Feedback for REG-107892-18 (Proposed Regulations on New 20 Percent Deduction for Pass-Through Businesses (§199A[1])) as of 9/27/2018

PROPOSED REGS SECTION NUMBER	SECTION TITLE	ISSUE	RECOMMENDATION	ADDITIONAL EXPLANATION /QUERIES
Prop. Regs. §1.199A-1	Operational Rules			
Prop. Regs. §1.199A-1(b)	Definitions	"Tiered Entities"	The IRS should define "tiered entities" or otherwise provide guidance expressly stating that mutual fund shareholders receive the 20% deduction under §199A to the extent the mutual fund receives qualified REIT dividends.	
		Trade or Business Standard Under §162 (Prop. Regs. §1.199A-1(b))	The IRS should make clear that passive investors are eligible for the pass through deduction. Currently it's ambiguous whether they should be treated as engaged in a business v. portfolio type investment for the pass through deduction.	For income to be qualified business income (QBI), it must be "business" income. The Code did not state what standard to apply and the proposed regulations applied the relatively high and vague "Section 162" standard, which is often applied using the *Groetzinger* Supreme Court test as follows: The taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify. Later cases have looked at a number of factors in determining whether real estate rental is a trade or business, looking at factors such as (i) attempted rentals and general rental activity, (ii) single vs. multiple tenants, (iii) net lease vs. landlord doing repairs, and (iv) operational responsibility. The net

[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

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				effect of the §162 standard could be that certain passive real estate investments including triple net lease real estate will need to be carefully examined to determine if it can be eligible for §199A's trade or business requirement and, if not, separate tracking will need to be done to physically separate this income from the general §199A calculations.
Prop. Regs. §1.199A-1(d)	Computation of the §199A deduction for individuals with taxable income above the threshold amount	Netting and Carryover of QBI less than zero from a trade or business (Prop. Regs. §1.199A-1(d)(2)(iii)(A) and *Ex. 9*)	Prop. Regs. §1.199A-1(d)(2)(iii)(A) and Example 9 require that losses are allocated to trade or businesses with positive QBI. The Chamber recommends revising or eliminating Prop. Regs. §1.199A-1(d)(2)(iii)(A) and Example 9.	In situations where a trade or business generates QBI less than zero, such losses should be carried forward to future years to offset positive QBI from such activity and NOT netted against other trade or business activities. This would allow the §199A deduction to be applied to trade or business activities that are generating positive QBI without this harmful limitation, while still appropriately reducing the deduction when the businesses generating the losses become taxable. The regulations specifically provide optionality with respect to the aggregation of activities. Taxpayers can choose to group or not group activities based on their specific facts and circumstances. The netting provisions effectively force a mathematical aggregation where one is not desired or necessary. Furthermore, there are already statutory limitations that prevent against claiming an excessive section §199A deduction within §199A itself, including limitations based on taxpayer's overall taxable

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				income, as well as the wage and basis limitations for each trade or business.
Prop. Regs. §1.199A-1(e)	Special Rules	"Tiered Entities"	The IRS should define "tiered entities" or otherwise provide guidance expressly stating that mutual fund shareholders receive the 20% deduction under §199A to the extent the mutual fund receives qualified REIT dividends.	
Prop. Regs. §1.199A-1(f)	Effective/applicability date	Miscellaneous	After "For purposes of determining QBI, W-2 wages, and UBIA of qualified property," insert "qualified REIT dividends and qualified PTP income" in Prop. Regs. §1.199A--1(f)(2).	
Prop. Regs. §1.199A-2	Determination of W-2 Wages and unadjusted basis immediately after acquisition of qualified property			
Prop. Regs. §1.199A-2(c)	UBIA of qualified property	UBIA of Qualified Property Acquired In Like-Kind Exchanges For §199A Purposes	The Treasury Department should interpret "unadjusted basis immediately after acquisition," for purposes of §199A, in a manner that would neither inhibit nor impair the economics of a taxpayer's decision to engage in a §1031 like-kind exchange. Solely for purposes of determining the wage and capital limitation of §199A(b)(2)(B), the Treasury Department should interpret "unadjusted basis immediately after acquisition" as the acquisition cost of qualified property, regardless of whether acquired through purchase or like-kind exchange.	This definition is consistent with the longstanding treatment that the basis of property is its cost or purchase price and will not disadvantage businesses that acquired property through a like-kind exchange. Further qualifications or limitations specific for like-kind exchange acquired business property run counter to the Congressional intent and statutory purpose of both sections 199A and 1031. Section 199A was enacted to provide non-corporate business taxpayers with effective tax rate relief on their qualified business income somewhat

