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ABSTRACT

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

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

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

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

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

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.).

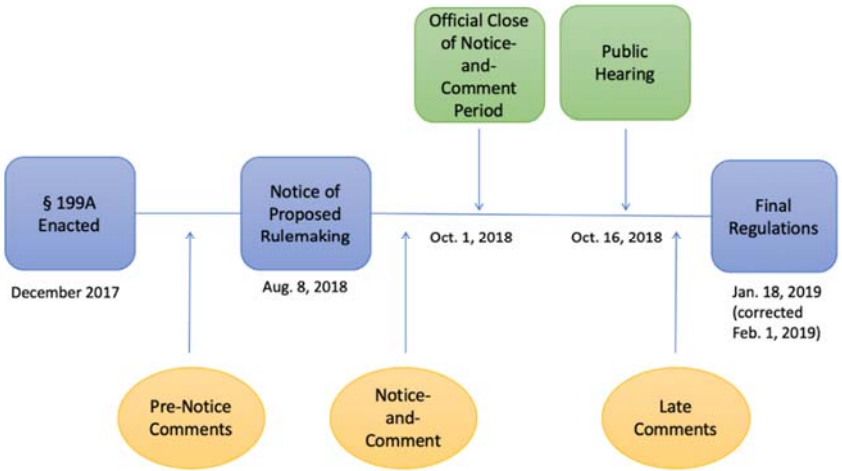
[68] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (finding that the existence of post-comment meetings and failure to docket them did not violate either the Clean Air Act or due process requirements).

[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

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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

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

(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

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[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

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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

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[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).

Appendix

Table 1: Treasury Notice of Proposed Rulemaking Mentions of Pre-Notice Comments Received (21 total)

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
1	Definition of Trade or Business (FR 40885)	"Multiple commenters stated that section 162 is the most appropriate definition for purposes of section 199A."	Treasury and IRS agree with commenters that for purposes of § 199A, § 162(a) provides the most appropriate definition of a trade or business.
2	Carryover loss rules if combined qualified REIT dividends and qualified PTP income is less than zero; Whether losses in excess of income can create negative § 199A deduction. (FR 40886)	"One commenter stated it was not clear whether, if a taxpayer has an overall loss from combined qualified REIT dividends and qualified PTP income (because a loss from a PTP exceeds REIT dividends and PTP income), the negative amount should be netted against any net positive QBI (regardless of source), or whether the negative amount should be segregated and subject to its own loss carryforward rule distinct from but analogous to the QBI loss carryforward rule" "Additionally, commenters have expressed concern that losses in excess of income could create a negative section 199A deduction, a result incompatible with the statute."	If an individual has an overall loss after qualified REIT dividends and qualified PTP income are combined, the portion of the individual's § 199A deduction related to qualified REIT dividends and qualified PTP income is zero for the taxable year. The overall loss does not affect the taxpayer's QBI amount—it is carried forward and must be used to offset combined qualified REIT dividends and qualified PTP income in the succeeding taxable year or years for § 199A purposes. Prop. Reg. § 1.199A–1(c)(2)(ii).
3	Offsetting and netting of losses where individual has more than one trade or business (FR 40887)	"One commenter noted that, if combined QBI from all of an individual's trades or businesses is greater than zero, but the individual's QBI from one or more trades or businesses is less than zero, the mechanics of how the loss should be offset against the QBI income for purposes of calculating the section 199A deduction are unclear. How such a loss is allocated matters in situations in which an individual has taxable income above the threshold amount and more than one trade or business with positive QBI. The commenter suggested that a ''netting'' approach best reflects Congress's intent, and that the absence of a netting approach would lead to inconsistent and counterintuitive results that Congress did not intend."	Netting is necessary to be consistent with the intent of § 199A. If an individual has QBI of less than zero from one trade or business, but has overall QBI greater than zero, the individual must offset the net income in each trade or business that produced net income with the net loss from each trade or business that produced net loss before applying the W-2 wage and UBIA of qualified property limitations. She must apportion the net loss among the trades or businesses with positive QBI in proportion to the relative amounts of QBI in such trades or businesses. Then, for purposes of applying the W–2 wages and qualified property limitations, the net gain or income with respect to each trade or business (as offset by the apportioned losses) is the taxpayer's QBI with respect to that trade or business. The W–2 wages and UBIA of qualified property from the trades or businesses that produced negative QBI are not taken into account and are not carried over into the subsequent year. Prop. Reg. § 1.199A–1(d)(iii).

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
4	Determination of W2 wages and unadjusted basis immediately after acquisition of qualified property (FR 40887-40888)	"The Treasury Department and the IRS have received comments concerning whether amounts paid to workers who receive Forms W–2 from third party payors (such as professional employer organizations, certified professional employer organizations, or agents under section 3504) that pay these wages to workers on behalf of their clients and report wages on Forms W–2, with the third party payor as the employer listed in Box c of the Forms W–2, may be included in the W–2 wages of the clients of third party payors."	In determining W–2 wages, a person may take into account any W–2 wages paid by another person and reported by the other person on Forms W–2, provided that the W–2 wages were paid to common law employees or officers of the person for employment by the person.
5	Do partnership special basis adjustments constitute qualified property for purposes of § 199A? (FR 40889)	"After the enactment of the TCJA, the Treasury Department and the IRS received comments requesting guidance as to whether partnership special basis adjustments under sections 734(b) or 743(b) constitute qualified property for purposes of section 199A."	No. Prop. Reg. § 1.199A–2(c)(1)(iii) provides that partnership special basis adjustments are not treated as separate qualified property.
6	How do qualified property rules apply to nonrecognition transfers involving transferred basis property within the meaning of § 7701(a)(43) (FR 40890)	"The Treasury Department and the IRS have received comments requesting guidance on the application of the qualified property rules to nonrecognition transfers involving transferred basis property within the meaning of section 7701(a)(43) (transferred basis transactions). For example, taxpayers and practitioners requested guidance on how to determine the depreciable period of the property if a partnership conducts a trade or business and qualified property is contributed to that trade or business in a nonrecognition transfer under section 721(a)."	Prop. Reg. §1.199A-2(c)(2)(iv) provides that, for purposes of determining the depreciable period, if an individual or RPE (the transferee) acquires qualified property in a transaction described in § 168(i)(7)(B), the transferee determines the date on which the qualified property was first placed in service using a two-step approach.
7	Redetermination of unadjusted basis immediately after acquisition and subsequent improvements to qualified property. (FR40890)	"The Treasury Department and the IRS have received comments requesting guidance on the treatment of subsequent improvements to qualified property."	Prop. Reg. § 1.199A–2(c)(1)(ii) provides that, in the case of any addition to, or improvement of, qualified property that is already placed in service by the taxpayer, such addition or improvement is treated as separate qualified property that the taxpayer first placed in service on the date such addition or improvement is placed in service by the taxpayer for purposes of determining the depreciable period of the qualified property.
8	Whether gain or loss treated as ordinary income under § 751 is QBI if all other QBI requirements are met. (FR 40891)	"The Treasury Department and the IRS have received comments stating that it is unclear whether gain or loss that is treated as ordinary income under section 751 should be QBI if the section 751 income meets all of the other requirements to be QBI."	Prop. Reg. §1.199A-3(b)(1)(i) clarifies that any gain attributable to assets of a partnership giving rise to ordinary income under § 751(a) or (b) is considered attributable to the trades or businesses conducted by the partnership, and may constitute QBI if the other requirements are met.

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
9	Extent to which § 1231 gains and losses may be taken into account in calculating QBI (FR 40892)	"The Treasury Department and the IRS have received comments requesting guidance on the extent to which gains and losses subject to section 1231 may be taken into account in calculating QBI."	Prop. Reg. §1.199A-3(b)(2)(ii)(A) clarifies that, to the extent gain or loss is treated as capital gain or loss, it is not included in QBI. So, if gain or loss is treated as capital gain or loss under § 1231, it is not QBI. If § 1231 provides that gains or losses are not treated as capital gains and losses, they are included in QBI (provided all other requirements are met).
10	Does "reasonable compensation" apply to entities other than S corporations? (FR 40893)	"The Treasury Department and the IRS have received requests for guidance on whether the phrase ''reasonable compensation'' within the meaning of section 199A extends beyond the context of S corporations for purposes of section 199A."	Prop. Reg. § 1.199A–3(b)(2)(ii)(H) provides that QBI does not include reasonable compensation paid by an S corporation but does not extend this rule to partnerships.
11	Whether § 751 income recognized upon sale of interest in a PTP must meet standards for QBI. (FR 40894)	"One commenter questioned whether section 751 income recognized upon the sale of an interest in a PTP must meet the standards for QBI (such as the requirement that the income be effectively connected with a U.S. trade or business) to qualify as qualified PTP income."	Yes. The other rules applicable to the determination of QBI apply to the determination of qualified PTP income. Prop. Reg. § 1.199A–3(c)(3)(ii).
12	Aggregation of trades or businesses (FR 40894)	"The Treasury Department and the IRS have received comments requesting that the regulations provide that taxpayers be permitted to group or ''aggregate'' trades or businesses under section 199A using the grouping rules described in § 1.469–4 (grouping rules). Section 1.469–4 sets forth the rules for grouping a taxpayer's trade or business activities and rental activities for purposes of applying the passive activity loss and credit limitation rules of section 469."	Some aggregation should be allowed, but the § 1.469-4 rules may be over or under inclusive. Prop. Reg. § 1.199A-4 describes the appropriate aggregation method. Comments are requested on that method.
13	Meanings and definitions of various listed "specified service trades or businesses" (FR 40896)	"The Treasury Department and the IRS have received comments requesting guidance on the meaning and scope of the various trades or businesses described in the preceding paragraph."	Prop. Reg. § 1.199A-5(b) provides guidance on the definition of an SSTB based on the plain meaning of the statute, past interpretations of substantially similar language in other Code provisions, and other indicia of legislative intent. Existing guidance under § 1202(e)(3)(A) and § 448(d)(2) is not an appropriate substitute.
14	Whether the § 448 regulations serve as a reasonable starting point for defining SSTB. (FR 40897)	"Commenters have suggested that the regulations under section 448 serve as a reasonable starting point for defining an SSTB for purposes of section 199A. However, commenters also noted that the objectives and included categories of trades or businesses within section 448 and section 199A are different."	Treasury draws on § 448 guidance as appropriate and with modifications.
15	Whether provision of consulting service in	"[T]he Treasury Department and the IRS are aware of the concern noted by commenters that in certain kinds of sales transactions it is common for	Prop. Reg. § 1.199A–5(b)(2)(vii) provides that the field of consulting does not include consulting that is

