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Leigh Osofsky
University of North Carolina School of Law, osofsky@email.unc.edu

Shu-Yi Oei
Boston College Law School, oeis@bc.edu

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

Shu-Yi Oei[*]
Leigh Osofsky[**]

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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[*] Professor of Law and Dean's Distinguished Scholar, Boston College Law School.
[**] Professor of Law, University of North Carolina School of Law. We are grateful to participants of the Duke Law School Tax Policy Colloquium, the Northeastern Law School Faculty Colloquium, the 2019 Boston College-Tulane Tax Roundtable, the 2019 AALS Annual Meeting, the 2018 Administrative Law Conference, and the 2018 National Tax Association Annual Conference on Taxation for helpful comments. Our particular thanks to John Coyle, Kathleen DeLaney Thomas, Hiba Hafiz, Claudia Haupt, Andy Hessick, Carissa Hessick, David Kamin, Zachary Liscow, Patricia McCoy, Diane Ring, and Larry Zelenak for comments on drafts. Finally, thank you to Melissa Hyland and Mary Ann Neary for excellent research assistance.

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

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

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[1] Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of the Internal Revenue Code) (enacting new § 199A); *see, e.g.*, Jim Tankersley & Alan Rappeport, *A Hasty, Hand-Scribbled Tax Bill Sets Off an Outcry*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/politics/hand-scribbled-tax-bill-outcry.html.

[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.

[4] 5 U.S.C. § 553(b)–(c) (2012).

[5] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533–34 (2003) (arguing that notice-and-comment procedures are essential to a legitimate and non-arbitrary administrative state); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670–71 (1975) (discussing models that legitimate the administrative state).

[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.[7] 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.[8] Hence, its potential problems and ambiguities were widely analyzed and criticized in the lead-up to enactment,[9] and, after enactment, scholars and practitioners eagerly awaited proposed regulations clarifying and interpreting the statute.[10] Finally, on August 8, 2018, Treasury released its highly anticipated notice of proposed rulemaking.[11] 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),[12] and Treasury held a public hearing on the proposed regulations on October 16, 2018.[13] On January 18, 2019, Treasury released the § 199A final regulations and issued corrected final regulations on February 1, 2019.[14] Our study examines the

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[7] § 11011, 131 Stat. at 2063. IRC § 199A is currently in force for tax years beginning after December 31, 2017 and before January 1, 2026. I.R.C. § 199A(i) (Supp. V 2017).

[8] David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1459 (2019) [hereinafter Kamin, *Games I*] (describing the new § 199A deduction as "[p]erhaps the most notorious change brought by the 2017 tax legislation.").

[9] *See, e.g.*, David Kamin et al., *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.

[10] Jonathan Curry, *Year in Review: Tax Bill Takes a Topsy-Turvy Road to GOP Victory*, 157 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, *Kautter Confident About New Tax Law Implementation*, 159 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, *More Regs, Fewer Notices Expected for Tax Bill Implementation*, 158 TAX NOTES 960 (2018) (discussing Treasury and IRS plan to issue more regulations than notices).

[11] *IRS Issues Proposed Regulations on New 20 Percent Deduction for Passthrough Businesses*, INTERNAL REVENUE SERV. (Aug. 8, 2018), https://www.irs.gov/newsroom/irs-issues-proposed-regulations-on-new-20-percent-deduction-for-passthrough-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).

[12] *See* 5 U.S.C. § 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.

[13] Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2952 (Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1).

[14] The final regulations and associated guidance were released via an IRS news release. *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.

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.[15] Based on our review of previous proposed regulation preambles, this appears to be a new phenomenon.[16] 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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Qualified Business Income Deduction, 84 Fed. Reg. at 2952.

15 *See infra* Part II.A.

16 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.[17] 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.[18] Our findings show that—as has been the case in non-tax rulemakings[19]—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.[20] 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 Plummer": 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.

[20] QUALIFIED BUS. INCOME DEDUCTION, https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=IRS-2018-0021&refD=IRS-2018-0021-0001 (last visited Oct. 14, 2019) (website results filtered by "Public Submission").

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.[21] 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.[22] 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.[23] And, in the tax field specifically, we have recently seen significant emphasis on these official procedures to safeguard governance and accountable process in rulemaking.[24] Our findings suggest—consistent with other research on the pre-notice period[25]—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

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[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.

[24] *See, e.g.*, Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); *cf.* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010).

[25] *See, e.g.*, sources cited *supra* note 18.

structure and were heavily cited in the proposed regulations.[26] 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.[27] 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

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[26] *See infra* Part II.A and accompanying notes.

[27] *See, e.g.*, William Hoffman, *TCJA Reg Writers Earn Tax Notes' 2018 Person of the Year*, 161 TAX NOTES 1409 (2018) (highlighting regulatory accomplishments under difficult constraints).

legislative and regulatory processes differ from reality.[28] 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.[29] 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.[30]

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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[28] *See, e.g.*, BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2017); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 67 (2015) (discussing unorthodox legislation, as coined by Barbara Sinclair); *see also* Krawiec, *supra* note 18 (taking an "examine the sausage" approach to regulatory development).

[29] *See, e.g.*, SINCLAIR, *supra* note 28; Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702 (2000); Gluck, *supra* note 28.

[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]

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[31] Damian Paletta & Jeff Stein, *Sweeping Tax Overhaul Clears Congress*, WASH. POST (Dec. 20, 2017), https://www.washingtonpost.com/business/economy/gop-tax-bill-passes-congress-as-trump-prepares-to-sign-it-into-law/2017/12/20/0ba2fd98-e597-11e7-9ec2-518810e7d44d_story.html?utm_term=.ec76672ddf01.

