American University Business Law Review

Volume 9 | Issue 1 Article 1

2020

Doubling Down On A Billion Dollar Blind Spot: Women Business Owners and Tax Reform

Caroline Bruckner
American University Kogod School of Business, cbruck@american.edu

DOUBLING DOWN ON A BILLION DOLLAR BLIND SPOT: WOMEN BUSINESS OWNERS AND TAX REFORM

CAROLINE BRUCKNER*

I. INTRODUCTION

In 1976, the U.S. Census Bureau ("Census") released its first ever report on the state of women's business ownership in the United States ("U.S.") that counted 402,025 women-owned U.S. firms representing only 4.6 percent of all firms and 0.3 percent of all U.S. business receipts, as of

* Caroline Bruckner is a tax professor on the faculty of American University Kogod School of Business (KSB) and is the managing director of the Kogod Tax Policy Center. Prior to joining KSB in 2015, she worked for the U.S. Senate Committee on Small Business and Entrepreneurship (SBC) from 2009 through 2014, ultimately as Chief Counsel. Before public service, Bruckner was a tax lawyer in private practice with PricewaterhouseCoopers, LLP – Washington National Tax Services and PaulHastings LLP. Bruckner is grateful to Amadea Anile (WCL'20) and Ben Begas (AU'20) for their extensive work on the congressional witness dataset included in this article.

1972.[1] Concerned by these low figures, U.S. Commerce Secretary, Dr. Juanita Kreps, a labor economist, advised President Carter to investigate the circumstances behind the numbers.[2] On August 4, 1977, Carter issued a memorandum creating an Interagency Task Force on Women Business Owners ("Task Force") to (i) identify and assess the adequacy of existing data on women entrepreneurs; and (ii) assess current federal programs and practices that have the effect of discriminating against women entrepreneurs or placing them at a competitive disadvantage.[3]

In November 1977, the Task Force established its membership and got to work.[4] High-level representatives from eight federal agencies served on the Task Force and contributed to its findings.[5] In conducting its review, the Task Force not only identified the many challenges women entrepreneurs face, but also focused on small businesses, "since this is the business sector in which most women-owned businesses are concentrated."[6] While recognizing that minority women business owners were subject to "double barriers of racism and sexism," the Task Force primarily attacked sexism, rationalizing that alleviating this significant problem would aid in the discrimination faced by minority women.[7] As part of this exercise, the U.S. Department of Treasury ("Treasury")

---

1. CAROLINE BRUCKNER, KOGOD TAX POLICY CTR. REPORT, BILLION DOLLAR BLIND SPOT: HOW THE U.S. TAX CODE'S SMALL BUSINESS EXPENDITURES IMPACT WOMEN BUSINESS OWNERS 6 (2017) [hereinafter BDBS], https://www.american.edu/kogod/research/upload/blind_spot_accessible.pdf (citing INTERAGENCY TASK FORCE ON WOMEN BUS. OWNERS, THE BOTTOM LINE: UNEQUAL ENTERPRISE IN AMERICA 32 (1978) [hereinafter THE BOTTOM LINE]) (explaining that the 1972 Census data served as a "valuable benchmark" despite issues with methodology and age).

2. BDBS, *supra* note 1, at 6 (citing BURTON I. KAUFMAN, THE CARTER YEARS 273 (2006)).

3. *Id.* (citing THE BOTTOM LINE, *supra* note 1, at 3); *see also* Memorandum on Task Force on Women Business Owners to the Sec'y of the Treasury, the Sec'y of Def., the Sec'y of Labor, the Sec'y of Commerce, the Sec'y of Health, Educ., and Welfare, the Adm'r of Gen. Servs. Admin., the Adm'r of Small Bus. Admin. 1429 (Aug. 4, 1977).

4. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3).

5. *Id.* (citing THE BOTTOM LINE, *supra* note 1, at 3); U.S. DEP'T OF COMMERCE, WOMEN BUSINESS OWNERSHIP: AN ANNOTATED BIBLIOGRAPHY 10 (1986) [hereinafter ANNOTATED BIBLIOGRAPHY].

6. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3, 32, 34); ANNOTATED BIBLIOGRAPHY, *supra* note 5, at 5.

7. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 3–4); Jimmy Carter, The First 18 Months: A Status Report of the Carter Administration Action on International Women's Year Resolutions (Sept. 4, 1978), https://www.jimmycarterlibrary.gov/digital_library/sso/148878/90/SSO_148878_090_12.pdf (noting that minority women face the same barrier of sexism as all women and all recommendations of the National Plan of Action shall apply "equally and fully to minority women").

prepared a report for the Task Force (the "1978 Treasury Study") that "concentrated on small business because the majority of women-owned businesses are small businesses" and focused its work on "credit and capital formation as well as other financially-related issues such as insurance, bonding and taxation."[8]

With respect to its assessment of the impact of tax on women-owned firms, the 1978 Treasury Study noted at the outset that tax laws were "sex neutral" and focused its work on describing tax provisions impacting small business.[9] Fundamentally, the 1978 Treasury Study assumed that "[o]f course, taxation is not sex-specific. A small business is taxed as a business, not as female- versus male-owned. As a consequence, any changes in tax laws to benefit small businesses would benefit men more than women, since so few businesses are owned by women."[10] And that was that.

Since then, women-owned firms, which Census defines as businesses in which women own 51 percent or more of the equity or stock,[11] have grown to approximately thirteen million businesses representing 42 percent of all U.S. firms as of 2019.[12] During this period of extraordinary growth, Congress has supported women's business ownership by passing legislation designed to eliminate discriminatory lending practices and promote federal contracting and counseling opportunities for women business owners.[13]

---

8. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 62, 66–67); U.S. DEP'T OF TREASURY, CREDIT AND CAPITAL FORMATION: A REPORT TO THE PRESIDENT'S INTERAGENCY TASK FORCE ON WOMEN BUSINESS OWNERS, at v (1978) [hereinafter 1978 TREASURY STUDY], https://fraser.stlouisfed.org/title/credit-capital-formation-256 (last visited Apr. 21, 2020).

9. BDBS, *supra* note 1, at 6 (citing THE BOTTOM LINE, *supra* note 1, at 17); Telephone Interview with Theodora K. Watts, author of 1978 Treasury Report (May 15, 2017) (on file with author).

10. 1978 TREASURY STUDY, *supra* note 8, at 86. In fact, the 1978 Treasury Study ultimately concluded that women-owned firms had even lower income than small businesses generally, and as a result, would not significantly benefit from major tax reform, but that tax simplification could lower costs of tax compliance. *Id* at 96.

11. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS AND SELF-EMPLOYED PERSONS (SBO) (2012), https://www.census.gov/programs-surveys/sbo/technical-documentation/methodology.html (last visited Apr. 14, 2020).

12. AMERICAN EXPRESS, THE 2019 STATE OF WOMEN-OWNED BUSINESSES REPORT 3 (2019) [hereinafter 2019 AMERICAN EXPRESS REPORT], https://about.americanexpress.com/files/doclibrary/file/2019-state-of-women-owned-businesses-report.pdf.

13. *See* BDBS, *supra* note 1, at 6 n.13 (citing Equal Credit Opportunity Act of 1974, Pub. L. No. 93–495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. §§ 1691–1691f) (outlawing discrimination based on sex or marital status in credit determinations); Women's Business Ownership Act of 1988, Pub. L. No. 100–533, 102 Stat. 2689 (1988) (supporting women small business ownership and establishing the National

At the same time, Congress has regularly worked to enhance the U.S. Internal Revenue Code as amended (the "IRC" or the "Code") to benefit small businesses on a number of fronts.[14] Most recently, in December 2017, Congress passed major tax reform legislation (commonly referred to as the "Tax Cuts and Jobs Act" or "TCJA"),[15] which policymakers intended to provide, *inter alia*, "tax relief for middle-class families . . . [and] tax relief for businesses, especially small businesses."[16] Specifically, policymakers intended, *inter alia*, to "enhance unprecedented expensing for

---

Women's Business Council); Women's Business Development Act of 1991, Pub. L. No. 102–191, 105 Stat. 1589 (1991) (championing women-owned business with federal contracting and women's business centers); Women's Business Centers Sustainability Act of 1999, Pub. L. No. 106–165, 113 Stat. 1795 (1999) (encouraging women-owned businesses federal contracting and reauthorizing Women's Business Program); SBA Reauthorization Act of 2000, Pub. L. No. 106–554, 114 Stat. 2763 (2000) (authorizing the Women-Owned Small Business Federal Contract Assistance Program, which is a set-aside program for women-owned businesses for federal contracts); Small Business Jobs Act of 2010, Pub. L. No. 111–240, 124 Stat. 2504 (2010) (assisting women's business centers)).

14. BDBS, *supra* note 1, at 6 n.14 (citing Miscellaneous Revenue Act of 1980, Pub. L. No. 96–605, 94 Stat. 3521 (allowing taxpayers to amortize startup costs over a period of 5 years); Economic Recovery Tax Act of 1981, Pub. L. No. 97–34, 95 Stat. 172 (1981) (replacing the 1958 small business expensing provision with a $5,000 maximum spending allowance); Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C.) (overhauling the U.S. tax code for the first time since 1954); Omnibus Reconciliation Act of 1993, Pub. L. No. 103–66, 107 Stat. 312 (1993) (raising small business expensing allowance to $17,500 and establishing capital gains exclusion for investments into qualified small business manufacturing corporations); American Jobs Creation Act of 2004, Pub. L. No. 108–357, 118 Stat. 1418 (2004) (amending the Internal Revenue Code of 1986) (allowing taxpayers to deduct up to $5,000 in startup costs in the year the business begins); Small Business Jobs Act of 2010, Pub. L. No. 111–240, 124 Stat. 2504 (2010) (increasing the expensing limits for Sec. 179; temporarily increased the amount of startup costs a taxpayer could deduct from $5,000 to $10,000; temporarily increased to 100% the exclusion from tax the capital gains from investments into qualified small business stock under Sec. 1202); Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114–113, 129 Stat. 2242 (making permanent 100 percent exclusion from tax the capital gains from investments into qualified small business stock under Sec. 1202); CONG. RESEARCH SERV., S. PRT. 114-31, TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 53 (2016), https://www.gpo.gov/fdsys/pkg/CPRT-114SPRT24030/pdf/CPRT-114SPRT24030.pdf).