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
	connection with sales of goods constitutes "consulting" for SSTB purposes (FR 40898)	businesses to provide consulting services in connection with the purchase of goods by customers. For example, a company that sells computers may provide customers with consulting services relating to the setup, operation, and repair of the computers, or a contractor who remodels homes may provide consulting prior to remodeling a kitchen."	embedded in, or ancillary to, the sale of goods if there is no separate payment for the consulting services.
16	Meanings of the term "athletics" for purposes of the SSTB definition (FR 40898)	"The field of athletics is not listed in section 448(d)(2), and there is little guidance on its meaning as used in section 1202(e)(3)(A). However, commenters noted, and the Treasury Department and the IRS agree, that among the services specified in section 199A(d)(2)(A) the field of athletics is most similar to the field of performing arts."	Prop. Reg. § 1.199A–5(b)(2)(viii) provides that the term ''performance of services in the field of athletics'' means the performances of services by individuals who participate in athletic competition such as athletes, coaches, and team managers in sports such as baseball, basketball, football, soccer, hockey, martial arts, boxing, bowling, tennis, golf, skiing, snowboarding, track and field, billiards, and racing. It does not include maintenance and operation of equipment or facilities for use in athletic events. It also does not include video or audio broadcasting of athletic events to the public.
17	Whether "financial" services" includes banking for purposes of SSTB definition. (FR 40898)	"Commenters requested guidance as to whether financial services includes banking. These commenters noted that section 1202(e)(3)(A) includes the term financial services, but that banking in separately listed in section 1202(e)(3)(B) which suggests that banking is not included as part of financial services in section 1202(e)(3)(A)."	Prop. Reg. § 1.199A–5(b)(2)(ix) generally provides that financial services includes financial services by financial advisors, investment bankers, wealth planners, and retirement advisors and other similar professionals, but does not include taking deposits or making loans.
18	Interpretation of "reputation or skill" for purposes of SSTB definition (FR 40899)	"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 by describing ways to (1) determine the extent to which the reputation or skill of employees or owners constitutes an asset of the business under Federal tax accounting principles, and (2) measure whether such an asset is in fact the principal asset of the business. One commenter suggested using an activity-based standard under which no service-based businesses would qualify for the section 199A deduction.....Another commenter described a balance sheet test that would compare the value of assets other than goodwill and workforce in place to the value of such goodwill and workforce in place. The commenter acknowledged that such a test could also be broader than Congress intended. In addition, the commenter noted that such a test could easily lead to strange and unintuitive results, and may be difficult to apply in the case of small businesses	Prop. Reg. § 1.199A–5(b)(2)(xiv) limits the reputation or skill'' to cases where the individual or RPE is engaged in the trade or business of: (1) receiving income for endorsing products or services (including distributive share of income or distributions from an RPE for which the individual provides endorsement services); (2) licensing or receiving income for the use of an individual's image, likeness, name, signature, voice, trademark, or any other symbols associated with the individual's identity, (including distributive share of income or distributions from an RPE to which an individual contributes the rights to use the individual's image); or (3) receiving appearance fees or income (including fees or income to reality performers

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
		that do not maintain audited financial statements and would both be ripe for abuse, and could potentially result in many legal disputes between taxpayers and the IRS....Finally, one 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 (for example, doctors, nurses, lawyers, and accountants), or who have otherwise achieved a high degree of skill in a given field (for example, professional athletes or performing artists	performing as themselves). Treasury and IRS request comments on this rule, the clarity of definitions for the statutorily enumerated trades or businesses that are SSTBs under § 199A(d)(2)(A), and the accompanying examples.
19	Whether "cracking" is allowable (FR 40900)	"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."	Cracking is inconsistent with § 199A's purposes. An SSTB includes any trade or business with 50% or more common ownership (directly or indirectly) that provides 80% or more of its property or services to an SSTB. Additionally, if a trade or business has 50% or more common ownership with an SSTB, to the extent that the trade or business provides property or services to the SSTB, the portion of the property or services provided to the SSTB will be treated as an SSTB (so the income will be treated as income from an SSTB). Prop. Reg. §1.199A-5(c)(2).
20	What to do about employees who classify themselves as independent contractors. (FR 40901)	"Section 199A provides that the trade or business of providing services as an employee is not eligible for the section 199A deduction. Therefore, taxpayers and practitioners noted that it may be beneficial for employees to treat themselves as independent contractors or as having an equity interest in a partnership or S corporation in order to benefit from the deduction under section 199A."	If an employer improperly treats an employee as an independent contractor, the improperly classified employee is an employee notwithstanding the improper classification. Prop. Reg. §1.199A-5(d)(3). For § 199A purposes, an individual treated as an employee for Federal employment tax purposes, and who is subsequently treated as other than an employee by the hiring person with regard to the provision of substantially the same services, is presumed to be an employee with regard to such services. Prop. Reg. § 1.199A– 5(d)(3). The presumption is rebuttable.
21	How does § 199A apply to taxpayers who circumvent thresholds by dividing assets among multiple trusts? (FR	"Under section 199A, the threshold amount is determined at the trust level without taking into account any distribution deductions. Commenters have noted that taxpayers could circumvent the threshold amount by dividing assets among multiple trusts, each of which would claim its own threshold amount. This result	Trusts formed with a significant purpose of receiving a deduction under § 199A will not be respected for § 199A purposes. Prop. Reg. § 1.199A-6(d)(3)(v).

	Issue/Fed. Reg. Pages	Relevant Language	Proposed Regulations Outcome
	40902)	is inappropriate and inconsistent with the purpose of section 199A."	

Table 2 – Treasury Notice of Proposed Rulemaking Requests for Further Comments (12 total)

	Matter on Which Additional Comments were Requested/Fed. Reg. Pages	Did the NPR Mention Receiving Pre-Notice Comments on this Issue?
1	Offsetting and netting of losses where individual has more than one trade or business. Treasury requests comments on the netting approach described in Prop. Reg. § 1.199A–1(d)(iii) (FR 40887)	Yes.
2	How do qualified property rules apply to nonrecognition transfers involving transferred basis property within the meaning of § 7701(a)(43)? Treasury and IRS request comments regarding appropriate methods for accounting for non-recognition transactions, including rules to prevent the manipulation of the depreciable period of qualified property using related-party transactions. (FR 40890)	Yes.
3	The proposed regulations (§ 1.199A–3(b)(1)(v)) provide that generally, a § 172 deduction for a net operating loss is not considered attributable to a trade or business and therefore, is not taken into account in computing QBI. However, to the extent the net operating loss is comprised of amounts attributable to a trade or business that were disallowed under § 461(l), it is considered attributable to that trade or business, and will constitute QBI to the extent the other § 199A requirements are satisfied. Treasury and IRS request comments regarding the interaction of section 199A and 461(l) generally. (FR 40891)	Not mentioned.
4	§ 199A(c)(4)(C) provides that QBI does not include, to the extent provided in regulations, any payment described in § 707(a)—addressing arrangements in which a partner engages with the partnership other than in its capacity as a partner—to a partner for services rendered with respect to the trade or business. Prop. Reg. §1.199A-3(b)(2)(ii)(J) provides that QBI does not include § 707(a) payment to a partner for services rendered with respect to the trade or business, regardless of whether the partner is an individual or an RPE. Treasury and IRS request comments on whether there are situations in which it is appropriate to include section 707(a) payments in QBI. (FR 40893)	Not mentioned.
5	Prop. Reg. §1.199A-3(b)(5) provides that, if an individual or an RPE directly conducts multiple trades or businesses, and has items of QBI properly attributable to more than one trade or business, the taxpayer or entity must allocate those items among the trades or businesses using a reasonable method consistent with the purposes of § 199A. There are several different ways to allocate expenses, but whether these are reasonable depends on the facts and circumstances. Treasury and IRS are considering whether "reasonable method" should be defined to include the direct tracing method, allocations based on gross income, or other methods, within appropriate parameters. Treasury and IRS request comments on reasonable methods for the allocation of items not clearly attributable to a single trade	Not mentioned.

	Matter on Which Additional Comments were Requested/Fed. Reg. Pages	Did the NPR Mention Receiving Pre-Notice Comments on this Issue?
	or business and whether any safe harbors may be appropriate. (FR 40893-94)	
6	Treasury's Prop. Reg. § 1.199A-4 describes the methods by which taxpayers may aggregate or group trades or businesses. The proposed regulation did not completely adopt the aggregation method in existing regulation § 1.469-4. Treasury requests comments on the aggregation method described in Prop. Reg. §1.199A-4, including whether this would be an appropriate grouping method for purposes of § 469 and 1411, in addition to § 199A. (FR 40894)	Yes.
7	The proposed regulations permit but do not require aggregation. But one of the requirements is that the same person or group must own a majority interest in each business to be aggregated. Treasury and IRS considered a reporting requirements in which the majority owner or group of owners would be required to provide information about all of the other pass-through entities in which they held a majority interest but the proposed regulations did not adopt such a requirement due to complexity and burdens on taxpayers. Treasury and IRS request comments on whether a reporting or other information sharing requirement should be required. (FR 40894-95)	Not specifically mentioned. But Treasury received general comments on aggregation.
8	Treasury and IRS considered permitting aggregation by an RPE in a tiered structure and considered several approaches, but are concerned that the reporting requirements would be overly complex for both taxpayers and the IRS to administer. Treasury and IRS request comments on the proposed approach to tiered structures and the reporting necessary to allow an individual to demonstrate to which trades or businesses his or her QBI, W-2 wages, and UBIA of qualified property are attributable for purposes of calculating his or her section 199A deduction. (p. 48).	Not specifically mentioned. But Treasury received general comments on aggregation.
9	Prop. Reg. §1.199A-4(c)(2)(ii) allows the Commissioner to disaggregate trades or businesses if an individual fails to make the aggregation disclosures required by Prop. Reg. § 1.199A-4(c)(2)(i). Treasury and IRS request comments regarding whether it is administrable to create a standard under which trades or businesses will be disaggregated by the Commissioner and what that standard might be. (FR 40895)	Not specifically mentioned. But Treasury received general comments on aggregation.
10	The proposed regulations limit the meaning of the "reputation or skill" clause to fact patterns in which the individual or relevant passthrough entity is engaged in the trade or business of: (1) receiving income for endorsing products, (2) licensing or receiving income for the use of an individual's image, likeness, name, signature, voice, trademark, or any other symbols associated with the individual's identity; or (3) receiving appearance fees or income. Prop. Reg. §1.199A-5(b)(2)(xiv). Prop. Reg. §1.199A-5(b)(4) contains two examples illustrating the application of this definition. Treasury and IRS request comments on this rule, the clarity of definitions for the statutorily enumerated trades or businesses that are SSTBs under § 199A(d)(2)(A), and the accompanying examples. (FR 40899)	Yes. Proposed regulations mention that Treasury received comments on a number of SSTB aspects and definitions, as well as the "reputation or skill" clause.
11	Although passthroughs cannot take the § 199A deduction at the entity level, each relevant passthrough must determine and report the information necessary for its direct and indirect owners to determine their own § 199A deduction. Each relevant passthrough must report this information on or with the Schedules K-1 issued to the owners, and must report this information regardless of whether a taxpayer is below the threshold. Prop. Reg. §1.199A-6(b).	Not mentioned.

	Matter on Which Additional Comments were Requested/Fed. Reg. Pages	Did the NPR Mention Receiving Pre-Notice Comments on this Issue?
	Treasury and IRS request comments whether it is administrable to provide a special rule that if none of the owners of the passthrough have taxable income above the threshold amount, the passthrough does not need to determine and report W-2 wages, UBIA of qualified property, or whether the trade or business is an SSTB. Although such a rule would relieve an RPE of an unnecessary burden, the RPE would need to have knowledge of the ultimate owner's taxable income.	
12	Under § 199A, the threshold amount is determined at the trust level without taking into account any distribution deductions. Taxpayers can therefore circumvent the threshold amount by dividing assets among multiple trusts, each of which would claim its own threshold amount. Prop. Reg. §1.199A-6(d)(3)(v) provides that trusts formed or funded with a significant purpose of receiving a deduction under § 199A will not be respected for purposes of § 199A. Treasury and IRS request comments with respect to whether taxable recipients of annuity and unitrust interests in charitable remainder trusts and taxable beneficiaries of other split-interest trusts may be eligible for the § 199A deduction to the extent that the amounts received by such recipients include amounts that may give rise to the deduction. Such comments should include explanations of how amounts that may give rise to the § 199A deduction would be identified and reported in the various classes of income of the trusts received by such recipients and how the excise tax rules in § 664(c) would apply to such amounts.	Yes.

