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Easing Regulatory Bottlenecks with Collaborative Rulemaking

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EASING REGULATORY BOTTLENECKS WITH COLLABORATIVE RULEMAKING

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ABSTRACT

Despite the chorus of critics who seek to rein in a perceived runaway regulatory state, the backlash against excessive tax regulation has been minimal. In fact, taxpayers and their advisors typically want more regulatory guidance, not less. Treasury regulations are the most authoritative form of administrative guidance for the Internal Revenue Code (IRS). Yet over the years, commentators have noted an ever-expanding backlog of regulatory projects at the IRS. This Article contends that a bottleneck exists in the rule development phase—the phase before public notice-and-comment—at the IRS Chief Counsel's Office, which is primarily responsible for writing tax regulations.

Bottlenecks occur when inputs come into a process at greater rates than the next step can convert them into outputs. In the rulemaking context, there are more regulations that need to be written than are being written. One way to unblock a bottleneck is to increase efficiency at the bottleneck. The most direct way to increase efficiency at the bottleneck would be to allocate additional resources to the IRS Chief Counsel's Office, which has suffered a double-digit reduction in its workforce since 2011. Rule development requires a significant investment of the IRS's resources because the agency generally promulgates regulations in a top-down, centralized fashion. The restoration of staffing shortages seems untenable, however, particularly in the current political environment where Congress kneecaps the agency by continually cutting its budget while at the same time meting out increasing responsibility. The decline in funding, coupled with increasing responsibility, makes the IRS's current top-down labor-intensive approach to rulemaking unsustainable.

This Article considers whether collaborative governance theory can be applied effectively

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to tax rulemaking. It does not attempt to develop a high-level theory of rulemaking. Instead, the focus here is much more grounded. It applies existing collaborative governance theory to evaluate whether experts outside the government—namely, the established tax bar—can be leveraged to unblock the regulatory bottleneck. The first part of the Article provides support for the existence of a bottleneck in rule development and Part II draws on this evidence to provide an explanation for the bottleneck. Part III considers ways to unblock the regulatory bottleneck, including greater reliance on experts outside the government. Part IV summarizes the collaborative governance research, both in general and in the tax scholarship. Part V addresses notable criticisms of collaborative governance, including the high noise-to-signal ratio that may result from increased public participation in rulemaking, the critique that collaborative governance will not actually speed up the rulemaking process, and the potential for agency capture as a result of leveraging experts outside the government as surrogate rulemakers. This Article's contention is that the established tax bar's participation in rule development avoids these criticisms. The final part of the Article outlines the recommended features and processes necessary to successfully implement collaborative governance in tax rulemaking.

This Article makes three contributions. First, it focuses attention on the rule development phase—the phase before regulations are subject to notice-and-comment under the federal Administrative Procedure Act. Less attention in the scholarship has been devoted to potential delay in rulemaking attributable to the rule development phase. Second, by applying collaborative governance theory to tax rulemaking, the Article fills a gap in the collaborative governance literature. Little collaborative governance scholarship exists that pertains to tax. Of the existing tax scholarship, academics generally focus on the application of collaborative governance theory to issues of tax enforcement or compliance rather than rulemaking. Third, the Article advances the work of scholars who seek to establish the merit of collaborative governance models by responding to three main criticisms of collaborative governance.

TABLE OF CONTENTS

INTRODUCTION

I. THE REGULATORY BACKLOG

Despite the chorus of critics who seek to rein in a perceived runaway regulatory state, the backlash against excessive regulation has been minimal in the tax arena.[1] In fact, taxpayers and their advisors typically want *more* regulatory guidance, not less.[2] Treasury regulations are the most authoritative form of administrative guidance for the Internal Revenue Code (IRC).[3] The

1. *See, e.g.*, Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. § 804 (2017) (requiring Congressional approval for "major" regulations as designated by the Office of Management and Budget (OMB) before they can become effective). The term "regulatory state" refers to the growth of regulation by government agencies. Critics commonly lament both the volume and scope of regulation as excessive and intrusive; promulgated by agencies with seemingly boundless discretion. To the extent that regulated industries' compliance costs are so expensive that they outweigh the purported benefits of regulation, is proof, critics say, of a regulatory system run amok.

2. David P. Hariton, *The Tax Treatment of Hedged Positions in Stock: What Hath Technical Analysis Wrought*, 50 TAX L. REV. 803, 803–04 (1995); *see also* Christopher Bergin et al., Tax Analysts, Roundtable Discussion on Taxpayer Guidance: How to Address the Growing Problem of Inadequate Guidance from the IRS on Complying with the Tax Code (July 22, 2011) (transcript available at http://www.taxmuseum.org/www/conferences.nsf/KeyLookup/GBRO-8J8TA9?OpenDocument&link=transcript) (quoting Mike Desmond, former Treasury Tax Legislative Counsel, saying "taxpayers . . . are banging down the doors to get . . . guidance out").

3. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1737 (2014); *see also* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 56–57

Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) promulgate regulations to implement and interpret provisions of the Code as part of the IRS mission to help taxpayers "understand and meet their tax responsibilities."[4]

Yet for years, commentators have noted an ever-expanding backlog of regulatory projects at the IRS.[5] Consider the so-called May Department Stores regulations proposed by Treasury and the IRS under § 337(d) in 1992, which were intended to prevent the use of a partnership to avoid the repeal of the *General Utilities* doctrine.[6] Those regulations sat in limbo for twenty years without being finalized. The Joint Committee on Taxation in 2003 cited the absence of final regulations as contributing to the Enron tax shelters.[7] After the Enron report, the IRS and Treasury added § 337(d) guidance

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(2011) (holding that Treasury regulations carry the force of law for *Chevron* deference purposes).

4. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 1.1.1.2.1 (2015) (stating the mission of the Internal Revenue Service (IRS)) [hereinafter I.R.M.]. The Secretary of the Treasury Department is statutorily authorized to issue "all needful rules and regulations for the enforcement of [the Internal Revenue Code]." I.R.C. § 7805(a) (2012). The authority to promulgate Treasury regulations has been delegated to the IRS Chief Counsel's Office in coordination with lawyers from the Treasury Office of Tax Policy. I.R.M. §§ 32.1.1.4.4–5 (2004). In addition to the authority delegated pursuant to § 7805(a), Congress also delegates tax rulemaking in particular areas. *See, e.g.*, I.R.C. § 1502 (2012) (authorizing the Secretary to "prescribe such regulations as he may deem necessary" for affiliated groups of corporations who file consolidated tax returns).

5. *See, e.g.*, Marion Marshall et al., *The Changing Landscape of IRS Guidance: A Downward Slope*, 90 TAX NOTES 673, 677 tbl.5 (2001) (showing backlog of pending tax regulation projects for 1980–2000 as reported in an IRS management information report); MARION B. MARSHALL & THOMAS F. FIELD, THE GUIDANCE DEFICIT: AN UPDATE, (Tax Notes 1998) (noting that final regulations in 1997 "hit an historic low, . . . continuing a consistent 17-year trend" and that "proposed and final regulations issued in 1997 number less than half of those published in 1980"). Over thirty years ago, the General Accounting Office (now Government Accountability Office (GAO)) determined that tax rulemaking had been backlogged for over fifteen years, and that the backlog was increasing. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-84-12, FURTHER IMPROVEMENTS NEEDED IN PROCESSING TAX REGULATIONS (1983).

6. Guidance in Notice 89-37, Which Treats the Receipt of a Corporate Partner's Stock by the Corporate Partner as a Circumvention of General Utilities Repeal, 60 Fed. Reg. 23,825–26 (May 8, 1995). The proposed regulations, if finalized, would have been effective retroactive to 1989. *See* I.R.S. Notice 89-37, 1989-1 C.B. 679. Unless otherwise noted, section references are to the Internal Revenue Code of 1986, as amended.

7. Monte A. Jackel & Audrey Ellis, *Perpetually Proposed: The May Company Regulations Revisited*, TAX NOTES TODAY (Apr. 2, 2012), http://www.taxnotes.com/tax-notes-today/corporate-taxation/perpetually-proposed-may-company-regulations-revisited/2012/04/02/vg2h

to the priority guidance plan.[8] By 2005–2006, the project was removed. In August 2012, the Tax Section of the New York State Bar Association (NYSBA) submitted comments to consider whether the 1992 proposed regulations were still needed in light of intervening changes to the Code.[9] The project was put back on the priority guidance plan for 2012–2013, presumably in response to the NYSBA comments.[10] In 2015, the regulations proposed in 1992 were withdrawn and replaced by new temporary regulations.[11]

Tracing the travails of the § 337(d) regulations is important for two reasons. First, the evolution of the regulation project demonstrates the important role that commentators outside the government play in tax rulemaking. Second, this example starkly illustrates the uncertainty created by a languishing regulation project. Because the proposed regulations stalled for more than twenty years before being withdrawn, the government made the temporary regulations effective only for prospective transactions that occurred on or after the publication date.[12] Taxpayers who feared retroactive application of the regulations may have engaged in legitimate tax planning to structure around the proposed regulations.[13] Other taxpayers, by contrast,

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(citing STAFF OF JOINT COMM. ON TAX, JCS-3-03, REPORT OF INVESTIGATION OF ENRON CORPORATION AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS, at 30 (2003)).

8. U.S. DEP'T OF THE TREASURY, THIRD QUARTERLY UPDATE OF THE 2003–2004 PRIORITY GUIDANCE PLAN, at 20 (2004) http://www.irs.gov/pub/irs-utl/2003-2004_pgp.pdf. The terms "priority guidance plan," "Guidance Priority List," and "business plan" are all used interchangeably to refer to the list of tax issues that the government uses to prioritize tax issues that should be addressed through regulations or other administrative guidance. *See* I.R.M. § 32.1.1.4.1(1).

9. N.Y. STATE BAR ASS'N TAX SECTION, REP. NO. 1270, REPORT ON THE IMPACT OF LEGISLATIVE CHANGES TO SUBCHAPTER K ON THE PROPOSED "MAY COMPANY" REGULATIONS UNDER SECTION 337(D) AND TECHNICAL RECOMMENDATIONS REGARDING AFFILIATE STOCK, (2012).

10. U.S. DEP'T OF THE TREASURY, INITIAL VERSION OF THE 2012–2013 PRIORITY GUIDANCE PLAN, at 21 (2012), https://www.irs.gov/pub/irs-utl/2012-2013_pgp.pdf.

11. Partnership Transactions Involving Equity Interests of a Partner, 57 Fed. Reg. 1213 (proposed June 29, 2015) (to be codified at 26 C.F.R. pt. 1). The regulations were published as temporary *and* final regulations, T.D. 9722, but the government treats them as temporary. Amy S. Elliott, *ABA Meeting: Guidance on Small ATBs Won't be Retroactive*, TAX NOTES TODAY (Sept. 22, 2015).

12. 26 C.F.R. §§ 1.337(d)–3T(i) (2016).

13. Fearing the uncertainty and potential chilling effect that the proposed regulations may be having on tax planning, Monte Jackel and Audrey Ellis in March of 2012 called for the government to either finalize the proposed regulations or withdraw them. *Supra* Jackel & Ellis, note 7.

may have ignored the potential risks of retroactivity. Taxpayers for whom the proposed regulations had no deterrent effect benefited from the government's foot dragging at the expense of the public fisc.

Timely tax regulations are crucial in a voluntary tax compliance system like ours in which taxpayers are responsible for calculating and reporting their tax liability.[14] Moreover, a long time lag between enactment of statutory provisions beneficial to taxpayers and Treasury's adoption of regulations to make those provisions effective may lead to taxpayer distrust.[15] There is always a concern that distrust and decreased respect for the tax system may lead to decreased compliance.[16] The government also relies on timely tax regulations to provide effective and uniform enforcement.[17] Uncertainty in the law hampers both the government and taxpayers.[18]

II. IDENTIFYING THE BOTTLENECK

Notwithstanding the importance of timely tax rulemaking, this Article contends that a bottleneck exists in the rule development phase—the phase before public notice-and-comment—at the IRS Chief Counsel's Office, which is primarily responsible for writing tax regulations.[19] Bottlenecks occur when inputs come into a process at greater rates than the next step can convert them into outputs. In the rulemaking context, there simply are more regulations that need to be written than are being written.[20] There are at

14. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2008-10-075, THE PUBLISHED GUIDANCE PROGRAM NEEDS ADDITIONAL CONTROLS TO MINIMIZE RISKS AND INCREASE PUBLIC AWARENESS, at 1 (2008) ("A strong published guidance program will help taxpayers understand and meet their tax responsibilities.") [hereinafter TIGTA REPORT].

15. *See generally* TAXPAYER ADVOCATE SERV., *Factors Influencing Voluntary Compliance by Small Businesses*, *in* NAT'L TAXPAYER ADVOCATE 2012 ANNUAL REPORT TO CONGRESS VOL. 2: TAS RESEARCH AND RELATED STUDIES, 1–70 (2012). In this report, the Taxpayer Advocate reports the results of a survey used to identify factors that may affect small business taxpayers' voluntary compliance.

