpayer do in that case? It also notes, "If you sold a mix of personal items at a loss and a gain, report them separ,ately." That can be a huge

[17] See the accounting industry's positive review of the safe harbors here: https://www.cpajournal.com/2018/10/22/understanding-the-irss-seven-new-casualty-loss-safe-harbors/.

[18] For a good history, see: IRS Issues Final Regulations Relaxing 401(k) Hardship Distribution Rules | Hunton Employment & Labor Perspectives (huntonlaborblog.com)

[19] See, for example, https://www.ntu.org/publications/detail/ntus-12th-annual-no-brainers-list-the-top-10-bipartisan-bills-for-taxpayers-in-2022.

compliance burden for many taxpayers. Yet the IRS has not updated its paperwork burden estimate for the 1099-K.

- The IRS' projection in Publication 6961, *Calendar Year Projections of Information and Withholding Documents for the United States and IRS Campuses 2022 Update* (published March 2023) of 1099-K forms it will receive over the next several years seems to be very low given the current statutory threshold. The text notes the delayed implementation until 2023. and projects 12.98 million 1099-Ks for 2022, an 8 percent increase in 2023 followed by a 14 percent increase in 2024, and insignificant increases over the rest of the estimate. This does not match what NTU has heard from other sources.
- The IRS also needs to clarify the issue regarding gross receipts. It should be made abundantly clear to taxpayers that they are not liable for taxes for fees and shipping costs that are included in the gross receipts figure.

It bears mentioning here that where future 1099-K guidance appears has an importance all its own. Recently a survey indicated that nearly 80 percent of young adults rely on social media for tax and financial advice.[20] The Service will need to give careful consideration to the formatting and placement of guidance, not just their contents, to capture the attention of these audiences.

Indeed, NTU's research affiliate, National Taxpayers Union Foundation, went so far as to provide "guidance" of its own on 1099-K requirements, utilizing a taxpayer who had purchased tickets to a Taylor Swift concert. The "Q&A" format takes the reader through a number of hypotheticals on the tax consequences of the purchase and subsequent resale of the tickets.[21] Since this item was published on NTU Foundation's website in December 2022, it has ranked in the "Top 5" most-trafficked pages on our website every single week until today. The blog post concludes:

> ***This is confusing!***
>
> We agree, and we've been warning Congress, the IRS, and taxpayers across the country that the new thresholds for 1099-K forms are going to generate a lot of confusion in early 2023. Many taxpayers who use eBay, PayPal, or some other platform as a 'digital garage sale' of sorts, to sell used furniture or old college textbooks at a loss, for example, will receive an information return for the first time under the new requirements in January or February 2023. Generally, the sale of used personal items at a loss does not generate federal tax liability, but taxpayers may think they owe taxes because they're receiving a 1099-K form for the first time.[22]

In short, there is more the IRS can do to provide guidance in this area.

[20] See https://www.kxxv.com/news/national/experts-warn-almost-80-of-youth-get-tax-advice-from-social-media#:~:text=The%20market%20research%20company%20Prolific,tax%20returns%20from%20social%20media.
[21] See https://www.ntu.org/foundation/detail/navigating-tax-rules-for-reselling-taylor-swift-tickets-and-other-tickets.
[22] *Ibid.*

Partnership Conservation Easements.

Section 170(h) of the Tax Code has been an intense topic of legislation, litigation, and rulemaking for several years. To NTU, the issues surrounding partnership conservation easements under this section have become emblematic of flawed approaches to tax administration – approaches creating unnecessary costs, confusion, complexity, and contraventions of taxpayer rights that are now spilling over into other areas of the tax system.

Very recent guidance (Notice 2023-30) intended to address just a few aspects of 170(h) matters as they relate to conservation easement deeds provides an illustration of how important the criterion in Notice 2023-36 regarding cures for "ineffective, insufficient, or unnecessarily burdensome" guidance is. Tax experts Ronald Levitt and Emily C. Ellis wrote:

> By enacting the new safe harbor, the new law follows typical government speak language by appearing to provide donors of conservation easements the opportunity to amend an easement deed to adopt safe harbor language, approved by the IRS in the newly issued regulations. However, the carveouts and exceptions included with the safe harbor prevent many, if not most, outstanding conservation easement deeds from taking advantage of the safe harbor. The new guidance is helpful to those few conservation easement deeds to which it applies, but for most taxpayers involved in conservation easement transactions, such as so-called syndicated conservation easement transactions, it is not worth the paper it is written on. For those who will benefit from the new safe harbor language, the amendments to the conservation easement deeds in question must be properly signed by both the donor and donee and have an effective date the same as the date of the original donation and must be recorded by July 24, 2023.[23]