Table 3 – Pre-Notice Comments

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
1	Tax Notes	12-Apr-18	ADP Total Source	Industry Interest	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable. PEO wages count.
2	Tax Notes	9-Apr-18	International Council of Shopping Centers (ICSC)	Trade Group	Taxpayers should be able to aggregate trades or businesses for § 199A purposes. This is consistent with § 199A's application at the partner level and avoids administrative complexity. Trade or business should be defined using the longstanding § 469 approach.	Split outcome. Treasury agrees that aggregation is appropriate but rejects use of § 469 rules. Treasury seeks comments on design of aggregation regime.
3	Tax Notes	27-Apr-18	RSM US LLP	Individual	Comments on definition of "services" in nine proscribed fields. Note's IRS's § 1202 ruling position that a relevant service is one performed by an individual or individuals whose identity is of substantial importance to the customer or customers. Letter is written in a personal capacity.	Unclear outcome. Comment is a nonspecific request by an uninterested party.
4	Tax Notes	25-Apr-18	National Association of Professional Employer Organizations	Trade Group	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable outcome. PEO wages count.
5	Tax Notes	23-Apr-18	Council of Insurance Agents and Brokers, Independent Insurance Agents and Brokers of America, National Association of Insurance and Financial Advisors	Trade Group	Insurance is not a SSTB; insurance should be defined broadly. Arguments are based on statutory interpretation and public policy.	Favorable outcome. Insurance is not a SSTB.
6	Tax Notes	4-May-18	Decision HR Holdings, PEO	Industry Interest	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable outcome. PEO wages count.
7	Tax Notes	4-May-18	Central Staff Services, Inc.	Industry Interest	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable outcome. PEO wages count.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
8	Tax Notes	7-May-18	Access Point Human Resources	Industry Interest	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable outcome. PEO wages count.
9	Tax Notes	7-May-18	Center Point Business Solutions	Industry Interest	Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer.	Favorable outcome. PEO wages count.
10	Tax Notes	10-May-18	Capitol Tax Partners	Industry Interest	Insurance is not a SSTB; Insurance production and distribution generates QBI. Request for safe harbor threshold. Request to use § 469 regulations method of allocation between trades or businesses.	Generally favorable outcome. Insurance is not a SSTB. Proposed regs adopt a de minimis threshold. Treasury allows aggregation but rejects use of § 469 approach. Treasury seeks comments on design of aggregation regime.
11	Tax Notes	5-Jun-18	Alternative and Direct Investment Securities organization and other real estate groups	Industry Interest	Request to use cost basis for purposes of wage and capital limitation of § 199A, even if property was acquired through a § 1031 exchange.	Unfavorable outcome. Treasury rejects this approach.
12	Tax Notes	4-Jun-18	LPL Financial	Industry Interest	Financial service advisors such as broker dealers and investment advisors are not SSTBs.	Unfavorable outcome. Treasury rejects this approach.
13	Tax Notes	9-Jun-18	International Franchise Association	Trade Group	Franchising is not a SSTB.	Unclear outcome. Franchising is not specifically mentioned but SSTB was defined narrowly.
14	Tax Notes	7-Jun-18	Covington	Law Firm	Banking is not a SSTB. Banking should be defined broadly. Follow-up of an in-person meeting.	Good outcome. Traditional banking activities (taking deposits / making loans) are not SSTB.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
15	Tax Notes, Reginfo.gov	4-Jun-18	Various Members of Congress	Government	Please provide clarity around aggregation of businesses.	Good outcome. Treasury adopted an aggregation approach.
16	Tax Notes, Notice 2018-43	14-Jun-18	Investment Company Institute	Trade Group	Benefits of § 199A should flow through to Regulated Investment Companies (RICs)	Deferred – Treasury eventually provided guidance on this in the form of new proposed regulations accompanying the release of the final 199A regulations in January 2019.
17	Tax Notes	18-Jun-18	Proskauer	Law Firm	"Investment management" should only include selling to customers. It should not include the development of investment products, which requires capital to produce. This was a follow-up of an in-person meeting.	Unfavorable outcome. Treasury rejects this approach.
18	Tax Notes	26-Jun-18	Crowe	Accounting Firm	There should be flexibility in grouping businesses. Wages paid by payroll organization on behalf of taxpayer should count as "W-2 wages" paid by the taxpayer. Auto dealership management companies are not SSTBs.	Treasury provides aggregation approach but solicits more comments. PEO wages count. Treasury did not address auto dealership management companies.
19	Tax Notes	3-Jul-18	John Stilwell	Industry Interest	Insurance is not a SSTB.	Favorable outcome. Insurance is not a SSTB.
20	Tax Notes	18-Jun-18	Mark Parkinson, American Health Care Association and National Center for Assisted Living	Trade Group	Skilled nursing facilities and assisted living communities are not SSTBs.	Unclear outcome. Treasury did not specifically mention these. (See final regulations later).
21	Tax Notes	16-Jul-18	SIFMA	Trade Group	Generally recommends § 199A guidance as a priority.	Good outcome. Treasury issues guidance.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
22	Tax Notes, Reginfo.gov	19-Jun-18	National Association of Realtors	Trade Group	Real estate brokers are not brokers (and hence not SSTB). Please provide clarity on reputation or skill prong (and read it narrowly). Please recognize that one trade or business may have both permitted and prohibited businesses. § 469 aggregation should apply. This letter is posted on the OIRA website as a "handout" to this meeting.	Generally good outcome. Real estate brokers are not brokers. Reputation or skill is read narrowly. Aggregation is allowed and there is a de minimis rule, but § 469 approach is not adopted.
23	Tax Notes	11-Jul-18	Underwriters Group	Industry Interest	Insurance is not a SSTB.	Good outcome. Insurance is not a SSTB.
24	Tax Notes	16-Jul-18	ABD Insurance and Financial Services	Industry Interest	Insurance is not a SSTB.	Good outcome. Insurance is not a SSTB.
25	Tax Notes	30-Apr-18	Various Banking people, on behalf of S corp banks.	Industry Interest	Banking is not a SSTB. Banking should be defined broadly. This was a follow up of an in person meeting.	Good outcome. Traditional banking activities (taking deposits / making loans) are not SSTB.
26	Tax Notes	17-Aug-18	TEGE Exempt Organizations Council (Note – document is dated after NPR was issued.)	Professional Organization	Flags open issues regarding how § 199A should apply to tax exempt trusts. Asks whether amount within the calculations is just that attributable to unrelated T/Bs or all activities of the passthrough. Asks for clarification of how calculations may be interrelated with separate silo calculations for T/B activities for UBTI purposes. Asks for clarification of whether QBI calculation is after business interest expense limitations (if applicable)	Generally good outcome. Treasury provides computation guidance.
27	Tax Notes	13-Aug-18	AICPA (Note – document is dated after NPR was issued.)	Professional Organization	Request for S corporation guidance on various TCJA matters, not just 199A. Request clarification on how to coordinate various losses and deduction limitations (§§ 163(j), 1366)(d), 465, 469, 461(l)) with § 199A QBI carryover losses.	Generally good outcome. Proposed regulations did address some of these loss coordination and deduction issues.
28	Tax Notes, reginfo.gov	4-Jun-18	Mortgage Bankers Association	Trade Group	Please confirm that mortgage banking companies are eligible for the § 199A QBI deduction. This letter was attached as handout for OIRA/OMB Meeting.	Unclear outcome. Proposed regulations say taking deposits and making loans is not a prohibited SSTB, but did not specifically address mortgage banks.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
29	Tax Notes	23-Jul-18	ABA Tax Section	Professional Organization	Requests 199A guidance that carryover losses are attributed to the qualified T/B from which the loss originated; that overall business loss doesn't affect the § 199A deduction otherwise available with respect to qualified PTP income and qualified REIT dividends earned in the same year; that there can be no negative deduction that is carried over; that a loss suspended under a different Code provision retains its characterization as a qualified item and its attribution to a particular T/B; that PTP losses not be included in the taxpayer's combined QBI amount and any qualified PTP loss be carried over to the succeeding tax year using mechanics similar to loss carryover rule; that guidance provide that § 1231 gains and losses are NOT included in QBI where gains exceed losses, because they are long term capital gains, but that § 1231 gains and losses are included in QBI where losses exceed gains because those are ordinary losses. Request guidance on § 1231(c) recapture rules application. Request confirmation that § 199A deduction doesn't reduce net earnings from self employment under § 1402. These comments are part of a larger ABA Tax Section project to comment on TCJA changes.	Treasury did provide guidance on many of these issues (e.g., pertaining to PTP income and REIT dividends, § 1231 gains and losses, etc.)
30	Tax Notes, Notice 2018-43	14-Jun-18	NAREIT	Trade Group	Requests confirmation that § 199A deduction applies to shareholders invested in REITs through a mutual fund. This letter was in response to Notice 2018-43 and is also available on regulations.gov.	Proposed regulations didn't address REITs held through mutual funds.
31	Tax Notes; Notice 2018-43	18-Jun-18	American Bankers Association	Trade Group	Request guidance that § 199A should be available to S corporation banks; that banking is not a SSTB; that certain references to ancillary activities in the statute (such as "dealing in securities") should be read narrowly to capture only those entities intended to be excluded from §199A benefits. This letter was in response to Notice 2018-43 and is also available on the regulations.gov website.	Generally favorable outcome. Traditional banking activities are not a SSTB.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
32	Tax Notes	15-Jun-18	Alexandre Marcellesi	Individual	Provides comments SSTB definition, particularly the "reputation or skill" clause. Argues that given the cost of enforcing "reputation or skill" and low likelihood that doing so will yield significant benefits, the best solution might be to eliminate the clause altogether.	Generally favorable outcome. The proposed regulations construe "reputation or skill" narrowly.
33	Tax Notes	18-Jun-18	ABA Tax Section	Professional Organization	Requests clear guidelines for determining QBI; published list of SSTBs; clarification of whether T/Bs listed in § 1202(e)(2)(B) through (E) but not listed in the § 199A(d)(2) cross reference are eligible for § 199A. Requests clarification that types of "financial services" excluded from § 199A only include those where service component is primary business of the TP, without the need for significant physical or intangible property to provide the products or services; that the reputation or skill clause applies only where the service is the primary business of the TP and the principal asset of the business is reputation/skill of owners and is limited to specialized service and skill businesses.	Mixed outcome. Treasury did not publish SSTB list. Treasury did clarify that financial services doesn't include banking and that "reputation or skill" should be construed narrowly.
