Legislation and Comment: The Making of the §199A Regulations

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LEGISLATION AND COMMENT: THE MAKING OF THE § 199A REGULATIONS

Shu-Yi Oei*
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ABSTRACT

In 2017, Congress passed major tax legislation at warp speed. After enactment, it fell to the Treasury Department to write regulations clarifying and implementing the new law. To assure democratic legitimacy in making regulations, administrative law provides that an agency must issue a notice of proposed rulemaking, followed by an opportunity for the public to comment (so-called “notice and comment”). But, after the 2017 tax overhaul, many sophisticated actors did not wait until the issuance of a notice of proposed rulemaking to comment, instead going to the Treasury Department immediately with comments designed to influence the regulations.

In this Article, we examine empirically this phenomenon of post-enactment commenting by studying the making of the Internal Revenue Code Section 199A regulations—some of the most important regulations implementing the 2017 tax reform. We examined the inputs into the regulatory process from legislative enactment through the regulations’ finalization. We find extensive engagement by sophisticated parties and industry groups prior to the official notice-and-comment period, which helped shape and anchor rulemaking outcomes. Subsequent comments submitted in the official notice-and-comment period led to technical and other discrete changes but did not fundamentally change the initial rulemaking approach. Throughout the rulemaking process, there was little direct, public-interested engagement.

Our study underscores how unorthodoxies in the legislative process bleed into the rulemaking process. Hasty legislation puts pressure on administrative law notice-and-comment procedures, exacerbating problems of unequal access and transparency already endemic to rulemaking, and potentially compromising

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democratic legitimacy. We propose solutions that may help ameliorate these problems and improve governance.

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INTRODUCTION

In December 2017, Congress passed a major overhaul of the Internal Revenue Code (the “Code”) at warp speed.¹ The hastiness of the process meant that the new legislation contained numerous errors, poorly designed provisions, and ambiguities.² Once the public furor surrounding legislative passage had died down, it fell to the Treasury Department (“Treasury”) to issue regulations clarifying and implementing the new law.³

Administrative law provides that, to make regulations, an agency must issue a notice of proposed rulemaking, followed by an opportunity for the public to comment.⁴ These so-called “notice-and-comment” procedures are meant to infuse the unelected agency’s rulemaking with democratic legitimacy.⁵ But, in the wake of the 2017 tax legislation, many sophisticated actors did not wait until Treasury had issued a notice of proposed rulemaking in order to comment. Rather, they went to Treasury right away with comments designed to influence the regulations.⁶

In this Article, we study the regulatory aftermath of the 2017 tax reform by conducting an empirical examination of the making of the Code Section 199A


² Howard Gleckman, How Will Treasury Fill in the Blanks of the Tax Cuts and Jobs Act?, FORBES (Apr. 17, 2018, 11:15 AM), https://www.forbes.com/sites/beltway/2018/04/17/how-will-treasury-fill-in-the-blanks-of-the-tax-cuts-and-jobs-act/#6ff1b8c2998d (noting that tax reform “was enacted quickly and many provisions did not go through the normal careful review process” and “[a]s a result, the statute is filled with mistakes and inconsistencies” that would require Treasury “to try to keep up with the scores of questions the TCJA has raised”).

³ See infra note 10.


⁶ See infra Part II.B and accompanying notes. This practice of commenting immediately after legislative enactment is likely to only become more entrenched as a sharply divided Congress increasingly turns to rapid-fire and unorthodox processes to pass laws. See, e.g., Daniel A. Farber & Anne Joseph O’Connell, The Lost World of Administrative Law, 92 TEX. L. REV. 1137, 1140 (2014) (exploring the gap between administrative realities and administrative law); Abbe R. Gluck et al., Unorthodox Lawmaking, Unorthodox Rulemaking, 115 COLUM. L. REV. 1789 (2015) (examining legislative and regulatory unorthodoxies and links between the two); see also, e.g., Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95 (2003) (suggesting that APA should be realigned with more administratively oriented goals).
regulations.\footnote{\textsection \textsection 11011, 131 Stat. at 2063. IRC \textsection 199A is currently in force for tax years beginning after December 31, 2017 and before January 1, 2026. I.R.C. \textsection 199A(i) (Supp. V 2017).} Section 199A is a new tax deduction for pass-through entities and sole proprietors and is widely regarded as one of the most important provisions enacted in the 2017 tax legislation.\footnote{David Kamin et al., \textit{The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation}, 103 \textit{MINN. L. REV.} 1439, 1459 (2019) [hereinafter Kamin, Games I] (describing the new \textsection 199A deduction as “[p]erhaps the most notorious change brought by the 2017 tax legislation.”).} Hence, its potential problems and ambiguities were widely analyzed and criticized in the lead-up to enactment,\footnote{See, e.g., David Kamin et al., \textit{The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the House and Senate Tax Bills} (Dec. 7, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084187 [hereinafter Kamin, Games II] (pointing out loopholes and planning opportunities in the new tax law); Kamin, supra note 8 at 1439; see also discussion infra Part I.A.} and, after enactment, scholars and practitioners eagerly awaited proposed regulations clarifying and interpreting the statute.\footnote{Jonathan Curry, \textit{Year in Review: Tax Bill Takes a Topsy-Turvy Road to GOP Victory}, 157 \textit{TAX NOTES} 1667 (2017) (“[r]egardless of the merits of the bill, the conversation about it will not end with its enactment…. Treasury will issue rules and regulations for the indefinite future as it works to administer the complicated new tax regime ….”); Emily L. Foster, \textit{Kautter Confident About New Tax Law Implementation}, 159 \textit{TAX NOTES} 100 (2018) (quoting Acting IRS Commissioner Kautter as saying, “Treasury and the IRS expect to resolve many uncertainties and complexities embedded in the new tax law through regulatory and other forms of guidance, while anticipating the need for some required statutory changes”); Emily L. Foster, \textit{More Regs, Fewer Notices Expected for Tax Bill Implementation}, 158 \textit{TAX NOTES} 960 (2018) (discussing Treasury and IRS plan to issue more regulations than notices).} Finally, on August 8, 2018, Treasury released its highly anticipated notice of proposed rulemaking.\footnote{IRS Proposed Regulations on New 20 Percent Deduction for Pass-through Businesses, \textit{INTERNAL REVENUE SERV.} (Aug. 8, 2018), https://www.irs.gov/newsroom/irs-issues-proposed-regulations-on-new-20-percent-deduction-for-pass-through-businesses. Those proposed regulations were published in the Federal Register on August 16, 2018. Qualified Business Income Deduction, 83 Fed. Reg. 40,884 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1).} That release kicked off the notice-and-comment period, the official opportunity for the public to comment on the proposed regulations. As required by the Administrative Procedure Act (APA), the official notice-and-comment period lasted at least 30 days (in this case lasting until October 1, 2018),\footnote{See 5 U.S.C. \textsection 553(d) (2012); Qualified Business Income Deduction, 83 Fed. Reg. at 40,884. However, as we discuss below, Treasury accepted comments until at least October 23, 2018.} and Treasury held a public hearing on the proposed regulations on October 16, 2018.\footnote{Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2952 (Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1).} On January 18, 2019, Treasury released the \textsection 199A final regulations and issued corrected final regulations on February 1, 2019.\footnote{The final regulations and associated guidance were released via an IRS news release. \textit{Treasury, IRS Issue Final Regulations, Other Guidance on New Qualified Business Income Deduction; Safe Harbor Enables Many Rental Real Estate Owners to Claim Deduction, INTERNAL REVENUE SERV.} (Jan. 18, 2019), https://www.irs.gov/newsroom/treasury-irs-issue-final-regulations-other-guidance-on-new-qualified-business-income-deduction-safe-harbor-enables-many-rental-real-estate-owners-to-claim-deduction. The corrected final regulations were published in the Federal Register on February 8, 2019 and became effective on that date.} Our study examines the
making of the § 199A regulations from the time of legislative enactment through their January 18, 2019 finalization.

In its August 8, 2018 notice of proposed rulemaking, Treasury took the unusual step of explicitly acknowledging comments it had received from taxpayers and practitioners prior to the official notice-and-comment period and repeatedly referred to those comments in explaining the positions it took in the proposed regulations. Based on our review of previous proposed regulation preambles, this appears to be a new phenomenon. Treasury did this even though these early-received comments were not made publicly available on regulations.gov, in contrast to comments received during the official comment period. By examining these Treasury acknowledgements, and by mining private subscription databases, government databases, and the tax press to locate comments that had been submitted early, we were able to gain insight into a critical part of the regulatory process often hidden from view: the influences on Treasury in the post-enactment period, prior to release of the notice of proposed rulemaking and the start of notice and comment. In this way, we were able to examine empirically how the rulemaking process actually unfolded and what voices tried to shape the regulations by commenting immediately after the legislation.

Our study yielded some distinctive observations about influence into the regulatory process prior to as well as during notice and comment:

First, our study provided a window into regulatory influences prior to notice and comment. In its notice of proposed rulemaking, Treasury repeatedly referred to and gave weight to comments it had already received to justify positions it took, even though the official notice-and-comment period had not actually begun. These pre-notice-and-comment comments (hereinafter referred to as “pre-notice comments”) were mostly from industry players, trade groups, and professional organizations of sophisticated tax professionals. The existence of these comments and Treasury’s mentions of them are important: Traditional administrative law scholarship regards the official public notice-and-comment period as a key means of legitimizing the power of unelected agencies to write

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See infra Part II.A.

For other major regulation projects implementing the 2017 tax legislation, we also saw similar extensive engagement with pre-notice comments in preambles. However, this does not appear to have previously been common practice (other than when Treasury was re-proposing regulations already proposed or had some other official channel (such as an IRS Notice) designed to solicit and receive comments prior to the issuance of the regulation).
regulations. Notice-and-comment procedures are supposed to infuse rulemaking with democratic legitimacy that may be lost if unelected agencies are left to make rules without public observation and input. But administrative law scholars have also increasingly noted the importance of the pre-notice period as a time when regulated parties try to influence rulemaking. Our findings show that—as has been the case in non-tax rulemakings—there were important, early-submitted inputs into tax rulemaking after the 2017 reform that are not captured by notice and comment.

Second, our study examined the nature of comments actually made during notice and comment. After the § 199A notice of proposed rulemaking was issued and the official notice-and-comment period commenced, Treasury received over 300 public comments. Unlike the pre-notice comments, the comments submitted during the official notice-and-comment period were made publicly available on regulations.gov. These latter comments generally came from less sophisticated constituencies than those who commented in the pre-notice period, suggesting that, while sophisticated actors knew to come in early or had the resources to do so, other constituencies possibly did not.

Our study also explored how these different types of influences translated into final regulations. In the final regulations, Treasury took seriously and made many technical adjustments in response to comments from the official notice-and-comment period. It made a number of discrete non-technical changes, which benefited particular commenters. However, Treasury also rejected many

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17 See infra Part I.B.
18 See discussion infra notes 62–70. Some recent empirical studies have attempted to provide some insights into the pre-notice process. Kimberly D. Krawiec, Don’t “Screw Joe the Plumber”: The Sausage-Making of Financial Reform, 55 ARIZ. L. REV. 53, 56–57 (2013) (taking an “examine the sausage” approach to regulatory development); Wendy Wagner et al., Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards, 63 ADMIN. L. REV. 99, 104 (2011) (“Rigorous engagement by a diverse and balanced assortment of affected interests, reinforced by an ability of these interests to challenge regulations in court, provide one of the primary mechanisms to ensure at least some democratic legitimacy of the administrative state.”); Susan Webb Yackee, The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking, 22 J. PUB. ADMIN. RES. & THEORY 373, 373–74 (2012) (studying ex parte influence after an advance notice of proposed rulemaking has been issued through content analysis of documents from seven government agencies); see also Daniel E. Walters, Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions, 43 HARV. ENVTL. L. REV. 175 (2019) (examining rulemaking petitions, and the extent to which various interests can use them to set agendas in the rulemaking process).
19 See Krawiec, supra note 18, at 71; Wagner, supra note 18, at 111–12; Yackee, supra note 18, at 388–89.
requests and did not fundamentally change its regulatory approach. Especially with respect to non-technical decisions, Treasury largely stood by decisions it had made and lines it had drawn in the proposed regulations. Treasury’s treatment of comments submitted during the notice-and-comment period relative to the pre-notice period suggests that the pre-notice period leading up to the proposed regulations is an important, formative period in regulatory development and may anchor the content of final regulations.

Our findings hold important implications. First, they confirm scholarly intuitions that unorthodox legislative processes may generate spillovers in the rulemaking and notice-and-comment process. This means that traditional accounts of legislative processes may underappreciate the role of the administrative rulemaking process as a second-stage forum for politicking. It also suggests that traditional administrative law paradigms could miss an important part of the regulatory story and the variable regulatory realities that may exist in light of legislative spillovers.

Our study also echoes concerns voiced by some administrative law scholars about administrative law’s ability to respond to these realities. The traditional administrative law paradigm relies extensively on official notice-and-comment procedures for rulemaking, emphasizing the importance of compliance with these procedures. And, in the tax field specifically, we have recently seen significant emphasis on these official procedures to safeguard governance and accountable process in rulemaking. Our findings suggest—consistent with other research on the pre-notice period—that this official paradigm is ill-suited to manage the extensive lobbying we witnessed in the pre-notice period. At the time the proposed § 199A regulations were issued, the bulk of the regulatory structure, including significant interpretive issues and important benefits for certain industries, was already in place. Pre-notice comments by industry groups and professional organizations were an important input into this regulatory

21 We also observed an informal post notice-and-comment period, in which commenters were allowed to submit comments late. See infra Part II.C.2.
22 See, e.g., Gluck, supra note 6, at 1795–97 (providing a high-level overview of potential spillovers); see also Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 575–79 (1984) (underscoring generally the interconnectedness of the different branches of government).
23 See infra Part I.B.
25 See, e.g., sources cited supra note 18.
structure and were heavily cited in the proposed regulations. These commenters were able to engage early without being subject to the transparency that accompanies notice and comment. Moreover, these early commenters had the opportunity to ask again later if the first request was not granted. Thus, the recent emphasis by scholars and policymakers in the tax field on official notice-and-comment procedures may miss an important dynamic in public engagement with tax rulemaking and an important set of inputs into such rulemaking.

Furthermore, official notice-and-comment procedures do not capture or document indirect commentary, such as that seen in the news or tax press. This commentary tends to represent a more public-interested perspective. While we saw evidence of some of these inputs having influence, Treasury’s engagement with and documentation of these indirect inputs was discretionary.

These observations suggest that there are tradeoffs inherent in regulatory practices: It was not only legally permissible but also made sense for Treasury to consider expert feedback on technical issues in crafting the § 199A proposed regulations. Indeed, faced with a hastily drafted statute and an urgent need for timely guidance, many would argue that Treasury did an admirable job of producing sound guidance in a timely manner. But there is potential cause for concern: Pre-notice commentary in the post-enactment period may provide insiders with disproportionate influence over regulatory outcomes, and lack of transparency feeds this possibility. Furthermore, administrative law’s focus on directly submitted comments, but not on indirect commentary, may sideline public-interested perspectives.

We suggest that Treasury and other agencies can make straightforward changes to their rulemaking processes to help manage these potential risks. These changes could include: publicizing rulemaking to a greater extent; seeking out a broader range of commenters in the pre-notice period; publicly posting pre-notice comments; and taking affirmative steps to make indirect commentary (for example, commentary by academics in the public interest) a more systematic part of agency consideration.

Our study intervenes at the intersection of two important academic literatures: unorthodox legislation and pre-notice regulatory processes. Both share a common theme: an emphasis on how textbook understandings of

26 See infra Part II.A and accompanying notes.

legislative and regulatory processes differ from reality. Our Article shows an even deeper connection: Non-textbook legislative processes put pressure on rulemaking processes, exacerbating problems that are already endemic in the latter. By better understanding this dynamic, we can create better law.

