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A NEW PARADIGM FOR IRS GUIDANCE: ENSURING INPUT AND ENHANCING PARTICIPATION

by

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I. INTRODUCTION

Cathy is a financially unsophisticated homemaker whose husband engaged in Medicare fraud in 1999, for which he was imprisoned the following year.[1] Cathy had no involvement in the family's financial dealings, legal or otherwise, and was completely unaware of her husband's fraud. As a result of the Medicare fraud, the couple owed an additional $900,000 in income taxes for the 1999 taxable year, which the IRS attempted to collect from Cathy and her husband in 2003.[2] In the collections packet issued to Cathy, the IRS informed her of the availability of "innocent spouse" relief, whereby a spouse may be relieved from joint and several liability when the spouse meets certain requirements.[3] Cathy, however, declined to elect

1. These introductory facts are based on the events of Lantz v. Commissioner, 607 F.3d 479, 480–81 (7th Cir. 2010).

2. Income earned from illegal activities is taxable to the same extent as legally derived income. *See, e.g.*, James v. United States, 366 U.S. 213, 219–20 (1961) (finding income earned from embezzlement activities to be taxable). When two spouses file a joint federal income tax return, the spouses are jointly and severally liable for the amount of the tax, interest, and penalties due in exchange for the privilege of generally favorable rates. *See* I.R.C. § 6013(d)(3).

3. *See* I.R.C. § 6015(b) (outlining the elements of an innocent spouse claim). Section 6015(b) and (c) provides opportunities for individuals to avoid joint and several liability if detailed requirements are satisfied. Section 6015(f) provides an opportunity for relief to individuals who fail to satisfy either the (b) or (c) requirements if "[u]nder procedures prescribed by the Secretary, if (1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax" or additional liability. While there had been some form of relief from joint and several liability since 1971, in 1998, Congress made substantial changes to the so-called innocent spouse regime, including the adoption of equitable relief under section 6015(f). *See* Bryan T. Camp, *The Unhappy Marriage of Law and*

innocent spouse relief because her incarcerated husband assured her that he would handle the matter. Cathy's husband died without having completed the necessary paperwork, and in 2006 the IRS resumed collection activities against Cathy. Cathy then claimed innocent spouse protection, but a Treasury regulation imposed a two-year deadline on such claims, and the IRS denied her relief.[4]

Generally, the Administrative Procedure Act (APA) requires that Treasury regulations such as the two-year rule be promulgated pursuant to an elaborate notice-and-comment regime, designed to involve the public in the issuance of agency rules binding on the public, thus preserving an element of democracy and accountability for rules that are otherwise issued by unelected Treasury officials.[5]The case of Cathy, and of many contemporaneous cases, specifically dealt with the IRS's adoption of the two-year restriction on filing (two-year rule) for equitable innocent spouse relief where the applicable Internal Revenue Code subsection, 6015(f), otherwise did not provide a deadline.[6] The IRS's rule, originally announced in the context of a notice,[7] adopted shortly thereafter in a revenue procedure,[8] and eventually promulgated in proposed[9] and final regulations,[10] generated

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Equity in Joint Return Liability, 108 TAX NOTES 1307 (Sept. 12, 2005) (reviewing the history and purpose of joint and several liability for married couples).

4. *See Lantz*, 607 F.3d at 481 (discussing the effect of regulation on the taxpayer's claim).

5. *See* 5 U.S.C. § 553(b), (c) (discussing the requirements for issuance of notice and acceptance of public comments in administrative rulemaking); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1160 (2008) [hereinafter Hickman, *A Problem of Remedy*] (noting that agency rules carry the binding force of law and discussing the procedure and policy behind their implementation).

6. Reg. § 1.6015-5(b)(1) [hereinafter two-year rule] (imposing a two-year time limit on section 6015(f) relief from joint and several liability). After the imposition of the new limitation, courts struggled to apply the restriction, resulting in the Tax Court invaliding the rule and several circuit courts of appeal reversing. *See* Hall v. Commissioner, 135 T.C. 374, 374 (2010) (holding the time period invalid); Mannella v. Commissioner, 132 T.C. 196, 196 (2009) (holding the time period invalid), *rev'd*, 631 F.3d 115, 116 (3d Cir. 2011) (holding the time period valid); Lantz v. Commissioner, 132 T.C. 131, 131 (2009) (holding the time period invalid), *rev'd*, 607 F.3d 479, 487 (7th Cir. 2010) (holding the time period valid); Coulter v. Commissioner, T.C. Docket No. 1003-09, appeal docketed No. 10-680 (2d Cir.).

7. *See* Notice 98-61, 1998-2 C.B. 758.

8. *See* Rev. Proc. 2000-15, 2000-1 C.B. 447, *superseded* by Rev. Proc. 2003-61, 2003-2 C.B. 296.

9. *See* Relief From Joint and Several Liability, 66 Fed. Reg. 3888 (proposed Jan. 17, 2001) (to be codified at 26 C.F.R. pt. 1).

10. *See* T.D. 9003, 2002-2 C.B. 294.

no formal public comment and no discernible attention outside of the IRS — in other words, the public did not meaningfully participate at all in its formulation or issuance.[11] Considering Cathy's case and others like it, this lack of public participation should not surprise anyone. After all, Code section 6015, the innocent spouse statute, by its terms was designed to protect spouses who were not involved in the family's financial affairs — such spouses would presumably have no awareness of Treasury rulemaking activities or incentive to participate in them.[12] In Cathy's case and many others, the incentive to participate arose only after the deadline to claim innocent spouse relief had passed. While interested parties and taxpayers failed to submit comments on the two-year rule before its adoption, significant controversy erupted after the fact. The Tax Court concluded that the regulation adopting the two-year rule was invalid,[13] two circuit courts of appeal held to the contrary,[14] and commentators criticized the legal analysis of the various opinions.[15] Because the two-year rule in practice often prevented abused ex-spouses from having the IRS or courts consider their case on the merits, the regulation led to a firestorm of controversy when the public finally became involved.[16]

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11. In announcing the proposed rule (as well as other rules relating to requests for relief) in regulatory form, the Treasury took the view that the regulations were exempt from the Administrative Procedure Act and not subject to the notice-and-comment regime that accompanies the issuance of agency legislative rules. *See id.* In the preamble that accompanied the final regulations, IRS noted that it had requested comments from the public in its subregulatory guidance and offered the public the opportunity to comment again with its promulgation of proposed regulations. *Id.*

12. *See* I.R.C. § 6015(b)(1)(C) ("the other individual filing the joint return establishes that in signing the return he or she did not know, and *had no reason to know*, that there was such understatement") (emphasis added).

13. Lantz v. Commissioner, 132 T.C. 131, 131 (2009) (holding the time period invalid) *rev'd*, 607 F.3d 479 (7th Cir. 2010).

14. Lantz v. Commissioner, 607 F.3d 479, 487 (7th Cir. 2010) (holding the time period valid); Mannella v. Commissioner, 631 F.3d 115, 116 (3d Cir. 2011) (holding the time period valid).

15. *See, e.g.*, Scott A. Schumacher, *Innocent Spouse, Administrative Process: Time for Reform*, 130 TAX NOTES 113 (Jan. 3, 2011) [hereinafter Schumacher, *Time for Reform*]; Patrick J. Smith, *Gaps in the Seventh Circuit's Reasoning in Lantz*, 128 TAX NOTES 1375 (Sept. 27, 2010).

16. Some have suggested that the statute and legislative history suggest a legislative decision to not include a two-year rule, though the circuit courts that have concluded differently suggest that the legal issue is at a minimum far from straightforward. *Cf.* NAT'L TAXPAYER ADVOC., 2010 ANN. REP. TO CONGRESS VOL.2, 3–4 (2010) [hereinafter NTA 2010 ANN. REP.] (asserting that after listening to testimony from innocent spouses describing cases where relief would be denied, Congress did not include a time restriction in section 6015(f)).

In contrast, the case of the regulations governing the reporting of uncertain tax positions ("UTP" regulations), promulgated at roughly the same time as the two-year rule, presents an example of the triumph of the public participation ideal in administrative rulemaking.[17] At a 2010 American Bar Association Tax Section meeting in Toronto, IRS Commissioner Douglas Shulman announced the release of the long awaited Schedule UTP.[18] The IRS previously released a draft Schedule UTP and solicited feedback and comments.[19] The final version of the schedule, incorporating the many comments received, underwent liberalizing changes and now requires certain corporations to disclose uncertain tax positions to the IRS on their corporate tax returns.[20] The proposal, radical in that it triggered an affirmative tax disclosure tethered to a corporation's reserve for financial accounting purposes, generated a significant amount of concern and public comment in the corporate tax community.[21] As soon as the

17. *See generally* Reg. § 1.6012-2(a)(4) (requiring attachment of Schedule UTP to corporate returns to disclose uncertain tax positions).

18. *Shulman Announces Release of Final UTP Reporting Schedule and Instructions and Guidance*, 2010 TNT 186–30 (Sept. 27, 2010) (TAX ANALYSTS). For tax years starting in 2010, Schedule UTP, or Uncertain Tax Position Statement, requires certain corporate taxpayers to report uncertain tax positions on their tax returns.

19. *See* Announcement 2010-9, 2010-7 I.R.B. 408; Announcement 2010-17, 2010-13 I.R.B. 515; Announcement 2010-30, 2010-19 I.R.B. 668; Announcement 2010-75, 2010-41 I.R.B. 428. The notice of proposed rulemaking was published later that year. *See* Requirement of a Statement Disclosing Uncertain Tax Positions, 75 Fed. Reg. 54,802 (proposed Sept. 9, 2010) (to be codified at 26 C.F.R. pt. 1). The IRS considered and responded to comments in each solicitation, incorporating an Explanation and Summary of Comments in its final rule. *See* T.D. 9510, 2011-6 I.R.B. 453 (announcing the final rule).

20. *See* T.D. 9510, 2011-6 I.R.B. 453 (announcing the final rule).

21. Prior to Schedule UTP, corporations had incentives not to make the IRS aware of positions that, at the time, the IRS may have challenged by an audit if they were detected. Because Schedule UTP requires all uncertain positions to be stated, significant controversy surrounded its adoption. *See, e.g.*, J. Richard Harvey, Jr., *Schedule UTP: An Insider's Summary of the Background, Key Concepts, and Major Issues*, 9 DEPAUL BUS. & COM. L.J. 349 (2011). The IRS has taken the position that it has authority to require the completion and filing of the form under a general grant of legislative authority pursuant to sections 7805(a), 6111, and 6112 of the Internal Revenue Code of 1986, as amended. Commentators have speculated that the IRS's use of regulations, and in particular its claim that it has authority to promulgate under a specific grant pursuant to sections 6111 or 6112 is related to its desire to ensure that its requirement is given greater deference by courts. *See* Jonathan Prokup & Dustin Covello, *The Schedule UTP Regulation: Is the IRS Gearing Up for Battle?*, TAX BLAWG (OCT. 2, 2011), http://taxblawg.net/2010/09/13/the-schedule-utp-regulation-is-the-irs-gearing-up-for-battle/. For a discussion of the degree of deference courts give to regulations and the difference that the tax bar has

Commissioner's speech revealed the form's final details, and in a manner that reminded me of the equivalent of network reporters parked outside the courtroom awaiting the results of a celebrity trial, high-priced tax lawyers took out their BlackBerries, Droids, and iPhones to text and e-mail the details of the revised plan back to their home offices. In the period leading to that event, taxpayers, advisors, and the tax bar as a whole publicly contributed their views in both formal and informal ways to the IRS's new program.[22] The public engaged in an elaborate give-and-take with the IRS and discussed IRS positions with high- and mid-level IRS employees at bar conferences, in the tax press, and in the hallways of the IRS itself. Although some were disappointed and others pleased with the ultimate guidance issued by the IRS,[23] the finalized plan to require disclosure of corporations' uncertain tax positions was nonetheless part of a process reflective of public participation, open deliberation, and forthright agency explanation.[24]

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traditionally assigned to regulations promulgated under a general grant of authority under section 7805(a) as contrasted with regulations specifically authorized by a particular section within the tax code, *see* Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation* (unpublished manuscript) at http://works.bepress.com/leandra_lederman/1/ [hereinafter Lederman, *The Fight Over "Fighting Regs"*]; Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343 (1991) [hereinafter Asimow, *Public Participation*].

22. For examples of comments submitted to the IRS, *see* Jeremiah Coder, *Commenters Ask IRS to Abandon UTP Reporting Proposal, Change Schedule*, 2010 TNT 106-1 (June 3, 2010) (TAX ANALYSTS); George M. Gerachis & Christine L. Vaughn, *Attorneys Suggest Changes to UTP Reporting Proposal*, 2010 TNT 111-26 (June 1, 2010) (TAX ANALYSTS); Ernst & Young LLP, *Ernst & Young Voices Concerns with UTP Reporting Proposal*, 2010 TNT 111-30 (June 1, 2010) (TAX ANALYSTS);

23. *See, e.g.*, Announcement 2010-9, 2010-7 I.R.B. 408 (explaining that the schedule will increase IRS efficiency); Adam M. Braun, Note, *Open Reserve-ations?: United States v. Textron Inc. and Its Application to International Tax Accounting*, 86 NOTRE DAME L. REV. 823 (2011) (explaining possible global competitive issues stemming from discoverability of UTP); Bruce D. Pingree et al., *Discovery and Privilege Issues Arising For Tax and Benefits Attorneys*, 831 PRACTING L. INST. & ADMIN. PRAC. SERIES LITIG 591, 659 (2010) (detailing concern that UTP disclosure may be considered a waiver of attorney/client and work product privileges). A few commentators have supported the UTP proposal. *See, e.g.*, J. Richard Harvey Jr., *Schedule UTP: Views of a Former Tax Adviser and Administrator*, 128 TAX NOTES 1259 (Sept. 20, 2010) (asserting that Schedule UTP is both necessary and reasonable); Kip Dellinger, *The Sky Is Falling! Comments on the UTP Proposals*, 127 TAX NOTES 1495 (June 28, 2010) (contending that criticisms of the IRS UTP proposals are exaggerated).

24. The tax community noted the give-and-take in the process leading to the adoption of the UTP requirements. *See IRS Releases Final Schedule UTP,*

In both announcing the UTP regime and initially setting the standards and requirements for equitable relief through the two-year rule, the IRS and the Treasury sought comments but did not explicitly use the notice-and-comment procedure generally applicable to federal agencies adopting rules with legal effect.[25] As I discuss below, even for regulatory guidance, the IRS and the Treasury, while generally seeking public input, often take the position that many of their regulations are exempt from the APA notice-and-comment regime.[26] In addition, much of what the IRS issues in the form of guidance is subregulatory — a variety of notices, announcements, rulings, forms, and questions and answers, often referred to in administrative law as informal guidance — published in bulletins or on the IRS website.[27] For that guidance, there are no absolute external requirements to facilitate participation or public involvement, though at times, as with the two-year

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Incorporates Changes, JOURNAL OF ACCT., Sept. 24, 2010, http://www.journalofaccountancy.com/Web/20103378.htm.

25. It is true, however, that in both instances, eventually the IRS sought comments and published proposed regulations in the Federal Register.

26. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1729 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (describing the Treasury Department's assertion of APA exemption). "Treasury acknowledges that APA section 553 governs its various regulatory efforts. Treasury also contends, however, that most Treasury regulations are interpretative in character and thus exempt from the public notice and comment requirements by the APA's own terms." *Id.*

27. The Internal Revenue Code delegates authority for promulgating regulations to the Secretary of the Treasury. I.R.C. § 7805(a). The Treasury formally issues regulations interpreting the Internal Revenue Code, and the Office of Tax Policy within the Treasury is significantly involved in reviewing and drafting Treasury regulations. *See* Treasury Directive 18-02, *Authority to Approve Internal Revenue Regulations* (Sept. 4, 1986). As a practical matter, the Office of Chief Counsel with the IRS often initially drafts most Treasury regulations. Guidance with respect to tax law other than regulations also generally implicates the involvement of both the Treasury and the IRS, with drafting done by the IRS and Treasury approval needed before issuance. *See* Treasury Order 111-01, *Issues of Tax Policy* (Mar. 16, 1981) (giving the Assistant Secretary exclusive authorization to make final determinations of Treasury Department positions with respect to tax policy). Accordingly, for the purposes of this article, I refer to the IRS and the Treasury interchangeably. Guidance from the IRS takes many forms, including some that carry questionable weight. *See* Donald L. Korb, *The Four Rs Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008); [hereinafter Korb, *The Four R's Revisited*] Jeremiah Coder, *News Analysis: How do FAQ Fit into the Guidance Puzzle?*, 131 TAX NOTES 7 (Apr. 4, 2011) (describing frequently asked questions (FAQs) as informal IRS guidance that helps clarify difficult issues and provide instructions in the absence of formal guidance).

rule and Schedule UTP, the IRS often seeks input on the rule that is the subject of informal guidance.[28]

As the UTP regulations have demonstrated, where affected taxpayers, the tax bar, and commentators have sufficient resources and incentive to participate, the IRS may refine its position over time by seeking formal APA-compliant public comment or by utilizing other informal avenues of public participation.[29] Through intensive participation, taxpayers and their advisors working with Schedule UTP in years to come will likely accept the process as largely legitimate, or at least responsive to public input. In contrast, when IRS rules relate to disadvantaged or lower-income taxpayers without the resources of the corporate community, no similar structure exists to encourage meaningful formal or informal participation in rulemaking.[30] Unlike the nation's largest corporate taxpayers, abused,

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28. *See* U.S.C. § 553(b)(A) (exempting "interpretative rules" and "general statements of policy" from the notice and comment requirements unless otherwise required by statute); *cf.* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. (2009) 239, [hereinafter Hickman, *IRB Guidance*] (asserting that contrary to the IRS's position, a large amount of IRS guidance does not fall under the interpretative rule exemption). For further discussion of the IRS APA exemption, see *infra* notes 116–40 and accompanying text. The IRS's position that its regulatory guidance is exempt from the APA's notice-and-comment regime is controversial, and courts will possibly take the cue of important scholarship suggesting that this view is improper (and at a minimum outside the administrative law norm pushing back at tax exceptionalism). *See* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1807–08.

29. For further discussion of the IRS's UTP policy, *see* Ilya A. Lupin, *Uncertain Tax Positions and the New Tax Policy of Disclosure Through the Schedule UTP*, 30 VA. TAX REV. 663 (2011) (examining the consequences and concerns surrounding Schedule UTP). Corporate taxpayers were concerned that the new schedule would increase "compliance costs, unfairly shift [] the balance of power, [] increase possibility of audits . . . and undermine [] the protections allowed by attorney-client privilege." *Id.* at 664–65. The IRS, on the other hand, believed the new schedule would increase transparency, improve compliance, and help identify areas of tax avoidance and evasion. *Id.* at 664.

30. For further scholarship on equitable relief under § 6015(f), see Carlton M. Smith, *Innocent Spouse: Let's Bury That "Inequitable" Revenue Procedure*, 131 TAX NOTES 1165 (June 13, 2011); Schumacher, *Time for Reform*, *supra* note 15; Joseph R. Goeke, *Tax Court Stands by Its Holding in Lantz that Equitable Innocent Spouse Relief Reg is Invalid*, 2010 TNT 184-11 (Sept. 22, 2010) (TAX ANALYSTS). When the IRS chooses to issue guidance outside the APA's notice-and-comment regime, it also raises questions as to the appropriate deference that courts should give to the IRS approach. This article does not consider that question, a question that scholars and practitioners have extensively discussed. *See* Hickman, *IRB Guidance*, *supra* note 28, at 256–57 (detailing IRS's use of interpretative guidance and differing standards of deference); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1546–72

financially dependent spouses, for example, are not monitoring the IRS's Cumulative Bulletin, draft forms, or web page, or sending proxies to bar conferences. Moreover, little in the way of institutional leverage operates to ensure that the IRS considers these views, even when the IRS asks for input on issues that have great effect on lower-income or disadvantaged taxpayers.

Rulemaking that fails to benefit from the collective wisdom of those whom the agency is regulating can have significant adverse effects.[31] Those decisions may adversely impact individuals resulting in deprivations of property that might not otherwise occur if the IRS had the benefit of greater public input, heighten anxiety regarding unpaid liabilities or claimed credits and refunds in dispute, and even perpetuate the very poverty that the provision in question was meant to ameliorate.[32] The effect is particularized to the individual that is subject to the rules, but also has systemic effects regarding the overall integrity of the tax system and the public's perception of the tax system and government overall.[33] For regulated individuals, rules

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[hereinafter Hickman, *The Need for Mead*] (examining tax understandings of legislative and interpretive rules); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557–58 (1940) (identifying tax regulations in general as interpretative and non-binding on the taxpayer). *But see* Jasper L. Cummings, Jr., *Treasury Violates the APA?*, 117 TAX NOTES 263 (Oct. 15, 2007) (disagreeing with Hickman's logic).