15. Pub. L. No. 115–97, 131 Stat. 2054 (2018) (amending the Internal Revenue Code).

16. Press Release, U.S. Dept. of Treasury, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017) [hereinafter Unified Framework], https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf; *see also* Stephen J. Pieklik et al., *Deducting Success: Congressional Policy Goals and the Tax Cuts and Jobs Act of 2017*, 16 PITT. TAX REV. 1, 6–7 (2018) (summarizing goals set forth in a policy framework prepared by the Trump Administration and the congressional tax-writing committees included in the Unified Framework).

business investments, especially to provide relief for small businesses."[17] The final legislation included a number of "special income tax provisions" designated as "tax expenditures" intended to alleviate tax burdens on individuals with business income as well as additional investments in existing small business tax expenditures.[18] For budget and revenue estimate purposes, "[t]ax expenditures are similar to direct spending programs that function as entitlements to those who meet established statutory criteria."[19]

The cost to taxpayers of the 2017 TCJA was substantial and initially projected to increase federal deficits by more than $1.8 trillion from 2018–2027.[20] More recently, the nonpartisan Congressional Joint Committee on Taxation ("JCT"), the official congressional budget estimator for tax expenditures, estimated that three tax expenditures targeted to small businesses (i.e., Sections 179 and 1202) and individuals with business income (i.e., Section 199A) will cost U.S. taxpayers more than $300.3 billion in revenue losses in the five-year period from 2019–2023.[21]

---

17. Unified Framework, s*upra* note 16, at 7.

18. JOINT COMM. ON TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" (Dec. 18, 2017) [hereinafter JCX-67-17], https://www.jct.gov/publications.html?func=startdown&id =5053 (last visited Apr. 18, 2020); *see also* JOINT COMM. ON TAXATION, JCX-55-19, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019-2023 2 (Dec. 18, 2019) [hereinafter JCX-55-19], https://www.jct.gov/publications.html?func=startdown &id=5238 (referring to "special income tax provisions" as "tax expenditures" because they "may be considered alternative means of accomplishing similar budget policy objectives") (showing the JCT's estimates of tax expenditures that have a greater than *de minimis* (i.e., more than $50 million of revenue loss) impact on the federal budget for use by the Congressional Budget Office (CBO), as well as the congressional tax-writing and budget committees in view of both "precedent" and "a subsequent statutory requirement that CBO rely exclusively on JCT staff estimates when considering the revenue effects of proposed legislation"). *See generally* Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005) (deconstructing the history of tax expenditure analysis).

19. JCX-55-19, *supra* note 18, at 2.

20. Letter from Keith Hall, Director, Cong. Budget Office, to Senator Rob Wyden, Ranking Member, Senate Comm. on Fin. (Jan. 2, 2018), https://www.cbo.gov/sys tem/files/115th-congress-2017-2018/costestimate/53437-wydenltr.pdf (stating that the Congressional Budget Office and Joint Committee on Taxation determined that the deficits under the Conference Agreement over the 2018-2027 period would increase by $1.5 trillion and the additional debt service would see a $1.8 trillion ten-year increase in deficits).

21. JCX-55-19, *supra* note 18, at 24–25 (estimating the cost of the following provisions from 2019-2023: (i) expensing under Section 179 of depreciable property ($59.9 billion); (ii) Section 199A, which is an up to 20 percent deduction for qualified business income ($233.5 billion); and, (iii) Section 1202, which allows a 100 percent exclusion of capital gain from tax for investments in certain small business stock ($6.9

However, at no point prior to or during debate over the TCJA did the congressional tax-writing committees publicly, meaningfully, and specifically consider whether this would be money well spent when it comes to women business owners ("WBOs").[22] In fact, during the sole U.S. Senate Committee on Finance ("SFC") hearing held in 2017 to examine proposals for business tax reform, women business owners were not even represented at the witnesses table.[23] This is acutely problematic because while women-owned firms have grown to number more than 40 percent of all U.S. firms as of 2019, the majority are small businesses operating in service industries and continue to face challenges growing their receipts and accessing capital.[24]

Moreover, research released and provided to Congress in June 2017 on WBOs and tax expenditures found that three of four of the most expensive small business tax expenditures included in the Code (i.e., IRC § 1202, § 1244, and § 179) were so limited in design that they either (i) explicitly excluded service firms (e.g., IRC § 1202), and by extension, the majority of women-owned firms; or (ii) effectively bypassed women-owned firms that are not incorporated (IRC § 1244) or that are service firms with few capital-intensive equipment investments altogether (IRC § 179).[25] The

billion)). *But see infra* Part III (explaining that Congress did not amend Section 1202 in TCJA, but that parts of Section 199A are derivative from Section 1202).

22. *Compare* BDBS, *supra* note 1, at 9 (connecting the Kogod Tax Policy Center's research done for BDBS with their review of 1,274 full congressional tax-writing committee hearings — from 1986 until 2016 — to confirm that neither the House of Representatives Committee on Ways and Means ("W&M") nor the U.S. Senate Committee on Finance ("SFC") has ever dedicated a full-committee hearing to assessing the impact of small business tax incentives with respect to women-owned firms), *with* S. REP. NO. 116-19, at 6 (2019) (giving an example of a hearing that included four women, out of seventeen witnesses, during 2017, but still did not hold a full committee hearing specifically on the tax challenges of women business owners in connection with tax reform), *and* H.R. REP. NO. 115-1115, at 117–18 (2019) (showing that the W&M Subcommittee on Tax Policy held two hearings in 2017 on tax reform soliciting testimony from eight witnesses, two of whom were women business owners).

23. *See Business Tax Reform: Hearing Before the S. Comm. on Fin.*, 115th Cong. 342 (2017); S. REP. NO. 116-19, at 6 (2019) (noting that the SFC held the hearing on September 19, 2017, and invited four witnesses to testify: Scott Hodge, President, Tax Foundation; Donald B. Marron, Institute Fellow, Urban Institute; Troy K. Lewis, Immediate Past Chair, Tax Executive Committee, American Institute of Certified Public Accountants; and Jeffrey D. DeBoer, President and CEO, Real Estate Roundtable).

24. *See* BDBS, *supra* note 1, at 7; ANNOTATED BIBLIOGRAPHY, *supra* note 5, at 8; 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 3, 10–11.

25. BDBS *supra* note 1, at 3 (summarizing the results of the BDBS survey of the members of Women Impacting Public Policy ("WIPP") and its coalition partners as a measure of (i) how often WBOs claimed small business tax expenditures; (ii) how familiar self-identified WBOs were with Sections 1202, 1244, 179, and 195; and (iii)

challenges that women business owners face are not new and Congress had the opportunity to consider them in connection with the 2017 tax reform debate.[26] It failed to do so.

This Article considers Congress' latest efforts to spur economic growth through the TCJA with respect to women-owned firms and concludes that Congress effectively doubled-down on the blind spot it has with respect to women business owners and tax expenditures targeted to small businesses. Although millions of WBOs will have some tax savings from TCJA's marginal rate cuts and other provisions, this Article argues that the legislation had unintended consequences with respect to the ability for women-owned firms to access capital, reflecting the billion dollar blind

---

whether those firms used them to raise capital). The survey, which WIPP consultants conducted from March 9, 2017 through April 11, 2017, received 515 completed responses from women who, on their own, or with other women, owned at least 51 percent of a business, from the more than 550,000 WIPP or coalition partner members invited to participate. *See* Jane Campbell, *Women Business Owners Are Missing Out On Billions in Tax Incentives & Investments: Congress Can Change That*, NAT'L ASS'N OF WOMEN IN REAL EST. BUS. (Oct. 10, 2017), https://www.nawrb.com/women-business-owners-are-missing-out-on-billions-in-tax-incentives-investments-congress-can-change-that; WOMEN IMPACTING PUBLIC POLICY, REPORT: WOMEN BUSINESS OWNERS MISS OUT ON KEY TAX PROVISIONS DESIGNED TO STIMULATE SMALL BUSINESS GROWTH (2017), https://www.wipp.org/page/BlindSpot.

26. Caroline Bruckner submitted multiple statements for the record to both the SFC and W&M committees and testified before the U.S. House Committee on Small Business in connection with hearings organized as part of the 2017 legislative debate on tax reform. The testimony and submissions included links to and excerpts from *BDBS*, which detailed the legislative history and Congress' intent to provide access to capital and opportunities for growth to small businesses with respect to four specific tax expenditures (i.e., I.R.C. § 1202; I.R.C. § 1244; I.R.C. § 179; I.R.C. § 195). *See Small Business Tax Reform: Modernizing the Code for the Nation's Job Creators*: *Hearing Before the H. Comm. on Small Bus.*, 115th Cong. 5 (2017) (testimony of Caroline Bruckner), https://republicans-smallbusiness.house.gov/uploadedfiles/10-4-17_bruckner_testimony.pdf; *Statement for the Record in Connection with July 13 Hearing*, *"How Tax Reform Will Help America's Small Businesses Grow and Create New Jobs"*, 115th Cong. 193 (2017) (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University Resident), https://docs.house.gov/meetings/WM/WM05/20170713/106236/HHRG-115-WM05-Transcript-20170713.pdf; *Submission from Caroline Bruckner to the U.S. S. Fin. Comm. in Response to the Chair's Request for Recommendations for Tax Reform* (on file with author — confidential submission); Caroline Bruckner, *Statement for the Record to the U.S. Senate Comm. on Small Bus. & Entrepreneurship in Connection with the June 14 Hearing Titled, "Tax Reform & Barriers to Small Bus. Growth"* (June 28, 2017) (statement of Caroline Bruckner); Caroline Bruckner, *Women in Business Must Be a Priority in U.S. Tax Reform Plans*, FIN. TIMES, (Aug. 30, 2017), https://www.ft.com/content/ebda758c-8cb7-11e7-a352-e46f43c5825d; Caroline Bruckner, *How the US Tax Code Bypasses Women Entrepreneurs*, THE CONVERSATION (Oct. 25, 2017, 7:39 PM), https://theconversation.com/how-the-us-tax-code-bypasses-women-entrepreneurs-86039.

spot Congress has when it comes to WBOs and the Code. Post-tax reform and given the economic devastation triggered by the 2020 novel coronavirus pandemic, there is an even greater urgency for policymakers to engage in effective tax expenditure oversight and work with federal agencies and congressional committees to develop the data and research required for evidence-based policymaking.