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				comparable to the corporate rate reduction. Section 1031 was originally enacted, and preserved in the Tax Cuts and Jobs Act ("TCJA") for real property, to stimulate transactional activity and incentivize business growth by deferring capital gain recognition on the sale of business property where the owner will have continuity of investment in like-kind replacement property. For purposes of §199A, the tax code should treat a like-kind exchange acquisition as simply an acquisition, thereby removing unnecessary complexity and making the §199A rate-equalizing deduction available on similar terms to similar business taxpayers.
		§743(b) adjustments §734(b) adjustments (Prop. Regs. §1.199A-2(c)(1)(iii))	Treasury states that §743(b) adjustments do not provide UBIA of QP. The taxpayer entitled to the §743(b) adjustment has an increased purchase price and should receive the benefit consistent with the overall policy reason for the §743(b) adjustment. Likewise, §734(b) adjustments should generate new UBIA.	Sections 743(b) and 734(b) follow the aggregation concept of partnership taxation. Consistent with these provisions, the UBIA of QP should be granted for those entitled to these adjustments, including those who inherit a partnership interest and receive a basis adjustment as a §743(b) adjustment. Section 734(b) adjustments originate in a redemption of a partnership interest (rather than one partner buying the interest of another partner). The partnership has paid more for the redeemed interest than the redeemed partner's share of the tax basis of the underlying assets. When a partnership has a §754

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				election in effect, the partnership steps up the basis of the underlying assets of the partnership. Therefore, the partnership should receive the benefit of additional UBIA in qualified property for the resulting §734(b) adjustment upon redemption of a partnership interest.
		Conform UBIA with the start of the recovery period (Prop. Regs. §1.199A-2(c), *Ex. 2*)	The depreciable period for property transferred under §§351 and 721 begin with the transferor's placed in service date, but the UBIA is the adjusted tax basis of the asset at the time of the transfer. Example 2 should be revised to contain consistent treatment for the depreciable period and UBIA of property acquired under §1031.	The depreciable period and the determination of the UBIA should conform. If the depreciable period begins with the transferor's acquisition date, the UBIA should be the transferor's unadjusted basis (now transferred to the transferee).
Prop. Regs. §1.199A-3	Qualified business income, qualified REIT dividends, and qualified PTP income	"Tiered Entities"		
Prop. Regs. §1.199A-3(b)	Definition of qualified business income	Real estate rental as trade or business income	Taxpayers need additional safe harbors for when real estate rentals are treated as trade or business income. The Code speaks of "significant services or significant expenses." To clarify that language, Treasury should provide a standard such as: • 500 hours by the taxpayer or the taxpayer's agents dealing with rental real estate (including, but not limited to, finding tenants, negotiating, arranging for repairs, paying bills, etc.); or	A person with one triple net lease (with no common ownership) does not (likely) have a trade or business, but what if the taxpayer has 100 such leases? Taxpayers with substantial numbers of rentals should be viewed as being in the trade or business of renting property if they incur significant costs or they are performing significant services. In addition, however, the time devoted to rental properties should be considered. Taxpayers should

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			• the 15% expenses test on gross rental receipts. (See §179(d)(5), which utilizes that percentage of expense standard for qualifying a noncorporate lessor to claim §179 on rental property).	be provided a safe harbor threshold number of hours for determining if they are in a trade or business.
Prop. Regs. §1.199A-3(d)	Effective/applicability date	Miscellaneous	After "For purposes of determining QBI, W-2 wages, and UBIA of qualified property," insert "qualified REIT dividends and qualified PTP income" in Prop. Regs. §1.199A-3(d).	
Prop. Regs. §1.199A-4	Aggregation			
Prop. Regs. §1.199A-4(a)	Scope and purpose		Permit relevant passthrough entities (RPEs) to aggregate trades or businesses. This could be accomplished by modifying language to provide "only if an individual or RPE can demonstrate that…".	To reduce complexity and administrative burdens, in addition to allowing aggregation by "individuals," permit RPEs to aggregate trades or businesses.
Prop. Regs. §1.199A-4(b)	Aggregation Rules	Expansion of Aggregation Opportunities	The IRS should allow taxpayers upon election to aggregate all of their interests in eligible businesses. Aggregation should apply the broad §469 standard instead of an election solely for 50% commonly owned integrated businesses.	
		Fiscal year	Prop. Regs. §1.199A-4(b)(1)(iii) requires the same fiscal year to aggregate. Some commonly-owned businesses do not have the same tax year. Aggregation should be allowed for the fiscal year that ends within the owner's tax year. Management as one business should not be dependent upon all legal entities having the same tax year.	
		Siblings	Siblings should be included in family attribution, consistent with Prop. Regs. §1.199A-5(c)(2)(iii) and (3).	The same standards for aggregation should apply as that for finding a commonly-owned business with an SSTB.

