Passthrough Partner

Code Sec. 199A Deduction—20% Off Qualified Trade or Business Taxable Income? Maybe? Part II

By J. Leigh Griffith

In December 2018, Part I of this column was based on the Proposed 199A Regulations¹ and included the applicable definitions and the basic concepts and mechanics of the 199A 20% deduction of Qualified Business Income ("QBI") up to the 20% of the excess of the taxpayer’s taxable income over the taxpayer’s net capital gain. For those individuals with taxable income (before the 199A deduction) above the threshold of $157,000 single or $315,000 joint return (the “Threshold”), there is a phased in application of the 50% of W-2 wages or the 25% of W-2 wages plus 2.5% of the unadjusted basis immediately after acquisition (“UBIA”) of depreciable tangible property limitation. For those individuals with taxable income (before the 199A deduction) above the Threshold that are involved in a specified service trade or business (“SSTB”), the 199A deduction phases out. The computation of W-2 wages and Notice 2018-64 and the UBIA rules as then found in the Proposed Regulations was discussed. As discussed herein, the 199A Regulations² modified the UBIA rules found in the Proposed Regulations. The application of Code Sec. 199A to trusts and estates was also discussed, but the Final Regulations made significant changes to those Proposed Regulations with modifications that include the substantive deletion of the Proposed Regulations for Code Sec. 643(f).

Part II incorporates the major changes between the Proposed Regulations and the Final Regulations but does not discuss the new proposed regulations dealing with previously suspended losses that constitute QBI and regulated investment companies, charitable remainder trusts and split-interest trusts,³ which were not covered in the Proposed Regulations. Part II also explores the aggregation of businesses held in separate entities and the disaggregation of separate businesses within one entity as well as what constitutes an SSTB. This column concludes with the Regulations’ provisions on estates and trusts.

Selected Modifications to the Proposed Regulations by the Final Regulations

Critical to Code Sec. 199A is the meaning of “Trade or Business,”⁴ which was largely undefined in the Proposed Regulations and remains so in the Regulations.

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As noted in Part I, the definition is extended to encompass the rental or licensing of tangible or intangible property (rental activity) that does not itself rise to the level of a Code Sec. 162 trade or business. The Regulations limit this extension to situations in which the property is rented or licensed to a trade or business conducted by an individual or a Relevant Passthrough Entity (“RPE”), which is commonly controlled under Reg. §1.199A-4(b)(1)(i)." regardless of whether the rental activity and the trade or business are otherwise eligible to be aggregated under Reg. §1.199A-4(b)(1)(i). Under the Regulations, this extension does not apply when the related party is not an individual or an RPE. Therefore, rental to a C corporation or certain trusts, which are not classified as RPEs, will not qualify for this extension.

Owners of real estate or tangible property who have common control of both the real estate RPE and the operating RPE will be deemed to be operating a Trade or Business if certain tests are met even if the real estate activity would not otherwise rise to the level of a Trade or Business. The Regulations ditched the “family attribution rules” and provide that the broader related party rules under Code Secs. 267(b) or 707(b) will be used to determine relatedness. The same person or group of persons directly or indirectly must own 50% or more of each Trade or Business to be aggregated. For this purpose, Trades or Businesses owned by an S corporation, 50% or more of the issued and outstanding shares of the corporation or in the case of a partnership 50% or more of the capital or profits in the partnership, each for a majority of the taxable year including the last day of the taxable year. None of the Trade or Business to be aggregated can be an SSTB. Nevertheless, this definition does not provide criteria for determining if a set of activities constitutes a trade or business.

Critical to Code Sec. 199A is the meaning of “Trade or Business,” which was largely undefined in the Proposed Regulations and remains so in the Regulations.

The Regulations rejected comments to use Code Secs. 469 and 1411 in the definition of Trade or Business but maintained the facts and circumstances test of Code Sec. 163. The preamble noted that a majority of the comments on the meaning of Trade or Business focused on the treatment of rental real estate activities. The preamble to the Regulations provides that in determining whether a rental real estate activity is a Code Sec. 163 Trade or Business, relevant factors include but are not limited to (i) the type of rental property (commercial or residential), (ii) the number of properties rented, (iii) the owner’s or the owner’s agents day-to-day involvement, (iv) the type and significance of any ancillary services provided under the lease (for example, a net lease versus a traditional lease and a short-term lease versus a long-term lease).

The IRS issued Notice 2019-07 concurrently with the Regulations providing notice of a proposed revenue procedure with a safe harbor under which a rental real estate enterprise may be treated as a trade or business solely for purposes of Code Sec. 199A. Under the proposed safe harbor, rental real estate may be considered a trade or business if at least 250 hours of services are performed each taxable year beginning prior to January 1, 2023, and any three of five consecutive years thereafter with respect to the enterprise. This includes services performed by owners, employees, and independent contractors and time spent on maintenance, repairs, collection of rent, payment of expenses, provision of services to tenants and efforts to rent the property. Not counted are hours spent in the capacity of an investor such as arranging, financing, procuring property, reviewing financial statements or reports of operations, planning, managing, or constructing long-term capital improvements and travel to and from the real estate. The safe harbor requires (i) separate books and records, (ii) separate bank accounts to be maintained for the rental real estate enterprise, and (iii) contemporaneous records including time reports, logs or similar documents that also describe the services performed. Property leased under a triple net lease or used by the taxpayer (including an owner or beneficiary of an RPE) as a residence for any part of the year under Code Sec. 280A is not eligible for Trade or Business inclusion! A triple net lease includes a lease agreement that requires the lessee to pay taxes, fees, and insurance, and to be responsible for maintenance activities for a property in addition to rent and utilities. This includes a lease agreement that requires the lessee to pay a portion of the taxes, fees, and insurance and to be responsible for the maintenance activities allocable to the portion of the property rented by the lessee. This definition is potentially broader than most would expect. However, it refers to maintenance activities, not the cost of maintenance. Does this mean that even though the rent includes a passthrough of an allocable share of such costs, if the landlord provides the janitors and maintenance people...
Trade or Business of the lower tier RPE will generally be conducted by an individual. In a tiered arrangement, there is more than one Trade or Business within an RPE or with any allocations. Consistency and the maintenance of the books and records must be consistent with the treatment of any partnership item by the partnership or must disclose the inconsistent treatment. While the flexibility to use any reasonable method and different methods for different items of income, gain, deduction and loss is taxpayer friendly, it also is ripe for producing disputes with the IRS. The complexity of the contemporaneous records and the penalty of perjury statement may cause many to avoid this “safe harbor”. Separately, the Regulations modified the definition of “net capital gain” for purposes of Code Sec. 199A to include not only net capital gain within the meaning of Code Sec. 1222(11) but also any qualified dividend income as defined in Code Sec. 1(h)(11)(B) for the tax- able year. 

Disaggregation and Allocation of Items Among Directly Conducted Trades or Businesses

The Proposed Regulations and the Regulations both provide that an Individual or an RPE can have more than one Trade or Business. QBI is separately determined for each Trade or Business. Items used to compute QBI may be allocable to more than one Trade or Business. For example, centralized accounting and legal services may provide services to a number of separate Trades or Businesses operated by a single Individual or pass-through entity. The Regulations provide favorable rules for allocating such items among the various Trades and Businesses. The Regulations provide that any reasonable method, based on all the facts and circumstances, consistently applied and clearly reflecting the income and expense of each Trade or Business, may be used by the Individual or RPE to allocate items among the several Trades or Businesses. Different reasonable methods may be used for different items of income, gain, deduction and loss. However, the overall combination of methods must also be reasonable based on all facts and circumstances, and the books and records maintained for each Trade or Business must be consistent with any allocations. 