16. *Id.* at 4.

17. TIGTA REPORT, *supra* note 14, at 15.

18. *Id.*

19. Limited studies of the rulemaking processes at other agencies confirm that it takes longer to develop proposed regulations than to finalize them. *See infra* note 84 and accompanying text. The IRS's justification for launching a pilot project in 2007 supports the notion that a bottleneck exists in rule development. I.R.S. Notice 2007-17, 2007-1 C.B. 748. The pilot project was undertaken to solicit more public input in rule development. The government believed that enlisting the public's help in rule development would allow it to develop guidance that otherwise would not be initiated.

20. *See supra* note 5.

least three plausible explanations for the bottleneck. First, there is an elaborate process within the agency before a rule becomes effective.[21] One of the chief criticisms of agency rulemaking is ossification, which means "it takes a long time and an extensive commitment of agency resources to use the [Administrative Procedure Act (APA)] notice-and-comment process to issue a rule."[22]

The APA is a federal statute that governs, among other things, the process by which federal agencies promulgate rules, which are broadly defined to include agency statements that "implement, interpret, or prescribe law or policy . . . ."[23] Section 553(b) of the APA includes procedures that apply when an agency is engaged in "informal rulemaking."[24] These provisions require agencies to give the public notice of proposed rulemaking via publication in the Federal Register, and the opportunity to comment on proposed rules before they become effective. Section 553(c) of the APA requires the agency to consider the comments received and "incorporate in the rules . . . a concise general statement of their basis and purpose."[25] These procedural requirements apply to "legislative rules," but not "interpretive rules."[26] Although the APA does not define these terms, it is well-settled that legislative rules include those issued pursuant to specific grants of rulemaking authority delegated by Congress to an agency.[27] If the agency follows the APA notice-and-comment requirements, courts are to defer to the agency unless the rule is arbitrary or capricious.[28]

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21. *See infra* notes 37–42 and accompanying text.

22. Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012); *see also* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY, 113, 115 (1992) ("In 1977, . . . the Senate Committee on Government Affairs concluded that delay was the 'fundamental impediment' to the functioning of regulatory agencies.").

23. 5 U.S.C. § 551(4) (2012).

24. *Id.* § 553(b).

25. *Id.* §§ 553(b)–(c).

26. *See id.* § 553(b)(3)(A).

27. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

28. Either under APA § 706(2)(A) or *Chevron*. *Chevron* Step One asks whether the statute is clear and unambiguous. If the statute resolves the matter at issue, courts must give effect to the statute rather than deferring to the agency. This makes sense because courts are just as capable as the agency on issues of statutory construction. If, on the other hand, the statute is

Tax law historically distinguished between legislative and interpretive regulations by looking at the source of the authority used to promulgate the regulation.[29] Treasury regulations adopted under the general grant of authority in IRC § 7805(a) which "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code]"[30] were "interpretative," whereas regulations adopted under specific grants like § 1502 were "legislative."[31] Interpretive regulations were not subject to the APA and they received less judicial deference than regulations adopted under more specific grants of authority.[32]

The United States Supreme Court's unanimous decision in *Mayo Foundation for Medical Education & Research v. United States*[33] clarified that the level of judicial deference afforded to Treasury regulations "does not turn on whether Congress' delegation of authority was general or specific."[34] A few years later, the Tax Court in *Altera Corp. & Subsidiaries v. Commissioner of Internal Revenue*[35] issued a unanimous opinion reviewed by the full court.[36] *Altera* further blurred the historical distinction between legislative and interpretive regulations when it said that all regulations issued under § 7805(a) are legislative, and therefore, subject to the APA notice-and-comment procedures.[37]

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unclear, Step Two requires the court to defer to the agency's interpretation unless it is arbitrary or capricious. 5 U.S.C. § 706(2)(a) (2012); *Chevron*, 467 U.S. at 842–44.

29. Rowan Cos., Inc. v. United States, 452 U.S. 247 (1981); United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982); *see also* ABA Section of Taxation, *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 728 (2004); *see also* I.R.M. § 32.1.1.2.8(3) (Sept. 23, 2011).

30. I.R.M. § 32.1.1.2.8(3) (Sept. 23, 2011). The agency has said that "Most IRS/Treasury regulations are considered interpretative," but it nonetheless claims that it submits most of its regulations to the public for notice-and-comment before adoption. *Id.* at §§ 32.1.2.3(3), 32.1.5.4.7.5.1(3). Professor Kristin Hickman disputes the agency's contention. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007) (introducing an empirical study, which shows that Treasury's compliance with APA rulemaking requirements is inconsistent).

31. I.R.C. § 1502 (authorizing the Secretary to "prescribe such regulations as he may deem necessary" for affiliated groups of corporations who file consolidated tax returns).

32. Skidmore v. Swift & Co., 323 U.S. 134 (1944); *see also* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537, 1569 (2006).

33. 562 U.S. 44, 57 (2011).

34. *Id.* The Court rejected *National Muffler*, which was a lesser form of deference that had applied to tax regulations.

35. 145 T.C. 91, 91–92 (2015) (invalidating Treas. Reg. § 1.3827(d)(2) pursuant to the APA's arbitrary and capricious standard in 5 U.S.C. § 706(2)(A)), appeal docketed, No. 16-70497 (9th. Cir. Feb. 23, 2016).

36. *Id.*

37. *Id.* at 116.

Despite the Tax Court's decision in *Altera*, whether the APA notice-and-comment regime is applicable to all tax regulations is uncertain.[38] To the extent tax rulemaking is subject to the APA, the agency's notice-and-comment procedures are implicated.[39] An abbreviated discussion of the tax rulemaking process provides context.[40] Once a decision is made to initiate a regulation project, a drafting team is formed, comprising personnel from the IRS Chief Counsel's Office and Treasury.[41] The team may prepare an issues memorandum to vet significant technical and policy issues, and may need to coordinate with other offices within the IRS. Drafts of the guidance are circulated for comment to numerous interested parties within the IRS and at Treasury, and briefings may be held with the executives.[42] Multiple levels of review and approval are required from IRS and Treasury personnel.[43] Eventually, the regulation is published in the Federal Register as required by the APA.[44] Public hearings may be held, and then the process is essentially repeated to finalize a proposed regulation.[45] Finalization of a regulation requires the preparation of an executive summary and potentially a background memorandum to alert executives to any issues that should be

38. *See generally* Jasper L. Cummings, *Conjuring Up the 'Force and Effect' of Tax Law*, TAX NOTES TODAY (Jan. 18, 2017), http://www.taxnotes.com/tax-notes-today/tax-system-administration/conjuring-force-and-effect-tax-law/2017/01/18/gcs2; Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 555 (2012) ("The tax law is in a state of flux when it comes to determining precisely when the notice and comment regime of the APA will be implicated.").

39. Various legal requirements outside the APA notice-and-comment process may impede the promulgation of rules. For example, the Congressional Review Act requires that agencies submit regulations to Congress and the GAO before the rule can become effective. I.R.M. § 32.1.6.10.2.4 (Sept. 20, 2011) (discussing Congressional Review Act, 5 U.S.C. § 801(a)(1) (2012)). However, a recent GAO report indicates that tax regulations are often not subject to at least some of these additional procedural requirements. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE, at 18–22 (2016) [hereinafter 2016 GAO REPORT]. See also *id.* at 25–28 for discussion of an agreement between the IRS and OMB that exempts most tax regulations from OMB review.

40. See generally Michael I. Saltzman & Leslie Book, IRS PRACTICE AND PROCEDURE, ¶ 3.02[3] for a discussion of the tax rulemaking process.

41. *See* I.R.S CHIEF COUNSEL REGULATION HANDBOOK, I.R.M. § 32.1 (Aug. 11, 2004) (discussing in detail the tax rulemaking process).

42. The Internal Revenue Manual lists sixteen different offices within the IRS and Treasury who should receive drafts of the regulations. I.R.M. § 32.1.6.7.2 (Aug. 11, 2004).

43. *Id.* at § 32.1.6.

44. *Id.*

45. *Id.*

addressed before finalization.[46] Ten different parties at the IRS and Treasury must sign off on the regulation before it is finalized.[47] Much has already been written on ways to re-engineer the rulemaking process, and this Article will therefore not repeat those important contributions.[48]

The second reason for the bottleneck in tax rulemaking may be due to Congress's habit of delegating non-tax policies and programs to the IRS to implement and administer.[49] Not only does this practice increase the agency's workload, but it also puts the agency in the position of regulating things it knows little or nothing about, which can only add to the agency's learning curve. Productivity growth is tied to experience.[50] In other words, the more experience a worker has with a task, the more work that worker can produce. Conversely, the less experience a worker has with a task, the longer it takes to complete the task. There is no reason to doubt that this conventional wisdom is applicable to the IRS's role in rulemaking in non-tax areas. Academics have written about ways to address the problem of Congress delegating to the IRS authority over issues outside of tax administration.[51]

The third, and perhaps most intractable, reason for the regulatory bottleneck in rule development is simply the formidable challenges of conceptualizing the proper regulatory response to difficult technical tax or policy questions.[52] Empirical scholarship confirms that it takes longer to develop

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46. I.R.M. § 32.1.6.8.1 (Sept. 11, 2011); I.R.M. § 32.1.6.8.2 (Aug. 11, 2004).

47. I.R.M. § 32.1.6.8.4 (Sept. 20, 2011).

48. *See e.g.*, Pierce, Jr., *supra* note 22; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

49. Hickman, *supra* note 3, at 1723 (discussing results of empirical study showing that most Treasury regulations promulgated between 2008 and 2012 concerned "programs, purposes, and functions other than raising revenue"). One prominent example is ObamaCare, or the Patient Protection and Affordable Care Act, which President Obama signed into law in March 2010. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). In addition to overseeing eligibility for the premium tax credit, the IRS is also responsible for administering the shared responsibility provision, which imposes a fee on individuals who fail to have health insurance and do not qualify for an exemption. I.R.C. § 5000A(b).

50. *See, e.g.*, Boyan Jovanovic & Yaw Nyarko, *A Bayesian Learning Model Fitted to a Variety of Empirical Learning Curves, in* BROOKINGS PAPERS: MICROECONOMICS, 247 (Martin N. Baily ed., 1995), https://www.brookings.edu/wp-content/uploads/1995/01/1995_bpeamicro_jovanovic.pdf.

51. *See, e.g.*, Hickman, *supra* note 3, at 1737.

52. *See Renato Beghe Suggests Method for Simplification of Partnership Liabilities*, 49 TAX NOTES 965, (Nov. 26, 1990), *microformed on* AccServ & Microfiche: Doc 90-7892 (Tax Analysts) ("It's

regulations than to finalize them.[53] It is reasonable to expect that tax regulation development likewise requires disproportionate resource investment. Rulemaking may require solving problems with no known or acceptable solutions. Moreover, integrating new law into the tax system is incredibly challenging. The U.S. tax system is incredibly complicated—some have said it is too complicated.[54] The tax system is comprised predominately of detailed rules rather than broad principles.[55] Complexity also arises because of the piecemeal manner in which the Code is drafted over time, with exceptions heaped on top of existing rules and innumerable cross-references embedded in seemingly every provision.[56] Consideration must also be given to the impact a proposed rule has on other published guidance as well as potentially complex effective date issues.[57]

In general, tax practitioners do not perceive the backlog that exists in tax rulemaking to be motivated by government reticence or hostility. Instead, Treasury and IRS Chief Counsel lawyers who are responsible for writing tax

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difficult to write simplified interpretative regulations for statutory provisions . . . that are themselves fiendishly complex.").

53. *See, e.g.*, Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564, 1567 (2015) (citing Kimberly D. Krawiec, *Don't "Screw Joe the Plumber": The Sausage-Making of Financial Reform*, 55 Ariz. L. Rev. 53, 144 n.150); Kerwin & Furlong, *supra* note 22, at 123).

54. Those criticizing the complexity of the tax code include politicians, tax system insiders like the Taxpayer Advocate and the IRS Commissioner, academics, and taxpayers themselves. WHITE HOUSE & DEP'T OF TREASURY, THE PRESIDENT'S FRAMEWORK FOR BUSINESS TAX REFORM: AN UPDATE (2016) (calling for reform of overly complicated business tax system); Jared Bernstein, Senior Fellow, Ctr. on Budget & Pol'y Priorities, Testimony Before the Joint Economic Committee, Meeting the Goals of the Federal Tax System (Apr. 20, 2016) (transcript available at http://www.cbpp.org/federal-tax/meeting-the-goals-of-the-federal-tax-system); NAT'L TAXPAYER ADVOCATE, 2016 ANNUAL REPORT TO CONGRESS, VOL. 1, 305–24 (2016); Gregory Korte, *Even the IRS Chief Says Tax Code is Too Complex*, USA TODAY, Apr. 3, 2014, http://www.usatoday.com/story/news/politics/2014/ 04/02/irs-commissioner-urges-congress-to-simplify-tax-code/7215107/ (IRS Commissioner Koskinen calling for tax simplification); David Lightman, *Most Think Tax System is Too Complicated*, PLANET WASHINGTON (Apr. 11, 2013, 7:52 AM), http://blogs.mcclatchydc.com/washington/2013/04/most-think-tax-system-is-too-complicated.html (indicating that 64% of respondents in Quinnipiac University poll believe the federal tax system is too complex).