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Prop. Regs. §1.199A-4(d)	Examples	"More than 50%"	Examples should use language "since the group of owners owns 50% or more."	The 50% or more standard should be used throughout the examples.
Prop. Regs. §1.199A-4(e)	Effective/applicability date		After "For purposes of determining QBI, W-2 wages, and UBIA of qualified property," insert "qualified REIT dividends and qualified PTP income" in Prop. Regs. §1.199A-4(e)(2).	
Prop. Regs. §1.199A-5	Specified service trades or businesses and the trade or business of performing services as an employee			
Prop. Regs. §1.199A-5(b)	Definition of specified service trade or business (SSTB)	Definition of a trade or business involving the performance of services in the field of "athletics" (Prop. Regs. §1.199A-5(b)(2)(viii), -5(b)(3), *Ex. 2*)	Clarify that the definition of a trade or business involving the performance of services in the field of "athletics" is limited to entities (a) that are owned or controlled by, or whose primary beneficiaries are, professional athletes and (b) that involve the performance of services by those athletes. In other words, the definition should apply solely to athletes' personal services companies. The definition should not include the trade or business of owning a professional sports team, and thus QBI should include income received by owners of professional sports teams from the entities that house those teams. (The proposed regulations treat income from the operation of a sports team, or at least from the sale of tickets by a sports team, as income from an SSTB.)	Limiting the exclusion from QBI to the income of athletes, and not excluding from QBI the income of team owners, is consistent with the goal of §199A. The goal is to allow the deduction (i.e. to allow the preferential tax rate) for income that is akin to the business income of a corporation (such as profits earned by a team owner), but not for income that is akin to wages earned by an employee (such as amounts received by a professional athlete). Defining the SSTB in this way is also consistent with similar language in other Code provisions. Section 199A(d)(2)(A) incorporates by reference §1202(e)(3)(A), which contains the list of SSTBs. The legislative histories of §1202, as well as of §§448 and 269A, which contain language similar to

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				that of §1202, make clear that those sections were intended to apply to individuals who perform professional services, such as doctors, lawyers, accountants, and entertainers, and to the personal services companies that they may establish for themselves. Thus, the cross-reference in §199A to income from the performance of services in the field of athletics is properly understood to apply to income of individual professional athletes and their personal services companies, not to the income of sports teams or their owners. This conclusion also mirrors the text of the §448 regulations, which distinguish between income earned by an actor and income earned by individuals whose business relates to the performing arts but who do not themselves perform services such as acting.
		Definition of a trade or business involving the performance of services in the field of consulting (Prop. Regs. §1.199A-5(b)(2)(vii) and -5(b)(3), *Ex. 4*)	Clarify that consulting done ancillary to, and solely in support of, a product development or manufacturing business would fall outside of the SSTB definition. This result could be achieved if the IRS simply narrowed the definition of consulting solely to stand-alone advice and counsel which has no link to production, manufacturing, sales, or licensing of products.	Not all consulting services are bundled with the initial software license; sometimes a taxpayer can have separate invoicing due to customer request or customization services provided throughout the year. Where a taxpayer relies heavily on revenue generated from the annual renewal of software, consulting services done throughout the software license period are ancillary to the renewal of products. Therefore, the Chamber believes that the consulting business should not be considered a SSTB for purposes of this deduction.

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		Definition of a trade or business involving the performance of services in the field of health care (Prop. Regs. §1.199A–5(b)(2)(ii))	Clarify whether care facilities are SSTB. The regulations should follow CMS guidelines as to whether a facility is a facility providing services substantially in the field of health (skilled nursing), or is merely assisted living. For instance, the regulations could reference 42 U.S.C. 1396r.	There is precedent for this kind of definition. See §1402(a)(1) (references §1233(a)(2) of the Food Security Act of 1985 (16 U.S.C. §3833(a)(2)) and also §§202 and 223 of the Social Security Act).
		Definition of "dealing in commodities" (Prop. Regs. §1.199A–5(b)(2)(xii))	Regulations should provide that "dealing in commodities" does not include taking physical possession for storage, transportation, packing and grading, or other acts, but instead is limited to dealing in paper ownership of commodities.	While the Chamber concedes that the definition of the commodity in §475(e)(2) is controlling, the definition of "dealing in commodities" should be clarified. It appears that dealing in commodities was intended to treat taxpayers who buy and sell paper ownership of commodities in the same manner as buying and selling securities. However, based upon the definitions of commodities, it appears that the purchase, storage and sale could be dealing. Taxpayers who purchase wheat, corn or soybeans (commodities that are traded on national exchanges), store and sell (i.e., grain elevators) would be treated as dealers under this definition.
		Meaning of sales to "customers" (Prop. Regs. §1.199A–5(b)(2)(xiii)(A))	The Chamber requests clarification that a mortgage loan originator that transfers mortgages to an agency or broker/dealer for cash or MBS (which MBS are then sold to broker/dealers and/or to unrelated persons in the capital markets solicited by broker/dealers and not by the originator) does not constitute a sale by the originator to a customer" within the meaning of Prop. Regs. §1.199A-5(b)(2)(xiii)(A).This could be accomplished by way of a	