[32] Peter Cary et al., *The Trump Tax Law Has Big Problems. Here's One Big Reason Why*, CTR. FOR PUB. INTEGRITY (Jan. 15, 2019), https://publicintegrity.org/business/taxes/trumps-tax-cuts/trump-tax-law-has-big-problems/.

[33] Rebecca M. Kysar & Linda Sugin, *The Built-In Instability of the G.O.P.'s Tax Bill*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/opinion/republican-tax-bill-unstable.html.

[34] Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, L. & CONTEMP. PROBS., 2018, at 61, 62–63, 69.

[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.

[37] Marie Sapirie, *Not Exactly an A+ on Passthroughs*, 158 TAX NOTES 995 (2018). For varying opinions, see, for example, Shu-Yi Oei & Diane M. Ring, *Is New Code Section 199A Really Going to Turn Us All Into Independent Contractors?* (Jan. 12, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101180; Lily Batchelder & David Kamin, *Op-Ed: 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; Noam Scheiber, *Tax Law Offers a Carrot to Gig Workers. But It May Have Costs*, N.Y. TIMES (Dec. 31, 2017), https://www.nytimes.com/2017/12/31/business/economy/tax-work.html. *See also* Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 457 (2018) (arguing that the TCJA was an exception from Congress's general practice of enacting highly detailed tax regulations).

[38] William A. Bailey, *Mechanics of the New Section 199A Deduction for Qualified Business Income*, J.

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."[39] 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.[40] Indeed, § 199A strikes at the heart of how we tax labor versus business income.[41]

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.[42] 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).[43] 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.[44] 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.[45]

ACCT., May 2018, at 44.

39 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.

40 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).

41 *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).

42 *See, e.g.*, Tony Nitti, *Tax Geek Tuesday: Making Sense of the New '20% Qualified Business Income Deduction'*, FORBES (Dec. 26, 2017, 8:48 AM), https://www.forbes.com/sites/anthonynitti/2017/12/26/tax-geek-tuesday-making-sense-of-the-new-20-qualified-business-income-deduction/#2210a36d44fd (describing the compromise reached by the Senate and House and some of the last-minute changes).

43 I.R.C. § 199A(d)(1), (3).

44 *See infra* Part II and accompanying notes.

45 Daniel Shaviro, *Evaluating the New US Pass-Through Rules*, 2018 BRITISH TAX REV. 49, 51; *see also, e.g.*, Conrad De Aenlle, *Small Businesses Have a New Tax Break, But There Are Many 'Ifs'*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/business/small-business-tax-break.html (describing many of the problems with § 199A as a function of Congress's rush in passing the law).

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 rulemaking[50] by infusing the process with public participation and deliberation,[51] values that are lost when Congress delegates regulatory decisions.[52] Due to this perceived importance to

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[46] The Administrative Procedure Act prescribes a different set of procedures for so-called "formal regulations," but agencies rarely use such regulations. *See* 5 U.S.C. §§ 556–557 (2012); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 253 (2014) (noting that "formal rulemaking under 5 U.S.C. §§ 556 and 557 has become almost extinct.").

[47] 5 U.S.C. § 553.

[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.[53] Furthermore, the E-Government Act of 2002 subjects notice and comment to electronic publication requirements,[54] 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.[55]

Much has been written about the tendency of agencies to try to evade these requirements by making rules outside of notice-and-comment.[56] 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.[57] The Supreme Court recently pronounced that it is "not inclined to carve out an approach to administrative review good for tax law only[,]"[58] prompting a wave of efforts designed to improve Treasury practices so that they comply with notice-and-comment.[59]

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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Mass Participation for Deliberative Agency Decisionmaking, 92 NW. U. L. REV. 173, 182–89 (1997) (describing rationales for participation); Wagner, *supra* note 18, at 104 ("Rigorous engagement by a diverse and balanced assortment of affected interests, reinforced by an ability of these interests to challenge regulations in court, provides one of the primary mechanisms to ensure at least some democratic legitimacy of the administrative state.").

[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).

[54] E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of 44 U.S.C.).

[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.").

[56] *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (seminal objection to making policy outside of notice-and-comment).

[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.

[59] *See* Press Release, U.S. Dep't of Treasury, Treasury, OMB Update Tax Regulatory Review Process (Apr. 12, 2018), https://home.treasury.gov/news/press-releases/sm0345; *see also* Hickman, *supra* note 24. *But see* Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2016) (challenging how much this compliance will accomplish).

how law is made.[60] 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.[61]

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.[62] 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.[63] 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.[64] And there is a growing body of

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[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 Torrents 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.[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.[66] The E-Government Act mandates transparency into the actual notice-and-comment period but not the pre-notice-and-comment period.[67] Judicial authority supports the lack of any such affirmative obligation.[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,[69] others do not. The result is that inputs outside of notice and comment are often unobservable and therefore understudied.[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.

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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.

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).

67 *See* E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of 44 U.S.C.).

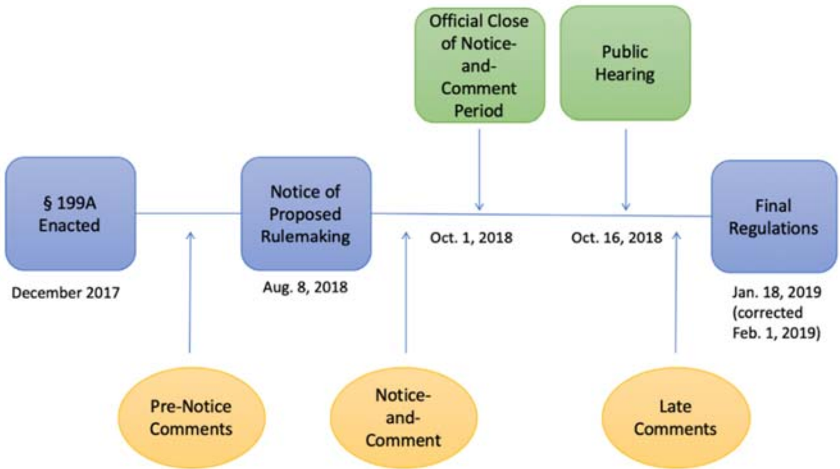
68 *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (finding that the existence of post-comment meetings and failure to docket them did not violate either the Clean Air Act or due process requirements).