55. David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999).

56. *See* Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947) ("The words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize of.").

57. For example, in certain cases, tax regulations may have retroactive effect. *See* I.R.C. § 7805(b).

regulations "are generally well regarded among the tax community as doing the best they can with the difficult job of administering the [IRC]."[58] While the tax bar generally is satisfied with the *quality* of tax regulations, it is the *quantity* of rulemaking that engenders complaint.[59]

III. UNBLOCKING THE BOTTLENECK

A. Decrease Input to the Bottleneck

There are two basic ways to unblock a bottleneck: (1) decrease input *to* the bottleneck; or (2) increase efficiency *at* the bottleneck. One might wonder whether decreasing input, in the form of less tax legislation, could alleviate the regulatory bottleneck. If history is our guide, this is unlikely to occur. Since 1940, Congress has enacted on average one tax bill a year.[60] Even in the modern era of intense gridlock, Congress continues to pass tax legislation.[61] Even if it were realistic to reduce the flow of new legislation, some amount of rulemaking inevitably will be necessary to clarify and interpret existing statutory provisions.

It is also impractical to expect that if Congress passes more detailed statutes then less regulatory guidance would be needed for the law to be implemented and understood. To begin with, Congress is not incentivized to enact more detailed legislation because proposed legislation must be scored, meaning the fiscal consequences of proposed legislation must be estimated, whereas regulations are not scored.[62] Even if Congress had the expertise and the inclination to write more detailed Code provisions, spelling out too many details invites loopholing.[63] In any event, more detailed Code provisions will

58. Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1202 (2008).

59. Hickman, *supra* note 30, at 1800; *see also* Bergin et al., *supra* note 2 (quoting former Treasury Legislative Counsel Michael Desmond when he stated that "taxpayers are . . . banging down the doors to get . . . guidance out and people [inside the government] are really struggling . . . to try to get it out").

60. *See generally* Urban Inst. & Brookings Inst., *Major Enacted Tax Legislation Table*, TAX POL'Y CTR. http://www.taxpolicycenter.org/legislation/index.cfm (last visited Aug. 27, 2017).

61. Between 2001 and 2013, Congress has passed at least one tax bill a year. *Id.*

62. Jonathan B. Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 791–92 (2015).

63. Michelle M. Kwon, *The Criminality of "Tax Planning"*, 18 FLA. TAX REV. 153, 177 (2015).

not necessarily reduce the amount of regulation.[64] Congress already writes very detailed Code provisions, leaving the IRS little leeway in tax policy decisions.[65] And yet, Treasury and the IRS write massive quantities of regulations.[66] This behavior indicates that the IRS and Treasury see the tax laws, however detailed, as requiring administrative interpretation. Decreasing input to the bottleneck is beyond the scope of this Article.[67]

B. Increase Efficiency at the Bottleneck

The most direct way to increase efficiency *at* the bottleneck would be to allocate additional resources to the IRS Chief Counsel's Office. That approach seems untenable, particularly in the current political environment.[68] Congress has cut the IRS's budget by 17% since 2010, the year Republicans captured control of the House of Representatives.[69] These funding cuts have

64. Forman & Mann, *supra* note 62, at 791–92.

65. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 197–202 (Cambridge Univ. Press 1999) (finding that Congress delegates less in tax than in other areas).

66. 2016 GAO REPORT, *supra* note 39, at 2 ("Treasury and IRS are among the largest generators of federal agency regulations . . . .").

67. Many ways that might decrease input to the rulemaking process would depend on Congress. For example, the volume of regulation projects may decrease if Congress writes fewer tax statutes or delegates fewer non-tax programs to the IRS to implement and administer. The agency has tried to trim the regulatory bottleneck by issuing guidance short of regulations, such as Notices and Revenue Rulings. This approach, sometimes called "informal rulemaking lite," avoids notice-and-comment on the front end, and because the guidance is less authoritative, can generally be issued more quickly. *See* Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. 89, 101 (2014) (discussing FDA's use of administrative guidance).

68. On January 23, 2017, President Trump imposed a hiring freeze on all federal agencies. Memorandum from Donald J. Trump, President, United States of American, to the Heads of Exec. Dep'ts & Agencies, (Jan. 23,2017), https://www.gpo.gov/fdsys/pkg/DCPD-201700062/pdf/DCPD-201700062.pdf.

69. CHUCK MARR & CECILE MURRAY, IRS FUNDING CUTS COMPROMISE TAXPAYER SERVICE AND WEAKEN ENFORCEMENT 1 (Ctr. On Budget & Pol'y Priorities 2016), http://www.cbpp.org/sites/default/files/atoms/files/6-25-14tax.pdf. The motivation for these budget cuts has been questioned, but it seems clear that the IRS is being singled out. *See, e.g.*, IRS, IRS OVERSIGHT BOARD, FY2015 IRS BUDGET RECOMMENDATION SPECIAL REPORT 5 (2014), https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20FY2015%20Budget%20Report-FINAL.pdf ("The IRS was one of only a few government agencies that did not have its funding restored to pre-sequestration levels under the Consolidated Appropriations Act of 2014."). The IRS Oversight Board has had to suspend its operations after the U.S. Senate failed to confirm enough members to make up a quorum. IRS

resulted in 13,000 fewer employees, a 14% decline in the agency's workforce overall,[70] and a 14% reduction between 2011 and 2015 in the number of lawyers in the IRS Chief Counsel's Office, the division responsible for writing tax regulations.[71] To absorb those funding cuts, the IRS has cut back on the guidance provided to taxpayers.[72] Despite public pressure, sufficiently funding the IRS seems unimaginable in the current political environment.[73] Given the decline in funding, increasing efficiency at the bottleneck by sufficiently staffing the agency is a non-starter.

C. Responding to Agency Inaction

Taxpayers have limited options to compel the IRS and Treasury to write tax regulations.[74] Taxpayers have had some success enforcing statutes that mandate the issuance of regulations.[75] Despite Congress's delegation, the

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OVERSIGHT BOARD, 2014 TAXPAYER ATTITUDE (2014) https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20Taxpayer%20Attitude%20Survey%202014.pdf. Fewer fiscal appropriations and less general support to the IRS may be intended to starve the agency as an indirect way of starving the beast that some perceive the federal government to be.

70. MARR & MURRAY, *supra* note 69, at 3.

71. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-624, IRS BUDGET: IRS IS SCALING BACK ACTIVITIES AND USING BUDGET FLEXIBILITIES TO ABSORB FUNDING CUTS 10 (2015).

72. *See, e.g.*, Rev. Proc. 2014-3, 2014-1 I.R.B. 112 (listing areas in which the IRS Chief Counsel's Office will not issue rulings or determination letters, and stating: "These lists should not be considered all-inclusive because the Service may decline to issue a letter ruling or a determination letter when appropriate in the interest of sound tax administration (including due to resource constraints"). The IRS's 2015–2016 guidance plan lists 277 projects, which is "more than 14 percent below the smallest number of projects—317—since 2011." Nathan J. Richman & Andrew Velarde, *Shrinking Priority Guidance Plan Addresses Spinoffs, Marriage*, TAX NOTES TODAY (Aug. 17, 2015), http://www.taxnotes.com/taxpractice/tax-system-administration/shrinking-priority-guidance-plan-addresses-spinoffs-marriage/2015/08/17/1s8np.

73. There have been numerous calls for Congress to appropriately fund the IRS. *See, e.g.*, MARR & MURRAY, *supra* note 69; George C. Howell, III, Letter to Congress (ABA Section of Taxation Mar. 17, 2016), *reprinted in ABA Tax Section Supports More IRS Funding*, TAX NOTES TODAY (Mar. 17, 2016), http://www.taxnotes.com/tax-notes-today/tax-system-administration/aba-tax-section-supports-more-irs-funding/2016/03/18/g3jn?highlight=ABA%20Section%20of%20Taxation.

74. *See* Albert C. Lin, *Power to the People: Restoring the Public Voice in Environmental Law*, 46 AKRON L. REV. 1017, 1019 (2013) ("Judicial review of agency action is generally easier to obtain than judicial review of agency inaction."); *see also* Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 168 (2014) (describing a "presumption against judicial review of agency inaction").

75. *See, e.g.*, Francisco v. Comm'r, 370 F.3d 1228 (D.C. Cir. 2004), *aff'g* 119 T.C. 317

government may not comply by issuing regulations.[76] Under those circumstances, courts have applied so-called phantom regulations, in effect treating mandatory delegations of Congressional authority to the Treasury as self-executing, meaning the issuance of regulations is not a precondition to the effectiveness of the underlying statute.[77]

Taxpayers could resort to § 706(1) of the federal APA, which permits a court to "compel agency action unlawfully withheld or unreasonably delayed."[78] But § 706(1) "applies only to '*discrete* action' that is 'legally *required*... about which an official had no discretion whatever.'"[79] In deciding whether to intervene in agency non-action cases, courts apply several factors set forth in *Telecommunications Research & Action Center v. FCC*.[80] Even with respect to mandatory delegations, which obligate Treasury to write regulations, the process, as with any judicial challenge, could be slow and potentially costly.

Section 553(e) of the APA provides that "Each agency shall give an interested person the right to petition for the issuance . . . of a rule."[81] This provision is largely ineffective, however. Although agency denials of rulemaking

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(2002); Pittway Corp. v. United States, 102 F.3d 932 (7th Cir. 1996); First Chicago Corp. v. Comm'r, 842 F.2d 180 (7th Cir. 1988), *aff'g* 88 T.C. 663 (1987); Occidental Petrol. Corp. v. Comm'r, 82 T.C. 819 (1984). *See generally* Amandeep S. Grewal, *Substance Over Form? Phantom Regulations and the Internal Revenue Code*, 7 HOUS. BUS. AND TAX L. J. 42, 92 (2006); Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 TAX LAW. 413, 414–15 (2003).

76. *See* Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Rulemaking Authority*, 68 ADMIN. L. REV. 395, 436 (2016) (finding that the agency complied less than 60% of the time based on observing forty years of Congressional rulemaking delegation to the Department of the Interior).

77. By contrast, a discretionary delegation is one where Congress specifically permits, but does not require, Treasury to issue regulations to implement a particular rule. Under a discretionary delegation, Treasury has the prerogative to decide as a policy matter whether to write regulations. *See* Gall, *supra* note 75, at 444 ("If the delegation is not only a delegation of rule-writing authority but also a delegation of policy-making authority, *i.e.*, a policy delegation, phantom regulations will not be employed."). Statutes containing discretionary delegations are said to be non-self-executing because these statutes generally do not become operative unless and until regulations are issued. N.Y. STATE BAR ASS'N TAX SECTION, REP. NO. 1121, REPORT ON LEGISLATIVE GRANTS OF REGULATORY AUTHORITY, at n.13 (2006), http://old.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1121Report.pdf.

78. Administrative Procedure Act, 5 U.S.C. § 706(1) (2012).

79. *In re* Long-Distance Tel. Serv. Fed. Excise Tax Litig., 751 F.3d 629, 634 (D.C. Cir. 2014) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63–64 (2004) (emphasis in original)).

80. 750 F.2d 70, 80 (D.C. Cir. 1984).

81. 5 U.S.C. § 553(e) (2012); 26 C.F.R. § 601.601(c) (2012).

petitions must include the reasons for denial, and are subject to judicial review, there is no time limit within which agencies must respond.[82] The statute says only that agencies are to respond to petitions within a "reasonable time."[83] *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Treasury* is the only case this author is aware of involving a petition for rulemaking directed to the IRS.[84]

D. Using Surrogate Rulemakers

We can expect the tax regulations bottleneck to persist and perhaps even to worsen because the IRS's responsibilities are increasing at a time of budget declines. Currently, rule development at the IRS requires a significant investment of its resources because the agency uses a mostly traditional model of rulemaking, meaning it promulgates regulations in a top-down, centralized fashion. Given the decline in funding, coupled with increasing responsibility, the IRS's current top-down, labor-intensive approach to rulemaking seems unsustainable.

In light of this rather bleak situation and the other less than satisfactory ways to increase efficiency in rule development, consideration should be given to shifting part of the workload to non-government experts.[85] This Article considers whether collaborative governance theory that better engages the tax bar in rulemaking can alleviate the regulatory bottleneck. This Article does not attempt to develop a high-level theory of rulemaking. Instead, the focus here is much more grounded. It seeks to apply existing collaborative governance theory to the practical challenge presented by the tax rulemaking bottleneck.