The Article proceeds as follows: Part I provides background on the 2017 tax reform process and § 199A itself, and on notice-and-comment rulemaking. Part II describes the findings from our empirical study. Part III examines the implications of our study and proposes solutions to improve transparency, access, and governance in rulemaking.

I. BACKGROUND

By way of background, this Part describes the hasty and unorthodox legislative process by which the 2017 tax reform was passed and outlines the main features of new § 199A. It then summarizes the state of administrative law literature concerning notice-and-comment rulemaking and non-textbook regulatory processes, including engagement with administrative agencies prior to notice and comment.

A. Hasty Legislation: The Case of § 199A

Scholars have recently highlighted how Congress has turned to unorthodox practices to pass legislation in highly partisan times. Such unorthodoxies include more diffuse lines of control; erosion of control by congressional committees and other subject-matter experts; consideration of legislation under complex procedural rules; and increased involvement of interest groups, private sector drafters, and congressional offices, such as the Congressional Budget Office, in the creation of legislation.

This phenomenon of utilizing unorthodox practices can be observed with respect to the 2017 tax reform—colloquially referred to as the Tax Cuts and Jobs Act (TCJA)—which is widely regarded as the most transformational change to

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30 SINCLAIR, supra note 28.
the tax code in over thirty years. 31 That legislation was driven by party leadership, rather than the relevant tax-writing committees, thereby undermining expertise. 32 The TCJA was enacted by way of a highly partisan process, in which Republicans passed the legislation without any Democrat votes. 33 Republicans also relied on reconciliation to pass the legislation, a procedure that avoids checks (such as a higher Senate vote count) that would have been required in a more traditional legislative process. 34 And, perhaps most markedly, the TCJA was passed in an extraordinarily hasty fashion: There were few hearings, Congress had minimal opportunity to review and improve on the legislation’s design, and the expertise of budget estimators was deliberately downplayed, undermined, and ultimately sidelined. 35 As a consequence, 36 the 2017 tax legislation left Treasury and the IRS with the heavy burden of sorting out numerous problems and uncertainties after the legislation’s passage. 37

This was particularly true with respect to § 199A, one of the most important domestic provisions of the 2017 tax legislation. This section was enacted to provide businesses other than C corporations with a tax rate reduction comparable to the rate reduction that the TCJA conferred on C corporations. 38

35 Cary, supra note 32; see also Shu-Yi Oei & Leigh Z. Osofsky, Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels, 104 IOWA L. REV. 1291, 1351 (2019) (discussing changes in drafting over time); Tankersley & Rappeport, supra note 1.
36 See, e.g., Ittai Bar-Siman-Tov, Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine, 97 GEO. L.J. 323, 340 (2009) (arguing that “the new unorthodox processes of legislation in Congress increase the danger of mistakes (or abuse) in the legislative process and in the process of enrollment”); Oei & Osofsky, supra note 35, at 1355.
38 William A. Bailey, Mechanics of the New Section 199A Deduction for Qualified Business Income, 1.
As a result, § 199A provides eligible pass-through businesses—partnerships, S corporations, and sole proprietors—with a deduction of up to 20% of “qualified business income.” These taxpayers make up a large portion of American taxpayers, so the deduction is likely to affect tens of millions of American individuals and businesses. Indeed, § 199A strikes at the heart of how we tax labor versus business income.

Despite its importance, § 199A was put together quickly as a late-breaking compromise between the House and Senate, which left many aspects of how the statute would actually work unclear. The provision drew substantive distinctions between the pass-through businesses that would be eligible for the new deduction and those that would not. Under the statute, taxpayers with income above certain thresholds would not be able to take the deduction if the business qualified as a “specified service trade or business” (SSTB). But, as discussed in more detail in Part II, the statute drew relatively arbitrary lines as to which businesses would be considered SSTBs, creating seemingly indefensible distinctions between businesses that would be considered SSTBs and those that would not.

One commentator argued:

The pass-through rules stand front and centre in illustrating both the 2017 Act’s sloppiness and its lack of principle. They function as incoherent and unrationalized industrial policy, directing economic activity away from some market sectors and towards others, for no good reason and scarcely even an articulated bad one.

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I.R.C. § 199A (Supp. V 2017). As noted, the provision as drafted will sunset in 2026, but may potentially be extended or made permanent. See supra note 7.

Martin A. Sullivan, The Market for Passthrough Deduction Tax Advice, 160 TAX NOTES 165 (2018) (estimating that 17.2 million small business taxpayers will generate § 199A deductions of less than $1,000; 4.8 million will generate deductions exceeding $1,000; and 3.3 million will generate deductions of unknown amounts).

See Ari Glogower, Requiring Reasonable Comp from a Corp, 160 TAX NOTES 961 (2018) (noting potential to use § 199A to shelter labor income); Oei & Ring, supra note 37 (discussing incentive to move from employee to independent contractor work).


I.R.C. § 199A(d)(1), (3).

See infra Part II and accompanying notes.

The extent of Treasury’s discretion to interpret and implement the lines drawn by this transformative new statute meant that Treasury had much work to do in rulemaking. It also meant that conditions were ripe for interested parties to try to influence that rulemaking. Moreover, there were numerous technical issues left to Treasury to resolve, such as how SSTB attributes should be aggregated across multiple businesses. These technical issues also drew attention from interested parties.

B. Regulatory Processes: Theory vs. Practice

Administrative law requires that agencies must follow notice-and-comment procedures to issue so-called “informal regulations.”46 These notice-and-comment procedures require agencies to provide “[g]eneral notice” of the proposed rulemaking in the Federal Register, along with at least thirty days for interested persons to comment.47 “After consideration of the relevant matter presented,” the agency is supposed to publish the final rules, along with a “statement of their basis and purpose.”48

Notice-and-comment procedures are meant to infuse the agency’s rulemaking with legitimacy. Scholars have long grappled with what legitimizes unelected agencies’ power to write regulations implementing statutes, a quasi-legislative task that may significantly affect public rights and obligations.49 The traditional wisdom is that the Administrative Procedure Act’s (APA) notice-and-comment procedures help legitimize such agency rulemaking50 by infusing the process with public participation and deliberation, values that are lost when Congress delegates regulatory decisions.52 Due to this perceived importance to

48 Id. § 553(c).
49 Compare, e.g., Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231 (1994) (arguing that the administrative state is unconstitutional), with Stewart, supra note 5 (providing a classic account of the models that legitimate the administrative state).
50 See, e.g., Bressman, supra note 5 (arguing that notice-and-comment procedures are essential to a nonarbitrary (and thus legitimate) administrative state).
51 U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947). Some theories of agency legitimacy focus more on participation, while others focus more on deliberation. See, e.g., Krawiec, supra note 18, at 56 (looking to pluralist, participatory justifications for notice-and-comment in particular); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511 (1992) (setting forth civic republican, deliberative justifications for the administrative state).
52 See, e.g., Hickman, supra note 24, at 1806 (describing notice-and-comment procedures as an “imperfect proxy for a more democratic legislative process”); Jim Rossi, Participation Run Amok: The Costs of
the regulatory state, notice and comment sits at the legal heart of agency rulemaking. Furthermore, the E-Government Act of 2002 subjects notice and comment to electronic publication requirements, in an effort to ensure that not only does the public have an opportunity to comment in the notice-and-comment period, but also that such commentary is electronically visible.

Much has been written about the tendency of agencies to try to evade these requirements by making rules outside of notice-and-comment. In the tax field specifically, recent debate has focused on whether Treasury regulation writers should be subject to the notice-and-comment procedures that apply in other areas of law, or whether tax is somehow exceptional. The Supreme Court recently pronounced that it is “not inclined to carve out an approach to administrative review good for tax law only[,]” prompting a wave of efforts designed to improve Treasury practices so that they comply with notice-and-comment.

Yet, there are problems with this traditional administrative law focus on notice-and-comment. First, scholars have begun to reckon with how the increasingly unorthodox nature of legislative processes dovetails with, and, in some ways causes, regulatory unorthodoxies. In particular, in a new line of work, scholars such as Lisa Bressman, Daniel Farber, Abbe Gluck, Anne Joseph O’Connell, and Rosa Po have examined how both the legislative and regulatory processes are increasingly diverging from “Schoolhouse Rock!” depictions of

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53 See, e.g., Texas v. United States, 86 F. Supp. 3d 591, 671–72 (S.D. Tex.), aff’d, 809 F.3d 134 (5th Cir. 2015) (granting temporary injunction against DAPA implementation on the grounds that APA rulemaking procedures were not followed).
55 Cf. Stephen M. Johnson, #BetterRules: The Appropriate Use of Social Media in Rulemaking, 44 FLA. ST. U. L. REV. 1379, 1389 (2017) (“Until the advent of e-rulemaking, commenters generally were not aware of the comments that other commenters were submitting.”).
57 Hickman, supra note 24; see also Mayo Found. v. United States, 562 U.S. 44 (2011).
58 Mayo Found., 562 U.S. at 55.
how law is made. In the regulatory context, scholars have examined this phenomenon at a high level by observing practices such as delegations to multiple different agencies, an increasing incidence of “emergency” regulation, and a turn to outside-of-government drafters.

Second, as to notice and comment itself, some have suggested that notice-and-comment may fail to capture much of what actually influences agency rulemaking. This literature suggests that much of the input that an agency receives is not part of the public notice-and-comment process but rather occurs informally between well-connected regulated parties and the agency outside of notice-and-comment. The APA’s notice-and-comment rulemaking requirements simply do not address these informal influences.

For this reason, administrative law scholars have increasingly argued that more attention needs to be paid to the period before notice and comment, that is, before the proposed regulations are issued. And there is a growing body of

60 Bressman, supra note 5; Farber & O’Connell, supra note 6, at 1140; Gluck, supra note 6, at 1794.
61 See Bressman, supra note 5, at 514; Gluck, supra note 6, at 1809–10.
62 Generally, notice and comment has been critiqued for, among other things, (1) ossifying the rulemaking process, see, e.g., Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 65 (1995) (describing how courts have transformed notice and comment into an “extraordinarily lengthy, complicated, and expensive process”); (2) being too weighted toward business interests, see, e.g., Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128, 131, 133 (2006) (finding, in a study of rulemakings with 200 or fewer comments, that over 57% of comments were submitted by business interests and only 6% of comments were submitted by public interest groups); and (3) being an inadequate mechanism for eliciting meaningful public input, see, e.g., Nina A. Mendelson, Rulemaking, Democracy, and Torments of E-Mail, 79 GEO. WASH. L. REV. 1343, 1357–58 (2011) (highlighting informational and incentive difficulties in getting widespread public comment).
63 William F. West, Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls, 41 ADMIN. & SOC’Y 576, 587, 589 (2009); see also, e.g., Cary Coglianese et al., Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration, 77 GEO. WASH. L. REV. 924, 931–32 (2009) (examining the concern that “public participation does not affect an agency’s actual decisionmaking process because such participation occurs after rules are already formulated”); E. Donald Elliott, Re-Inventing Rulemaking, 41 DUKE L.J. 1490, 1494 (1992) (“If the agency is to state the detailed basis for its actions in such a way that its actions will survive judicial review, public input through formal notice-and-comment rulemaking must come relatively close to the end of the agency’s process, when the proposed rule has ‘jelled’ into something fairly close to its final form.”); Rubin, supra note 6, at 167 (“By the time the agency has undertaken all the other steps necessary to draft a proposed regulation, it has invested enormous staff resources in that particular regulation, its members have become convinced that the draft represents the ideal solution to the problem.”); Seidenfeld, supra note 51, at 1560 (worrying that preliminary work for agency rulemaking is often done “without organized public input”); Stephanie Stern, Cognitive Consistency: Theory Maintenance and Administrative Rulemaking, 63 U. PITT. L. REV. 589 (2002) (pointing to cognitive biases in the rulemaking process that anchor early influences).
64 See, e.g., Jennifer Nou & Edward H. Stiglitz, Strategic Rulemaking Disclosure, 89 S. CAL. L. REV. 733, 734–35 (2016) (arguing that more attention needs to be paid to the critical pre-notice period); West, supra note 63, at 591 (stating that “an adequate examination of participation in rulemaking should consider the interrelationship between notice and comment and the informal processes that precede it”).
empirical literature about the pre-notice period that lends support to this notion.\textsuperscript{65} Yet, while administrative law does not prevent agencies from engaging in pre-notice communications with interested parties or disclosing pre-notice communications that it receives, it also does not set parameters for such engagement or require disclosure.\textsuperscript{66} The E-Government Act mandates transparency into the actual notice-and-comment period but not the pre-notice-and-comment period.\textsuperscript{67} Judicial authority supports the lack of any such affirmative obligation.\textsuperscript{68} This means that access and transparency outside of the actual notice-and-comment period are thus left to agency discretion. While some agencies do provide access and transparency into pre- and post-notice communications,\textsuperscript{69} others do not. The result is that inputs outside of notice and comment are often unobservable and therefore understudied.\textsuperscript{70}

With this theoretical background in mind, the § 199A rulemaking process presented some unusual research opportunities. Treasury’s references to pre-notice comments in its notice of proposed rulemaking (which we also refer to as the “NPR” or “notice”), in addition to tax press coverage of this regulatory process, offered us a unique, though not completely transparent, window into how inputs during the pre-notice period may have influenced the rulemaking, relative to actual notice and comment.

\textsuperscript{65} See, e.g., Krawiec, supra note 18; Wagner, supra note 18; Yackee, supra note 18; see also infra notes 262–268 and accompanying text.

\textsuperscript{66} See, e.g., Krawiec, supra note 18, at 71 (pointing out that "Administrative Procedure Act docketing and other transparency requirements are generally limited to the period after publication of the proposed rule"); Wagner, supra note 18, at 112 (similarly noting concerns regarding lack of requirements that agencies docket comments received prior to the actual notice-and-comment period); West, supra note 63, at 590–91 (pointing to variable record-keeping prior to issuance of proposed rules).


\textsuperscript{68} See, e.g., Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (finding that the existence of post-comment meetings and failure to docket them did not violate either the Clean Air Act or due process requirements).

\textsuperscript{69} For discussion of an agency that has historically focused extensively on increasing inclusivity and transparency in the rulemaking process, see Patricia A. McCoy, Comment on the Request for Information on Rulemaking Processes by the Consumer Financial Protection Bureau (June 7, 2018), https://www.regulations.gov/document?D=CFPB-2018-0009-0121.

\textsuperscript{70} There are a few notable exceptions. See, e.g., Krawiec, supra note 18; Wagner, supra note 18; Yackee, supra note 18; see also Wesley A. Magat et al., Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior (1986) (discussing case study of Clean Water Act rulemaking in which industry insiders were able to influence the rule prior to notice and comment, with very little ability of public to change the rule after issuance of the notice of proposed rulemaking). They have generally found reason for concern. For more discussion of these studies, and how their findings are similar or different from ours, see infra notes 262–268 and accompanying text.
II. THE MAKING OF THE § 199A REGULATIONS

As the above discussion outlines, the December 2017 enactment of § 199A as part of the 2017 tax reform kicked off a process by which the regulations interpreting the provision were made. Treasury first issued proposed regulations on August 8, 2018 and finalized those regulations on January 18, 2019.71 Along the way, Treasury received comments from interested parties. Some came in right after legislative enactment (before the proposed regulations were issued), some came in during the official notice-and-comment period, and some came in late. There was also a public hearing on the proposed regulations.72 The making of the § 199A proposed regulations can thus be depicted pictorially as follows:

In this Article, we studied empirically the making of the § 199A regulations from enactment of the legislation through the issuance of the final Treasury regulations on January 18, 2019 with attention to the post-enactment comments and other inputs into the regulations. Our goal was to understand the influences that shaped the proposed and final regulations and to examine the extent to which these influences (a) were transparent to the public and (b) were successful.