31. This article is not a detailed cataloguing of rules that the IRS has adopted that implicate lower income or disadvantaged taxpayers. Of particular concern are rules that relate to taxpayers who owe a liability but are unable to pay due to financial circumstances. While the IRS has broad powers to collect taxes on agreed upon liabilities, the IRS evaluates ability to pay in light of a taxpayer's reasonable collection potential. Reasonable collection potential involves a consideration of equity in nonexempt assets and a monetized present value of the excess of the taxpayer's income over necessary expenses, as set forth in the Internal Revenue Manual and published on the IRS web page. *See* IRM 5.8.4.3.1, (June 1, 2010) http://www.irs.gov/irm/part5/irm_05-008-004.html#d0e86. Many substantive determinations that the IRS makes in the collection process derive from the concept of reasonable collection potential, such as offers in compromise and installment agreements, and IRS determinations to not take enforced collection action against delinquent taxpayers. *See* Keith Fogg, *Buying Your Clunker Back from the IRS* (working paper on file with author) (discussing the IRS's adoption of certain aspects of collection standards as outside any mechanism for public input and devoid of meaningful explanation as to why or how the IRS decided on certain rules pertaining to administrative collection determinations).

32. NTA 2010 ANN. REP. *supra* note 16, at 3 (explaining that the two-year limitation to section 6015(f) forecloses a class of equitable relief the statute was designed to reach).

33. A rich literature exists on the role that procedural justice plays in the people's acceptance of governmental action. *E.g.*, E. ALLAN LIND & TOM R. TYLER,

not particularly well-suited to the circumstances of the very people that the IRS is regulating can often lead to unfair results, as in Cathy's case. For the aggregate regulated population, rules that fail to take into account interests of classes of taxpayers undermine the very social contract that ties individuals to accepting government conduct.[34]

Provisions regulating low-income or disadvantaged taxpayers, such as the earned income tax credit (EITC),[35] are as important, or even more important, to the lives of those regulated parties as the UTP provisions are to the nation's corporate taxpayers.[36] These provisions can make the difference between poverty and the ability to pay rent and meet levels of basic sustenance for the disadvantaged taxpayer. As many taxpayers do not have the skills or means to challenge IRS actions once rules are set in place, the IRS must take care to adopt the right rules at the outset, rather than hope to refine them through public participation over time. Unlike well-heeled taxpayers and their advisors who have ready access to the IRS in both formal and informal ways, few structural mechanisms exist to ensure that the IRS benefits from the public input of taxpayers or experts who can contribute to the IRS's understanding of the issues that relate to less-connected taxpayers.[37] It is for those issues and those taxpayers[38] that this paper proposes a modest, but I believe important, new paradigm.

THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, (Melvin J. Lerner ed., 1988); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

34. *See* Solum, *Procedural Justice*, *supra* note 33, at 183 (indicating that meaningful participation is a prerequisite for legitimate authority).

35. I.R.C. § 32. The earned income tax credit provides taxpayers who have earned income of less than a certain threshold amount, depending on the number of qualifying children, with a refundable credit which reduces their tax liability and may result in substantial refunds in excess of their tax liability. In 2011, the maximum EITC for a taxpayer with three or more qualifying children is $5,751.

36. For a more detailed analysis of EITC importance, *see* Steve Holt, THE BROOKINGS INSTITUTION, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW, (2006) [hereinafter Holt, THE EITC AT AGE 30] (surveying recent studies addressing the EITC and concluding that, although important work remains to improve its effectiveness, the EITC remains a significant tool for addressing poverty and incentivizing labor). *But see* Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285 (2010) [hereinafter Alstott, *EITC Doesn't Make Work Pay*] (criticizing those who assert the EITC has been effective in reducing poverty, given inadequate measures of poverty and the EITC's limited effect in light of workers who are subject to involuntary work disruption and thus devoid of earned income and potentially unable to claim the EITC).

37. To be sure, professional organizations such as the American Bar Association Section of Taxation (ABA Tax Section) and the American Institute of Certified Public Accountants do provide meaningful input on issues beyond those associated with business taxpayers or wealthier individual taxpayers. The ABA Tax Section has provided meaningful financial and logistical support for tax clinics, and

This article argues that the existing regime for formal and informal public participation in administrative rulemaking has failed low-income and disadvantaged taxpayers, and that greater public participation in the IRS's rulemaking process with respect to issues relating to low-income or disadvantaged taxpayers will improve the quality of administrative rules that regulate such taxpayers.[39] When IRS rulemaking activities touch on large or wealthy taxpayers with the time, resources, and incentive to care, the activities typically generate intense public and interest group attention because huge amounts of money are involved; whether or not the IRS engages in formal notice-and-comment rulemaking or pursues more informal avenues is largely irrelevant in these cases because well-resourced taxpayers will find a way to make their voices heard.[40] While the degree of public

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attorneys wishing to work on issues pertaining to lower-income taxpayers, through a standing committee and financial support for attorneys working at clinics. *See* Keith Fogg, *History of Tax Clinics* (working paper on file with author) (discussing the role of the ABA Tax Section and how it promoted clinics at an early stage and has nurtured their development). The proposals I address relating to tax clinics in Part IV of this article will facilitate additional involvement in organizations such as the ABA Tax Section by allowing clinicians, who are often forced to prioritize time and resources, to meet funding concerns, a common issue facing legal service providers generally. *See* Marian Wang, *Budget Compromise Slashes Funds for Organizations That Help Poor Deal With Predatory Lending, Domestic Violence, Foreclosures*, PROPUBLICA (May 16, 2011), http://www.alternet.org/story/150959/budget_compromise_slashes_funds_for_organizations_that_help_poor_deal_with_predatory_lending,_domestic_violence,_foreclossures/ (discussing how legal service providers are often unable to satisfy demand due to resource shortfalls).

38. I do not mean to suggest that only low-income taxpayers face barriers to meaningful participation with IRS rulemaking. The paradigm I suggest may have applicability to other, less mainstream taxpayers, such as charitable organizations or non-U.S. based entities.

39. At the highest levels of the Obama administration, there is an emphasis on enticing greater participation in agency rulemaking. *See* Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES, May 13, 2010, http:www.nytimes.com/2010/05/16/magazine/16Sunstein-t.html?pagewanted=all [hereinafter Wallace-Wells, Sunstein, *Cass Sunstein*] (examining Sunstein's agency directive to improve public participation in the rulemaking process). "'Hardly anyone would isolate Section 553 of the Administrative Procedure Act' — the law that governs the public notice-and-comment period for most federal rules — 'as the greatest invention of modern government, . . . [b]ut I see it as having potential.'" *Id.*

40. *See*, for example, the process surrounding the IRS's review of its decision to improve oversight of unlicensed tax return preparers generated intense public and interest group involvement, in part due to the large commercial interests associated with the return-preparer industry, a multi-billion- dollar industry. *See* Return Preparer Review Pub. 4832 (Rev. 12-2009). The IRS began a comprehensive review of its strategy regarding return preparers resulting in identification, education, and competency requirements, stemming in part from criticism of high error rates on

participation and agency ex ante consideration of an issue should of course vary depending upon a number of factors (such as impact on the agency and the taxpayers),[41] the limited incentive and lack of resources that lower-income and disadvantaged taxpayers[42] have in ex ante participation warrants a special degree of agency attention to issues that will affect those communities that goes beyond the currently available avenues of public participation in tax rulemaking. Further, ex post challenges to tax regulations in court are unlikely to offer an effective remedy for low-income disadvantaged taxpayers due to the expense of litigation and the inherent procedural impediments to suits challenging revenue collection rules.[43]

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commercially-prepared returns and lack of IRS oversight of return preparers. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-38, TAX ADMINISTRATION: 2007 FILING SEASON CONTINUES TREND OF IMPROVEMENT, BUT OPPORTUNITIES TO REDUCE COSTS AND INCREASE TAX COMPLIANCE SHOULD BE EVALUATED 18 (2007) (noting that the IRS has not collected information on preparers); TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2008-30-147, WHILE DOCUMENTATION WAS NOT AVAILABLE TO FULLY ASSESS THE RETURN PREPARER PROGRAM, IDENTIFICATION AND PROCESSING OF PREPARER PENALTIES CAN BE IMPROVED (2008), http://www.treasury.gov/tigta/auditreports/2008reports/200830147_oa_highlights.pdf (asserting that the IRS has failed to investigate suspected preparer penalties in accordance with IRS guidelines). Announced initially in testimony before the House Ways & Means Oversight Subcommittee, IRS Commissioner Doug Shulman began the first review through fact-finding and input from interested parties, which included "open meetings" with preparers, consumer advocates, and other interested parties. Return Preparer Review Pub. 4832 at 42. The National Taxpayer Advocate was an early and forceful champion of additional oversight, especially in light of the impact that commercial preparers have had on the low-income-taxpayer community. *See* NAT'L TAXPAYER ADVOC.: FY 2002 ANN. REP. to Congress 216-30 (2002); NAT'L TAXPAYER ADVOC: 2003 ANN. REP. to Congress, at 270–301 (2003); NAT'L TAXPAYER ADVOC.: 2004 ANN. REP. to Congress 67–88 (2004).

41. For a more detailed discussion of those factors, *see infra* note 179 and accompanying text.

42. For purposes of this article I do not adopt a strict definition of lower-income or disadvantaged taxpayer. *See generally* I.R.C. § 7526 (defining low-income by reference to 250% of federal poverty guidelines). There is significant controversy regarding appropriate measuring of poverty in the United States. *See* Alstott, *EITC Doesn't Make Work Pay*, *supra* note 36, at 292 (criticizing the current U.S. official poverty methodology as an inadequate measure). As Professor Alstott and others have noted, it is based on an approach from the 1960s that reflected Americans as spending approximately one-third of their income on food, with the poverty standard then calculated based upon food costs times three. While these figures are updated annually for inflation, they do not reflect the overall rise in American standard of living and fail to reflect current needs of families. *Id.*

43. For a thorough discussion of the difficulties and disincentives to challenge Treasury regulations in court, see Hickman, *A Problem of Remedy*, *supra*

The article builds on scholars who have considered the role that proxies can play to help address pluralistic imbalances and considers the possible role that two key institutional actors, the Taxpayer Advocate Service (TAS) and Low Income Taxpayer Clinics (LITCs), can play in the IRS's rulemaking function. In particular, I call for greater formal and informal mechanisms to ensure that the TAS and tax clinics contribute both formally and informally to the IRS's rulemaking process. I propose that TAS have a more robust role in the formation of guidance through a statutorily-created counsel that would have broad authority to participate in the development and promulgation of IRS guidance and specific authority and to submit comments within the notice-and-comment procedure. That role would be backstopped by enhanced TAS reporting obligations to Congress, which would include informing Congress of TAS's role in specific projects and explaining the outcome of the progress on particular provisions. In addition, I call for a legislative change to the statutory provision authorizing federally funded LITCs. Specifically, the statute should define a qualifying clinic activity to include the submission of comments to the IRS relating to issues that are germane to the representation of the clinic's clients who have controversies with the IRS. Not only will a legislative change show congressional recognition of the role of clinics in the rulemaking process, it will further the likelihood that a clinic's submission of comments will contribute to federal funding, especially given the reality that legal service organizations generally and clinic directors and employees have limited resources. Importantly, clinic directors may currently view activities such as commenting on rules as potentially harming their chances of funding given that the time needed to comment carries opportunity costs and may currently be viewed as interfering with the clinic's core representational or educational mission.

This article highlights how, in light of the increasing role that the IRS plays in the lives of individuals with fewer resources, the IRS will increasingly have to go beyond the mechanism of formal APA notice and comment, a mechanism that the IRS has not consistently used, and one which the IRS has claimed does not apply as a legal matter to much of its

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note 5, at 1154–57 (discussing the general lack of knowledge among practitioners of administrative law principles and unique administrative burdens placed on litigants seeking judicial review in refund or deficiency suits). For example, the Anti-Injunction Act forbids any suit seeking an injunction to restrain the assessment or collection of taxes — in effect, it forces litigants to seek redress through refund or deficiency suits. *See* I.R.C. § 7421(a). Similarly, the Declaratory Judgment Act prohibits courts from providing declaratory relief for issues "with respect to Federal taxes." 28 U.S.C. § 2201(a). *But see* Cohen v. United States, 650 F.3d 717, 736 (D.C. Cir. 2011) (allowing a taxpayer's challenge to the IRS's specialized telephone excise tax refund procedure on grounds that the suit did not challenge tax, assessment of tax, or collection of tax).

rulemaking functions at any rate. Part II of this article briefly introduces the context in which the IRS conducts its rulemaking activities. Part III discusses the APA notice-and-comment regime generally, and more specifically focuses on the Treasury and the IRS's rulemaking practices. While other scholars have taken direct aim at the shaky legal pedigree of the IRS's "tax-exceptional" approach to the notice-and-comment regime,[44] commentators generally have overlooked the problems associated with lower-income taxpayers' lack of voice in the rulemaking process. To remedy that shortfall, in Part IV of this article, I call for changes in agency conduct to encourage public participation in formulating rules. Finally, in Part V, I build upon a model proposed by administrative law scholars who have suggested legislative reform to the APA and in agency practice to place greater responsibility on administrative agencies to gather input from regulated parties.[45] I argue that the IRS, when confronted with the need to formulate rules that are likely to impact the lives of disadvantaged or low-income taxpayers, should, to the extent feasible, affirmatively seek out the input of taxpayers, consumer groups, and other experts that would allow the IRS to harness the collective wisdom of its increasingly diverse constituency. I suggest broader agency initiatives in seeking views of those regulated, including the use of social networks, and outreach to nontraditional groups affected by IRS actions. In addition, I argue for a greater willingness of the IRS to put its rules through traditional APA notice-and-comment rulemaking. When its guidance relates to disadvantaged or lower-income taxpayers, however, barriers exist that limit or prevent meaningful involvement, making traditional notice-and-comment rulemaking insufficient. I therefore argue that the IRS should foster a collaborative

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44. To be sure, long-standing and persuasive arguments exist to treat administrative law differently as it applies to the Treasury and the IRS, given the overwhelming importance of revenue collection to the overall functioning of an effective government. *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 531–33 (1994) [hereinafter Caron, *Tax Myopia*] (discussing reasons for differential treatment of tax law as compared to administrative law generally); Hickman, *The Need for Mead*, *supra* note 30, at 1541 (discussing arguments in favor of tax exceptionalism). Considering the increasing attention given to administrative law concepts in the tax realm, however, the burden is likely to fall on proponents of the exceptionalist argument to demonstrate that the Treasury and the IRS should remain excepted from general administrative concepts.

45. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695 (2007) [hereinafter Johnson, *Good Guidance*] (proposing an amendment to the APA in order to incentivize greater public participation in agency rulemaking).

relationship between itself and those whom it regulates,[46] especially those who may be at the margins of society.

II. IRS: MORE THAN REVENUE COLLECTION

This article proceeds with an awareness that the IRS is an agency that is central to the federal government. Revenue collection is the principal goal of the IRS, and policies that impede or dilute the ability to perform that function carry grave risks to society as a whole.[47] The IRS mission statement does not specifically consider the IRS's role as a provider of benefits.[48] In addition to bringing in $2.3 trillion in revenues,[49] the IRS faces many challenges and delivers a wide range of benefits that have little to do with its core function of collecting taxes.[50] Under increasing pressure to deliver a

46. The collaborative approach in rulemaking may also encourage greater cooperation and compliance generally. Scholars have increasingly considered that governments and agencies in particular can promote compliance through a more robust engagement with regulates, rather than relying solely on command and control and sanction-based policies. *See* Valerie Braithwaite, *Responsive Regulation and Taxation: Introduction*, 29 LAW & POL'Y 3, 4 (2007) (responsive regulation sets forth a regulatory pyramid with a "series of options that a tax authority might use to win compliance, sequenced from the least intrusive at the bottom to the most intrusive at the top."); IAN AYERS & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992) (defining responsive regulation as an idea that regulators must respond to the conduct they seek to regulate); Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL'Y REV, 85, 111 (2009) (considering responsive regulation with respect to its potential benefits for IRS tax compliance).

47. *See* Michael Lewis, *Beware of Greeks Bearing Bonds*, VANITY FAIR, Oct. 1. 2010, http://www.vanityfair.com/business/features/2010/10/greeks-bearing-bonds-201010 (discussing the Greek financial crisis and the role of taxes, tax compliance norms, and the civic crisis). The lack of a tax compliance norm in Greece is a major factor in the fiscal and social crisis. One Greek tax collector interviewed by Lewis stated "'It's become a cultural trait,' . . . '[t]he Greek people never learned to pay their taxes. And they never did because no one is punished. *No one has ever been* punished. It's a cavalier offense — like a gentleman not opening a door for a lady.'" *Id.* Lewis further explained that not only would enforcing tax compliance be arbitrary due to the overwhelming number of people who don't file, but the average tax case takes about fifteen years to resolve in Greek courts. *Id.*

48. The IRS's mission is to"[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all." *See* IRM 1.2.10.1.1 (Dec. 18, 1993), http://www.irs.gov/irm/part1/irm_01-002-010.html.

49. Revenue collected during the 2010 fiscal year. IRS Data Book, 2010 1 (2010).

50. For an outstanding overview of the challenges facing tax administration, *see* former IRS Commissioner Lawrence B. Gibbs, *2008 Erwin L. Griswold Lecture*

myriad of social benefits,[51] respond to late-changing legislation,[52] and shrink the tax gap,[53] the IRS like other federal agencies suffers from many of the same tensions endemic in administrative law generally — balancing efficiency on one hand with participation, transparency and accountability on the other.[54]

Despite these and other pressures on the IRS, Congress has increasingly called on the agency to have key roles in non-revenue raising functions associated with home ownership, health care, education, work incentives, and reducing poverty.[55] In addition, Congress has instituted more

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Before the American College of Tax Counsel: Constancy and Change in Our Federal Tax System, 61 TAX LAW. 673 (2008) (predicting the challenges to include operating a technologically outdated filing system, increasing non-compliance, obtaining sufficient appropriations to cover operating costs, and potential conflicts between the IRS's need for tax information and taxpayers' rights, among others).

51. The explosion of the use of refundable credits is generating greater academic and policy attention. *See* NTA 2010 ANN. REP. VOL. 2, *supra* note 16, at 103 (identifying legal complexity as "a most serious problem of tax administration, particularly with respect to social benefits delivered through the tax law"). "Social benefit programs in particular and tax complexity in general arise in large part from tax expenditures, or government spending structured through the revenue system." *Id.* at 104. *See also* LILY BATCHELDER & ERIC TODER, GOVERNMENT SPENDING UNDERCOVER: SPENDING PROGRAMS ADMINISTERED BY THE IRS, CENTER FOR AMERICAN PROGRESS 2 (2010), http://www.urban.org/UploadPDF/1001365_undercover_spending.pdf [hereinafter Batchelder & Toder, GOVERNMENT SPENDING UNDERCOVER] (attributing the relative lack of attention to these programs to their absence from the annual appropriation process and their surface similarity to tax cuts in that they are often accomplished through rebates that reduce tax liabilities); Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006) (arguing from an efficiency perspective that the use of refundable credits is often preferable to other forms of tax expenditures).

52. The estate tax expired in 2009 and was reinstated late in 2010, allowing estates, including those of several billionaires, to go untaxed. *See* Paul Sullivan, *Estate Tax Will Return Next Year, but Few Will Pay It*, N Y. TIMES, Dec. 17, 2010, http://www.nytimes.com/2010/12/18/your-money/taxes/18wealth.html. The reinstatement put pressure on the IRS and executors to implement late-developing statutory changes.

53. *See* Hearing on *"Bridging the Tax Gap" Before the Comm. on Finance U.S. S.*, 108th Cong. (2004) (statement of Nicholas P. Codic, Commissioner for Patents).

54. *See* Kristin E. Hickman, *The Promise and the Reality of U.S. Tax Administration*, 8–9 Minnesota Legal Studies Research Paper No. 10-60, 2010, http://ssrn.com/abstract=1657060.

55. In light of the charging IRS responsibility, the NTA proposes the IRS mission statement to reflect the IRS's role as both revenue collector and social

formalized procedural protections relating to taxpayers who unquestionably owe a fixed liability to the IRS but who are either unable or unwilling to pay those liabilities.[56] Those procedural protections, as a general rule, require the IRS to consider the individual circumstances of each taxpayer and create and apply rules and standards to allow certain individuals to enjoy relief from the IRS's unique powers as a creditor.[57] Increasing the responsibilities of the IRS relative to non-revenue raising functions, such as administering the earned income tax credit and determining whether individual circumstances warrant relief from liability or alternatives to enforced collection, at a minimum complicates the IRS's job. Some say it dilutes the IRS's mission and jeopardizes the health of the revenue collection system overall.[58] Given the

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benefit provider. *See* NAT'L TAXPAYER ADVOC., 2010 ANN. REP. TO CONGRESS VOL. 1, 21 [hereinafter NTA 2010 ANN. REP. VOL. 1].

56. Under the Restructuring and Reform Act of 1998, Congress made significant changes to collection methods for those unable to pay their tax liability. *See* S. REP. No. 105-174, at 67–94 (1998) (establishing new formal procedures for ensuring taxpayer due process in IRS collection actions, including the ability to raise collection alternatives — posting of bond, substitution of other assets, installment agreements, or offers in compromise); 144 CONG. REC. S7717-04, S7719 (prohibiting the IRS from rejecting a taxpayer's offer in compromise based upon doubt as to taxpayer liability).