The collaborative governance movement began in the late 1980s by certain administrative agencies that experimented with alternatives to traditional rulemaking in response to regulatory failures. Traditional rulemaking was seen as adversarial—with affected parties jockeying with each other and with the agency for influence and advantage. The idea was to democratize the rulemaking process by facilitating more participation and collaboration

82. Auer v. Robbins, 519 U.S. 452, 459 (1997) (citing 5 U.S.C. §§ 555(e), 702, 706 (2012)).

83. 5 U.S.C. § 555(b).

84. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Treas., 21 F. Supp. 3d 25 (D.C. 2014) (indicating that IRS's failure to act on rulemaking petition does not give petitioner standing to sue IRS). Citizens for Responsibility & Ethics in Wash. (CREW) submitted a rulemaking petition to the IRS with respect to regulations under § 501(c)(4). *Id.* at 30. The IRS responded about three weeks later, saying it would "consider . . . changes in this area." CREW later filed suit, claiming the IRS had not taken any action on the regulations at issue, which amounted to an effective denial of its rulemaking petition. *Id.*

85. Rulemaking also can be made less labor intensive by writing less detailed regulations.

between the agency and affected parties.

Collaborative governance has not gained traction in practice. It is used most often in environmental regulation and health and safety regulation, and the results of some of the experiments have been uncertain and disputed. Three main criticisms are: (1) democratizing the rulemaking process fails to improve the quality of public comments; (2) collaborative governance does not actually speed up rulemaking; and (3) the risk of agency capture may increase to the extent the government collaborates with repeat private actors. After providing an overview of the collaborative governance movement in Part IV of this Article, Part V explains how tax rulemaking is sufficiently different from the existing experiments such that using the tax bar as surrogate rulemakers may dissipate these criticisms.

IV. USING COLLABORATIVE GOVERNANCE PRINCIPLES TO INNOVATE THE TRADITIONAL RULEMAKING PROCESS

A. Summary of Collaborative Governance Research

Administrative agencies historically promulgated rules using a command-and-control model. Under this model, the agency promulgates or commands, the rules and controls compliance with those commands through legal sanctions.[86] Traditional rulemaking reflects a top-down approach where decisionmaking is centralized at the administrative agency. One assumption underlying traditional command-and-control rulemaking is that the agency is in the best position to craft regulations due to the expertise of its people.[87] Whatever its benefits, the traditional approach to rulemaking "overburdens agencies and undervalues the capacity of nongovernmental groups to participate in governance."[88]

Over the years, alternative models have been put forward to address shortcomings of the command-and-control model. One alternative to traditional command-and-control rulemaking is negotiated rulemaking, which Philip Harter championed in the 1980s.[89] As the name suggests, negotiated rule-

86. OFFICE OF VICE PRESIDENT AL GORE, IMPROVING REGULATORY SYSTEMS, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993) ("One of the major problems is that regulatory programs rely too heavily on traditional command-and-control regulation rather than on more innovative, market-oriented mechanisms that allow regulated entities greater flexibility in meeting regulatory objectives.").

87. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 9 (1982).

88. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 13 (1997).

89. Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind*

making is the development of rules through negotiation or consensus between the agency and private stakeholders.[90] The agreed-upon rule becomes the basis for APA notice-and-comment rulemaking.[91] In contrast to traditional rulemaking, negotiated rulemaking is a bottom-up approach in the sense that it engages stakeholders outside of government to develop, implement, and enforce regulation. Congress formalized negotiated rulemaking when it passed the Negotiated Rulemaking Act in 1990.[92] The Negotiated Rulemaking Act permits agencies to develop proposed rules using negotiated rulemaking committees.[93]

Negotiated rulemaking grew out of a concern that the traditional approach was ossifying and adversarial.[94] Some negotiated rulemaking proponents viewed traditional rulemaking as "a fundamentally adversarial process in which affected parties jockeyed with each other and with the agency for influence and advantage."[95] One objective of negotiated rulemaking was to bring these affected interests to the negotiating table to reach consensus on a proposed regulation before it was subjected to public notice-and-comment under the APA. Another goal of negotiated rulemaking was to increase public participation to enhance the legitimacy and quality of rules.[96] While enhancing rule legitimacy and quality is each valuable in its own right, getting the public's advice and buy-in might also help to demystify the rulemaking process by warding off litigation challenging the rules.[97]

In 1997, Professor Jody Freeman proposed a "collaborative governance" model as a response to an ossified rulemaking process.[98] Freeman and others

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Act, 85 NEB. L. REV. 1015, 1035 (2007) (noting that Harter published the first article about negotiated rulemaking).

90. Harter, *supra* note 87, at 28.

91. Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 411, 423 (2009).

92. Negotiated Rulemaking Act of 1989, Pub. L. No. 101-648, § 3(a), 104 Stat. 4970, § 583 (1990) (renumbered § 563, Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, § 3(a)(2), 106 Stat. 944 (1992), codified as 5 U.S.C. §§ 561–570a (2012)).

93. 5 U.S.C. § 563(a).

94. *See generally* Harter, *supra* note 87.

95. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 205 (CQ Press, 4th ed. 2011).

96. *See* Harter, *supra* note 87, at 28–31 (discussing the anticipated advantages of negotiated rulemaking).

97. *Id.*

98. Freeman, *supra* note 88.

see collaborative governance as an umbrella term that encompasses negotiated rulemaking.[99] Others speak in terms of "new governance" or "responsive regulation."[100] The collaborative governance literature, and by extension collaborative governance itself, is simultaneously too broad and too narrow. It can be seen as too broad in the sense that it lacks specificity.[101] Collaborative governance can also be too broad in the sense that academics have not agreed on a shared terminology.[102] By contrast, the collaborative governance literature can be viewed as too narrow in the sense that much of it consists of case studies documenting particular observances of collaborative governance.[103] Political scientists Chris Ansell and Alison Gash observe that the "untidy character of the literature on collaboration reflects the way it has bubbled up from many local experiments."[104] Agencies began experiment-

99. *Id.* at 34–36; *see also* Harter, *supra* note 91, at 414.

100. *See, e.g.*, Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 444–45 (2010); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 954 (2009); Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 478 (2004). Professor Cristie Ford speaks of "new governance" as "something of a big tent that captures several discrete but related approaches." Ford, *supra*, at 444. Responsive regulation "emphasizes a dynamic, non-adversarial approach where regulators assist regulated actors in complying with the law, and where regulated actors, as reward for their cooperation, assist regulators in crafting the regulatory environment." *Id.* at 437. *See generally* Valerie Braithwaite, *Responsive Regulation and Taxation: Introduction*, 29 L. & POL'Y 1 (2007) (describing the Australian Taxation Office's Compliance Model, which is based on responsive regulation).

101. John Donahue, *On Collaborative Governance* 2 (Harvard U., Working Paper No. 2, 2004), https://sites.hks.harvard.edu/m-rcbg/CSRI/research/publications/workingpaper_2_donahue.pdf (characterizing collaborative governance as "some amalgam of public, private, and civil-society organizations engaged in some joint effort").

102. Karkkainen, *supra* note 100, at 478 ("New Governance scholarship has not yet settled upon a common nomenclature, leaving even the most dedicated reader with the daunting task of sorting through and translating a bewildering babel of unfamiliar, competing, and possibly incompatible terminology, which may or may not describe similar phenomena in different terms, or different phenomena in similar terms."); *id.* at 496 ("New Governance is not a single model, but a loosely related family of alternative approaches to governance."); *see also* U. NETWORK FOR COLLABORATIVE GOVERNANCE, DEFINITIONS OF COLLABORATIVE GOVERNANCE, www.kitchentable.org/sites/ktd/files/documents/Definitions%20of%20Collaborative%20Governance.pdf (last visited Aug. 27, 2017) (illustrating collected definitions of "Collaborative Governance").

103. Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. THEORY 543, 544 (2007) (indicating that "much of the literature is focused on the species rather than the genus").

104. *Id.*

ing with alternatives to traditional models in response to government failures.[105] Scholars, in turn, extrapolated from those particular agency experiments to attempt to develop a theoretical framework. Thus, instead of developing a theory and applying it to practice, scholars were using practice to formulate theory. They observed the phenomena first and then sought to anchor those observations with a theory.

B. Collaborative Governance Literature in Tax

This Article fills a gap in the literature by applying collaborative governance theories to tax rulemaking. Little collaborative governance scholarship exists that pertains to tax. Of the existing tax scholarship, some academics focus on the application of collaborative governance theories to issues of enforcement or compliance rather than rulemaking. For example, Dennis Ventry situates the IRS's Advance Pricing Agreement Program and the Compliance Assurance Process within the "new governance" and "responsive regulation" literatures.[106] The Compliance Assurance Process seeks to resolve potential tax issues "through transparent and cooperative interaction between [large business] taxpayers and the IRS" before their tax returns are filed.[107] The Advance Pricing Agreement Program allows taxpayers to resolve transfer-pricing issues "in a principled and cooperative manner" before their tax returns are filed.[108] The goal of both programs is to reduce tax administration and compliance burdens for both the government and the taxpayer.[109] Ventry sees these pre-return filing programs as collaborative governance processes because they allow taxpayers and their advisors to "participate directly in the resolution of [their] of tax issues."[110]

Less attention in the scholarship has been devoted to delay in rulemaking

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105. *Id.*

106. Dennis Ventry, *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 437, 465 (2008).

107. I.R.M. § 4.51.8.2(2) (Sept. 25, 2015).

108. Rev. Proc. 2015-41, 2015-35 I.R.B. 263. Transfer-pricing refers to the methods by which related companies, and in particular multi-nationals, determine the prices to charge one another for goods or services. *See* CYM H. LOWELL ET AL., U.S. INTERNATIONAL TRANSFER PRICING § 1.01 (Warren Gorham & Lamont 2d ed. 1998). Governments are concerned with transfer-pricing strategies that shift income from high-tax to low-tax jurisdictions. *See id.*

109. I.R.M. § 4.51.8.2(4)(C) (Compliance Assurance Process); Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (Advance Pricing Agreement Program).

110. Ventry, *supra* note 106, at 466; *see also* Leigh Osofsky, *Some Realism about Responsive Tax Administration*, 66 TAX L. REV. 121 (2012) (analyzing "the limitations of responsive tax administration for U.S. tax compliance" through the lens of the Compliance Assurance Program).

attributable to the rule development phase. Tax scholars who have applied collaborative governance principles to the rule development phase have focused their efforts primarily on the potential benefits from increased public participation in rule development. Carole Berry called on the IRS to experiment with negotiated rulemaking.[111] Danshera Cords called for more public participation in tax rulemaking.[112] Leslie Book recommends that the IRS's National Taxpayer Advocate and tax clinics act as proxies in the rulemaking process for low-income taxpayers, who otherwise would lack a voice due to the complexity of the tax laws and their lack of resources.[113] This Article builds on Book's work by recommending that the established tax bar do more to act as surrogate rulemakers.[114] But unlike Book, who focuses on the underrepresentation of poorly resourced taxpayers in rulemaking, this Article seeks to leverage members of the established tax bar, who typically represent well-resourced taxpayers.

C. A Working Definition of Collaborative Governance

At its root, collaborative governance, including negotiated rulemaking, replaces agency-centric command-and-control rulemaking with a new paradigm that facilitates more participation and collaboration by promoting "movement downward and outward."[115] In light of the imprecision in the collaborative governance literature, this Article will use the following working definition of collaborative governance: governmental actors and non-governmental experts working collaboratively in the pursuit of a public

111. Carole Berry, *Sub S One Class of Stock Requirement: Rulemaking Gone Wrong*, 44 CATH. U. L. REV. 11 (1994); *see also* Ehren Wade, *Just What the Doctor Ordered?: Health Care Reform, the IRS, and Negotiated Rulemaking*, 66 ADMIN. L. REV. 199 (2014) (advocating IRS's use of negotiated rulemaking to increase public participation and to alleviate strain on agency resources).

112. Danshera Cords, *"Let's Get Together": Collaborative Tax Regulation*, 11 PITT. TAX REV. 47 (2013) (recommending the IRS use collaborative governance techniques to increase involvement of taxpayers in rulemaking).

113. Book, *supra* note 38.

114. *See* Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 55 (2008) (harnessing "a credible third party to play a surrogate regulatory role"); *see also* NEIL GUNNINGHAM & DARREN SINCLAIR, LEADERS AND LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION 18 (2002) ("Given the limited resources of most regulatory agencies, . . . there is a need to shift away from direct regulation toward a variety of alternative strategies, involving . . . the use of third parties as surrogate regulators.").

115. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 381 (2004).

goal—tax rulemaking—using specified processes.[116] It is important to emphasize four aspects of this definition. First, the involvement of non-governmental actors is not a call to engage broad public participation in tax rulemaking.[117] While the lack of representation for certain taxpayers in the rule development process is recognized, this Article does not address that problem. Consequently, what is articulated here is unlike crowdsourcing, which more typically "leverages a large and diverse crowd."[118] Second, emphasis must be given to the requirement of "working collaboratively." One could imagine a system such as outsourcing or another type of private ordering in which non-governmental actors agree to perform certain tasks on the government's behalf and subject to the government's control.[119] Even under those circumstances, it may be said that the government and the non-governmental actors are cooperating in the sense that they are working toward a shared goal. But for purposes of this Article, they are not necessarily collaborating. A distinction should be made between working independently yet cooperatively toward a shared goal versus working interdependently or collaboratively toward a shared goal. Third, the participants must be pursuing a public goal, in this case, tax rulemaking. Finally, the working definition

116. This working definition borrows elements from Ansell & Gash's definition of collaborative governance: "public and private actors work[ing] collectively in distinctive ways, using particular processes, to establish laws and rules for the provision of public goods." Ansell & Gash, *supra* note 103, at 545. The Weil Program on Collaborative Governance at the John F. Kennedy School of Government definition: "The engagement of non-governmental actors in the pursuit of public missions." Donahue, *supra* note 101, at 1.

117. Indeed, as E. Donald Elliott observed: "Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

118. David Orozco, *The Use of Legal Crowdsourcing ("Lawsourcing") to Achieve Legal, Regulatory, and Policy Objectives*, 53 AM. BUS. L.J. 145, 151 (2016). Orozco coins the term "lawsourcing" to describe crowdsourcing applied to legal issues and providing examples. Crowdsourcing is a variation of "outsourcing" to an undefined crowd of people who contribute their expertise to solve a problem. Jeff Howe, *The Rise of Crowdsourcing*, WIRED, (June 01, 2006, 12:00 PM), https://www.wired.com/2006/06/crowds/. The IRS completed its first ever crowdsourcing challenge on April 16, 2016, using the government's crowdsourcing platform called challenge.gov. The challenge, which was co-sponsored by the Mortgage Bankers Association, asked participants to "organize and present tax data in new ways that make tax information easier to understand and use." I.R.S. News Release IR-2016-86 (June 10, 2016). Cash prizes provided by the Mortgage Bankers Association were announced on June 10, 2016 for best overall design, best taxpayer usefulness, and best financial capability. *Id.*

119. *See* Ansell & Gash, *supra* note 103, at 548 (distinguishing between collaborative governance and public-private partnerships).

emphasizes the use of "specified processes." To be sure, the IRS and the established tax bar have informally engaged in collaborative rulemaking. The working definition imagines formal and explicit mechanisms to facilitate that process.[120]

V. ADDRESSING THE ANTICIPATED CRITICISM: COLLABORATIVE GOVERNANCE REIMAGINED FOR TAX RULEMAKING

Collaborative governance techniques have not taken a strong hold despite the touted advantages. Several criticisms about the efficacy of collaborative governance may contribute to this unfortunate result. This Article's contention is that the established tax bar's participation as surrogate rulemakers avoids these major criticisms.

A. Quality of Participation

The term e-rulemaking is commonly defined as "the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online . . . and (iii) enable more effective and diverse public participation."[121] The government's central e-rulemaking tool is regulations.gov, which basically digitizes the APA's notice-and-comment process.[122] Members of the public can use the website to access regulatory materials, including regulations and public comments, and can submit comments on a regulation or to another comment.[123] Agencies also use websites, online portals, and social media as tools to engage the public.[124] A rich body of literature has developed in the area of e-rulemaking, much of it focused on the role of e-rulemaking to increase the availability of data to the public in the interest of transparency and greater participation of the lay public in government decision making.[125]

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120. *See id.* at 546; *infra* Part VI.

121. CYNTHIA R. FARINA, AM. BAR ASS'N, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 3 (2008) [hereinafter FEDERAL E-RULEMAKING REPORT], http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2505&context=facpub. In 2002, Congress passed the E-Government Act as a way to use technology to facilitate increased access to government information and increased public participation in government. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002), 44 U.S.C. §§ 3601–3606 (2012).

122. OFFICE OF MGMT. & BUDGET, FY 2014 ANNUAL REPORT TO CONGRESS: E-GOVERNMENT ACT IMPLEMENTATION 31–32 (2015).

123. *About Us*, REGULATIONS.GOV, https://www.regulations.gov/aboutProgram (last visited Aug. 14, 2017).

124. OFFICE OF MGMT. & BUDGET, *supra* note 122, at 27.

125. *See generally* Cords, *supra* note 112; Book, *supra* note 38.

One consequence of collaborative rulemaking is the high noise-to-signal ratio that may result from the participation of the untrained public in rulemaking.[126] Making the comment process easier by, for example, putting it online may not improve the deliberative process. Instead, it may simply increase the number of useless comments relative to useful ones.[127] The prevalence of spam on social media is proof of this phenomenon. This phenomenon has also been observed in rulemaking at the Environmental Protection Agency (EPA), which is a frequent user of collaborative governance.[128]

Unlike environmental regulations, tax regulations typically fail to generate the same kind of passionate rhetoric and controversy. There is a grassroots activism surrounding environmental issues that simply does not exist in taxation. While a person of reasonable education can conceptually understand that high levels of toxins in water may be harmful, for example, complex tax issues lack a similar populist appeal. Issues involving high public salience and low technical complexity are most likely to engage public comment. Many, if not most, tax issues, however, have low public salience and high technical complexity. Ordinary members of the public are unlikely to find most tax issues important, perhaps because the "topics are too specialized, technical, or narrow to generate public interest."[129] Even if citizens were interested in taxation, issue complexity deters engagement.[130] As a result, the use of technology to facilitate deliberations of tax issues is not apt to result in a high noise-to-signal ratio. Comments by and large likely come from tax practitioners and trade associations.[131] The use of technology in tax rulemaking is

126. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441 (2004); *see also* BETH SIMONE NOVECK, WIKI GOVERNMENT 132 (Brookings Inst. Press 2009) (noting the "high noise-to-signal ratio" in environmental law).

127. *See generally* Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41 (2006).

128. *See id.* (illustrating an empirical study of e-mail comments received in Environmental Protection Agency (EPA) rulemaking).

129. Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10,670, 10,673 (2014).

130. Thomas A. Bryer, *Public Participation in Regulatory Decision-Making*, 37(2) PUB. PERFORMANCE & MGMT. Rev. 263, 265 (2013).

131. *See* Cynthia Farina et al., *Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project*, 41 FORDHAM URB. L.J. 1527, 1569 (2014) ("Our impression . . . is that many of the . . . regulations issued annually by United States regulators involve relatively narrow issues on which affected stakeholders are already effectively commenting."). These comments go on to say, "The better option, in such rulemakings, may be to supplement statutory notice-and-comment with one of the carefully limited and controlled deliberative processes that are constructed around a representative sampling of participants who agree to contribute the required effort." *Id.*

unlikely to change that fact except perhaps on the margin.[132]

B. Effects on Rulemaking Efficiency

Intuitively, one might expect collaborative governance to increase rulemaking efficiency. After all, the collaborative governance model allocates more resources to a problem by drawing in experts outside the government to work with the agency. Involving non-governmental experts might also be expected to result in faster rulemaking to the extent collaborating experts have access to information that the government does not.[133] These hypotheses have not been sufficiently tested due to a lack of data.[134] Data is limited

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132. Consider the recent debt-equity regulations under § 385. Of the 200 unique comments received on regulations.gov, at least fifty comments from individuals, several who posted anonymously, were in favor of efforts to stop corporate inversions or perceived corporate abuses of the system without offering any technical comments to the regulations. Many of these commenters expressed the sentiment that the tax system was unfair because sophisticated multi-national corporations could avoid taxes while individual taxpayers could not. *See, e.g.*, GJ Buckman, Comment Letter on Treatment of Certain Interests in Corporations as Stock or Indebtedness (REG-108060-15), (May 4, 2016), https://www.regulations.gov/document?D=IRS-2016-0014-0038 ("I am disgusted with the corporate tax dodging that is bankrupting this country while forcing me to pay more and more taxes to support the things all humans need. Enough is enough. I support the new rules that make it harder for corporations to dodge taxes—in fact, I would like them to be even stronger."); Howard Miller, Comment Letter on Treatment of Certain Interests in Corporations as Stock or Indebtedness (REG-108060-15), (May 10, 2016), https://www.regulations.gov/document?D=IRS-2016-0014-0052 ("I must pay my taxes. You pay your taxes."). The agency also received 29,604 identical comments from Americans for Tax Fairness members and supporters. These comments expressed support for the "proposed 'earnings stripping' rule" to ensure American companies pay "their fair share" of taxes. Frank Clemente, Comment Letter on Treatment of Certain Interests in Corporations as Stock or Indebtedness (REG-108060-15), (July 1, 2016), https://www.regulations.gov/document?D=IRS-2016-0014-0080. The public may have shown greater interest in the § 385 regulations because of coverage in the popular press regarding corporate inversions and earnings stripping. *See, e.g.*, Andrew Soergel, *Ask an Economist: What the Heck is a Corporate Inversion?*, U.S. NEWS, Feb. 16, 2016, http://www.usnews.com/news/the-report/articles/2016-02-16/ask-an-economist-what-the-heck-is-a-corporate-inversion; Steven Davidoff Solomon, *Corporate Inversions Aren't the Half of It*, N.Y. TIMES, Feb. 9, 2016, https://www.nytimes.com/2016/02/10/business/ dealbook/corporate-inversions-arent-the-half-of-it.html; Emily Stephenson, *"Earnings Stripping:" The Next Tax-Dodging Strategy in Obama's Crosshairs?*," REUTERS, Oct. 2, 2014, http://www.reuters.com/article/us-usa-inversion-treasury-idUSKCN0HR1YA20141002.

133. *See* Harter, *supra* note 87, at 30.

134. *See* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 113 (2011) ("As an empirical matter . . . little is known about the rule development phase."). Wagner and her colleagues used EPA records

because the APA record keeping requirements apply only after rules are developed and are published in the Federal Register to solicit public comment.[135] While the APA mandates the notice-and-comment process, it does not address the rule drafting process.[136]

In 2007, the IRS announced a pilot program pursuant to which it intended to seek public input in rule development as part of an effort to publish guidance in "a more timely and efficient manner."[137] The government expected that public participation in rule development would speed up the rulemaking process.[138] The agency believed that "upfront public participation might enable it to develop guidance that otherwise would not be started. In addition, Counsel believed this process would help it use its staff resources more efficiently because some of the background research would be provided

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to determine it took an average of four years for the EPA to write a proposed regulation. The EPA voluntarily logged contacts and communications during the entire life cycle of rulemaking, including the rule development phase. *Id.* at 121. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS, at 22 (2009) [hereinafter 2009 GAO REPORT] (noting that agencies are not tracking time or staffing resources for rule development).

135. *See* Krawiec, *supra* note 53, at 71.

136. *See* JEFFREY W. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 6–7 (2006); *see also* Stephen M. Johnson, *Beyond the Usual Suspects: Acus, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 116 n.234 (2013) (noting that the APA does not call for advance notices of proposed rulemaking).

137. I.R.S. Notice 2007-17, 2007-1 C.B. 748. It is unclear to me whether the pilot project remains in place. Although the Notice resulted in only three public submissions, the IRS Chief Counsel's Office said they were "encouraged by the results of the pilot program . . . but a few additional projects are required before a decision can be reached on the future of this program in our guidance process." TIGTA REPORT, *supra* note 14 at 17, 31. It is referred to in I.R.M. § 32.2.2.6.4, which includes the factors the agency is to consider when determining which projects to include on the agency's priority guidance plan. I.R.M. § 32.2.2.6.4 (Aug. 28, 2009) ("When selecting projects for the GPL [Guidance Priority List], the IRS and Treasury should consider . . . whether the guidance may be appropriate for enhanced public involvement through the process described in Notice 2007-17."). However, it could as likely be that the Internal Revenue Service Manual section is out of date and the Notice has simply not been made obsolete. Professor Stephanie McMahon said, "Congress quickly terminated the program as granting too much power to participating interested parties," but that statement is not substantiated by the sources cited. Stephanie Hunter McMahon, *The Perfect Process in the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 601 (2016).