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			regulatory example that closely tracks a mortgage finance business. For example: Example: Taxpayer regularly originates residential mortgage loans, and transfers those loans to government-sponsored entities for cash or mortgage-backed securities (MBS). Taxpayer also sells mortgages and MBS to unrelated, regulated financial institutions, who stand ready to purchase for their own account, to provide liquidity to the taxpayer (and other mortgage originators) and/or to facilitate their sale in the broader capital markets. Taxpayer transfers mortgages and MBS when it seeks liquidity. It does not hold itself out as a source of supply in the market, standing ready to make a market in mortgages or MBS by providing price quotes on demand or by selling them to customers upon request. Taxpayer does not solicit purchasers of the MBS, and does not hold itself out in the market as standing ready to sell MBS or mortgages. Because the taxpayer is not selling the mortgage or MBS to customers, the taxpayer is not considered to be "dealing in securities" under §199(d)(2)(B). We believe this guidance would be consistent with Congressional intent, and sound tax policy.	
		"Negligible sales" exception (Prop. Regs. §1.199A–5(b)(2)(xiii)(A))	Clarify the application of the "negligible sales" exception of Prop. Regs. §1.199A–5(b)(2)(xiii)(A), by moving the second sentence of Prop. Regs. §l .199A-5(b)(2)(xiii)(A)	The first sentence of Prop. Regs. §1.199A-5(b)(2)(xiii)(A) defines "dealing in securities" to mean "purchasing securities from **and** selling securities to customers." (Emphasis added.)

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			to a new subparagraph that is specifically delineated as an exception, and amended to read as follows: Dealing in securities means regularly purchasing securities from and selling securities to customers in the ordinary course of a trade or business. .. (i) Exception. For purposes of the preceding clause, ~~however,~~ a taxpayer that regularly originates loans in the ordinary course of a trade or business of making loans but engages in no more than negligible sales of the loans "to customers" is not dealing in securities for purposes of section l99A(d)(2). See §l.475(c)-1(c)(2) and (4) for the definition of negligible sales.	The second sentence of Prop. Regs. §1.199A-5(b)(2)(xiii)(A) reflects an exception to the definition that is provided in the first sentence, In other words, a taxpayer whose activity meets the definition reflected in the first sentence of Prop. Regs. §1.199A- 5(b)(2)(xiii)(A), will nonetheless be excluded if the taxpayer makes only "negligible sales." Importantly, if a taxpayer's activity does not (in the first place) meet that definition (because, for example, there are no sales to "customers"), the taxpayer simply does not need to avail itself of "negligible sales" exception provided in the second sentence of Prop. Reg. §1.199A- 5(b)(2)(xiii)(A). So, for example, although a mortgage lender may sell mortgages to agencies and broker/dealers (and thus has more than "negligible sales"), it is nonetheless not "dealing in securities," because it does not sell to "customers" (and thus, does not fit the definition reflected in the first sentence of Prop. Regs. §1.199A- 5(b)(2)(xiii)(A)). In this case, the "negligible sales" exception in the second sentence of Prop. Regs. §1.199A-5(b)(2)(xiii)(A) is simply not relevant to the taxpayer (who is not otherwise "dealing in securities"). As written, there is a concern that the second sentence of Prop. Regs. §1.199A-5(b)(2)(xiii)(A) could be read as the exclusive manner in which a