57. IRS procedural protections create a tension between discretion and efficiency. One example is the IRS automated lien filing practice, which is based on a threshold amount of unpaid liability, rather than on a case-by-case basis. Although this may be efficient, critics have asserted that the corresponding financial harm created by the process is significantly more harmful to taxpayers, and, in many instances, results in the IRS being unable to collect at all. *See* Michael Beller, *Taxpayer Advocate Report Highlights Need for Lien Reform*, 2011 TNT 126-5 (June 30, 2011) (TAX ANALYSTS). Professor Keith Fogg argues that the greater push for efficiency and cost-cutting in the filing of low dollar liens has removed avenues for low-income taxpayers' unique circumstances to be heard and has led to the IRS wasting resources in filing liens that are unlikely to yield sufficient funds to recoup the costs of the lien filing, much less recover the amount of tax owed. T. Keith Fogg, *Systemic Problems with Low-Dollar Lien Filing*, 133 TAX NOTES 88 (Oct. 2, 2011). Professor Fogg proposes that the IRS should base its lien filing regime on factors such as real estate equity and taxpayer cooperation, rather than automatic minimum thresholds in amount of tax owed, in order to reduce the administrative burden on the IRS and increase the amount of delinquent taxes collected. *Id.*

58. *See* NTA 2010 ANN. REP. VOL. 1, *supra* note 56, at 15 (calling for a broadening of the IRS's mission to include its roles as both revenue collection agent and benefit administrator). *But see* Jeremiah Coder, *News Analysis: The New IRS: Expanding the Mission?*, 128 TAX NOTES 575, (Aug. 9, 2010) (quoting former Commissioner Mortimer Caplin's comment that expanding the mission statement of the IRS beyond its tax collecting role "goes overboard"). Caplin contends that Olsen's call for a new mission statement, although reflective of the IRS's current

monumental tasks the IRS has before it, there should be little surprise that the agency itself, as with many other agencies, often emphasizes efficiency at the expense of participation and genuine accountability in the way it conducts its core rulemaking and adjudicatory functions.[59]

While there has been significant academic interest with respect to the effect of the IRS's efforts at increasing tax efficiency when it makes individual determinations[60] and the lack of compliance with the APA's notice-and-comment regime,[61] there has been little attention given to the impact of agency procedure on lower-income individuals.[62] This article is an invitation for policy makers and scholars to consider the importance of participatory values and democratic responsiveness in the context of IRS

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role, pushes the IRS in unrelated directions. *Id.* He states, "I'm a critic of new chores continuously imposed on the IRS to police social and economic policies." *Id.*

59. *See* Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1158 (2004) [hereinafter Book, *The Collection Due Process*] (describing the tension between IRS efficiency and collection due process rules). Congress and the courts too have emphasized at various times expediency as a rationale for providing extraordinary powers to the IRS. *See, e.g.*, Bull v. United States, 295 U.S. 247, 259 (1935) (stressing the importance of prompt and certain tax collection); Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37 (1974) (identifying protection of the government's ability to collect taxes in a quick and unimpeded manner as an objective of the Anti-Injunction Act). That emphasis on efficiency, flexibility, and agency discretion is largely attributable to a traditional legislative judicial reluctance to interpose procedural impediments on ensuring the free flow of revenues in the government coffers. *See* Nina E. Olson, *2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 TAX LAW. 227 (2010).

60. *See* Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 275 (2009) [hereinafter Camp, *Theory and Practice*] (describing the TAS as providing a "mechanism to pull taxpayers out of the automatic processing regime" used to increase efficiency and centralize return processing); *See also* Shu-Yi Oei, *Getting More by Asking Less: The Role of Stakeholder Dynamics in Reforming Tax Law's Offer-in-Compromise Procedure*, 160 U. PENN. L. REV. (forthcoming 2012).

61. *See* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1732-40.

62. In addition, there has been some scrutiny around whether the IRS is the best agency to administer the provision. *See* Batchelder & Toder, GOVERNMENT SPENDING UNDERCOVER, *supra* note 51 (calling for systematic review of IRS spending programs); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1001–02, 1023 (2004) (describing the benefits and the drawback of IRS administration of the EITC program as opposed to a more specialized agency). Weisbach and Nussim conclude that integration of the EITC within the tax system makes more sense than the integration of the food stamp program (FSP) into the tax system due to the degree of responsiveness needed to implement the FSP. *Id.* at 1024.

rulemaking. Those themes are often considered when scholars examine the legitimacy and efficacy of agencies other than the IRS.[63] Those scholars have noted that the process by which agencies make rules in and of itself, as with the legislative process, can shortchange parties without resources or voice to participate. When agencies have responsibility for provisions that touch those who are poor and marginalized, merely opening up the guidance process, a significant step in and of itself, is likely to be insufficient to generate input and help maintain agency legitimacy in a democratic government.[64] Before turning to the challenges agencies face when promulgating rules that relate to low-income individuals, the following section examines agency rulemaking in general and IRS rulemaking within that broad context.

III. ORGANIZATION OF APA CONCEPTS AND IRS RULEMAKING

Administrative agencies perform two basic functions: adjudication and rulemaking.[65] The APA[66] does not clearly distinguish rulemaking and adjudication, though it does define the agency functions in terms of rules and orders, and those two categories are intended to have "distinct procedural consequences."[67] A "rule," under the APA definition, is an "agency statement

63. *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH L. REV. 1343, 1343 (2011) [hereinafter Mendelson, *Rulemaking*] (explaining how public proposal and public comments incorporated into the rulemaking process increase legitimacy of agency decisions).

64. *See id.* at 1346 (discussing large amounts of comments received through the e-rulemaking process and asserting that agencies too often discount those from lay people); Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 511–12 (1968-1969) [hereinafter Bonfield, *Representation for the Poor*] (explaining that economically underprivileged persons who are effected by federal rulemaking often lack the means to assert their interest regardless of opportunity to do so).

65. Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts — Except When They're Not*, 59 ADMIN. L. REV. 79, 83–84 (2007) (describing the development of agency functions).

66. Administrative Procedure Act, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

67. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park*'s Requirement of Judicial Review "On the Record,"* 10 ADMIN. L.J. AM. U. 179, 184 (1996) ("The APA's differentiation between adjudicative and legislative [rulemaking] action has proved intelligible only by means of reading common sense and constitutional tradition into the statute."). In essence, the rulemaking role that administrative agencies play is similar to that played by legislative bodies: They promulgate rules, procedures, and standards applicable to both themselves and to

of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[68] An "order," for the purposes of the APA, is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing."[69] Under this definition, adjudication refers to an action that results in a final determination of a matter related to a specific person, while rulemaking is a process for "formulating, amending, or repealing a rule," resembling more of a statute in that it applies to a category of regulatees generally.[70]

The focus on procedure leading to the formation of rules necessarily takes us to a review of general administrative law principles as applied to agency rulemaking. In addition to being descriptive, this section has a normative approach. Given the importance of money and power, many scholars considering the relationship between regulated parties and government agencies have noted the potential problems when regulated parties are excluded from or have little opportunity to participate in the formation of rules that are meant to protect or benefit those parties.[71] Rules that are designed to encourage participation in the modern administrative state do not work as well or evenly when the agency is responsible for parties that have few resources, or when bigger, more powerful entities crowd the process and capture agency rulemaking in a variety of ways. In offering a general description and normative approach critical of existing participatory measures in the APA, this section is a prelude to prescriptive measures that can help address the problems it identifies.

A. Agency Rulemaking

Recently, courts and academics in particular have focused on the relationship of the IRS's rulemaking powers to the APA. While administrative tax law issues largely escaped scrutiny for much of the first five decades following the APA's enactment, scholars and judges alike are now calling for the tax bar's increased awareness of administrative law

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those they regulate. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 483–87 (2000).

68. 5 U.S.C. § 551(4).

69. 5 U.S.C. § 551(6).

70. MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRAC. & PROC. ¶ 3.02[1] (2010).

71. *See* Bonfield, *Representation for the Poor*, *supra* note 64, at 511 (describing that lower income individuals are inadequately represented in the rulemaking process compared to their middle class and wealthy counterparts).

principles.[72] The APA is a foundational statute and the result of legislative and scholarly debates about the increasingly important role of agencies in the post-New Deal world, where power flowed to Washington and unelected bureaucrats were increasingly responsible for the welfare of the citizens through administering legislation that touched all aspects of Americans' lives.[73]

Administrative law scholars have long considered how the American administrative state is legitimate in our overall democratic system of government.[74] Not mentioned in the Constitution, agencies today make crucial policy choices and wrestle with crucial policy questions at which statutes either merely hint or delegate completely to agency action.[75] One leading scholar, Professor Nina Mendelson, identifies agency legitimacy as a function of accountability and democratic responsiveness.[76] Accountability relates to the degree and extent that the agency is obligated to disclose and justify its actions, as well as the opportunity for judicial review of agency actions to ensure that the agency does not act in an arbitrary way.[77] Democratic responsiveness relates to the extent that the agency action "reflects and expresses the popular will."[78] In the absence of sufficient

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72. *See* Amy S. Elliott, *Chenery Principle Could Help Resolve Circuit Split in Review of Tax Regs, Mayo Case*, 2010 TNT, 216-11 (Nov. 9, 2010) (TAX ANALYSTS) (citing Tax Court Judge Mark V. Holmes's call for application of the *Chenery* principle to determine the validity of agency action). *See also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381 (1985) [hereinafter Asimow, *Nonlegislative Rulemaking*] (exemplifying early criticism of IRS rulemaking as contrary to the APA and lacking public input).

73. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (describing debates surrounding the enactment of the APA). The APA was the embodiment of a constraint on the liberal New Deal agencies and represented a compromise between individual rights and agency flexibility. *Id.* at 1558. "The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning." *Id.* at 1559.

74. *See* Mendelson, *Rulemaking*, *supra* note 63, at 1344 (describing actions, such as public participation, which legitimate agency rulemaking).

75. *Id.* at 1347 (describing the broadening of agency power from "expertise" to now more judgment-based decisions).

76. *Id.* at 1350 (stating that a government action may be seen as democratically responsive to the extent it expresses the popular will).

77. *Id.* at 1348–49 (discussing ways in which agencies can be held accountable for their decisions). Mendelson also points that, although agency heads are not elected by the people, the public can still hold agencies accountable by ensuring that those elected officials who are charged with overseeing agency actions do so in a manner that adequately controls them. *Id.* at 1349.

78. *Id.* at 1350 (describing when a government action may be democratically responsive).

statutory guidance, agency action can be seen as responsively democratic to the extent that it has sufficient presidential or congressional oversight. Given institutional limitations associated with either form of oversight,[79] agencies' actions rest more securely in a democracy when they take into account the interests of individuals, or facilitate reasoned and informed debate and discussion, as part of the agency process whereby the agency formulates rules or promulgates guidance.[80]

Questions about the legitimacy of IRS actions in the democratic state have not traditionally been the subject of scholars considering the place that the IRS has within the broader administrative law landscape. This may reflect a longstanding awareness that even in a society as distrustful of taxes as our own — after all, our country is founded on a bedrock of concerns about state taxing powers[81] — the tax collector needs broad powers to assess and collect taxes to ensure that the state coffers are full. All three branches of

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79. Mendelson, *Rulemaking*, *supra* note 63, at 1352–55 (describing presidential and congressional short comings). Due to the presidential electoral process's focus on swing states, it may be difficult for the president to parallel policy choices to the national preferences, and presidential influence over agency action may not be consistent. *Id.* at 1353–54. Congress, on the other hand, may have more effective means at controlling agencies through the power of the purse, but it is still subject to local interests and may in turn have a limited sense of the popular concern. *Id.* at 1354–55.

80. Civic republicanism is a theory that "simultaneously seeks to foster individual freedom from government-imposed values and freedom collectively to define the value of the relevant political community." *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992) [hereinafter Seidenfeld, *Republican Justification*]. Accordingly, government is only legitimate if it acts to further the common good, a concept defined as what is best for the community as determined by the community. *Id.* Therefore, when an agency engages in notice and comment rulemaking, as well as providing reasoning for its decisions, it legitimizes agency action. *See* Mendelson, *Rulemaking*, *supra* note 63, at 1350 citing Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683 (1975) [hereinafter Stewart, *Reformation*]. Pluralist theories of democracy, on the other hand, assert that a government decision is legitimate to the extent that it "hears from and considers — even reconciles — a wide variety of interests." *Id.* at 1350. Therefore, if relevant interests are represented in agency decisions, such as through public opportunity to comment, it is operating in an effectively pluralist manner. Pluralistic theories consider public interest "as an aggregation of preferences of stakeholder groups," whereas civic republicans define public interest as a "result of a democratic dialogue in which citizens fully disclose their interests and are open to hearing others' reasons. . . ." *Id.* at 1350–51.

81. *See* Marjorie Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-tax Rhetoric in America*, 50 BUFF. L. REV. 819, 824 (2002) (recognizing that anti-tax sentiments are intrinsic in American patriotism since the country's inception).

the federal government have evinced a wariness of imposing constraints on the tax collector[82] and have afforded extraordinary discretion to the IRS to allow it to bring in needed revenues. In more recent times, academics have lamented at how the IRS, and to some extent, the tax bar, tend to view the IRS as exceptional, entitled to greater powers and deference than other Executive Branch agencies. Scholars[83] and courts[84] are poking holes at the need for continued slavish devotion to tax exceptionalism.

While American society and jurisprudence have broadly trended toward a greater expectation of procedural regularity in all agency rulemaking activities,[85] I believe the current encroachment on tax exceptionalism specifically stems from the changing role of the Internal Revenue Code itself. The modern Tax Code is implicated in an alphabet soup

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82. *See* Cheatham v. United States, 92 U.S. 85, 88-89 (1875) (asserting "All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them"); Book, *The Collection Due Process*, *supra* note 59, at 1148 (explaining that prior to CDP provisions, the IRS had broad powers to collect taxes without judicial review which many observed as powerful and dangerous).

83. *See* Caron, *Tax Myopia*, *supra* note 44, at 554 (stating that tax law operates largely outside of the insight learned in other administrative law areas); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 3 (2004) [hereinafter Camp, *Inquisitorial*] (recognizing that the tax code has generally not adopted ideas from other areas of law such as civil procedure); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996) (asserting that tax law tends to operate separate from other areas of law, depriving it from "cross-fertilization"); Danshera Cords, *How Much Process is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004) (describing the limitations RRA 1998 (specifically CDP provisions) placed on the historically broad powers given to the IRS). *See* Hickman, *Coloring Outside the Lines, supra* note 26, at 1732–40 (2007) (describing Treasury's departure from APA rulemaking requirements, resulting in lack of notice and comment opportunity).

84. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011) (refuting tax exceptionalism with regards to interpretive deference). "Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action.... The principles underlying our decision in Chevron apply with full force in the tax context." *Id.* at 713 (internal cites omitted). *See also* Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011).

85. LAWRENCE FRIEDMAN, TOTAL JUSTICE, 80–90 (1985) (describing the increased demands on the legal system to provide for fair procedure as the due process revolution).

of credits and provisions that address topics and behavior far from revenue collection.[86] Accordingly, the justification for exceptional treatment of the IRS as lying outside administrative law norms becomes less compelling as the Code takes on other roles beyond pure revenue collection.[87] Through the Code, Congress has tasked the IRS with administering these benefit-delivering provisions; Congress itself, however, has noted on some occasions that the traditional tolerance of absolute or near-absolute IRS discretion, having its origins in the pressing need for unfettered access to revenues, is not a foregone conclusion just because the IRS is involved in the administration of a statute.[88] Similarly, recent commentary has explored the

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86. Recent Congressional testimony on the distribution of tax burdens has emphasized the growing use of the tax code to deliver social benefits *See, e.g.*, Scott A. Hodge, President, Tax Foundation, Is the Distribution of Tax Burdens and Tax Benefits Equitable?, Hearing Before the U.S. Senate Committee on Finance, May 3, 2011,
http://finance.senate.gov/imo/media/doc/Testimony%20of%20Scott%20Hodge.pdf .

87. To be sure, the Code has for a long time played a key role in providing incentives through deductions, credits and exclusions that are removed from the exercise of determining the proper base of income in an income tax. Yet, Congress's penchant for tax credits, and refundable credits in particular, has had a significant complicating impact on the IRS's job of administering the tax system. *See* NTA 2010 ANN. REP. VOL. 1, *supra* note 55, at 15.

88. Moreover, even when it comes to tax collection, Congress has expressed its desire to ensure that the IRS and courts consider the individual interests and minimize the potential for error and harm. Perhaps most famously this Congressional desire appears in the IRS Restructuring Act of 1998 and, in particular, the collection due process within that legislation. *See* I.R.C. § 6330(c)(3)(C) (The basis for determination of levies will depend in part on "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."). The importance of individual rights is expressed in other areas where Congress gave taxpayers increasing rights to hearings and explanation before the IRS could take actions that it previously could do without worry of running afoul of statutory rights: *See* 26 U.S.C. § 6159(b)(5)

> The Secretary may not take any action under paragraph (2), (3), 04 (4) unless – (A) a notice of such action is provided to the taxpayer not later than the day 30 days before the date of such action, and (B) such notice includes an explanation why the Secretary intends to take such action. I.R.C. § 6159(b)(5).

See also I.R.C. § 7122(d)(3)(A) (providing that "an officer or employee of the Internal Revenue Service shall not reject an offer-in-compromise from a low-income taxpayer solely on the basis of the amount of the offer."). It has also charged the IRS to relieve taxpayers from liability to the extent that collection violates fairly undefined notions of fairness. *See* I.R.C. § 6015(f) (directing the court to take into consideration all the facts and circumstances, to determine whether it is inequitable

applicability of the due process clause to the delivery of welfare benefits via the Earned Income Tax Credit.[89] Given the growing use of the tax code to deliver benefits and increasing Congressional recognition that interests other than the government's warrant statutory protection, it is not surprising that there is a change and less acceptance of the IRS as meriting a blanket exception to rules that apply to other agencies. While the IRS still enjoys great powers, and while there is still resistance to even formally acknowledging its crucial non-revenue collecting mission, scholars and courts are reexamining means to ensure accountability.

B. Notice and Comment Rulemaking Versus Informal Rulemaking in Administrative Law Generally

Agencies issue guidance that can broadly be classified into one of three categories of "rules": legislative rules, non-legislative rules, and procedural rules.[90] Legislative rules carry the force of law and must comport with APA notice and comment requirements.[91] Non-legislative rules need not comport with APA requirements and merely clarify or define statutory language, a previous administrative rule, or a judicial or agency adjudicative decision.[92] Procedural rules govern internal agency policies, procedures for seeking agency adjudication, and procedures for the submission of comments on proposed regulations; while the APA explicitly mentions procedural rules

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to hold the individual liable for any unpaid tax or deficiency); I.R.C. § 7122 (allowing offers on a third ground: effective tax administration).

89. *See* Megan Newman, *The Low-Income Tax Gap: The Hybrid Nature of the Earned Income Tax Credit Leads to its Exclusion from Due Process Protection*, 64 TAX LAW. 719 (2011). I have previously analyzed the relationship of constitutional procedural due process principles to issues of tax collection. *See generally*, Book, *The Collection Due Process, supra* note 59.

90. This is not to say that formal rulemaking is the only way regulations are promulgated. Section 553 of the Administrative Procedure Act applies only to agency rulemaking, but agencies may also promulgate rules through adjudication. *See* Leslie Book, *A Response to Professor Camp: The Importance of Oversight*, 84 IND. L.J. SUPP. 63 (2009).

91. *See* 5 U.S.C. § 553(b); Hickman, *The Need for Mead, supra* note 30, at 1543 n.23 ("The APA itself does not use the legislative term to describe rules subject to the notice and comment requirements. However, explanations of APA provisions in both pre- and post-APA literature and jurisprudence use the term in distinguishing such rules from interpretive rules.").

92. *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985) (discussing various types of non-legislative agency rulemaking activities).

as exempt from notice and comment, courts remain divided on exactly what a procedural rule is.[93]

1. Legislative Rules and APA Notice and Comment Requirements

Put simply, legislative rules are those that bind the public in some substantive and meaningful way. In *American Mining Congress v. Mine Safety and Health Administration*,[94] the D.C. Circuit announced the most widely used[95] test for determining whether a rule is legislative, asking (1) whether there would be an adequate legislative basis for enforcement action or the conferral of benefits without the agency rule at issue; (2) whether the agency published the rule in the Code of Federal Regulations;[96] (3) whether the agency explicitly invoked its general legislative authority; or (4) whether the rule effectively amends a prior legislative rule.[97] If any single factor exists, the rule is legislative.[98] APA formal procedural protections are only triggered if legislation calls for rules "to be made on the record after opportunity for agency hearing."[99] If the rule is legislative but not required to be made on the record under section 553 of the APA, when promulgating rules an agency must do three things: publish a written notice of proposed rulemaking, offer parties a chance to comment and participate through the submission of written data, views, or arguments, and publish a statement of basis and purpose when promulgating final rules.[100] Taken together, these

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93. *See* 5 U.S.C. § 553(c); *see also, e.g.*, Philips Petroleum Co. v. Johnson, 22 F.3d 616, 620–21 (5th Cir. 1994), *Modified*, 36 F.3d 89 (5th Cir. 1994) (addressing "substantial impact" of rule on regulated parties, focusing on burden imposed by rule rather than rule's language or appearance); JEM Broad. Co., Inc. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994) (considering whether regulation at issue encodes "substantive value judgment" or merely "alter[s] the manner in which the parties present themselves or their viewpoints to the agency." (internal quotations omitted)).