Although a relatively small number of taxpayers claim 170(h) deductions, the controversies surrounding them have an outsized impact on Tax Court caseloads, not to mention the troubling precedents that IRS actions in this area have for the entire filing population. Therefore it is incumbent on the Service to prioritize better guidance, in the form of a broader "safe harbor" for all standard elements of a conservation easement agreement. In 2021, NTU led a coalition of taxpayer advocacy groups that praised then-Treasury Secretary Nominee Janet Yellen for her openness to this very concept during her confirmation hearing:

> This sensible approach could, under your leadership, be quickly facilitated by forming a working group of expert stakeholders inside and outside of government under a 90-day deadline to formulate the guidance. This in turn could be subject to public notice and comment so that, by late summer of this year, a great measure of consistency and transparency could finally be brought to an area of tax administration that has proven burdensome both to the Service and to taxpayers. As IRSAC's recommendations some 15 years ago with historic preservation easements, and the creation of a panel to settle

[23] See https://www.lexology.com/library/detail.aspx?g=21ae59c2-64b1-4c2c-b689-1203066c91d8.

> valuations of donated art both demonstrate, reaching agreement on complex issues in the Section 170 space is feasible if all parties come to the table in good faith.[24]

We also recommended that this step be taken in our February 2023 comments on REG-106134-22, for the sake of sound tax administration:

> It is sometimes argued that effective tax administration requires 'strategic ambiguity' to create a compliance attitude of 'better safe than sorry' among taxpayers and preserve flexibility for enforcement. We would disagree. In any area of law, ambiguity not only creates perceptions of unfairness among citizens, it also can result in protracted administrative headaches for the government. Both the former, but particularly the latter, has certainly been the case with IRS's compliance approach to Section 170(h) and Notice 2017-10. The Service has pursued several strategies against [partnership easements], beginning with valuation challenges of the underlying easements, then moving into 'foot faults' with easement agreements and other associated transactions. The near-100 percent audit rate of these transactions has exacted, and will continue to exact, a heavy toll on IRS examination, collection, and litigation resources that threaten other compliance initiatives.[25]

There are few other actions the IRS could take in the guidance sphere that would send as strong a message to the taxpaying community of a genuine, fundamental change in direction toward more balanced, rational tax administration than this one.

Employee Retention Tax Credit (ERTC).

Commendably, the Service has provided solid, ongoing guidance to taxpayer-employers on how to claim ERTC and provide recordkeeping trails for eligibility. Yet, ERTC demonstrates that the criteria outlined in Notice 2023-36 need to be flexible. For one portion of the tax community – accountants – a major gray area needs to be addressed.

As highlighted by a joint communication from the National Association of Tax Professionals and the National Society of Accountants, as of February of this year key questions remained for the accounting community, for which the organizations requested guidance:

- What is our due diligence in preparing the affected income tax return when we did not prepare the ERC filings?
- What is our due diligence if we do not agree that the client qualified for ERC or discover improper ERC filings?

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[24] See Coalition Letter: Tax Administration Must Be Clear and Fair For Conservation Easements - Publications - National Taxpayers Union (ntu.org).
[25] See https://www.ntu.org/publications/detail/ntu-comments-to-irs-agency-needs-better-rulemaking-on-conservation-easements.

- What is our responsibility when relying on what the IRS refers to as "Third parties," not tax professionals, for ERC filings?
- What questions should our members be asking their clients?
- What is the tax professional's exposure to Circular 230, or even Title 26, tax preparer penalties?[26]

It is unclear to us whether or how the Service has responded to this request. Whatever has occurred or will occur, this situation is a reminder that guidance often needs to be attenuated to particular audiences for maximum salutary effect.

Captive Insurance.

This is yet another area where the Service's approach to a relatively small cross-section of taxpayers has had major impacts on the courts as well as the misuse of enforcement tools. Following a severe rebuke from the U.S. Supreme Court[27] and a lower court over a lack of transparency or public input over its administrative practices toward captive insurance, the IRS issued a regulation, REG-109309-22, in April inviting public comment.[28]

This is yet another opportunity for the Service to substantially modify its guidance based on voluminous input already provided by taxpayers. Areas on which to focus are:

- Eliminating the harsh provisions that retroactively designate arrangements that were made in compliance with the 2015 PATH Act as listed transactions.

- Revisit the 10-year lookback and 65 percent loss ratio for classification of a captive insurance operation as a listed transaction, which many commenters have described as arbitrary and unrealistic.