34	Tax Notes, Notice 2018-43	14-Jun-18	AICPA	Professional Organization	Multiple guidance requests from various AICPA "panels," not all to do with § 199A. Request guidance related to definition of "compensation" in § 415 as it relates to § 199A; guidance on definition of QBI, on aggregation method of calculating QBI of passthroughs, on deductible amount of QBI for passthroughs with net loss, on qualification of wages paid by employee leasing companies, on application of § 199A to owners of fiscal year passthroughs ending in 2018, and on availability of the deduction for ESBTs; guidance on coordination of § 1366(d) suspended losses with § 199A (and request that such guidance apply the following order: 163(j), 469, 461(l), 199A). Request clarification of § 199A as applied to trusts and estates. This was submitted in response to Notice 2018-43 and is also available on regulations.gov.	Generally favorable outcome. Proposed regulations dealt with some of these issues, including applicability to passthroughs and trusts, § 461(l) etc.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
35	Tax Notes	31-May-18	ABA Tax Section	Professional Organization	Request guidance on aggregation of activities. TPs should be allowed to group qualified trades or businesses consistent with Treas Reg 1.469-4(c). Aggregation of QTBs and SSTBs should only be prohibited where SSTB is appropriately treated as a separate, significant economic activity. Please prohibit disaggregation of incidental activity with respect to an SSTB from the SSTB (or, with respect to a QTB, from a QTB) when incidental activity does not generate any independent third party revenue, and represents no more than a certain percentage of gross revenues, wages or employees. Please specify that common law employees are treated as employees for § 199A purposes, despite the fact that they receive W2 from other entities (e.g., PEOs)	Mixed outcome. Proposed regulations did have guidance on aggregation and disaggregation and allowed some aggregation. Proposed regulations also allowed PEO-paid wages to count for W2 wage purposes.
36	Tax Notes	24-May-18	ABA Tax Section	Professional Organization	Request for guidance on multiple topics, including multiple issues concerning SSTB definition and aggregation across trades or businesses. Asks whether S corporation banks qualify for the deduction; how to determine W-2 wages and whether PEO-paid wages count; how to determine a partner's allocable share of unadjusted basis, including what share of depreciation is relevant; what is the effective date as applied to Fiscal Year entities; how aggregate qualified business from preceding year under § 199A(c)(2) is taken into account in subsequent year; how to compute net capital gain limitations per § 199A(a)(1)(B); whether ordinary income a partner of a partnership is required to be recognized under § 751(a) where partner sells its partnership interest is QBI; whether remedial income or deductions under § 704(c) are QBI, whether § 1231 gain/loss is excluded from QBI as capital gain/loss; how § 199A deduction reduces partners' income for SECA tax purposes; losses allocated from a PTP impact the § 199A calculation.	Treasury addressed many of these topics. Some guidance on aggregation was provided, though § 469 rules were rejected. Guidance was provided on S corp banks, PEOs, and § 751.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
37	Tax Notes	19-Mar-18	Parity for Main Street Employers	Trade Group	Asks for a reasonable method of calculating § 199A deduction to ensure main street businesses aren't penalized. Requests guidance that allows taxpayers to group activities conducted through S corps and partnerships using § 469 approach. Requests permission for businesses with existing groups to reorganize to reflect new law.	Generally good outcome. Treasury adopted aggregation, but § 469 approach was rejected.
38	Tax Notes	23-Mar-18	NYSBA	Professional Organization	Requests guidance regarding SSTB definition, including aggregation and netting issues; how to measure W-2 wages. Requests clarification of: ambiguities surrounding qualified property (e.g., depreciable period, how qualified property rules operate with § 1031 exchanges, how to compute passthrough member shares of unadjusted basis in property held by passthrough where ownership changes); clarification of various partnership issues, (such as § 702 separately stated items, § 704 special allocations, treatment of § 751 inclusions, purchases and sales of partnership interests); application to nonresident aliens; and application of § 1231, ESBTs, and cooperative dividend rules.	Proposed regulations addressed some but not all of these issues.
39	Tax Notes	7-Mar-18	US Chamber of Commerce	Trade Group	Request for guidance on multiple TCJA topics, not just 199A. Requests that QBI activities may be aggregated at the partner level for purposes of the wage and asset test. Requests clarification regarding whether a de minimis rule for disqualified activities should apply; clarification regarding whether wages are determined similar to Reg. § 1.199-2(a)(2) and whether a T/B is defined as an activity within an entity (e.g., what happens if entity has to clearly separate trades or businesses). Mutual fund shareholders receiving REIT dividends should get the 20% deduction. Request clarification that 481 adjustments related to pre-effective date periods are excluded from QBI.	Proposed regulations provide a de minimis rule. Proposed regulations don't address the REITs-held-through-mutual-fund question. They clarify that § 481 adjustments arising in a taxable year ending before January 1, 2018, do not constitute QBI. They requested further comments about aggregation across tiered entities.
40	Tax Notes	7-Mar-18	National Society of Accountants	Professional Organization	Request 6 month extension for corporation to make S corporation election, in order that taxpayers can digest § 199A guidance and plan accordingly.	Unclear outcome. 6 month extension was not mentioned in the proposed regulations.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
41	Tax Notes	21-Feb-18	AICPA	Professional Organization	Detailed request for guidance regarding definition of qualified trade or business; aggregation method for calculating QBI of passthroughs; deductible amount of QBI for passthroughs with business net loss; qualification of wages paid by employee leasing company; application of § 199A to owner of fiscal year pass through entity ending in 2018, and availability of § 199A deduction for ESBTs.	Generally favorable outcome. Proposed regulations addressed many of these issues.
42	Tax Notes	29-Jan-18	AICPA	Professional Organization	Multiple requests for guidance, not just on § 199A. Guidance is requested regarding SSTB definition; interaction of § 199A with other code sections, and calculation of § 199A deduction for complex business structures. (e.g., calculation when flowing through multiple tiered entities, netting computation of losses from one business against gains from another, effect of existing grouping rules (e.g., § 469) of T/B for purposes of W-2 wage and basis limitation, and SSTBs). Clarify whether wages are determined using similar concepts to Reg. § 1.199-2(a)(2) and whether a T/B is defined as an activity within an entity (i.e., what happens when entity has two T/Bs); whether similar QTBs are aggregated for purposes of the calculation; whether de minimis rule for SSTBs applies; and whether TPs may consider a management company an integral part of a QTB if substantially all the manage company's income is from the other T/B; whether real property rental income is QTB. Clarify whether, if grouping is allowed, TPs can treat real estate rental to related C corps as a T/B; clarify how to determine effectively connected items e.g. § 1245 gains, retirement plan contributions of partners/solo proprietors, § 162(l) deduction and self employment tax computation. Request guidance regarding unadjusted basis of assets expensed under bonus deprecation, of assets held as of Jan 1 2018, of property subject to § 743(b) basis adjustments. Clarify effect of § 199A deduction on net investment income tax calculations.	Mixed outcome. Prop. Regs. provided guidance regarding tiered entities, how to determine wages, how to aggregate QTBs, and a de minimis rule. Prop. Regs. also provide that rental or licensing of tangible or intangible property (rental activity) that does not rise to the level of a § 162 trade or business is nevertheless treated as a trade or business for purposes of § 199A, if the property is rented or licensed to a trade or business commonly controlled under § 1.199A-4(b)(1)(i) (regardless of whether the rental activity and the trade or business are otherwise eligible to be aggregated under §1.199A-4(b)(1)). Prop. Regs. hold that basis adjustments under § 734(b) and 743(b) are not treated as qualified property.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
43	reginfo.gov	6-Aug-18	National Automobile Dealers Association	Trade Group	Request that TPs be allowed to group or regroup business activities they control using the same rules that were in effect when TCJA was enacted, and be allowed to calculate 20% deduction on a consolidated basis for each group. Request that TPs can make changes to their financial structure until the extended due date of the 2018 tax return; that any guidance changes take effect prospectively; that W-2 wages paid by PEO agent count; that auto dealer management companies are not SSTBs; that LIFO TPs who sell their businesses may utilize the wages of that business during the 12 months prior to the sale for purposes of computing wage based limitations.	Mixed outcome. Proposed regulations allowed PEO W-2 wages to count. Did not address changes to financial structure or automobile dealers.
44	reginfo.gov	6-Aug-18	Washington Center for Equitable Growth	Public Interest	Discusses whether to issue guidance regarding § 199A wage aggregation for purposes of W-2 limitation from perspective of cost-benefit analysis, in contrast to a no-guidance baseline.	n/a
45	reginfo.gov	3-Aug-18	Parity for Main Street Employers	Trade Group	Powerpoint presentation comparing treatment of S and C corporations under the TCJA. Unclear what they specifically asked for. This organization submitted a letter to the IRS dated March 19, 2018	n/a
46	reginfo.gov	30-Jul-18	American Bankers Association	Trade Group	Request clarification that S corporation banks are eligible for the § 199A deduction. American Bankers Association also submitted a June 18, 2018 letter.	Generally favorable outcome. Traditional banking activities are not a SSTB.
47	Tax Notes	18-Dec-17	Orrin Hatch (SFC Chairman)	Government	Letter criticizing Bob Corker for assertion that § 199A was crafted for real estate developers and was "airdropped" into the conference agreement and implying that Corker had role in advocating for or negotiating § 199A's inclusion. Arguing that for more than a year, taxwriters have been working on C corp relief legislation that provides equity for passthrough businesses. The provision wasn't airdropped.	n/a
48	Tax Notes	1-May-18	Richard Neal	Government	Requesting § 199A guidance to alleviate taxpayer confusion regarding their eligibility. Also asking Treasury/IRS to consider anti-abuse measures to curb concerning signs of aggressive tax minimization.	Favorable outcome, though requests were generic. The proposed regulations addressed these issues.