94. 995 F.2d 1106 (D.C. Cir. 1993).

95. As of 2010, six circuits have adopted the *American Mining Congress* test. *See* RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 454 (5th ed. 2010).

96. The D.C. Circuit has since deemphasized this second factor, calling it only "a snippet of evidence of agency intent," and in the same case rejecting an argument that the contested regulation was legislative in nature solely by virtue of its publication in the CFR. *See* Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994).

97. *American Mining Congress*, 995 F.2d at 1112. The Ninth Circuit would also ask whether a rule binds tribunals outside of the agency issuing the rule. *See* Erringer v. Thompson, 371 F.3d 625, 631 (9th Cir. 2004).

98. 995 F.2d at 1112.

99. The Administrative Procedure Act, 5 U.S.C. § 553(c).

100. 5 U.S.C. § 553 (b)-(d).

requirements are referred to as the notice and comment rules. [101] The notice and comment regime reflects the quasi-legislative role that agencies play and attempts to inject democratic responsiveness and accountability in actions that unelected agency officials take when promulgating general rules. A foundational aspect of rulemaking under the APA is that agency guidance having the force of law must be subject to notice and comment rulemaking. This right of public participation reflects a delicate legislative balance whereby in the modern state agencies with expertise promulgate rules of general application but ensure input that contributes to collective wisdom and enhances legitimacy of state actions.[102]

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101. There were two main trends in last few decades as relates to informal rulemaking. First, in response to courts of appeals imposing additional requirements on agencies attempting to engage in informal rulemaking, in the famous case of Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978), the Supreme Court held that it was up to Congress, not the courts, to inject additional procedural requirements on agencies engaging in informal rulemaking. Second, in response to *Vermont Yankee*, courts, Congress and the executive branch have imposed obligations on agencies that have made the notice and comment regime of informal rulemaking increasingly burdensome. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 283 (2010) [hereinafter Franklin, *Nonlegislative Rules*].

102. *See* Wallace-Wells, *Cass Sunstein*, *supra* note 39 (examining Sunstein's agency directive to improve public participation in the rulemaking process). "Hardly anyone would isolate Section 553 of the Administrative Procedure Act . . . as the greatest invention of modern government . . . But I see it as having potential." *Id. See also* ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING at §§ 5.2.1, 5.2.2 & 5.2.3, at 144-50 (1986) (describing the benefits of rulemaking as promoting rules that are "lawful," "technically sound," and "politically responsible"); CARY COGLIANESE, HEATHER KILMARTIN & EVAN MENDELSON, TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS 2–5 (July 2008) www.law.upenn.edu/academics/instiutes/regulation/transparencyReport.pdf (arguing that an "optimal" level of public participation can improve "legitimacy" and result in "more informed policy decisions").

2. *Non-Legislative Rules: Interpretive Rules and Procedural Rules*

A second type of rulemaking exists outside the APA notice and comment regime in the form of non-legislative rules.[103] Section 553 of the APA states that except when notice or hearing is required by statute, general notice of proposed rulemaking is not required for "rules of agency organization, procedure, or practice"; interpretative rules and general statements of policy; and rules as to which the agency has good cause to conclude that notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[104] Although the APA expressly exempts these guidance documents or "non-legislative rules" from notice and comment, it does not define that category. The "working definitions" set forth in the 1947 Attorney General's Manual on the Administrative Procedure Act say that legislative rules (the manual calls them "substantive

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103. *See* Franklin, *Nonlegislative Rules supra* note 101, at 282 (noting that 'informal rulemaking" is also referred to as "section 553 rulemaking" or "notice and comment rulemaking").

104. 5 U.S.C. § (b)(3)(A)-(B). An agency may circumvent the APA's notice and comment requirement by asserting the "good cause" exception, which waives notice and comment where the process would be "impracticable, unnecessary, or contrary to the public interest." Essentially an emergency procedure intended to allow immediate rulemaking where delay would do harm, an agency must meet a high burden in order to successfully assert the good cause exception. Treasury's invocations of the good cause exception, however, typically occur in non-emergency circumstances, and it often fails to provide sufficient justification explaining why it is necessary to issue immediate guidance. *See, e.g.*, T.D. 9158, 2004-2 CB 665 (asserting good cause where regulations provided guidance on treatment of certain contingent liabilities in acquisition of nuclear power assets where Treasury had previously issued private letter rulings on issue in prior years); T.D. 9089, 2003-2 CB 906 (invoking good cause for regulations elaborating on consequences of Supreme Court decision two years prior). Treasury has also relied on the good cause exception on at least one occasion to combat abusive tax shelters, though its ability under Code section 7805(b) to retroactively apply final regulations may reduce the need for the good cause exception in this area. *See, e.g.*, T.D. 9062, 2003-2 CB 46 (addressing ambiguities in Code regarding transfer of certain liabilities along with property into partnership in exchange for interest in partnership, asserting good cause exception by arguing regulations were "necessary to prevent abusive transactions"). *See* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1786 (arguing that good cause exception may not be necessary to combat tax shelters where Treasury may make final regulations retroactive to date of initial NPRM). Recent nontax cases have required a high burden for agencies to meet the good cause exception. *See* United States v. Valverde, 628 F.3d 1159, 1166 (9th Cir. 2010) (rejecting Attorney General's invocation of good cause exception where Attorney General offered merely conclusory statements that delay in issuing regulation would be "contrary to the public interest.").

rules") are "issued by an agency pursuant to statutory authority and . . . implement the statute."[105] Interpretive rules, on the other hand, "advise the public of the agency's construction of the statutes and rules which it administers";[106] and general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[107] In practice, the distinction between interpretive and legislative rules left courts "to struggle with the task of distinguishing legislative from nonlegislative rules."[108] Courts have described the tests that govern these cases as "fuzzy," "tenuous," "blurred," "baffling," and "enshrouded in considerable smog."[109]

Two categories of exempt rules, interpretive rules and general statements of policy, are often labeled "guidance documents" or "on-legislative rules," to distinguish them from legally binding regulations, which are themselves often called "legislative rules."[110] These non-legislative guidance documents greatly outnumber regulations that are promulgated

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105. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 39 (1947).

106. *Id.*

107. *Id.*

108. Franklin, *Nonlegislative Rules*, *supra* note 101, at 286.

109. Professor Franklin and others have also bemoaned the lack of clarity in distinguishing general statements of policy from legislative rules, with courts tending "to examine whether the rule is binding, either on the public or on the agency" . . . which

> has proven difficult for courts to apply. For one thing, the degree to which a rule is binding may be hard to judge in the absence of a well-developed record of enforcement. For another, challenged rules often contain disclaimers renouncing any binding effect. Courts sometimes, however, hold these rules to be legislative nonetheless, depending on other language in the rule or the way in which the agency has invoked the rule in enforcement actions or litigation.

Franklin, *Nonlegislative Rules*, *supra* note 101, at 288 (footnotes omitted). The most common test employed in distinguishing legislative rules from interpretive rules was formulated by the D.C. Circuit in *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993). *See* text at *supra* note 95 page 33. Six circuit courts of appeals have adopted the *American Mining Congress* test, though the Tax Court has only endorsed the test in a single concurring opinion. *See* Intermountain Ins. Serv. of Vail, LLC v. Commissioner, 134 T.C. 211, 226 (2010), (Halpern and Holmes, JJ., concurring) *rev'd.*, Intermountain Ins. Serv. of Vail v. Commissioner, 650 F.3d 691 (D.C. Cir. 2011).

110. Section 553 also exempts from the notice-and-comment process rules involving military and foreign affairs and "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(1)-(2).

through notice and comment.[111] Federal agencies publish guidance that "set forth a policy on statutory, regulatory, or technical issue[s] or an interpretation of a statutory or regulatory issue."[112] In other words, non-legislative rules are usually not binding on the public but they are usually binding on the promulgating agency.[113] They come in a variety of names and forms (manuals, circulars, bulletins, etc.) and even in innovative formats, such as video, audio or web-based software.[114]

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111. *See* Sean Croston, *The Petition is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles Over "Regulation Through Guidelines,"* 63 ADMIN. L. REV. 381, 384 (2011) [hereinafter Croston, *Petition*] (describing the volume of guidance versus legislative rules). *See also* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 787 (2010) (suggesting that while guidance documents overwhelmingly out number legislative rule, agencies have not abused their power to issue it); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 805 (2001) (stating that "publication rules" greatly outnumber those that pass through notice and comment); M. Elizabeth Magill, *Agency Choice of Policymaking Form,* 71 U. CHI. L. REV. 1383, 1411 (2004) (pointing to an increased use of informal guidance documents over time).

112. OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) [hereinafter OMB, Final Bulletin]. The OMB definition is very similar to the APA definition of a rule, "mean[ing] the whole of part of an agency statement of general or particular applicable . . . designed to implement, interpret, or prescribe law or policy . . . of an agency . . . 5 U.S.C. § 551(4). For a discussion of the growing use of guidance outside notice and comments, *see* Croston, *Petition supra* note 111, at 388 (arguing that interested persons should seek the right to petition federal agencies for all forms of guidance).

113. *See* Batterton v. Marshall, 648 F.2d 694, 701–02 (D.C. Cir. 1980).

114. OMB, Final Bulletin *supra* note 112, at 3434. As Sean Croston and others have described, informal guidance can amount to essentially free legal advice for regulated parties who may be confronting a host of technical and complex statutory rules. *See* Croston, *Petition*, *supra* note 111, at 382–83 (asserting that one reason for increased use of informal guidance is to help those regulated comply with regulations). From an agency's perspective, non-legislative guidance allows the agency to reduce administrative burden as contrasted with individual requests for explanation and application to specific circumstances. *See id.* at 382–83 (reasoning that informal guidance upfront decreases the burden of responding to shareholder requests for interpretation after the fact). In addition, informal guidance allows agencies to avoid notice and comment requirements under the APA, thus allowing agencies to issue guidance more quickly than legislative rules and reducing the time that regulated parties and staff are uncertain about how to apply the law to individual circumstances.

C. IRS Rulemaking and Guidance: The Tax-Exceptional Approach?

As contemporary scholarship has recognized, Treasury, the IRS, and the tax bar generally take a "tax-exceptional" approach to administrative law in conducting rulemaking activities, particularly as regards the legislative/interpretive distinction in Treasury regulations.[115] For example, a "legislative" tax regulation (one requiring compliance with APA notice and comment procedures) binds the public and is promulgated pursuant to a specific statutory grant of authority.[116] In contrast, an "interpretive" regulation (one not requiring compliance with APA notice and comment) theoretically does not bind the public[117] and is promulgated pursuant to the general grant of rulemaking authority under Code section 7805.[118] The tax bar essentially concerns itself with where the rulemaking power comes from and avoids a substantive analysis of the regulation's effects, such as *American Mining Congress* would require.[119] Importantly, while the Treasury acknowledges that APA section 553 notice and comment rules govern its regulatory efforts, it contends that most of its regulations are exempt from these procedures either because of their interpretive nature or under the good cause exception.[120] Whether this assertion is correct, and many contend that it is not, Treasury offers little or no explanation behind its assertion.[121] Nonetheless, the Treasury maintains that it generally follows APA rulemaking procedure, usually publishing Notices of Proposed

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115. *See* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1761–62 (describing historical approach of tax bar and Treasury and arguing such approach no longer comports with contemporary standards of administrative law practice).

116. *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE, ¶ 3.02[3][a]–[b], at 3-12 to -14 (rev. ed. 2002) [hereinafter SALTZMAN, IRS PRACTICE].

117. Failure to comply with an "interpretive" Treasury regulation, however, can result in the imposition of penalties. *See* I.R.C. § 6662 and accompanying regulations.

118. *See* John F. Coverdale, *Court Review of Tax Regulations and Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 44 (1995).

119. *See* Intermountain Ins. Serv. of Vail, 134 T.C. at 240–42 (Halpern and Holmes, JJ., concurring) (contrasting legislative/interpretive distinction in tax law and administrative law).

120. *See* Reg. § 601.601(a)(2) (acknowledging that APA rules apply for promulgation of regulations). *But see* Internal Revenue Manual §§ 32.1.3.3 and 32.1.5.4.7.5.1 (asserting that most Treasury regulations are interpretive and therefore not subject to the APA provisions).

121. *See* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1759–89 (analyzing Treasury's asserted APA exceptions and funding them lacking support).

Rulemaking ("NPRM") in the Federal Register and soliciting public comments.[122]

As Professor Asimow pointed out, the two most important consequences of the distinction relate to the scope of judicial review and to the public participation requirements of the APA. Traditionally, courts have given less scrutiny, or greater deference, to legislative rules as contrasted to interpretive rules. The scope of review, and the deference that the agency receives with respect to its promulgated rules, is somewhat less clear with respect to interpretive rules leading some courts to apply heightened deference to interpretive rules as well as legislative rules, and others less so.[123] APA rulemaking provisions more directly turn on the distinction between legislative and interpretive rules, with the APA's public participation requirements triggered (unless an exception applies) for legislative rules.

Tax law has also struggled to distinguish between legislative rules and non-legislative guidance flowing from the IRS. Historically, there were many tax cases applying the legislative versus interpretive distinction in applying the deference given to the IRS's interpretation.[124] The landscape in this area changed radically after the decision in *Mayo Foundation for Medical Research v. United States*, where the Supreme Court clarified that courts are to apply the same *Chevron*-type deference to regulations irrespective as to whether they were promulgated under Treasury's general

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122. *See* IRM § 32.1.2.3. *But see* Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1731 (asserting that "most if not all Treasury Regulations are legislative rather than interpretative"). In her study, Hickman analyses 232 separate Treasury regulatory projects for which Treasury Decisions (TDs) or Notice of Proposed Rulemaking were published in the Federal Register over the course of three years, finding that regardless of Treasury procedures, approximately 40 percent did not follow APA procedures. *Id* at 1748. Hickman explains, that Treasury typically issues legally binding temporary regulations, only collecting public comments after the fact and evaluating them in the final regulation issues sometime later. *Id.* In these instances where TDs were issued simultaneously with a notice of proposed rulemaking, the public typically is not afforded an opportunity to comment. *Id.* at 1757. In some instances, Treasury skipped the notice and comment process altogether. *Id.* at 1749.

123. *See Mayo*, 131 S.Ct. 704, 712-13 (2011) (detailing the differing standards for interpretive agency guidance and ultimately deciding that treasury guidance should be afforded *Chevron* deference).

124. *See* Rowan Companies, Inc. v. United States, 452 U.S. 247, 253 (1981) (stating that the word "wages" as interpreted by the Commissioner under § 7805(a) specific grant of authority, is subject only to inquiry relating to "whether the interpretation or method is within the delegation of authority").

Section 7805(a) authority, or under specific grants of legislative authority within a substantive statute.[125]

While administrative law lawyers might take *Mayo* as a natural progression in light of the changed landscape of administrative law, the historical tax practice of distinguishing interpretive and legislative regulations based upon whether Treasury invoked general rather than specific statutory authority for purposes of calibrating the degree of deference to the agency for judicial review purposes had been entrenched in the tax world for decades.[126] *Mayo* has clarified that for purposes of the scope and intensity of judicial review, the longstanding tax approach that focuses on the source of the regulatory adoption is obsolete. Yet *Mayo* does not directly speak to the other main consequence flowing from the distinction between legislative and interpretive rules, specifically to what extent the APA's participation requirements are triggered in tax matters. *Mayo*'s swipe

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125. 131 S.Ct. 704, at 707 (2011) (asserting that *Rowan* and other cases giving greater deference to specific grants of authority have been outdated by the application of *Chevron* deference to general grants of authority). The *Mayo* Court's dismantling of the tax exceptional approach is consistent with the Court's approach in other cases such as Dickinson v. Zurko, 527 U.S. 150 (1999), where the Supreme Court held that decisions of the Patent and Trademark Office must be reviewed in the same manner as other agency determinations. The Court's rationale largely centered on the need for uniform regulation of administrative agencies. *Id.* at 154 (recognizing "the importance of maintaining a uniform approach to judicial review of administrative action). Section 559 of the APA provides, in part, that the APA does "not limit or repeal additional requirements . . . recognized by law." Before *Zurko* reached the Supreme Court, the Federal Circuit, in an en banc opinion, held that this exception allowed for a separate clearly erroneous standard, as it was the practice under court review of the PTO's predecessor at the time of APA's enactment, it amounted to a stricter standard than ordinary arbitrary and capricious agency review, and thus was an additional requirement under section 559 that trumped the section 706 standard of review. *See* In Re Zurko, 142 F.3d 1447 (1998) *rev'd*, Dickinson v. Zurko, 527 U.S. 150 (1999). Reversing, the Supreme Court held that given the need for uniform regulation of agencies, to trigger the section 559 exception, the practice prior to the APA had to be clear, and in its view that was not the case. *See Zurko*, 527 U.S. at 154.

126. For example, Professor Asimow, writing in 1991, referred to legislative history in 1921, four years after the predecessor to section 7805(a) was adopted, where several members of Congress commented that the 1921 statute was the "first to take the daring step of providing for delegations of rulemaking power to the Treasury in light of the complex character of the statutes under consideration" and how "tax authorities almost uniformly assume that regulations adopted pursuant to . . . Section 7805(a) . . . are interpretive and that rules adopted pursuant to specific grants of rulemaking authority are legislative." *See* Asimow, *Public Participation*, *supra* note 21, at 358. *See also* Lederman, *The Fight over "Fighting Regs," supra* note 21 (tracing law on judicial deference to tax authorities over time).

at tax exceptionalism undercuts the rationale behind the Treasury view that the APA participation requirements are inapplicable to regulations promulgated under section 7805(a). As *Mayo* did not speak to that issue precisely, it remains to be seen how the tax bar's exceptional approach to public participation will fare.

In addition to regulations, Treasury and the IRS issue several important forms of informal guidance (otherwise known as "IRB Guidance") [127] — while these rules technically do not bind the public and are not promulgated with notice and comment, they nonetheless often bind the public in some meaningful way, usually through the imposition of penalties for noncompliance.[128] Revenue Rulings are interpretations made by the IRS and published in the Internal Revenue Bulletin (IRB), which apply tax law to a particular set of facts.[129] They are both intended to inform taxpayers of the likely outcome of their behavior and provide IRS staffers with a format to apply the Treasury position — ensuring uniform application of the tax law.[130] Revenue procedures have a similar objective, setting forth procedure to allow employees to apply the tax law and assist taxpayers, promoting voluntary tax compliance.[131] Revenue procedures are issued principally by the Associate Chief Counsel Offices, are published in the IRB, and cover a wide variety of procedural and administrative matters. When there is a need for quick and immediate guidance to ensure effective tax administration, the IRS often uses notices and announcements as its delivery methods of choice. A notice is published in the IRB and can cover a large array of topics ranging from changes in forms, solicitation of public comments, and to alert the public to proposed rulemaking.[132] Announcements, also published in the IRB, usually contain information of short term value such as effective dates of temporary regulations, modification of form instructions or providing explanations for newly adopted policies or programs.[133] This brief list only scratches the surface of IRS guidance which also includes various types of letter rulings, several forms of legal advice such as technical advice memoranda and Chief

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127. *See* Hickman, *IRB Guidance*, *supra* note 28, at 240 (explaining the term "IRB guidance" is given for the documents published in the Internal Revenue Bulletin and Cumulative bulletin).

128. *See* Reg. § 1.6662-3(b)(2) (allowing for imposition of penalties for failure to comply with revenue rulings and notices); Hickman, *IRB Guidance*, *supra* note 28, at 265 (noting that taxpayers and return preparers can be subject to penalties for failing to comply with facially non-binding IRB guidance).

129. Internal Revenue Manual § 32.2.2.3.1.

130. *See* Korb, *The Four R's Revisited*, *supra* note 27, at 330-31 (describing history and purpose of revenue rulings).

131. *See id.* at 336.

132. *See id.* at 339–340 (listing topics covered by IRS notices).

133. *See id.* at 340–41 (explaining short term guidance is more typically disseminated in the form of announcements).

Counsel notices, and notices of acquiescence.[134] Moreover, as with the Schedule UTP discussed above, much guidance the IRS issues actually takes place in forms, schedules, and instructions, and increasingly in the form of posted questions on the IRS web page.

D. The Impact of Tax Exceptionalism on Public Participation

Regardless of whether Treasury correctly exempts its IRB guidance from the APA's notice and comment regime, the extension of IRS guidance to issues relating to benefits and relief from liability also heightens the risk that administrative law scholars have emphasized regarding the impact of ill-suited agency guidance directed at lower income individuals.[135] As substantive provisions reach issues relating to potentially the difference between poverty[136] or a lifetime of tax debt,[137] leading to possibly devastating impact, the interest in crafting appropriate guidance the first time around becomes a necessity. Moreover, less sophisticated taxpayers may be unwilling or not able to discern the difference between legally binding rules and others, effectively making the policy de facto binding.[138] While the IRS may ask for public input or input from proxies such as the American Bar Association Tax Section when it publishes informal guidance, it is difficult for issues that do not have a natural constituency to generate informal or formal input. The big problem is the absence of possibility of private parties to be heard on proposed policy alternatives.[139]

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134. *See generally* Korb, *The Four R's Revisited*, *supra* note 27, at 330–361 (discussing various forms of IRS informal published guidance).