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.

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

[71] *See supra* notes 11–14 and accompanying text.
[72] Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2952 (Feb. 8, 2019).

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.

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[73] Qualified Business Income Deduction, 83 Fed. Reg. 40,884 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1).

[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.*

[75] *See* Lydia O'Neil, *How Firms Could Sidestep Tax Law's Pass-Through Deduction Limits*, BIG L. BUS. (Mar. 27, 2018), https://biglawbusiness.com/how-firms-could-sidestep-tax-laws-pass-through-deduction-limits.

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.[76] 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.[77] 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).[78] 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.[79] 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.

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[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

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[81] I.R.C. § 199A(b)(2)(A) (Supp. V 2017).

[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.[88] For instance, Treasury noted that it had received various comments on how the reputation or skill clause should be constructed.[89] Treasury also noted that it had received comments on specific types of trades or businesses, and whether those businesses qualified for the § 199A deduction.[90]

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.[91] This issue is relevant because the § 199A deduction may be limited by the amount of W-2 wages that a business pays to employees.[92]

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

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§ 448 regulations as a starting point, Treasury decided to draw on those regulations only "when appropriate" and "with some modifications." *Id.*

[88] Qualified Business Income Deduction, 83 Fed. Reg. at 40,896.

[89] *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 ….").

[90] 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.

[91] *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*).

[92] 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."[93] Treasury also received comments dealing with technical details of how QBI should be computed.[94]

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."[95] 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.[96] Treasury also noted receiving guidance requests regarding whether the "reasonable compensation" provision in § 199A extends beyond S corporations to cover other pass-through entities.[97]

2. Treasury Requests for Additional Comments

We counted twelve separate instances in the NPR preamble in which Treasury specifically requested additional comments.[98] 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).

[95] Qualified Business Income Deduction, 83 Fed. Reg. at 40,900; *see also* Kamin, *Games I*, *supra* note 8; Kamin, *Games II*, *supra* note 9; Ruth Simon & Richard Rubin, *Crack and Pack: How Companies are Mastering the New Tax Code*, WALL STREET J. (Apr. 3, 2018), https://www.wsj.com/articles/crack-and-pack-how-companies-are-mastering-the-new-tax-code-1522768287.

[96] Qualified Business Income Deduction, 83 Fed. Reg. at 40,901.

[97] *Id.* at 40,893. 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.[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.[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.[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

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common in Treasury's proposed regulation preambles.

[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[102] 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.[103] 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.[104]

We contacted Tax Analysts to verify the extent to which their publication covered the universe of pre-notice comments submitted to Treasury.[105] 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

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102 *Tax Analysts, Expert Tax Analysis - About Tax Notes*, TAX NOTES, https://www.taxnotes.com/about-tax-analysts (last visited Aug. 18, 2019).

103 Telephone Conversation with Treasury (Oct. 10, 2018, 1:30 PM).

104 Other sources we checked included BloombergLaw/BNA, Lexis, Westlaw, RIA Checkpoint, Cheetah, and Politico Pro. While some pre-notice correspondence was available on BloombergLaw/BNA, none of the above sources contained separate repositories of correspondence sent to Treasury and the IRS.

105 Telephone Conversation with Tax Analysts (Aug. 24, 2018, 9:30 AM); Telephone Conversation with Tax Analysts (Aug. 31, 2018, 4:00 PM).

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]

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[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.

[109] The Priority Guidance Plan sets forth guidance priorities for the IRS and Treasury, taking into account public input. Priority Guidance Plan, INTERNAL REVENUE SERV., https://www.irs.gov/privacy-disclosure/priority-guidance-plan (last visited Aug. 18, 2019). Such guidance may take the form of new regulations, or revocations of old regulations, or issuance of Notices, Revenue Rulings, or Revenue Procedures. *Id.*

[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:[111]

Type of Commenter	**Number**
Trade Groups	16
Industry Interests	12
Professional organizations	12
Law and accounting firms	4
Government	4
Individuals	2
Public Interest	1
Total	**51**

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,[112] while trade and industry groups more directly advocated for positions favorable to their interests.[113]

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)[114] and ADP (writing on behalf of itself, as a PEO).[115] The trade associations that commented included the International

(2017) (questioning whether the program has been terminated).

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.

112 *See infra* Part II.B.1.b (describing correspondence submitted by professional associations).

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.

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*).

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)[116] and the American Bankers Association and Mortgage Bankers Association (writing on behalf of banks and mortgage banks).[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.[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.[119] The American Bankers Association and Mortgage Bankers Association specifically requested that S corporation banks not be treated as prohibited SSTBs.[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

Treasury (Apr. 12, 2018) (on file with *Emory Law Journal*).

[116] Letter from Int'l Council of Shopping Ctrs. to David J. Kautter, Assistant Sec'y for Tax Policy, Dep't of the Treasury, and William M. Paul, Acting Chief Counsel, Internal Revenue Serv. (Apr. 9, 2018) (on file with *Emory Law Journal*).

[117] *See* sources cited *infra* note 120.

[118] Letter from Proskauer Rose LLP to Thomas West, Tax Legislative Counsel, Dep't of the Treasury, and Bryan Rimmke, Attorney-Advisor, Dep't of the Treasury (June 18, 2018) (on file with *Emory Law Journal*).