	Source	Document Date	Authors	Type	Summary of Request	Proposed Regulations Outcome
49	Tax Notes	26-Jul-18	Congress members	Government	Requests Treasury and IRS to provide transition relief for underwithheld individual and small business owners (if due to §199A and new law they underpay estimated taxes).	Unfavorable outcome in the Prop. Regs. But relief was subsequently granted in Notice 2019-11.
50	Notice 2018-43	15-Jun-18	H&R Block (Kathy Pickering)	Accounting Firm	Requests "clarification" on a number of issues, including: computational and definitional guidance; definition of SSTB (want a list); clarification whether QTB includes activities generating real estate rental income; partnership and S corp guidance of K-1 changes (passthrough reporting rules); safe harbor guidance (similar to § 199 guidance); guidance whether § 199A applies for § 1411 net investment income tax purposes; whether businesses may use § 469 grouping rules; whether reasonable compensation rules apply to partners. This correspondence was in response to Notice 2018-43. Requests went beyond mere clarification.	Mixed outcome. Some requests were granted; some were not.
51	Notice 2018-43	15-Jun-18	Pennsylvania Institute of CPAs Committee on Federal Taxation	Professional Organization	Requesting TCJA guidance on various matters, including § 199A deduction. Not very specific.	n/a

Table 4 – Notice-and-Comment Submissions on regulations.gov

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
2	08/21/18	Individual		"Net capital gains", as used to calculate the deduction, should be defined as excluding qualified dividends, which are taxed as capital gains. The regulation should make it clear if the deduction applies to real estate income reported on Schedule E.
3	08/21/18	Industry Interest	§ 1031 qualified intermediary firm	Requests clarity regarding rental businesses. Argues that lower basis provided for 1031 property is unfair. Requests a number of proposed small, clarification changes
4	08/21/18	CPA (individual)		Requests clarification regarding whether certain items (ie: self-employment tax, etc.) are deductible for purposes of 199A.
5	08/21/18	Attorney/CPA (public interest)		Argues that reasonable compensation and guaranteed payments to service partners shouldn't reduce QBI.
6	08/22/18	CPA (individual)		Argues that the proposed regulation de minimis rules are ripe for manipulation. Suggests applying old 199A rules. A sophisticated comment.
7	08/28/18	CPA		Requests definition of engineer.
8	08/28/18	CPA (individual)		Argues that affiliated trades or businesses that include rentals should be QBI. Argues that, to the extent that 1245 treats gain as capital gain, it should be count towards QBI.
9	08/28/18	CPA/Accounting firm	Padgett Business Services	Raises questions about how to determine reasonable compensation and whose responsibility it is to determine it. Asks whether rentals counts as SSTB. Asks various other informational questions about SSTBs. Asks how the anti-abuse rule for employees-turned-independent contractors will work (e.g., how far back will IRS look in seeing when one turns into the other, etc.). Raises questions about suspended losses.