Unfortunately, the Regulations do not provide meaningful guidance as to what is necessary to establish there is more than one Trade or Business within an RPE or conducted by an individual. In a tiered arrangement, the Trade or Business of the lower tier RPE will generally be considered to be a separate Trade or Business, and unless subject to the mandatory aggregation rules discussed later herein, passed through to the owners of the upper tier RPEs. Disaggregation of the Trades or Businesses of an RPE is made at the RPE level. For purposes of entities taxable as partnerships, the decision at the entity level will bind each and every partner. Under the new partnership audit rules of Code Sec. 6223, each partner must file returns consistent with the treatment of any partnership item by the partnership or must disclose the inconsistent treatment. While the flexibility to use any reasonable method and different methods for different items of income, gain, deduction and loss is taxpayer friendly, it also is ripe for producing disputes with the IRS. Clear reflection of income is rather subjective, and reasonableness of methods individually and in the aggregate is also subjective. Consistency and the maintenance of the books and records for a Trade or Business that reflects the allocations can also give rise to dispute. The relationship between flexibility and certainty is often uneasy. Nevertheless, given the infinite factual variations that will be presented, the decision of the drafters of the Regulations is sound, and most disputes will likely be on the margins with individuals and RPEs pushing the envelope.

All in all, this appears to be a good trade for the taxpayers in general but a potential trap for the advisor preparer if the property or services provided to the related SSTB is very small.
the previously disassociated Trades or Businesses. The IRS will likely then compare the result to the separate W-2/UBIA Limitations and assess for the full adjustment at the maximum individual rate. Under Code Sec. 6225’s default rules, this will generate a liability at the partnership level.

### Aggregation

As discussed previously, an Individual or RPE may be engaged in more than one Trade or Business. A Trade or Business may be operated in a proprietorship, trust, estate or RPE or combination thereof. Generally, the 199A deduction is based on each separate Trade or Business, and each RPE has its own Trades or Businesses that may be disaggregated as provided above. If specific rules are satisfied, however, the Regulations permit but do not require RPEs as well as Individuals to aggregate separate Trades or Business other than SSTBs whether directly operated or operated through RPEs or lower tier RPEs for purposes of determining QBI, W-2 and UBIA amounts and the limitations. If an RPE aggregates, its owners and any upper tier owners must honor the aggregation and cannot disaggregate the aggregation. Aggregation generally is not required but is an option. Different Individuals or RPEs may choose to aggregate the same Trades or Businesses differently from that of others. However, any aggregation by an individual with respect to a Trade or Business operated through an RPE must occur in a manner not inconsistent with the aggregation of an RPE. An RPE may aggregate Trades or Businesses operated directly or through a lower-tier RPE to the extent an aggregation is not inconsistent with the aggregation of a lower-tier RPE. The RPE and Individual, however, must always calculate QBI and the W-2/UBIA Limitation separately for each Trade or Business before the Individual aggregates.

The poisoning of both the tree and the fruit for purposes of Code Sec. 199A is somewhat surprising to the author.

The Regulations provide five substantive requirements that the Individual (not an RPE) must demonstrate are satisfied in order to aggregate separate Trades or Businesses. In addition, there are specific disclosure requirements. The five requirements are the following:

1. The same person or group of persons, directly or indirectly, own(s) 50% or more of each Trade or Business to be aggregated. As discussed later herein, there are attribution rules for determining ownership for this purpose.
2. The ownership constituting the direct or indirect 50% or more of each Trade or Business to be aggregated must exist for the majority of the taxable year including the last day of the taxable year.
3. All items attributable to each Trade or Business to be aggregated are reported on returns with the same taxable year (excluding short taxable years).
4. None of the Trades or Businesses to be aggregated is an SSTB.
5. Based on the specific facts and circumstances, the Trades or Businesses to be aggregated must satisfy at least two of the following three factors: (i) the Trades or Businesses provide products and services that are the same or customarily offered together; (ii) the Trades or Businesses share facilities or significant centralized business elements such as personnel, accounting, legal, manufacturing, purchasing, human resources or information technology resources; and (iii) the Trades or Businesses are operated in coordination with or reliance upon one or more of the businesses in the aggregated group (such as supply chain interdependencies or one Trade or Business renting the real estate to the other).

The satisfaction of two of the three factors is not automatic. The Regulations provide some useful examples. Some of the examples find the sharing of accounting and human resource functions sufficient to establish significant centralized business elements. The fifth example reminds the reader that the parties seeking to aggregate have the burden of proving over 50% common ownership of the businesses sought to be aggregated.

To determine if the same person or group of persons, directly or indirectly, own(s) 50% or more of each Trade or Business to be aggregated, the Regulations provide that in the case of an S corporation, the same individuals must own 50% or more of the issued and outstanding shares. In the case of a partnership, the same individuals must own, directly or indirectly, 50% or more of the capital or profits in the partnership. The Regulations do not establish a limit on the number of persons who can be combined when testing to see if the 50% or more common ownership is met. This ownership must be for the majority of the taxable year for which items are to be aggregated, including the last day of the tax year. The
The majority of the taxable year requirement refers to the tax year of the individual or RPE that conducts the Trade or Business.\textsuperscript{34}

The Proposed Regulations appeared to make the initial choice of what Trades or Businesses are aggregated to be extremely important as it appeared to be difficult to alter the aggregation and add or subtract Trades or Businesses owned at the time of the initial aggregation in the future. While the initial aggregation decisions are indeed important, with respect to additions, the Regulations reacted to comments and provided that a taxpayer’s failure to aggregate Trades or Businesses will not be considered to be an aggregation and that later aggregation is not precluded.\textsuperscript{35} If an Individual chooses to aggregate two or more Trades or Businesses, however, the Individual must consistently report the aggregated Trades or Businesses in all subsequent years.\textsuperscript{36} If there is a change in the facts and circumstances such that an Individual’s prior aggregation no longer qualifies for aggregation, then the Trades or Businesses will no longer be aggregated and the Individual may reapply the rules to determine a new permissible aggregation.\textsuperscript{37} In a very favorable development for taxpayers, due to the fact that many individuals and RPEs may be unaware of the aggregation rules when filing 2018 returns, the Regulations allow amended returns for the 2018 taxable year to elect to aggregate.\textsuperscript{38} However, the general rule is an amended return cannot add an additional Trade or Business to an aggregation or start an aggregation.\textsuperscript{39}

A newly created or acquired Trade or Business may be added to an existing aggregated Trade or Business if the specified requirements are met.\textsuperscript{40} For purposes of determining whether the Trades or Businesses operated directly (i.e., as a proprietorship, including as a disregarded entity) or through RPEs that an individual taxpayer desires to aggregate are 50% or more directly or indirectly commonly owned, the Regulations use Code Secs. 267(b) and 707(b). This is an important expansion to the Proposed Regulation’s family attribution rules. The direct or indirect common ownership must exist for a majority of the taxable year and on the last day of the taxable year.\textsuperscript{41} As noted earlier, one Individual may choose to aggregate specific Trades or Businesses while other Individuals owning interests in the same Trades or Businesses may decide not to aggregate.\textsuperscript{42}

It takes more than the common ownership, however, to aggregate two or more Trades or Businesses. First, no aggregation is allowed for an SSTB\textsuperscript{43} and each Trade or Business must have the same taxable year (excluding short taxable year).\textsuperscript{44} The Trades or Businesses to be aggregated must satisfy two of the following three tests:

1. The Trades or Businesses must provide products, property, or services that are the same or customarily offered together.
2. The Trades or Businesses must share facilities or share significant centralized business elements, such as personnel, accounting, legal, manufacturing, purchasing, human resources or information technology resources.
3. The Trades or Businesses are operated in coordination with, or reliance upon, one or more of the businesses in the aggregated group (for example, supply chain interdependencies).\textsuperscript{45}

If one RPE leases property to another RPE that is an operating entity and meets the ownership test, the property RPE can be aggregated with the RPE lessee because the operating RPE shares the facility and the facility and operating RPE are operated in reliance on each other.\textsuperscript{46} The Regulations contain an example of an RPE (RPE 1) that operates a food service and movie theater, which operate in coordination with and reliance on each other. Another commonly owned RPE (RPE 2) operates a food service business. RPE 1 can aggregate both of its businesses if so desired. RPE 1’s food service business can aggregate with RPE 2’s food service business. Somewhat surprisingly, if RPE 1 aggregates its two lines of business, it cannot aggregate with RPE 2 and if RPE’s food service business aggregates with RPE 2, RPE 1 cannot aggregate both of its Trades or Businesses and with RPE 2.\textsuperscript{47}

Code Sec. 199A breaks new ground and as such those toiling in the fields are going to break many plows as the provisions have many “rocky” places. The facts and circumstance nature of many of the determinations is ripe for uncertainty and disputes.

Commercial real estate leasing and residential real estate leasing, even if commonly owned and shared centralized services, cannot aggregate. Commercial and residential real estate are not the same type of property or services.\textsuperscript{48} If an Individual or RPE chooses to aggregate two or more Trades or Businesses, the Individual must file an annual disclosure. This statement is attached to the
Individual’s or RPE’s income tax return identifying each Trade or Business that is aggregated. The statement must contain (i) a description of each aggregated Trade or Business; (ii) the name and EIN of each entity in which one or more of the Trades or Businesses is operated; (iii) information identifying any Trade or Business that was formed, ceased operations, was acquired or disposed of during the taxable year; and (iv) other information the Commissioner may require in other guidance. The individual or RPE must also report aggregated Trades or Businesses of an RPE in which the individual holds a direct or indirect interest. In the event of a failure to disclose, the Commissioner may disaggregate the Individual’s or RPE’s Trades or Businesses.

Trade or Business of Performing Services as an Employee

Performing services as an employee is not a Trade or Business for purposes of Code Sec. 199A. No items of income, gain, loss or deduction from the performance of services as an employee constitute QBI. How the employer classifies the service provider is immaterial. The IRS will determine if the classification as an employee is appropriate. In addition, the Regulations create a rebuttable presumption that a person properly treated as an employee for federal employment tax purposes by the person to whom he or she provided services and who is subsequently treated other than as an employee but continues to provide (directly or indirectly through an entity) substantially the same services to such person (or a related person) is in the Trade or Business of being an employee. This presumption can be rebutted by the former employee showing that under federal law, regulations and principles (including common-law employee classification rules), the individual is performing services in a capacity other than as an employee. The Regulation has several examples illustrating the application of the employee rules. One example demonstrates facts and circumstances to override the presumption that a former employee who ceased to be an employee but who continues to provide similar services is no longer an employee but a partner.

Specified Service Trades or Businesses

SSTBs are excluded from the definition of "qualified Trade or Business." Nevertheless, Individuals with taxable income below the Threshold Amount who are engaged in an SSTB may obtain the benefit of the 199A deduction. As discussed in Part I of this column, an Individual engaged in or owning interests in an RPE engaged in an SSTB is subject to a phase-in of the exclusion of the 199A deduction if the Individual’s taxable income exceeds the Threshold Amount. If an Individual’s taxable income exceeds the Threshold Amount plus Phase-in-Range, no 199A deduction is permitted with respect to the SSTB regardless of the QBI, W-2 wages and UBIA amount even if some of the items in the SSTB are derived from an activity that is not itself a specified service activity. The limitation on or elimination of the 199A deduction applies to any direct or indirect owner of an RPE engaged in an SSTB activity regardless as to whether the Individual is an owner who is active or passive in the specified service activity.

Special Rules Applicable to All SSTBs

Before exploring the specific unlucky 13 fields constituting SSTBs, the Regulations provide some special rules that are helpful when thinking about SSTBs and mitigation strategies.

De Minimis Rule

As indicated above, even services of a Trade or Business that are not SSTB services are tainted if they are part of an SSTB. The Regulations provide a de minimis rule based on the gross receipts of the Trade or Business. For a Trade or Business with gross receipts of $25 million or less, the Trade or Business is not an SSTB if less than 10% of the gross receipts are attributable to the performance of services in an SSTB field. For a Trade or Business with gross receipts of over $25 million, the de minimis percentage is 5%. The performance of any activity incident to the actual performance of services in the specified service field is considered as the performance of services in the specified service field. The Regulations provide an example illustrating the separation of two Trades or Businesses operated in a single RPE. In Example 2, Animal Care LLC provides veterinarian services performed by a licensed staff and also develops and sells organic dog food at its veterinarian clinic. The veterinarian services are services in the field of health (an SSTB). Animal Care LLC has gross receipts of $3,000,000, of which $1,000,000 is from veterinary services. If these two activities are considered as one Trade or Business, the veterinary services would cause everything to be treated as an SSTB. Even though it appears the activities occur under one roof, the example states that dog food sales are separately invoiced and separate books and records are kept. There are also separate
employees who are unaffiliated with the veterinary clinic and who only work on the dog food products. On these facts, the dog food and veterinary services are considered separate, and the dog food service is not tainted by the veterinary services.61 Does this Example imply that separate employees and separate invoicing are required to be able to separate two Trades or Businesses operated by one RPE?

 Provision of Property or Services to an SSTB with Common Ownership—Mandatory Aggregation62

Although the general rule in aggregation is an option, dealing with SSTBs may require aggregation. Trade or Business (that would otherwise not be treated as an SSTB) if owned 50% or more by owners of an SSTB and the Trade or Business provides services to the SSTB, that portion of the Trade or Business providing property or services to one or more SSTBs whose owners own 50% or more of the providing Trade or Business is treated as a separate SSTB with respect to the related parties.63 For this purpose, ownership includes direct and indirect ownership by related parties within the meaning of Code Secs. 267(b) and 707(b).64

Surprisingly, a technical reading of the Regulation indicates that even if the amount of property and services of the Trade or Business providing services to the commonly owned SSTB would otherwise fall into the de minimis rule percentage discussed immediately above, that portion of the Trade or Business may not to escape SSTB status. The Regulation provides that “that portion of the Trade or Business of providing property or services to the 50% or more commonly-owned SSTB will be treated as a separate SSTB with respect to the related parties.”65 If such portion is itself a separate SSTB, then the de minimis rule would not apply as such service is not a part of another Trade or Business.66 The de minimis rule applies to an RPE or individual with a non-SSTB activity that has embedded or ancillary SSTB activity that does not generate more than the specified 5% or 10% of the total gross receipts attributable to the Trade or Business activity. Here, the Regulation appears to classify that portion of a Trade or Business providing services to a commonly owned SSTB as itself constituting an SSTB. Whether that is the intended result in unknown.