[119] *See, e.g.*, Letter from NAPEO to David J. Kautter, Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury (Apr. 25, 2018) (on file with *Emory Law Journal*); Letter from Barry Eisler to David J. Kautter, *supra* note 115.

[120] Letter from Mort. Bankers Ass'n to David J. Kautter, Acting Comm'r, Internal Revenue Serv., and William M. Paul, Acting Chief Counsel, Internal Revenue Serv. (June 4, 2018) (on file with *Emory Law Journal*); Letter from Am. Bankers Ass'n to Internal Revenue Serv. (June 18, 2018) (on file with *Emory Law Journal*).

the insurance industry,[121] the banking industry,[122] the nursing and assisted living facilities industry,[123] the real estate industry,[124] franchisors,[125] and others.[126]

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.[127]

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.[128] 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 …."[129] 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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[121] *See, e.g.*, Letter from Council of Ins. Agents & Brokers to Thomas C. West, Jr. et al., Tax Legislative Counsel, U.S. Dep't of the Treasury (Apr. 23, 2018) (on file with *Emory Law Journal*).

[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*).

[124] Letter from Nat'l Ass'n of REALTORS, to David J. Kautter, Acting Comm'r, Internal Revenue Serv., and William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Serv. (June 19, 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*).

[127] Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,898 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1) (explaining exclusion of banking in accordance with commenters' requests); *cf.* Stephanie Cumings, *Small Banks Push Back on 199A Financial Services Rules*, TAX NOTES TODAY (Sept. 17, 2018), https://www.taxnotes.com/tax-notes-today-federal/partnerships-and-other-passthrough-entities/small-banks-push-back-199a-financial-services-rules/2018/09/17/28fc9 .

[128] Letter from LPL Fin., to Steven T. Mnuchin, Sec'y of the Treasury, U.S. Dep't of the Treasury, and David J. Kautter, Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury (June 4, 2018) (on file with *Emory Law Journal*).

[129] I.R.C. § 199A(d)(2)(B) (Supp. V 2017).

not be disadvantaged.[130] The proposed regulations ultimately did not create a special carveout from SSTBs for these types of businesses.[131]

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.[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.[133]

Of course, the lawyers and accountants who are members of these organizations have industry clients, and those clients have interests. But facially,

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[130] Letter from LPL Fin., to Steven T. Mnuchin and David J. Kautter, *supra* note 128.

[131] Qualified Business Income Deduction, 83 Fed. Reg. at 40,925.

[132] With respect to the twelve pieces of correspondence by professional associations, some were authored by the same organization. The AICPA and ABA Tax Section each wrote four letters concerning § 199A, and the remaining four were written by the TEGE Exempt Organizations Council, the NYSBA, the National Society of Accountants, and the Pennsylvania Institute of CPAs Committee on Federal Taxation. The TEGE Exempt Organizations Council letter was dated August 17, 2018 and a letter from the AICPA was dated August 13, 2018. Even though the TEGE Exempt Organizations Council letter came in after the August 8, 2018 NPR release date, we included it because the letter mentioned that it was "a follow-up to conversations held earlier in the year among members of the TEGE Exempt Organizations Council and [IRS and Treasury] representatives." TEGE Exempt Organizations Council, Comment Letter on Regulatory Implementation of the Tax Cuts and Jobs Act (Aug. 17, 2018). We also included the August 13, 2018 AICPA letter because it technically came in prior to the August 16, 2018 publication of the NPR in the Federal Register. AICPA, Comment Letter on Request for Immediate Guidance Regarding S Corporation Items Included in Pub. L. No. 115-97 (Aug. 13, 2018), https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20180813-aicpa-scorp-letter-2017-tcja-issues.pdf.

[133] *See, e.g.*, ABA Section of Taxation, Comment Letter on the Treatment of Losses and Certain Other Issues with Respect to the Section 199A Deduction (July 23, 2018), https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/072318comments.pdf; AICPA, Comment Letter on Recommendations for 2018–2019 Guidance Priority List (Notice 2018-43) (June 14, 2018); ABA Section of Taxation, Comment Letter on the Aggregation and Disaggregation of Trade or Business Activities for Purposes of Section 199A (May 31, 2018); NYSBA, Comment Letter on Report No. 1392 on Section 199A Deduction (Mar. 23, 2018).

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.[134] 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.[135] Another letter, from Congressman Richard Neal, requested guidance to alleviate taxpayer confusion over eligibility and asked Treasury to consider anti-abuse measures.[136] 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.[137] 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.[138]

d. Pre-Notice Meetings

The OMB/OIRA website revealed six meetings between Treasury and various groups prior to the release of the proposed regulations.[139] 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).

[136] Richard Neal, Comment Letter on Pass-Through Deduction Guidance from Treasury and IRS (May 1, 2018), https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/IRC.pdf.

[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.

[139] *See EO 12866 Meetings Search Results*, OFF. INFO. & REG. AFF., https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=201804&rin=1545-BO71&viewRule=true (last visited Oct. 20, 2019).

also available on the OIRA/OMB website. Most of these handouts were correspondence asking for Treasury to take certain positions in the proposed regulations.[140] 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.[141]

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.[142]

One group of indirect commentators was tax law professors, who used outlets such as Twitter,[143] blogs,[144] papers posted on Social Science Research Network (SSRN),[145] op-eds in newspapers,[146] 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.[147] 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

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[140] 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. *Id.* Some were duplicates of documents contained in the Tax Analysts databases.

[141] *See* discussion *supra* note 127.

[142] *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.").

[143] *See, e.g.*, Victor Fleischer (@vicfleischer), TWITTER (Nov. 2, 2017, 8:48 PM), https://twitter.com/vicfleischer/status/926294879998758912.