Part II of this Article provides background on the economic contributions of women's business ownership and reviews how women-owned firms are organized, their average receipts, and growth trends. In addition, Part II summarizes the ongoing challenges these firms encounter growing their businesses and accessing capital. Part III sets forth new data on the underrepresentation of women as witnesses before the tax-writing committees and its connection to the recent tax reform process. Part IV of this Article summarizes two small business tax expenditures Congress funded in the TCJA that reflect the unintended consequences of Congress' billion dollar blind spot including: (1) *Section 199A – Qualified Business Income Deduction*; and (2) *Section 179 – Accelerated Deduction for Small Businesses*. Part V discusses recent efforts by Congress to consider how WBOs can benefit from targeted tax policy and suggests strategies for Congress to develop effective tax expenditure oversight and evidence-based policymaking.

II. WOMEN BUSINESS OWNERS AS AN ECONOMIC FORCE

Since Census started tracking them in 1972, the number of women-owned firms has increased exponentially.[27] Prior to 2017, the most consistent measure of this increase was the Census Survey of Business Owners ("SBO"), which Census conducted every five years, in years ending in two or seven, with the most recent being done in 2012.[28] That year, Census counted more than 9.9 million women-owned firms — an

---

27. BDBS, *supra* note 1, at 11. *See generally* ANNOTATED BIBLIOGRAPHY, *supra* note 5 (stating that the 1977 Census reported that 75 percent of all women-owned firms were concentrated in the services and retail trade sectors).

28. *See* U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS (SBO), https://www.census.gov/econ/overview/mu0200.html (last visited Apr. 18, 2020). In 2017, Census announced it would replace the SBO with an annualized survey called the Annual Business Survey ("ABS"). *Census Bureau Announces New 2017 Annual Business Survey*, U.S. CENSUS BUREAU (June 19, 2018), https://www.census.gov/newsroom/press-releases/2018/annual-business-survey.html. Census' decision to transition away from the SBO to the ABS, which will only track employer firms, could mean Census "is unable to guarantee comprehensive data sets for 90% of women-owned small businesses." NAT'L WOMEN'S BUS. COUNSEL, 2019 ANNUAL REPORT 28 (2019) [hereinafter 2019 NWBC ANNUAL REPORT], https://cdn.www.nwbc.gov/wp-content/uploads/2019/12/20204228/NWBC-2019-Annual-Report-508compliant.pdf.

increase of 26.8 percent from 2007.[29] More recent data, based on the 2012 SBO results, continues to show the skyrocketing growth of WBOs over the last four decades.[30] In 2019, there were approximately thirteen million (12,943,400) WBOs with revenue of almost $2 trillion.[31] When combined with firms owned equally by men and women, women-owned firms total 15,258,900 — or "49 percent of all businesses."[32]

Notably, women of color have led the charge in the growth of women-owned businesses.[33] Firms owned by women of color grew at a rate of 43 percent over the last five years (double the 21 percent rate of all new women-owned firms) and "account for 50 percent of all women-owned businesses."[34] In 2019, women-owned firms employed 8 percent of the private sector workforce, which translates to approximately 9.4 million people.[35]

A. Most Women-Owned Firms Are Small Business Service Firms

Despite these gains, private sector and academic research has found that "although women business owners account for 40 percent of all U.S. firms and the total number of women-owned firms has increased over the last ten years by 58 percent, [they] remain small businesses primarily operating as service firms (more than 60 percent) and continue to face challenges growing receipts and accessing capital."[36] Government research has found that "almost all (99.9 [percent]) of women-owned businesses are small businesses" and that the overwhelming majority (90 percent) of women-

29. Erika H. Becker-Medina*, Women-Owned Firms on the Rise*, U.S. CENSUS BUREAU (July 31, 2019), https://www.census.gov/newsroom/blogs/random-samplings/2016/03/women-owned-businesses-on-the-rise.html.

30. 2019 AMERICAN EXPRESS REPORT*, supra* note 12, at 3.

31. *Id.*

32. *Id.*

33. *Impact on the Budget and American Families: Hearing on 2017 Tax Law Before the H. Comm. on Budget*, 116th Cong. 4 (2019) [hereinafter 2019 TAX REFORM BUDGET HEARING] (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (citing data from AMERICAN EXPRESS, *The 2018 State of Women-Owned Businesses Report* (2018) [hereinafter 2018 AMERICAN EXPRESS REPORT], https://about.americanexpress.com/files/doc_library/file/2018-state-of-women-owned-businesses-report.pdf) (noting that firms owned by women of color grew by 163 percent from 2007 to 2018 and 64 percent of new women-businesses launched every day are owned by women of color); *id*. at 4–5.

34. 2019 AMERICAN EXPRESS REPORT*, supra* note 12, at 4–5.

35. *Id.* at 3.

36. 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 47 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University).

owned businesses are non-employer businesses (i.e., businesses with no employees).[37] In terms of revenue, in 2012, 88.5 percent of women-owned firms had annual receipts below $100,000.[38] Notwithstanding their exponential growth, less than 2 percent of (or just 171,842) of WBOs had annual receipts in excess of $1 million in 2012.[39]

Table 1. 2012 Census SBO Data on Women-Owned Firms[40]

Receipt/Revenue Size	Number of Women-Owned Firms	Percent of Women-Owned Firms
Total/2012 SBO Data	9,878,397	100%
less than $5,000	2,497,048	25.3%
$5,000 to $9,999	1,776,343	18.0%
$10,000 to $24,999	2,722,295	27.6%
$25,000 to $49,999	1,052,900	10.7%
$50,000 to $99,999	681,243	6.9%
$100,000 to $249,999	553,503	5.6%
$250,000 to $499,999	258,398	2.6%
$500,000 to $999,999	164,824	1.7%
$1,000,000 or more	171,842	1.7%

This is a sharp contrast to the 6.2 percent or 923,173 male-owned firms with receipts of $1 million or more.[41] Also troubling is a 2019 estimate that found that while overall women-owned firms averaged $142,900 in earnings, firms owned by women of color averaged only $65,800 in annual revenues, while non-minority women-owned firms averaged more than

37. Michael J. McManus, *Women's Business Ownership: Data from the 2012 Survey of Business Owners,* U.S. SMALL BUS. ADMIN. 2, 4 (May 31, 2017), https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf (defining a small business as having fewer than 500 employees).

38. BDBS, *supra* note 1, at 11 (noting that women owned businesses are mostly in the service industry).

39. *Id.*; *see also* McManus, *supra* note 37, at 11 (supporting the point that women-owned firms grew from 2007 to 2012).

40. BDBS, *supra* note 1, at Table 1; *see id.* at 12 n.39 (stating that the table is from the "research division of National Women's Business Council derived from Census 2012 SBO data"); *see also Behind the Numbers: The State of Women–Owned Businesses in 2018*, WOMEN'S BUSINESS ENTER. NATIONAL COUNCIL (Oct. 10, 2018), https://www.wbenc.org/blog-posts/2018/10/10/behind-the-numbers-the-state-of-women-owned-businesses-in-2018 (stating the number of women-owned businesses which generate less than $100,000 is 88 percent of all women-owned businesses and that only 1.7 percent of all women-owned businesses generate $1,000,000 or more in revenue).

41. BDBS, *supra* note 1, at 11.

double — $218,800.[42]

Despite the economic recovery since 2012, the "vast majority" of women-owned businesses (88 percent or 10,775,600 firms) continued to generate revenues less than $100,000 in 2018, and that "[overall] revenue growth for women-owned business was driven by the addition of firms, not an increase in average revenue per firm."[43]

In terms of industry representation, although women-owned firms have permeated every industry sector to some degree, they remain predominately active in service industries and are underrepresented in other industries.[44] "For example, according SBA's Office of Advocacy's analysis of Census' 2012 SBO data, while women own 36 [percent] of all U.S. firms and 20 [percent] of all employer businesses, 'women-owned businesses were only 9 [percent] of the construction industry and 24 [percent] of the manufacturing industry.'"[45] More recent private sector data on WBOs has found:

- Half of women-owned businesses are concentrated in three industries: other services (23%), health care and social assistance (15%), and professional/scientific/technical services (12%);
- Women are significantly more likely to launch businesses within the healthcare (10%) or education sectors (9%) than men (5% in both cases). In contrast, men are significantly more likely to start businesses in the construction and manufacturing industries (12%) than women (4%).
- Women-owned businesses employ the most people in healthcare and social assistance (20%), accommodations and food services (16%) and administrative, support and waste management services (13%).

42. *See* 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 5.

43. 2018 AMERICAN EXPRESS REPORT, *supra* note 33, at 5 (finding that women entrepreneurship is still growing however).

44. BDBS, *supra* note 1, at 12; *see* McManus, *supra* note 37, at 4 (highlighting that the top four out of five industries women own businesses in are services and that these industries typically have a higher than average ratio of WBOs); *see also* 2018 AMERICAN EXPRESS REPORT, *supra* note 33, at 11 (determining that "other services" firms owned by women, such as hair salons and pet care businesses, have experienced 126 percent growth from 2007 to 2018 compared to 58 percent growth for all women-owned businesses in the same time period).

45. BDBS, *supra* note 1, at 12 (showing statistics of how women are underrepresented in certain industries). *See generally* McManus, *supra* note 37 (discussing representation of women-owned business across all U.S. firms as a percent of employer business in 2012); SCORE Association, *The Megaphone of Main Street: Women's Entrepreneurship Spring 2018*, SCORE ASS'N (2018), https://s3.amazonaws.com/mentoring.redesign/s3fs-public/SCORE-Megaphone-of-Main-Street-Women%E2%80%99s-Entrepreneurship-Spring-2018_1.pdf (highlighting the representation of women-owned businesses in various industries).

- Women-owned businesses have the *highest total revenue* in wholesale trade (17%), retail trade (15%) and professional, scientific and technical services (10%).[46]

Although limited federal government data and private sector data on the number of women-owned firms, their receipts, and presence among industries is available, similar government research on the current number of women-owned firms operating as C-corporations or S-corporations from existing SBA or IRS data is not regularly collected and published.[47]

Instead, IRS publishes general statistics for firm organization showing that sole proprietors, subchapter S-corporations, and partnerships, collectively, filed approximately 95 percent of the 33.4 million business tax returns for the 2013 tax year; sole proprietors filed 72 percent of the returns, followed by S-corporations (13 percent), partnerships (10 percent), and C-corporations (5 percent).[48] That noted, IRS does have some data for women-owned firms operating as sole proprietors, and SBA's Office of Advocacy does track data on the legal organization for small firms generally.[49] In particular, IRS research division, the Statistics of Income ("SOI"), provides data on women-owned sole proprietors and, as of 2014, counted 11.7 million women-owned firms operating as sole proprietors (an estimated 42.6 percent of the total 27.6 million sole proprietors) using taxpayer data, "but does not have these data for the other forms of businesses."[50]

---

46. *Behind the Numbers: The State of Women-Owned Businesses in 2018*, WBENC (Oct. 10, 2018), https://www.wbenc.org/blog-posts/2018/10/10/behind-the-numbers-the-state-of-women-owned-businesses-in-2018 (analyzing data from the 2018 AMERICAN EXPRESS REPORT).