1

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
10	08/28/18	Lawyer/Public Interest		Raises various issues, including: (1) the estimated burden of complying with 199A; (2) the characterization of "guaranteed payments for capital" as not constituting "QBI" (argues that these should be QBI); (3) the treatment of banking services as not QBI (argues that banking should be a SSTB); (4) the 5 and 10% de minimis rules; (5) definitions of certain listed activities; (6) the narrow scope of skill or reputation prong (argues that this was mistaken); (7) reputation or skill (noting that "Treasury and the IRS appear to have rejected the input of several commentators who suggested that this category of businesses should capture many service-based businesses where the income of the business is effectively derived from the skill of its employees and owners rather than other factors.")
11	08/28/18	Industry Interest	Commonwealth Care of Roanoke	Skilled nursing centers should not be SSTBs
12	08/31/18	Enrolled Agent (individual)		Questions whether various industries are SSTBs.
13	08/31/18	CPA (individual)		199A calculation should not include things like IRA contributions, etc.
14	08/31/18	CPA		1. As long as TP participates in active rentals, should be QBI. 2. TP who changes from employee to independent contractor is exercising right to minimize tax liability - shouldn't penalize w/ presumption that is not QBI.
15	08/31/18	Law Firm	Finn, Dixon & Herling	All 707(a) payments should be QBI. Distortions will be created by SSTB distinctions.
16	08/31/18	Trade/Industry Group	National Federation of Independent Business,	Long letter regarding who is a SSTB; discusses corrections needed in health and performing arts fields, etc.
17	08/31/18	CPA (letterhead)		Officer compensation and guaranteed payments should not be included as QBI.
18	09/04/18	CPA	Collins Accountancy	Requests information on whether rentals qualify for the deduction; appeals to fairness.
19	09/04/18	Individual		Argues against "anti-crack and pack" strategies.
20	09/04/18	Trade/Industry Group	Community Home Lenders Ass'n	Should go further w/ banking stuff by making clear that independent mortgage lenders (non-bank mortgage bankers/or "independent mortgage banking firms" are not considered SSTBs (writes out own letter - not form).
21				Duplicate comment; withdrawn.
22	09/04/18	Law firm (on behalf of trade group)	Greenberg Glusker	Performing arts (which is an SSTB) should NOT include movie directors. The proposed regulations got that wrong.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
23	09/04/18	CPA	Green & Company	Wants to confirm that certain type of trading income is SSTB. This CPA services traders but doesn't explicitly say he's writing on behalf of traders.
24	09/05/18	Trade/Industry Group	National Multifamily Housing Council and National Apartment Association	Makes various comments on how to calculate UBIA. Argues that REIT dividends from mutual funds should qualify for the deduction. Makes various suggestions regarding the aggregation rules.
25	09/10/18	Enrolled Agent	Kozlog Tax Advisors	Requests clarifications regarding treatment of rental properties.
26	09/11/18	Trade/Industry Group	American Staffing Association	Staffing is not a SSTB.
27	09/11/18	Law firm (on behalf of trade group)	Miller & Chevalier (on behalf of American Staffing Association)	Staffing is not a SSTB; Request to testify at October 16 Hearing.
28				Duplicate comment; withdrawn.
29	09/11/18	Professional Association	AICPA	Request to testify at October 16 Hearing.
30	09/12/18	Industry Interest	Quicken Loans	Requests clarification on the negligible sales exception and of the meaning of sales to customers with respect to mortgage businesses.
31	09/12/18	CPA (accounting firm)	Clifton Larson Allen	Argues that SSTB should exclude commodities traders who take physical possession of the commodity.
32	09/13/18	Law Firm	Miller & Chevalier	Requests guidance that QBI retains character when passed through tiered-entities. Requests clarification regarding application of common ownership test when aggregating trades or businesses that are operated in a tiered pass-through structure. Makes specific recommendations in accordance with legislative history.
33	09/13/18	Individual/"community banker"		S corp bank form letter
34	09/13/18	Individual/"community banker"		S corp bank form letter
35	09/13/18	Individual/"community banker"		S corp bank form letter
36	09/13/18	Individual/"community banker"		S corp bank form letter

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37	09/13/18	Individual/"community banker"		S corp bank form letter
38	09/13/18	Individual/"community banker"		S corp bank form letter
39	09/13/18	Individual/"community banker"		S corp bank form letter
40	09/14/18	Individual/"community banker"		S corp bank form letter
41	09/14/18	Individual/"community banker"		S corp bank form letter
42	09/14/18	Individual/"community banker"		S corp bank form letter
43	09/14/18	Individual/"community banker"		S corp bank form letter
44	09/14/18	Individual/"community banker"		S corp bank form letter
45	09/14/18	Individual/"community banker"		S corp bank form letter
46	09/14/18	Individual/"community banker"		S corp bank form letter
47	09/14/18	Individual/"community banker"		S corp bank form letter
48	09/14/18	Individual/"community banker"		S corp bank form letter
49	09/14/18	Individual/"community banker"		S corp bank form letter
50	09/14/18	Individual/"community banker"		S corp bank form letter

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51	09/14/18	Individual/"community banker"		S corp bank form letter
52	09/14/18	Individual/"community banker"		S corp bank form letter
53	09/14/18	Individual/"community banker"		S corp bank form letter
54	09/14/18	Individual/"community banker"		S corp bank form letter
55	09/14/18	Individual/"community banker"		S corp bank form letter
56	09/14/18	Individual/"community banker"		S corp bank form letter
57	09/14/18	Individual/"community banker"		S corp bank form letter
58	09/14/18	Individual/"community banker"		S corp bank form letter
59	09/14/18	CPA		Request that treatment of rental property be clarified promptly because taxpayers are struggling with the issue.
60	09/17/28	Individual/"community banker"		S corp bank form letter
61	09/17/18	Individual/"community banker"		S corp bank form letter
62	09/27/18	Individual/"community banker"		S corp bank form letter
63	09/17/18	Individual/"community banker"		S corp bank form letter
64	09/17/18	Individual/"community banker"		S corp bank form letter
65	09/17/18	Individual/"community banker"		S corp bank form letter

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66	09/17/18	Individual/"community banker"		S corp bank form letter
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69	09/17/18	Individual/"community banker"		S corp bank form letter
70	09/17/18	Individual/"community banker"		S corp bank form letter
71	09/17/18	Individual/"community banker"		S corp bank form letter
72	09/17/18	Individual/"community banker"		S corp bank form letter
73	09/17/18	Individual/"community banker"		S corp bank form letter
74	09/17/18	Individual/"community banker"		S corp bank form letter
75	09/17/18	Individual/"community banker"		S corp bank form letter
76	09/17/18	Individual/"community banker"		S corp bank form letter
77	09/17/18	Individual/"community banker"		S corp bank form letter
78	09/17/18	Individual/"community banker"		S corp bank form letter
79	09/17/18	Individual/"community banker"		S corp bank form letter
80	09/17/18	Individual/"community banker"		S corp bank form letter

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81	09/17/18	Individual/"community banker"		S corp bank form letter
82	09/17/18	Individual/"community banker"		S corp bank form letter
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84	09/17/18	Individual/"community banker"		S corp bank form letter
85	09/17/18	Individual/"community banker"		S corp bank form letter
86	09/17/18	Individual/"community banker"		S corp bank form letter
87	09/17/18	Individual/"community banker"		S corp bank form letter
88	09/17/18	Individual/"community banker"		S corp bank form letter
89	09/17/18	Individual/"community banker"		S corp bank form letter
90	09/17/18	Individual/"community banker"		S corp bank form letter
91	09/20/18	Individual/"community banker"		S corp bank form letter
92	09/20/18	Individual/"community banker"		S corp bank form letter
93	09/20/18	Individual/"community banker"		S corp bank form letter
94	09/20/18	Individual/"community banker"		S corp bank form letter
95	09/20/18	Individual/"community banker"		S corp bank form letter

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96	09/20/18	Individual/"community banker"		S corp bank form letter
97	09/20/18	Individual/"community banker"		S corp bank form letter
98	09/20/18	Individual/"community banker"		S corp bank form letter
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100	09/20/18	Individual/"community banker"		S corp bank form letter
101	09/20/18	Individual/"community banker"		S corp bank form letter
102	09/20/18	Individual/"community banker"		S corp bank form letter
103	09/20/18	Individual/"community banker"		S corp bank form letter
104	09/20/18	Individual/"community banker"		S corp bank form letter
105	09/20/18	Individual/"community banker"		S corp bank form letter
106	09/20/18	Individual/"community banker"		S corp bank form letter
107	09/20/18	Trade/Industry Group	Missouri Bankers Ass'n	S corp bank form letter, but written independently
108	09/20/18	Individual/"community banker"		S corp bank form letter
109	09/20/18	Individual/"community banker"		S corp bank form letter
110	09/20/18	Trade/Industry Group	Community Bankers Association of Georgia	S corp bank form letter, but written by a trade group

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
111	09/20/18	Trade/Industry Group	Independent Community Banks of North Dakota	S corp bank form letter
112	9/20/18	Individual		"you are dumb"
113	09/20/18	Trade/Industry Group	Colin Barrett, Tennessee Bankers Association	S corp bank form letter
114	09/20/18	Trade/Industry Group	Community Bankers Association of Oklahoma	S corp bank form letter
115	09/24/18	CPA (individual)		Nursing facilities should not be SSTBs.
116	09/24/18	CPA (individual)		Are umpires, etc. SSTB?
117	09/24/18	Trade/Industry Group	American Bankers Association	Extensive S corp bank letter, including arguments regarding S corp banks.
118	09/24/18	Trade/Industry Group	NJ Bankers Ass'n	S corp bank form letter
119	09/24/18	Trade/Industry Group	Independent Bankers Association of Texas	S corp bank form letter, but a slightly different one.
120	09/24/18	Individual		Value-laden letter. "This law is discriminator and unconstitutional." "Please consider removing the taxable income limits for all personal service professions, not just Engineering and Architectural."
121	09/24/18	CPA firm (to help retail pharmacy industry)		"Even though the sale of pharmaceuticals and medical devices is clearly excluded as a health service, we kindly request the IRS to clarify in the regulations that a retail pharmacy is included in this definition."
122	09/24/18	Individual/"community banker"		S corp bank form letter
123	09/24/18	Individual/"community banker"		S corp bank form letter