[144] *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.

[145] *See, e.g.*, Kamin et al., *Games I*, *supra* note 8.

[146] *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.

[147] Kamin et al., *Games I*, *supra* note 8; Kamin et al., *Games II*, *supra* note 9.

status in order to be able to take the deduction,[148] and outlining how taxpayers might avoid the limitations of § 199A by "cracking" apart revenue streams,[149] or by "packing" qualifying income into a service partnership so the partnership can take the deduction.[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.[151] The concerns voiced by these professors were picked up, echoed by, and broadcast widely in the popular press.[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.[153] They also targeted the much-discussed cracking and packing strategies,[154] leading one commentator to muse that the IRS appeared to have gone after "the most commonly discussed strategies out in the public."[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.[156] Finally, the proposed regulations extensively engaged with comments about the "reputation or skill" language in the statute,[157] though they ultimately addressed the issue in a way that was unsatisfactory to some of the professors (by construing the language narrowly).[158] This

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[148] Kamin et al., *Games I*, *supra* note 8, at 1462–64; *but see* Oei & Ring, *supra* note 37.

[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.

[150] *Id.* at 1468–69.

[151] *Id.* at 1470–73.

[152] *See, e.g.*, Simon & Rubin, *supra* note 95 (outlining the "cracking" and "packing" strategies); Noam Scheiber, *Tax Law Offers a Carrot to Gig Workers. But It May Have Costs*, N.Y. TIMES (Dec. 31, 2017), https://www.nytimes.com/2017/12/31/business/economy/tax-work.html?r=1.

[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.

[154] Qualified Business Income Deduction, 83 Fed. Reg. at 40,900.

[155] Jonathan Curry, *Passthrough Regs Take Dim View of Crack-and-Pack Strategies*, 160 TAX NOTES 1018 (Aug. 13, 2018).

[156] Qualified Business Income Deduction, 83 Fed. Reg. at 40,889.

[157] *Id.* at 40,898–99.

[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,[159] 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.[160] 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).[161] The example provided that if the celebrity chef merely ran a restaurant, then she would remain eligible for the deduction.[162]

After the release of this proposed regulation, commentators either cheered[163] or jeered[164] 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

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(Aug. 10, 2018), https://medium.com/whatever-source-derived/reputation-or-skill-in-the-new-pass-through-regulations-efac160f4fbe.

159 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.

160 *See, e.g.*, Ruth Simon, *The Tax Break that Doctors and Plumbers Both Will Miss*, WALL ST. J. (Jan. 19, 2018), https://www.wsj.com/articles/what-do-a-plumber-and-a-celebrity-brand-have-in-common-they-could-miss-out-on-a-big-tax-break-1516363201 (discussing the chef/celebrity chef issue).

161 Qualified Business Income Deduction, 83 Fed. Reg. at 40,926.

162 *Id.*

163 *See, e.g.*, Jeffrey Levine, *Proposed Regulations Refine Definitions for Specified Service Businesses Eligible for QBI Deduction*, KITCES (Aug. 22, 2018), https://www.kitces.com/blog/sstb-specified-service-business-de-minimis-rule-crack-and-pack-80-50-rule-qbi-deduction (celebrating the narrow construction of "reputation").

164 *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,[165] though this number increased subsequently.[166] The breakdown of the types of comments is as follows:

Type of Commenter	**Number**
Individual "community bankers"	135
Trade and Industry Associations	82
Industry Interests	42
CPA/Accountant/Enrolled Agent (firms and individual)	35
Law firms	18
Professional Associations (Law/CPA)	9
Unidentifiable individuals	8
Academic	3
Withdrawn	3
Lobbying firms	2
TOTAL	**337**

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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[165] *Qualified Business Income Docket (REG-107892-18)*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=IRS-2018-0021. The comment period officially closed on October 1, 2018. *But see infra* text accompanying notes 200–209 for discussion of late-submitted comments.

[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,[167] 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."[168]

Comments also addressed technical issues such as the aggregation rules and how to determine the basis of property acquired in a like-kind exchange.[169] And some comments addressed issues with anti-abuse rules such as the widely discussed question of what "reasonable compensation" means[170] or the attempt to clamp down on the so-called "crack and pack" strategy.[171]

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[167] *See, e.g.*, American Financial Services Association, Comment Letter on Proposed Regulations under Section 199A of the Internal Revenue Code; IRS and REG-107892-18 (Oct. 1, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0279 (arguing that the sale of a loan or a credit sale transaction should not constitute "financial services" that result in SSTB treatment); Commonwealth Care of Roanoke, Inc., Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Aug. 28, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0011 (arguing that skilled nursing centers should not be SSTB); United Security Financial Corp., Comment Letter on Proposed Regulations under Section 199A (REG-107892-18) Public Comments Submission (Sept. 28, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0301 (arguing that mortgage banking and other lending should not be SSTB).

[168] Donna Waters, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 27, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0170.

[169] *See, e.g.*, American Seniors Housing Association, Comment Letter on Assisted Living Residences under Code Section 199A (RIN 1545-BO71) (Oct. 1, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0289 (addressing the §1031 like-kind exchange basis issue and the SSTB issue); U.S. Chamber of Commerce, Comment Letter on REG-107892-18 (Proposed Regulations on New 20 Percent Deduction for Pass-Through Businesses) (Sept. 27, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0182 (discussing many technical issues in addition to addressing the definition of an SSTB).

[170] *See, e.g.*, National Association of Tax Professionals, Comment Letter on Section 199A [REG-107892-18] (Oct. 1, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0237 (discussing preparer obligations with respect to reasonable compensation and § 199A); *see also supra* note 97.

[171] Anonymous, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 4, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0019.