47. BDBS, *supra* note 1, at 11–12. This kind of data, if regularly collected and made available, would provide insight to policymakers on the uptake rates and revenue loss distribution of small business tax expenditures with respect to WBOs as described *infra* Part IV.

48. GARY GUENTHER, CONG. RESEARCH SERV., IF11122, 2019 TAX FILING SEASON (2018 TAX YEAR): SECTION 199A DEDUCTION FOR PASSTHROUGH BUSINESS INCOME (2019) [hereinafter CRS199A REPORT], https://fas.org/sgp/crs/misc/IF11122.pdf (explaining that evidence suggests Congress intended the 199A deduction for noncorporate businesses to be a tax cut "comparable" to the corporate tax rate cut under TCJA).

49. *See Frequently Asked Questions about Small Business*, SMALL BUS. ASS'N OFF. OF ADVOC., (Sept. 24, 2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/24153946/Frequently-Asked-Questions-Small-Business-2019-1.pdf.

50. BDBS, *supra* note 1, at 12 n.46.

B. Women-Owned Firms Still Encounter Growth and Access to Capital Challenges

Despite the considerable gaps in government research on how women-owned firms are organized, extensive work has been done by academics on gender and entrepreneurship.[51] Much of it has focused on the challenges women business owners have growing their revenue and accessing capital. In fact, although Census research has tracked a dramatic spike in the number of women-owned firms in recent decades, average receipts and firm size have not grown to the same degree, indicating, among other things, that challenges remain for these small business owners.[52]

For example, in 2017, SBA's Office of Advocacy issued a report on women-owned firms finding that they continue to "lag behind in revenue and employment. For every dollar of revenue an average women-owned employer business earns, a male-owned business earns $2.30. For every [ten] employees at a women-owned business, a male-owned business employs [fifteen]."[53]

Related to the growth challenges women-owned firms encounter is the documented challenge women-owned firms have accessing capital.[54]

---

51. *See generally* ALBERT N. LINK & DEREK R. STRONG, GENDER AND ENTREPRENEURSHIP: AN ANNOTATED BIBLIOGRAPHY (2016) (covering scholarly contributions from 1979 through 2016 to gender and entrepreneurship); Patricia G. Greene et al., *Women Entrepreneurs: Moving Front and Center: An Overview of Research and Theory* (2003) (overview on research and theory on women entrepreneurs); Jennifer Jennings & Candida Brush, *Research on Women Entrepreneurs: Challenges To (and From) the Broader Entrepreneurship Literature?*, 7 ACAD. MGMT. ANNS. 663 (2013). However, this research generally does not consider tax issues. To see what research has been done on women and tax issues specifically, see BDBS, *supra* note 1, at 15 n.63 (citing Anthony C. Infanti & Bridget J. Crawford, *Critical Tax Theory: An Introduction* (U. of Pitt. Legal Studies Research, Working Paper No. 2009-04), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333799#) (listing a series of foundational works on women and tax issues generally and explaining that "legal scholars beginning with Grace Blumberg and including: Anne Alstott, Dorothy Brown, Bridget Crawford, Anthony Infanti, Carolyn C. Jones, Marjorie Kornhauser, and Nancy Staudt to name only some, have developed research analyzing 'what impact the tax laws have on historically disempowered groups'") .

52. *See, e.g.*, Susan Coleman & Alicia Robb, *Access to Capital by High-Growth Women-Owned*, NAT'L WOMEN'S BUS. COUNCIL (2014), https://cdn.www.nwbc.gov/wp-content/uploads/2018/02/27191226/High-Growth-Women-Owned-Businesses-Access-to-Capital-Report.pdf.

53. *See* McManus, *supra* note 37, at 13.

54. *See A Compendium of National Statistics on Women-Owned Businesses in the U.S.*, CTR. FOR WOMEN'S BUS. RESEARCH (2001), https://cdn.www.nwbc.gov/wp-content/uploads/2018/02/27202652/A-Compendium-of-National-Statistics-on-Women-Owned-Businesses-in-the-U.S.pdf. *See generally* CANDIDA G. BRUSH ET AL., DIANA REPORT: WOMEN ENTREPRENEURS 2014: BRIDGING THE GENDER GAP IN VENTURE CAPITAL (2014) (analyzing venture capital investments in women entrepreneurs since

Indeed, some older research found that "lack of access to capital (including personal resources) is seen as a major reason for the concentration of women-owned businesses in service and retail."[55] More recent research has reiterated that WBOs "struggle to access capital, which in turn restricts their growth."[56]

In 2018, the nonpartisan National Women's Business Council (the "NWBC"), which is a federal advisory committee that provides independent analysis, research, and policy recommendations to the Administration, SBA, and the congressional small business committees, published a report on WBO's ability to access capital and reiterated that when it comes to financing their businesses, women-owned firms face systemic obstacles that "impede their growth, many of which are in place from the beginning."[57] In general, "women start businesses with smaller amounts of capital than men, are less likely to raise capital from external sources, and . . . are more likely to say they do not need financing to start a business because they are more likely than men to rely on owner-provided equity to launch their firms."[58]

With respect to accessing bank loans, research has found that:

> [S]everal characteristics of women-owned businesses . . . affect their access to loans and set them apart from men-owned entities, including:
> WBOs are slightly less likely to have high credit scores compared to men;
> Women-owned businesses are less likely to be incorporated;
> WBOs have fewer years of industry and startup experience;
> WBOs are less likely to apply for new loans; and
> WBOs are slightly more likely to not apply for new credit when they need it, ostensibly because of fear of denial.[59]

Those fears are not unwarranted. The data on WBOs and conventional bank loans shows generally, and SBA loans show in particular, that WBOs represent a minority of the total number of conventional and SBA loans for small businesses. For example, in the fiscal year of 2019, SBA approved more than $28.2 billion in loans of which "nearly" $6.6 billion (or 23

1999).

55. *See* BDBS, *supra* note 1, at 13.

56. NAT'L WOMEN'S BUS. COUNCIL, UNDERSTANDING THE LANDSCAPE: ACCESS TO CAPITAL FOR WOMEN ENTREPRENEURS 1 (Mar. 1, 2018) [hereinafter NWBC 2018 REPORT], https://cdn.www.nwbc.gov/wp-content/uploads/2018/03/28215658/NWBC-Report_Understanding-the-Landscape-Access-to-Capital-for-Women-Entrepreneurs.pdf.

57. *Id*. at 2.

58. *Id*.

59. *Id*. at 16.

percent of the total) went to women-owned firms through the 7(a) program.[60]

In 2014, the U.S. Senate Committee for Small Business and Entrepreneurship, published its own report ("Small Business Committee Report") on existing barriers to women's entrepreneurship and concluded that "in the area of capital, studies find that women do not get sufficient access to loans and venture investment."[61] Specifically, the Small Business Committee Report found that access to capital is a more severe challenge for women-owned firms when it noted:

> 1. Women account for only 16 percent of conventional small business loans, and 17 percent of SBA loans even though they represent 30 percent of all small companies.
> 2. Of conventional small business loans, women only account for 4.4 percent of total dollar value of loans from all sources. In other words, just $1 of every $23 in conventional small business loans goes to a woman-owned business.[62]

More recently, the NWBC cited research in its December 2019 annual report that in 2018, female founders got less than 3 percent of the $130 billion of venture capital dollars.[63] The consequences of failing to have reliable access to capital are well-documented in the existing literature, "finding evidence that [WBOs] have difficulty accessing debt capital, lines of credit, and other forms of funding."[64] These challenges can compound and "lead to difficulties in market access as corporate buyers of goods and services frequently evaluate their potential suppliers' financial ability to determine their dependability."[65]

As alarming as these facts are, "notable gaps remain in government research on women-owned firms and access to capital issues."[66] In fact, the Small Business Committee Report ultimately found that:

---

60. U.S. SMALL BUS. ADMIN., SBA FINANCIAL AGENCY FINANCIAL REPORT FISCAL YEAR 2019 1 (Nov. 15, 2019), https://www.sba.gov/sites/default/files/2019-12/SBA_FY_2019_AFR-508.pdf; *see also* NWBC 2018 REPORT *supra* note 56, at 5–8 (analyzing SBA's loan data from FY 2011-2016 set forth in Tables 2, 3, 4, and 5 that shows that in each year for the SBA's flagship lending programs, WBOs represent less than one-quarter of overall loan recipients by volume and participation during those years).

61. *See* STAFF OF S. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, MAJORITY REP. OF THE U.S. SEN. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, 21ST CENTURY BARRIERS TO WOMEN'S ENTREPRENEURSHIP 2 (2014).

62. *Id*.

63. 2019 NWBC ANNUAL REPORT, *supra* note 28, at 17.

64. NWBC 2018 REPORT, *supra* note 56, at 11–12.

65. *Id*. at 13.

66. *See* BDBS, *supra* note 1, at 14.

> [W]hen it comes to assessing the capital needs of women-owned businesses, limited government data on small business credit and virtually none that is gender-based has hindered the development of effective public policy to support and provide adequate access to capital. The lack of data is as astounding as it is concerning.[67]

At the same time, what limited research that is available on WBOs and tax issues has readily acknowledged tax as an important source of equity for small businesses:

> Taxation plays a key role in the survival and growth of small businesses, primarily through its effect on equity infusion. The major source of equity capital for expansion of a business is reinvested profits. The amount of tax the business must pay determines the amount of money available for growth and expansion.[68]

Notwithstanding the fact that policymakers often design tax provisions as a means to provide access to capital to small businesses, the overall absence of government tax data and research on women-owned firms' ability to claim tax expenditures as a means to access capital remains a billion dollar blind spot for policymakers and taxpayers.[69] Compounding the overall lack of tax research on WBOs is the reality that congressional tax-writers are significantly less likely to hear testimony from women during hearings. As described in Part III *infra*, analysis of witness testimony presented during congressional tax-writing committee hearings reveals that women are regularly underrepresented as witnesses before these committees.