138. *See* I.R.S. Notice 2007-17, 2007-1 C.B. 748. (stating that "increased public participation in the preliminary stages of certain guidance development would provide a significant benefit to taxpayers by permitting IRS and Treasury to hasten the publication of a greater number of guidance projects"); *see also* TIGTA REPORT, *supra* note 14, at 15.

by the public."[139] Unfortunately, the government did not evaluate whether the pilot program improved the timeliness of guidance.[140]

Some empirical scholarship shows that negotiated rulemaking speeds up the rulemaking process, but the results are mixed. Professor Gary Coglianese's empirical work showed that the EPA's negotiated rulemaking projects did not decrease overall rulemaking time.[141] Instead, he posits that negotiated rulemaking simply shifts more time to the rule development phase because the goal is for the agency to reach consensus with outside stakeholders.[142] Other scholars and the EPA itself, however, found that negotiated rulemaking did produce regulations more quickly than traditional top-down rulemaking.[143]

It is uncertain how well the negotiated rulemaking empirical research translates, if at all, to collaborative tax rulemaking. As an initial matter, it is probably unhelpful to draw conclusions about one agency based on empirical results from another agency because of variances among agencies' internal rulemaking processes as well as the complexity and disparities of the issues involved.[144] Moreover, this Article is not advocating for negotiated rulemaking, which has been the focus of empirical scholarship. The existing empirical scholarship regarding the efficiency of negotiated rulemaking needs to be put into context. Negotiated rulemaking is most common in environmental regulation and health and safety regulation, two areas of the law where one can imagine competing interests among regulated industry, the relevant government agencies, public interest groups, and the public at large. A primary

139. TIGTA REPORT, *supra* note 14, at 2.

140. *Id.* at 17.

141. Gary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997). Much of the empirical work focuses on negotiated rulemaking at the EPA because that agency "has pursued by far the most negotiated rulemakings." *Id.* at 1260.

142. *Id.* at 1285–86.

143. *See* Philip J. Harter, *Assessing the Assessor: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 41 (2000) (claiming that negotiated rulemaking cuts rulemaking time by one-third). Harter later acknowledged that negotiated rulemaking may not speed up things. Harter, *supra* note 91, at 414. *See also* Freeman, *supra* note 88, at 24 ("The EPA's own study of its first seven negotiated rule makings concluded that negotiated rules are produced more quickly than traditional rules . . . ."); Kerwin & Furlong, *supra* note 22, at 124 (finding that negotiated rulemaking at EPA sped up time, "especially in the post-proposal time period").

144. *See* 2009 GAO REPORT, *supra* note 134, at 18 (finding a lot of variance among agencies in time to develop rules as well as time elapsed between proposal of rules and their finalization).

assumption underlying negotiated rulemaking was that traditional rulemaking was adversarial.[145]

By contrast, tax rulemaking generally is less adversarial than environmental regulation or health and safety regulation. These differences make collaborative governance more conducive to tax rulemaking. For one, there are fewer competing interests.[146] In addition, the Anti-Injunction Act essentially prohibits pre-enforcement challenges to tax regulations, which results in less litigation as compared to other areas of rulemaking.[147] Without the threat of judicial challenges, the IRS should be able to operate less defensively in the rule development phase as compared to the EPA or the Occupational Safety and Health Administration (OSHA), for example. Fewer competing interests and the elimination of the threat of judicial challenges presumably would lead to consensus more quickly. Finally, unlike environmental regulation, tax rulemaking is not technology driven. It would be reasonable to expect delays in environmental rule development while the EPA gathers scientific evidence from regulated industry or through modeling. Unlike the EPA, the IRS does not need scientific evidence before regulations can be developed, thus eliminating any delay associated with data collection in the rule development phase.[148]

C. Potential for Regulatory Capture

By enlisting the tax bar to act as surrogate rulemakers, the potential for regulatory capture must be addressed.[149] The reaction to the IRS's 2007

145. *See generally* Harter, *supra* note 87.

146. *See infra* notes 171–173 and accompanying text.

147. I.R.C. § 7421(a) (2012) (noting that except pursuant to specific Code provisions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"). The rationale for the rule is "[to protect] the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." Bob Jones U. v. Simon, 416 U.S. 725, 736 (1974). *But see* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1129 (2015) (interpreting the Tax Injunction Act in 28 U.S.C. § 1341 to not apply to block challenge to notice and reporting requirements imposed on out-of-state retailers who sell goods to Colorado residents because the challenged requirements do not "restrain assessment, levy, or collection"). Note that while *Direct Marketing* interpreted the Tax Injunction Act, not the Anti-Injunction Act, the Court noted that, "We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code." *Id.*

148. *But see* Altera Corp. v. Comm'r, 145 T.C. 91 (2015) (invaliding a Treasury regulation after the government failed to engage in sufficient fact finding or data analysis).

149. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (explaining that the term regulatory capture refers to the phenomenon

pilot program illustrates the concern. The pilot program sought the public's assistance in rule development as part of an effort to publish guidance in "a more timely and efficient manner."[150] Certain high-profile lawmakers criticized the program, concerned that the government was "putting special interests before the public interest when developing tax guidance."[151] The U.S. Treasury Inspector General for Tax Administration (TIGTA) found the IRS's pilot program did "not present an increased risk of influence by special interest groups in the selection of guidance projects" because it "did not directly create tax guidance or circumvent existing internal controls."[152]

Despite TIGTA's findings, it is plausible that using tax practitioners as surrogate rulemakers may negatively influence the agency's decisionmaking to the extent the surrogates promote their own or their clients' self-interest to the detriment of the public interest.[153] There are, however, two structural mechanisms that would constrain the tax bar.[154] First, while outside tax experts would have some power to sway, the agency would retain ultimate authority to decide the form and substance of any regulations that are offered

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of administrative agencies becoming unduly influenced, or captured, by the industries they regulate).

150. I.R.S. Notice 2007-17, 2007-1 C.B. 748.

151. *See* Max Baucus, *Baucus, Grassley Oppose IRS Plan to Outsource Writing of Agency Rules,* TAX NOTES TODAY (Mar. 16, 2007), http://www.taxnotes.com/tax-notes-today/tax-system-administration-issues/baucus-grassley-oppose-irs-plan-outsource-writing-agency-rules/2007/03/16/xn43. Critics included Senator Max Baucus (D-MT), former chairman of the Senate Finance Committee, and Chuck Grassley (R-IA), the committee's ranking Republican member at the time. *See also* David Cay Johnston, *I.R.S. Letting Lawyers Write Rules,* N.Y. TIMES, Mar. 9, 2007, http://www.nytimes.com/2007/03/09/business/09tax.html.

152. *See* TIGTA REPORT, *supra* note 14, at 2.

153. The Federal Advisory Committee Act (FACA) imposes various requirements on advisory committees, which are defined to include "any committee, board, commission, council, conference, panel, task force, or other similar group . . . utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." *See* 5 U.S.C. app. § 3(2)(C) (2012). Under a broad reading, FACA could be read to apply to collaborative efforts with the tax bar. Nonetheless, the Supreme Court held that Congress did not intend that the word "utilized" be read literally to "cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) (holding that FACA did not apply to ABA's Standing Committee on Federal Judiciary, which advises the President, through the Department of Justice, on potential nominees for federal judgeships).

154. *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law,* 52 ADMIN. L. REV. 813, 819 (2000).

for public notice-and-comment. This Article does not recommend rulemaking be outsourced or privatized so the tax bar alone could not directly create tax guidance.[155] The recommendations in this Article should augment the agency's existing approaches, not replace them. Second, APA notice-and-comment procedures, to the extent they apply, will continue to provide accountability and transparency.[156]

In addition to those structural mechanisms, it is important to recognize that tax practitioners can and do distinguish between their roles as advocates for their clients' interests and neutral advisors acting in the public interest.[157] Consider the last big wave of tax shelter activity that became firmly established in the 1990s. To be sure, some tax advisors "bec[ame] 'linguistic Houdinis who specialize[d] in hypertechnical arguments as to why their client's rat poison meets the five-part test for being apple pie.'"[158] Those advisors, in effect, abdicated their gatekeeping role, and failed to act in the public interest.[159] But at a time where the benefits from participating in abusive tax shelters outweighed the costs, an overwhelming majority of tax advisors were unwilling to undertake tax shelter work.[160] Tax advisors can undermine our

155. Admittedly, the government's failure to cede authority and reach consensus with private actors may actually hinder collaborative governance. As Professors John Donahue and Richard Zeckhauser have recognized, the amount of discretion the government relinquishes to private collaborators is what distinguishes collaboration from pure volunteerism. *See* JOHN DONAHUE & RICHARD ZECKHAUSER, COLLABORATIVE GOVERNANCE: PRIVATE ROLES FOR PUBLIC GOALS IN TURBULENT TIMES 15–16 (2011). Giving private actors discretion incentivizes them to take more responsibility. *Id.* at 36–37. But too much discretion may encourage them to act for their own self-interest. *Id.* at 37.

156. *See supra* notes 30–33 and accompanying text.

157. *See* David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 350 (2006) ("It is a matter of pride for the [New York State Bar Association's Tax Section] that they focus on systemic concerns, not taxpayer interests.").

158. *See* Brent J. Horton, *How Corporate Lawyers Escape Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 S.C. L. REV. 149, 157–58 (2008) (quoting Mike France, *Close the Lawyer Loophole*, BLOOMBERG (Feb. 2, 2004), https://www.bloomberg.com/news/articles/2004-02-01/commentary-close-the-lawyer-loophole).

159. *See* Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 853 (2013) ("Ethical rules . . . are worthless if they are not truly accepted and internalized by the group governed by such rules.").

160. It probably is impossible to know how pervasive this behavior was, but we can assume it was the minority approach. *See* William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1458 (2006). In denying a taxpayer's motion to compel production of all Son-of-Boss tax opinions that the IRS had collected as well as a list of the names and addresses of all law firms and accounting firms known by the IRS to have issued Son-of-Boss tax opinions, the Tax Court indicated that

self-assessment tax system, and some have. But most advisors exercised restraint despite the promise of substantial professional fees in an essentially unregulated market with little downside risk.[161] Most advisors were not swayed despite competitive pressures in a modern-day law practice that focuses attention to the bottom line and achieving the client's and lawyer's own interests even if at the expense of the public interest.[162] As Professor Simon notes, "a major contingent of practitioners, many in the big established firms, have taken a strong position against what they, along with the IRS, call 'abusive' tax practice."[163] That the vast majority of advisors resisted the economic lure of tax shelter work shows that tax practitioners can and do exercise restraint even though contrary to their and their clients' economic interests.

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those firms constituted "only a small subset of tax advisers." 3K Inv. Partners v. Comm'r, 133 T.C. 112, 116 n.6 (2009). The taxpayer was attempting to bolster its reasonable cause and good faith defense in the hopes of avoiding civil tax penalties. The taxpayer argued that "the availability of a large number of law firms and accounting firms issuing tax opinion letters determining that so-called 'Son-of-Boss' transactions would produce the tax results as reported by Petitioner on its subject tax return would bolster Petitioner's position that it had reasonable cause and that Petitioner acted in good faith." *Id.* at 116. Further, petitioner hoped to show that it had reasonable cause for the position taken on its return "based upon the general consensus of national law firms across the country that were issuing tax opinion letters that were taking the same position as the Petitioner." *Id.* The Tax Court "reject[ed] any suggestion that the requested information . . . shows any 'general consensus' of tax advisers regarding Son-of-Boss transactions." *Id.* at n.6.

161. *See generally* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 65–73 (MIT Press 2014) (discussing a thorough explanation of the factors contributing towards an optimal environment for abuse).

162. *See* Russell G. Pearce & Eli Ward, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 516–17 (2012) (noting a shift in law firm culture rooted in autonomous self-interest); Christine Pedigo Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 DUQ. L. REV. 349, 363 (2010) (describing the evolution of law firms in the last thirty years to a "more competitive, bottom-line oriented business environment").

163. *See* Simon, *supra* note 160, at 1458 (contrasting the tax bar's behavior with that of securities lawyers, who have "opposed SEC regulation of their practice with remarkable uniformity"); *see also* William H. Simon, *Organizational Representation and the Frontiers of Gatekeeping*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1069, 1072 (2011) (explaining that tax reforms, "[w]hile far more radical than the securities developments . . . have not prompted the uniform resistance on the part of the tax bar; indeed, important portions have been embraced and encouraged by prominent members of the tax bar. These members have responded to perceived weaknesses in the regulatory regime, not by trying to distinguish themselves in their willingness to exploit them, but by publicizing them in ways designed to assist and pressure the regulators to close them").

Nor are the tax bar's efforts always pro-taxpayer and anti-public interest. Presuming that tax practitioners' actions benefit only themselves or their clients, on the one hand, or only the public interest, on the other, presents a false dichotomy.[164] Israel's relatively recent enactment of a tax regime governing private non-charitable irrevocable trusts is a good illustration. A committee composed of Israeli government personnel as well as two lawyers and an accountant from the private sector, considered among Israel's premier trust professionals, crafted a tax regime to govern private non-charitable irrevocable trusts.[165] The legislation benefited the public by closing a gap in the law that had left income and capital gains earned by irrevocable trust assets exempt from tax.[166] The committee's efforts also benefitted the tax bar by transforming an area of tax avoidance into one of complex tax compliance, which required the skill and expertise of the elite tax bar, and thus ensured demand for their services.[167]

There is no denying that special duties have been institutionalized both in law and in practice to moderate tax advisors' self-interest. For example, many of the legal reforms following the most recent wave of widespread tax shelter activity imposed upon tax advisors various special duties, including heightened Circular 230 standards and greater disclosure requirements.[168] The tax bar supported these reforms even though arguably contrary to their clients' and their own interests. The tax bar recognized that tax shelter activities "posed a significant threat to the integrity of the tax system and embarked on sustained law reform efforts to address the problem."[169] Paul Sax notes: "Every major development in ethics and standards of tax practice has emanated from the [ABA] Tax Section. Not the Treasury, or the Service,

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164. *See* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 590 (2012) ("Even if regulation does work for the regulated industry, it is not at all clear that capture is at work.").