135. *See* Bonfield, *Representation for the Poor*, *supra* note 64, at 511–12.

136. The most predominant credit used for low-income taxpayers is the Earned Income Tax Credit. *See* Holt, THE EITC AT AGE 30, *supra* note 36 (surveying recent studies addressing EITC issues). For a somewhat different view of the topic, *see also* Leonard Burman, *Jon Stewart's Fake News on Tax Expenditures*, FORBES, May 10, 2011, http://blogs.forbes.com/leonardburman/2011/05/10/jon-stewarts-fake-news-on-tax-expenditures/ (discussing the growing use of tax credits in the IRC as a form of spending).

137. *See* I.R.C. § 6015(f), Relief from Joint and Several Liability on Joint Return.

138. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328 (1992) (describing how interpretative rules have a practical bind effect if private parties are lead to believe that failure to conform will bring adverse consequences).

139. *See id.* at 1329–30 (referring to lack of opportunity to be heard that is evident in non-legislative rules with binding effect).

IV. CRITIQUE OF THE FOUNDATIONAL APA DISTINCTION BETWEEN "LEGISLATIVE" AND "INTERPRETIVE" REGULATIONS APPLIED TO THE IRS

When one surveys the literature and cases on the line between notice and comment rulemaking and informal guidance, I can make two broad conclusions that are directly relevant for the thesis in this paper: (1) courts and scholars are uncertain where the line should be drawn between rulemaking that requires notice and comment and rulemaking that need not go through the process[140] and (2) there are also good reasons to not require all agency rulemaking to take place via notice and comment, such as the need for immediate guidance in some circumstances.[141] The rub for many administrative law scholars, and a question that is the topic of much administrative law scholarship, is how to draw the line, or as Professor Franklin states:

> [H]ow can courts strike the best balance between administrative efficiency and broad public participation in agency policymaking? Interpret the exemptions from notice and comment too narrowly, and you drive agencies into a purely adjudicative mode that offers less notice and less opportunity for widespread participation. Interpret them too broadly, and you allow agencies to dispense with public input at the pre-promulgation stage as a matter of course.[142]

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140. *See, e.g.*, Boeing Co. v. United States, 537 U.S. 437, 447-48 (2003) ("Even if we regard the challenged regulation as interpretive because it was promulgated under § 7805(a)'s general rulemaking grant . . . we must still treat the regulation with deference."); Hosp. Corp. of Am. & Subs. v. Commissioner, 348 F.3d 136, 144 (6th Cir. 2003) (noting that failure to comply with notice and comment does not necessarily have bearing on binding force of regulation); *Intermountain Ins. Serv. of Vail*, 134 T.C. 211, 240 (2010) (Halpern and Holmes, JJ., concurring) (noting disagreement within Tax Court over where notice and comment requirements attach), *rev'd*, 650 F.3d 691 (D.C. Cir. 2011); Hickman, *Coloring Outside the Lines*, *supra* note 26, at 1764 (discussing incompatibility of tax law conceptions of notice and comment requirements with administrative law generally).

141. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 346–47 (2009) [hereinafter Mantel, *Procedural Safeguards*] (discussing policy justifications for excepting notice and comment requirements in some circumstances); Korb, *The Four R's Revisited*, *supra* note 27, at 342 (discussing need for informal guidance in many cases).

142. Franklin, *Nonlegislatvie Rules*, *supra* note 101, at 306.

While administrative law scholars have spent considerable time exploring the balance between efficiency and participation in rulemaking, a substantial amount of scholarship also considers the formidable barriers to participation in the rulemaking process that individuals, and, in particular, lower income individuals face. Effective and informed participation requires parties to both have the required background knowledge to make meaningful comments, and the financial and technical resources to do so.[143]

The scheme in APA section 553 is meant to provide a mechanism for public participation. As summarized above, an agency must publish advance notice and take comments prior to finalizing a rule. Courts impose a general obligation on agencies to explain their reasoning when they reject significant comments.[144] Agency actions that are not reasoned or are arbitrary or capricious face the possibility that judges will vacate agency action.[145] Administrative law scholars have noted that these requirements ensure that agencies remain "accountable for following the law (including implementing any critical value choices Congress may have made in the authorizing statute) and for acting in a nonarbitrary fashion."[146]

In theory, the APA scheme's approach to allow for direct involvement in agency process and agency explanation satisfies both a pluralist and civic republican view of democratic accountability. From a pluralist perspective, an agency decision is democratic "to the extent the agency hears directly from and considers a wide variety of interests."[147] The APA requirements allowing for access to the agency, as well as the backstop of the right to challenge agency actions in court, is a mechanism to allow for individuals to provide input and ensure that agencies remain accountable for their actions. From a civic republican perspective, legitimacy of agency actions in a democratic state is grounded in agencies contributing to a dialogue where citizens provide their views and agencies and citizens alike are deliberative and open to considering differing perspectives.[148] The APA's

143. *See* Johnson, *Good Guidance*, *supra* note 45, at 735 (describing several barriers to effective participation).

144. *See* ACLU v FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (stating notice and comment rulemaking obligates agencies to respond to all significant comments).

145. 5 U.S.C. § 706 (defining scope of review).

146. Mendelson, *Rulemaking*, *supra* note 63, at 1356.

147. *Id.* at 1350. *See also* Stewart, *Reformation*, *supra* note 80, at 1679, 1683 (stating that courts have asserted agencies must consider "all of the various interests affected by their decisions as an essential predicate" to determining the public interest).

148. *See* Seidenfeld *Republican Justification*, *supra* note 80, at 1514 (defining the theory of civic republicanism). "Civic republicanism promises democratic government that does not exclude or coerce citizens whose backgrounds and values differ from those of mainstream society." *Id.*

requirements to allow for participation, and the judicial gloss requirements that agencies explain their actions contribute to accountability in a civic republican sense.

In practice, observers of agencies generally have noted that despite the pluralist and civic republican theories of rulemaking's legitimacy in a democratic state, there is a skewing of participation in the process toward business interest and away from a diffuse class of regulated beneficiaries.[149] The main reason for this observation is that while the administrative law right to participate under APA Section 553 is clear, it takes "resources to uncover the existence of a rulemaking, to understand the issues at stake, and to prepare persuasive comments."[150] Compounding the issue is the collective action problem, meaning there are challenges associated with organizing those whose interests are widely diffused as compared to matters that relate to more concentrated groups.[151]

As a practical matter, business groups and others with significant resources tend to dominate the rulemaking process. For example, studies of agencies tend to show that regulated entities as contrasted with regulated beneficiaries predominantly provide comments to agencies.[152] As a counterweight to business interests, with many matters that are the subject of agency rulemaking (such as environmental issues) there are significant

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149. *See* Mendelson, *Rulemaking, supra* note 63, at 1357–58 (stating that one reason big business groups dominate rulemaking participation is their availability of financial resources to do so); Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1382 (2010) [hereinafter Wagner, *Administrative Law*] (asserting pre-NPRM interest group communication is also likely to be extensive and influential); Jason Webb Yackee & Susan Web Yackee, *A Bias Towards Business? Asessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) [hereinafter Yackee, *Bias Towards Business*] (stating that rulemaking costs remain so high that individuals and public interest groups are disadvantaged).

150. *See* Mendelson, *Rulemaking, supra* note 63, at 1357–58.

151. *Id.* at 116 (explaining that because of a free rider problem, groups with diffused interests have greater challenges organizing as opposed to small concentrated groups); *see also* THE POLITICS OF REGULATION, 357, 360 (JAMES Q. WILSON, ED., 1980).

152. *See* Wagner, *Administrative Law, supra* note 149, at 1334 n.40 (quoting Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 99 (1983) (stating "[w]idely dispersed costs or benefits are less effectively represented in policymaking than concentrated costs or benefits. Thus we would expect error-correction to favor interests championed by enforcers and regulated firms and to undervalue interests of unorganized beneficiaries of government programs."); Yackee, *Bias Towards Business, supra* note 149, at 131, 133 (explaining that in a study of mid size rulemaking business groups submitted over 57 percent of comments while nonbusiness groups and public interest organizations contributed only 6 percent).

public interest organizations that do participate in the process and help redress the imbalance. Yet, the balance is still skewed toward business interests in the process generally. Professor Wagner has observed public interest groups face barriers to entry when pluralistic processes are undermined by a system that becomes oblivious to the costs imposed on participants in a meaningful way.[153] Groups that already struggle against organizational and related collection action impediments to represent the public interest cannot keep up. Wagner argues that resource rich participants engage in information capture by providing agencies with excess information that stretches agency staff so that the staff is overwhelmed.[154] Moreover, Wagner claims that limits on time, resources and expertise blunt the effectiveness of public interest groups, especially when regulated entities overwhelm the process.[155]

V. GOOD GUIDANCE REQUIRES A BETTER BALANCE BETWEEN EFFICIENCY AND PARTICIPATION IRRESPECTIVE OF APA CLASSIFICATION

A. Moving Beyond Current APA Classification

In the previous section, I discussed how existing rules within the APA are not likely to provide either the certainty or degree of input that the IRS will need to administer its rules, especially as those rules relate to issues germane to lower-income or disadvantaged taxpayers. In addition, the tax law is in a state of flux when it comes to determining precisely when the notice and comment regime of the APA will be implicated. A possible approach at this point would be for courts to require the IRS to issue more guidance subject to notice and comment, or at least require the IRS to take more seriously the exceptions applicable to notice and comment rules under the APA. I do not recommend that approach as a blanket solution to the problem I have identified and worry that it would have unintended adverse consequences. At times, the public and IRS employees need informal guidance, and as a practical matter the Treasury and the IRS cannot put all of its guidance in time consuming regulation projects.[156] This point is consistent

153. *See* Wagner, *Administrative Law*, *supra* note 149, at 1378 (discussing collective action impediments to meaningful participation in notice and comment process).

154. *See id.* at 1352 (discussing coping strategies to avoid post-promulgation litigation as overwhelming understaffed and under-resourced agencies).

155. *See id.*

156. *See* Asimow, *Public Participation*, *supra* note 21, at 346 (describing practical reasons for the need to issue interim guidance after Tax Reform Act of 1986). Asimow uses the Section 469 passive activity loss rules as an example,

with a number of commentators in the broader administrative law literature who recognize that the APA's blurry distinction between legislative and interpretive rules led agencies and courts into a definitional morass, but who

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stating "this provision is exceptionally complex, involves very large revenue gains, contains vague and undefined phrases and applies (or might apply) to millions of taxpayers. Thus, the preparation of regulations to provide guidance to taxpayers and the Internal Revenue Service was a high priority." *Id.* Furthermore, Asimow stresses that interpretative rules are an important part of agency guidance because subjecting all rules to notice and comment would not only be a time-consuming process, but would limit this type of pertinent guidance-disserving the interests of good government. *Id.* at 352. The Treasury maintains some forms of its guidance are exempt from the APA for a variety of reasons. This may be the case if (1) the regulations are interpretive, (2) they are temporary, (only some regulations are temporary) or (3) the APA's good cause exception applies because of the need for immediate public guidance. *Id.* at 347. *But see* Juan J. Lavilla, *The Good Cause Exception to Notice and Comment Rulemaking Requirements under the Administrative Procedure Act*, 3 ADMIN. L.J. 317 (1989) [hereinafter Lavilla, *Good Cause Exception*] (surveying agency good cause exception claims, asserting that the IRS most frequently abuses this exception). Some have argued that courts should calibrate deference to agency action based upon whether the guidance has gone through notice and comment. *See also* Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720 (2007) (emphasizing that greater procedure incorporating public input should/does receive greater deference upon judicial review); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004) (arguing that courts are more likely to apply *Chevron* deference to policy having undergone notice and comment); *but see* E. Donald Elliott, *Re-Inventing Rulemaking,* 41 DUKE L.J. 1490, 1490 (1992) (asserting that the real purpose of notice and comment is not to obtain public participation, but only to create a record for judicial review). These commentators suggest that courts should treat rules that have gone through this procedure as having the force of law in agency enforcement actions. Guidance that has not gone through notice and comment should be denied this treatment. Professor Franklin refers to this as a short cut, with a rule's "procedural provenenace [determining] its substantive effect" rather than the substance determining procedure as under current law. *See* Franklin, *Nonlegislative Rules*, *supra* note 101, at 279 (arguing that the short cut carries with it far too many costs, including minimizing the benefits of front-end regulatee participation). In addition, the particularized difficulties associated with ensuring pre-enforcement judicial review of IRS action (including the Declaratory Judgment Act and Anti Injunction Act) contribute to the possibility that ex post participation via court challenge is less viable in the tax context. *Id.* at 310-11. *See also* Hickman, *A Problem of Remedy*, *supra* note 5, at 1200 (explaining "jurisprudence stands almost unyieldingly against pre-enforcement challenges to Treasury regulations promulgated in violation of APA procedural requirements").

fall short of recommending that there agencies adopt across the board rulemaking subject to existing notice and comment procedures.[157]

Moreover, scholars and commentators looking at agencies have generally noted that focusing solely on the dividing point between legislative rules and other rules under the APA minimizes the role other informal guidance has as a practical matter both in the working lives of agency employees and broader sense of civic acceptance of agency action.[158] As Professor Jessica Mantel notes:

> The success of our social contract depends first on those entrusted with governmental powers exercising their discretion for the benefit of "we the people," and second on citizens' acceptance of and obedience to the state's rules for organizing societal functioning and its allocation of public resources. Process plays a fundamental role in reinforcing both obligations. In shaping agencies' decisionmaking, procedures promote the legitimacy of administrative policies

157. *See* Franklin, *Nonlegislative Rules*, *supra* note 101, at 278 (explaining judicial difficulty in distinguishing legislative versus nonlegislative rules, and urging courts not to take a "short cut" by looking only to notice and comment to decide). Congress, the President, and the courts have taken recent steps that make notice and comment more cumbersome, including statutes that require review for impact on specific interests like small business information collection and state and local governments. *Id.* at 283. As Professor Franklin identifies, this has made nonlegislative rulemaking more attractive. The three main benefits for agencies to engage in this form of rulemaking, all of which relate to administrative efficiency, are: (1) providing swift and accurate notice to the public; (2) informing lower level agency employees about changes or views to ensure bureaucratic uniformity; (3) avoiding opportunity costs by freeing up agency resources away from notice and comment process. *Id.* at 303–04. *See also* Jacob Gersen, *Legislative Rules Revisited*, *supra* note 156, at 1721 (explaining that in terms of deference associated with formal versus informal rules, agencies will choose to put more controversial rules through formal procedure, informal procedures will be associated with less controversial agency interpretations). Gersen argues that agencies have a clear choice; utilize formal procedure that take into account public input and receive greater deference, or use informal procedures and receive greater scrutiny thereafter. *Id.* at 1722.

158. *See* Johnson, *Good Guidance*, *supra* note 45, at 701 (asserting that nonlegislative rules enables agencies to give advance notice to the regulated community about the agencies interpretations and enables them to promote consistent decision-making and application of the law by their employees); Mantel, *Procedural Safeguards*, *supra* note 141, at 351 (reiterating agency incentives to issue rule as guidance rather than through notice-and comment rulemaking). Guidance documents also have a substantial impact on the behavior of regulated parties, beneficiaries of government programs and the public that can be just as significant as legislative rules. *Id.* at 354.

> and protect against violations of the public trust by agency officials. Social psychology also has shown that fair procedures that reinforce the legitimacy of the administrative state strengthen individuals' normative commitment to obey the law. For these reasons, the wholesale absence of process requirements for agencies' nonlegislative rulemaking cannot stand. Agency guidance documents, carrying as they do the imprimatur of the state, must be legitimated through a process that comports with our ideas of fair government.[159]

In light of her concerns, Mantel provides that "agencies should be required to offer the public an opportunity to comment on guidance prior to its adoption or, when there is a compelling need for timely final guidance, after its adoption."[160] To encourage greater understanding, agencies also "should provide a concise statement of the legal and policy rationale for a nonlegislative rule when issued in final form."[161]

Professor Stephen Johnson, in a recent article, argues that Congress should amend the APA to require agencies "to the extent practicable, necessary and in the public interest, provide opportunities for timely and meaningful public participation in rule making, including the formulation of interpretive rules and general statements of policy."[162] Johnson, like Mantel, seeks to dispense with the notion that only legislative rules warrant opportunities for public participation.[163]

The insights of Professors Johnson and Mantel are important and allow for a consideration of the practical effect of non-legislative guidance as well as the difficulty agencies and courts have in classifying guidance under the APA in the first instance. As a model toward increasing participation, Johnson points to the EPA as effectively putting in place best practices to increase the likelihood that its guidance gets the benefit of public input.[164]

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159. Mantel, *Procedural Safeguards*, *supra* note 141, at 346–47.

160. *Id.* at 348.

161. *Id.*

162. Johnson, *Good Guidance*, *supra* note 45, at 697.

163. *See id.* (arguing that greater procedural controls could lead to the same ossification that resulted in legislative rule making).

164. *See id.* at 736–37. To address the shortfalls of notice and comment, and as a model for improving public participation, Johnson points to the EPA's Public Involvement Policy. *See* U.S. ENVIL PROT. AGENCY, EPA 233-B-03-022 PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003) [hereinafter EPA PUBLIC INVOLVEMENT POLICY] http://www.epa.gov/pubinvol/policy2003/finalpolich.pdf. The EPA has been called "an innovative leader in collaborative governance" incorporating input from those affected by its rules to shape its policy. *See* CARMEN SIRIANNI, INVESTING IN DEMOCRACY: ENGAGING CITIZENS IN COLLABORATIVE GOVERNANCE, 166 (2009) [hereinafter SIRIANNI,

Some of those best practices include town hall meetings at a time and place convenient to those impacted by the agency's policy, increased access to proposed policy online in a user-friendly webpage, as well as developing contact lists to ensure that as new information is disseminated regarding the policy, it is distributed to those effected in a meaningful and understandable manner.[165] As Johnson asserts, public participation is a vital component of agency decision making. Not only does it improves the quality of agency decision making, it also makes agencies "more likely to make rational, defensible decisions when they solicit input from a broad array of stakeholders, who can identify facts and issues that the agency might otherwise fail to consider adequately."[166] Furthermore, increased participation enhances agencies' legitimacy, making the public more apt to accept the policy and less likely to challenge it after the fact.[167]

B. Applying the Insight of Professors Mantel and Johnson to the IRS

Both Professors Mantel and Johnson, in criticizing the existing manner that the APA imposes participatory requirements, reflect an

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INVESTING IN DEMOCRACY]. The goal of the policy is the ensure the EPA "continue[s] to provide for meaningful public involvement in all its programs, and consistently look for new ways to enhance public input . . . [the] EPA staff and manager should seek input reflecting all points of view [and] . . . should work to ensure that decision-making processes are open and accessible to all interested groups, including those with limited financial and technical resources. . . ." EPA PUBLIC INVOLVEMENT POLICY, *supra*, at 1. With increased public involvement, the Agency seeks to "make it easier for the public to contribute to the Agency's decisions, build public trust, and make it more likely that those who are most concerned with and affected by Agency decisions will accept and implement them." *Id.* at 1. In order to achieve its goals, the Policy lists seven basic steps for effective public involvement: (1) plan and budget for public involvement activities, (2) identify the interested and affected public, (3) consider providing technical or financial assistance to facilitate involvement, (4) provide information and outreach, (5) conduct public consultation and involvement activities, (6) review and provide feedback, and (7) evaluate public involvement activities. *Id.* Accompanying each step are specific actions and methods agency staff can utilize in order to meet these goals. *See also* Sirianni, *Investing in Democracy*, *supra,* at 155–223 (detailing EPA success as "civic enabler") and (citing the EPA Public Involvement Policy at 207); Lisa B. Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance,* 2010 WIS. L. REV. 297, 330 (2010) (commending the EPA's "collaborative governance").

165. *See* EPA PUBLIC INVOLVEMENT POLICY, *supra* note 164, at 16 (identifying effective public outreach policies).

166. Johnson, *Good Guidance*, *supra* note 45, at 735.

167. *See id.* at 735–37 (describing public participation as a vital component of decisionmaking because if increases legitimacy of agency decisions).

understanding that broader range of agency actions would benefit from additional input and agency explanation. Like Professors Mantel and Johnson, rather than pushing the IRS to focus solely on notice and comment rulemaking in the context of guidance that is considered legislative under the APA, I propose that the IRS reach out to the public and solicit participation when it issues a wide range of guidance, especially when the guidance relates to lower income taxpayers and issues related to either relief from liability or the delivery of benefits. This approach recognizes that public participation is crucial to the success of agency actions, irrespective of whether the agency's actions relate to nonlegislative rules or other types of agency guidance. It also recognizes that existing notice and comment procedure in and of itself is not a panacea.[168] Even if agencies increasingly subjected their guidance to notice and comment, it would be insufficient to ensure participation due to barriers that limit the possibility of meaningful public involvement, especially when the issues implicate diffuse interests and relate to individuals who do not have the time, expertise or money necessary to understand and provide meaningful commentary.[169]

To be sure, a challenge would be calibrating the degree of participation and extent of public involvement, as well as the existence and amount of agency explanation of its actions. Changes in technology, including the existence of social media sites[170] and greater internet

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168. *See* Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1490 (1992) (asserting that even if notice and comment is used, it rarely captures true public participation). Elliott asserts that "notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions — a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." *Id.* at 1492. If agencies truly wanted to get policy input, they would do so with "informal meetings with trade associations and other constituency groups, to roundtables, to floating trial balloons in speeches or leaks to the trade press, to the more formal techniques of advisory committees and negotiated rulemaking." *Id.* at 1492–93.