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124	09/24/18	Individual/"community banker"		S corp bank form letter
125	09/24/18	Individual/"community banker"		S corp bank form letter
126	09/24/18	Individual/"community banker"		S corp bank form letter
127	09/24/18	Individual/"community banker"		S corp bank form letter
128	09/24/18	Individual/"community banker"		S corp bank form letter
129	09/24/18	Individual/"community banker"		S corp bank form letter
130	09/24/18	Individual/"community banker"		S corp bank form letter
131	09/24/18	Individual/"community banker"		S corp bank form letter
132	09/24/18	Individual/"community banker"		S corp bank form letter
133	09/24/18	Individual/"community banker"		S corp bank form letter
134	09/24/18	Individual/"community banker"		S corp bank form letter
135	09/25/18	individual		This comment is about ESOPs and seems to have nothing to do with 199A.
136	09/25/18	CPA firm	Grandizio, Wilkins, Little & Matthews, LLP	Requests more guidance regarding trade or business definition. Makes some suggestions.
137	09/25/18	Law Firm (Public Interest)	Lindabury, McCormick, Estabrook & Cooper	Points out that IRS's position on reasonable compensation in the regulations may affect choice of entity unnecessarily. Seems motivated by the public interest.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
138	09/26/18	Trade/Industry Group	California Community Banking Network	S corp bank form letter
139	09/26/18	Individual/"community banker"		S corp bank form letter
140	09/26/18	Individual/"community banker"		S corp bank form letter
141	09/26/18	Individual/"community banker"		S corp bank form letter
142	09/26/18	Individual/"community banker"		S corp bank form letter, but it has a few things added
143	09/26/18	Individual/"community banker"		S corp bank form letter
144	09/26/18	Individual/"community banker"		S corp bank form letter
145	09/26/18	Individual/"community banker"		S corp bank form letter
146	09/26/18	Individual/"community banker"		S corp bank form letter
147	09/26/18	Individual/"community banker"		S corp bank form letter
148	09/26/18	Individual/"community banker"		S corp bank form letter
149	09/26/18	Individual/"community banker"		S corp bank form letter
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151	09/26/18	Individual/"community banker"		S corp bank form letter
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153	09/26/18	Individual/"community banker"		S corp bank form letter
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157	09/26/18	Individual/"community banker"		S corp bank form letter
158	09/26/18	Individual/"community banker"		S corp bank form letter
159	09/26/18	Individual/"community banker"		S corp bank form letter
160	09/26/18	CPA		Raises various issues, including treatment of rental activities; treatment of SSTB income that isn't de minimis; ordering rules for suspended losses limited by basis, at-risk limitations, or passive activity limitations; allocation of UBIA of qualified property among partners in a partnership.
161	09/26/18	Trade/Industry Group	ICBSD	S corp bank form letter
162	09/26/18	CPA (individual)	Anthony DeStefano, CPA	Questions how the law and final rule will treat companies that have more than one component, department, line of business, etc. that are not considered "service" related under the law and the proposed regulation. For example, how would we treat companies that sells goods, manufactures goods and/or also provide disqualifying services defined in the law and the proposed regulation.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
163	09/26/18	Trade/Industry Group	American Council of Engineering Companies	The proposed regulations correctly follow statute for the most part by excluding engineering as a SSTB, but doesn't treat it as a per se exclusion in all cases. This results in engineering needing to be tested under reputation and skill prong, which it shouldn't have to be because it should be a per se exclusion.
164	09/26/18	Individual/"community banker"		S corp bank form letter
165	09/26/18	Individual/"community banker"		S corp bank form letter
166	09/26/18	Individual/"community banker"		S corp bank form letter
167	09/26/18	Individual/"community banker"		S corp bank form letter
168	09/26/18	Individual/"community banker"		S corp bank form letter, but at the end says: "PLEASE DO NOT DISCRIMINATE AGIANST US JUST BECAUSE WE DON'T HAVE THE MONEY TO LOBBY AGAINST THIS. TREATS THE SMALL COMMUNITY BANKS FAIR!"
169	09/26/18	Law firm	Miller & Chevalier	Certain 707(a) payments should be QBI (references another comment letter in support, in addition to other items). Asks for modifications to reporting rules.
170	09/27/18	Industry interest		Engineering consultant, who is angry that architects get the deduction but they do not.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
171	09/28/18	Industry interest	Emory	"... I believe that the Qualified Business Income Deduction proposed rule effectively provide tax relief to SMEs that generate employment and thus foster prosperity in the affected communities. However, it is not clear the limitations that this proposed deduction is subject to. The proposed rule states that 'Individuals, trusts and estates with qualified business income, qualified REIT dividends or qualified PTP income may qualify for the deduction. In some cases, patrons of horticultural or agricultural cooperatives may be required to reduce their deduction. The IRS will be issuing separate guidance for co-ops.' It would be crucial to analyze this proposed rule in association with the separate guidance as this may the eligible taxpayers and the reach of this rule."
172	09/28/18	Individual/"community banker"		S corp bank form letter
173	09/28/18	Industry interest	Emory Point	"I'm writing to express my approval of the Qualifies Business Income Deduction proposed rule. I believe this rule effectively provides tax relief and extra resources ro SMEs that generate jobs in the local communities they serve. However, I believe it is necessary to better describe who are the taxpayers that are subject to this deduction so the reach of this regulation can be better analyzed." Letter talks about co-ops, etc.
174	09/28/18	Academic/Public interest	Donald Williamson, American University Kogod Business Tax Center	Advocates a safe habor to let middle income taxpayers treat real estate income as 199A trade or business income. Request to testify at October 16, 2018 hearing.
175	09/28/18	Professional Association	American College of Trust and Estate Counsel	34 page document with several comments, responses to positions in the proposed regulations, and responses to questions that Treasury had asked in the proposed regulations.
176	09/28/18	Professional Association	American Counsel of Trust and Estate Counsel	Request to speak at the October 16, 2018 hearing, accompanied by really long series of comments regarding trusts.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
177	09/28/18	Trade/Industry Group	Louisiana Bankers Ass'n	Requests that all banking activities are eligible for deduction.
178	09/28/18	Trade/Industry Group	National Association of Realtors	Requests clarification that rentals of real property are a trade or business, even if done in small amounts, and can thus qualify for the deduction.
179	09/28/18	Trade/Industry Group	Investment Company Institute	Asks Treasury to clarify that RICS can pass through certain qualified dividends to shareholders so that they can take the 199A deduction. Asks Treasury and the Internal Revenue Service (IRS) to clarify that regulated investment companies (RICs) can pass through to RIC shareholders certain qualified dividends from real estate investment trusts (REITs) and income from publicly traded partnerships (PTPs) so that RIC shareholders can take 199A deduction.
180	09/28/18	Professional Association	California Lawyers Assn. Tax Section	"Controlled group" rules under 414 should be used for purposes of determining aggregation rather than creating an entirely new framework for 199A. Since qualified T/B references 1202(e)(3), Treasury should provide regulations under 1202(e)(3). Treasury should clarify whether wages allocable to QBI and paid as reasonable compensation can be includible for purposes of determining W-2 wage limitation, despite not being includible in QBI. (Note: some of the letter continued the dialogue that began before and continued through the proposed regs. See, e.g., p. 6: "The AICPA in its February 21, 2018, letter stressed that the application of a separate and brand new legal entity standard imposes an unreasonable burden on taxpayer compliance and inefficiencies in IRS administration...The Treasury and the IRS are also aware of the comments concerning the administration and compliance challenges of having multiple grouping regimes, and for this very reason requested comments on whether the aggregation method under Prop. Reg. § 1.199A-4 is an appropriate grouping method. (See Preamble at 45.) Adopting an existing, well-established framework for aggregating businesses under common control should significantly reduce concerns surrounding taxpayer compliance, burden, and administration challenges."
181	09/28/18	Individual	Xiaowei Wang	Short, value laden comments (e.g., "Also, the new deduction is primarily benefiting the wealthy people. High income individuals with multiple business interests can take advantage of aggregation rules that could increase their deduction for qualified business income.")
182	09/28/15	Trade/Industry Group	Chamber of Commerce (Caroline Harris)	Raises lots of technical issues, in addition to definition of SSTB
183	09/28/18	Trade/Industry Group	Independent Community Bankers of MN	S corp bank form letter

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
184	09/28/18	Individual/"community banker"		Discusses concerns of banks. Seems to have been independently written.
185	09/28/18	CPA	Oscar Harris	Requests clarification that nursing homes are not SSTBs. Contains arguments that what Congress was really going after was lawyers / doctors trying to create disguised businesses, and that the prohibition shouldn't apply to nursing homes nothwithstanding explicit statutory language.
186	09/28/18	Trade/Industry Group	United Brotherhood of Carpenters	Writes in support of the presumption that someone who was formerly an employee remains treated as an employee. Reason: We don't want to provide construction employers another reason to misclassify workers as independent contractors.
187	09/28/18	Trade/Industry Group	Federation of Exchange Accomodators	Request for change to 1031 rules; UBIA should be unadjusted basis.
188	09/28/18	Individual/"community banker"		S corp bank form letter
189	09/28/18	Trade/Industry Group	American Farm Bureau Federation	Describes how the proposed regulations benefit the farm industry, but how clarifications are needed to ensure that they fully benefit in accordance with Congress's intent (e.g., with respect to aggregation, passive lease income, capital gains, commodity trading, losses, trusts, and income tax basis).
190	09/28/18	Individual/"community banker"	William O'Neil	Subchapter S bank issue, but in the writer's own words.
191	09/28/18	CPA firm	BKD	Discusses (1) operational rules, (2) determination of W-2 wages after acquisition of UBIA property, (3) aggregation, (4) other technical issues, and (5) SSTB definition.
192	09/28/18	CPA firm	BKD	Request to testify at October 16, 2018 hearing.
193	09/28/18	Individual/"community banker"		Subchapter S banking activity should not be a SSTB. Letter is independently written.
194	09/28/18	CPA firm (to help community bank clients)	Wipfli CPAs and consultants	Argues that "banking" should include trust activities conducted by banks. Requests changes in the rules with respect to reasonable compensation / QBI (vague on details). Argues that sales of originated loans should be part of banking.
195	09/28/19	CPA		Requests clarification whether home health care is a SSTB.
196	10/02/18	CPA/accounting firm	Padgett Business Services	Outline of Comments for October 16, 2018 hearing.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
197	10/02/18	Academic/Public interest	Donald Williamson Professor at American University Kogod Center	Request to testify at October 16, 2018 hearing.
198	10/02/18	industry interest (individual)	LPL Financial Advisor (seems like a small financial advising firm run by one person)	Request to testify at October 16, 2018 hearing regarding independent contractor financial services.
199	10/02/18	Individual/"community banker"		S corp bank form letter
200	10/02/18	Individual/"community banker"		S corp bank form letter
201	10/02/18	Individual/"community banker"		S corp bank form letter
202	10/02/18	Individual/"community banker"		S corp bank form letter
203	10/02/10	Law firm	Klehr Harrison	Expresses concern that some antiabuse efforts are overbroad and unauthorized.
204	10/02/18	Individual/"community banker"		S corp bank form letter
205	10/02/18	Individual/"community banker"		S corp bank form letter
206	10/02/18	Individual/"community banker"		S corp bank form letter
207	10/02/18	Individual/"community banker"		S corp bank form letter
208	10/02/18	Trade/Industry Group	John Nesse, SWACCA (wall and ceiling employers association)	Requests that employee status presumption be retained in the final rule, to stop employers who try to use subcontractor relationships.
209	10/02/18	Individual/"community banker"		Sale of mortgages on secondary market should not be a SSTB.
210	10/02/18	Industry interest	LPL Financial	Financial advisors like the commenter should not be a SSTB.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
211	10/02/18	Industry interest	American Security Mortgage Corp.	Businesses that take deposits or make loans are not financial services. "Dealing in securities" should be construed narrowly (and should not apply to the commenter).
212	10/02/18	Law firm	Barry Yellin	Various recent medical treatments, like gene therapy, are not healthcare (i.e., are not a SSTB).
213	10/02/18	Industry interest	Tracie Klein (CFO, Tolleson Private Bank, TX)	S corp bank letter, but independently written. Articulated on behalf of the bank.
214	10/02/18	Industry interest	Plaza Home Mortgage	Mortgage banking is not a SSTB.
215	10/02/18	Industry interest	WestStart Bank	Subchapter S bank activities should not be a SSTB. Independently written letter.
216	10/02/18	CPA firm (to help nursing facility clients)	Bonadio Group	Skilled nursing facilities are not a SSTB. Requests clarification regarding the application of de minimis rule in this area.
217	10/02/18	Industry interest	Wauchula State Bank	Discusses various S corp bank issues, including aggregation and de minimis rule.
218	10/02/18	CPA		Provides compilation of questions that the letter writer has received from various CPAs, in the course of making presentations on 199A to over 4,000 CPAs.
219	10/02/18	CPA	Delman and Company CPAs	Rules need to be simplified and should apply to all businesses equally.
220	10/02/18	Individual/"community banker"		S corp bank form letter
221	10/02/18	Individual/"community banker"		S corp bank form letter
222	10/02/18	Individual/"community banker"		S corp bank form letter
223	10/02/18	Individual/"community banker"		S corp bank form letter
224	10/02/18	Professional Association	American Institute of CPAs	Lists 11 issues for consideration including SSTB and various technical issues.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
225	10/02/18	Trade/Industry Group	IIABA	Independent insurance agencies should be excluded from SSTB. A de minimis rule is appropriate, but the rule provided in the proposed regulations should be modified. Requests further guidance on what constitutes a separate SSTB.
226	10/02/18	CPA (individual)		Various comments about the family attribution rules.
227	10/02/18	Trade/Industry Group	American Veterinary Medical Association	Veterinarians are not in the field of "health" and should not be considered a SSTB.
228	10/02/18	Trade/Industry Group	Institute for Portfolio Alternatives	Raises UBIA issues, including in the 1031 context.
229	10/02/18	Industry interest	William Giambrone (submitted on behalf of some mortgage bankers)	Mortgage firms are not SSTBs. Sale of mortgage loans is not securities activity.
230	10/02/18	Trade/Industry Group	National Association of Convenience Stores (NACS) & Society of Independent Gasoline Marketers of America (SIGMA)	Various requests: (1) Eliminate harsh penalties for calculation errors; (2) include safe harbor for when a T/B can be a separate business, (3) allow taxpayers to make annual aggregation decisions (4) provide more guidance on aggregation; (5) family attribution rules, (6) minimize compliance costs by providing IRS forms, etc. as soon as possible.
231	10/02/18	Trade/Industry Group	American Physical Therapy Association	Encourages IRS to adopt the narrowest possible definition of services furnished in the field of health.
232	10/02/18	CPA firm (to help mortgage banking clients)	BKM Sowan Horan Accountants	Requests clarification with respect to dealers in securities. Requests a definition of "negligible sales."
233	10/02/18	Industry interest	The Mortgage Co.	Dealing in securities should exclude mortgage banking and other lending activities.
234	10/02/18	Trade/Industry Group	Private Practice Section of the American Physical Therapy Association	Argues that the proposed regulations get it wrong by including physical therapists in the SSTB definition, for a number of reasons.
235	10/02/18	Trade/Industry Group	Center for Electronic Revenue Communication Advancement (CERCA)	Various requests: (1) Clarify T or B definition; (2) clarify how suspended passive losses are treated; (3) clarify how non-recaptured 1231 losses are treated; (4) clarify allocation of partner's share of unadjusted basis of property; (5) clarify that QBI is calculated without adjustments such as IRA contributions, etc.; (6) clarify application of 199A to exempt trusts.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
236	10/02/18	Trade/Industry Group	National Association of Automobile Dealers	Treatment of management companies Anticipation of likely changes to business aggregations relief when dispose of asset during year determination of separate T or B. Request to testify at public hearing.
237	10/02/18	Professional Association	National Association of Tax Professionals	Requests clarification of T or B definition for rental activities. Requests more detail regarding definition of taxable income and how it is calculated. Request that Treasury determine due diligence requirements with respect to reasonable compensation.
238	10/02/18	Trade/Industry Group	Associated General Contractors of America	Argues that construction is not a SSTB and that reputation or skill clause should be interpreted narrowly. Objects to use of 162 in defining "trade or business." Expresses concerned objections to new independent contractor presumption standard that applies to former employees.
239	10/02/18	Trade/Industry Group	Council of Insurance Agents and Brokers	Requests that Treasury retain current exclusion of insurance brokers from SSTB. Requests that Treasury create a safe harbor regarding what can constitute a separate business and that it increase the de minimis exemption in the proposed regulations.
240	10/02/18	Law firm (on behalf of S corp bank clients)	Kennedy Sutherland	Argues that S corp banks should qualify for deduction. An independently written letter.
241	10/02/18	Law firm (on behalf of S corp bank client)	Paducah Bank and Trust Company, KY (submitted by Kennedy Sutherland)	Writing on behalf of bank, asks that all bank income should be treated as QBI. Suggests various changes to the de minimis rules.
242	10/02/18	Industry interest	MidFirst Bank, OK	Requests that the favorable treatment that banks are asking for be expanded to thrift institutions.
243	10/02/18	Trade/Industry Group	Community Mortgage Lenders of America	Requests clarification that independent mortgage banking firms are not SSTBs and that various customary services of mortgage banking firms are not SSTBs.
244	10/02/18	Professional Association	Tax Section State Bar of Texas	Argues that (1) qualified property contributed to a partnership or S corporation should be its pre-contribution UBIA; (2) certain basis adjustments under 734 and 743 should be qualified property for purposes of UBIA; (3) Treasury should change rules with respect to 707(a) and (c) guaranteed payments; (4) Treasury should specify in more detail what is mean by performance of services in the field of health; (5) Treasury should clarify how to determine QBI under section 864(c)(8); (6) Treasury should provide more clarification around the intended application of Prop. Reg. 1.643(f)-1 (regarding non-grantor trusts). Makes various other comments regarding needed clarification around trusts.
245	10/02/18	CPA firm	RSM	Questions regarding lending transactions and SSTBs