The major takeaways from our study are as follows:

We found extensive engagement by interested parties with Treasury and the IRS in the period immediately after legislative enactment, before proposed regulations were even issued. Two major groups stood out during this pre-notice

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71 See supra notes 11–14 and accompanying text.
period. First, major industries and their representatives and trade associations asked Treasury for favorable treatment. Second, professional organizations of sophisticated tax experts (such as the New York State Bar Association (NYSBA) Tax Section and the American Bar Association (ABA) Tax Section) advised Treasury on how various technical issues should be resolved. These pre-notice inputs found their way into the August 8, 2018 proposed regulations—Treasury repeatedly referred to these early comments and responded to the concerns they raised in the proposed regulations preamble.73 Many, but not all, of the outcomes requested by these groups were granted, though we cannot prove that Treasury’s receipt of a particular comment actually caused the regulatory positions it took.

Yet Treasury did not make this body of pre-notice commentary publicly available on any central government repository. Making such commentary public is a requirement of comments made during the official notice-and-comment period but not for pre-notice commentary.74 Instead, we had to track the pre-notice comments down using various government and private sources.

During the pre-notice period, we also saw significant public dialogue on the Internet and other forums, in which academics and others discussed § 199A and the impending regulations.75 This indirect commentary seemed more focused on the public interest and formulation of good policy, rather than specific industry interests. Even though this dialogue was not directly communicated to Treasury, Treasury did sometimes mention insights from such dialogue in the proposed regulations preamble.

The proposed regulations, which were extensive, thus represented a comprehensive effort by Treasury to craft a regulatory approach, despite the fact that the official notice-and-comment period had not yet occurred.

74 The Internal Revenue Manual states that “[a]ll written and electronic comments received become part of the public record, are routinely released to several commercial tax services, and are available for public inspection and copying.” IRM 32.1.7.2 (Aug. 1, 2018). However, these procedures technically apply to comments received after a NPR (or a so-called advance NPR, the latter of which can sometimes be used to provide advance notice of a proposed rulemaking, but was not used in the case of § 199A). See id. (referring to “written and electronic comments with respect to ANPRMs and NPRMs”); 26 C.F.R. § 601.601(b)(1) (2018) (likewise discussing public access to comments submitted “in response to a notice of proposed rule making”). We contacted Treasury to find out whether or when comments they received or considered outside of the actual notice-and-comment period would be posted on regulations.gov. Telephone Conversation with Treasury (Sept. 25, 2018, 10:00 AM); Telephone Conversation with Treasury (Oct. 10, 2018, 1:30 PM). Treasury was not able to give us any clear indication about whether or when these materials would be publicly available on the regulations.gov website or through any other source. Id.
Once the proposed regulations had been issued and the official notice-and-comment period had opened, a larger set of commenters chimed in. Unlike the pre-notice comments, the public comments made during the official notice-and-comment period were posted by Treasury on regulations.gov and therefore were easier to study. The composition of these commenters was different from those in the pre-notice period. Commenters in the official notice-and-comment period tended to include more small accountants (i.e., solo or small practices, as opposed to major accounting firms), a wider variety of businesses, and more individuals. Comments in the public interest remained an insignificant part of the comments. Furthermore, some commenters commented late, after the official comment period had closed.

In the final regulations, Treasury carefully catalogued and responded to the comments that it had received in the official notice-and-comment period. In many cases, Treasury clarified issues raised by commenters through text or examples and made technical changes to the proposed regulations in response to feedback about potential problems. Treasury also made some discrete, non-technical changes that gave certain taxpayers advantageous outcomes (such as more clarity about not being classified as an SSTB). However, many others did not get what they wanted, sometimes despite extensive comments requesting the change.

Importantly, Treasury also did not change its overall approach in response to public-interested comments received. When rejecting approaches suggested by commenters, Treasury often did so by referring back to its reasoning articulated in the preamble to the proposed regulations. Treasury generally did not make foundational changes to the regulatory scheme that had been previously adopted in the proposed regulations.

The story that emerges is that the period directly after legislative enactment—the pre-notice period—was a critical time to influence Treasury and the IRS. Reaching out to Treasury during the pre-notice period was highly correlated with getting what a commenter wanted. Even indirect commentary in this period appeared to have had influence. However, since these indirect comments were, by their nature, not actually submitted to the government, the unilateral power to decide on that influence rested with Treasury, and Treasury

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76 Qualified Business Income Deduction, 84 Fed. Reg. at 2952.
77 Id.
78 Id.
79 Id.
also held the unilateral discretion over whether to highlight that influence in the proposed regulations preamble.

These findings suggest that a good strategy to influence Treasury might be to reach out directly after legislative enactment, in the pre-notice period, to get desirable treatment, and then to comment again in the official notice-and-comment period (or after it had ended) to try to obtain even more favorable results, rather than waiting until the official notice-and-comment period to chime in.

In this Part, we summarize our research approach and major findings. We attempt to keep the discussion general; supporting data is provided in the Appendix.80

A. Mentions of Pre-Notice Commentary in the Notice of Proposed Rulemaking

The official notice-and-comment period had not yet taken place at the time Treasury issued the NPR. Yet, in its NPR preamble, Treasury repeatedly referred to comments it had already received or considerations that had already been raised. This beneficial Treasury practice made more visible than usual the influences on the proposed regulations, and hints at an important exchange of ideas that occurred between Treasury and various constituencies even before the official notice-and-comment period.

We counted twenty-one discrete instances where Treasury noted in the background preamble that it had “received comments” on issues, or that “commenters had noted” or “taxpayers and practitioners had noted” certain issues, or that Treasury “was aware” of certain concerns, or that commenters “had requested guidance.” We also counted twelve instances in which Treasury asked for additional comments in the NPR. Here, we describe Treasury’s references to comments in broad brush strokes.

1. Treasury References to Comments Received

The types of comments Treasury mentioned receiving in the NPR can be divided into three broad categories: foundational questions, technical issues, and anti-abuse rules. Detailed descriptions of the twenty-one instances in which Treasury described comments received are listed in Table 1 of the Appendix.

80 The Appendix is available online at http://law.emory.edu/elj/content/index.html.
First, Treasury noted receiving some comments about issues that were foundational to the operation of the statutory provision. At its core, § 199A allows a potential 20% deduction for “qualified business income” (QBI) with respect to a taxpayer’s “qualified trade or business.”81 However, as mentioned previously, being classified as an SSTB makes taxpayers above certain income levels ineligible for the deduction.82 Based on these provisions, both the question of what is a “trade or business” to begin with and what is an SSTB are linchpins of the statute.83

Yet, the statutory scheme left open many questions about both of these provisions. The statute does not define what is a “trade or business.”84 And it leaves open many questions as to what constitutes an SSTB. Critically, in defining SSTB, the statute (by cross-reference) includes “any trade or business … where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees.”85 This “reputation or skill” clause is a potentially significant bar on eligibility for the § 199A deduction.86 But this provision was unelaborated in the statute.

Not surprisingly, given the centrality of these questions about the “trade or business” and SSTB provisions, Treasury noted that it received comments about them in the pre-notice period.87 Perhaps most crucially, Treasury noted that it

82 Id. § 199A(d).
83 The classification of a “trade or business” matters at many points throughout the statute. See, e.g., id. § 199A(b)(1) (defining “combined qualified business income” as “the sum of the amounts determined under paragraph (2) for each qualified trade or business carried on by the taxpayer, plus 20 percent of the aggregate amount of the qualified REIT dividends and qualified publicly traded partnership income of the taxpayer for the taxable year”).
84 See id. § 199A (providing no such definition).
85 Id. §§ 199A(d)(2), 1202(e)(3)(A).
86 See, e.g., Tony Nitti, The 20% Pass-Through Deduction: Where Do We Stand Now?, FORBES (June 20, 2018, 9:30 AM), https://www.forbes.com/sites/anthonynitti/2018/06/20/the-20-pass-through-deduction-where-do-we-stand-now/#1f02f3894392 (noting numerous issues with § 199A but describing “[t]he most troubling aspect of Section 199A” to be “the definition of the ‘specified service businesses’ for which a taxpayer is generally ineligible to claim the deduction”).
87 For instance, Treasury pointed out that the statute does not define the term “trade or business” and accordingly noted that “[m]ultiple commenters stated that section 162 is the most appropriate definition for purposes of section 199A.” Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,885 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1). Treasury generally agreed with commenters. Id. Treasury also noted responding to various other comments regarding how to aggregate businesses to make trade or business and SSTB determinations. For instance, Treasury noted receiving comments regarding whether taxpayers could group or aggregate trades or business together for these purposes and, if so, how. Id. at 40,884. While some commenters requested permission to apply the Treas. Reg. § 1.469-4 grouping rules, Treasury declined and instead articulated an approach specific to § 199A. Id. at 40,894; Treas. Reg. § 1.199A-4. Treasury also received comments regarding how, generally, to look at businesses to make an SSTB determination. Qualified Business Income Deduction, 83 Fed. Reg. at 40,897. While some commenters suggested that Treasury look to the existing
had received comments “on the meaning and scope of … various trades or businesses” and in particular what constitutes a disqualified SSTB. For instance, Treasury noted that it had received various comments on how the reputation or skill clause should be constructed. Treasury also noted that it had received comments on specific types of trades or businesses, and whether those businesses qualified for the § 199A deduction.

Second, Treasury mentioned receiving comments addressing more technical issues. Some of these issues may have been important to the specific industries or constituencies affected, or knowable to avid followers of tax-specific publications but were less widely reported in the popular press. For example, Treasury noted that it had received comments regarding whether workers receiving Forms W-2 from professional employer organizations (PEOs) such as ADP TotalSource (“ADP”) may be included in the W-2 wages of the PEO clients, that is, the underlying businesses that hired the PEO to issue the tax form and perform other human resources functions. This issue is relevant because the § 199A deduction may be limited by the amount of W-2 wages that a business pays to employees.

Treasury also noted receiving guidance requests regarding other technical matters, such as whether partnership special basis adjustments constitute § 199A

§ 448 regulations as a starting point, Treasury decided to draw on those regulations only “when appropriate” and “with some modifications.” Id. at 40,896. Id. at 40,899 (“The Treasury Department and the IRS received several comments regarding the meaning of the ‘reputation or skill’ clause. Commenters described potential methods to give maximum effect to the literal language of the reputation or skill clause …. One commenter suggested using an activity-based standard under which no service-based businesses would qualify for the section 199A deduction …. [O]ne commenter described a standard based on whether the trade or business involves the provision of highly-skilled services. The commenter argued that the primary benefit of a standard like this is that it would harmonize the meaning of the reputation or skill phrase with the trades or businesses listed in section 1202(e)(3)(A), each of which involve the provision of services by professionals who either received a substantial amount of training … or who have otherwise achieved a high degree of skill in a given field ….”).

For example, commenters requested guidance on the meaning of the field of “athletics” (Treasury provided guidance), whether consulting services provided in connection with the sale of goods constitute an SSTB (Treasury specified circumstances in which ancillary consulting services will not yield SSTB treatment), and whether banking constitutes a financial service ineligible for the § 199A deduction (Treasury said no). Id. at 40,898.

Id. at 40,887–88. For a principal example of an industry request for guidance on the issue, see, for example, Letter from ADP to David Kautter, Assistant Secretary, U.S. Dep’t of Treasury (Apr. 12, 2018) (on file with Emory Law Journal).

I.R.C. § 199A(b)(2)(B) (Supp. V 2017). Treasury ultimately took the position—substantially similar to its prior position under the former § 199 regulations—that a PEO client (the underlying employer) could count amounts paid by the PEO to employees on the client’s behalf in W-2 wages, provided those receiving the wages were common law employees of the employer. Qualified Business Income Deduction, 83 Fed. Reg. at 40,888.
“qualified property.” Treasury also received comments dealing with technical details of how QBI should be computed.

Third, Treasury received comments on issues that can be characterized as potential anti-abuse rules, or rules designed to prevent workarounds to the statute. For instance, Treasury stated that it was “aware that some taxpayers have contemplated a strategy to separate out parts of what otherwise would be an integrated SSTB, such as the administrative functions, in an attempt to qualify those separated parts for the section 199A deduction” and noted that this strategy was “inconsistent with the purpose of section 199A.” Treasury also noted the risk, mentioned by “taxpayers and practitioners,” that employees might think it beneficial to treat themselves as independent contractors or as S corporation or partnership equity holders in order to benefit from the § 199A deduction. Treasury also noted receiving guidance requests regarding whether the “reasonable compensation” provision in § 199A extends beyond S corporations to cover other pass-through entities.

2. Treasury Requests for Additional Comments

We counted twelve separate instances in the NPR preamble in which Treasury specifically requested additional comments. Detailed descriptions of these twelve instances are contained in Table 2 of the Appendix.

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93 Qualified Business Income Deduction, 83 Fed. Reg. at 40,889. The basis of qualified property matters because the § 199A deduction may be limited if the taxpayer does not pay sufficient W-2 employee wages or does not spend enough on a combined amount of W-2 wages and investments in “qualified property.” § 199A(b)(2)(B). The proposed regulations’ position is that, due to the risk of inappropriate duplication of basis, such partnership special basis adjustments do not constitute qualified property. Qualified Business Income Deduction, 83 Fed. Reg. at 40,889; Treas. Reg. § 1.199A-2(c)(1)(iii).

94 QBI is part of the base that determines the size of the 20% deduction. § 199A(a)(1)(A).


97 Id. at 40,889. The “reasonable compensation” issue arises because § 199A provides that qualified business income (the base for computing the 20% deduction) does not include “reasonable compensation paid to the taxpayer by any qualified trade or business of the taxpayer for services rendered with respect to the trade or business.” § 199A(c)(4)(A). But “reasonable compensation” is a term borrowed from the S corporation context, which raises the question of whether the concept was not meant to apply to partnerships and sole proprietors. Various commenters had flagged the “reasonable compensation” issue in the immediate aftermath of § 199A’s passage. See, e.g., Oei & Ring, supra note 37. Treasury concluded that the “reasonable compensation” concept does not apply outside the S corporation context. Qualified Business Income Deduction, 83 Fed. Reg. at 40,893.

98 These twelve instances do not include places where Treasury requested comments on the economic impacts of the proposed regulations. Note that asking for comments on specific issues is not new and is in fact...
Of these twelve instances, five pertained to issues on which Treasury had noted in the preamble that it had already received comments. In these cases, Treasury had considered the issue and taken a position in the proposed regulations but wanted additional feedback. These areas concerned potential loopholes or revenue leaks and more technical areas (e.g., aggregation, pass-throughs, and use of losses). Treasury also requested further comments on its proposed interpretation of the “reputation or skill” clause in the trade or business definition, on its definitions with respect to “specified service trades or businesses,” and on the eligibility of certain trust interest holders and beneficiaries for the § 199A deduction.\(^\text{99}\)

In three other instances, Treasury mentioned having received general comments on related issues, though not necessarily on the specific issue for which additional comments were being solicited. These instances had to do with aggregation and disaggregation across trades or businesses or entities and the reporting rules that apply in these circumstances.\(^\text{100}\)

Finally, in four remaining instances, Treasury did not specifically mention that it had already received pre-notice comments on issues about which Treasury was requesting additional comments.\(^\text{101}\) These tended to be technical areas in which Treasury was considering or had articulated a regulatory approach but wanted feedback on whether its proposed approach was feasible.

B. Finding and Describing the Pre-Notice Comments

In light of these Treasury references to comments received, an important question arises: Could we (and therefore, could other interested observers) find the pre-notice comments referred to in the NPR? And how difficult was it to do so?