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				loan originator's activity is disqualified from "dealing" status. In other words, there is a concern that a loan originator's activity can onlv be exempted from "dealing" status, if it meets the "negligible sales" provision in the second sentence of Prop. Regs. §1.199A-5(b)(2)(xiii)(A). The Chamber believes this reading of the provision is incorrect and unintended, and request clarification that (consistent with the preceding paragraph) the "negligible sales" exception is simply an exception to the general definition.
Prop. Regs. §1.199A-5(c)	Special Rules	Property provided to an SSTB (Prop. Regs. §1.199A–5(c)(2))	Real estate rentals, commonly owned with the SSTB, are treated as trade or business, but tainted as SSTB. Real estate rented to a commonly owned SSTB should not be considered SSTB income.	Real estate rentals are ubiquitous to all business entities. A real estate rental should not be tainted as SSTB merely because the owner chooses to invest in real estate to rent to her own SSTB. Real estate rentals should be treated differently from commonly owned service businesses or personal property rentals (such as medical equipment).
		Allocation between SSTB and QBI	If a legal entity has businesses described as SSTB and QBI, the regulations need to provide guidance as to the computation of the QBI for the non-SSTB portion of the business. Taxpayers should be provided simplified methods of allocating expenses and CGS between SSTB and QBI businesses modeled after Regs. §1.199-4.	Taxpayers are concerned that if they have SSTB receipts over the de minimis threshold, the entire business is tainted as SSTB. Examples need to be provided. See, e.g., taxpayers could use §861 (point to Regs. §1.199-4(d)), which uses cost accounting principles. For a safe harbor, taxpayers should be allowed to use a simplified method if their average annual gross receipts are less than $25 million (i.e., the same

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				standard as in §448 for use of the cash method). The result under the simplified method might look like: SSTB / Non-SSTB / Total Gross receipts 1,500 / 7,500 / 9,000 Cost of goods sold / (5,000) / (5,000) Gross profit 1,500 / 2,500 / 4,000 Other Expenses (825) / (1,375) / (2,200) Net 675 / 1,125 / 1,800 allocate operating expenses based upon relative gross profit 37.50% / 62.50%
		Method of defining trade or business (Prop. Regs. §1.199A-5(c)(1)(ii))	The regulations need to clarify how a trade or business is defined. As a cursory matter, the 5% de minimis rule applicable to taxpayers with $25 million or more in gross receipts should be raised to 10%. Further, under the de minimis rule in the proposed regulations, it is not clear where, if you are above the de minimis threshold from a SSTB, whether the whole taxpayer would be classified as an SSTB and would receive no §199A deduction. We believe the whoel taxpayer should not be classified as an SSTB and should receive a deduction/	The regulations need to clarify how a trade or business is defined. For example, it is unclear whether a taxpayer should be considered a single trade or business made up of multiple divisions (such as consulting, education, publications, et.) or whether the taxpayer is really made up of separate trades or businesses (i.e., consulting business, education business etc.). If separate and distinct businesses, then the classification of consulting services as an SSTB would not deny the rest of the taxpayer the §199A deduction; the taxpayer would simply remove consulting from the calculation.

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Prop. Regs. §1.199A-5(d)	Trade or business of performing services as an employee	Independent Contractor Classification (Prop. Regs. §1.199A-5(d)(3))	Clarify that the presumption should be that an independent contractor is operating as such and that it is up to the relevant federal agencies to determine whether the business is misclassified.	There is a significant concern with Prop. Regs. §1.199A-5(d)(3). The proposed rule creates a new "presumption" standard whereby an independent contractor will be "presumed" to be an employee for purposes of §199A and then puts the onus on the independent contractor to prove that that they are actually an independent contractor. Considering the IRS is barred from issuing regs on misclassification under Section 530, small businesses are concerned that IRS will use §199A as a means to create a precedent for misclassification going forward. That concern is magnified by the scenario where an independent contractor would be deemed an employee for purposes of (not) claiming the §199A deduction, but would be deemed an independent contractor for collecting self-employment taxes (and then putting the burden on the independent contractor to prove otherwise).
		Presumption	The presumption of employee status should not apply if the service provider has had a break in service of [a defined period of time].	As worded, it appears that if a taxpayer ever performed services as an employee, the taxpayer can't later (ten years later?) provide services as an independent contractor.
Prop. Reg. §1.199A-5(e)	Effective/applicability date		After "For purposes of determining QBI, W-2 wages, and UBIA of qualified property," insert "qualified REIT dividends and qualified PTP income" in Prop. Regs. §1.199A-5(e).	
Prop. Regs. §1.199A-6	Relevant passthrough entities (RPEs),			

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	publicly traded partnerships (PTPs), trusts, and estates			
Prop. Regs. §1.199A-6(e)	Effective/applicability date		After "For purposes of determining QBI, W-2 wages, and UBIA of qualified property," insert "qualified REIT dividends and qualified PTP income" in Prop. Regs. §1.199A-6(e).	
Miscellaneous §199A Issues	Passive activity losses	Ordering rules for carryover passive activity losses	Clarify the ordering rules for the utilization of carryover passive losses in the §199A calculation.	