Leadership Development Session
Government Comment Submission Process

Thursday, May 28, 2020 | 5:00 pm Eastern
Panelists

• Megan Brackney, Vice Chair, Committee Operations
• Eric Sloan, Vice Chair, Government Relations
• Lisa Zarlenaga, Chair, Committee on Government Submissions
• Megan Newman, Chief Counsel, Tax Section
• Mary Slonina, Administrative Practice Committee
• Jonathan Forrest, Corporate Tax Committee
Questions?

All attendees can submit questions for the panelists throughout the session via the chat feature.
Why?

• An important goal of the Tax Section is to provide objective and thoughtful input on tax matters of importance.

• Tax Section comments are held in high regard by the Government, and it is critical that the Section maintain that reputation.

• The comment process works best when everyone understands Section’s procedures and expectations.
Three Types of Comments

1. Technical Comments
   - Most comments (e.g., IRS and Treasury)

2. Blanket Authority Comments
   - All comments not under technical commenting authority. Involves a longer but very similar process.

3. Formal ABA Position
   - Important enough to justify a statement on behalf of the entire American Bar Association
   - Very rare
Technical Comments
The ABA delegates to the Tax Section authority to submit narrowly focused comments in response to a time sensitive solicitation* from:

- Department of Treasury
- Internal Revenue Service
- Department of Labor
- Pension Benefit Guaranty Corporation
- The United States Tax Court (on rules)

*Can be a formal request for comments in the federal register, a notice or another public request for comments or informal solicitation from a government official requesting the Section’s feedback on a matter of tax policy or procedure. Informal requests should be in writing but can be a brief email (please forward to Section Counsel for the file).
The Players (part one)

Committee Chair – Highlighting potential projects, checking Code jurisdiction, coordinating with other committees as relevant, identifying lead drafter, helping recruit drafting team, signing off on substance, helping to usher project forward with submission deadline in mind.

Lead Drafter – Can be the Committee Chair or someone the Chair identifies to organize the drafting team. Responsible for piecing together the sections from the team and making sure they flow.

Drafting Team – Members from the committee who volunteer to write sections of the comment letter. Can be solicited through the committee list serv or invited by the Lead Drafter or Committee Chair.

Council Director – Helps to usher the process forward, can help connect with other committees. Does not need to review for substance (this change was made a few years ago).

Section Counsel – Member of the Tax Section staff, responsible for helping move comment letter forward, answering questions, connecting people, helping the VCGR manage various projects, updating status report for the COGS committee, editing, creating cover sheets, managing the ABA procedures and submitting the comments to the government.
The Players (continued)

Committee on Governments Submissions (COGS) - Most committees are assigned a content area expert who sits on the COGS Committee. The committee has monthly calls to discuss the status of projects. Reviewers can help with formation of positions, drafting, moving projects forward. Required that COGS Reviewer provide substantive and style feedback before moving up the chain of review. The Chair of the COGS Committee oversees all the comment projects in progress and runs the monthly calls.

Vice Chair for Government Relations (VCGR) - Two-year voluntary Officer level position on the Tax Section Council. Responsible for reviewing every set of comments after they go through the COGS review and before the Chair of the Section sees them. Someone with deep experience with the comment process who has also served a three-year term as Council Director.

Tax Section Chair – One-year voluntary position who leads the Section. Must sign off on every comment letter. Signature is on the cover letter.

ABA Policy Director – ABA requires we provide someone from the Policy Department 24 hours to review the comment letter in substantially final form and confirm it is within our technical commenting authority before submission.
Current COGS Committee Assignments

Ellen Aprill – Exempt Organizations, Estate & Gift, Teaching Tax

John Colvin – Administrative Procedure, Civil & Criminal Tax Penalties, Court Practice and Procedure, Tax Collection, Bankruptcy and Workouts

Lucy Farr – Financial Institutions & Products, Investment Management

Jeanne Sullivan and Gary Huffman – Partnerships & LLCs, Real Estate, S Corps, Closely Held Businesses

Ellen McElroy – Tax Accounting, Capital Recovery & Leasing, Sales, Exchanges and Basis

Joe Schimmel – Pro Bono & Tax Clinics, Individual & Family

Eric Solomon – Corporate, Affiliated & Related, and others as assigned

Edward Tannenbaum – International Committees

Susan Wetzel – Employee Benefits, Employment

Lisa Zarlenga – Corporate, Affiliated & Related, and others as assigned
Overview of the Process

We will review the specifics of each step later, but these are the main steps in the process of creating and submitting a comment letter.

1. Initiate Project and Assemble Drafting Team
2. Drafters Write their Sections and Lead Drafter Assembles
3. COGS Review and Subsequent Edits
4. VCGR Review and Subsequent Edits
5. Chair of the Section and ABA Policy Director Sign Off (sometimes subsequent edits)
6. Add Cover Letter and Submit to Government by Email
NEWLY UPDATED Tax Section Style Guide – for this session we are releasing the updated Style Guide. It will be posted on the Tax Section website.