Importantly, Treasury did not publicize the comments on regulations.gov, and hence they were not easily or comprehensively accessible from government sources. We instead had to rely on four sources to obtain those comments: (1) Tax Analysts databases at taxnotes.com, which required a paid subscription to access; (2) the Office of Information and Regulatory Affairs (OIRA) and the

\(^{99}\) Qualified Business Income Deduction, 83 Fed. Reg. at 40,899, 40,902. These were issues on which Treasury had already received substantial pre-notice comments.

\(^{100}\) Id. at 40,894–95.

\(^{101}\) Of course, the fact that Treasury did not explicitly mention in the NPR that it had received pre-notice comments does not definitely prove that it did not receive any comments. It is possible that Treasury did receive comments on other topics but did not mention them in the preamble.
Office of Management and Budget (OMB) website, reginfo.gov, which contained some information about meetings held related to OIRA/OMB review and documents and handouts distributed during those meetings; (3) regulations.gov, which contained comments electronically submitted to the IRS and Treasury in response to IRS Notice 2018-43 (a separate track in which the IRS invited taxpayer recommendations for inclusion in the 2018–19 priority guidance plan); and (4) Internet searches to identify indirect commentary that Treasury may have considered, as indicated by either Treasury’s own comments in the NPR or other evidence of impact.

We used Tax Analysts to search for pre-notice comments because Tax Analysts is a leading provider of U.S. tax news and a key source of coverage of the rulemaking process not otherwise offered by the government. Tax Analysts was also the only source that contained searchable collections of Treasury, the IRS, and congressional correspondence. Furthermore, Treasury itself referred us to Tax Analysts to obtain pre-notice information not otherwise available. And, while other private tax news services (which also require a paid subscription) offered some coverage of the rulemaking process, their coverage was not as complete, and their interfaces were harder to search.

We contacted Tax Analysts to verify the extent to which their publication covered the universe of pre-notice comments submitted to Treasury. We learned that Tax Analysts publishes on their website any correspondence that they receive from Treasury or the IRS that is at all substantive. Tax Analysts obtains such correspondence in a number of ways: Treasury and the IRS routinely send Tax Analysts correspondence they have received. Additionally, Tax Analysts may hear about a meeting or correspondence with the government and then ask either the government or the other party for information about the meeting or the correspondence. However, Tax Analysts cannot be sure that the correspondence they receive represents the entire universe of correspondence. There is likely some gap between what they receive and what exists.

Ultimately, we were able to locate potential sources of pre-notice comments in most, but not all, of the twenty-one instances where Treasury noted in the
NPR that it had received such comments. However, we have no assurance that the comments we found were the only ones Treasury received and/or relied upon. Moreover, the exercise required a Tax Notes subscription and significant effort. We also detected instances in which indirect pre-notice commentary, which appeared on informal communication sites such as blogs and social media, likely influenced Treasury’s proposed regulations.\(^{106}\)

Below, we describe the pre-notice comments we found, including: (1) direct commentary by (a) industry interests, (b) professional associations, and (c) other voices, and (2) indirect commentary. We also describe commentary by some groups via pre-notice meetings.

1. Direct Commentary

To locate pre-notice comments submitted to Treasury, we did a search using the term “199A” in three Tax Notes databases: the Treasury Tax Correspondence database, the IRS Tax Correspondence database, and the Congressional Tax Correspondence database. In addition, the OIRA/OMB website contained information about OIRA reviews of regulations under Executive Order 12866\(^{107}\) and documented meetings related to that review and meeting handouts. We counted six Executive Order 12866 meetings and downloaded six handouts associated with those meetings.\(^{108}\) Finally, we found some § 199A-related recommendations that were electronically submitted in response to IRS Notice 2018-43, which invites public comments for the IRS 2018-19 Priority Guidance Plan.\(^{109}\) The IRS solicits comments on priority guidance recommendations every year, so these submissions are not specific to § 199A. Of the fifty-two electronic comments submitted in response to Notice 2018-43 on regulations.gov, only four directly addressed § 199A guidance.\(^{110}\)

\(^{106}\) See infra Part II.B.2.

\(^{107}\) Executive Order 12,866 requires that “significant regulatory actions” be reviewed by OIRA and OMB. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993).

\(^{108}\) Some of those meetings had no handouts attached and some had more than one handout attached.


\(^{110}\) The existence of this longstanding IRS guidance-seeking procedure provided a convenient existing channel for pre-notice comments to be conveyed to the IRS in the months following the 2017 tax overhaul. This suggests a potential need for further study of these IRS guidance procedures as a source of influence and way to expand access in the unofficial pre-notice period. There has been some confusion in the literature about what the procedures are for giving early feedback regarding potential guidance. See, e.g., I.R.S. Notice 2007-17, 2007-12 I.R.B. 748 (creating pilot program to get more public feedback regarding potential guidance projects); Michelle M. Kwon, Easing Regulatory Bottlenecks with Collaborative Rulemaking, 69 ADMIN. L. REV. 585, 610 n.137
Between these sources, we counted a total of fifty-one pieces of pre-notice correspondence (excluding duplicates), broken down as follows:\textsuperscript{111}

<table>
<thead>
<tr>
<th>Type of Commenter</th>
<th>Number</th>
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<tbody>
<tr>
<td>Trade Groups</td>
<td>16</td>
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<tr>
<td>Industry Interests</td>
<td>12</td>
</tr>
<tr>
<td>Professional organizations</td>
<td>12</td>
</tr>
<tr>
<td>Law and accounting firms</td>
<td>4</td>
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<tr>
<td>Government</td>
<td>4</td>
</tr>
<tr>
<td>Individuals</td>
<td>2</td>
</tr>
<tr>
<td>Public Interest</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>51</strong></td>
</tr>
</tbody>
</table>

A comprehensive list of the pre-notice comments Treasury received is contained in Table 3 of the Appendix.

The comments varied in specificity, in subject matter, and in how strongly they advocated certain positions, but certain trends were detectable. Most notably, professional associations tended to flag relatively technical matters and ask for clarification on uncertain issues,\textsuperscript{112} while trade and industry groups more directly advocated for positions favorable to their interests.\textsuperscript{113}

\textit{a. Industry Interests}

Industry interests that commented included both businesses themselves and trade associations. For example, they included Capitol Tax Partners (writing on behalf of specified insurance companies)\textsuperscript{114} and ADP (writing on behalf of itself, as a PEO).\textsuperscript{115} The trade associations that commented included the International (2017) (questioning whether the program has been terminated).

\textsuperscript{111} Most of this correspondence was found in the Tax Notes databases but a handful was available on government websites. Twenty-five were in the Tax Notes Treasury Tax Correspondence Databases, seventeen in the IRS Tax Correspondence Database, and three in the Congressional Tax Correspondence database. There were a few handouts attached to Executive Order 12,866 meeting notices on reginfo.gov and six on regulations.gov in response to Notice 2018-43.

\textsuperscript{112} See infra Part II.B.1.b (describing correspondence submitted by professional associations).

\textsuperscript{113} To be clear, some of these points were also brought up by the professional associations of lawyers and accountants and by industry and interest groups, but as noted, professional associations generally took the tone of requesting clarification, rather than advocating for a certain position.

\textsuperscript{114} Letter from Capitol Tax Partners to David J. Kautter, Assistant Sec’y for Tax Policy, Dep’t of the Treasury, and William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Serv. (May 10, 2018) (on file with Emory Law Journal).

\textsuperscript{115} Letter from ADP to David J. Kautter, Assistant Sec’y of Treasury for Tax Policy, U.S. Dep’t of the
Council of Shopping Centers (writing on behalf of the shopping center industry)\textsuperscript{116} and the American Bankers Association and Mortgage Bankers Association (writing on behalf of banks and mortgage banks).\textsuperscript{117} Some of the writers did not specifically state that they were working on behalf of a client, but it was clearly implied, such as in the case of the Proskauer Rose law firm letter regarding the applicability of § 199A to the investment management businesses.\textsuperscript{118}

This set of correspondence generally advocated for favorable tax results that would be in the interest of the taxpayer(s) or industry on whose behalf the correspondence was being written. For instance, the PEOs and payroll groups argued that when a third party (i.e., a payroll organization) pays wages on behalf of another taxpayer, the payments should count as W-2 wages that increase the taxpayer’s ability to take a § 199A deduction.\textsuperscript{119} The American Bankers Association and Mortgage Bankers Association specifically requested that S corporation banks not be treated as prohibited SSTBs.\textsuperscript{120} Numerous other industries, or parties writing on their behalf, wrote that their industry should be excluded from the kinds of SSTBs that would be ineligible for the § 199A deduction if their income exceeds certain thresholds. These industries included
the insurance industry, the banking industry, the nursing and assisted living facilities industry, the real estate industry, franchisors, and others. Generally, Treasury granted many of these requests, even if in not as generous a fashion as the commenters had advocated. For instance, the proposed regulations excluded banking from the definition of SSTB, even if it did not do so by defining banking as explicitly and expansively as some comments had requested.

However, not all requests were granted in the proposed regulations. For instance, LPL Financial asked Treasury to clarify that financial services professionals such as broker-dealers and investment advisors would not be placed in the undesirable category of SSTB under the statute. This request seemed an implausible reach, given that § 199A itself specifically stated that SSTBs included “the performance of services that consist of investing and investment management, trading, or dealing ….” The letter floated broad policy justifications in support of ignoring the statutory language, such as the fact that Congress generally intended to grow the economy, and that their business, which included services such as planning for family transitions, should

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122 Letter from Covington & Burling LLP to David J. Kautter, Assistant Sec’y for Tax Policy, Dep’t of the Treasury, and William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Serv. (June 7, 2018) (on file with Emory Law Journal) (arguing that traditional banking is a qualified trade or business); Letter from Am. Bankers Ass’n, to Edith Brashares et al., Dep’t of the Treasury (Apr. 30, 2018) (on file with Emory Law Journal).

123 Letter from Am. Health Care Ass’n & Nat’l Ctr. for Assisted Living, to David J. Kautter, Assistant Sec’y for Tax Policy, Dep’t of the Treasury (June 18, 2018) (on file with Emory Law Journal).


125 Letter from Int’l Franchise Ass’n, to David J. Kautter, Assistant Sec’y for Tax Policy, Dep’t of the Treasury (June 9, 2018) (on file with Emory Law Journal).

126 Memorandum from Crowe LLP to Nat’l Automobile Dealers Ass’n (undated) (on file with Emory Law Journal).


not be disadvantaged.\textsuperscript{130} The proposed regulations ultimately did not create a special carveout from SSTBs for these types of businesses.\textsuperscript{131}

\textit{b. Professional Associations}

Professional associations that commented included the NYSBA, the ABA Tax Section, the American Institute of Certified Public Accountants (AICPA), the TEGE Exempt Organizations Council, and the National Society of Accountants.\textsuperscript{132} These are membership associations of sophisticated tax practitioners.

The tenor of these letters differed from those written by industry-specific interest groups in the sense that these professional associations tended not to openly advocate for a specific position but rather phrased their requests in terms of seeking clarification. Many of the issues raised by these organizations were technical, seeking the “correct” rule on complicated matters, rather than seeking an advantageous tax outcome for a taxpayer or industry. For example, professional organizations flagged questions of how to apply the law in the case of multiple trades or businesses and how to coordinate new § 199A with other tax provisions.\textsuperscript{133}

Of course, the lawyers and accountants who are members of these organizations have industry clients, and those clients have interests. But facially,
at least, the correspondence written by these professional associations took a more neutral, clarification-seeking tone. The proposed regulations addressed many of these technical issues and ambiguities raised and requested further comments on some of these areas.

c. Other Voices

Industry interest groups and professional associations aside, we saw three letters by members of Congress to Treasury and the IRS. One letter from various Congress members requested that Treasury allow aggregation by businesses across multiple entities for purposes of calculating the deduction, to alleviate inequities between differently structured businesses. Another letter, from Congressman Richard Neal, requested guidance to alleviate taxpayer confusion over eligibility and asked Treasury to consider anti-abuse measures. A third letter, written by Ways and Means Committee Democrats, requested transition relief for individuals and small business owners who had been subject to inadequate withholding due to the new law. All three letters were written in the months following § 199A’s enactment.

In addition, there were several letters by individuals that did not fit neatly into either the private interest or technical categories. We saw only one piece of correspondence—by the Washington Center for Equitable Growth—clearly advocating for the public interest.

d. Pre-Notice Meetings

The OMB/OIRA website revealed six meetings between Treasury and various groups prior to the release of the proposed regulations. These groups were: the National Association of Automobile Dealers, the Washington Center for Equitable Growth, Parity for Main Street Employers, the National Association of Realtors, the American Bankers Association, and the Mortgage Bankers Association. Handouts that were circulated during these meetings were

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134 We found an additional three pieces of correspondence in this database that were not relevant.
135 Various Congress members, Comment Letter to Treasury and IRS (June 4, 2018).
137 Various Congress members, Comment Letter to Treasury and IRS (July 26, 2018).
138 By “public interest,” we mean comments that attempt to close potential loopholes in the tax law or otherwise protect the fisc, for instance by arguing that it would be inappropriate as a matter of tax law to provide a taxpayer or industry of taxpayers a given, advantageous tax treatment.
also available on the OIRA/OMB website. Most of these handouts were correspondence asking for Treasury to take certain positions in the proposed regulations.\footnote{Two handouts were PowerPoint slides. Two of the meeting handouts—from National Association of Realtors and Mortgage Bankers Association—were letters that were also included in the Tax Notes databases.} As noted, Treasury granted some of these requests (for example, the request not to treat certain, central banking activity as an SSTB) but denied or did not address others and took some positions less favorable than those requested.\footnote{See discussion supra note 127.}

2. Indirect Commentary

Aside from the correspondence communicated directly to Treasury and the IRS, there was also a substantial amount of public, indirect commentary concerning § 199A in the pre-notice period. There is some evidence that this commentary influenced Treasury. Treasury stated in numerous places in the NPR that it was “aware” of certain concerns or strategies contemplated by taxpayers, detailed some of the concerns described in the indirect commentary, and ultimately addressed at least some of them in the proposed regulations.\footnote{See, e.g., Qualified Income Business Deduction, 83 Fed. Reg. 40,884, 40,900 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1) (“The Treasury Department and the IRS are aware that some taxpayers have contemplated a strategy to separate out parts of what otherwise would be an integrated SSTB, such as the administrative functions, in an attempt to qualify those separated parts for the section 199A deduction.”).}

One group of indirect commentators was tax law professors, who used outlets such as Twitter,\footnote{See, e.g., Victor Fleischer (@vicFleischer), TWITTER (Nov. 2, 2017, 8:48 PM), https://twitter.com/vicfleischer/status/926294879998758912.} blogs,\footnote{See, e.g., Daniel Shaviro, Under the New Tax Bill, Lose Money Before Tax but Make Money After-Tax, START MAKING SENSE (Dec. 17, 2017), http://danshaviro.blogspot.com/2017/12/under-new-tax-bill-lose-money-before.html.} papers posted on Social Science Research Network (SSRN),\footnote{See, e.g., Lily Batchelder & David Kamin, The GOP Tax Plan Creates One of the Largest New Loopholes in Decades, L.A. TIMES (Dec. 31, 2017), http://www.latimes.com/opinion/op-ed/la-oe-batchelder-kamin-tax-deduction-pass-through-income-20171231-story.html.} op-eds in newspapers,\footnote{See, e.g., Kamin et al., Games I, supra note 8.} and other public mediums to opine on the new statute. Perhaps most notably, a group of thirteen law professors co-authored and publicly posted a paper, which was widely circulated, about the “games” that could be played as a result of the new legislation.\footnote{Kamin et al., Games I, supra note 8; Kamin et al., Games II, supra note 9.} The paper identified numerous potential problems with § 199A, for example suggesting that the new provision would encourage high-income individuals who were previously employees to convert to independent contractor
status in order to be able to take the deduction,\textsuperscript{148} and outlining how taxpayers might avoid the limitations of § 199A by “cracking” apart revenue streams,\textsuperscript{149} or by “packing” qualifying income into a service partnership so the partnership can take the deduction.\textsuperscript{150} The professors also worried about how § 199A would create an incentive for businesses to stuff depreciable property into a partnership and wondered about how the “reputation or skill” prong of § 199A would be implemented and what its effects would be.\textsuperscript{151} The concerns voiced by these professors were picked up, echoed by, and broadcast widely in the popular press.\textsuperscript{152}