III. DATA ON WOMEN TESTIFYING BEFORE THE TAX-WRITING COMMITTEES

In announcing the decision to move forward with tax reform in April 2017, then-Chair of W&M, Rep. Kevin Brady (R-TX), announced that W&M would hold a series of hearings on tax reform in Spring 2017 with a plan to vote on legislation later in the Summer.[70] This announcement

---

67. BDBS*, supra* note 1, at 14 (citing STAFF OF S. COMM. ON SMALL BUS. AND ENTREPRENEURSHIP, *supra* note 61).

68. BDBS*, supra* note 1, at 5.

69. *See* BDBS*, supra* note 1, at 4; *see also* Ariel Jurow Kleiman et al., *The Faulty Foundatons of the Tax Code: Gender and Racial Bias in Our Tax Laws*, NATIONAL WOMEN'S LAW CENTER (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/11/NWLC-The-Faulty-Foundations-of-the-Tax-Code-Accessible-FINAL.pdf (acknowledging the absence of data on tax expenditure distribution among women, people of color, and other marginalized communities generally and recommending, *inter alia*, applying inclusive budgeting principles to the entirety of the tax system).

70. REUTERS, *U.S. House Tax Committee Plans Public Hearings on Tax Overhaul*,

followed a years-long effort to overhaul the Code and hold a series of hearings, which, in prior congresses at least, had been a bipartisan effort.[71] Congressional committees organize hearings in one of four types: legislative, oversight, investigative, or nomination as a primary means of soliciting expert testimony, insight, and advice for legislative and oversight functions.[72]

In 1986, which was the last time Congress successfully passed comprehensive tax reform, the tax-writing committees adopted an aggressive outreach strategy over the preceding two years that included hearings and testimony from businesses, individuals, experts, and other stakeholders, resulting in eighty-nine hearings with nearly 2,600 witnesses, according to one analysis.[73] During that time, JCT prepared sixty-two reports over twenty-one months; CBO and CRS wrote an additional ten, with one specifically dedicated to considering the racial implications of provisions of the 1986 tax reform effort.[74]

In contrast, the tax reform hearing process during the 115th Congress was much more condensed. As summarized in Table 2 below, the congressional tax-writing committees held a total of twelve hearings on tax reform in 2017 alone, and less than 19 percent of the witnesses testifying at these hearings were women.[75] Of the twelve tax reform hearings, women

---

CNBC (Apr. 6, 2017, 6:06 AM), https://www.cnbc.com/2017/04/06/us-house-tax-committee-plans-public-hearings-on-tax-overhaul.html.

71. Max Baucus & Dave Camp, *Tax Reform Is Very Much Alive and Doable*, WALL ST. J. (Apr. 7, 2013, 6:23 PM), https://www.wsj.com/articles/SB1000142412788 7323611604578396790773598474.

72. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL98-317, TYPES OF COMMITTEE HEARINGS (2018), https://www.senate.gov/CRSpubs/cb39da50-6535-4824-9d2f-e5f1fcf0a3e4.pdf.

73. Peter Carey et al., *The Trump Tax Law Has Big Problems. Here's One Big Reason Why*, CENT'R FOR PUB. INTEGRITY (Jan. 15, 2019), https://publicintegrity.org /inequality-poverty-opportunity/taxes/trumps-tax-cuts/trump-tax-law-has-big-problems.

74. *Id*.

75. Data for Tables 2, 3 & 4 extrapolated from the Congressional Record Representation Dataset [hereinafter CRRD] (dataset on file with author). The CRRD is the first-of-its kind digital diversity and inclusion legislative tool in the U.S. designed to track the number of women and people of color testifying before congressional committees to measure diversity and inclusion of congressional witnesses. Developed in 2019, the CRRD is comprised of witnesses testifying at congressional legislative, oversight or investigative hearing identified using published committee end-of-congress (EOC) reports and hearing transcripts. The CRRD excludes witnesses at confirmation hearings or mark-ups. The CRRD has been created by human-based processing of publicly available EOC Reports, which congressional committees are required to prepare and file at the end of each Congress. EOC Reports document a committee's legislative activities during a Congress and identify witnesses that testified at hearings. Preliminary results for the gender of witnesses before SFC and W&M from the CRRD for the 110th–112th Congresses announced in January 2020 at the 20th

participated as witnesses in only seven, and as noted *supra*, no women business owners testified at the sole SFC hearing on business tax reform in 2017. Notably, no women testified at five (42 percent) of the twelve total tax reform hearings the tax-writing committees held on tax reform in 2017.[76]

Table 2. 115th Congress Tax Reform Hearing Witness Totals		
Totals	**SFC**	**W&M**
Tax Reform Hearings	5	7
Hearings without any Women	2	3
Witnesses	17	48
Men	13	40
Women	4 (24%)	8 (17%)

To be fair, the absence of women's testimony before the tax-writing committees during the tax reform debate in the 115th Congress is not unusual when considered in the larger context of women testifying before the tax-writing committees in recent congresses on tax reform and the failure of the tax-writing committee to hold hearings focused on women business owners.

In fact, research published in June 2017 — and made available to the tax-writing committees — found that of the 1,274 full-committee hearings over 1,521 days of each of the congressional tax-writing committees for the 99th to the 114th Congresses (1985–2016), neither committee had held any

Annual Meeting of the Southern Political Science Association in San Juan, Puerto Rico. CAROLINE BRUCKNER, KAREN O'CONNOR & DAKOTA STRODE, A SEAT AT THE TABLE: JUST HOW REPRESENTATIVE IS THE LEGISLATIVE PROCESS? AN ANALYSIS OF THE GENDER DISTRIBUTION OF WITNESSES BEFORE A SELECT GROUP OF COMMITTEES IN THE U.S. CONGRESS (2020) [hereinafter CRRD PRELIMINARY FINDINGS PAPER], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543554.

76. For purposes of determining how many tax reform hearings the congressional tax-writing committees held during the 110th–115th Congresses, the author initially reviewed the tax-writing committees EOC reports for the 110th–115th Congresses and identified each legislative, oversight, and investigative hearing that included the terms "reform" or "tax reform" in the hearing's title or the executive summary. The search criteria then expanded to include legislative hearings that contemplated major changes to the tax code indicative of reform as described in the summary of the hearing included in the EOC reports. Preliminary totals were compared to the general tax reform hearing lists developed and maintained by Professor Annette Nellen at San Jose State University, available at https://www.sjsu.edu/people/annette.nellen/website/115th-hearings.htm#General (last visited on Apr. 19, 2020). The final hearing totals were adjusted to include tax-writing committee general tax reform hearings listed on Professor Nellen's site in the general tax reform hearing category notwithstanding the absence of the word "reform" in the hearing title.

full committee hearings dedicated to assessing the impact of tax incentives designed to create access to capital with respect to women-owned firms, despite the fact that women business owners had grown from little more than 3 million to more than 11.3 million, or 38 percent, of all U.S. businesses during the same period.[77] A more extensive analysis of witness testimony at tax reform hearings held by the tax-writing committees during the 110th through the 115th Congresses from publicly-available committee reports and transcripts shows that women did not regularly participate as witnesses even before the 115th Congress.[78] For example, 44 percent of the SFC tax reform hearings had no women as witnesses, while 46 percent of W&M tax reform hearings failed to include any women. Overall, women comprised merely 17.5 percent of the total 462 witnesses called to testify at the 91 tax reform hearings the tax-writing committees held from 2007 through 2017.

Table 3. 110th–115th Congress Tax Reform Hearing Witness Totals		
Totals	**SFC**	**W&M**
Total Tax Reform Hearings	50	41
Hearings without any Women	22 (44%)	19 (46%)
Witnesses	206	256
Men	168 (82%)	213 (83%)
Women	38 (18%)	43 (17%)

Admittedly, the foregoing data does not include any tax reform hearings held by other committees during the same period that may have specifically focused on women business owners and tax reform. Nor does it reflect the number of women of color who may have testified, which is not currently available, but is particularly relevant given that women of color are 50 percent of all women-owned firms as noted in Part II *infra*.

In addition, the data included in Table 3 counts twenty fewer SFC tax reform hearings than the total number that the then-SFC Chair Orrin Hatch (R-UT) counted in a press release issued in November 2017 stating SFC tax reform efforts "over the last six years" included holding "70 hearings on how the tax code can be improved and streamlined to work better for all Americans."[79] However, the witness data of all legislative hearings (i.e.,

77. BDBS, *supra* note 1, at 8.

78. CRRD*, supra* note 75.

79. Press Release, Senate Finance Committee, Senate Finance Committee Takes on Tax Reform (Nov. 2017) [hereinafter Senate Finance Committee Takes on Tax Reform], https://www.finance.senate.gov/imo/media/doc/11.9.17%20Committee%20History.pdf. The difference in the SFC tax reform hearing totals is attributable to the

all legislative, oversight or investigative hearings, excluding confirmation hearings or mark-ups) held by the tax-writing committees from the 110th (2007-2008) through the 115th (2017-2018) Congresses shows that the underrepresentation of women as witnesses is not confined to tax reform hearings. Rather, the data shows that women are consistently underrepresented at legislative hearings. For example, of the 355 legislative hearings the SFC held from the 110th through the 115th Congress, 47 percent (166) did not include any women witnesses. W&M was comparable: it held more total hearings (479), but it also did not have women testify at 166 (35 percent). This systemic inequity is particularly problematic given SFC alone "has the largest committee jurisdiction in either chamber of Congress, oversees more than 50 percent of the federal budget and has jurisdiction over tax, trade and healthcare policy."[80]

Table 4. 110th–115th Total SFC and W&M Legislative Hearings		
Totals	**SFC**	**W&M**
Total Legislative Hearings	355	479
Total Hearings Without Women	166 (47%)	166 (35%)
Total Witnesses	1307	2320
Men	986	1719
Women	321 (24.56%)	601 (25.9%)

A preliminary 2020 study of the representation of women as witnesses before the tax-writing committees during the 110th–112th Congress concedes "that the low rates of women testifying could reflect other inequalities in the political system such as a lower percentage of women as committees members, as well as the fact that many senior executive Federal agency positions are held by men."[81] In addition, that study noted that "the overall percentage of women as witnesses testifying before these House and Senate committees essentially mirrors the percentage of women in Congress — both in the low 20 percentages, yet it is actually higher than percentage of women serving as members of these committees."[82] However, the overall consistent underrepresentation of women as witnesses in congressional tax-writing committee hearings remains surprising

more limited criteria used for purposes of this article described *supra* note 76. The SFC EOC report for the 115th Congress did not include a tax reform hearing list beyond the hearings SFC held during the 115th Congress. *See generally* S. Rep. No. 116–19 (2019).