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.[172] 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.[173] 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.[174] 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."[175]

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.[176]

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172 For just one example of the form letter, see Brett Mills, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 17, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0086. There were other form letters or very close to duplicative letters from the mortgage industry, but they were less prevalent and tended to be from individuals higher up in the organizational structure. *See, e.g.*, The Mortgage Company, Comment Letter on Proposed Regulations under Section 199A (REG-107892-18) Public Comments Submission (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0233.

173 *See supra* note 127 and accompanying text.

174 *See, e.g.*, California Community Banking Network, Comment Letter on Proposed Regulations under Section 199A of the Internal Revenue Code; IRS and REG-107892-18 (Sept. 26, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0138.

175 *Id.*

176 Anonymous, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 24, 2018), https://www.regulations.gov/document?D=

Various CPAs also engaged,[177] 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?"[178] 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."[179] Various other commenters also asked for clarification on the eligibility of rental real estate for the § 199A deduction.[180]

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).[181] The letter argued that the categorization of banking as not an SSTB was an unreasonable construction of the statute.[182] 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.[183]

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.

[178] Richard Schiveley, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 14, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0059.

[179] *Id.*

[180] *See, e.g.*, American Institute of CPAs, Comment Letter on Proposed Rule: Qualified Business Income Deduction (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0224.

[181] Daniel Shefter, Comment Letter on Proposed Section 199A Regulations (Aug. 28, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0010; *see also, e.g.*, Council for Electronic Revenue Communication Advancement, Comment Letter on Proposed Regulations under IRC §199A (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0235 (fleshing out various uncertainties raised by technical aspects of the rule and providing various suggestions).

[182] Shefter, *supra* note 181.

[183] One of the only other examples of a letter that focused on protecting the revenue base was one that complained about another provision of the Code entirely—§ 409, governing employee stock ownership plans. Arlen Drof, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Sept. 25, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0135.

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

184 Robert D. Manfred, Jr., Comment Letter on Proposed Regulations Concerning the Deduction for Qualified Business Income Under IRC Section 199A (REG-107892-18) (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0316.

185 Writers Guild of America West, Comment Letter on the Definition of Specialized Service Trade or Business Under the IRC Section 199A Proposed Treasury Regulations (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0310.

186 The Securities Industry and Financial Markets Association Asset Management Group, Comment Letter on the Proposed Regulations Concerning the Deduction for Qualified Business Income Under Section 199A of the Internal Revenue Code (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0260.

187 The American Veterinary Medical Association, Comment Letter on Proposed Regulations—Qualified Business Income Deduction, 83 Fed Reg. 40884 (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0227.

188 *Compare, e.g.*, David M. Fogel, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Aug. 31, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0014 (arguing that taxpayers should be allowed to exercise their right to minimize their tax liability by switching from employees to independent contractors), *with* United Brotherhood of Carpenters and Joiners of America, Comment Letter on IRS Proposed Rule Regarding Qualified Business Income Deduction (REG-107892-18) (Sept. 28, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0186 (supporting the presumption that employees who switch to independent contractors should not be eligible for the deduction because an alternative rule would create bad incentives for workers).

189 *See, e.g.*, MidFirst Bank, Comment Letter on Proposed Regulations under Section 199A of the Internal Revenue Code—IRS and REG-107892-18 (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0242 (referencing prior suggestions by the American Bankers Association, Independent Bankers of America, and Subchapter S Bank Association and indicating where they needed to be expanded to thrift and saving institutions).

from Treasury in the NPR.[190] Some commenters cited comments that had been made in the pre-notice period as support for their continuing arguments.[191] 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.[192]

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."[193]

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."[194] The National Association of Professional Insurance Agents noted that they appreciated the "careful consideration of the uncertainty posed by the law and the significance

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[190] American Bankers Association, Comment Letter on Qualified Business Income Deduction, Proposed Regulations under Section 199A of the Internal Revenue Code (REG-107892-18); 83 Federal Register 40884 (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0250 (responding to a request for comments in the NPR regarding "whether taxable beneficiaries of split-interest trusts, such as charitable remainder trusts, should be eligible for the section 199A deduction").

[191] *See, e.g.*, Kathleen E. Gerber, Comment Letter on Proposed Regulations Under Section 199A (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0317 (referencing the many comments made in the pre-notice period in a discussion of how the reputation or skill prong should be treated).

[192] Community Mortgage Lenders of America, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0243. Likewise, the extensive form letter campaign by the S-corp banks had the flavor of taxpayers who had already gotten a lot coming back for more. *See* Eric Yauch, *More 199A Comments Focus Ire on Trade or Business Definition*, 161 TAX NOTES 238, 238 (2018).

[193] International Council of Shopping Centers, Comment Letter on Proposed Regulations Concerning the Deduction for Qualified Business Income Under 199A of the Code (REG-107892-18) (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0280.

[194] Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,898 (proposed Aug. 16, 2018) (to be codified at 26 C.F.R. pt. 1).

of the work being done by independent insurance agents around the nation."[195] 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."[196] 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."[197]

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.[198] 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.[199]

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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[195] National Association of Professional Insurance Agents, Comment Letter on Qualified Business Income Deduction (REG–107892–18) (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0265.

[196] International Franchise Association, Comment Letter on REG-107892-18, Qualified Business Income Deduction, 83 Fed. Reg. 40884 (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0308.

[197] *Id.*

[198] Tenaska, Inc., Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0266. In the final regulations, Treasury ultimately "agree[d] with commenters that the definition of dealing in commodities for purposes of section 199A should be limited to a trade or business that is dealing in financial instruments or otherwise does not engage in substantial activities with respect to physical commodities." Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2975 (Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1).