In significant ways, the proposed § 199A regulations were responsive to these concerns. They noted the concern about former employees converting to independent contractors and created a presumption that a former employee would continue to be treated as an employee unless certain conditions are met.\textsuperscript{153} They also targeted the much-discussed cracking and packing strategies,\textsuperscript{154} leading one commentator to muse that the IRS appeared to have gone after “the most commonly discussed strategies out in the public.”\textsuperscript{155}

Additionally, while the proposed regulations could not entirely reverse the incentive for pass-through businesses to acquire depreciable property to get the deduction—which was a function of the legislation itself—they nonetheless also sought to prevent acquisitions of depreciable property followed by dispositions that would clearly be abusive.\textsuperscript{156} Finally, the proposed regulations extensively engaged with comments about the “reputation or skill” language in the statute,\textsuperscript{157} though they ultimately addressed the issue in a way that was unsatisfactory to some of the professors (by construing the language narrowly).\textsuperscript{158} This

\begin{itemize}
\item[\textsuperscript{148}] Kamin et al., Games I, supra note 8, at 1462–64; but see Oei & Ring, supra note 37.
\item[\textsuperscript{149}] Kamin et al., Games I, supra note 8, at 1465–68. This would help qualify as much income from a service business as possible for the deduction.
\item[\textsuperscript{150}] Id. at 1468–69.
\item[\textsuperscript{151}] Id. at 1470–73.
\item[\textsuperscript{153}] Qualified Business Income Deduction, 83 Fed. Reg. at 40,901. This approach was subsequently subject to critique as perhaps not going far enough by not covering those who had never been employees. See, e.g., Lily Batchelder (@lilybatch), TWITTER (Aug. 8, 2018, 10:40 AM), https://twitter.com/lilybatch/status/1027248234975178752.
\item[\textsuperscript{154}] Qualified Business Income Deduction, 83 Fed. Reg. at 40,900.
\item[\textsuperscript{156}] Qualified Business Income Deduction, 83 Fed. Reg. at 40,889.
\item[\textsuperscript{157}] Id. at 40,888–99.
\item[\textsuperscript{158}] See, e.g., David Kamin, “Reputation or Skill” in the New Pass-Through Regulations, MEDIUM
responsiveness suggested that, although this indirect commentary occurred in public and scholarly forums, rather than in direct Treasury correspondence,\(^5\) it nonetheless seemingly trickled into the agency’s consciousness and provoked some response.

The percolating of ideas from public dialogue into the proposed regulations is perhaps best illustrated by way of example. Shortly after the legislation’s passage, commentators began to publicly toss around potential conundrums and inconsistencies raised by § 199A and other Code sections. One hypothetical that commentators raised was that § 199A may ordinarily provide an advantage to a chef who owns her restaurant, but, perhaps paradoxically, not when the chef happens to be a celebrity chef.\(^6\) The celebrity chef hypothetical was just one example of the outcomes that might flow from the statute where a taxpayer runs a business relying in part on the taxpayer’s “reputation or skill.” Any number of fact patterns could have illustrated the same point. And yet the celebrity chef hypothetical seemed to stick, and ultimately found its way into the proposed regulations as an example of a situation in which a taxpayer would be ineligible for the deduction (i.e., where the chef used her celebrity status to sell a line of cookware).\(^7\) The example provided that if the celebrity chef merely ran a restaurant, then she would remain eligible for the deduction.\(^8\)

After the release of this proposed regulation, commentators either cheered\(^9\) or jeered\(^10\) this example and what it meant for the treatment of mixed skill, reputation, and services. That the celebrity chef example—a trope that was batted around in the pre-notice period—was carried into the proposed regulations, and critiqued afterwards, suggests an interactive dialogue and

\(^{5}\) We cannot rule out the possibility that the communication in these public forums was paired with direct correspondence to or direct interactions with the Treasury Department and IRS that simply were not picked up in publicly available databases.


\(^{8}\) Id.


\(^{10}\) See, e.g., Kamin, *supra* note 158 (repeatedly pointing to the celebrity chef example to argue that the Proposed Regulations did not do justice to the statutory provision); Tony Nitti, *Proposed 199A Regulations: Three Big Questions Remain*, 160 TAX NOTES 1557 (2018) (using the chef example to argue that Treasury drew the “reputation or skill” catch-all too narrowly).
informal flow of ideas between public commentators and Treasury that seemingly percolated into the proposed regulations’ text.

C. Notice and Comment

We next reviewed the public comments submitted during the actual notice-and-comment period and the October 16, 2018 hearing testimony to see how those inputs compared with inputs in the pre-notice period.

1. Comments Received in the Official Comment Period

At the official close of the notice-and-comment period, the total number of comments on regulations.gov was 317, though this number increased subsequently. The breakdown of the types of comments is as follows:

<table>
<thead>
<tr>
<th>Type of Commenter</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual “community bankers”</td>
<td>135</td>
</tr>
<tr>
<td>Trade and Industry Associations</td>
<td>82</td>
</tr>
<tr>
<td>Industry Interests</td>
<td>42</td>
</tr>
<tr>
<td>CPA/Accountant/Enrolled Agent (firms and individual)</td>
<td>35</td>
</tr>
<tr>
<td>Law firms</td>
<td>18</td>
</tr>
<tr>
<td>Professional Associations (Law/CPA)</td>
<td>9</td>
</tr>
<tr>
<td>Unidentifiable individuals</td>
<td>8</td>
</tr>
<tr>
<td>Academic</td>
<td>3</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>3</td>
</tr>
<tr>
<td>Lobbying firms</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>337</strong></td>
</tr>
</tbody>
</table>

A comprehensive list of comments Treasury received that were posted on regulations.gov is contained in Table 4 in the Appendix.

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166 This includes comments received by February 15, 2019. Qualified Business Income Docket, supra note 165. This number includes withdrawn comments. A few additional comments were added after this (i.e., after the final regulations were issued), including comments from the AICPA and the ABA on the final regulations. The existence of these post-final regulations comments suggests that some actors were already commenting on and pushing for changes to the final regulations. While our study ends with the final regulations and thus does not examine any comments after February 15, 2019 in detail, their existence does suggest the continued role of commentary and lobbying even after the finalization of the regulations.
a. Topics and Commenters

Many of the topics addressed in the actual notice-and-comment period were the same or similar to topics raised in the pre-notice period. By far, the principal topic in the actual notice-and-comment period continued to be what should count as an SSTB. Commenter after commenter made the case that the commenter’s industry should not constitute an SSTB, and, with the benefit of the proposed regulations, some commenters expressed frustration that their industry would be considered an SSTB while another, similar industry would not. For instance, one comment from an individual explained, “I would hope that if an architect, who designs houses, would qualify for the deduction, someone like myself, who designs technological innovations (next generation cameras, AR glasses, medical devices, etc.) would qualify as well.”

Comments also addressed technical issues such as the aggregation rules and how to determine the basis of property acquired in a like-kind exchange. And some comments addressed issues with anti-abuse rules such as the widely discussed question of what “reasonable compensation” means or the attempt to clamp down on the so-called “crack and pack” strategy.

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Relative to the pre-notice period, the comments in the official notice-and-comment period tended to represent a slightly broader variety of perspectives. Most noticeably, there was an extensive form letter campaign in the notice-and-comment period by small community banks. One hundred and thirty-five form letters made the same point: that the proposed regulations’ treatment of banks organized as S corporations was unfairly detrimental to these small businesses. While, as discussed previously, core banking activity such as taking deposits and making loans had been excluded from the definition of SSTBs, other activities of S corporation banks (such as ancillary financial advising) would constitute an SSTB. Thus, the community bank form letters argued that the de minimis threshold in the proposed regulations was too low to protect such banks against certain of their activities being counted as SSTBs, and that the inclusion of such activities as SSTBs would have undesirable results. These letters, while clearly instigated by a sophisticated and organized effort, nonetheless gave voice to a position supported by a segment of non-tax law experts—bank officers, employees, shareholders, and affiliates. Indeed, a few of these form letters adopted the title “Grassroots Message on 199A.”

In addition, a few individuals who were seemingly not tax law experts (though they were still somewhat informed about the tax law) weighed in on behalf of themselves, including by voicing value-laden comments. For instance, one anonymous comment stated, in part:

Reg 1.199A-5 attacks all Personal Service ‘S’ Corporations, except for Engineering and Architectural, by limiting the deduction amount based on taxable income. The hand picking of two professions is outrageous. This affects the medical community, pulling qualified medical professionals away from America because of taxes

This law is discriminator [sic] and unconstitutional.

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173 See supra note 127 and accompanying text.


175 Id.

Various CPAs also engaged, asking questions that seemed largely designed to request clarification about how to fill out tax returns. For instance, one exasperated CPA from Reno, Nevada asked, “Why can’t IRS simply make it clear by stating that rental property DOES or DOES NOT qualify for the new 199A deduction?" This same CPA underscored with frustration that: “I urge IRS to make this issue abundantly clear and to do so PROMPTLY. Tax preparers all across the country are now in the process of advising their clients with year-end tax planning, and we’re all in the dark about this important matter.” Various other commenters also asked for clarification on the eligibility of rental real estate for the § 199A deduction.

There were also a few comment letters that seemed concerned about the public interest. For instance, one letter from a tax practitioner and tax law adjunct professor provided a detailed analysis of various problems with the proposed regulations (some of which, the letter suggested, reflected some of the difficulties of the underlying statute). The letter argued that the categorization of banking as not an SSTB was an unreasonable construction of the statute. This argument was clearly focused on the public interest and not particular taxpayers or industries. In total, we only counted six letters that took what could be described as having a public-interested perspective. This was a small number in comparison to the extensive industry lobbying for particular taxpayer favorable results.

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IRS-2018-0021-0120.

177 Note that not all the CPAs identified themselves as such. We performed internet searches that confirmed that the cited commenters were CPAs.


179 Id.


182 Shefter, supra note 181.

Importantly, the inclusion of a number of less sophisticated commenters did not diminish the extensive industry presence. Commenters ranged from the Commissioner of Major League Baseball,184 to the Writers Guild of America West,185 to the Securities Industry and Financial Markets Association Asset Management Group,186 to the American Veterinary Medical Association.187 While there was sometimes a difference of perspectives on particular issues (such as, for instance, how the presumption that treats former employees as employees for the purposes of § 199A should operate),188 commenters did not often take opposing positions. Instead, each industry tended to argue that the advantageous rules of § 199A should apply to them. The requests tended to build on each other,189 asking for increasingly favorable positions.

b. Relationship between Pre-Notice Engagements and Official Public Comments

The fact that some commenters had already engaged with Treasury in the pre-notice period had impacts. Notably, not all commenters were entering the conversation in the same position. Many were just beginning a conversation regarding issues they were concerned about. In contrast, others were continuing a conversation by responding to specific requests for guidance that had come

Some commenters cited comments that had been made in the pre-notice period as support for their continuing arguments. Others pointed to decisions they liked in the proposed regulations and asked that they be built upon. For instance, the Community Mortgage Lenders of America ("CMLA") expressed that "CMLA appreciates language in the proposed rule that excludes 'the making of loans' from the definition of 'Financial Services,'" but asked that the final rule provide "explicit clarifying language or guidance stating that" independent mortgage banks are not SSTBs and that specified, customary services of independent mortgage banks are excluded from the SSTB category of financial services.

Some of the comments from industry groups recycled requests made during the pre-notice period. For instance, the International Council of Shopping Centers ("ICSC") "commend[ed] the Treasury and the IRS for the overall helpful and practical clarifications provided in the Proposed Regulations," but then went on to request that Treasury "reconsider or clarify additional points, many of which were noted in [the ICSC’s] original comment letter dated April 9, 2018." Some commenters that had already gotten what they wanted in the proposed regulations simply congratulated Treasury on a job well done. For instance, the proposed regulations specifically provided that "brokerage services," which fall in the prohibited SSTB category, "does not include services provided by real estate agents and brokers, or insurance agents and brokers." The National Association of Professional Insurance Agents noted that they appreciated the "careful consideration of the uncertainty posed by the law and the significance of the comments and the breadth of the proposed regulations on the financial services industry."
of the work being done by independent insurance agents around the nation. While we cannot conclude that pre-notice comments yielded the proposed regulations’ positions, at least some industries expressed the belief that they did. For instance, in its official public comment, the International Franchise Association explained its view that its earlier, pre-notice submission “is in substantial agreement with the terms and reasoning of the Proposed Regulations.” As a result, in its comments in the actual notice-and-comment period, it re-submitted its pre-notice letter along with one additional request, and thanked Treasury for its “responsiveness to IFA’s earlier proposals in this rulemaking.”

Not all industry groups were satisfied with the proposed regulations. For instance, Tenaska, an energy company, was not pleased with how the SSTB rules applied to commodities trading. It argued that only trades or businesses that deal with financial instruments related to commodities should be barred from the deduction, while dealers in physical commodities should be eligible. But these dissatisfied parties were able to make their case in light of, and in dialogue with, the proposed regulations. In Tenaska’s case, in addition to making arguments based on the plain meaning and history of the statute, Tenaska explained that other decisions made by Treasury in the proposed regulations illustrated Treasury’s ability to make the moves Tenaska wanted. In particular, Tenaska argued that Treasury’s creation of a de minimis rule, nowhere explicitly authorized by statute, showed that Treasury could make decisions necessary to increase administrability.

Stepping back, the official notice-and-comment period was notable for its slightly broader set of participants (though it remained industry dominated, with a particular focus on what industries would be SSTBs), but also for the different positions in which different participants found themselves. Some were coming in having already won a lot in the proposed regulations, while others were

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197 Id.
199 Tenaska, Inc., supra note 198.
coming in either fresh to the conversation or working out of a real or perceived deficit.

2. Late Comments

The preamble to the § 199A proposed regulations explicitly stated that “[w]ritten or electronic comments must be received by October 1, 2018.” The regulations.gov website likewise indicated that comments were due by October 1, 2018. But the “Comment Now!” button on the website remained active after this time. We therefore continued to monitor regulations.gov after the official close of the notice-and-comment period and identified additional, late-submitted comments that appeared there.