80. Senate Finance Committee Takes on Tax Reform, *supra* note 79.

81. CRRD PRELIMINARY FINDINGS PAPER, *supra* note 75, at 16.

82. *Id.*

considering that over the last forty years, WBOs have grown to number more than 42 percent of all U.S. businesses, which would suggest a greater presence of qualified women available to testify on business and tax issues generally.

The impact of the absence of WBOs being fully represented as witnesses during the tax-writing committees' tax reform hearings is no less than a doubling down on an existing billion dollar blind spot Congress has when it comes to WBOs and small business tax expenditures.

IV. TCJA & SMALL BUSINESS TAX EXPENDITURES

The consequences of the absence of WBOs participating in the tax reform legislative process is reflected by two tax expenditures funded in the TCJA, Sections 199A and 179, which JCT now estimates will cost taxpayers almost $300 billion in lost revenue from 2019–2023.[83]

A. Section 199A – Qualified Business Income Deduction

Once it decided to cut the top corporate tax rate from 35 percent to 21 percent, Congress included a new deduction in the TCJA for individuals with business income, Section 199A, to "provide tax relief for small businesses that do not operate as C-corporations."[84] In connection with its initial summary of the cost of the TCJA, JCT estimated that Section 199A alone would cost taxpayers more than $415 billion over ten years.[85] Notwithstanding the fact that JCT estimated the corporate tax rate cut cost taxpayers more than three times Section 199A (i.e., approximately $1.3 trillion in fiscal years 2017–2027), according to the legislative history,

83. *See* JCX-55-19, *supra* note 18, at Table 1 (estimating the cost of the following provisions from 2019-2023: (i) expensing under Section 179 of depreciable property ($59.9 billion); and (ii) Section 199A, which is a 20 percent deduction for qualified business income ($233.5 billion)); *see also* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 4 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (analyzing JCT's analysis that more than 90 percent of the revenue loss generated from the new deduction will flow to firms with income of over $100,000); *Expanding Opportunities for Small Businesses Through the Tax Code: Hearing of the S. Comm. on Small Bus. & Entrepreneurship*, 115th Cong. 4 (2018) [hereinafter *Expanding Opportunities for Small Businesses Hearing*] (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (noting that tax investments of the TCJA were not robustly investigated with respect to WBOs in connection with Congress' efforts on tax reform).

84. Judith Folse Witteman, *Sec. 199A: Regulations Shed Light on QBI Deduction*, J. ACCOUNTANCY (Feb. 1, 2019), https://www.journalofaccountancy.com/issues/2019/feb/irs-sec-199a-qbi-deduction.html.

85. JCX-67-17 *supra* note 18, at 1.

Section 199A "reflects Congress's belief that a reduction in the corporate income tax rate does not completely address the Federal income tax burden on businesses."[86] While Congress may have reasoned that a new deduction for business income would benefit small businesses not otherwise able to take advantage of a 21 percent corporate tax rate, Section 199A's complexity has proven to be challenging even for experienced tax professionals and planners.[87] In fact, one commentator went so far as to note:

> [S]ection 199A's twenty-percent deduction is far more restrictive than the simple reduction in the C corporation tax bracket to a flat twenty-one percent rate . . . [and] is a needlessly complex labyrinth filled with ambiguous language that opens the unwary taxpayer to possible missteps and an easier to meet accuracy-related penalty for substantial understatement of tax liability.[88]

In general, Section 199A is a deduction "of up to 20 [percent] of income from a domestic business operated as a sole proprietorship or through a partnership, S-corporation (as defined in section 1361(a)(1)), trust, or estate."[89]

The deduction amount is "generally equal to the lesser of 20 [percent] of combined qualified business income (QBI) . . . or 20 [percent] of taxable income less net capital gain."[90] For purposes of Section 199A, QBI is "for any tax year, the net amount of qualified items of income gain, deduction, and loss with respect to any qualified trade or business of the taxpayer."[91] In 2019, the full deduction was available to married taxpayers filing joint returns ("MFJ") with taxable income below $321,400 and for taxpayers filing as single or head-of-household with taxable income below $160,700.[92] For taxpayers with incomes above those amounts but below $421,400 in the case of MFJ, or $210,700 in the case of single or head of

86. JOINT COMM. ON TAXATION, JCS-1-18, GENERAL EXPLANATION OF PUBLIC LAW 115-97, 20 (Dec. 2018), https://www.jct.gov/publications.html?func=startdown&id=5152; *see also* CRS199A REPORT, *supra* note 48.

87. *See* Craig Benson, *Section 199A: A Magic Dance Through the Labyrinth,* 58 WASHBURN L.J. 187, 214 (2019) ("The method and speed at which the TCJA became law resulted in cryptic statutory language with little legislative history, leaving the tax community in desperate need of guidance.").

88. *Id.* at 187 (emphasis added).

89. Qualified Business Income Deduction, 84 Fed. Reg. 27, 2952 (Feb. 8, 2019) [hereinafter QBI DEDUCTION REGULATIONS], https://www.federalregister.gov/documents/2019/02/08/2019-01025/qualified-business-income-deduction.

90. Witteman, *supra* note 84.

91. *Id.*

92. *See id.*

household filings, certain limitations apply to phase-out the deduction.[93] Notwithstanding these and other limitations, the IRS estimates that at least ten million taxpayers will benefit from the new Section 199A deduction and that the time it takes to calculate the deduction will range from "[thirty] minutes to [twenty] hours, depending on individual circumstances, with an estimated average of 2.5 hours."[94]

Importantly for WBOs, the majority of whom operate service businesses,[95] if a taxpayer is (i) a "specified service trade or business" (SSTB); and (ii) has taxable income above the Section 199A income and phase-out thresholds, the deduction is unavailable altogether.[96]

Specifically, Section 199A(d)(1) provides that a "qualified trade or business" is any trade or business *other than* a SSTB, or the trade or business of performing services as an employee.[97] The text of Section 199A(d)(2)(A) defines a SSTB to mean "any trade or business, which is described in section 1202(e)(3)(A) (applied without regard to the words, engineering, architecture)."[98] In effort to aid taxpayers navigating Section 199A, the IRS summarizes the relevant language from Section 1202(e)(3)(A) on its website and explains that a SSTB is:

> [A] trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, investing and investment management, trading, dealing in certain assets or any trade or business where the principal asset is the reputation or skill of one or more of its employees or owners.[99]

In February 2019, IRS and Treasury issued final regulations explaining the calculation for the Section 199A deduction, which included guidance on what businesses qualify as SSTBs.[100] For purposes of Section 199A, a trade or business where the principal asset is the reputation or skill of one of its employees is limited to businesses "that receive income for endorsing

---

93. I.R.C. § 199A(e)(2) (showing that the thresholds and phase-out amounts for married, filing separate taxpayers for 2019 were: $160,725 to $210,725; for tax years beginning after 2018, the threshold and phase-out amounts are indexed to inflation).

94. QBI DEDUCTION REGULATIONS, *supra* note 89, at 2952.

95. *See supra* Part II(A) (discussing that most women owned firms are small business firms).

96. *See* I.R.C. § 199A(d)(1) (West 2019).

97. *Id*. (emphasis added).

98. *See id.* §199A(d)(2)(A).

99. *Tax Cuts and Jobs Act, Provision 11011 Section 199A – Qualified Business Income Deduction FAQs*, IRS, https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs (last updated Jan. 10, 2020).

100. *See* QBI DEDUCTION REGULATIONS, *supra* note 89, at 2969.

products or services; license or receive income for the use of an individual's image, likeness, name, signature, voice, trademark or any other symbols associated with the individual's identity; or receive appearance fees or income."[101]

The regulations mirror Congress' decision to specifically incorporate language from an existing Code provision, Section 1202(e)(3)(A), which is a small business tax expenditure designed to provide access to capital to certain small businesses through the Code.[102] However, existing tax research made available to Congress in June 2017 found that Section 1202 is a direct reflection of the billion dollar blind spot Congress has when it comes to WBOs and small business tax expenditures.[103] Specifically, the legislative history and absence of research on Section 1202's effectiveness indicates a dubious-at-best track-record, and more importantly, that it excludes the majority of service firms, and by extension, the majority of WBOs.[104]

Specifically, when Congress developed Section 1202 in 1993, the intent was generally understood to "encourage the flow of capital to small businesses, many of which have difficulty attracting equity financing"[105] and to "promote long-term investments in small businesses and venture capital startups by providing a partial exclusion of gain on the sale qualified small business stock."[106] In particular, Congress designed Section 1202's partial capital gain exclusion to:

---

101. Witteman, *supra* note 84.

102. BDBS, *supra* note 1, at 14–15 (explaining the legislative history of Section 1202 and Congress' intent to provide access to capital for eligible small businesses).

103. *See* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 47–48 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (showing that congressional limitation of certain service firms from eligibility explicitly excludes a majority of women-owned firms); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 29, 34 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (citing survey research that found only three WBOs had used IRC § 1202 to raise capital).

104. BDBS, *supra* note 1, at 3, 17 (confirming this finding to a certain degree: of 515 WBO respondents, only three (or less than .6%) indicated they had been able to attract capital for their corporation from non-corporate investors using Section 1202; notably, the IRS does not publish or track data on Section 1202 and women-owned firms); *see* Alan D. Viard, *The Misdirected Tax Debate and the Small Business Stock Exclusion*, 134 TAX NOTES 737 (2012) (noting the debate on whether this tax expenditure levels the playing field).

105. H.R. REP. NO. 103-111, at 600.

106. BDBS, *supra* note 1, at 16 (citing Beckett G. Cantley, *The New Section 1202 Tax-Free Business Sale: Congress Rewards Small Businesses that Survived the Great Recession*, 17 FORDHAM J. CORP. & FINANCIAL LAW 1 (2012)).