165. *See* Adam S. Hofri-Winogradow, *Professionals' Contribution to the Legislative Process: Between Self, Client, and the Public*, 39 LAW & SOC. INQUIRY 96, 105–06 (2014) (noting that although Hofri-Winogradow's article is directed at the legislative process, much of it is applicable to administrative rulemaking).

166. *Id.* at 102.

167. *Id.* at 103. A similar phenomenon may exist among revolving-door regulators—private-sector lawyers who work for the agency temporarily and then rejoin their law firms or companies—who may be motivated to write more complex rules to generate demand for their services once they return to the private sector. *See* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1293–94 (2015).

168. *See* Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 94–109 (2006) (discussing the ABA Tax Section's and the New York State Bar Tax Section's response to tax shelters).

169. *Id.* at 95.

or the ABA, or the American Institute of Certified Public Accountants (AICPA), or any other professional organization, but from the Tax Section."[170]

Rather than viewing the tax bar with skepticism, it more accurately should be seen as a counterbalance to the influence of regulated industry for the public's benefit. Typically, the risk of agency capture is diminished to the extent the interests of regulated industry—those directly affected by the rules—are counterbalanced by public interest groups who represent the interests of those for whom the law is intended to benefit. For example, if labor unions lobby Congress for workplace safety legislation for the protection of workers, the unions could counterbalance the influence of regulated industries—the employers—when regulators like OSHA write rules to implement the law. The conventional wisdom in rulemaking is that the government regulates industry for the benefit of some defined group of beneficiaries whose interests are represented by public interest groups who operate as a counterbalance to the regulated party. In fact, Professors Ayres and Braithwaite assume "there will be an appropriate [public interest group]," because the underlying law that prompted the regulation would not likely have been enacted in the absence of some interest pushing for it.[171]

Ayres and Braithwaite's paradigm, which fits environmental regulation and health and safety regulation, does not easily map onto tax regulation. Their paradigm is less applicable to tax because Congress typically enacts tax statutes for the benefit of the government on its own initiative, rather than prompting from some external interest.[172] In addition, while there are interest groups who provide research and analysis of tax laws, they typically are not directly engaged with the IRS in rulemaking in the way that a traditional interest group may be.[173] But the tax bar, which certainly has the expertise to delineate the public interest, can serve the role of traditional public interest groups, consistent with the "longstanding tradition within the elite tax bar that embraces the gatekeeping role."[174]

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170. Paul J. Sax, *The Section's Role in Ethics and Standards of Tax Practice*, 68 TAX LAW. 59, 59 (2014).

171. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 59, 59 (Oxford Univ. Press 1992).

172. *Id.*

173. *See generally*, TAX FOUND., https://taxfoundation.org/ (last visited Aug. 14, 2017); TAX POL'Y CTR., http://www.taxpolicycenter.org/ (last visited Aug. 14, 2017); CITIZENS FOR TAX JUSTICE, www.ctj.org (last visited Aug. 14, 2017).

174. Simon, *supra* note 163, at 1073; *see* Harter, *supra* note 91, at 441 ("Agency officials and staff have no monopoly on seeing the public interest.").

VI. A SKETCH OF RECOMMENDED FEATURES

This Article recommends that governmental actors and non-governmental experts work collaboratively in the pursuit of a public goal, tax rulemaking, using specified processes.[175] To be clear, the tax bar already informally participates in the government's rulemaking and legislative efforts by, among other things, helping prioritize the IRS's planned guidance, submitting comments to proposed regulations, and participating with the government on panels at ABA Tax Section meetings.[176] The prevalence of this dialogue, however, is uncertain because the process is not formalized. The rulemaking process would benefit from changes in both the kind and the intensity of collaboration between the IRS and the tax bar.

This Article does not recommend the commodification of agency rulemaking. Not every project will be ideal for collaboration with the tax bar. Some matters may be more appropriate than others, depending on the specific technical issues involved. Additionally, which IRS Associate Chief Counsel is overseeing a regulation project may make a project relatively amenable for collaboration. For example, opportunities for collaboration make more sense in circumstances where the relevant IRS Associate Chief Counsel office handling the regulation project has strong relationships with the tax bar and mutual trust and respect exist.[177] The quality of relationships presumably varies. Thus, it may be that a regulation project handled by the Associate Chief Counsel for Corporate makes sense because that office has a very good relationship with the tax bar, and thus, opportunities for collaboration with Corporate will be easier to facilitate.[178] That may not be true for all Chief Counsel offices.

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175. *See supra* note 116 and accompanying text.

176. *See* Johnston, *supra* note 151 (stating that Pilot program was just formalizing the existing process).

177. Collegiality between the experts and the government is an important condition identified by Professor Hofri-Winogradow to engender tax professionals' involvement in statutory tax reform in a manner that serves the public interest. *See* Hofri-Winogradow, *supra* note 165, at 118–19.

178. *See* Amy S. Elliott, *News Analysis: The New Limits on Corporate Letter Rulings Explained*, TAX NOTES TODAY (Jan. 31, 2012), http://www.taxnotes.com/tax-notes-today/corporate-taxation/news-analysis-new-limits-corporate-letter-rulings-explained/2012/01/31/vcyx ("According to a practitioner at a firm that regularly seeks rulings from several offices within chief counsel, 'Without any question, the corporate part of chief counsel is the best-run, best-operated, most thoughtful group . . . .'").

A. Make the Regulatory Business Plan More Useful

As an initial matter, the IRS should provide more transparency in the development of its regulatory business plan.[179] In setting its regulatory priorities, the IRS solicits input from within and outside the agency. To get public input, the agency publishes an annual notice, and also receives recommendations from organizations such as Tax Executives Institute, the ABA, and the AICPA.[180] The Chief Counsel Regulation Handbook lists several criteria that should be considered in selecting projects for the business plan, including "whether the recommended guidance resolves significant issues relevant to many taxpayers" and "whether the recommended guidance promotes sound tax administration."[181] The criteria primarily focus on materiality, both in terms of the number of taxpayers affected as well as the significance of the issues involved, and practicality—what reasonably can be done with existing resources and whether the guidance will be easy for taxpayers to understand and apply.[182]

According to the Chief Counsel Regulation Handbook, the respective Associate Chief Counsel offices should document reasons for including or declining to include recommendations in the agency's business plan, but the Associate Chief Counsel offices are not required to communicate that rationale with external constituents.[183] The IRS could do more to communicate why or why not projects are selected for inclusion in the agency's business plan. Prioritization of projects included on the business plan and more specificity about included projects may also be useful.[184]

B. Improve Collaboration Opportunities

The IRS Chief Counsel's Office drafting team must obtain prior approval before "engaging in any discussions with outside interested parties about a

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179. Once published, the agency's business plan informs the public of the agency's regulatory priorities and provides agency accountability. The items on the business plan are expected to be completed within the fiscal year, but that target often is not met. *See* Marie Sapirie, *Priorities: The Priority Guidance Plan in Perspective*, TAX NOTES (June 8, 2015), http://www.taxnotes.com/tax-notes/tax-system-administration/news-analysis-priorities-priority-guidance-plan-perspective/2015/06/08/qz2g?highlight=marie%20sapirie.

180. I.R.M. §§ 32.2.2.6.3 (1)–(2) (2011).

181. *Id.* § 32.2.2.6.4(1).

182. *Id.*

183. *Id.* § 32.1.1.4.2(7).

184. Andrew Velarde, *Building a Better Priority Guidance Plan*, TAX NOTES (Sept. 19, 2016) http://www.taxnotes.com/tax-notes/tax-system-administration/news-analysis-building-better-priority-guidance-plan/2016/09/19/r2pv?highlight=andrew%20velarde.

regulation project."[185] Furthermore, Chief Counsel employees are admonished not to disclose outside the government the specifics of a regulation under development until the regulations are made available to the public generally in the Federal Register.[186] The justification for this approach presumably is to avoid accusations that the government is giving certain outside parties some unfair advantage.[187] While this rationale may be well-intentioned, these policies hamper collaboration during the rule development phase and perhaps could be more narrowly tailored.

Additionally, the agency's internal procedures should address more specifically interactions with the public and, in particular, bar associations and industry groups, during the rule development phase. As a means of comparison, the Chief Counsel Regulations Handbook used to expressly permit private meetings with outside groups in response to their unsolicited comments at either the government's or the commenter's request.[188] There was also guidance for agency personnel to solicit comments from specific industry groups or professional associates without the need to issue a notice of proposed rulemaking.[189]

Opportunities for tax practitioners and academics to participate should occur earlier in the rulemaking process.[190] The IRS uses a mostly top-down, command-and-control approach to rulemaking, which means the tax bar's most significant contributions come in the form of detailed comments to proposed regulations.[191] By that point, the agency has invested tremendous resources to develop the proposed rules. Thought must be given to the overall approach, substantive issues must be identified and resolved, and policy decisions may have to be made. More frequent use of advance notices of proposed rulemaking is one way for the government to solicit feedback from interested stakeholders before beginning to draft regulations.

Earlier engagement will require the IRS to hone the skill of "making the ask." "Making the ask" is a term of art in the world of fundraising that refers

185. I.R.M. § 32.1.1.5(2) (2004).

186. *Id.* § 32.1.1.5(3).

187. *See* IRS, 1997 CHIEF COUNSEL REGULATIONS HANDBOOK (3)(15) 20 581.2 (Jan. 18, 1995) (stating that while discussing "potential alternative approaches" with outside stakeholders, "great care should be taken not to provide information that could affect market behavior or provide participants with unfair advantage relative to the general public").

188. *Id.*

189. *Id.*

190. Noveck, *supra* note 126, at 499 n.252 (quoting Nat'l Performance Review, *REG04: Enhance Public Awareness and Participation, in* IMPROVING REGULATORY SYSTEMS (1993), http://govinfo.library.unt.edu/npr/library/reports/reg04.html).

191. *See supra* notes 40–44 and accompanying text for a description of the rulemaking process.

to the simple fact that a successful fundraiser eventually must explicitly ask the prospective donor for a gift, typically financial, though it may be something else like time or influence. Two of the biggest mistakes in fundraising are (1) failing to ask at all, but instead leaving it up to the prospect to take the initiative and (2) failing to ask for a specific gift.[192] In a general sense, the business plan can be viewed as an advance notice of proposed rulemaking and a request for comments. But if the agency does nothing more than publicize its regulatory priorities, it has failed to "make the ask." The IRS must be more deliberate and more specific when engaging the bar in rulemaking.

The agency, on the front end, should identify specific questions or discrete issues that the bar can assist with, and it should explicitly ask the tax bar for assistance.[193] It may be helpful to draw from the experience of private law firms who have been contending with a problem similar to the government: clamors from their clients about ways to deliver quality legal services faster and at lower cost.[194] Among the potential solutions for law firms is the disaggregation and outsourcing of legal work.[195] Likewise, the agency should consider ways to parse regulation projects into discrete pieces or modules that could be distributed among outside collaborators. Such an approach would allow work across modules to happen simultaneously, which may lead to greater efficiencies.[196] Enhancing collaboration in this manner would also give the government expertise and practical insight it may be lacking in-house, which may improve effectiveness as well.

An important component of this proposal is not simply to encourage self-selected experts to be responsible for particular issues, but also to get them to collaborate with each other and with the government in rule development. Explicit mechanisms within the current system that facilitate collaboration among commenters to rulemaking are nonexistent. While there may be important reasons for multiple bar associations and other groups to provide feedback, there may also be opportunities for collaborations among outside

192. *See* David Lansdowne, *The 20 Biggest Fundraising Mistakes, Part II*, GUIDESTAR (Nov. 2007), https://www.guidestar.org/Articles.aspx?path=/rxa/news/articles/2007/20-biggest-fundraising-mistakes-part-2.aspx.

193. On occasion, the IRS does engage in this kind of a process. *See, e.g.*, I.R.S. Ann. 2010-9, 2010-7 I.R.B. 408 and 2010-7, 2010-13 I.R.B. 515 (stating that in advance of a notice of proposed rulemaking for what became Schedule UTP, IRS solicited comments to specifically targeted questions).

194. William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. 5, 14 (2014).

195. *See generally* Milton C. Regan & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137 (2010).

196. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information*, 104 MICH. L. REV. 1175, 1181 (2006).

experts that currently remain unexplored.