The “Comment Now!” button finally appeared to go inactive and to instead state “Comment Period Closed” on October 23, 2018, at which time there were 336 total comments received. One additional comment was posted on regulations.gov on December 3, 2018. This meant that approximately twenty additional comments trickled in the months after the official close of the notice-and-comment period on October 1, 2018. We found no official, public notification of the extension of the comment period, though Tax Analysts did report a statement by a Treasury official at the October 5, 2018 ABA Tax Section meeting that: “[T]he comment period for the proposed regulations has been extended to the hearing date, which is October 16.” It is possible that, even after regulations.gov stopped accepting comments on October 23, 2018, or even after October 1, 2018, additional comments were submitted directly to Treasury that were not visible on regulations.gov at the time of our study. Notably,

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202 For instance, when checked on Oct. 10, 2018, the “Comment Now!” button was still active.
203 See, e.g., infra text accompanying note 208.
208 For instance, Tax Analysts reported that the NYSBA supplemented their pre-notice comments with a report seemingly directly submitted to Treasury on October 19, 2018. Tax Analysts, NYSBA Outlines Recommendations for Proposed Section 199A Regs, 2018 TAX NOTES TODAY 204-24 (Oct. 19, 2018), https://www.taxnotes.com/tax-notes-today-federal/exemptions-and-deductions/nysba-outlines-recommendations-
there were some comments submitted after the final regulations were issued and posted on regulations.gov. 209

3. The Public Hearing

On October 16, 2018, Treasury and the IRS held a hearing about the proposed § 199A regulations. While we contacted Treasury to attempt to gain remote access to the hearings, Treasury was not able to provide us such access and instead referred us to Tax Analysts, 210 which was able to provide us the hearing transcript. 211 The hearings lasted approximately three-and-a-half hours and provided all of those on the hearing docket (twenty-four docketed speakers) plus two others present the opportunity to speak. 212

While there were some new speakers in the hearing who had not chimed in with substantive comments during the pre-notice or actual notice-and-comment period, there were also many repeat players. As one example, LPL Financial testified at the hearing to request again that broker dealers and investment advisors not be treated as SSTBs.213 LPL Financial had made the same argument in the official notice-and-comment period 214 as well as in the pre-notice period.215

As was the case in the official notice-and-comment period, some hearing participants used the opportunity to plead for greater clarity.216 Many congratulated Treasury on a job well done 217 and some who were relatively

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209 See supra note 204.
210 Telephone Conversation with Treasury (Oct. 3, 2018, 11:54 AM).
212 Id.
213 Id.
215 See supra notes 128–131 and accompanying text.
217 See, e.g., id. (testimony of Kent Mason, thanking Treasury for “the hard work, the excellent product, the timely result and the opportunity to testify here today”).
satisfied used the opportunity to ask for a bit more such as, for instance, an example that would clarify application to a given industry.218

D. The Final Regulations

On January 18, 2019, Treasury and the IRS released the final § 199A regulations219 along with related guidance,220 and on February 1, 2019, issued a corrected version of those final regulations.221 The preamble to the final regulations included pages of detailed discussion of all of the comments received during the official notice-and-comment period, as well as how Treasury had responded to them. This preamble discussion suggested that Treasury had extensively considered the comments received during the notice-and-comment period in formulating the final regulations.

Treasury did make some revisions in response to public comments received. Many of these revisions pertained to technical issues, such as how § 199A would interact with optional basis adjustments after sales of partnership interests, and how to aggregate multiple trades or businesses.222 These were situations in which commenters had pointed out that failure to make these revisions would lead to unintended consequences or distortive results. Treasury also provided

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218 See, e.g., id. (testimony of Charles Thurston, asking again specifically for a franchise example).
219 See supra note 14.
220 The related guidance included: (a) a revenue procedure containing methods for calculating various aspects of the deduction; (b) a new set of proposed regulations that provided guidance regarding how to treat previously suspended losses for purposes of § 199A and how the deduction should be treated for taxpayers with interests in real estate investment trusts, charitable remainder trusts, and split-interest trusts; and (c) a notice of a proposed revenue procedure offering a safe harbor for certain real estate enterprises to be treated as a trade or business for purposes of § 199A. Rev. Proc. 2019-11, 2019-09 I.R.B. 742; Qualified Business Income Deduction, 84 Fed. Reg. 3015, 3015–23 (proposed Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1); I.R.S. Notice 2019-07, 2019-09 I.R.B. 740.
221 See supra note 14.
222 For example, the available deduction is potentially limited by the “unadjusted basis immediately after acquisition” (UBIA) of “qualified property,” but there is a question of how such UBIA should be divided between partners in a partnership. I.R.C. § 199A(b)(2) (Supp. V 2017). Treasury revised the final regulations to provide that in allocating UBIA, such allocation should be made in accordance with I.R.C. § 704(b) only, not § 704(b) and § 704(c) as had been provided by the proposed regulations, as the latter would lead to “unintended results.” Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2958 (Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1). Treasury also made several other technical changes in how to determine UBIA. See, e.g., id. at 2958–59 (discussing UBIA of property contributed in a nonrecognition transaction and UBIA of property received in a § 1031 exchange). In addition, Treasury also made revisions to how trades or businesses should be aggregated in computing the deduction, providing, for example, that aggregation should be allowed at the entity level. Id. at 2952.
clarifications by modifying language or fine-tuning concepts in response to comments received.\textsuperscript{223} Other times, Treasury provided clarifying examples.\textsuperscript{224}

Despite these changes, Treasury did not fundamentally change its regulatory approach in the final regulations. This was particularly true with respect to some of the most contested regulatory issues, including what constituted a “trade or business” for the purposes of § 199A and which businesses constituted disqualified SSTBs not eligible for the deduction. For instance, Treasury denied requests that it provide a regulatory definition, factors-based test, bright-line test, or safe harbor for determining when a trade or business exists, retaining the proposed regulations’ existing reliance on the § 162 rules, albeit with minor rewording.\textsuperscript{225} Likewise, Treasury mostly did not change its approach to SSTB determination.\textsuperscript{226} Most notably, despite an onslaught of comments (including from community banks) requesting higher de minimis thresholds—levels of gross receipts from prohibited activities below which a taxpayer will not be regarded as being engaged in a prohibited service—Treasury retained the thresholds it had created in the proposed regulations and defended them based on past practices.\textsuperscript{227}

To be sure, Treasury did make discrete changes that satisfied particular commenters’ requests. Perhaps most notably, Treasury offered a safe harbor for determining when rental real estate constitutes a trade or business eligible for the deduction.\textsuperscript{228} However, some practitioners subsequently argued that this safe harbor fails to provide clear guidance, is not particularly advantageous, and is essentially meaningless.\textsuperscript{229} Similarly, Treasury made some modifications to the SSTB rules that constituted a real win for certain industry commenters. For

\textsuperscript{223} For example, Treasury clarified that the special rule for rentals of property to related parties does not apply to rentals to C corporations. Qualified Business Income Deduction, 84 Fed. Reg. at 2977. Treasury also provided clarification that in the cases of multiple trades or businesses, QBI from an SSTB is reduced before applying the netting and carryover rules. Id. at 2957. Treasury also clarified that to meet the 50% ownership test in order to aggregate trades or businesses, 50% ownership must be maintained on the last day of the tax year. Id. at 2966.\textsuperscript{224} See, e.g., id. at 2968 (adding example clarifying when a real estate trade or business satisfies the aggregation rules); id. at 2970 (adding example clarifying that franchising is not an SSTB solely based on sale of franchise in a listed field of service; adding example of a skilled nursing/assisted living facility offering services that do not rise to the level of the performance of services in health).\textsuperscript{225} Id. at 2954.\textsuperscript{226} See id. at 2961–66.\textsuperscript{227} Id. at 2974–76.\textsuperscript{228} Rev. Proc. 2019-07, 2019-09 I.R.B. 740.\textsuperscript{229} See, e.g., Eric Yauch, Real Estate Businesses Are Dissatisfied with Parts of 199A Guidance, TAX PRAC. EXPERT, Jan. 23, 2019, at 22, 22 (citing arguments that real estate enterprises that meet the safe harbor requirement of spending 250 hours on rental services each year likely would have already met the trade or business requirement, so the safe harbor “accomplishes nothing”).
instance, Treasury declined to provide a blanket exclusion for skilled nursing and assisted living facilities from being an SSTB in the field of health, but did provide an example of a situation in which an operator of a senior residential facility was not performing services in the field of health and therefore qualified for the deduction. And Treasury made a number of similar discrete clarifications or changes that benefitted certain groups, sometimes quite significantly. But these changes did not constitute an overhaul of the approach adopted in the proposed regulations.

Moreover, the few publicly-interested comments objecting to the regulatory approach generally were not accommodated in the final regulations. For instance, perhaps the most significant, taxpayer-favorable move in the proposed regulations was Treasury’s narrow reading of the reputation or skill clause to SSTB determination. In the preamble to the final regulations, Treasury noted that, while many had praised the narrow reading, some had also expressed concern about the “narrowness of the definition.” But Treasury defended its position on the grounds that it was concerned about the “substantial uncertainty” that a broad interpretation of the clause would create for taxpayers and the IRS, and referred back to the proposed regulations preamble in justifying its narrow reading.

E. Summary: Understanding the § 199A Story

Stepping back, studying the making of the § 199A regulations from legislative enactment until finalization yields a number of insights about the regulatory process. The fundamental regulatory structure had essentially been built in the proposed regulations with input from interested parties (both tax professionals and industry players) who had chimed in quickly, in the immediate aftermath of § 199A’s enactment. At least fifty-one comments, many sophisticated, were submitted before the official notice-and-comment period had actually opened. However, neither the content nor even the existence of these pre-notice comments was fully transparent to observers prior to the issuance of the proposed regulations. Yet, these pre-notice comments were mentioned

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231 Treas. Reg. § 1.199A-5(b)(3)(ii). Treasury noted that the determination was a “facts and circumstances” one. Qualified Business Income Deduction, 84 Fed. Reg. at 2970.
232 For example, Treasury clarified that engineering and architectural services will not constitute consulting services that qualify as SSTBs. Qualified Business Income Deduction, 84 Fed. Reg. at 2972.
233 Id. at 2975.
234 Id. (“As stated in the preamble to the proposed regulations, it would be inconsistent with the text, structure, and purpose of section 199A to potentially exclude income from all service businesses from qualifying for the section 199A deduction for taxpayers with taxable income above the threshold amount.”).
repeatedly in the proposed regulations preamble and clearly helped shape the proposed regulations.

Meanwhile, the final regulations, which were released after the public comment period, made clarifications and revisions but by and large did not make fundamental changes to the overall approach. The changes that were made tended to be either technical or discrete. This is in some sense unsurprising and may in fact be both the predictable and even the required result of constraints that Treasury faced. From a practical perspective, Treasury was under tremendous time pressure to issue the final regulations quickly and in time for the 2018 filing season, and ultimately released a very complex set of final regulations just over a year after the statute’s enactment. Even after taking into account delays caused by the government shutdown, finalization of the regulations happened just three months after the October 16, 2018 public hearing was concluded. This meant that Treasury was undoubtedly constrained in how many changes it could reasonably make between the proposed and final regulations.

Administrative law requirements only strengthened the incentives for Treasury to make revisions and clarifications, but few fundamental changes, in the final regulations. As a matter of administrative law, failure to make any changes in response to comments received in the notice-and-comment period may result in final regulations being struck down due to unresponsiveness. At the same time, wholesale changes may result in the final regulations being struck down on the grounds that the public would not have had sufficient notice to enable meaningful comment. Stuck between this rock and hard place, Treasury’s approach of making incremental, but not fundamental, changes in the final regulations is not only expected, but perhaps the only route Treasury could have taken to try to assure the regulations would be upheld if challenged.

Finally, public-interested perspectives were notably both missing from and also unlikely to be included in the regulatory project. We found essentially no evidence of comments submitted directly to Treasury or the IRS in the pre-notice period that represented the public-interested perspective. While there was a

236 Id.
237 Cf. Home Box Office, Inc. v. FCC, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (pointing out that “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public”).
small handful of such comments in the official notice-and-comment period, Treasury generally rejected them in the final regulations, possibly because granting them would have required a fundamental change to the regulatory approach. Indirect public commentary in the public interest seemed to have some influence on the proposed regulations, but it is unclear how Treasury chose what indirect commentary to consider.

III. ANALYSIS AND IMPLICATIONS

What conclusions can we draw from the making of the § 199A regulations? In this Part, we discuss the implications of our study for the relationship between legislative and regulatory processes and for administrative practice.

A. Regulatory Spillovers from Unorthodox Legislative Processes

Our study identifies an important aspect of how the legislative and regulatory processes interact. As discussed, recent law and political science scholarship has highlighted the unorthodox nature of legislative processes—the use of non-textbook processes to pass legislation in an era of increasingly divided politics, and the 2017 tax legislation exemplified many of these unorthodoxies. The way the legislation was passed meant that there was little opportunity to catch errors and ambiguities. It was obvious to most observers that Treasury would have to address many of these open questions in regulations and other guidance. However, what was less obvious was how the use of non-textbook legislative processes would put pressure not just on regulatory content, but also on regulatory processes in the post-enactment period. Indeed, while there has been recent literature discussing the relationship between legislative and regulatory unorthodoxies, as well as literature acknowledging influences in the regulatory process outside of official notice and comment, there has been little empirical study of the former and no investigation of how the two connect to each other.

239 See supra Part I.A.
240 See supra Part I.A.
241 Wallace, supra note 37, at 457 (explaining that the TCJA process differed from prior tax reform in that it left much more to the Treasury Department and the IRS to decide).
242 Scott R. Furlong & Cornelius M. Kerwin, Interest Group Participation in Rule Making: A Decade of Change, 15 J. PUB. ADMIN. RES. & THEORY 353, 360 (2005) (hypothesizing that increasing gridlock in Congress pushes more policymaking into the administrative sphere, which increases lobbying in the administrative process).
243 Gluck, supra note 6.
244 E.g., Krawiec, supra note 18; Wagner et al., supra note 18; Yackee, supra note 18.
Our Article documents how unorthodoxies of the legislative process may have exacerbated pre-notice dynamics already inherent in the regulatory process, thereby providing empirical support for the connections between unorthodox legislation and agency rulemaking. It thus bridges the academic literature on legislative unorthodoxies with the literature on influences outside of notice and comment. Specifically, we observed how the 2017 tax legislation triggered an outpouring of comments to Treasury prior to any notice of proposed rulemaking. One likely driver of such outpouring was that sophisticated actors were aware that the hasty nature of the legislative process, and the accompanying ambiguities and outright problems with the statute, would require significant regulations in short order. They thus sought to influence the regulatory process right after legislative enactment.

Thus, what was left undone in the legislative process seeped into the regulatory process. As further discussed below, these pre-notice interventions, while understandable, also pose threats to the legitimacy of rulemaking procedures. Our study shows how, by incentivizing pre-notice interventions, unorthodox legislation may put pressure on regulatory processes and outcomes to a greater extent than usual.

This suggests an important normative point: The costs and benefits of legislative process unorthodoxies need to be examined together with the costs and benefits of regulatory process unorthodoxies. As some have suggested, unorthodox legislation may have benefits such as easing legislative passage. However, to the extent such passage increases pressure on regulatory processes in a way that undermines important values or substantive outcomes, the cost of the unorthodox legislation may be greater than we might think.

Moreover, our findings show how traditional approaches to studying tax administrative processes might not fully encapsulate pressures on those processes in the aftermath of legislative unorthodoxies. First, in contrast to scholarship that shows limited public engagement with Treasury in the regulatory process, our study found substantial engagement in the pre-notice, notice-and-comment, and post-notice periods. This occurred despite the fact

245 See infra Part III.B.
246 E.g., Sinclair, supra note 28.
247 Clinton G. Wallace, Congressional Control of Tax Rulemaking, 71 TAX L. REV. 179, 182 (2017) (recent study of notice-and-comment in tax that found close to zero participation in most cases, with comments being dominated by private interests to the extent comment occurs).
248 This is not to say that extensive engagement in the regulatory process never otherwise occurs in the ordinary course. As scholars have long documented, while most rulemakings tend to garner very little participation, some highly salient rulemakings garner extensive participation. See, e.g., Cary Coglianese, Citizen
that efforts to increase engagement in rulemaking generally have had limited success, with scholars finding that public participation often involves repetitive submissions, significant costs to the agency, and little value due to the lack of knowledge necessary to comment effectively. Second, while recent tax scholarship has focused on the importance of Treasury complying with notice-and-comment procedures and notes that Treasury has made tremendous gains in this regard, our study suggests that even such gains may be inadequate in the aftermath of legislative unorthodoxies. Focusing only on notice and comment misses the outpouring of pre-notice lobbying activities that follows the legislative process, and the extra access that such pre-notice engagement allows those with connections to the regulatory process.