[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."[200] The regulations.gov website likewise indicated that comments were due by October 1, 2018.[201] But the "Comment Now!" button on the website remained active after this time.[202] 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.[203]

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.[204] One additional comment was posted on regulations.gov on December 3, 2018.[205] 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.[206] 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."[207] 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.[208] Notably,

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[200] Qualified Business Income Deduction, 83 Fed. Reg. at 40,884.

[201] *Qualified Business Income Deduction (REG-107892-18)*, REGULATIONS.GOV (Aug. 16, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0001.

[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.

[204] *Qualified Business Income Deduction (REG-107892-18)*, REGULATIONS.GOV (Aug. 16, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0001. As of August 30, 2019, there are 342 comments. Again, this includes withdrawn comments.

[205] Florida Bar Tax Section, Comment Letter on Request for Clarification in Proposed Section 199A Regulations (Dec. 3, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0339.

[206] *See* Qualified Business Income Docket (Reg-107892-18), REGULATIONS.GOV, https://www.regulations.gov/docket?D=IRS-2018-0021.

[207] Eric Yauch, *Treasury Clarifies 199A De Minimis Rules Have Cliff Effect*, 161 TAX NOTES 379, 380 (2018) (quoting a statement by Audrey Ellis, attorney-adviser, Treasury Office of Tax Legislative Counsel).

[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

proposed-section-199a-regs/2018/10/22/28jl1?highl. Tax Analysts also reported that twelve Republican Senators wrote a letter to Treasury advocating on behalf of the S-corp banks on October 17, 2018. Letter from Republican Senators to Steven T. Mnuchin, Sec'y, U.S. Dep't of Treasury (Oct. 17, 2018) (on file with *Emory Law Journal*). We did not find these on regulations.gov.

209 *See supra* note 204.

210 Telephone Conversation with Treasury (Oct. 3, 2018, 11:54 AM).

211 Tax Analysts, *Transcript Available of IRS Hearing on Passthrough Deduction*, 2018 TAX NOTES TODAY 202-14 (Oct. 16, 2018), https://www.taxnotes.com/tax-notes-today-federal/exemptions-and-deductions/transcript-available-irs-hearing-passthrough-deduction/2018/10/18/28j6q?highlight=.

212 *Id.*

213 *Id.*

214 LPL Financial, Comment Letter on IRS Notice of Proposed Rulemaking Titled "Qualified Business Income Deduction," REG 107892-18, 83 Fed. Reg. 40884 (Oct. 2, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0210.

215 *See supra* notes 128–131 and accompanying text.

216 *See, e.g.*, Tax Analysts, *Transcript Available of IRS Hearing on Passthrough Deduction*, 2018 TAX NOTES TODAY 202-14 (Oct. 16, 2018), https://www.taxnotes.com/tax-notes-today-federal/exemptions-and-deductions/transcript-available-irs-hearing-passthrough-deduction/2018/10/18/28j6q?highlight= (testimony of Iona Harrison, explaining that she lacks tax expertise and looking for clarity).

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 regulations[219] 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.[223] Other times, Treasury provided clarifying examples.[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.[225] Likewise, Treasury mostly did not change its approach to SSTB determination.[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.[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.[228] However, some practitioners subsequently argued that this safe harbor fails to provide clear guidance, is not particularly advantageous, and is essentially meaningless.[229] Similarly, Treasury made some modifications to the SSTB rules that constituted a real win for certain industry commenters. For

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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.

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).

225 *Id.* at 2954.

226 *See id.* at 2961–66.

227 *Id.* at 2974–76.

228 Rev. Proc. 2019-07, 2019-09 I.R.B. 740.

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,[230] 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.[231] And Treasury made a number of similar discrete clarifications or changes that benefitted certain groups, sometimes quite significantly.[232] 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."[233] 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.[234]

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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[230] Qualified Business Income Deduction, 84 Fed. Reg. at 2970.

[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.[235] Even after taking into account delays caused by the government shutdown,[236] 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.[237] 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.[238] 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

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[235] Nathan J. Richman & Jonathan Curry, *Treasury Opts for Taxpayer Friendly Approach in 199A Regs*, TAX NOTES TODAY (Jan. 22, 2019), https://www.taxnotes.com/tax-notes-today-federal/partnerships-and-other-passthrough-entities/treasury-opts-taxpayer-friendly-approach-199a-regs/2019/01/22/292dn.

[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").

[238] *See* Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996) (discussing in depth the "logical outgrowth" requirement).

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,[239] and the 2017 tax legislation exemplified many of these unorthodoxies.[240] 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.[241] 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.[242] Indeed, while there has been recent literature discussing the relationship between legislative and regulatory unorthodoxies,[243] as well as literature acknowledging influences in the regulatory process outside of official notice and comment,[244] there has been little empirical study of the former and no investigation of how the two connect to each other.

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[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.[245] 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.[246] 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,[247] our study found substantial engagement in the pre-notice, notice-and-comment, and post-notice periods.[248] 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.[249] 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,[250] 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,[251] as well as greater involvement of the OMB in tax rulemaking more generally.[252] 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

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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.

[249] *See, e.g.*, MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 10 (2013), https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf (finding that "e-rulemaking has not proven more dialogic or collaborative than the traditional paper process"); Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1195 (2016) (summarizing that "the promise of a more participatory, newly dialogic rulemaking culture has not been fulfilled").

[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).

[252] Press Release, Tax Regulatory Review Process, *supra* note 59.

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 doctrines[257] 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

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[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.[258] 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.[259] 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.[260] 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.[261]

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.[262] They found that input into the pre-notice period was "almost completely monopolized by regulated parties."[263] 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.[264] 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.[265] 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

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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.[266] 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.[267] These findings underscore long-held concerns that powerful and well-resourced insiders may dominate the administrative process.[268]

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.[269] 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.[270] Where plausible and specific, these requests were generally granted (though, again, we cannot prove causation).[271]

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.[272] 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

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[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.[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.[274] Under administrative law doctrines, final regulations must be a "logical outgrowth" of proposed rules or risk invalidation.[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.[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

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273 *See generally* Oei & Osofsky, *supra* note 35 (noting importance of expertise in tax law).