> [F]acilitate the formation and growth of small C-corporations involved in commercial development of new technologies by increasing their access to relatively patient capital . . . by giving investors (individuals such as angel investors as well as venture capital funds organized as partnerships) an incentive to acquire significant equity stakes in such firms.[107]

Although originally intended to help small research-intensive manufacturing firms, the legislative history of Section 1202 indicates that Congress subsequently amended Section 1202, and ultimately eliminated tax on gains from these investments altogether in 2010, to "encourage new and additional investment in small businesses" in the hopes that "access to additional capital will help the small businesses expand and create jobs."[108]

Nevertheless, since 1993, government and academic research has found that "there is no conclusive evidence that the provision has had the intended effect of increasing the flow of equity capital to eligible firms."[109] In addition, tax experts have criticized it "as ineffective due to its many limitations, including its application to selected industries."[110] Moreover, once Congress reduced the top capital gains rate to 15 percent in 2003, "tax advisers saw little reason to pursue a provision that came with a host of requirements yet yielded a tax rate benefit of less than 1 [percent]."[111] Section 1202 has gone largely unused since its enactment[112]; however, congressional tax expenditure estimators still anticipate that it will cost taxpayers at least $6.9 billion in lost revenue from 2019–2023.[113]

Notwithstanding the lack of IRS data on the effectiveness of Section 1202 and research that indicates it excludes the majority of women-owned firms,[114] Congress incorporated Section 1202's provisions with respect to

107. *Id.* at 15; *see also* Cantley, *supra* note 106, at 5 (stating that Section 1202 was created to promote long-term investment in small businesses).

108. BDBS, *supra* note 1, at 15.

109. *Id.* (citing CONG. RESEARCH SERV, *Tax Expenditures: Compendium of Background Material on Individual Provisions* (Dec. 2016), https://www.govinfo.gov/content/pkg/CPRT-114SPRT24030/pdf/CPRT-114SPRT24030.pdf).

110. *See*, *e.g*., Viard, *supra* note 104, at 737 ("[T]argeting particular sectors for tax relief tilts the economic playing field and misallocates economic resources, unless the targeted sector is initially taxed more heavily than others, in which case the targeting actually helps level the playing field.").

111. Tony Nitti, *Qualified Small Business Stock Gets More Attractive*, THE TAX ADVISOR (Nov. 1, 2018), https://www.thetaxadviser.com/issues/2018/nov/qualified-small-business-stock-more-attractive.html (explaining that Section 1202 has become more obsolete with each reduction in the long-term capital gains rate).

112. *See id.*

113. JCX-55-19, *supra* note 18, at Table 1.

114. *See* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 5–6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing

service firms into the operational rules of Section 199A for purposes of defining SSTBs.[115] Notably, Section 199A does not eliminate the deduction for qualified business income of SSTBs until a taxpayer has taxable income above the threshold and phase-out amounts. Most WBOs will be able to claim some portion of the Section 199A deduction as the overwhelming majority of WBOs have revenues below $100,000 (almost 90 percent).[116] At the same time, at least half of WBOs are concentrated in three industries: other services, health care and social assistance, and professional/scientific/technical services[117] that would render them ineligible for any Section 199A deduction in the event they have revenues over the threshold and phase-out amounts.

In addition, JCT estimates on the distribution of the overall revenue loss of Section 199A suggest that the provision is, in fact, less favorable to WBOs.[118] For example, according to Table 3 of JCT's distributional analysis of the TCJA, more than 90 percent of the revenue loss generated from the new deduction under IRC § 199A will flow to firms with income of *more than* $100,000 in 2018 and 2024.[119] This inequitable distribution is even more pronounced when considered at higher income levels: only 1.7 percent of women-business owners have receipts of $1,000,000 or more,[120]

Director, Kogod Tax Policy Center Kogod School of Business, American University) (noting that Section 1202 is so limited that women-owned firms are effectively excluded); *see also Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 5 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (explaining that there is no publicly-available data to show the limited utility of Section 1202).

115. *See* I.R.C. § 199A(d)(2) (2018).

116. *See supra* Part II.A and Table 1.

117. 2019 AMERICAN EXPRESS REPORT, *supra* note 12, at 11.

118. *See Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 7 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (explaining that JCT's distributional analysis of the revenue loss of Section 199A suggests that the tax benefits of Section 199A will not be felt by the majority of women business owners); 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 6 (statement of Caroline Bruckner Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (finding that JCT's analysis supports a finding that key tax investments are less favorable to women); *see also*, Ari Glogower, *The Rhetoric and Reality of Small Business Preferences in the 2017 Tax Legislation*, 16 THE FORUM 441, 448 (Nov. 30, 2018), https://doi.org/10.1515/for-2018-0030 (reviewing JCT distributional analysis with respect to Section 199A).

119. *See* JOINT COMM. ON TAXATION, JCX-32R-18, TABLES RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT 2017 THROUGH 2026 4 (2018), [hereinafter JCX-32R-18], https://www.jct.gov/publications.html?func=startdown&id=5093.

120. *See supra* Part II.A and Table 1.

but JCT found in 2018 that 44 percent of the IRC § 199A will flow to pass-through businesses with $1,000,000 of income.[121] Further, JCT projects that the 44 percent will increase to 52 percent by 2024.[122]

The estimates show that the majority of the revenue Congress spent in Section 199A flows to firms other than the majority of WBOs, which are more than forty percent of all U.S. firms. To determine whether this is an intended investment by Congress, the tax-writing committees should conduct oversight on the design and distribution of Section 199A with respect to WBOs as the JCT estimates suggest that Congress doubled-down on its billion dollar blind spot when it comes to women-owned firms and tax expenditures.[123]

While most WBOs will no doubt see some limited benefit from IRC § 199A, JCT's distributional analysis raises serious questions as to whether the provision as designed adequately reflects congressional intent with respect to women-owned firms, 99 percent of which are small businesses.[124] As discussed *supra*, Congress intended Section IRC § 199A to operate as a tax cut for small businesses comparable to the TCJA's

---

121. JCX-32R-18, *supra* note 119, at Table 3; *see also* 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (stating that only a small percentage of women business owners will see a benefit from Section 199A); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 7 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (showing that the majority of women business owners will not benefit from Section 199A).

122. *See* JCX-32R-18, *supra* note 119, at Table 3.

123. On April 24, 2018, SFC held a hearing titled, "Early Impressions of the New Tax Law." The author submitted a statement for the record explaining how the estimates set forth in JCX-32R-18 suggest Congress' investments in Section 199A and Section 179 would be less favorable to WBOs. *See generally Early Impressions of the New Tax Law*: *Hearing Before the S. Fin. Comm.*, 115th Cong. (2018), https://www.govinfo.gov/content/pkg/CHRG-115shrg38066/html/CHRG-115shrg38066.htm (statement by Caroline Bruckner). In addition, on May 23, 2018, the W&M subcommittee on tax policy held a hearing titled, *Hearing on Tax Reform and Small Businesses: Growing Our Economy and Creating Jobs*, to consider the impact of tax reform on small businesses. On May 22, 2018, at the request of W&M staff, the author prepared a statement for the record explaining JCT's distributional analysis of the revenue loss of Section 199A as set forth in JCX-32R-18 and suggested that the TCJA tax benefits of Section 199A and Section 179 would not be felt by the majority of women business owners (emails on file with author). During the hearing, W&M Member, Rep. Linda Sanchez (D-CA), entered the author's statement and supporting report into the record. *Hearing on Tax Reform and Small Businesses: Growing Our Economy and Creating Jobs: Hearing Before the H. Subcomm. On Tax Policy*, 115th Cong. (2018), https://docs.house.gov/meetings/WM/WM05/20180523/108364/HHRG-115-WM05-Transcript-20180523.pdf.

124. *See supra* Part II.A.

generous corporate tax rate cut. However, JCT's revenue loss distribution suggests that the overwhelming majority (more than 90 percent) of the money spent for this single tax provision will flow to firms *other than* the majority of WBOs who have revenues below $100,000.

Similarly, research suggests additional oversight is warranted with respect to the TCJA's investments into expanding IRC § 179 as it too will be of limited benefit to WBOs.

B. Section 179 – Accelerated Depreciation for Investments in Tangible Property for Small Businesses

In addition to the $414.5 billion Congress initially spent on Section 199A, Congress also invested an additional $25.9 billion enhancing Section 179, an existing small business tax expenditure, as part of TCJA.[125] Section 179 is a popular tax expenditure that has resided in the Code since 1958 and it allows businesses to deduct up to a specified amount of the cost of qualified assets (mostly machinery and equipment) in the year the assets are placed in service.[126] The Section 179 deduction includes two notable limitations: (1) the deduction cannot exceed a taxpayer's income from their trade or business; and (2) the deduction is phased out dollar for dollar when a taxpayer's total spending on qualified assets exceeds a specific threshold amount.[127]

In 2017, prior to the TCJA, Section 179's maximum deduction was $510,000 of qualified property placed in service that year and the phase-out threshold was $2,030,000.[128] If a "business' total investment in qualified property was greater than the phase-out threshold, the maximum expensing allowance was phased out dollar for dollar, with the business no longer eligible for Section 179 expensing when its investment in qualified property for the year reached $2,540,000 or more."[129]

In connection with announcing their goals for 2017 tax reform legislation, policymakers indicated a desire to "enhance unprecedented

---

125. JCX-67-17, *supra* note 18, at 3.

126. *See* BDBS*, supra* note 1, at 18. At the time Congress enacted Section 179, it intended to "reduce the tax burden on small firms, give them an incentive to invest more, and simplify their accounting." *Id*. at 19. Since 1958, Congress has enhanced Section 179 regularly, by "raising the expensing allowance and increasing the phase-out threshold to 'boost the economy and lower the tax burden on small business owners at the same time.'" *Id*.

127. *See* I.R.C. § 179(b)(3) (2018).

128. Alice E. Keane, *Immediate Expensing: How TCJA Made Depreciation Unnecessary for the Next Five Years*, 129 J. TAX'N 21, 24 (2018) (discussing changes in expense allowances in Section 179).