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
246	10/02/18	Trade/Industry Group	Alternative and Direct Investment Securities Assn.	199A should use step up in basis for 1031 property.
247	10/02/18	Trade/Industry Group	American Escrow Association	Requests clarification that "accounting" excludes escrow activity from SSTB.
248	10/02/18	Academic & Lawyer (Public Interest)	F. Ladson Boyle & Jonathan Blattmachr	Finds error in example allocating 199A deduction between estate/trust and beneficiaries. Makes suggestions for modifying the example in 1.199A-6(d)(3)(v)).
249	10/02/18	Trade/Industry Group	American Escrow Association	Request to testify at October 16, 2018 hearing.
250	10/02/18	Trade/Industry Group	American Bankers Association	Request that charitable remainder trusts be allowed to calculate the 199A deduction at the trust level and treat the trust as a single taxpayer for purposes of the taxable income, wage, and UBIA threshold.
251	10/02/18	Industry interest	Supreme Lending	Mortgage banking is not a SSTB
252	10/02/18	individual	Carol Arnn	Skilled nursing should not be a SSTB
253	10/02/18	Trade/Industry Group	American Optometric Ass'n	Sales of medical devices should not be included in health for SSTB purposes. The de minimis threshold should be increased.
254	10/02/18	Industry interest	Veritas Funding	Mortgage lending and associated activities should not be a SSTB.
255	10/02/18	industry interest	Veritas Funding	Mortgage lending should not be a SSTB. This appears to be a separate form letter.
256	10/02/18	Individual/"community banker"		S corp bank form letter
257	10/02/18	Individual/"community banker"		S corp bank form letter
258	10/02/18	Trade/Industry Group	American Health Care Association and National Center for Assisted Living	Assisted living, etc. should not be a SSTB. Approves of cracking down on crack and pack.
259	10/02/18	Trade/Industry Group	Nareit	Requests confirmation that direct and indirect holders of REITs qualify for the deduction. Request that 45 day holding period for REIT dividends be eliminated.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
260	10/02/18	Trade/Industry Group	Securities Industry and Financial Markets Association Management Group	Large diversified asset managers that invest significant capital in research should not be a SSTB.
261	10/02/18	Trade/Industry Group	Wisconsin Bankers Ass'n	S corp bank form letter
262	10/02/18	CPA firm	Richey, May & Co.	Mortgage banking, including lending, should not be a SSTB.
263	10/02/18	Industry interest	Embrace Home Loans, Inc.	Taking deposits and making loans should not be a SSTB. Making/financing loans does not constitute "dealing in securities."
264	10/02/18	Trade/Industry Group	Manufactured Housing Institute	Requests clarification to ensure that passthrough entities that engage in the lending and financing of residential property, including chattel financing of manufactured homes, qualify for the deduction. Requests clarification that mortgage banking firms are not SSTBs.
265	10/02/18	Trade/Industry Group	National Association of Professional Insurance Agents	Agrees with proposed regulations position in excluding insurance sales from SSTB. Expresses appreciation for IRS and Treasury's "careful consideration of the uncertainty posed by the law and the significance of the work being done by independent insurance agents around the nation."
266	10/02/18	Industry interest	Tenaska Inc.	Argues that trading and dealing of physical commodities are trades or businesses that should qualify for deduction. Requests broader aggregation rules.
267	10/02/18	CPA/accounting firm	Citrin Cooperman	Provides various suggested examples of aggregation rules.
268	10/02/18	Law firm (on behalf of S corp bank client)	First American Bank, IL (written by Kennedy Sutherland)	Request to testify at October 16, 2018 hearing.
269	10/02/18	Lobbying firm (representing industry interest)	Capitol Tax Partners	Makes various recommendations regarding the de minimis threshhold.
270	10/02/18	Industry interest	Commerce National Bankshares of Florida Inc.	Provides data to argue against the de minimis rules in the proposed regulations.
271	10/02/18	Trade/Industry Group	Association for Advanced Life Underwriting	Requests modifications of parts of the proposed regulations that will make it needlessly difficult for life insurance professionals to take the deduction. Problems include unnecessarily broad definition of financial services, broad view of what constitutes investing and investment management, and unclear drafting of provision excluding insurance agents and brokers from the definition of brokerage services.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
272	10/02/18	Industry interest	Homeowners Financial Group (Thomas Osselaer)	Request that final regulations clarify that trades or businesses that "take deposits" or "make loans" (e.g. mortgage banks) are not examples of "financial services" trades or businesses that would be SSTBs. Request clarification that a mortgage banking company is not engaged in a trade or business that constitutes "dealing in securities" for purposes of 199A.
273	10/02/18	Individual/"community banker"		S corp bank form letter
274	10/02/18	Industry interest	Veterans United Homes Loans	Clarify that mortgage banking companies in the business of making loans are not a SSTB.
275	10/02/18	Professional Association	American Institute of CPAs	Outline of topics to be presented at October 16, 2018 hearing.
276	10/02/18	Law firm (on behalf of S corp bank client)	Kennedy Sutherland	Request to testify at October 16, 2018 hearing on behalf of Commerce National Bank.
277	10/02/18	Trade/Industry Group	National Grain and Feed Association	Request the final regulations should be revised to clarify that for 199A, a trade or business is not engaged in the performance of services that consist of investing, trading, or dealing in commodities if it regularly takes physical possession of the underlying physical commodity in the ordinary course of its trade or business.
278	10/02/18	Trade/Industry Group	Community Bankers of Michigan	S corp bank form letter
279	10/02/18	Trade/Industry Group	American Financial Services Association	Request that final regulations clarify the definition of loan and make clear that taxpayers who make loans or extend credit should not be classified as SSTBs.
280	10/02/18	Trade/Industry Group	International Council of Shopping Centers	Commends Treasury and IRS for its proposed regulations clarifications, including clarifications that self-constructed property or property improvements are taken into account on their placed-in-service date for purposes of measuring UBIA; that the exclusion of brokerage services as SSTB does not include real estate agents and real estate brokers; and that the exclusion of investing and investment management as an SSTB does not include directly managing real property. Requests clarification of other points, including whether rental real estate is a T/B, 1031 issues, aggregation issues, 734(b) and 743(b) basis adjustments, RIC dividends attributable to REITs, and application of pro ration concepts to SSTB de minimis rules.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
281	10/02/18	Trade/Industry Group	Financial Executives International	Computational rules Reporting rules Definitional rules Aggregation Request to testify at hearing.
282	10/02/18	Industry interest (individual)		Requests clarification that skilled nursing care is not a SSTB.
283	10/02/18	Trade/Industry Group	National Grain and Feed Association	Requests clarification that SSTB does not include investing, trading, or dealing in commodities if one takes physical possession of the commodity in ordinary course of the trade or business.
284	10/02/18	Trade/Industry Group	S Corporation Association	Various comments regarding aggregation rules, de minimis threshold (requests that it be higher), SSTBs (requests relief for some businesses), electing small business trusts.
285	10/02/18	Trade/Industry Group	National Grain and Feed Association	Request to testify at October 16, 2018 hearing.
286	10/02/18	Lobbying firm	Federal Policy Group	The independent contractor presumption in the proposed regulations is unfair. Examples should be provided of how to rebut that presumption. The rule that guaranteed payments for capital are not QBI is wrong for a number of reasons.
287	10/02/18	Trade/Industry Group	S Corp Association	Request to testify at October 16, 2018 hearing.
288	10/02/18	Trade/Industry Group	National Independent Automobile Dealers Ass'n	Credit sales, sales of loans, and retail installment sales contracts should be excluded from the definition of "financial services."
289	10/02/18	Trade/Industry Group	American Seniors Housing Ass'n	Basis of property should not have to be adjusted downwards after 1031 exchange. Assisted living facilities are not a SSTB.
290	10/02/18	Trade/Industry Group	National Community Pharmacists Ass'n	Proposed regulations get it wrong by including pharmacists as a SSTB in a number of ways.
291	10/02/18	Trade/Industry Group	Real Estate Roundtable	Various comments, including on 1031 basis issues, aggregation issues. Argues that rental income from property should be a T or B.
292	10/02/18	Law firm	Plante & Moran, PLLC	Requests that de minimis threshold be increased, and that final regulations specify what happens when there is more than de minimis amount of gross receipts, etc. Requests clarification that engineering and architecture take precedence over SSTB. Request that definition of T/B be expanded to include real estate professionals. Request that aggregation of lower-tier pass-through entities be permitted. Requests clarification regarding Schedule K-1 reporting of separately stated items in QBI.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
293	10/02/18	Trade/Industry Group	National Independent Automobile Dealers Ass'n	Credit sales, sales of loans, and retail installment sales contracts should be excluded from the definition of "financial services."
294	10/02/18	Trade/Industry Group	National Association of Health Underwriters	Agrees with proposed regulation guidance.
295	10/02/18	Trade/Industry Group	Mortgage Bankers Association	Requests clarification that dealing in securities does not include financing real estate.
296	10/02/18	Trade/Industry Group	NFIB	Requests that Treasury keep the reputation or skill prong narrow, keep and increase de minimis rules. Agrees with how proposed regulations calculate QBI and appreciates straightforward rules concerning income aggregation.
297	10/02/18	Trade/Industry Group	Parity for Main Street Employers	Agrees with proposed regulations' general approach to aggregation rules and offers some suggestions on how to strengthen and improve aggregation rules.
298	10/02/18	Industry interest	Intuit	Requests clarification of what counts as SSTB, especially with respect to rental properties. Asks how to allocate QBI when it is affected by other factors such as passive activity losses. Asks whether tax adjustments such as employment tax affect QBI.
299	10/02/18	Trade/Industry Group	Wisconsin Health Care Association and Wisconsin Center for Assisted Living	Long-term care facilities should qualify for the deduction.
300	10/02/18	Trade/Industry Group	Coalition to Promote Independent Entrepreneurs	Presumption for former employees should be removed.
301	10/02/18	Industry interest	United Security Financial	Mortgage banking and other lending should not be a SSTB.
302	10/02/18	Trade/Industry Group	Food Marketing Institute	Please clarify that dealing in commodities does not include taking physical possession of commodities. Please expand attribution rules to include siblings. Interaction between 199A rules and reasonable compensation can be unfair.
303	10/02/18	Trade/Industry Group	TechServe Alliance	Suggests clarifications regarding the definition of a SSTB related to "consulting." "[T]o provide additional clarity to the definition of 'consulting,' we encourage Treasury and IRS to: (1) modify Example 3 under proposed Treasury Regulation section 1.199A-5(b)(3); and (2) provide an additional example to clarify that staffing services are generally not considered to be performing services in the field of consulting."
304	10/02/18	Industry interest	Charter Communications	Please modify recordkeeping, reporting, and aggregation rules.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
305	10/02/18	Trade/Industry Group	Small Business Legislative Council	Expresses concern regarding complexity of the regulations, about the definition of SSTB, and about how to treat businesses when part of the business is a SSTB.
306	10/02/18	Trade/Industry Group	TechServe Alliance	Request to testify at October 16, 2018 hearing.
307	10/02/18	Industry interest	Fremont Bank	Banking should be eligible for the deduction, etc.
308	10/02/18	Trade/Industry Group	International Franchise Association	Repeats concerns from a pre-notice letter and adds a request for a franchising example.
309	10/02/18	Trade/Industry Group	International Franchise Association	Request to testify at October 16, 2018 hearing, along with comment letter dated October 1, 2018 attached.
310	10/02/18	Trade/Industry Group (Labor union)	Writers Guild of America West	Requests clarification that writers are not included in the definition of performing arts.
311	10/02/18	Trade/Industry Group	National Association of Home Builders	Generally approves of the proposed regulations but does not like presumption for former employees. or 1031 basis rules.
312	10/02/18	Industry interest	Phillips 66	Manufacturing activities and hedging activities should not be SSTBs.
313	10/02/18	Industry interest	Bank of Hemet	Expresses concern that a small amount of income from originating and selling loans could cause them to be a SSTB. Raises difficulty of having to maintain a separate set of books and records to track whether such income exceeds the de minimis thresholds and having to explain and report to shareholders if it does.
314	10/02/18	Trade/Industry Group	Associated Builders and Contractors	Generally approves of aggregation rules asks Treasury to refine them. Appreciates narrow reading of reputation or skill. Expresses concern about presumption standard for former employees.
315	10/02/18	Trade/Industry Group	Small Business Council of America	SSTB definition shouldn't be expanded beyond the statute. If business has SSTB part and non-SSTB part, the non-SSTB part should get the deduction. Distribution from ESBT shouldn't be counted twice for 199A threshold computation.
316	10/02/18	Trade/Industry Group	Office of the Commissioner of Baseball	Example 2 on p. 167 of the proposed regulations should be replaced to reflect the economics of professional sports franchises and the fact that athletes' value makes up small part of the total value of all employees.
317	10/02/18	Law firm	Thompson & Knight	On-air advertising spots should not be treated as SSTB. Provides a suggested regulatory example that would yield this result.
318	10/02/18	Industry interest	RP Funding (mortgage banking company)	"Dealing in securities" should be modified to state that mortgage banking and other lending activities are excluded from SSTB.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
319	10/11/18	Trade/Industry Group	North Carolina Bankers Association	Final regulations should simply state that business activities that are conducted in regulated banks generate qualified business income (QBI). Fiduciary operations, originating and selling loans and related business activities should be included. Failing which, de minimis thresholds should be raised and dealer in securities definition clarified.
320	10/11/18	Industry interest	Large USDA business and industry lender	Requests that sales of guaranteed portion of USDA loans to others is treated as part of what banks do. Concern is being limited in tax deductions due to these loan sales.
321	10/11/18	Law firm (on behalf of trade group)	Kennedy Sutherland LLP (on behalf of Jefferson Bank)	Request to testify at October 16, 2018 hearing. Says bank will be submitting a letter.
322	10/11/18	Industry interest	Extraco Banks	Argues that all S corp bank activity should be eligible for the deduction. (Concerned because they would exceed the proposed regulations de minimis rule.)
323	10/11/18	industry interest	Kennedy Sutherland (on behalf of Jefferson Bank)	Request to testify at October 16, 2018 hearing.
324	10/11/18	Trade/Industry Group	National Association of Realtors	Outline of October 16, 2018 hearing testimony.
325	10/11/18	Trade/Industry Group	NFIB	Request to testify at October 16, 2018 hearing.
326	10/11/18	Law firm	Williams Parker Harrison Dietz & Getzen	Comments on aggregation rules, family attribution rules, and aggregation of trades or businesses with de minimis SSTB elements.
327				Comment was withdrawn
329	10/16/18	Trade/Industry Group	Gary Gasper, MLB	Supplemental Letter; lengthy discussion; offers example that would specify that MLB is not an SSTB.
330	10/16/18	Industry interest	Broadway Bancshares, Inc.	Raises SSTB and de minimis rule issues.
331	10/16/18	Industry interest	Morton Community Bank	S corp bank letter (but not the exact form letter)
332	10/16/18	Law firm	Miller & Chevalier	Requests clarification that U.S.-source taxable income arising upon recapture of an overall foreign loss under 904(f)(1) constitutes QBI in the recapture year to the extent the overall foreign loss limited the otherwise allowable 199A deduction in a prior tax year.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
333	10/16/18	Industry interest	Jefferson Bank	Raises SSTB bank issues; thanks Treasury for opportunity to testify today. Asks for clarification that all of a bank's fiduciary activities conducted as a part of its trust business qualifies for the deduction (and is not disqualified investment management). Requests confirmation that bank is not "dealing in securities" by virtue of its selling of loans it originates to customers.
334	10/16/18	Industry interest	BankSouth	All business activities that are performed in a regulated bank should generate QBI. If a simple exemption is not made, additional guidance narrowing the definition of SSTB should be included that does not capture typical banking activities such as trust operations and loan sales. The de minimis thresholds of 5% and 10% do not work given interest rates, bank balance sheets, and the complexity of bank management. Please clarify that, upon failure to meet the de minimis test, other qualified business activities will not be completely "tainted" and lose all of the 20% deduction. The "dealing in securities" definition should be clarified with respect to the definition of customer and should not include activities such as sales to GSE's, loan aggregators, etc.
335	10/22/18	Industry interest	Country Club Bank (submitted by Kennedy Sutherland)	Asks that all business activities done by banks should qualify as QBI. Failing which, wants an exemption narrowing SSTB definition that does not capture activities like trust operations and loan sales. 5% and 10% de minimis thresholds don't work (too low) given interest, bank balance sheets, and complexity. Want clarification that if fail de minimis threshold, other QBI activities won't be tainted. Want clarification on meaning of "dealing in securities" -- should not include sales to GSEs, loan aggregators, etc.
336	10/22/18	Industry interest	BankSouth	Proposed regulations define many of the powers of S corp banks as SSTBs, thus effectively eliminating the S bank QBI deduction. Also, mortgage origination and sale is apparently defined in proposed regulations as securities trading. Originating mortgages for consumers to purchase or refinance their home and selling that mortgage to manage liquidity, capital and interest rate risk is not securities trading. This creates conflicts with banking laws.
337	10/22/18	Individual		These rich major league baseball owners shouldn't be getting this tax break. Make them pay their fair share. I'm tired of them fleecing the public with their taxpayer funded stadiums and now they're coming hat in hand for even more public money? The heck with them, I say. I urge to deny Major League Baseball's request.

ID[1]	Date	Type of Commenter	Commenter	Nature of Comment
338	10/22/18	Industry interest	United Bank (GA)	Final regulations should simply state that business activities conducted by banks generates QBI. Fiduciary operations such as trust services and originating and selling loans and related business activities in mortgage area should qualify. If final regs don't provide this broad qualification, then, de minimis threshold should be raised and Treasury should clarify that " if a particular business activity is deemed to be a SSTB due to exceeding the de minimis level of gross receipts and if it meets the requirement of being a trade or business, the presence of a SSTB will not "taint" the other qualified business income. Treasury should also clarify that "dealing in securities" excludes traditional banking activities like loan origination and then selling of loan to entities like Fannie Mae or Freddie Mac.
339	12/03/18	Professional Association	Florida Bar Tax Section	Comments on various topics. Aggregation rules; family attribution rules; de minimis SSTB rules; field of health, athletics; various other issues.