169. *See* Johnson, *Good Guidance*, *supra* note 45, at 735 (explaining barriers that inhibit effective public participation). Even when the IRS does solicit comments for its proposed rulemaking, these barriers often prevent taxpayers most significantly effected from commenting. For example, Notice 98-61, 1998-2 C.B. 758, which set out the two year limitation for section 6015(f) received no comments regarding the change. *See supra* notes 5–11 and accompanying text for a more detailed discussion of the lack of public participation regarding the two year limitation. The litigation that amounted after its finalization, however, is a testament to its importance. *See* Lantz v. Commissioner, 132 T.C. 131 (2009) (holding the time period invalid), *rev'd*, Lantz v. Commissioner, 607 F.3d 479 (7th Cir. 2010) (holding the time period valid); Mannella v. Commissioner, 631 F.3d 115 (3d Cir. 2011) (holding the time period valid).

170. *See* Mendelson, *Rulemaking*, *supra* note 63, at 102 (explaining how the growth of technology and e-rulemaking has facilitated the receipt of comments

accessibility across the board, provide additional opportunities for IRS to reach out, and taxpayers to give input to the agency, and IRS to explain its actions.[171] The IRS will need to spend resources to publicize its actions and

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from lay people relating mostly to values rather than technical expertise). Mendelson explains the benefits of e-rulemaking and how it enhances participation. *See also* COMM. ON THE STATUS AND FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING, 7 (2008), http://ceri.law.cornell.edu/documents/report-web-version.pdf (stating that e-rulemaking can "enhance public participation . . . so as to foster better regulatory decisions . . . [add] greater support for those decisions by more involved regulatory and beneficiary communities"). Recent innovative use of social media by the Obama administration suggests how transformative social media can be as a means of communicating to and receiving information from the public. *See* Michael S. Shear, *Obama Takes Questions From his Tweeps*, N.Y. TIMES, July 6, 2011 (recapping President Obama's town hall Twitter session where he accepted tweets from the public); Katelyn Sabochick, *President Obama @ Twitter Town Hall: Economy, Jobs, Deficit, and Space Exploration*, THE WHITE HOUSE BLOG (Jul. 07, 2011 at 9:38 am) (listing the tweets answered by the President) http//www.whitehouse.gov/blog/2011/077page=6.

171. *See* Mendelson, *Rulemaking, supra* note 63, at 102. On the one hand, increased public participation through the internet, particularly regulations.gov, can certainly broaden public participation and increase democracy, even going so far as to give rise to "political campaigns" about particularly controversial rulemaking activities. *See* Peter L. Strauss, *Implications of the Internet for Quasi-Legislative Instruments of Regulation*, 28 WINDSOR Y.B. ACCESS. JUST. 377, 390 (2010) (noting that use of consolidated, computer-based records through unified system of regulations.gov can increase agency efficiency in rulemaking activities and allow easier access to entire record by interested parties); *see also* Stuart J. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1(1) Policy & Internet, Article 2 (2009), http://www.pso-commons.org/policy-and-internet/vol1/iss1/art2 (discussing computerized system for handling of mass email comments). On the other hand, scholars have expressed reservations about the increasing use of the internet and social media in the promulgation of administrative rules. Particularly, scholars have criticized the unified, monolithic system of regulations.gov as unresponsive to the particular needs of a given agency and overly solicitous of low-quality, unhelpful, or politically-motivated comments from parties that would otherwise lack the incentive to participate in any meaningful way in a system that would require participants to set forth some minimal amount of effort. *See, e.g.*, Stuart M. Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 908, n.43 (2006) (noting in one particular FCC rulemaking activity open to public participation on regulations.gov that over one million comments were received, but none were "terribly helpful or influential"); Gary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 959 (2006) ("According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent . . . had anything original to say."); John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969 (2006) (finding only

target its need for guidance and information to appropriate audiences. Knowing who to ask, and where to reach out, are skills not likely part and parcel of IRS guidance writers' training, though there is a significant segment of the IRS involved in providing outreach to the community, and organizations within the IRS (such as the Taxpayer Advocate Service) have contacted listserves dedicated to low income practitioners, used town halls, YouTube and other new media outlets to get their message across.

In addition to helping the IRS, should its position be challenged in court, its explanation of its choices in guidance should be more forthcoming. The IRS has long guarded internal deliberations from public discovery,[172] but

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marginal change in quality of FCC rulemaking after introduction of public participation through regulations.gov). Further, an ever-present concern is the prospect of making rulemaking activities more time-consuming and costly for already understaffed or under-resourced agencies. *See* Strauss, *supra*, at 391 (noting that increased volume of comments in record can expose agency to intrusive congressional oversight and judicial review if agency fails to adequately consider all comments, even comments ultimately lacking merit). As a remedy to these concerns about information overload through the unified system of regulations.gov, some third-party participation initiatives, such as the Cornell Electronic Rulemaking Initiative (CeRI), have formed that aim to facilitate public participation in rulemaking, but at the same time synthesize and filter public comments before they reach the regulating agency. *See* Strauss, *supra*, at 392 (citing CeRI, http://www.lawschool.cornell.edu/research/ceri/Index.cfm). In one example involving a proposed Department of Transportation (DOT) regulation that would prohibit regulated truck drivers from texting while driving, CeRI summarized the regulation on its website, solicited public participation on particular sections of the regulation on particular days, and developed a summary of the public comments that it subsequently submitted to DOT. *See id.* (advocating for effectiveness of third party advocates such as CeRI, arguing that such third-programs would not be necessary if agencies were free to create their own individualized websites to refine public participation).

172. There is a long history of litigation between the IRS and publisher Tax Analysts regarding access to Chief Counsel writing. Chief Counsel training materials summarize as follows: "Section 6110 of the Internal Revenue Code codifies the outcome of several Freedom of Information Act (FOIA) lawsuits, brought by Tax Analysts dating back to the early 1970s, to make available for public inspection certain work products produced, in relevant part, by the National Office of Chief Counsel. Denominated as "written determinations," these work products are letter rulings, technical advice, determination letters, and — by virtue of the 1998 IRS Restructuring & Reform Act amendments — Chief Counsel Advice." There is still litigation regarding the scope this provision. *See Tax Analysts Finds Examples of Guidance of Taxpayers in E-Mails That IRS Chief Counsel Sent to Field Offices*, TAX ANALYSTS, Apr. 10, 2008 http://www.taxanalysts.com/www/pressrel.nsf/Releases/4B9F8DE65D03A8E1852574270053D878?OpenDocument (citing examples of chief counsel advice found in IRS emails that should have been made public).

when the IRS deliberates about issues that result in guidance, enhancing the public's acceptance of and the legitimacy of the agency actions itself are related to understanding why the agency acts.[173] Some decisions may be grounded in agency expedience, and others may reflect a weighing of other values, but all too often the public and the courts are left wondering why the agency has acted.[174] Explaining the rationale for an approach, in a manner that reflects the IRS's consideration of comments, should be part of the IRS checklist, irrespective of whether the guidance was subject to APA notice and comment, or the IRS's version of notice and comment through the publication of NPRM.

Amending the APA in the way Professor Johnson suggests, and subjecting the IRS to its terms, would signal the importance of public participation in agency decision making processes. Johnson's proposed amendment is intentionally open ended, allowing agencies to determine how much public participation is needed, and which procedures best facilitate "opportunities for timely and meaningful public participation."[175] Johnson looks to the courts "to impose additional procedural requirements on agencies as courts fleshed out the meaning of 'to the extent practicable, necessary and in the public interest,'" and thus creating a body of common law for agencies to rely on when promulgating rules.[176] It is not clear precisely how much a role courts would, or should have, in helping refine

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173. The IRS has also started to use social media outlets to provide the public insight into the agency interworking. *See* National Taxpayer Advocate Twitter link, http://www.irs.gov/advocate/. The IRS also holds a number of town hall meetings throughout the country focusing on a variety of taxpayer issues. *See, e.g.*, California Practitioner Liason Meeting and Seminars, http://www.irs.gov/businesses/small/article/0,,id=127814,00.html; IRS Provides Guidance to Louisiana, Mississippi Taxpayers Dealing with Casualty Loss Reimbursements, Mar. 24, 2008, http://www.irs.gov/newsroom/article/0,,id=180322,00.html. The IRS also hosts national webinars for Practitioners.

174. The IRS's failure to explain its reasoning for adoption of rules it seeks to have court apply may have adverse consequences under general administrative law doctrine. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947) (court not permitted to affirm agency decision on grounds not advanced by agency); Shamik Trivedi, *After* Mayo, *Greater Chance of Taxpayer Success Against the IRS, Tax Court Judge Says*, 2011 TNT 120–2 (suggesting courts should apply the *Chenery* rule in tax cases).

175. Johnson, *Good Guidance*, *supra* note 45, at 738.

176. *Id.* at 739. Even with that discretion, I believe that one benefit of such an approach is that it will engender greater agency consideration to the need for involving the public and explaining its actions. To the extent that involvement and explanation provide too great a cost, the IRS can offer a brief explanation why that is the case. *See* Lavilla, *Good Cause Exception*, *supra* note 156 (surveying agency good cause exception claims, asserting that the IRS most frequently abuses this exception).

procedural aspects of rulemaking.[177] There are unique issues associated with challenging the procedural validity of IRS rulemaking,[178] yet I believe that other institutional actors can play a complimentary role in enhancing these participatory values. Irrespective of the precise role that courts or other actors should play, I believe the broader point is important, i.e, that there should be institutional pressure and leverage placed on the IRS to increase participation and accommodate the views of differing constituencies.

The paradigm I propose presupposes a more engaged IRS willing to employ a broader degree of participatory measures to a greater number of issues. While I do not offer a one size fits all approach to how much process should be attached to each guidance project, a question that IRS will need to consider when calibrating the degree of participation is precisely how much process to employ before formulating guidance. This balancing of values related to participation and efficiency is a familiar one; it animates the decision whether to put a rule through notice and comment or issue it in the form of informal guidance. Not every issue will be subjected to multiple

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177. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (exemplifying Supreme Court reluctance to impose procedures on agencies). "[W]hile agencies are free to grant additional procedural rights in the exercise of their discretion, reviewing courts are generally not free to impose them if the agencies have not chosen to grant them . . . even apart from the APA, the formulation of procedures should basically be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. *Id.* at 520.

178. In particular, the Declaratory Judgment Act and Anti-Injunction Act limit the ability to challenge the procedural sufficiency of IRS guidance outside traditional deficiency or refund litigation matters. *See* Hickman, *A Problem of Remedy*, *supra* note 5, at 1164-65. *But cf.* Cohen v. U.S., 650 F.3d 717, 731, (D.C. Cir. 2011) (holding in limited circumstances that section 702 waives sovereign immunity for procedural challenges under APA in the tax context as well as in other contexts). The litigation involved the IRS's special refund scheme for a telephone excise tax that a number of circuit courts had previously concluded was illegally collected. After setting up a procedure in Notice 2006-50 to allow for refunds, the taxpayer in Cohen alleged that the IRS failed to comply with notice and comment procedures applicable to agencies that issue legislative guidance under the APA. In a majority en banc opinion, the Court read the DJA prohibition on matters "with respect to federal taxes" as coterminous with the narrower language of the associated Anti-Injunction Act prohibition on suits, which relates to the preclusion of injunctive relief, as "restraining the assessment or collection of any tax." I.R.C. § 7421(a). As the taxpayers in *Cohen* did not seek a restraint in the assessment or collection of taxes, and were rather disputing the process set forth in the Notice, the majority held that neither the Anti-Injunction Act nor the DJA applied, and thus held in limited circumstances that section 702 waives sovereign immunity for procedural challenges to the Notice under the APA. *Cohen*, 650 F.3d at 724.

town hall meetings and direct involvement of the Commissioner in soliciting input, or warrant releasing a memo or explanation of its decision in adopting a particular approach.

Despite my reluctance to provide a tight fit and my desire to maintain agency discretion, I propose that the IRS consider a number of factors to help determine just how much it should do to engage the public:

- The number of taxpayers or third parties affected by the guidance,
- The extent to which the issue requires a consideration of equitable factors,
- The extent to which the issue gives the IRS broad discretion, especially when the discretion relates to the granting of relief from liability or providing a benefit,
- Visibility of issues to external parties,
- Severity of burden the rules may impose on taxpayers or third parties,
- Extent to which taxpayer rights are impacted,
- Likelihood that the circumstances of those impacted by rules differs from the circumstances of the regulating agency,
- Extent that the issue has the attention of parties that are familiar with or involved in the informal process of influencing,
- The administrative burden on the IRS given other demands it faces,
- The extent that the issue requires immediate guidance.[179]

The benefit of this approach is that it requires the IRS to consider the circumstances both for and against engaging the public. How much the scale should be tipped in any issue requires the judgment of the IRS; yet, by at least considering the factors, the IRS will weigh the merits associated with seeking guidance. For example, an issue that requires the agency to consider equitable factors in granting relief, or one that gives the IRS broad discretion, would presumptively attract greater process. The presumption could be

179. These factors were adopted from Nina Olson's response to TIGTA report evaluating the TSA process used to identify potential systemic issues. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *The Identification and Evaluation of Systemic Advocacy Projects Designed to Resolve Broad-Based Taxpayer Problems Can be Improved*, Jun. 27, 2011 http://www.treasury.gov/tigta/auditreports/2011reports/201110052fr.pdf. The report stated that improvements can be made to TAS's screening process used to identify these systemic issues. The National Taxpayer Advocate responded that TAS has in fact developed a number of criteria that apply when evaluation potential impact of systemic issues and asserted that issues can only be evaluated based on an exercise of informed judgment. *Id.* at 17–19.

rebutted, however, if there was an immediate need for guidance.[180] To assist with the important goal of educating the public as well as increasing the broader acceptance of the IRS's actions, the IRS should briefly explain the rationale for the process it chooses for any issue, and summarize the nature of meaningful comments and input it received during the procedures leading to the promulgation of the guidance it issues.[181] A prominent place in the discussion should be the views of TAS or tax clinics, as well as the justification for the adoption of a particular rule.

In the next section, I discuss how strengthening the role of intermediaries such as the Taxpayer Advocate Service and low income taxpayer clinics can assist the agency in addressing the challenges associated with underrepresentation. Even if Congress were to amend the APA, or the IRS were to engage proactively to seek the input of all those it regulates, these intermediaries are necessary to overcome barriers such as time, public expertise, and technical knowledge, all of which limit involvement in the American political system among those that have the fewest resources.

C. *How the Taxpayer Advocate Service and Clinics can Help Ensure that Lower Income Taxpayer's Interests are Served in the Rulemaking Process*

As described above, the IRS can do more to seek out the voice of the underrepresented in the rulemaking process. Even with an IRS determined to seek input from groups underrepresented in the political process, however, it is likely that due to the characteristics of lower-income or underrepresented taxpayers that are the subject of IRS guidance, there would be a shortage of meaningful input. Accordingly, I propose an approach that would first, as described above, require the IRS to take positive steps to reach out to seek input, and second, ensure that organized third parties are encouraged and incentivized to contribute to the IRS's formation of rules. My idea is not novel; scholars outside the tax area have long noted how poorer Americans are underrepresented in the political process, and that agencies often need to interact with organized intermediaries or proxies who can advance the interest of people who the agencies regulate.[182]

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180. The immediate need for guidance should not necessarily foreclose involvement; interim rules could be adopted, with guidance finalized after the agency had time to put in place the means for generating public participation.

181. While this is done as a matter of course in the preamble to regulations, it is not done in subregulatory guidance.

182. For example, *see* Bonfield, *Representation for the Poor*, *supra* note 64, at 511 (urging "the sound operation of the federal administrative rulemaking system demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of its product."). Bonfield asserts that agency rulemaking is more representative of middle and upper class Americans who either

Commentators looking at agencies whose regulatory policies have significant impact on low income people have often shared a concern for ensuring more pluralistic engagement in the informal rulemaking process. One of the earlier commentators, Arthur Bonfield, argues that agencies fail to consider the needs of lower income citizens when developing policy because their public participation programs are both inadequate and inconsistently applied.[183] Bonfield, as I do here, offered a two-pronged approach. Initially, he asserts that agencies making rules seek to ascertain the views of the poor.[184] Bonfield, like Johnson, proposed practical steps that agencies can do, such as holding formal hearings on proposed rules in close proximity to the poor people affected and holding informal town hall meeting in their own neighborhoods, to increase public participation.[185]

In addition, even with those actions, Bonfield felt that barriers among regulatees like poverty and limited time would blunt their effect. Accordingly, he suggested an independent counsel to represent the interests of the poor in all federal rulemaking that substantially effects them, acting as an artificial representative for the poor.[186] Acting as an advocate, the group would be under the affirmative duty "to seek the advice and help of relevant sources of every kind, whether private or governmental, individual or organizational."[187]

Other scholars and advocates have also considered the use of advocate agencies and ombudsmen to represent the interests of poor or

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directly or indirectly monitor agency activities, to the detriment of those who lack the resources to keep themselves informed. *Id.* at 511–12. *See also* Susan Lazarus & Joseph Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971) [hereinafter Lazarus & Onek, *The Regulators*] (stating the central problem with regulatory agencies is their unresponsiveness to public concerns). Lazarus and Onek posit that "the mere fact that agencies perform efficiently does not insure that the agencies are properly fulfilling their functions." *Id.* at 1071.

183. Bonfield, *Representation for the Poor*, *supra* note 64, at 514–16 (reasoning that not only do agencies fail to realize the substantial impact their programs have on the poor, the efforts used to solicit public participation are inadequate).

184. *Id.* at 512, 522–23.

185. *Id.* at 524. Bonfield urges federal agencies to use special notice and hearing arrangements tailored to meet the problems of economically underprivileged persons in order to accurately obtain their views on regulations. An updated version of Bonfield's proposal would most likely capture the vast social media networks to facilitate discussion and keep the public aware of agency decision making in real time. As applied to economically under privileged persons, access to this forum may still be limited, and thus agencies should also continue to structure their public participation policy to be accommodating to a particular group.

186. *Id.* at 530–31.

187. *Id.* at 531.

otherwise underrepresented parties.[188] In a recent essay, Professors McDonnell and Schwarcz explore the role that regulatory contrarians can play in the regulatory process, with a focus on ensuring a more adaptive and responsive financial regulatory process.[189] Their essay describes ombudsman contrarians as one of the four types of regulatory contrarians that exist,[190] with the ombuds term referring to an independent entity or person that is charged with responding to complaints. Noting that the ombuds office within the IRS, the Taxpayer Advocate Service, is "[p]erhaps the most well-known ombudsman contrarian," McDonnell and Schwartz refer to its ability to improve the agency's relationship through persuasive force and soft powers, such as its Congressional reporting power, and its participation within the academy (such as in research colloquium and conferences).[191] TAS also has the ability to "continually present the taxpayer point of view to other subcomponents within the agency as a balance, counterweight, or check to insular thinking and the enforcement mentality that often pervades inquisitorial systems."[192]

While McDonnell and Schwarcz describe TAS and ombuds success generally in the context of encouraging agencies to act and combat the regulatory tendency toward delay, Professor Wendy Wagner focuses more on the role that intermediaries such as ombuds can play once the agency has committed to act. Professor Wagner has called for the deployment of "government intermediaries" to redress a "pluralistic imbalance" that she believes is exacerbated by the ability of larger, better financed parties to engage in information capture, or the "excessive use of information and related information costs as a means of gaining control over regulatory decision-making in informal rulemakings."[193] Professor Wagner writes

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188. *See* Wagner, *Administrative Law*, *supra* note 149, at 1414 (proposing that government intermediaries such as agency selected ombudsmen, advocates and advisory groups, stand in for underrepresented interest groups in order to redress pluralistic imbalances in rulemaking); Stewart, *Reformation*, *supra* note 80, at 1723, 1748 (asserting that specialized advocacy in the form of high-level government advocates may be a potential way to ensure diffused interests are represented in policy formation); Lazarus & Onek, *The Regulators*, *supra* note 182, 1097–93 (stating that even when political power of public constituencies has proven powerful, like with consumer protection, it is usually ineffective at influencing administration of laws after their enactment).

189. *See generally* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629 (2011).

190. The other regulatory contrarians listed by McDonnell and Schwarcz are consumer representative, investigative, and research. *Id.* at 1653.

191. *Id.* at 1655.

192. *Id.* at 1655–56 n.108 (citing Bryan Camp, *What Good is the National Taxpayer Advocate?*, 126 TAX NOTES 1243 (Mar. 8, 2010)).