This technical reading, however, has a positive aspect for many (perhaps most) commonly owned Trades or Businesses providing services to an SSTB. By treating the portion of property or services provided to the commonly owned SSTB as a separate SSTB, the remaining activity of the Trade or Business providing such services to others appears to escape the SSTB limitations and should have a fresh de minimis exception for that remaining portion. If that reading is correct, this appears to be a good trade for the taxpayers in general but a potential trap for the advisor preparer if the property or services provided to the related SSTB is very small.67

 Guidance as to What Constitutes an SSTB

The Regulations provide some guidance to identify what constitutes one of the unlucky 13 fields of services that are excluded (subject to the income exception). The statute refers to Code Sec. 1202(e)(3)(A), which has very little published guidance or judicial history. The Conference Report also referred to Code Sec. 448, but the statute does not.68 The Treasury found the guidance of the existing definitions of Temporary Reg. §1.448-1T(e) helpful and the authority developed over the years regarding Code Sec. 448(e) informative but not necessarily controlling.69 The purposes of Code Secs. 448 and 199A are rather different. The preamble to the Proposed Regulation states the following: “Therefore, the guidance in proposed §1.199A-5(b) applies only to section 199A, not sections 1202 and 448.”70 The Regulations state the following: “The rules of this paragraph (b)(2) apply solely for purposes of section 199A and therefore may not be taken into account for purposes of applying any provision of law or regulation other than section 199A and the regulations thereunder, except to the extent such provision expressly refers to section 199A(d) or this section.”71

 Services Performed in the Field of Health

The Regulations define these services as “the provision of medical services by individuals such as physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists, and other similar healthcare professionals performing services in their capacity as such.”72 The Regulations took a major deviation from the Proposed Regulations and deleted from the definition of services performed in the field of health “who provide medical services directly to a patient (service recipient).”73 The preamble of the Regulations states that “proximity to patients is not a necessary component of providing services in the field of health. Accordingly, the final regulations remove the requirement that medical services be provided directly to the patient.”74 Excluded from the field of healthcare services not directly related to a medical services field include a health club or spa that provides physical exercise.
or conditioning to their customers, payment processing, or the research, testing, and manufacture or sales of pharmaceuticals or medical devices.\textsuperscript{75}

In response to comments, the Regulations added several examples.

The first example is an independent contractor pharmacist who provides assistance to a small rural medical facility when the full-time staff needs assistance. The responsibilities are receiving and reviewing orders from physicians providing medical care at the facility, making recommendations on dosing and alternatives to the ordering physician, performing inoculations, checking for drug interactions, and filling pharmaceutical orders for patients receiving care at the facility. The pharmacist is engaged in performing services in the field of health.\textsuperscript{76}

The second example is “X,” an operator of a residential facility for senior citizens who reside on the facility campus. Services include housing management, maintenance, meals, laundry, entertainment, etc. X contracts with local professional healthcare organizations for an extensive range of healthcare services, which are provided at the facility. X charges the residents for the costs associated with residing at the facility, but any medical services are billed directly by the healthcare providers to the senior citizens for the professional healthcare services even though the services are provided at the facility. X is not performing services in the field of health.\textsuperscript{77}

The third example is “Y,” an operator of specialty surgical centers providing outpatient medical procedures not requiring the patient to stay overnight. Y ensures compliance with state and federal laws for medical facilities and manages the facility’s operations and performs administrative functions. Y does NOT employ physicians, nurses, and medical assistants but enters into agreements with other professional medical organizations or directly with medical professionals to perform procedures and provides all medical care. Y bills patients for facility costs relating to their procedures, and the healthcare professional or their affiliated organization bills the patient for the actual costs of the procedure conducted by the physician and medical support team. Y is not performing services in the field of health.\textsuperscript{78}

The fourth example is “Z,” a developer and only provider of a patented test used to detect a particular medical condition. Z accepts test orders only from healthcare professionals (Z’s clients) and does not have contact with patients. Z’s employees do not diagnose, treat, or manage any aspect of patient care. Z does have an employee with an advanced medical degree that manages the testing operations. All other employees are technical support staff and not healthcare professionals. Z trains the workers for more than a year for working with Z’s test, which is of no use to other employers. Upon completion of an ordered test, Z analyzes the results and provides its clients (the healthcare professionals) a report summarizing the findings. Z does not discuss the report’s results, or the patient’s diagnosis or treatment with any healthcare provider or the patient nor does the healthcare provider inform Z of the provider’s diagnosis or treatment. Z is not providing services within the field of health.\textsuperscript{79}

The changes to this portion of the Regulations muddy the water considerably with respect to healthcare and health services. Are physicians who perform research for the development of new pharmaceuticals or treatment regimens that include clinical studies in which patients utilize what is being developed in the field of health included in the field of health? If the physician researchers do not conduct the clinical trials and do not even see the patients on which the drugs or procedures are tested, they would not appear that they should be in the field of health, but they are probably being informed of the results and discussing matters with practicing healthcare professionals. Does that “taint” them? Arguably, the provision of clinical trials is a treatment (at least for those who are not receiving placebos) but is a necessary step in research. Are these physicians acting in the capacity of providing medical services or in their capacity as advancing medical research? Are academic physicians, nurses and perhaps others who treat patients and also perform research in two Trades or Businesses—one an SSTB and the other not? If conceptually two trades or businesses, can they be realistically disaggregated?

The example concerning outpatient surgery centers would seem to hold that if nurses and technical staff are provided by the outpatient surgery center, the service is in the field of healthcare. If the outpatient facility is commonly owned, then clearly it would be encompassed by the provision of services to an SSTB (the doctors performing medical services) and would most likely be considered an SSTB. In the absence of sufficient common ownership, however, if nurses and others providing patient services are not provided by the surgery center, it appears from the example that the provision of the facility, reception, facility billing, bookkeeping, human resources and scheduling in the outpatient facility is not engaged in the field of healthcare. Can the amount of the fee paid to the surgery center be broken into component parts and the position taken that the nurses and other technical persons’ revenue is less than the 5% or 10% of the gross revenue?
The preamble indicates that technicians who operate medical equipment or test samples but render no clinical interpretation or provide actual medical services to patients will be analyzed on a facts and circumstances basis but does not provide guidance as to what facts and circumstances are relevant.\textsuperscript{80}

**Services in the Field of Law**

These are “performance of legal services by individuals such as lawyers, paralegals, legal arbitrators, mediators, and similar professionals performing services in their capacity as such.”\textsuperscript{81} It does not include services that do not require skills unique to the field of law such as printers, delivery services or stenography services.

**Services in the Field of Accounting**

These are “provision of services by individuals such as accountants, enrolled agents, return preparers, financial auditors, and similar professionals performing services in their capacity as such.”\textsuperscript{82} The Regulations do not provide examples of services that are not in the field of accounting; however, the preamble to the Proposed Regulations states that “[t]he field of accounting does not include payment processing and billing analysis.”\textsuperscript{83} The field of accounting is not limited to services requiring a person to be a Certified Public Accountant or have any state licensure. Bookkeepers and tax return preparers providing services to third-party clients are providing services in the field of accounting.\textsuperscript{84} In the field of accounting, the educational background of a service provider does not appear to make a difference.\textsuperscript{85}

**Services in the Field of Actuarial Science**

These are “provision of services by individuals such as actuaries and similar professionals performing services in their capacity as such.”\textsuperscript{86} The Regulations give no further guidance. The preamble to the Proposed Regulations, however, provides that the definition “does not include the provision of services by analysts, economists, mathematicians, and statisticians not engaged in analyzing or assessing the financial cost of risk or uncertainty of events.”\textsuperscript{87} The preamble to the Regulations provides that the mere employment of an actuary does not itself cause the Trade or Business to be treated as performing services in the field of actuarial science.\textsuperscript{88}

**Services in the Field of Performing Arts**

These are “performance of services by individuals who participate in the creation of performing arts, such as actors, singers, musicians, entertainers, directors, and similar professionals performing services in their capacity as such.”\textsuperscript{89} The preamble to the Regulations states the following: “To the extent that a writer is paid for written material, such as a song or screenplay, that is integral to the creation of the performing arts, the writer is performing services in the field of performing arts.”\textsuperscript{90} Persons providing services that are not unique to the creation of performing arts are not providing services in the field of performing arts.