Perhaps ironically, efforts to strengthen tax regulatory processes, without full acknowledgement of the nature and impact of pre-notice process, may exacerbate, rather than ameliorate, legitimacy problems inherent in rulemaking. Tax scholars’ efforts to ensure that tax rulemaking complies with administrative law standards recently have culminated in high-profile litigation, as well as greater involvement of the OMB in tax rulemaking more generally. These developments may help explain why, in making the § 199A regulations, Treasury considered and mentioned comments so extensively. Treasury’s more deliberate consideration of all comments may appear to be a victory for administrative law processes in tax. However, the fact that Treasury may have felt pushed to consider all comments, including pre-notice comments, to a greater extent may actually undermine the legitimacy of the rulemaking process if pre-notice comments were a non-transparent way for insiders to disproportionately influence the regulations. Put another way, if the focus on administrative process has encouraged Treasury to carefully consider pre-notice participation in rulemaking: past, present, and future, 55 Duke L.J. 943, 950–56 (2006) (discussing general rule of few comments but also examples of extensive participation in salient rulemakings). But the problems and ambiguities created by a hastily drafted major legislation may illustrate unique dynamics between the legislative and regulatory processes.

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250 See, e.g., Mayo Found. v. United States, 562 U.S. 44, 55 (2011) (“We are not inclined to carve out an approach to administrative review good for tax law only.”).

251 See, e.g., Altera Corp. & Subsidiaries v. Comm’r, 926 F.3d 1061 (9th Cir. 2019) (resolving a longstanding litigation regarding whether, among other things, Treasury’s cost-sharing regulations complied with Administrative Procedure Act rulemaking requirements).

comments but has not helped equalize access or transparency in the pre-notice period, we may paradoxically have created as many problems as we have solved.

The bottom line is that the extensive pre-notice comments we witnessed in the aftermath of the hasty 2017 tax reform underscore how the inadequacies of the legislative process may exacerbate inadequacies of the regulatory process. The blending of the two should prompt legislative and regulatory scholars, both in tax and beyond, to reconsider pre-existing assumptions about how each part of the process, and policy interventions into them, will affect the other.

B. Administrative Practice Implications: Managing Tradeoffs and Risks

Our study also suggests that administrative law paradigms may be inadequately suited to manage the real-world variations in regulatory process. As detailed above, the traditional administrative law paradigm looks to notice and comment as the time in which the public engages with the agency to provide feedback on regulations.253 But our study found numerous communications, primarily by trade and industry actors and by associations of tax professionals, outside of notice and comment. Treasury repeatedly referenced pre-notice comments in the proposed regulations and granted many of the requests made.254 This suggests that pre-notice engagement may be an effective way of getting desired regulatory content.255 Furthermore, Treasury did not make fundamental changes in the final regulations, which supports the notion that the agency approach in the proposed regulations is likely to be somewhat sticky.256 Administrative law doctrines257 may contribute to agency reluctance to make substantial changes after proposed regulations are issued.

These findings underscore the suggestions of some administrative law scholars that extensive focus on the official notice-and-comment period misses

253  See supra Part I.B.

254  The detailed preamble is a far cry from the sparse notice actually required by the APA’s text. See 5 U.S.C. § 553(b) (2012) (requiring “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved”). This was done partially in response to judicial and executive trends in rulemaking. See supra notes 247–252 and accompanying text.

255  We cannot conclude that specific grants of requests were necessarily caused by the requests. However, we did find numerous instances of Treasury specifically supporting a position by saying that it agreed with a given comment or suggestion. See, e.g., Qualified Income Business Deduction, 83 Fed. Reg. 40, 884, 40,885 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1) (saying that the IRS agrees with commenters that, for purposes of § 199A, “section 162(a) provides the most appropriate definition of a trade or business”).

256  See discussion supra Parts II.C and II.D.

257  E.g., Kannan, supra note 238 (referencing “logical outgrowth” doctrine).
an important part of regulatory development. As noted above, scholars have suspected that the pre-notice period is a time in which industry insiders may be able to influence the agency in a period of nontransparent lobbying, which may exacerbate tendencies for such insiders to dominate rulemakings, especially complex rulemakings like § 199A. Scholars have suggested that the more complex the rulemaking, the more likely it is to be dominated by regulated parties, who often have informational and incentive advantages that allow them to intervene in a way that public interest groups and other outsiders cannot. In these cases, the pre-notice period may especially exacerbate the greater access and influence of private, regulated parties in a way that undermines the legitimacy that notice and comment is supposed to confer.

The nascent empirical literature about the pre-notice period supports this claim. For instance, Wendy Wagner, Katherine Barnes, and Lisa Peters studied interest group influence over the lifecycle of complex EPA rulemakings regarding emissions standards for the release of air toxins. They found that input into the pre-notice period was “almost completely monopolized by regulated parties.” Kimberly Krawiec analyzed the comment letters and other contacts received by the Financial Stability Oversight Council regarding the Volcker Rule in the pre-notice period. She found that financial institutions and their representatives had dominated pre-notice commentary, accounting for 93% of the contacts during the studied period, and exhibited a surprising amount of cohesion. Susan Yackee conducted an empirical study of ex parte influence after an advance notice of proposed rulemaking has been issued, examining government documents from seven federal agencies and conducting telephone

258 See sources cited supra note 63.
259 E.g., West, supra note 63, at 589 (noting that “prenotice participation is potentially subject to the alleged bias in favor of the ‘special interests’ or ‘subgovernment actors’ that notice-and-comment requirements are designed to counter”).
260 Wendy E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 DUKE L.J. 1321, 1384–85 (2010) (highlighting how complexity of proposed rulemakings can make them all but indecipherable to parties that are not regulated parties); see also William T. Gormley, Jr., Regulatory Issue Networks in a Federal System, 18 POLITY 595, 607 (1986) (worrying in particular about who has influence when the issues are highly complex and have low salience); cf. Walters, supra note 18 (empirical study of rulemaking petitions at the agenda-setting stage of regulatory formation showing higher rates of business interest participation but “distinct lack of any business advantage” in affecting agency decisions; arguing that “the evidence supports the idea that agencies engage with interest groups with critical distance at the agenda-setting stage, and that the driving force in agency decision making is not the identity or interests of the petitioner, but instead the agencies’ incrementalist, pragmatic orientation toward improving existing regulatory programs”).
261 West, supra note 63, at 589.
262 Wagner et al., supra note 18.
263 Id. at 125.
264 Krawiec, supra note 18.
265 Id. at 58–59.
surveys with interested parties. Yackee found that interest group contacts during the pre-notice period influenced regulatory outcomes and also found “suggestive evidence” that such contacts were a potential factor in causing regulations to be withdrawn from consideration, thereby blocking and shaping policy outcomes. These findings underscore long-held concerns that powerful and well-resourced insiders may dominate the administrative process.

In some ways, our study supports these findings. Out of fifty-one pieces of pre-notice correspondence, twenty-nine came from industry and trade groups and organizations—sophisticated regulated parties. Among those twenty-nine pieces of correspondence, there was extensive lobbying by industry groups for particular outcomes, for example, arguments about whether particular industries belonged in the undesirable category of being an SSTB. Where plausible and specific, these requests were generally granted (though, again, we cannot prove causation).

But our study also suggests a more complex picture of the pre-notice period than the existing literature. In addition to industry requests, we also found that sophisticated professional associations of tax lawyers and accountants such as the ABA Tax Section, the NYSBA, and the AICPA also accounted for a significant number of the direct comments in the pre-notice period. This commentary tended to request guidance and clarification on technical issues, rather than asking for favorable treatment. We also found robust indirect commentary by academics and others, including analysis in news op-eds, blogs, Twitter, SSRN, professional meetings, and other forums. These findings show

266 Yackee, supra note 18; see also, e.g., Keith Naughton et al., Understanding Commenter Influence During Agency Rule Development, 28 J. POL. ANALYSIS & MGMT. 258 (2009) (an earlier work that found that formal participation of interested parties in the rule development stage was influential in a study of Department of Transportation rules that began with an advance notice of proposed rulemaking).

267 Yackee, supra note 18, at 374.

268 See, e.g., James Q. Wilson, The Politics of Regulation, in THE POLITICS OF REGULATION 357, 367–70 (James Q. Wilson ed., 1980) (outlining a famous four-quadrant possibility of outcomes based on distribution of benefits and costs and worrying most about capture in situations of diffuse benefits and concentrated costs). Such concerns also seem to find support in studies of the actual notice-and-comment period, which have found low relative participation by public interest groups and/or a bias toward business and industry in rulemaking. E.g., Wallace, supra note 247, at 182; Yackee & Yackee, supra note 62, at 133 (finding, in a study of rulemakings with 200 or fewer comments, that 57% of comments were submitted by business and only 6% of comments were submitted by public interest groups); Marissa Martino Golden, Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998) (finding that business interests participated much more heavily in rulemaking than public interest groups).

269 See discussion supra Part II.B.

270 See discussion supra Part II.B.

271 See discussion supra Part II.B.

272 See discussion supra Part II.B.
that, in addition to industry lobbying, the pre-notice period may also be a time in which experts may provide valuable technical advice to Treasury or may chime in through other avenues. These inputs appear to be important in regulatory development in a technical and expert-driven field.\textsuperscript{273}

How should these agency rulemaking practices be evaluated? Pre-notice engagements are not prohibited by administrative law, nor are they necessarily all bad, particularly in an expert-dependent field like tax law. In a world of tight timetables, hastily drafted legislation, and complicated statutes, Treasury potentially has much to gain by taking input from sophisticated tax professionals in crafting proposed regulations, especially on technical matters likely to arise in sophisticated business transactions.\textsuperscript{274} Under administrative law doctrines, final regulations must be a “logical outgrowth” of proposed rules or risk invalidation.\textsuperscript{275} Thus, it may well be the case that carefully considering the input of tax professionals and even regulated parties before issuing proposed regulations makes it more likely that final regulations will be upheld. In light of constraints agencies face, pre-notice engagement may be the best option in an imperfect world.\textsuperscript{276}

But the existence of pre-notice engagements also raises concerns about systematically advantaging certain groups and disadvantaging others. In the case of § 199A, there are three main concerns:

First, pre-notice commentary provided an opportunity for extensive and effective industry lobbying without any real counterweight at a phase when Treasury positions were likely to become anchored and locked in. In the § 199A case, Treasury granted many industry requests in the proposed regulations and did not materially back away from these grants in the final regulations. While, again, we cannot prove causation, this suggests that there was value in coming in early and drawing Treasury’s attention to issues important to one’s industry. Favorable outcomes granted at this phase were unlikely to be retracted at a later point. Thus, unless the agency can find a way to encourage countervailing voices

\textsuperscript{273} See generally Oei & Ososky, supra note 35 (noting importance of expertise in tax law).

\textsuperscript{274} See, e.g., Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 429–30 (2007) (describing benefits to agency of soliciting input from regulated parties in terms of expertise and working relationships).

\textsuperscript{275} See supra note 238 and accompanying text.

\textsuperscript{276} See, e.g., Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) (“Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.”).
to participate in this phase, well-organized trade groups and industry players are likely to benefit from the ability to set an agenda before notice and comment.

Second, coming in during the pre-notice period allows parties in the know to make requests multiple times. For example, one could partially obtain what one wanted in the pre-notice period and then ask for more in the actual notice-and-comment period, building on the prior request. Or, alternatively, one could make a request in the pre-notice period that was not granted (or was not as clearly or fully granted as one had hoped), and then make another request in the official notice-and-comment period. For instance, in the pre-notice period, the franchising industry requested to be excluded from SSTB treatment, was generally satisfied with the narrow definition of SSTBs in the NPR, but also pushed for even more favorable treatment in the official notice-and-comment period, ultimately winning an advantageous clarifying example in the final regulations.277

Third, pre-notice engagements could occur without being subject to the same transparency requirements as engagements during the official comment period. Lack of transparency is potentially problematic because it may be easier to grant more requests when no one is looking, even if this is not one’s intent. Pressure from a persistent requester, without being subject to the counterpressure of public scrutiny, may lead to higher likelihood of the request being granted. Lack of transparency also means it is less likely that less sophisticated parties will be aware of pre-notice engagements and know to chime in. And, even putting aside substantive outcomes, lack of transparency yields the possibility of perceived unfairness—the public may be less likely to trust a process it cannot see.

In addition, there is reason to worry that participation by professional organizations of tax experts may not adequately offset these concerns. While professional associations offering technical advice may potentially serve as a counterweight to lobbying, there are limitations to this potential. Professional associations have historically struggled with what their role should be. They tend to be run primarily by practitioners.278 This has created a tension between the practitioners’ duties to serve their clients and the potential role of these associations as guardians of the tax system.279 In the case of the § 199A

278 The prominent tax section executive committee of the NYSBA association, for instance, is comprised almost entirely of sophisticated practitioners, with a few prominent academics sprinkled in. Tax Section Executive Committee, N.Y. STATE BAR ASS’N, http://www.nysba.org/wcm/committeerooster?comnumid= TAX1000 (last visited Oct. 20, 2019).
regulations, professional associations generally addressed this tension by offering technical advice and seeking clarifications, without making overt, normative, policy-based arguments.280 While this technical advising may be valuable to Treasury, it does not offer a direct counterweight to interest-group lobbying in the pre-notice period.281

Some of these same concerns hold for the post-notice-and-comment period as well. As noted, Treasury allowed parties to submit late comments on regulations.gov until October 23, 2018.282 This opportunity would technically have been open to anyone. However, it is much more likely that those deep in the know—insiders, attendees at an ABA Section of Taxation meeting where Treasury indicated the comment period was open, or careful readers of Tax Analysts—would be aware of the opportunity.283

Like accepting pre-notice commentary, allowing late comments may have some benefits to the regulatory process. For example, accepting late comments may give sophisticated tax experts the necessary time to work through difficult technical issues and the resulting comments may improve the quality of Treasury’s final regulations. On the flip side, the risk is that extending the comment period with inadequate publicity effectively reduces the relative access for some constituencies and allows others to submit comments at a time when there is a lower likelihood of rebuttal.284

In contrast to the advantage conferred on early and late comments, indirect commentary was systematically disadvantaged in the regulatory process. We

280 See supra Part II.B.

281 See supra Part II.B.

282 See supra Part II.C.2.


284 Cf Herz, supra note 249, at 10 (discussing common practice of submitting comments on the last day of the comment period and the resulting lack of opportunity for rebuttal); Johnson, supra note 55, at 1389 (outlining strategy of waiting until the end of comment period to submit comments so as to avoid possibility of rebuttal); see also Cynthia R. Farina et al., Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking, 31 PACE L. REV. 382, 418 (2011) (“Sophisticated repeat players typically wait until the last minute to file lengthy advocacy pieces that offer only knowledge favorable to their position.”). In general, the concept of a post notice-and-comment period is distinct from, but related to, review of regulations after they have been promulgated. For discussion of this phenomenon, see generally Wendy Wagner et. al., Dynamic Rulemaking, 92 N.Y.U. L. REV. 183 (2017).
saw some suggestion that indirect comments on social media, the news, and professional publications may have shaped Treasury’s decisions in the proposed rules, but there is no official requirement that agencies actually consider indirect comments in either the pre-notice or notice-and-comment period, and there is concomitantly no judicial review for failure to do so. These indirect comments thus occupy an undefined and peripheral space in terms of accountable process and their capacity to influence regulatory outcomes. This outcome is particularly problematic where, as here, public-interested commentary largely occurred through indirect sources.