C. Better Use of Technology

The agency and the tax bar should consider using collaborative drafting software and other tools that permit collaboration between the government and the tax bar and among members of the tax bar. There is rich literature regarding the use of technology to effect, among other things, greater transparency and greater public participation.[197] The federal government's website, regulations.gov, permits users to read and post comments to proposed regulations. In addition to making it easier for the public to comment on proposed regulations by permitting electronic submissions, the website in effect operates as a virtual reading room by providing access to other commenters' comments. However, the website does not provide interactive capabilities that facilitate online collaboration.[198] Comments are uploaded to the website only after the agency processes them, which may take several weeks.[199] The website does not even appear to permit a commenter to directly respond to a posted comment. Moreover, commenters are not required to use the electronic portal to submit comments. The agency presumably uploads paper submissions to the website even though there inevitably will be some delay.[200] This Article contends that regulations.gov improved the quantity of public comments to proposed rulemaking but has done little

197. *See, e.g.*, Gregory D. Jones, *Electronic Rulemaking in the New Age of Openness: Proposing a Two-Tier Voluntary Registration System for Regulations.Gov*, 62 ADMIN. L. REV. 1261 (2010); Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924 (2009); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L. J. 943 (2006); Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L. J. 893 (2006); Beth Simone Novak, *The Electronic Revolution in Rulemaking*, 53 EMORY L. J. 433 (2004).

198. *See generally*, REGULATIONS.GOV, https://www.regulations.gov/ (last visited on Aug. 14, 2017).

199. Frequently Asked Questions, Commenting, *Why Can't I see a Comment I Submitted?*, REGULATIONS.GOV, (last visited Aug. 14, 2017) https://www.regulations.gov/faqs.

200. As of July 16, 2016, neither the comments from the ABA Tax Section nor the New York State Bar Association (NYSBA) to the proposed regulations under § 385 were posted to regulations.gov, although both sets of comments are included in Tax Analysts' Tax Notes Today database, which can be accessed via Lexis. George C. Howell, *ABA Tax Section Joins Chorus of Commentators on Debt-Equity Regs.*, TAX NOTES TODAY (July 14, 2016), http://www.taxnotes.com/worldwide-tax-daily/cross-border-mergers-and-acquisitions/aba-tax-section-joins-chorus-commentators-us-debt-equity-regs/2016/07/14/hc1z?highlight=George%20C.%20Howell (ABA Tax Section comments); Stephen B. Land, *NYSBA Tax Section Report Takes Aim at Proposed Debt-Equity Regs.*, 2016 TAX NOTES TODAY 126–36 (June 30, 2016) (NYSBA comments).

to affect the quality of comments.[201]

RegulationRoom is an example of second-generation e-rulemaking.[202] RegulationRoom is a pilot project involving selected rulemakings from agencies that enter memoranda of understanding with Cornell researchers. It also serves as a research and teaching platform for Cornell, whose ultimate goal is to "provide guidance on design, technological, and human intervention strategies—grounded in theory and tested in practice—for effective Rulemaking 2.0 systems."[203] The website separates a regulation project into discrete pieces and then allows users to target their comments to particular parts of an agency's proposed rule.[204] Comment threading allows users to engage with one another. Select Cornell students and faculty and nongovernmental researchers act as moderators to facilitate cross-discussion. In the future, the website may incorporate online collaborative rule drafting. The website is a "work in progress" that is revised after a rule closes to consider the experiences and feedback from the closed rulemaking.[205]

D. Call to the Tax Bar

One practical question is whether the government has any incentive to become more efficient. Additionally, it is important to consider whether it will be politically feasible for the IRS to collaborate more fully with the tax bar, given the political rebuff to past collaboration efforts.[206] These questions are legitimate and cannot easily be addressed. To mitigate these concerns, the tax bar should take the initiative to promote mechanisms to achieve

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201. *See generally* Cynthia R. Farina et al., *Designing an Online Civic Engagement Platform: Balancing "More" vs. "Better" Participation in Complex Public Policymaking*, 5 INT'L J. E-POLITICS 16, 20 (2014); Farina et al., *supra* note 129, at 10,671.

202. "[E]-rulemaking (literally, "electronic rulemaking") has served as a shorthand descriptor for a breathtaking range of ideas about how information and communications technologies could be deployed within the rulemaking process." Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 405 (2011); *see* REGULATIONROOM, www.regulationroom.org. (last visited Aug. 14, 2017). RegulationRoom is run by Cornell eRulemaking Initiative, an interdisciplinary group of researchers at Cornell University.

203. *Overview*, REGULATIONROOM, http://regulationroom.org/about/overview (last visited Aug. 14, 2017).

204. See Johnson, *supra* note 136, at 107–08 for a more detailed description of RegulationRoom relating to a Department of Transportation rulemaking.

205. *History*, REGULATIONROOM, http://regulationroom.org/about/history (last visited Aug. 14, 2017).

206. *See supra* notes 150–152, and accompanying text discussing the IRS's pilot program announced in Notice 2007-17.

greater collaboration in rule development. For example, the ABA Tax Section should consider acting as a clearinghouse to help bar associations coordinate their efforts.[207] Furthermore, the tax bar certainly could act on its own initiative to draft proposed regulations included on the agency's business plan for the agency's consideration.[208]

It is not obvious that members of the tax bar will necessarily have the relevant skills to write good regulations. Writing comprehensible regulations is a craft. Beyond communicating the content in clear, understandable language, and often requiring the use of terms of art and numerous cross-references, a Treasury regulation has a particular structure and order. There is at least one company, The Regulatory Group, Inc., who provides regulation writing training for regulatory agencies, public interest groups, and others who seek to participate in federal rulemaking.[209]

The tax bar should take a greater role in promoting to younger generations of tax practitioners the value of public service and to instill in them a public duty to the tax system. This can be encouraged through participation in bar activities and government employment. Many tax practitioners rotate between private practice and Treasury or the IRS.[210] While the revolving

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207. *See* Ansell, *supra* note 103, at 546.

208. See, for example, the Tax Section of the New York State Bar Association's submission, on its own initiative, of simplified regulations under § 752 regarding the allocation of partnership liabilities. I.R.S. News Release, Regulation Simplification Proposal of New York State Bar Association Tax Section, *reprinted in New York State Bar Association Calls for Pension Simplification*, TAX NOTES TODAY (Dec. 19, 1989), http://www.taxnotes.com/tax-notes-today/benefits-and-pensions/new-york-state-bar-association-calls-pension-simplification/1989/01/09/16vb1?highlight=I.R.S.%20News%20Release%2C%20Regulation%20Simplification%20Proposal%20of%20New%20York%20State%20Bar%20Association%20Tax% 20Section. The IRS distributed the NYSBA's comments "For the convenience of those who would be interested in commenting." The press release also invited "Comments from the public . . . in respect of the merits of the approach to understandability and simplicity of regulation drafting included in the Tax Section drafts." *Id.*

209. *See* THE REGULATORY GROUP, INC., http://www.regulationwriters.com (last visited Aug. 15, 2017).

210. *See, e.g.*, William Hoffman, *Tax Analysts Exclusive: Conversations: John Koskinen*, TAX NOTES TODAY (Aug. 4, 2014), http://www.taxnotes.com/tax-notes/personnel-people-biographies/tax-analysts-exclusive-interview-irs-commissioner-john-koskinen/2014/08/04/2142796 (referring to the IRS revolving door as a recruiting tool); David Lupi-Sher, *Proposed IRS Capitalization Rules Raise Questions*, TAX NOTES TODAY (Feb. 20, 2002), http://www.taxnotes.com/tax-notes-today/accounting-periods-and-methods/proposed-irs-capitalization-rules-raise-questions/2002/02/20/ztjb (quoting Professor Steve Johnson about his concern with the revolving door between IRS or Treasury and legal and accounting firms, which he says "does exist in tax to an uncomfortable degree"); IRS Letter from Paul Streckfus

door aspect of public service is criticized for, at a minimum, the appearance of impropriety, government service can play a role in fostering practitioners' taxpaying ethos and their duty to the tax system. It also gives them some incentive to protect their reputational capital.[211] David Schizer conveyed a conversation he had with "[s]ome pro-government tax lawyers" who told him "they feel less at home in bar committees than they used to, and that the younger generation of bar leaders is more prone to taxpayer advocacy."[212] If these anecdotes signify a trend, the slowing revolving door may, at least in part, be to blame.

E. Engaging Academics

Like other members of the tax bar, tax academics participate in rulemaking, but there could be a more robust role for academics in rule development subject to some constraints.[213] First, academics may be reluctant to engage in applied research in lieu of pure or basic research, particularly if their institutions do not value applied research for tenure and promotion purposes.[214] The distinction is between applying existing knowledge to solve a particular problem—applied research—versus seeking to discover new knowledge simply for the sake of knowledge acquisition—pure or basic research.[215] For academics that want their research to have real-world impact,

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to Deputy Assistant Secretary for Tax Policy Pamela Olson (Sept. 4, 2001), *reprinted in Streckfus Blasts Treasury for Catering to Private Bar*, TAX NOTES (Nov. 1, 2001) http://www.taxnotes.com/exempt-organizations/exempt-organizations/streckfus-blasts-treasury-catering-private-bar/2001/11/01/kstf?highlight=IRS%20Letter%20from%20Paul%20Streckfus%20to%20Deputy%20Assistant%20Secretary%20for%20Tax%20Policy%20Pamela%20Olson (criticizing the Office of Tax Policy at the Department of Treasury for its revolving door policy).

211. *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1190–91 (1996).

212. David M. Schizer, *supra* note 157, at 350 n.51.

213. *Id.* at 349 (noting that "academics are a significantly underutilized resource" in tax administration). To be sure, academics are involved in rule development and other public service for the benefit of tax administration. The IRS for many years has sponsored a research conference at which academics present their tax administration research. *See IRS Research Conference*, IRS, https://www.irs.gov/uac/soi-tax-stats-irs-research-conference (last updated Aug. 17, 2017). The IRS also had a professor in residence program that was revitalized in 2007, but has since been stopped due to a lack of funding. IRS Chief Counsel Revitalizes Professor-in-Residence Program, I.R.S. News Release IR-2007-06 (Jan. 10, 2007).

214. *See* Elizabeth Deakin, *Perspectives on Causes and Cures for Urban Decay: The Role of University Urban Planning Departments in Community Building*, 30 CONN. L. REV. 1301, 1314–15 (1998).

215. Basic research has been described as "the goose that lays the golden eggs: 'Basic research does not necessarily produce results that are immediately relevant . . . , but the

participation in rule development may be a useful endeavor. The second obstacle for academics may be detachment from practice. The lack of real-world practical knowledge, whether before coming into the academy or having significant practice experience but then failing to stay engaged in practice after becoming an academic, makes it difficult to know the current transaction landscape.

CONCLUSION

This Article makes the case for applying collaborative governance theory to better engage the tax bar in rulemaking to dislodge the bottleneck in regulatory rule development. Uncertainty in the law coupled with the complexity of the tax system makes it difficult to advise clients with respect to prospective transactions and negatively affects taxpayer compliance with the law. More guidance, and more timely guidance, helps promote taxpayers' compliance with the law. The modern-day prominence of administrative law combined with the practical inability of the IRS to comprehensively monitor compliance puts more pressure on lawyers to do more to influence their clients' compliance with the law.[216] More guidance also helps to ensure the government's uniform and effective enforcement of the law.

Serving as surrogate rulemakers will be an opportunity for bar associations to reaffirm their traditional commitment to public service and legal reform and to increase professionalism within the bar.[217] It can also be an opportunity for the tax bar to reassert its duty to the tax system. By playing a prominent role, bar associations can shore up the integrity of the legal system.

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knowledge gained often is essential for progress in the various steps involved in new discoveries.'" Deborah M. Hussey Freeland, *Speaking Science to Law*, 25 GEO. INT'L ENVTL. L. REV. 289, 307 (2013), (quoting LISE M. STEVENS, *Basic Science Research*, 287 JAMA 1613, 1754 (2002)). The University of Tennessee, recently amended its faculty handbook to include "engaged scholarship" within the definition of scholarship. UNIV. OF TENN., KNOXVILLE, FACULTY HANDBOOK 16-17 (2016), http://provost.utk.edu/wp-content/uploads/sites/10/2016/10/Faculty-Handbook-2016.pdf. Engaged scholarship "bring[s] together faculty and community collaborators to address real world problems and opportunities. *Id.* at 16. The best examples "are those that engage faculty in advancing knowledge through the pursuit of their scholarly interests while simultaneously addressing specified community problems and issues, thereby benefiting the scholar, the discipline, the university, and society." *Id.* at 17.

216. Lavoie, *supra* note 159, at 820.

217. Simon, *supra* note 160, at 1463 (recognizing the role that bar organizations can have in reforming the law).

As Deborah Rhode has said, "the bar needs to become more publicly accountable for its public responsibilities."[218]

218. Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1331 (2009).

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