The preamble to the Proposed Regulations states that the definition of “performing arts” is informative to the Proposed Regulations, and that definition did include “directors.” The inference of unique to the creation of performing arts combined with the listing of a director would seem to indicate that producers, songwriters, screenplay and script writers, set designers, video game designers and others who are not actually on the stage, film or recording are in the field of performing arts. The specificity of the Regulations discussed above appears to confirm this inference. This is different than Code Sec. 448.\textsuperscript{91} The Regulations’ examples of persons who are not in the field of performing arts are those maintaining and operating the equipment or facilities for use in the performing arts or persons who broadcast or otherwise disseminate video or audio of performing arts to the public. Example 5 of the Regulations illustrates a singer who writes and records a song, and both the mechanical and performance royalties are excluded from the calculation of QBI.\textsuperscript{92} In addition, the inclusion of “director” and the inclusion of persons who themselves are not performing artists is troubling to the author (undoubtedly influenced by the environment of Nashville (Music City)). Are managers, promoters and private record labels providing services in the field of performing arts? The rationale of the sports team example would seem to equally apply to a Broadway theater (or traveling) production.\textsuperscript{93} Are touring companies more like the broadcasters or sports teams? The Regulations provide that RPEs that plan and coordinate film production are SSTBs, and passive investors in such ventures are not eligible for the 199A deduction. If the business is dealing with independent contractors such as most music performers, is the business promoting and booking tours an SSTB? Unlike the artists, songwriters, producers, etc., they are not participating in the creation of the performing arts, rather they are simply promoting the performing arts and perhaps the sale of tour merchandise.

**Services in the Field of Consulting**

These are “provision of professional advice and counsel to clients to assist the client in achieving goals and solving problems.”\textsuperscript{94} This includes advocacy with the intention
of influencing decisions by government officials. It does not include performance of services other than advice and counsel such as sales or economically similar services or the provision of training and educational courses. Sales or economically similar services will have a facts and circumstances test including manner compensated for services provided. Consulting services do not include consulting services embedded in, or ancillary to, the sale of goods or performance of services on behalf of a Trade or Business that is otherwise not an SSTB if there is no separate payment for the consulting services. The Regulations expressly provide that “Services within the fields of architecture and engineering are not treated as consulting services.”

The Regulations added two examples of RPEs providing personnel services. In the first example, an RPE assisted unrelated entities in making their personnel structure more efficient, including the use of temporary workers. This RPE did not provide the temporary workers, and its payment was not affected whether the client used temporary workers or did not. It is engaged in providing services in the field of consulting and is an SSTB. In contrast, the second example involves a temporary worker staffing firm that reviews resumes and refers workers to its clients. The staffing firm is paid a fixed fee for each temporary worker hired by the client and a bonus if the worker becomes a permanent employee. The RPE is not an SSTB. Interestingly, and perhaps troubling, the example states that the RPE does not evaluate the client’s needs nor evaluates the client’s consulting contracts to determine the type of expertise needed. In the author’s opinion, the services that are excluded in this example should be permissible so long as the RPE was only being paid for the workers who were hired on a temporary or permanent basis. These should be embedded services or ancillary services to the sale of goods or performance on behalf of a Trade or Business that is itself not an SSTB.

Services in the Field of Athletics

These are “performance of services by individuals who participate in athletic competition such as athletes, coaches, and team managers in sports such as baseball, basketball, football, soccer, hockey, martial arts, boxing, bowling, tennis, golf, skiing, snowboarding, track and field, billiards, and racing.” The preamble to the Proposed Regulations stated that the field of athletics is most similar to the field of performing arts. Services in the field of athletics include provision of services that do not require skills unique to athletic competition. Similar to the services in the field of performing arts, the examples of excluded services (i.e., not SSTB) are the maintenance and operation of equipment or facilities for athletic events and the provision of services by persons who broadcast or otherwise disseminate video or audio of athletic events to the public. In Example 7, the services in the field of athletics included a partnership that owned a professional sports team, employed athletes and sold tickets to attend games in which the sports team participates. The partnership is engaged in an SSTB, and the distributive share to both passive and non-passive owners does not constitute QBI.

Services in the Field of Financial Services

These are “provision of financial services to clients including managing wealth, advising clients with respect to finances, developing retirement plans, developing wealth transition plans, the provision of advisory and other similar services regarding valuations, mergers, acquisitions, dispositions, restructurings (including in title 11 or similar cases), and raising financial capital by underwriting, or acting as a client’s agent in the issuance of securities and similar services.” Examples include financial advisors, investment bankers, wealth planners and retirement advisors. The sale of life insurance does not appear to be included in the field of financial services. However, life insurance agents who do advise clients on wealth transition plans and retirement plans on a fee-for-service basis may find that they have crossed the line, and the de minimis rule is very low. The IRS appears to be sensitive to this as the preamble to the Regulations provides that the IRS declined to provide a blanket exemption to insurance agents and noted that financial services such as managing wealth, advising clients with respect to finances and the provision of advisory and other similar services can be provided by insurance agents.

Financial services do not include taking deposits or making loans. Banking is separately listed in Code Sec. 1202(a)(4) and is not listed in Code Sec. 1202(a)(3) and therefore under the normal rules of construction is outside the ambit of the Code Sec. 199A exclusion. However, an Individual or RPE can be in more than one Trade or Business. A business that is primarily banking (taking deposits or making loans) may also provide other services that are within the ambit of financial services. Arranging lending transactions between a lender and a borrower is an SSTB. A number of banks are S corporations, and their advisors should carefully determine if the bank is in more than one Trade or Business for purposes.
of the 199A deduction. It is the S corporation’s responsibility to determine the Trade or Business activities of the corporation.

Services in the Field of Brokerage Services

These include “services in which a person arranges transactions between a buyer and a seller with respect to securities (as defined in section 475(c)(2)) for a commission or fee.” The Regulations list stock brokers but exclude real estate agents and brokers and insurance agents and brokers.109

Services in the Field of Investing and Investing Management110

This refers to a Trade or Business receiving fees for providing investing, asset management or investment management services and advice with respect to the buying and selling of investments but does not include fees for directly managing real property.111

Services in the Field of Trading112

These services are performed in the “trade or business of trading in securities (as defined in section 475(c)(2)), commodities (as defined in section 475(e)(2)), or partnership interests.” Determining if a person is a trader is a facts and circumstances test including source and type of profit that is associated in the activity regardless of whether that person trades for the person’s own account, for the account of others or any combination thereof. A manufacturer or farmer engaging in hedging transactions as part of his or her Trade or Business of manufacturing or framing is not considered to be in the business of trading commodities.