C. Suggested Improvements to Administrative Practices

We now address some ways to better balance the tradeoffs and risks discussed above. We first outline our concrete suggestions and then explain our theoretical grounding for these suggestions.

1. Pre-Notice Transparency

First, we recommend that Treasury ensure more transparency in the pre-notice period by committing to publicly post pre-notice comments it receives on regulations.gov, rather than relying on private subscription services to make these comments available to the public. Treasury should also go a step further and publicize unwritten and verbal contacts between the agency and private interests in the pre-notice period.

Here it is worth re-emphasizing that our study of the pre-notice period would not have been possible without heavily reliance on Tax Analysts’ private databases. These databases are only available to those with a subscription to the Tax Notes periodicals, and an individual subscription to Tax Notes Today costs...

See supra text accompanying notes 153–164.

See, e.g., Herz, supra note 249, at 73 (“The key point is that agencies are not at the mercy of putative commenters. They need not consider and respond to op-eds, law review articles, or cocktail party conversations, however directly relevant to a rulemaking they may be, because such observations do not meet agency-imposed criteria for what is a comment.”).

See, e.g., Richard Murphy, Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency, 47 WAKE FOREST L. REV. 681, 704 (2012) (“Requiring prompt, electronic, searchable docketing of all written communications once a rulemaking has become “serious” would mark a major advancement over the current system ….”).

See Jonathan Curry, Behind the Scenes at OMB: How’s That New Agreement Working Out?, 2018 TAX NOTES TODAY 176-3 (Sept. 11, 2018) (alluding to the meetings between lobbyists, Treasury staff, and OMB throughout the 199A process); West, supra note 63, at 586 (explaining that “[i]nformal conversations and e-mail exchanges are almost ubiquitous forms of participation in proposal development”); Yackee, supra note 18 (finding that ex parte contacts in particular were influential in the pre-notice period in a number of rulemakings).
$2,500 annually.\textsuperscript{289} Thus, in order to access many of the pre-notice comments, one effectively is required to subscribe to Tax Notes or some other private tax news source. We also had to rely on Tax Analysts to understand the § 199A rulemaking process, including to gain access to the § 199A hearing transcript,\textsuperscript{290} learn about Treasury accepting late-submitted comments, and to find some of these comments that did not appear on regulations.gov. Furthermore, it was only through significant effort—detailed searching of the Tax Analysts databases, and identifying and searching other sources—that we were able to locate the pre-notice correspondence.\textsuperscript{291} Thus, despite the fact that Treasury itself repeatedly referred to pre-notice comments in its proposed regulations preamble, there was no central repository for such correspondence, nor any systematic agency effort to make the comments easily available to the public.

It is also worth noting that the informational landscape we confronted was different from that encountered by scholars who had studied pre-notice engagements such as Wagner et al., Krawiec, and Yackee. These scholars had access to publicly available government sources.\textsuperscript{292} This suggests that pre-notice transparency initiatives are already being embraced to some extent by other agencies, and it would be possible for Treasury to follow suit.

2. Equalizing Pre-Notice Access

While transparency is important, it is not enough. Treasury should also take affirmative steps to encourage more voices in the pre-notice period and to make channels for pre-notice participation clear.

While most tax experts were aware that the § 199A regulations were coming,\textsuperscript{293} many would not have been aware of the extent of pre-notice participation.

\begin{footnotes}
\item[290] We did find at least one public posting of the hearing transcript on the internet, which itself just attached the hearing transcript with a Tax Analysts document ID. This shows that the poster, a major accounting firm, obtained the transcript from Tax Analysts and posted it publicly. \textit{IRS Holds Public Hearing on Section 199A Proposed Regulations, EORNST & YOUNG (Oct. 28, 2018), https://taxnews.ey.com/news/2018-2109-irs-holds-public-hearing-on-section-199a-proposed-regulations.}
\item[291] In addition, neither the Tax Analysts nor the government databases fully capture the less formal interactions with Treasury and IRS such as phone calls or discussions between private sector attorneys and agency officials.
\item[292] See discussion at supra notes 262–268 and accompanying text. For instance, Wendy Wagner et al. focused on docketed informal communications with the EPA during the pre-notice stage. Wagner et al., supra note 18, at 124–28. Krawiec analyzed the pre-notice comments received by the Financial Stability Oversight Council regarding the Volcker Rule. Krawiec, supra note 18, at 57.
\item[293] There were numerous notifications in the tax community that the proposed § 199A regulations were being considered and their release would be imminent. See, e.g., Eric Yauch, \textit{Bankers Group and Government}
engagement between Treasury and industry groups. There was no systematic public process or portal to accept pre-notice comments. Some commenters piggybacked on the existing Notice 2018-43 procedure for suggesting IRS guidance priorities for 2018–19, while others apparently met with Treasury officials and submitted comments as part of those meetings. Still others just submitted written comments. It is therefore likely that only those who had the expertise and contacts to submit pre-notice comments would have done so.

There are some easy steps that Treasury could take to improve pre-notice access. As a start, Treasury could make more effort to publicize the impending rulemaking and flag the questions they are considering as early as possible so as to generate as broad a swath of comments as possible. Scholars have suggested that agencies use something called an Advance Notice of Proposed Rulemaking (ANPRM) to publicize a rulemaking earlier in the process. Agencies use ANPRMs—which are published in the Federal Register—to request public comments before proposed rules are formulated, in order to encourage public participation at an early stage. We agree that greater use of ANPRMs would increase access to pre-notice commentary.

Treasury could also create a public portal or comments page for submission of pre-notice input. Especially in the context of regulations enacted in the aftermath of hasty legislation, providing more explicit indications that Treasury is taking comments may make access more uniform, by more effectively encouraging a broader array of parties to engage in post-legislation comment.

3. Consideration of Indirect Commentary

More could also be done with respect to indirect commentary. In the pre-notice period, we saw extensive indirect commentary on blogs, social media, and news sites by academics and other commentators that was not directly submitted to the agency. This indirect commentary tended to speak to public-
interested considerations more so than directly submitted comments,\textsuperscript{298} and some of the concerns raised in this indirect commentary helped shape the proposed regulations.\textsuperscript{299} We therefore encourage Treasury to engage in more innovative outreach campaigns through social media and the like to engage the public in regulatory debate as early as possible.\textsuperscript{300} And we believe that Treasury should document indirect pre-notice commentary that it considers important, explain the reasons for its reliance, and make this indirect commentary available on regulations.gov as well.

Relatedly, our observations suggest that indirect commentary continued to be important after the § 199A proposed regulations were issued. The conventional position is that the agency has no affirmative responsibility to consider indirect comments in the notice and comment period\textsuperscript{301} and must include them in the rulemaking record only if the agency, of its own volition, considers them in formulating regulations.\textsuperscript{302} There are reasons for this position, including that requiring an agency to actively search public discussions for potential comments may be inordinately onerous.\textsuperscript{303} But the risk of the conventional position is that the agency may miss out on countervailing perspectives in finalizing its proposed regulations.\textsuperscript{304} In cases where indirect commentary contains public-oriented perspectives largely missing from directly submitted comments, not capturing indirect comments may miss an important perspective.\textsuperscript{305}

\textsuperscript{298} See supra Part II.B.

\textsuperscript{299} See supra text accompanying notes 153–164.

\textsuperscript{300} See, e.g., Farina, supra note 284 (describing the collaboration between the Cornell eRulemaking Initiative and the United States Department of Transportation to engage in more innovative agency rulemaking outreach, including through the use of social media and agency monitored internet conversations); McCoy, supra note 69, at 26 (explaining how the CFPB has “harnessed new technologies—including emails, social media, and online interactive tools—to seek comment from ordinary Americans located in the farthest reaches of the country” and that “[t]his broad and imaginative outreach is true not only to the letter, but also to the spirit of, the Administrative Procedure Act”); Porter & Watts, supra note 249 (exploring the use of visual communication in rulemaking).

\textsuperscript{301} See supra text accompanying notes 285–286.

\textsuperscript{302} See Bethlehem Steel v. EPA, 638 F.2d 994, 1000 (7th Cir.1980) (citing National Courier Association v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1229, 1241 (D.C. Cir.1975)) (stating that agency should include any document that “might have influenced the agency’s decision”).

\textsuperscript{303} Cf. Kwon, supra note 110, at 625–26 (arguing for greater academic engagement in the regulatory process).

\textsuperscript{304} Coglianese, supra note 248, at 964 (summarizing research that e-rulemaking has not lived up to its promise of meaningfully increasing participation in rulemaking).

\textsuperscript{305} See, e.g., Johnson, supra note 55, at 1384–85 (describing need to get input from “sources other than the major regulated entities and trade associations that normally participate in the process”).
This concern about agencies missing out public-interested perspectives because they are not communicated directly to the agency likely is not idiosyncratic, but rather a systemic byproduct of the existing rulemaking paradigm. A major motivation for participating in rulemaking is to establish a record to later challenge regulations in the courts. However, those concerned about the public-interest impact of regulations tend to have a harder time than regulated parties in challenging regulations because they often lack standing. This is especially true in tax, where the lack of standing to bring a claim that another party paid insufficient tax has stymied efforts to protect against overly taxpayer-favorable guidance. This standing dilemma may help explain the sideling of public-interested perspectives in notice and comment and beyond: Without an incentive to create a record for judicial challenges, academics and other public-interested commentators may understandably see themselves not as central participants in notice and comment, but rather as outside commentators. But if this causes the agency to be unaware of or feel no need to respond to the public-interested perspective, then the inability to challenge regulations will have created a distortion in the process of making them.

These dynamics suggest that we should perhaps encourage agencies to systematically and affirmatively study public commentary that is available through indirect sources and to integrate such public commentary into the rulemaking process and record. We thus suggest that Treasury adopt a norm of systematically monitoring discussions of regulatory proposals that are happening on tax and mainstream news outlets, social media, and other public spaces during the notice-and-comment period, and to document such engagement and respond to it. This will enable Treasury to broaden its gaze and expand sources of input into the regulatory process. Additionally (or

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306 See, e.g., Elliott, supra note 63, at 1492 (“What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review.”).

307 See, e.g., Mendelson, supra note 274 (discussing generally the limited options that regulatory beneficiaries have to protect their interests); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 186–88, 195–96 (1992) (discussing standing and other bars to redress for regulatory beneficiaries).


309 It will also mirror agencies’ own increasing use of innovative media to communicate with the public. See, e.g., Porter & Watts, supra note 249 (discussing and analyzing these approaches); see also ERULEMAKING MANAGEMENT OFF., IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM 8 (Nov. 30, 2010) (advising agencies to “[u]se social media tools to engage the public early in the regulatory process”); Press Release, Internal Revenue Service, IRS Launches Instagram Account to
Alternatively, if the agency finds this possibility too burdensome, Treasury should create more formal mechanisms to capture public voices, including the input of academics, in regulatory formulation, as other agencies have done.  

4. Equalizing Access in the Post-Notice Period

Finally, if Treasury is going to accept comments after the close of the official comment period, this should be broadly publicized. It should not be the case that only attendees of the ABA Tax Section meetings, careful readers of Tax Notes, and those sophisticated enough to continue to monitor the regulations.gov site would know about the extended comment period. It should be easy for Treasury to make the extended comment period more broadly known through an accurate statement of the comment end-date in the NPR. If Treasury is going to continue to receive comments even after the official comment period closes, it should announce that fact publicly and provide information on who to contact and how to submit such comments. Treasury should also commit, to the greatest extent possible, to making any post-notice comments (whether submitted directly, through informal communications, or on regulations.gov) publicly available.

5. Limitations and Responses

The solutions we have proposed would not solve all problems. They also raise concerns. A key concern is the question of how much transparency is too much, and whether increasing transparency will reduce agency flexibility and deter interactions. On the one hand, transparency and access are fundamental to accountability, which is a “hallmark of democratic governance.” As a result, transparency and access have been perceived as crucial to legitimating administrative agencies’ role in the democratic system. On the other hand,
transparency and access are costly and can hamper an agency’s ability to deliberate confidentially and make decisions flexibly.314

Developing an optimal theory of transparency and access in the administrative state is beyond the scope of this Article. However, even without such a theory, it is clear that more needs to be done to reduce differences in transparency and access. A fundamental precept of administrative law is that rulemaking, a quasi-legislative task, is important and different enough from other agency functions so as to impose a distinct and affirmative obligation on the agency to provide an open comment period for rulemaking.315 In the age of the Internet, this obligation has now been enhanced with electronic publicity requirements.316

Once we take the special treatment of rulemaking—long entrenched in administrative law and theory, and codified in the APA317—as a given, it is clearly unjustified to subject the official notice-and-comment period to a vastly different access and transparency regime than other periods of influence into the rulemaking process, particularly since Treasury is actively considering these other inputs and even citing to them in its proposed rulemaking. Indeed, some of the most important and influential commenters did not comment at all in the official notice-and-comment period. For instance, the NYSBA Tax Section and the ABA Tax Section—two extremely prominent and influential professional associations—commented in pre-notice or post-notice, but never commented in the official notice-and-comment period. Under current approaches, these submissions would not have to be publicized on regulations.gov. In short, to have access and transparency only for the official notice-and-comment period compromises the values underlying the special treatment of the agency’s quasi-legislative rulemaking role.318

accountability for the administrative state).


315 See, e.g., United States v. Cain, 583 F.3d 408, 420 (6th Cir. 2009) (“And when an agency acts in this legislative capacity, Congress generally requires the agency to follow the quasi-legislative notice and comment procedures of the APA.”).


318 Cf. Farber & O’Connell, supra note 6, at 1139–40 (pointing to an example of an FDA rulemaking in which much of what was important happened outside of the actual notice-and-comment process and explaining that “[f]ocusing on the formal notice and the ensuing process of formal public comment would give an entirely misleading picture of how food safety policy was created”).
A second potential concern is that imposing additional requirements on regulatory rulemaking may push agencies into making policy through less formal mechanisms, such as notices, rulings, and the like, which are not subject to notice-and-comment procedures. However, this concern also should not be overstated. While transparency requirements may deter some interactions, both agencies and interested parties have much to gain by continuing to engage. Moreover, interactions that would not survive public scrutiny may not be an unabashed good in the first place. The tendency for agencies to move to less formal guidance also has limits. Both agencies and regulated parties have incentives to get certain types of guidance entrenched in regulations, which are generally less malleable and more authoritative. This may help limit shifts to using fewer formal alternatives. Moreover, for complex rulemakings like § 199A, it is simply implausible for an agency to do everything through less formal guidance. Rulemaking, in other words, is highly unlikely to go away. Our study suggests that we should think harder about how to improve access and transparency into the rulemaking process.

CONCLUSION

This Article studied the rulemaking process in the wake of game-changing but hastily passed legislation. We studied the comments that went into making the § 199A regulations from the time of enactment until the finalization of the regulations. This set of regulations, one of the most important that came out of the transformative 2017 tax reform, will ultimately have a significant effect on how labor and businesses are taxed. This Article preserves and analyzes the history of how these regulations were made.

Our study showed how unorthodoxies in the legislative process may bleed into and exacerbate unorthodoxies in the rulemaking process. We found substantial pre-notice commentary in the wake of legislative enactment, which influenced the proposed regulations. We identified other aspects of the rulemaking process, including late-submitted comments and indirect comments, which resulted in different constituencies being entitled to different access and subject to different transparency. We suggest improvements that ought to be made to the rulemaking process to achieve better governance. This is a particularly important goal in an era of increasingly unorthodox legislation.

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319 See, e.g., Mendelson, supra note 274, at 408 (discussing how costliness of notice-and-comment procedures pushes agencies to less formal guidance).

320 See Aaron L. Nielson, Sticky Regulations, 85 U. CHI. L. REV. 85, 91 (2018) (articulating the benefits of the stickiness of regulations, relative to other, less formal guidance).