129. *Id.*

expensing for business investments, especially to provide relief for small businesses."[130] To make good on this promise, Congress increased the maximum expensing deduction to $1 million and the corresponding phase-out threshold to $2.5 million starting in tax years beginning after 2017.[131] Effectively, beginning in 2018, "businesses can depreciate up to $1 million of the basis of qualified property placed in service in the tax year, as long as their total investment is $2.5 million or less, after which any investment over that amount is phased out dollar for dollar up to $3.5 million."[132]

In 2016, Treasury issued a report (the "2016 Treasury Report") measuring the uptake of Section 179 among firms using IRS data from 2002–2014.[133] The report found that the "take-up rates were relatively high for Section 179 expensing . . . generally in the 70 [percent] or 80 [percent] range for C-corporations and S-Corporations, and somewhat lower at around 60 [percent] to 70 [percent] for partnerships and individuals."[134] However, the 2016 Treasury Report failed to offer any insight whatsoever as to the uptake by women-owned firms.[135] This data analysis gap is relevant because other small business research suggests, "that accelerated depreciation allowances are not necessarily universally good for small businesses."[136]

Notably, in 2017 during the tax reform debate, research and WBO survey data on Section 179 indicated that a majority of the WBOs surveyed do not "fully benefit from Section 179 either because they don't know about it or don't regularly make use of it."[137] Post-tax reform, JCT

---

130. Unified Framework, s*upra* note 16, at 7.

131. Keane, *supra* note 128.

132. *Id.*

133. *See* John Kitchen & Matthew Knittel, *Business Use of Section 179 Expensing and Bonus Depreciation, 2002-2014*, OFFICE OF TAX ANALYSIS 1 (2016) [hereinafter 2016 TREASURY REPORT], https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-110.pdf; *see also* BDBS*, supra* note 1, at 18–19 (comparing the Treasury report with the results of the BDBS survey); *Expensing More Popular Than Bonus Depreciation, Treasury Study Shows*, FRAZIER & DEETER (Dec. 28, 2016), https://www.frazierdeeter.com/insights/expensing-more-popular-than-bonus-depreciation-treasury-study-shows/ (breaking down the Treasury's study of Section 179).

134. 2016 TREASURY REPORT, *supra* note 133, at 1.

135. BDBS, *supra* note 1, at 19.

136. *See*, *e.g.*, BDBS, *supra* note 1, at 19; (citing Don Bruce, John Deskins & Tami Gurley-Calvez, *Depreciation Rules and Small Business Longevity*, 3 J. ENTREPRENEURSHIP & PUB. POL'Y 10, 26 (2014)). *But see* Kyle Pomerleau, *Full Expensing Spurs More Investment than a Corporate Rate*, TAX FOUNDATION (May 3, 2017), https://taxfoundation.org/full-expensing-corporate-rate-investment (arguing that full expensing may be preferable to tax cuts for larger firms).

137. BDBS *supra* note 1, at 20; Campbell, *supra* note 25; *see also* Anne Bauer, *We Can Do It? How the Tax Cuts and Jobs Act Perpetuates Implicit Gender Bias in the*

estimates Section 179 is one of the most expensive tax expenditures targeted to help small businesses and will cost taxpayers almost $60 billion from 2019–2023 in lost revenue.[138] At the same time, there is no official government data on the uptake rates of Section 179 by women-owned firms — 99.9 percent of whom are small businesses.[139] Congress' additional $25.6 billion investment in Section 179 — absent any review or consideration as to whether it would benefit WBOs as a means of accessing capital — reflects the doubling down on a billion dollar blind spot policymakers have with respect to how the Code's small business tax expenditures impact these thirteen million small businesses.

V. CONGRESSIONAL ACTION POST-TCJA

Although congressional tax writers did not specifically consider or address the access to capital challenges WBOs have during the 2017 development of and debate over TCJA, since then, SFC Ranking Member, Sen. Ron Wyden (D-OR), has worked to remedy this oversight. Beginning in Spring 2019, Sen. Wyden's SFC staff repeatedly solicited input and policy recommendations from WBO experts and stakeholders on how the Code could address WBO access to capital challenges.[140]

On Oct. 30, 2019, Sen. Wyden introduced the *Providing Real Opportunities for Growth to Rising Entrepreneurs for Sustained Success (Progress) Act (S. 2738)*.[141] In connection with the bill's introduction, Wyden announced his intention to specifically address the challenges WBOs have stating, "[w]omen business owners, particularly women of color, are underestimated, underrepresented and undercapitalized . . . [e]xisting tax incentives do not do nearly enough to help women-owned small businesses. Our bill would diminish these gaps and help women-owned businesses hire and grow." The bill includes two new tax incentives targeted to WBOs, the overwhelming majority of which have revenues below $100,000, including:

Code, 43 HARV. J.L. & GENDER 1 (2019), https://ssrn.com/abstract=3353324.

138. JCX-55-19, *supra* note 18, at 24.

139. BDBS, *supra* note 1, at 11, 19, 27 (referring to lack of government data on women owned firms utilizing Section 179 and Treasury's definition of a "small business" that is discussed in more detail in footnote 34 of the article); *see* McManus, *supra* note 37.

140. Press Release, Senator Wyden, Wyden Introduces Bill to Boost Capital Access for Women-Owned Business (Oct. 30, 2019), https://www.finance.senate.gov/ranking-members-news/wyden-introduces-bill-to-boost-capital-access-for-women-owned-business. Author repeatedly met with SFC staff on developing legislation to help WBOs (notes on file with author).

141. *Id.*

1. A new first employee credit equal to 25 percent of W-2 wages reported would be claimed annually, up to $10,000 in a single tax year, with a lifetime limit of $40,000 against the business' payroll tax liability. Eligible businesses must be majority owned by U.S. individual(s) that each earn $100,000 or less per year ($200,000 in the case of joint filers); and
2. A new investment credit to encourage third-party capital investment of up to 50 percent of a qualified debt or equity investment can be claimed, up to $10,000 in a single tax year, with a lifetime limit of $50,000. Eligible businesses must have at least one full-time equivalent employee and be majority owned by U.S. individual(s) that each earn $100,000 or less per year ($200,000 in the case of joint filers).[142]

S. 2738 is an encouraging first step in acknowledging the role the Code could play in remedying the challenges WBOs face in accessing capital.[143] However, Congress needs more data on these issues, particularly with respect to hearing from women business owners during committee hearings.

In view of Congress' additional investments in tax expenditures targeted to small businesses in connection with TCJA, there is an even greater urgency for congressional tax-writing committees to conduct oversight and request tax research regarding WBOs use of tax expenditures post tax reform.[144] The existing absence of data and research on these issues "is contrary to recent congressional efforts to engage in evidenced-based policymaking."[145] To that end, at a minimum, the congressional tax-writing committees should consider implementing the following recommendations to gain a better understanding of how small business tax expenditures impact women-owned businesses:

1. Hold hearings to consider the impact of Code's small business tax expenditures on women-owned small businesses;

142. *Id.*

143. 2019 NWBC ANNUAL REPORT, *supra* note 28, at 17.

144. 2019 TAX REFORM BUDGET HEARING, *supra* note 33, at 3 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (discussing lack of data for women-owned firms and information in footnote 13); *Expanding Opportunities for Small Businesses Hearing*, *supra* note 83, at 6 (statement of Caroline Bruckner, Executive-in-Residence, Accounting and Taxation Managing Director, Kogod Tax Policy Center Kogod School of Business, American University) (discussing the need for Congress to conduct oversight and research on the impact of tax expenditures on women-owned businesses); *see* Peter G. Pupke, *Minnesota Governor Signs Omnibus Tax Bill Updating IRC Conformity, Reducing Income Tax Rate, and Enacting Other Changes*, J. MULTISTATE TAX'N 32, 35 (2019) (discussing how the TCJA affects women-owned businesses).

145. BDBS, *supra* note 1, at 22.

2. Task the U.S. Government Accountability Office (GAO) with preparing a report detailing recommendations on how Treasury, IRS, SBA and JCT can coordinate to develop the data needed to prepare an assessment of the distribution of existing small business tax business with respect to WBOs. GAO's recommendations should include discussions of and recommendations on protecting taxpayer privacy data in connection with using tax return information to develop the necessary data;
3. Develop voluntary witness disclosure statements for individuals testifying before the tax-writing committees. Such statements should ask witnesses to volunteer information with respect to their gender, race, ethnicity, and veteran status;
4. Amend the tax-writing committee rules to require staff include voluntarily-provided demographic data of witnesses testifying before the committees in EOC reports and in hearing transcripts; and
5. Charge the JCT with preparing a formal estimate of the distribution of the revenue loss of small business tax expenditures with respect to women business owners.

Looking forward to the 117th Congress, members of the JCT, specifically the Chair and Vice Chair, should draft language for adoption at the organizational meeting of JCT in the 117th Congress that mandates JCT include distributional analysis of all business tax expenditures with respect to women-owned firms, together with its revenue estimates for publication.

VI. CONCLUSION

Congress has a billion dollar blind spot when it comes to women business owners and small business tax expenditures, which is not surprising, considering that the committees charged with oversight of tax issues have yet to fully investigate or consider how the Code impacts women business owners. In fact, the tax-writing committees have yet to hold a hearing on these issues. But just as concerning as the notable absence of any tax-writing committee hearing on women business owners is the persistent underrepresentation of women as witnesses before the committees altogether. Although women-owned firms have grown exponentially in number in recent decades to now number almost thirteen million (42 percent of all U.S. firms in 2019), the overall participation of women as witnesses at tax-writing committee legislative hearings remains disproportionately low. In fact, no women testified at 45 percent of the total tax reform hearings the tax-writing committees held during the 110th through the 115th Congresses. Although women did testify at more than half of the total tax reform hearings, women represented only 17.5 percent of the total 462 witnesses who testified. The absence of women testifying before the tax-writing committees was not limited to hearings on tax reform; from the 110th through the 115th Congresses, of the 3,627 witnesses who testified at 834 legislative, oversight, or investigative hearings the tax-writing committees held, more than 75 percent were men. But more stunningly: women did not testify at all at 332 (almost 40 percent) of the hearings the tax-writing committees held during this period. Data is not (yet) available as to the number of women of color who testified before these committees, but given the existing data on women's representation as witnesses, it is unlikely that it would reflect the fact that women of color account for 50 percent of all women-owned businesses.

The consequence of failure to solicit testimony from women generally and develop data on how tax expenditures impact WBOs specifically is nothing short of a doubling down on a billion dollar blind spot. Congress does not have the data or testimony to determine whether money it spends through tax expenditures helps these small businesses access capital as intended. This is most vividly illustrated by JCT's estimates on the distribution of the revenue loss for Section 199A showing that more than 90 percent of the revenue will go to firms with revenues greater than $100,000. Similarly, existing tax research on WBOs indicates that women-owned firms claim Section 179 at significantly lower rates than existing government research finds for small firms generally. Section 179 is one of the most expensive small business tax expenditures in the Code and will now cost taxpayers almost $60 billion in the coming years, and yet Congress does not have research regarding the benefits to women business owners. At the same time, what government research that does exist reiterates the ongoing challenges WBOs face growing their revenue and accessing capital.

In the wake of the economic devastation triggered by COVID-19, there is an even greater urgency for Congress to invest in firms and to consider what levers exist in the Code to help businesses recover. As part of that process, Congress needs to consider the specific challenges women-owned firms have accessing capital to aid in their recovery. Failure to consider these issues could fundamentally undermine congressional intent to help these small businesses survive.