Services in the Field of Dealing

The Regulations identify three services involved in the field of dealing: (i) dealing in securities; (ii) dealing in commodities; and (iii) dealing in partnership interests. Each of the three services are described below.116

Dealing in Securities (as defined in Code Sec. 475(e)(2)) is “regularly purchasing securities from and selling securities to customers in the ordinary course of a Trade or Business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in securities with customers in the ordinary course of a Trade or Business.”117 The performance of services to originate a loan is not treated as the purchase of a security from the borrower.118 The Proposed Regulations had an exception to dealing in securities for loan originators that regularly originated loans but engaged in no more than negligible sales. The IRS deleted the “negligible sales” concept from the Regulations.119

Dealing in Commodities (as defined in Code Sec. 475(e)(2)) “means regularly purchasing commodities from and selling commodities to customers in the ordinary course of a Trade or Business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in commodities with customers in the ordinary course of a Trade or Business.” The Regulations provide that for purposes of Code Sec. 199A, gains and losses from “qualified active sales” as defined in Reg. §1.199A-5(b)(2)(xiii)(B)(1) (generally involving the active conduct of a producer, processor, merchant, or handler of commodities) are not taken into account in determining whether a person is engaged in the Trade or Business of dealing in commodities.121 The Regulations provide extensive guidance with respect to this exclusion, which should be carefully reviewed by professionals advising taxpayers involved in commodities.122

Dealing in Partnership Interests “means regularly purchasing partnership interests from and selling partnership interests to customers in the ordinary course of a Trade or Business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in partnership interests with customers in the ordinary course of a Trade or Business.”123

Trade or Business Where Principal Asset Is Reputation or Skill of One or More Employees or Owners126

The Regulations retained a narrow definition of situations when the reputation or skill of an owner constitutes an SSTB. Wisely the Treasury and IRS decided that the 199A deduction was only available to incompetents. Rather these are Trades or Businesses that consist of any of the following or any combination thereof: (i) compensation for endorsements of products or services; (ii) licensing or receiving fees, compensation or other income from the use of an individual’s image, likeness, name, signature, voice, trademark or any other symbol associated with the individual’s identity; and (iii) income for appearing at an event or on radio, television or another media format that would include social media and video game players. For this purpose, fees, compensation or other income includes receipt of a partnership interest and the corresponding distributive share of income, deduction, gain or loss from the partnership, or the receipt of stock of an S corporation and the corresponding income, deduction, gain or loss from the S corporation stock.125
The poisoning of both the tree and the fruit for purposes of Code Sec. 199A is somewhat surprising to the author. The receipt of the capital interest is understandable. The exclusion of the ongoing income from the partnership or S corporation in which the individual received a capital interest is the surprising aspect unless the taxpayer must continue to provide the “services” to retain the interest. The author’s assumption is that the Treasury believed the income from the partnership interest or S corporation stock is the continuing value of the endorsement or mark or indicates the person is still in the Trade or Business of endorsing even if not continuing to provide the endorsement or likeness. If the partnership no longer markets the endorsement or uses the mark, there is nothing in the Regulation that would indicate that the income and gain from the partnership ceases to be tainted with respect to the 199A deduction.126

Observations on SSTB

While providing broad guidance, the Regulations leave a number of gray areas in interpreting whether something is a service in some of the fields that will be resolved over time but in the interim can make advising clients difficult. Involvement in a Trade or Business providing services with anything listed in Code Sec. 475(c)(2) or (e)(2) seems to be encompassed for purposes of the 199A deduction: primarily through Code Sec. 199A(d)(2)(B)’s broad classification of investing and investment management, trading or dealing in securities, partnership interests or securities. Tax advisors should take note of the example finding that the passive owners of a partnership that owned a sports team constituted the provision of a service in the field of athletics. This stems from the underlying premise that it is the Trade or Business and not the activity of the particular taxpayer that is necessarily controlling. A football team is obviously in the field of athletics. Logically, if a business employs the service providers of a listed field and deals with the customers, it is not surprising that the business is an SSTB. There is nothing in the Regulations that seem to indicate this is unique to athletics. Trades or Businesses that have SSTB type services that are ancillary to or embedded in their connection with their effort to sell products and services that would not otherwise be an SSTB and for which their clients do not receive a charge (other than embedded in the cost of the non-SSTB service or product) should not be entrapped. The de minimis rule is based on gross receipts attributable to services and the provision of small amounts of SSTB services to customers or clients that are separately charged to facilitate non-SSTB products or services.127

RPEs and Computational and Reporting Rules

**RPE Computational and Reporting Rules**128

Since the computation of the 199A deduction may be made at the individual level, an RPE must determine the items necessary for individuals who own interests in the RPE and communicate the appropriate information to such individuals so they may properly compute their 199A deduction through appropriate identification of Trades or Businesses and the relevant QBI, W-2 wages and UBIA of each. An RPE that chooses to aggregate Trades or Businesses may determine the items for the aggregated Trade or Business. RPEs with qualified REIT dividends and publicly traded partnership (“PTP”) qualified income or loss must allocate those items among their owners and provide information to their owners and the IRS.

The Regulations provide four steps for an RPE to determine the items necessary for its individual owners to calculate their 199A deduction. These include the following: (i) determine whether any of its Trades or Businesses are SSTBs under the rules of Reg. §1.199A-5, (ii) determine the QBI for each Trade or Business engaged in directly under the rules of Reg. §1.199A-3, (iii) determine the W-2 wages and UBIA amounts for each Trade or Business engaged in directly by the RPE and (iv) determine if the RPE has any (a) qualified REIT dividends earned directly or through another RPE or (b) qualified PTP income earned directly or indirectly through investments in PTPs.129

Having made the above determinations and calculations, the RPE must report the appropriate information to its owners. With respect to Trades or Businesses engaged in directly by the RPE, the RPE must separately identify and report on the K-1 issued to its owners (i) each owner’s allocable share of QBI, W-2 wages and UBIA of qualified property attributable to each such Trade or Business and (ii) whether any of the Trades or Businesses are SSTBs. In addition, the RPE must provide an attachment to the K-1 identifying any QBI, W-2 wages, UBIA of qualified property and SSTB determinations reported by any RPE in which the RPE owns a direct or indirect interest. Finally, the RPE must report each owner’s share of any qualified REIT dividends or qualified PTP income or loss received by the RPE (including through another RPE).130 If an RPE fails to separately identify or report to each of its owners on a K-1 or attachments thereto the above information and the owner’s share (and the share of any upper-tier
indirect owner) of positive QBI, W-2 wages and UBIA of qualified property attributable to each Trade or Business engaged in by that RPE, then the above information will be presumed to be zero.\footnote{131} In a change from the Proposed Regulations, the Regulations permit any QBI, W-2 wages, UBIA of qualified property reported to an RPE from a lower tier RPE to be reported on an amended return.\footnote{132} The Regulations, however, do not appear to allow amended or late return reporting of QBI, W-2 wages and UBIA of qualified property for Trades or Businesses engaged in directly by the RPE. If the RPE is a partnership, the partners are required to file consistent with the information and elections of the partnership unless specific disclosure to the contrary.\footnote{133} What disclosure is required and how to overcome the presumption is not set forth in the Regulations.

Computational and Reporting Rules for PTPs

Similar to an RPE, each PTP must determine its QBI for each Trade or Business in which it is directly engaged and whether any is an SSTB. Each PTP must provide the allocable shares to each of its partners on a Schedule K-1 issued to its partners as well as the qualified REIT dividends and/or qualified PTP income or loss received by the PTP. Unlike RPEs, the PTP is not required to determine or report W-2 wages or the UBIA of qualified property for the Trades or Businesses in which it engages in directly.\footnote{134} 

Special Rules for Trusts and Estates

Introduction

The Regulations regarding trusts and estates differ significantly from the Proposed Regulations with respect to split-interest trusts, distributable net income (“DNI”) distributions and Code Sec. 643(f). A trust or estate computes its 199A deduction based on QBI, W-2 wages, UBIA of qualified property, qualified REIT dividends and qualified PTP income allocated to the trust or estate. An individual beneficiary takes into account the items allocated to the individual from a trust or estate in the same manner as if they came from an RPE. To the extent a non-grantor trust or estate retains QBI, W-2 wages and UBIA of qualified property used in a Trade or Business, the trust or estate is treated as an individual.\footnote{135} 

The preamble to the Proposed Regulations asserted that Proposed Regulation §1.643(f)-1 simply reflected current law,\footnote{136} although the effective date was August 16, 2018.\footnote{137} Many in the estate and trust bar disagreed with the assertion that the Proposed Regulation §1.643(f)-1 was a statement of the then-current law.\footnote{138} The Regulations substantially revised the Proposed Regulations pertaining to Code Section 643(f) and largely regurgitates the statute and again indicates it is effective for tax years after August 16, 2018. This is rather confusing—does the IRS believe the understanding of the meaning of the statute was what the Proposed Regulations stated? This makes conservative planning in this area rather difficult and perhaps justifies more aggressive planning with pre-existing trusts.