• The link for the government submissions resources page is here: https://www.americanbar.org/groups/taxation/resources/government_submissions/

• Review prior comments from your committee and other committees. https://www.americanbar.org/groups/taxation/policy/
Comment Process - Initiation

- Be aware of important developments under your committee’s jurisdiction (referring to the **Code Jurisdiction List**).
- Let your COGS Reviewer know you are starting a new comment project.
- Track progress of proposed regulations through OIRA.
- Before regulations are released, either form a drafting team or delegate to someone in your committee to be the lead drafter and explain the process and procedures to that person.
- Hold an initial planning call. Explain the steps and timeline to the drafters and discuss potential positions and division of labor.
- When the regulations come out, hold another planning call. Set internal deadlines and confirm drafting responsibilities.
- Try to get new and/or different members of your Committee involved in projects. This could help share opportunities with emerging leaders and avoid comment burn out from the usual drafters.
- It is acceptable to talk to the government to get a sense of what issues would be helpful to address or provide some verbal feedback, but do not share anything in writing.
Comment Process - Drafting

- Drafting team should agree on positions. It is possible but not ideal to also present a minority view.
- Some background information is helpful. The main audience is the government, but both government attorneys very familiar with the issues and those who are less intimately involved will read them. Other Section members also read them. But too much background information just slows the process.
- Comments that are brief and limited in focus are preferable.
- Focus on content and style
  - Objective
  - Intellectually honest
  - Respectful and neutral tone
  - Recommendations or suggestions not “requests”
- Lead drafter is responsible for piecing together the portions of the draft and editing for flow and in accordance with the Style Guide.
- More concise clearly written and carefully edited projects move through the review process faster.
Comment Process - Review

1. Lead Drafter
2. Committee Chair (if not the lead drafter)
3. COGS Reviewer
   • Most committees have been assigned a reviewer. If yours is not, reach out to the COGS Chair or Section Counsel for a COGS Reviewer assignment.
4. Section Vice Chair, Government Relations
5. Section Chair (and ABA Policy Department)
Sample 90 Day Timeline

May – Committee Chair and/or COGS reviewer or Council Director learn that proposed regs are at OIRA. Lead drafter assigned and he or she forms the drafting team. Pre-issuance planning call of drafting team.

June 2 – Proposed regs released with 90-day deadline of September 1.

June 4 – Lead drafter circulates proposed regs to drafting team via email and sets call to discuss response. The email includes a reminder of the ABA conflicts policy, which is attached to the email.

June 8 – Leader sends an issues list or outline for first call.

June 11 – First call

June 14 – Revised issues list circulated.

June 16 – Follow up call to agree on positions. If drafting will be shared, portions assigned, and drafting begins.

July 1 – All portions of draft are submitted to lead drafter, who stitches them together, ensuring that they read as if one person drafted the comments and that they are in accordance with the Style Manual.
Timeline (continued)

July 8 – Draft sent to working group for review and comments
July 11 – Third call to discuss comments on draft
July 18 – Draft sent to committee chair
July 25 – Committee chair returns comments to lead
August 1 – Lead returns draft to committee chair, who forwards them to COGS reviewer.
August 8 – COGS Reviewer sends draft back to drafters for revisions.
August 15 – Drafters send revised draft back to COGS Reviewer.
August 18 – Draft goes to COGS Chair, Section Counsel and VCGR.
August 24 – VCGR shares feedback with COGS Reviewer and drafters
August 28 – Drafters turn draft back to VCGR and Section Counsel. It is then sent to Section Chair and ABA Policy Director for sign off.
August 30 – Incorporate any additional comments from Section Chair.
September 1 – Submission to IRS/Treasury
Conflicts of Interest

Lead Drafter and Committee Chair are responsible for making sure all drafters are familiar with the Conflict of Interest policy at the start of the drafting process.

“Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.”
Disagreements

• Within the drafting group, disagreements should be resolved by the Committee Chair.
• If still unresolved, COGS Reviewer will make the call.
• If unresolved by the COGS Reviewer and the Chair of the COGS Committee, the Vice Chair Government Relations will make the determination.
• The Section Chair will make the final decision.
• Comments can include minority opinions – but the strong preference is to avoid this and present one recommendation on behalf of the Section.
Blanket Authority
Comments
Policy Statement to

- Legislative bodies
- Governmental agencies (other than Treasury, IRS, Labor, PBGC)

Limited to technical comments on matters of importance to the formation of tax policy or the administration of the tax laws. Generally, the Section gets involved after legislation has been enacted.
Blanket Authority Comments - Procedure

• Follow technical comment drafting procedure
• Requires Section Council vote
  – Reviews substance
  – Blanket authority request
• Requires ABA Approval
  – 10 days for other ABA entities to object
  – 5 days if expedited review warranted
Blanket Authority Comments - Tips

• Start early
  – Review process is much longer compared to technical comments
• Alert Section Staff Counsel to potentially controversial points
  – Controversial or sensitive points and issues must be addressed as early as possible to maximize the likelihood of approval by Section Council and the ABA
Formal ABA Position
Formal ABA Position

• Important enough to justify a statement on behalf of the entire ABA
• Procedure
  – Committee vote
  – Council vote
  – Section leadership consideration
  – Submission to the ABA for adoption by House of Delegates or the Board of Governors
• Very rare
QUESTIONS?