- As First Capital's comments indicated, the regulation would have the effect of forcing captive insurance labeled as listed transactions to be embroiled in amending "prior returns for some period (3-4 years), disallowing deductions for captive premium paid by the insureds, assessing interest and penalties, AND taxing the captive's net income. This is unfair, unconstitutional, and punitive."[29] NTU is taking note.

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[26] See https://www.natptax.com/AboutNATP/PressCenter/Documents/NATP_NSA_ERC_LetterToCommissioner_FINAL.pdf

[27] For background, see https://www.scotusblog.com/case-files/cases/cic-services-llc-v-internal-revenue-service/.

[28] See https://www.federalregister.gov/documents/2023/04/11/2023-07315/micro-captive-listed-transactions-and-micro-captive-transactions-of-interest.

[29] See comments at Regulations.gov.

NTU urges the Service to plainly show how its guidance was modified from the initial regulation to the finalized one. As we have noted in previous comments, other federal agencies, among them the Federal Housing Finance Agency,[30] could be consulted for models in clearly communicating to affected stakeholders how (or whether) their comments had a substantive impact on regulatory outcomes.

Other Guidance from Recent Congressional Hearings.

At his confirmation hearing before the Senate Finance Committee in February, Commissioner Werfel received several questions for the record regarding the status of specific IRS guidance that was either released but unclear, in preparation but not released, or not then under consideration. The following items are the result of direct constituent input to Senators' offices. As such, they are ideal candidates for the IRS to either consider issuing guidance, expedite guidance still in process, or provide better publicity of their issuance since February:

- Digital Assets. Senator Blackburn commented:

  [T]he IRS suggests that taxpayers who receive mining or staking rewards should be prepared to pay taxes twice – on initial receipt as they participate in the validation of each block in a blockchain and upon ultimate disposition later of this created property. Such treatment would counter typical treatment for created property under the law, where such property is taxed only on disposition. The IRS has produced conflicting signals regarding digital assets and how to bring consistent tax clarity to the millions of Americans participating in permissionless blockchain ecosystems.

- Work Opportunity Tax Credit. Senator Scott commented:

  It is my understanding that a lack of IRS guidance concerning WOTC could potentially result in windfall payments to firms that are merely claiming tax credits for employees who happen to meet WOTC criteria. …Those providers could take the view that they are not violating the WOTC instructions because 'offer of employment' is undefined for WOTC purposes, and thus that 'conditional' or 'contingent' offers do not trigger the screening requirement prior to becoming a 'final' or unqualified offer.

- Small Business R&D Credit. Senator Crapo commented:

  Many small and medium-sized businesses may not file for the R&D tax credit on their original return, but instead file an amended return to claim the credit. The IRS has recently instituted a new policy that requires companies applying for the R&D tax credit on an amended return to provide a detailed discussion of why their company qualifies for

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[30] See https://www.ntu.org/publications/detail/ntu-comments-to-irs-agency-needs-better-rulemaking-on-conservation-easements.

> the R&D tax credit. My understanding is that in practice this new policy has placed significant burdens on small and medium business due to the fact that the IRS has not provided adequate, detailed guidance and examples of the information the IRS is looking [for] the taxpayer to provide.

Additional questions for the record from Senators Carper and Cortez Masto centered on renewable energy tax credits, demonstrating the bipartisan level of concern over the pace, volume, and thoroughness of guidance.[31]

Conclusion

At a June 8 conference sponsored by the Texas Federal Tax Institute, an IRS official stated that when it came to interim guidance the Service issued on the corporate Alternative Minimum Tax created by the 2022 Inflation Reduction Act, "If we're silent on an issue — this has come up — we don't want people to infer anything. Our silence is an indication that we just don't have an answer on that."[32]

If this is indeed to be IRS doctrine across numerous tax issues, then it is even more incumbent upon the Service to put maximum resources into providing meaningful, comprehensible guidance as quickly as possible. Otherwise, the very foundation of the IRS Strategic Operating Plan – indeed of the entire tax system – will be structurally weak. It is NTU's hope that these comments will in a small way help to strengthen that foundation.

Thank you for considering this lengthy document, and we are at your service should you have any questions.

[31] For details on this section, see United States Senate Committee on Finance. "Finance Committee Questions for the Record, Hearing on the Nomination of Daniel Werfel, Responses by Daniel Werfel." February 24, 2023. https://www.finance.senate.gov/download/responses-to-questions-for-the-record-to-daniel-werfel.
[32] See https://www.taxnotes.com/lr/resolve/tax-notes-today-federal/dont-read-into-silence-in-corporate-amt-notices-irs-says/7gvl5.