Grantor Trust

With respect to the 199A deduction, a grantor trust’s grantor for all or a part of a trust computes the grantor portion of the Code Sec. 199A deduction as if that person directly conducted the activities of the trust or received the 199A items as if such person received them from an RPE. The trustee, however, will be required to provide to the grantor (and the IRS) the information that permits the grantor to make the relevant computations.\footnote{139} 

Non-Grantor Trust

With respect to the 199A deduction and items, a non-grantor trust (or portion of a non-grantor trust) or estate is treated as an RPE to the extent it receives or generates QBI, W-2 wages, UBIA, qualified REIT dividends and qualified PTP income and allocates such items to the trust beneficiaries. With respect to any retained items, a non-grantor trust or estate is treated as a natural individual with an overlay of trust accounting rules.\footnote{140} 

For a non-grantor trust, the trust accounting rules apply to allocate the items of deduction (other than depreciation and amortization) in accordance with the classification of the deductions under Reg. §1.652(b)-3(a) and (b). Depreciation, depletion and amortization are otherwise included in the computation of QBI of the trust or estate regardless of how those deductions are allocated between the trust and its beneficiaries for other purposes of the Code.\footnote{141} 

The positive or negative QBI calculated at the trust or estate level, W-2 wages, UBIA, qualified REIT dividends and qualified PTP income or loss are allocated between the trust and estate and the beneficiaries based on the relative proportion of the trust’s or estate’s DNI for the taxable year that is distributed or required to be distributed to the beneficiaries or retained by the trust or estate even though the depreciation or depletion deductions may be allocated in a different manner for income tax purposes. The separate share rule of Code Sec. 663(c), which treats
a single trust as multiple trusts in determining DNI, is regarded for purposes of Code Sec. 199A.\textsuperscript{142} If the trust or estate has no DNI for the taxable year, all QBI, W-2 wages, UBIA, qualified REIT dividends and qualified PTP income or loss are allocated entirely to the trust or estate.\textsuperscript{143}

The Threshold Amount for any trust or estate is $157,500 adjusted for inflation.\textsuperscript{144} The taxable income of a trust or estate for purposes of determining whether the Threshold Amount is exceeded is computed after taking into account any distribution deductions under Code Secs. 651 or 661.\textsuperscript{145}

**ESBT**

An electing small business trust (“ESBT”) is treated as two separate trusts. The ESBT accounts for the QBI and other items from the S corporation owned by the ESBT in the S portion of the trust and the other items from assets treated as owned by the grantor trust portion, which must take into account any QBI and other items from any other entities or assets owned by the non-S portion under Reg. §1.643(c)-1.\textsuperscript{146} For purposes of determining whether the ESBT is engaged in an SSTB, the S portion and the non-S portion are treated as a single trust.\textsuperscript{147}

**Anti-Abuse Rule for Code Sec. 199A**

The Proposed Regulations have an anti-abuse rule that disrespects the trusts that are formed or funded with a principal purpose\textsuperscript{148} of avoiding the threshold amount limitation, or of using more than the threshold amount will not be respected as a separate trust entity for purposes of Code Sec. 199A.\textsuperscript{149} This test is applied at the creation or additional funding of a trust, and once tainted, the trust is tainted thereafter, even if the avoidance or the use of more than the threshold amount is no longer a principal purpose. The inclusion of funding implies that the anti-abuse rule applies to existing trusts that are funded with a principal purpose of avoiding the 199A threshold to maximizing the 199A deduction. The anti-abuse rule also refers to Reg. §1.643(f)-1, which is found in the Regulations. How one determines what a principal purpose is under these circumstances or, perhaps better, how one carries the burden of proof of establishing the creation or funding did not have as a principal purpose is not terribly clear to the author. Presumably, a principal purpose is higher than a significant purpose. The term “disrespects” is not a common term in the tax world, and the author is uncertain of the meaning. If a new trust is created, does disrespect mean for purposes of 199A that the trust is treated as if it does not exist and the property remained with the grantor for contribution of the QBI, W-2 wages and UBIA? If additional funds or assets are placed in the trust and the funding is disrespected, is the transaction ignored for Code Sec. 199A purposes? If so, are QBI, W-2 wages and UBIA computed in the hands of the transferor(s)?

Reg. §1.199A-6(d)(3)(v) also references Reg. §1.643(f)-1. The Proposed Regulations under Reg. §1.643(f)-1 were revised to essentially paraphrase the statute. Very aggressive and taxpayer unfriendly provisions of the Proposed Regulations were dropped, at least for the moment. The Regulation now states that two or more trusts will be aggregated and treated as a single trust if such trusts have (i) substantially the same grantor or grantors; (ii) substantially the same beneficiary or beneficiaries; and (iii) a principal purpose for establishing one or more of such trusts or for contributing additional amounts is the avoidance of Federal income tax.\textsuperscript{150} Spouses will be treated as one person.

**Conclusion**

Code Sec. 199A breaks new ground and as such those toiling in the fields are going to break many plows as the provisions have many “rocky” places. The facts and circumstance nature of many of the determinations is ripe for uncertainty and disputes. Determining that there are two or more Trades or Businesses being conducted by an individual or an RPE seems to be a critical piece of the planning puzzle, but exactly what is required to have and support a separate Trade or Business is unclear. Appropriate separable books and records is a visible factor, but it will take more than that. With respect to some of the SSTB fields of service, it is not clear exactly what is or is not an SSTB. Determining whether the de minimis test for tainting the Trade or Business is met may be particularly challenging in some fields such as medicine, and perhaps the elimination of patient contact has made that field much harder to analyze.

Aggregation and disaggregation are things that the taxpayer and the taxpayer's tax advisors should carefully consider. Having the appropriate “groupings” will be very important as time goes on. Under the Regulations, a Trade or Business can be added to the aggregation, but it will be difficult to disaggregate.