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).

275 *See supra* note 238 and accompanying text.

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

[277] *See supra* notes 125, 196–197; *see also* Qualified Business Income Deduction, 84 Fed. Reg. 2952, 2970 (Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1).

[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/committeeroster?commid=TAX1000 (last visited Oct. 20, 2019).

[279] Joseph J. Thorndike & Ajay K. Mehrotra, *"Who Speaks for Tax Equity and Tax Fairness?" The*

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

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Emergence of the Organized Tax Bar and the Dilemmas of Professional Responsibility, 81 L. & CONTEMP. PROBS. 203, 205 (2018) (exploring this tension and how it has been resolved historically).

280 *See supra* Part II.B.

281 *See* supra Part II.B.

282 *See supra* Part II.C.2.

283 Robert Booey, Comment Letter on the Internal Revenue Service (IRS) Proposed Rule: Qualified Business Income Deduction (REG-107892-18) (Oct. 22, 2018), https://www.regulations.gov/document?D=IRS-2018-0021-0337 (arguing in response to comments by Major League Baseball, "[t]hese rich major league baseball owners shouldn't be getting this tax break"). Some particularly knowledgeable parties even seemed to submit late comments directly to Treasury after the official close of the comment period. *See supra* note 208.

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,[285] 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.[286] 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.[287] Treasury should also go a step further and publicize unwritten and verbal contacts between the agency and private interests in the pre-notice period.[288]

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

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[285] *See supra* text accompanying notes 153–164.

[286] *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.").

[287] *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 ….").

[288] *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.[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,[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.[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.[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,[293] many would not have been aware of the extent of pre-notice

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[289] Tax Notes, https://www.taxnotes.com/subscription-inquiry (subscription pricing) (last visited Oct. 20, 2019).

[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. *IRS Holds Public Hearing on Section 199A Proposed Regulations*, ERNST & YOUNG (Oct. 28, 2018), https://taxnews.ey.com/news/2018-2109-irs-holds-public-hearing-on-section-199a-proposed-regulations.

[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.

[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.

[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, *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.[294] 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.[295] We agree that greater use of ANPRMs would increase access to pre-notice commentary.[296]

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.[297] This indirect commentary tended to speak to public-

Meet to Discuss 199A Regulations, 2018 TAX NOTES TODAY 151-6 (Aug. 6, 2018) (on file with *Emory Law Journal*) (reporting their expected release "any day").

[294] *See, e.g.*, Kwon, *supra* note 110, at 620.

[295] *See, e.g.*, Office of the Federal Register, *A Guide to the Rulemaking Process, How Does an Agency Involve the Public in Developing a Proposed Rule?*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (describing such a notice as "a formal invitation to participate in shaping the proposed rule").

[296] Indeed, one of the reasons that researchers have been able to study the pre-notice period in other legal contexts has been as a result of the use of an ANPRM. *See, e.g.*, Yackee, *supra* note 18, at 376 (studying contacts with the agency after issuance of an ANPRM).

[297] *See supra* Part II.B.

interested considerations more so than directly submitted comments,[298] and some of the concerns raised in this indirect commentary helped shape the proposed regulations.[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.[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[301] and must include them in the rulemaking record only if the agency, of its own volition, considers them in formulating regulations.[302] There are reasons for this position, including that requiring an agency to actively search public discussions for potential comments may be inordinately onerous.[303] But the risk of the conventional position is that the agency may miss out on countervailing perspectives in finalizing its proposed regulations.[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.[305]

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298 *See* supra Part II.B.

299 *See supra* text accompanying notes 153–164.

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).

301 *See supra* text accompanying notes 285–286.

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").

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

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).

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.[306] 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.[307] 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.[308] This standing dilemma may help explain the sidelining 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.[309] 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).

308 For foundational cases regarding lack of standing to challenge tax liability of others, see *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring); Allen v. Wright, 468 U.S. 737, 740 (1984). For discussion of some of the associated issues, see Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 833 (2012). *But see* Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 131 (2015) (setting forth a counterargument).

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.[310]

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.[311] On the one hand, transparency and access are fundamental to accountability, which is a "hallmark of democratic governance."[312] As a result, transparency and access have been perceived as crucial to legitimating administrative agencies' role in the democratic system.[313] On the other hand,

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Help Taxpayers (Nov. 30, 2018), https://content.govdelivery.com/accounts/USIRS/bulletins/21f3de5 (describing addition of Instagram to IRS's existing use of social media platforms as a way to help explain the tax law to taxpayers and help them prepare for tax filing).

310 *Cf.* McCoy, *supra* note 69, at 9 (describing CFPB's use of academic advisory councils, including the Academic Research Council); *see also* Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 568–83 (2012) (advocating role for Taxpayer Advocate and clinics as a way to protect low-income taxpayer interests in the regulatory process).

311 *See, e.g.*, ESA L. SFERRA-BONISTALLI, *EX PARTE* COMMUNICATIONS IN INFORMAL RULEMAKING (2014), https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf (examining various sides of the issue as well as judicial treatment).

312 Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007).

313 *See, e.g.*, Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 82–83 (2012) (pointing to, as well as problematizing, the role of public

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 APA[317]—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]

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accountability for the administrative state).

314 *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 908 (2006) (fleshing out costs of transparency).

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.").

316 For discussion of electronic publicity requirements in the E-Government Act of 2002, see *supra* text accompanying notes 54–55.

317 5 U.S.C. § 553 (2012).

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.[319] 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.[320] 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).