193. *See* Wagner, *Administrative Law*, *supra* note 149, at 1325, 1414.

mostly about the potential for capture in the context of environmental rulemaking where, unlike in many of the tax issues relating to poorer taxpayers, there is a possibility that larger better financed voices can crowd out other less powerful voices with respect to particularized matters. In those matters, an agency such as the EPA, balances differing interests of the regulated parties. Professor Wagner's (and others) concern is that powerful parties can control or capture the agency, through for example, the allure of employment prospects for agency employees or the ability to overload the agency with information in a way that distorts the process.[194]

When agencies seek to act and provide guidance in a variety of forms, parties with access and voice have opportunity to present and persuade the agency, and those without the ability to communicate will face an agency that is unaware of their needs. Wagner suggests that agencies allow ombudsmen to participate in the formative rulemaking process so that agencies consider not just the costs of regulation, but also the health benefits with regard to "vulnerable populations."[195] If the agency failed to consider the interests adequately in the formulation of rules, Professor Wagner proposes that the ombudsperson would be "required to file comments," thus building a record for review to be used by other regulatory participants and potentially in the context of judicial review of the agency's rulemaking.[196] For rulemakings that are highly technical, Wagner suggests assembling an expert advisory committee that would allow for the agency to consider issues relating to "missing affected interests," i.e., interests that the agency may not otherwise consider (or even be adequately made aware of).[197]

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194. *Id.* at 1325. Wagner also references other areas of agency regulations that have also been plagued by information capture. *Id.* at n.18 (citing Pete Tridish & Danielle Redden, *Radio Controlled: A Media Activist's Guide to the FCC!*, PROMETHEUS RADIO PROJECT, Feb. 12, 2006 (referring to information capture and excessive information in FCC rulemaking)); Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 449 (2003) (arguing that increased disclosure requirements can be problematic in light of inadequate filtering of information).

195. Wagner, *Administrative Law*, *supra* note 149, at 1414.

196. *See Id.* at 1415 (reasoning that a paper trail of comments would be beneficial to judicial review).

197. In addition to improving the agency's rules ex ante, Wagner's proposals have as a secondary objective creating a record so that parties challenging the agency's rulemaking in court may be able to point to inadequacies in the process or substance of the agency's rulemaking. As discussed above, in the tax context, limits to parties' ability to receive pre-enforcement judicial review combined with the trend of greater deference to IRS rulemaking makes this secondary objective less relevant. Likewise, Professor Wagner's suggested use of ALJs to oversee a hybrid formal/informal rulemaking, in light of the relative absence of ALJ's in the tax context make this portion of the proposal inapplicable to IRS rulemaking. *Id.*

Professor Wagner's policy prescription makes sense for the IRS, and as Professors McDonnell and Schwarcz identify, the IRS already has in place a strong ombuds office that plays an active, though incomplete role in representing the voices of less powerful taxpayers. In tax matters, while there may not be the same clash between say polluters and environmental groups that Professor Wagner identifies, the effect may be the same. For example, the IRS may not necessarily consider or weigh sufficiently the interests of poorer or underrepresented taxpayers in the context of rules relating to the delivery of benefits or to relief of liability because those taxpayers and their issues are less germane to the agency's core constituencies.[198]

Non-tax and tax scholars looking at TAS have praised its abilities to provide voice for the poor and for its influence tax administration.[199] Yet, TAS's role is incomplete because its recent success has much to do with its current charismatic and persistent leader Nina Olson, and it could benefit from administrative and legislative changes that would cement its role in the process even when she departs the scene. Moreover, its statutory reporting powers are focused on alerting Congress of problems and solutions, rather than directing TAS to have a more direct and clear role in the formation of IRS guidance. The following discusses the evolution of TAS over the past few decades and proposes a more concrete role for the agency in the rulemaking process.

1. TAS

Since its origin as the IRS's problem resolution program (PRP) of the 1970s,[200] TAS, the IRS's ombuds, has grown in independence, responsibility and prestige. Since 2001, it has been headed by Nina Olson, who, as National Taxpayer Advocate, has been a major voice in tax administration and has made significant steps to institutionalize the office's powers. The history of the office indicates its relatively modest beginnings,[201] and its increasing power and prestige over the years,[202] to a

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198. *See* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

199. *See, e.g.*, Bryan Camp, *What Good is the National Taxpayer Advocate*, 126 TAX NOTES 1243 (Mar. 8, 2010) [hereinafter Camp, *National Taxpayer Advocate*].

200. I am indebted to and borrow from the excellent discussion of the evolution of the PRP program in Camp, *National Taxpayer Advocate*, *supra* note 199.

201. In 1976, the IRS implemented the Problem Resolution Program (PRP) to address taxpayer problems that were not promptly or timely resolved, or where the Service had not been fully responsive to the needs of taxpayers. *Id.* That program

point now where it plays a significant, though incomplete, role in the formation of administrative policy.[203]

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originated in large part due to the automated functions of IRS adjudication procedures, and the concomitant need to have specialized IRS employees to assist with taxpayers navigate problems. *Id.* In 1979, the IRS expanded the PRP program and created a senior position, the taxpayer ombudsman, to both coordinate PRP activity and to provide systemic advocacy by reviewing "[p]olicies and procedures and legislative proposals for unfair taxpayer burdens." *Id.* at 27 (citing James W. Quiggle and Lipman Redman, *Procedure Before the Internal Revenue Service*, at 6 (6th ed. 1984)). The focus of PRP was on assisting taxpayers when operations failed and providing a mechanism to elevate concerns to Congress. The trend of increasing responsibilities continued in 1988 when Congress enacted section 7811 as part of the Taxpayer Bill of Rights which codified aspects of the PRP program and allowed TAS to issue Taxpayer Assistance Orders (TAO) to prevent the IRS from taking certain administrative collection actions. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342. Note that only the Commissioner could overrule TAO. *See* IRM 13.1.20.5 (12-15-2007).

202. Administrative changes in 1992, gave TAS explicit authority to take positive actions in addition to ordering the release of levies with a TAO (such as ordering the release of a taxpayer's refund). *See* I.R.S. Deleg. Order 239 (rescinded Jan. 1, 2004); Camp, *Inquisitorial*, *supra* note 83 (explaining DO gave taxpayer ombudsman authority to require positive acts, later incorporated onto TABOR2). The 1996 Taxpayer Bill Of Rights 2 (TBOR2) codified the changes and renamed the Taxpayer Ombudsman as the Taxpayer Advocate and there was a higher level of independence, authority and responsibility attached to this new position. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104–168 Stat. 1452. TBOR 2 extended the scope of the TAO by giving the Taxpayer Advocate broader authority in issuing a TAO. TBOR 2 also mandated that the Taxpayer Advocate present two annual reports to Congress, with Congress specifying what those reports should contain. *See* Evolution of the Office of the Taxpayer Advocate, I.R.S. Publication http://www.irs.gov/pub/irs-utl/evolution_of_the_office_of_the_taxpayers_advocate .pdf. The move towards restructuring the Service and the impetus for further reform led Congress to establish the National Commission on Restructuring the Internal Revenue Service in 1996. *See* Treasury, Postal Services and General Government Appropriations Act, 1996.

203. The Restructuring Commission report supported changes to "restore the public's faith in the American tax system," incorporate greater outside oversight, simplify the system and strengthen TAS to allow for greater independence. NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE. A VISION FOR A NEW IRS, at 5 (June 25, 1997). Specifically, it recommended, "to succeed, the Advocate must be viewed, both in perception and reality, as an independent voice for the taxpayer within the IRS." *Id.* at 48. To mitigate those concerns, the Commission called on TAS to expand its reporting obligations by identifying the ten most litigated issues and providing solutions for mitigating disputes in those areas. *See id.* at 49. The Commission proposed that "[t]o ensure the independence of the national Taxpayer Advocate, candidates for this position should have substantial experience representing taxpayers before the IRS or with taxpayer

Following RRA 98, TAS increasingly played an important role in the development of legislation.[204] Its reports and the testimony of Nina Olson have had a substantial impact in terms of encouraging administrative and legislative sensitivity to issues and interests that are not necessarily championed by any organized group. In addition, TAS has greatly expanded its capacity to address individualized problems that taxpayers have in navigating the system and had a role in a variety of issues that resulted in changes to IRS guidance.[205] How much of the influence of TAS rests with the skills of the current National Taxpayer Advocate, as compared to the institutional powers of its office, however, remains unclear. In addition, its reporting role is directed to Congress, and while it is responsible for informing Congress, to ensure an even stronger role, and one that will last beyond the term of any one NTA, Congress and the IRS itself can make changes that emphasize TAS's role in assisting the IRS and Treasury develop

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rights issues. If the Advocate is selected from the ranks of career IRS employees, the selection also should be a person with substantial experience assisting taxpayers or with taxpayer rights issues, and the job description should stipulate that it will be the employee's final position within the agency." *Id.* The Commission also called for a more vigorous internal role in preventing problems before they occur, emphasizing a special relationship with the IRS's outside board of directors. *Id.* My proposals thus build on the Commission's theme for ex post TAS involvement.

204. *See* National Taxpayer Advocate, 2001 Annual Report to Congress at 2 (voicing concern about differing definitions and complex rules surrounding "qualifying child" deductions, and calling for revision). The Working Families Tax Relief Act of 2004 subsequently enacted this TAS recommendation. Pub. L. No. 108-311, 118 Stat. 1169.

205. *See, e.g.*, Withdrawal of Notice of Federal Tax Lien after Release, BSSE-05-0611-037 (June 10, 2011) (setting forth new procedures for processing requests for withdrawal of notices of federal tax liens after the lien has been released and reflecting a victory for the NTA). *See also, National Taxpayer Advocate Says IRS Not Meeting Needs of Low-Income Taxpayer*, 2010 TNT 51-41 (March 16, 2010) (TAX ANALYSTS) (containing Nina Olson's testimony before the House Ways and Means Oversight Subcommittee regarding the need for NFTL reform). The Taxpayer Advocate asserted that although NFTLs are powerful and effective collection tools, improperly applied, they may cause unnecessary hardship to taxpayers. *Id.* Therefore, the IRS must balance the harm the lien may inflict and the revenue it is likely to generate. *Id.* As cases percolate through the Taxpayer Advocate Service, it is uniquely situated to examine how these policies impact taxpayer interests. For example, if a taxpayer loses his job and he becomes delinquent on his taxes, an NFTL may be applied. If it is applied, it is immediately recorded on the taxpayer's credit report. Not only will this have long term damage on his credit score, it may also destroy his financial viability — hampering employment opportunities and thus driving up a taxpayer's costs, and lowering the likelihood he will be able to pay their tax deficiency. Even if the tax debt is settled and the lien released, the NFTL will still appear on a taxpayer's credit report, potentially indefinitely, causing him long term financial repercussions.

policies before problems arise, rather than in a reactive way through IRS guidance that may adversely impact taxpayer interests.

Although TAS is involved in proposing legislative changes to Congress, little explicit statutory authority exists to empower TAS to act in the rulemaking process. To supplement the powers of TAS within the guidance process, the statute should reflect an affirmative role for commenting on proposed agency guidance as well as report on the effect of its involvement in rulemaking. Moreover, the structure of the office should be modified to allow a statutorily based counsel to play a formal role in the rulemaking process. That approach is discussed below.

a. Enhancing the Role of the Taxpayer Advocate

Congress has invested TAS with several statutorily-designated "hard" powers and obligations, from which spring numerous informal "soft" powers.[206] While these powers have led to an increased level of awareness of taxpayer issues at the IRS, they essentially center on ex post solutions to taxpayer problems. That is, the current TAS regime does not adequately involve TAS in ex ante participation in IRS rulemaking. One factor that has contributed to TAS's soft power in the past decade is the skill and experience of the current NTA. Congress can take specific steps to enhance the statutory powers that TAS has with respect to rulemaking, and, in particular, with respect to ensuring that the IRS consider TAS's perspective before the IRS promulgates rules. This subsection proposes three additions to TAS's "hard" powers aimed at increasing TAS "soft" powers and involvement in ex ante rulemaking consideration. First, Congress can create an office of independent counsel that will report to the NTA and carve a defined role for that counsel in the rulemaking process. Second, TAS's reporting obligations to Congress may be expanded to include the extent to which IRS has considered issues that TAS raises in the rulemaking process, including the extent to which IRS has sufficiently engaged the interests of outside stakeholders and considered interests of individuals. Third, Congress may provide a mechanism for the IRS to specifically identify comments of TAS in the notice and comment process, using section 7805(f) as a model.

Using section 7805(f) as a model, I propose TAS play a more vital role in the promulgation of agency guidance. Responsibility for drafting

206. For example, TAS has the "hard" powers to intervene in an ongoing taxpayer case before the IRS and may issue a variety of administrative measures to delay IRS actions and prompt additional agency consideration. As an outgrowth of these explicitly granted powers, as well as the skills and energy of the office, TAS has also gained what I term "soft" powers, such as the ability to participate in the academy and colloquia. Its prestige and influence undoubtedly contribute to IRS taking into account its views prior to promulgating guidance.

regulations rests with the Assistant Secretary of the Treasury for Tax Policy and the Office of Tax Legislative Counsel. Initial drafting of regulations is delegated to the Commissioner and his or her legal advisors in the Office of Chief Counsel.[207] A fairly intense internal review process ensures that both Treasury and IRS are comfortable with regulations before promulgation. As mentioned above, the IRS view is that regulations are generally exempt from the APA notice and comment regime, although it usually provides at least an informal mechanism for public comment outside the APA.[208]

The Code also provides, under section 7805(f), that after publication of any proposed or temporary regulation, the IRS is to submit the regulation to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the regulation on small businesses.[209] The Chief Counsel then submits comments on the regulation, and the IRS is statutorily required to consider those comments, discussing those more significant in the preamble of the final regulation.[210] This model presents a template that

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207. SALTZMAN, IRS PRACTICE, *supra* note 116, at sec 3.002. *See also*, Korb, *The Four R's Revisited*, *supra* note 27, at 324–25.

208. *See* Hickman, *Coloring Outside the Lines*, *supra* note 26 (describing Treasury's view that most of its regulations are interpretive and therefor exempt from APA notice and comment procedure). For more in depth discussion of Treasury's guidance *see supra* notes 115–34 and accompanying text. Even when the IRS maintains that it is exempt from APA notice and comment because its rule is either interpretive, temporary, or promulgated under the good cause exception, the Treasury may still issue a notice of proposed rulemaking and solicit public comments, explicitly stating that it is doing so outside and not pursuant to APA rules. *See, e.g.*, Regulations Prepared for IRC Section 469, Passive Activity Loss, T.D. 8175, 1988-1 C.B. 191, 205 (inviting comments but explicitly stating its temporary, interpretive regulation was not subject to APA or RFA).

209. *See* Review of Impact of Regulations on Small Business, IRC § 7805(f), Providing that: (1) after publication of a proposed regulation, it shall be submitted to the Chief Counsel for Advocacy of the SBA for comment on impact on small business; (2) In prescribing the final regulation which has been submitted to the Chief Counsel (A) the secretary shall consider the Counsels comments, and, (B) discuss any response to them in the preamble of the final regulation. Furthermore, (f)(3) if the final regulation does not supersede the proposed regulation, the Secretary must again submit the regulation for SBA comments and consider them in the preamble. Initiated under, Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342.

210. *See id.* The Regulatory Flexibility Act (RFA), which is applicable to all rules published pursuant to Administrative Procedures Act section 553(b), requires an agency to prepare a regulatory flexibility analysis in its notice of proposed rulemaking that describes the impact of the proposed rule on small entities and any significant alternatives to the proposed rule. RFA, 5 U.S.C. §§ 603–04. Because the Treasury maintains that most of its regulations are exempt from the APA notice and comment requirement, either because they are nonlegislative

Congress should adopt to enhance the advocacy role of the National Taxpayer Advocate. Amending section 7805 to provide that the IRS is to submit regulations to counsel for the NTA, and likewise require the IRS to discuss any concerns that the counsel raises, would provide a record allowing the public (and courts) to evaluate the IRS's decision-making process and further ensure that it considers the interests that TAS represents. To effectuate this, legislation would be needed to grant statutory authority for an independent counsel[211] hired by the NTA that would report directly thereto (Counsel to the NTA).[212] To avoid the difficult task of limiting which issues TAS should offer comments on, the legislation should clarify that the intent is to allow the IRS to benefit from taxpayers whose perspectives may not typically be before the IRS due to limited resources or sophistication, or other barriers. In addition, the intent should reflect that Congress wishes all taxpayers, not just those with the resources and paid intermediaries, have their interests furthered in the rulemaking process. This would require the NTA to select which regulations it comments on, and essentially give the NTA discretion to comment, or not, depending upon the nature of the issue.[213] To serve as a useful monitor of this new power and how the IRS

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interpretive rules or under the good cause exception, it is not required to comply with the RFA. Therefore, although section 7805(f) does not act as an exemption for Treasury rules which are promulgated in accordance with the APA, it subjects nonlegislative "interpretive" rules to a lesser degree of analysis.

211. *See* S. Rep. No. 105-174 (1998); H.R. Rep. No. 105-599 (1998) (Conf. Rep.). The Senate version of the RRA98 suggesting legislative changes to TAS provided in § 1102(a) that the NTA had the authority to appoint a counsel in the Office of the Taxpayer Advocate that reported directly to the NTA, but this was dropped in conference. Although there is not much in way of legislative history with respect to the functions that the Senate had in mind for this position, it may have been an attempt to provide a statutory foundation to be more involved with the formation of policy within the IRS in a manner consistent with the Commission Report.

212. After this article was written but before its publication, the NTA made a similar proposal. *See* 2011 Annual Report to Congress, http://www.taxpayeradvocate.irs.gov/usersfiles/file/2011_ARC_Legislative%20Recommendations.pdf, at p. 577.

213. Currently, NTA has on her staff directorates providing staff services for a variety of areas. In addition, the Office of Chief Counsel provides several legal advisors. *See* National Taxpayer Advocate Background, Appendix III at 4, http://www.irs.gov/pub/irs-utl/tas03obj.pdf. These advisors, known as Special Counsel to the National Taxpayer Advocate (CNTA), although assisting NTA, report back to the Office of Chief Counsel. IRM 1.1.6.4 (07-29-2005). The CNTA is responsible for matters that require interpretation of IRC §§ 7803(c) and 7811, raise questions regarding the authority of the NTA, and relate to the completion of legislative recommendations drafted for the NTA's annual report to congress. *Id.* This creates the possibility of a conflict when the Chief Counsel takes a legal

overall responds, as part of its reporting responsibilities to Congress, NTA would describe the regulations it offered comments on, and to what extent the IRS did or did not take those views into account in finalizing its rules.[214]

b. Subregulatory Input from TAS

Under current procedures, in addition to regulations, the Assistant Secretary of the Treasury for Tax Policy makes "the final determination of the Treasury Department's position with respect to issues of tax policy arising in-connection with regulations, published Revenue Rulings and Revenue Procedures, and tax return forms and to determine the time, form and manner for the public communication of such position."[215] Before promulgation of a variety of forms of subregulatory guidance, the IRS's Office of Chief Counsel generally circulates "green" drafts of rule-making throughout all the offices within IRS, including TAS.[216] If TAS identifies a problem with this guidance, it may raise the concern to the Assistant Secretary but there is no formal sign-off or procedure to ensure TAS comments are considered. Although the creation of a Counsel to the NTA

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position that differs from the NTA's. There are other attorneys who work with the NTA, and who are housed in the Attorney-Advisory Group. This Group does not provide legal advice or advocacy to the NTA, but does provide the NTA access to skills such as researching tax law and assisting with report writing, thus providing both direct and indirect assistance with the NTA's systemic advocacy function. See http://www.irs.gov/pub/irs-utl/nta2011objectivesfinal..pdf, at 75-77; http://www.taxpayeradvocate.irs.gov/userfiles/file/2011_ARC_Legislative%20Recommendations.pdf, at p.577.

214. Ignoring TAS comments or failing to explain why IRS acted in ignoring those comments might lead a court to find the regulations infirm. *See* Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (stating "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Moreover, requiring TAS to report on the regulations it comments on, and highlight areas where IRS has failed to take into account those comments, will provide requisite Congressional attention to issues that may adversely impact taxpayers.

215. The signature authority of the Assistant Secretary arises under Department of the Treasury Order 111-01 which effectively gives the Office of Tax Policy veto power. http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to111-01.aspx. While the Chief Counsel for Advocacy of the Small Business Administration has section 7805(f) to ensure small business interest are considered in nonlegislative regulations, TAS currently has no such avenue to assert low income taxpayer concerns.

216. Email on file with author.

operating in manner similar to the Chief Counsel of Advocacy for the SBA would allow TAS to have a stronger voice in regulatory guidance, this additional procedural step may result in IRS relying on increased use of sub-regulatory guidance to bypass this requirement.

As Professor Mantel and others identify, the same concerns with respect to ensuring that an agency considers the interests of parties in subregulatory as in regulatory guidance, a mechanism should be in place to allow for systemic TAS input there as well. One approach would be to require guidance from the Counsel to the NTA, with regard to issues that could have significant effect on low income taxpayers, before the IRS issues a notice, revenue ruling, or other forms of guidance. Although the Assistant Secretary for Tax Policy would still have the final say as to whether the guidance is issued, the Counsel to the NTA would be given the opportunity to provide comments, and in the case of a disagreement, the NTA would have the discretion to report such instances to Congress.[217] The report should provide and explain any disagreement and, as with other recommendations contained in the TAS annual report to Congress, allow the IRS the opportunity to respond. This procedure will thereby create a complete record for Congress to determine whether there is proper consideration of the interests of low income taxpayers. This proposal would encourage understanding of the rationale behind IRS policies, and provide systemic pressure on the IRS to consider differing views before or close in time to using guidance.