While the Final Regulations are very complicated, the benefits of the 199A deduction are too compelling to be ignored. Many taxpayers will benefit significantly from the 199A deduction provided tax advisors review the regulations carefully and apply thoughtful analysis to each unique situation.
1 Qualified Business Income Deduction, 83 FR 40,884 (proposed Aug. 16, 2018).
2 Qualified Business Income Deduction, 84 FR 2952 (Feb. 8, 2019).
3 Qualified Business Income Deduction, 84 FR 3015 (proposed Feb. 8, 2019).
4 Reg. §199A-4(b)(14).
5 Reg. §199A-4(b)(1)(i) requires the same person or group of persons to directly or indirectly own, for the majority of the taxable year (which includes the last day of the taxable year) in which the aggregation is to occur, 50% of each Trade or Business to be aggregated. In the case of Trades or Businesses owned (i) by an S corporation, 50% or more of the issued and outstanding shares of the corporation or (ii) by a partnership, 50% or more of the capital or profits in the partnership are owned directly or indirectly by the same person or group of persons. An individual is considered as owning the interest in each Trade or Business owned, directly or indirectly, under the rules of Code Secs. 267 and 707(b).
6 Reg. §199A-4(b)(1)(i).
7 Reg. §199A-4(b)(1)(ii)–(ii).
8 This distinction indicates that the rental of commercial real estate and residential real estate are two different Trade or Businesses.
10 Section 3.01 of Notice 2019-07 states: "Failure to satisfy the requirements of the safe harbor does not preclude a taxpayer from otherwise establishing that a rental real estate enterprise is a trade or business for purposes of 199A."
11 Id. ("Real estate used by the taxpayer (including an owner or beneficiary of an RPE relying on this safe harbor) as a residence for any part of the year under section 280A is not eligible for this safe harbor.").
12 Notice 2019-07, IRB 2019-19 Section 3.06.
13 Reg. §199A-1(b)(3).
14 Proposed Reg. §199A-4(a); Reg. §199A-4(a).
15 Reg. §199A-3(b)(5).
16 Id.
17 Id.
18 Code Sec. 199A(Γ)(1).
19 Reg. §301.6223-1(b)(3).
20 Reg. §199A-4(c)(2)(i).
21 Reg. §199A-4.
22 An RPE that does not elect to aggregate must determine each Trade or Business separately.
23 Reg. §199A-4(b). Aggregation only applies to qualified Trades or Businesses in unincorporated form or in an S corporation. See Reg. §199A-4(d)(Example 11).
26 Reg. §199A-4(b)(2)(i).
27 Reg. §199A-4(b)(2)(ii).
28 Reg. §199A-4(b)(2). The requirement that each Trade or Business first determines its QBI, W-2 wages and UBIA separately and then is aggregated makes matters transparent to an auditor and simplifies making an adjustment if the auditor feels that the requirements for aggregation are not met.
29 Reg. §199A-4(d)(1).
30 Reg. §199A-4(b)(1)(i).
31 Reg. §199A-4(b)(1)(xv).
32 Reg. §199A-4(d).
33 Reg. §199A-4(d)(Example 5).
34 Qualified Business Income Deduction, 84 FR 2952, 2967 (Feb. 8, 2019).
35 Reg. §199A-4(c)(1).
36 Id.
37 Id.
38 Reg. §199A-4(c)(1).
39 Id.
40 See Reg. §199A-4(d) (Examples 8 and 9).
41 Reg. §199A-4(d) (Example 15).
42 Reg. §199A-4(d) (Example 17).
43 Reg. §199A-4(c)(2)(i).
44 Reg. §199A-4(c)(1)(–)(3).
45 Reg. §199A-4(c)(1)(–)(3).
47 Reg. §199A-5(d).
48 Reg. §199A-5(g)(3).
50 Reg. §199A-5(g)(3)(iii) (Example 3).
51 Code Sec. 199A(Γ)(1). The Individual’s taxable income is the key, not the taxable income of the SSTB. This calculation is made at the individual level.
54 Reg. §199A-5(c)(1).
55 Reg. §199A-5(c)(1)(iii).
56 Proposed Reg. §199A-5(c)(3) provided for another form of forced aggregation referred to as “Incidental to specified service trade or business.” The Regulations deleted this subsection and dropped the concept.
57 Reg. §199A-5(c)(3). The Proposed Regulations provided that if 80% or more of the services were related to a related SSTB, then the entire Trade or Business would be treated as an SSTB. The Regulations state that the tainted element is prorated regardless of the percentage of receipts provided to the related SSTB and only the prorated portion is considered a separate SSTB.
58 Reg. §199A-5(c)(2)(ii). Related parties under Code Sec. 267(b) include members of a family, two corporations that are members of the same controlled group, and a corporation and a partnership if the same persons own more than 50% in value of the outstanding stock of the corporation and more than 50% of the capital interest or the profits interest in the partnership. The definition of related parties expands under Code Sec. 707(b), by way of reference to Code Sec. 267(b), to include two partnerships in which the same persons own, directly or indirectly, more than 50% of the capital interests or profits interests. The mandatory aggregation of a commonly controlled RPE providing services to an SSTB is a reaction to the “crack and pack” scenario whereas personnel would be stripped out of an RPE into a commonly controlled RPE but the services would be to the original SSTB proposed by many commentators prior to the release of the Proposed Regulations.
59 Reg. §199A-5(c)(2)(i).
60 This appears to fit the concept of having the commonly owned percentage treated as a separate SSTB. The result may seem harsh and present a trap for the unwary with only a de minimis amount of property or services being provided to the commonly owned SSTB, but it does fit the regulatory pattern and may be the consistent by-product of an overall logical and otherwise favorable policy decision.
61 Prior to the release of the Proposed Regulations, commentators talked about distributing real estate owned by a law firm out of the law firm pass-through entity and placing it into a separate entity that leases the space to the law firm. Similarly setting up a separate pass-through that would provide all of the secretarial, copy center and other clerical support to the law firm for a fee was also discussed. This provision of the Proposed Regulations and now in the Regulations is an example of a law firm doing just that and concludes that the law firm, real estate rental pass-through and the administrative pass-through are all SSTBs.
63 Qualified Business Income Deduction, 83 FR 40,884, 40,896 (proposed Aug. 16, 2018). “Therefore, consistent with ordinary rules of statutory construction, the guidance in proposed §199A-5(b) is informed by existing interpretations and guidance under both sections 1202 and 448 when relevant.” Id. and “[p]roposed §199A-5(b) generally follows the guidance issued under section 448(d)(2) with some modifications. In certain instances, the principles of section 448(d)(2) provide useful analogies in defining the particular fields listed in Code Sec. 1202(e) (3)(A) (as modified by section 199A(d)(2)(A)) for purposes of section 199A.” Id. at 40,897.
64 Qualified Business Income Deduction, 83 FR at 40,896.
65 Reg. §199A-5(g)(3).
67 Id.
68 Qualified Business Income Deduction, 84 FR 2952, 2971 (Feb. 8, 2019).
70 Reg. §199A-5(b)(3)(i) (Example 1).
72 Reg. §199A-5(b)(3)(iii) (Example 3). In the author’s experience, the surgical facility
provides some of the nurses and assistants for the physicians with respect to procedures performed at the facility. This example seems to leave most such facilities out in the cold. 37 Reg. §1.199A-5(b)(2)(x)(iv) (Example 4).

38 Qualified Business Income Deduction, 84 FR 2952, 2971 (Feb. 8, 2019) (“The final regulations do not adopt the suggestion that technicians who operate medical equipment or test samples are not considered to be performing services in the field of health as this is a question of fact.”). 38 Reg. §1.199A-5(b)(2)(iii).


40 Qualified Business Income Deduction, 83 FR at 40,897.

41 Qualified Business Income Deduction, 83 FR at 40,897.


43 Reg. §1.199A-6(b). The Prologue to the Proposed Regulations has several pages discussing this “reputation or skill” category. Qualified Business Income Deduction, 83 FR 40,884, 40,898, 40,899 (proposed Aug. 16, 2018). A broad interpretation could literally encompass most service businesses and make the enumeration irrelevant as a mere subset of excluded businesses. The draftsmen settled on a relatively narrow interpretation both to attempt to maximize Congressional intent and to be able to administer the provision in a uniform manner. The prologue to the Regulations ratified this approach. Qualified Business Income Deduction, 84 FR at 2975.


59 Reg. §1.199A-5(b)(2)(xx).}

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