2. *Clinics*

Scholars have noted the role that organized public interest groups outside government can play in promoting the agenda of lower income or regulated individual interests.[218] While there are general restrictions that

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217. Leaving discretion with the Assistant Secretary of tax policy will help ensure subregulatory guidance will not be bottlenecked by TAS comments, but will also balance the interests of all parties.

218. Well-financed public interest groups have the ability to lobby agencies in order to advance their views in the policy and regulations produced. *See* Wagner, *Administrative Law*, *supra* note 149, at 1349 (using EPA rulemaking as an example for interest groups to infiltrate policymaking). This public interest community has traditionally had little involvement with the formulation of IRS guidance, with one major exception. One area where public interest advocates have greatly influenced IRS policy is with respect to refund anticipation loans (RALs). RALs are short-term loans secured by a taxpayer's anticipated tax refund amount. In 2011, the IRS effectively curtailed the practice by no longer revealing information about a potential lender's past due tax liabilities or other liabilities that the IRS can satisfy with refunds. Due to the high cost of those loans and questionable trade practices, the public interest community had a longstanding practice of attempting to convince IRS

apply to limit the lobbying activities of legal service organizations[219] and particular restrictions that apply to federally funded tax clinics, there is ample opportunity for the IRS to capitalize on clinics involvement with low income taxpayers before the IRS puts in place rules that may become the subject of resource intensive litigation if the rules are improper or unwise in the first instance.[220]

Since 1998, tax clinics that meet certain criteria, including representing low-income[221] taxpayers or providing outreach to taxpayers who have limited English proficiency, receive matching federal funding.[222]

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and Congress to limit their availability. *See* Danielle Douglas, *End of the RALs?*, THE WASHINGTON POST, Mar. 27, 2011, http://www.washingtonpost.com/capital_business/end-of-the-rals/2011/03/25/AFNQJVkB_story.html.

219. *See* 45 C.F.R. Pt. 1612. Restrictions in Lobbying and Certain Other Activities (specifying which activities are prohibited for recipients are Legal Services Corporation grant recipients). *See also* Legal Aid Services of Oregon v. Legal Services Corp., 608 F.3d 1084 (9th Cir. 2010). Because not all clinics receive funding from Legal Services, they are not confined to these restrictions. *Id.*

220. Low Income Tax Clinics (LITCs) specifically are restricted from using any federal grant funds or matching grant funds to either directly or indirectly support, modify, or adopt any low, regulation or policy at any level of government. To clarify, the 2012 Grant Application Packages outlines distinctions between permitted and prohibited activities. Low Income Taxpayers Clinic 2012 Grant Application and Guidelines, IRS Publication 3319 (Rev. 9-2011) [hereinafter Grant Application]. For example, grantees are prohibited from using federal grant funds and matching funds to "draft or assist in the drafting of legislation or provide comments on draft legislation." *Id.* at 38. It is permissible, however, to use funds to educate the public or constituents on legislative issues, "so long as the education is not part of a broader effort to directly or indirectly . . . influence legislators on a specific piece of legislation or legislative issue." *Id.* at 39, 67. *See also* 31 USC § 1352; 2 CFR Pt. 230, 220; Publicity and Propaganda/Appropriations Laws Restrictions; 2012 Grant application *supra* at 40 (identifying these sources of guidance on lobbying activities and effect on LITC activity). Note that some tax clinics, including the Benjamin Cardozo School of Law Tax Clinic, do not receive federal funding and would not be subject to these limits.

221. The term low-income taxpayer clinic means that a clinic: (i) does not charge more than a nominal fee for its services; and (ii) represents low-income taxpayers in controversies with the IRS or operates programs to inform individuals for whom English is a second language about their rights and responsibilities. *See* I.R.C. § 7526(b)(1)(A). The statute does, however, give some room for up to 10 percent of cases in a given year to include taxpayers other than those defined as "low-income." *See* I.R.C. § 7526(B)(i) (at least 90 percent of taxpayers represented by the clinic must have incomes that do not exceed 250 percent of the poverty level).

222. I.R.C. § 7526(a) (stating that the Secretary may make matching fund grants for qualified low-income taxpayer clinics). *See also* Leslie Book, *Tax Clinics: Past the Tipping Point and to the Turning Point*, 34 EXEMPT ORG. TAX REV. 27 (2001); Keith Fogg, A Brief History of Low Income Tax Clinics, ABA section on

Clinics have grown significantly since the advent of federal funding,[223] with many housed within traditional legal service organizations, others based in law or business schools under the supervision of a professor, and still others freestanding. The principal activity of tax clinics is the representation of individuals who have disputes before the IRS or Tax Court, or who have tax liabilities and are unable to pay fully on those debts.[224] In essence, clinics are a proxy for legal representation before the IRS, playing a role necessitated in part by the explosion of the use of the tax system as a means for delivering benefits in the aftermath of welfare reform, ensuring IRS focus on compliance among taxpayers claiming those benefits, and the traditional absence of tax work from general legal service organizations.[225] Traditionally, the number of clients that clinics represented has been a key factor in IRS decisions to provide funding.[226] As such, while some clinics

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Taxation 2010 Joint Fall CLE Meeting (Sept. 25, 2010) (detailing history of low-income taxpayer clinics from inception to present). Although the majority of low-income taxpayer clinics are funded through the federal grant program, there are other clinics in existence that operate separate from federal funding.

223. Section 7526 authorizes the Secretary to provide a matching grant up to $100,000 for qualified clinics. In 1999 grants were awarded to thirty-four clinics. As of 2011, 165 clinics have received funding through the LITC programs. *See* Grant Application, *supra* note 220, at 10.

224. Out of the 156 LITCs currently operating within all fifty states, the District of Columbia and Puerto Rico, eighteen provide ESL services exclusively, fifty-two provide representation without ESL support, and eighty-six provide both Representation and ESL. *See* http/www.irs.gov/pub/irs-pdf/p4134.pdf.

225. *See* Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 358–60 (2002) (describing that rights and benefits are often meaningless for low-income taxpayers who lack access to representation in the face of IRS compliance actions). LITCs not only provided representation, they deliver benefits in the form of increased confidence in the tax system and increased exposure of low income taxpayer issues that have in the past been underrepresented. *Id.* at 414–16. *See also* Janet Spragens and Nina E. Olson, *Tax Clinics: The New Face of Legal Services*, 2000 TNT, 181–101 (Sept. 18, 1000) (describing how changes in welfare laws, the expansion of the earned income tax credit (EITC), and increased compliance efforts directed largely at low income taxpayers claiming the EITC converged to increase the need for free or low-cost tax representation to the nation's working poor).

226. Low Income Tax Clinics are part of the Taxpayer Advocate service. The IRS created the LITC program in 1998 as part of the RRA '98, and in 2003 it was transferred from the IRS Wage and Investment operating division to the TAS, where the director of LITC programs reports directly to the National Taxpayer Advocate. Because clinics apply for grants and grant renewals through TAS, TAS is responsible for both setting guidelines for clinic activity and evaluating clinics effectiveness. Furthermore, RRA '98 provided that Local Taxpayer Advocates be located in each state, whom area clinics report to, and to whom report directly to the National Taxpayer Advocate. *See* I.R.C. § 7803(c)(4).

and directors of tax clinics have participated in commenting on proposed IRS rules, either individually[227] or in the context of work within the American Bar Association Tax Section,[228] clinicians with limited time and resources[229] have had to allocate their time carefully lest they run the risk of cutting into their ability to handle cases. Therefore, the primary focus has been on serving clients in the context of adjudication proceedings, rather than through participation in the rulemaking process.

To be sure, since TAS took over the responsibility of clinics from IRS's Wage and Investment unit,[230] TAS has recognized the valuable

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227. *See* Leslie Book, *Unofficial Transcript of IRS Hearing on Proposed Regulations: User Fees for Offer in Compromise*, 2003 TNT, 35–27 (Feb. 13, 2003) (asserting that user fees as applied will discourage good-faith submissions of OICs by low income taxpayers).

228. *See* Low Income Taxpayer Committee Panel Website, http://apps.americanbar.org/dch/committee.cfm?com=TX330500 (providing resources for Low Income Taxpayer Representation, providing Multilanguage EITC forms and publications, and pleading strategies for LITC issues such as section 6015(f) innocent spouse to name a few). Note that almost all guidance will have an LITC clinician involved. *See* Carlton M. Smith, *What's Next? Equitable Tolling, Judical Deference and Challenges to Regulations, Revenue Rulings and Revenue Procedure in a Post* Mayo Foundation, Lantz, and Mannella *Era*, ABA TAX SECT. LOW INCOME TAXPAYER COMM. (2011) (describing from the view point of a clinician the implication of recent section 6015(f) litigation).

229. The issues of limited resources and ability of legal clinics to meet the needs of indigent clients with civil matters is something that is well known in the nontax literature. *See* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 575 (2011) (suggesting that growth in population and the number of laws that add to the problems that poor people encounter as the two most important ereasons for the increasing problem of limited access to civil legal representation among the poor); Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts* (Sept. 2008), 4, http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf (describing the pressing need for legal services for the poor funded by federal and state government). *See also* Anthony Doniger, *A Civil Right to Counsel*, 51 B. B.J., 2, 2 (Sept./Oct. 2007) (addressing how to provide counsel as a matter of right to low-income persons in civil proceedings); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

230. *See* GRANT APPLICATION, *supra* note 220, at 10 (describing briefly the history of LITCs). In 2003, the LITC Program Office was transferred from the IRS

services some clinic provide in the form of scholarship addressing issues relevant to low-income taxpayers[231] and has helped facilitate the flow of information to TAS regarding systemic issues that clinics experience first-hand through their representative work.[232] In addition, TAS has recognized that clinics housed in law or business schools may have less ability to represent the same number of clients as nonacademic clinics[233] and has acknowledged that activities such as commenting on regulations and writing articles are also critical factors in assessing clinic performance.[234] While

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Wage and Investment (W&I) operating division to the Taxpayer Advocate Service (TAS). The Director of the LITC Program Office reports directly to the National Taxpayer Advocate. *Id.*

231. Non-clinical scholars are recognizing the valuable role that scholars associated with tax clinics can play. *See* Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 269 (2009) (praising clinicians such as Villanova Tax Clinic Director Keith Fogg on his contribution to tax reform scholarship, specifically with regard to section 6672 Trust Fund Recovery Penalty).

232. For example, I am aware that in 2011, the IRS had assembled a task force on issues relating to innocent spouse, and the task force that includes clinicians. The task force is considering a number of issues, including possible revision of the Form 8857, Request For Innocent Spouse Relief, http://www.irs.gov/pub/irs-pdf/f8857.pdf.

233. The 2012 grant application addressed the unique situation of academic LITCs. In academic clinics, fewer taxpayers are served than in nonacademic clinics because of the time involved in teaching and mentoring students. *See* Grant Application, *supra* note 220, at 67. Clinical scholarship has provided insight 'from the trenches' on how tax policy affects low income taxpayers, providing TAS with the needed information to suggest legislative changes and report the most pressing issue to Congress in its annual report. *See* Camp, *Theory and Practice*, *supra* note 60, at 274 (expressing the importance of LITCs both in their ability to become a "lobbying voice" for low income taxpayers and a source of valuable tax administration proposals and articles from a nontraditional view from clinical professors). *See, e.g.*, Janet Spragens & Nancy Abramowitz, *Low-Income Taxpayers and the Modernized IRS: A View From the Trenches*, 107 TAX NOTES 140, (Jun, 13, 2005) (detailing the effects of '98 reform and reorganization on low income taxpayers); Nancy S. Abramowitz, *Thinking About Conflicting Gravitational Pulls LITCS: The Academy and the IRS*, 56 AM. U. L. REV. 1127, 1133 (2007) [hereinafter Abramowitz, *Gravitational Pulls*] (recognizing the "closeup scholarly examination of client-centered lawyering" that amounts from clinical professors).

234. *See* Grant Application, *supra* note 220, at 67 (providing program office evaluation measure specific to academic clinics). "[T]he LITC Program Office will consider additional ways in which academic clinics can accomplish LITC Program goals (e.g., providing technical assistance, training, and mentoring to other LITC programs, publishing articles about the LITC Program, commenting on proposed Treasury regulations that affect low income or ELS taxpayers, and monitoring graduates to determine whether they perform *pro bono* work on behalf of or otherwise assist low-income taxpayers." *Id.* Even though the unique position of

these efforts are valuable, Congress and the IRS can do more to encourage clinics to participate in agency rulemaking. As a legislative incentive, Congress could amend section 7526(b)(1)(A) to provide that a permitted clinic activity includes work related to the submission of comments on regulations or other agency guidance provided that those comments are reflective of issues that are germane to their representation of low income taxpayers or people for whom English is a second language.[235] In addition, to further help identify the importance of this type of work, LITCs should be required to report to TAS on their commenting activity in annual reports it submits. Moreover, Congress may wish to provide a separate funding

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academic LITCs was acknowledged in 2007, the new commenting criteria for evaluation did not appear in LITC Grant Applications until 2012. *See* Abramowitz, *Gravitational Pulls*, *supra* note 233, 1133 (voicing concerns shared by the LITC community that LITC Program Office may overemphasize the number of taxpayers served by a program, putting academic clinics at a disadvantage). Concerns were met with response and the "National Taxpayer Advocate has recognized essential differences between academic and pro bono clinics and has extended a hand to academia to offer criteria for evaluating their programs." *Id.* at 1130.

235. Amended the statute could read as follows (proposed change in italics):

I.R.C. § 7526(b)(1)(B) Representation of low-income taxpayers. A clinic meets the requirements of subparagraph (A)(ii)(I) if —

(i) at least 90 percent of the taxpayers represented by the clinic have incomes which do not exceed 250 percent of the poverty level, as determined in accordance with criteria established by the Director of the Office of Management and Budget; and

(ii) the amount in controversy for any taxable year generally does not exceed the amount specified in section 7463; and

(iii) *the clinic provides meaningful commentary to proposed treasury regulations substantially effecting low income taxpayers.*

(c) Special rules and Limitations. . . .

(4) Criteria for awards. In determining whether to make a grant under this section, the Secretary shall consider —

(A) The numbers of Taxpayers who will be served by the clinic, including the number of taxpayers in the geographical area for whom English is a second language;

(B) The existence of other low income taxpayer clinics serving the same population;

(C) The quality of the program offered by the low-income taxpayer clinic. . . .

(D) Alternative funding sources available to the clinic. . . .

(E) *The contribution of meaningful commentary to proposed treasury regulations that will substantially affect low income taxpayers.*

Alternatively, perhaps regulations under section 7526 could liberally define representational work to include participation in rulemaking with respect to matters that clinics are generally involved in.

mechanism for clinics that engage principally in that activity or incentivize organizations to receive funding separate and distinct from money that is allocated specifically to representation or outreach work.[236] The effect of these changes would be both symbolic and practical, as Congress and the IRS signal to the community that they take nonrepresentative work seriously and help clinic employees and directors who may otherwise feel compelled to allocate their limited resources to areas that are rewarded in the funding process.

VI. CONCLUSION

Reflecting similar concerns that this article raises, the 2011 Taxpayer Advocate Annual Report to Congress, which came out after this article was originally drafted, makes an explicit legislative recommendation that would require the IRS to submit proposed or temporary regulations prior to their publication to the NTA for comment, and would also require that the IRS address those comments in the preambles to the regulations. In addition, the 2011 Annual Report recommends allowing the NTA to appoint an independent counsel, whose role would include directly providing legal advice to the NTA.[237] The recommendations I make, as well as the specific legislative recommendation the NTA herself makes, reflect an increased awareness that the IRS plays one of the more prominent roles of all agencies in the lives of Americans. Congress has chosen to increase the IRS's responsibilities beyond revenue collection, especially in the last twenty years with the explosion of the amount and size of refundable credits and the placement of nontax legislation (like health reform) within the internal revenue code. Superimposed on these additions is an increasing codification of taxpayer rights in the collection process, an overall trend in American culture to expect more transparency in institutions and opportunities for public involvement. The IRS in the time following the passage of the APA often received a free pass from provisions to ensure greater accountability and participation. That free pass rooted in tax exceptionalism is coming to an end.

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236. This is not intended to exhaustively discuss the mechanism for such funding; rather, the focus here is that Congress and TAS can do more to ensure that there are proper incentives and certainly no disincentives associated with providing comments to the IRS.

237. http://www.taxpayeradvocate.irs.gov/usersfiles/file/2011_ARC_ Legislative %2020Recommendations.pdf at p.576. The 2011 report also urges that the NTA be granted power to submit amicus curiae briefs and contemplates that the counsel assist the NTA with that brief writing function, as well as the task of commenting on regulations.

The IRS will have an opportunity to consider ways in which its actions and guidance are reflective of participatory values that will help ensure its legitimacy and produce better formed rules that the public will be more receptive to following. The still crucial goal of revenue collection, essential for the modern nation state, need not be undercut by the agency performing functions beyond that still primary goal. The paradigm I propose reflects the reality of the IRS's functions and provides an opportunity for it to remain responsive and accountable to the public it is serving. Failing to consider its new position in the lives of Americans carries with it great risks in that acceptance of the legitimacy of the agency is a likely powerful factor associated with tax law compliance. Moreover, increased participation will enhance the wisdom of guidance that the IRS adopts.

The IRS has advantages relative to other agencies in that it has TAS and clinics, powerful intermediaries that would be willing partners to facilitate public involvement and serve as proxies when that involvement is not available or impractical. Moreover, adopting a best practices approach to participation in the form of informal guidance that would be backstopped by IRS explanation of its actions would allow it to serve as a model for other agencies. The IRS, like other agencies, has many choices as to how it issues guidance to the public. It is not my intent that this article serve a call to limit the IRS's discretion; rather, my hope is that it serves as a prompt for the IRS (and Congress) to consider as a matter of course the ways in which it can engage the public more meaningfully before it issues guidance that as a practical matter has great impact on the lives of ordinary Americans.

What of the two-year rule mentioned in the introduction? After about thirty judges ruled or heard argument on cases winding their way through courts of appeal and in Tax Court, the IRS receiving Congressional rebuke for its policy and the extraordinary efforts of Commissioner Shulman in instituting a high level review of the IRS's policies, the IRS reversed course. In July of 2011, the IRS announced that it would be giving relief to taxpayers whose claims for equitable relief were denied because of the two-year rule in the past and offering relief to those who had yet applied.[238]

The reaction in the community of advocates and scholars was immediate. The National Taxpayer Advocate, in a press release, stated that:

> I am pleased the IRS will be providing relief from the two-year rule not merely to taxpayers who file future claims but also to most taxpayers whose claims were rejected in the past. I particularly want to commend Commissioner Shulman, who personally made the decision to change this policy. I also want to commend TAS's Local Taxpayer

238. *See* Notice 2011-70, 2011-32 I.R.B. 135; I.R.S., News Release IR-2011-80 (Jul. 25, 2011).

> Advocates, who worked on many of these cases and advocated for change; the Low Income Taxpayer Clinics, who represented many taxpayers as this issue was winding its way through the courts; and the many Members of Congress who advocated for this result. This is a welcome occasion where everyone has emerged a winner.[239]

While the IRS withdrawal is good policy, it would have been even better policy had the IRS made more of an effort to get direct input on the rule before it issued its guidance. The efforts of local advocates and clinics — singled out by the NTA when the IRS made its high profile withdrawal of the rule, should systematically be part of the ex ante guidance process. Relying on clinics or the TAS to work with aggrieved taxpayers or lobby Congress for changes after the fact does not make for sound tax administration and engenders ill feelings between the IRS, Congress and, most importantly, among those very individuals who the provision was enacted to help. The paradigm I offer in this article reveals how the IRS can provide a more inclusive and participatory way of governing.

239. *See* Nina Olson, *Taxpayer Advocate Commends IRS for Policy Change on Equitable Innocent Spouse Relief*, 2011 TNT 143–26 (Jul. 25, 2011).

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University of California, Los Angeles, School of Law
Citizens United, Tax Policy, and Corporate Governance
Faculty Sponsor: Prof. Steven Bank

Second Prize (tied) ($2,500):

Jacob Dean
University of Cincinnati College of Law
"Do you have that new church app for your iPhone?' Making the Case for a Clearer and Broader Definition of Church Under the Internal Revenue Code
Faculty Sponsor: Prof. Stephanie Hunter McMahon

Second Prize (tied) ($2,500):

Stas Getmanenko
Southern Methodist University
Consequences of Carried Interest Reform for the Private Investment Industry
Faculty Sponsor: Prof. Christopher Hanna

Honorable Mention:

Tessa Davis
Florida State University College of Law
Repoducing Value
Faculty Sponsor: Prof. Curtis Bridgeman

Jacob Goldin
Yale Law School
Libertarian Paternalist Meets Tax Policy: Designing Commodity Taxes for Inattentive Consumers
Faculty Sponsor: Prof. Yair Listokin