

TRUSTS AND QBI: THE NEW 199A APPLIED

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I. INTRODUCTION

The Tax Cuts and Jobs Act, passed by Congress on December 20, 2017, by Public Law No. 115-97, and signed into law by President Trump on December 22, 2017, introduced a new Internal Revenue Code (IRC) Section 199A.¹ The new law is effective for tax years beginning January 1, 2018 and sunsets on December 31, 2025.² The new rule is designed to reduce taxes on flow-through income from partnerships, sole proprietorships, and S corporations, by allowing the owner to deduct up to twenty percent of the “qualified business income,” subject to various limitations and exceptions.³ Proposed Treasury Regulations were published in August of 2018.⁴

Many trusts own interests in partnerships, limited liability companies, and S corporations.⁵ This article examines how trusts may take advantage of the new rules to potentially receive deductions of up to twenty percent of qualified business income.⁶ Part II of this article briefly describes the Proposed Regulations.⁷ Part III provides selected definitions, all of which can be found in the Proposed Regulations.⁸ Part IV is a mechanical analysis

1. Tax Cuts & Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, 2063; (codified as amended at 26 U.S.C. §199A (2017)).

2. *Id.*

3. *Id.*

4. Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,884 (Aug. 16, 2018); *see infra* Part II.

5. *See* John Cromwell, *Can a Trust Own an S Corp?*, LEGALZOOM, <https://info.legalzoom.com/can-trust-own-s-corp-24064.html> [perma.cc/KB24-6BJ6] (last visited Oct. 10, 2018); *see* Joshua K. Merkel, *Trust Funding: C Corporations*, JOSHUA K. MERKEL (May 9, 2013), <http://caestateplaner.com/trust-funding-c-corporations/> [perma.cc/ZVH6-WTU3]; David R. Nave, *The Good, the Bad & the Ugly of Trusts Investing in Partnerships*, J. OF PASSTHROUGH ENTITIES (May–June 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923081 [perma.cc/K5D3-PN66]; *Can a Trust Own an LLC? Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/can-a-trust-own-an-llc> [perma.cc/S5BG-KE7T] (last visited Oct. 10, 2018).

6. *See* discussion *infra* Parts II–VII.

7. *See infra* Part II.

8. *See infra* Part III.

of the deductions for trusts.⁹ Part V sets out the rules for aggregation.¹⁰ Part VI highlights certain reporting requirements.¹¹ Part VII explains the multiple trust rules, which provide an important background for exploring whether a deduction is available.¹² Part VIII concludes with some discussion and thoughts on estate planning with respect to the new rules.¹³ Importantly, this article is based largely on the Proposed Regulations.¹⁴ Once the Regulations are finalized, some of the statements and explanations in this article may no longer apply.

II. PROPOSED REGULATIONS

The Proposed Regulations consist of six parts.¹⁵ Proposed Regulation (Prop. Treas. Reg.) § 1.199A-1 details the operational rules and provides the mechanics of the deduction.¹⁶ Thankfully, there are many examples.¹⁷ Prop. Treas. Reg. § 1.199A-2 explains in detail the determination of W-2 wages and unadjusted basis immediately after acquisition of property.¹⁸ These concepts are necessary for the “wage-basis” test that is used to effectively eliminate or phase-out the deduction.¹⁹ Prop. Treas. Reg. § 1.199A-3 provides the definition of “qualified business income,” qualified REIT dividends, and qualified publicly-traded partnership (PTP) income.²⁰ This article focuses on qualified business income, and only briefly mentions REIT and PTP income.²¹ The definitions are required to understand the mechanics of IRC § 199A.²² Prop. Treas. Reg. § 1.199A-4 covers aggregation, which is useful to trusts with interests in multiple entities.²³ Prop. Reg. § 1.199A-5 sets out the “specified service trades or businesses” that are excluded from the deduction, or at least excluded for trusts with income above a certain threshold.²⁴ The last section, Prop. Treas. Reg. § 1.199A-6, covers miscellaneous issues, specifically the application of IRC § 199A to trusts and estates.²⁵ Lastly, Prop. Treas. Reg. § 1.643(f)-1, titled “Treatment of Multiple Trusts,” which is not included in the § 199A Proposed Regulations

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Part VI.

12. *See infra* Part VII.

13. *See infra* Part VIII.

14. *See* Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,884–930 (Aug. 16, 2018).

15. *Id.*

16. Qualified Business Income Deduction, 83 Fed. Reg. at 40,885–88.

17. *See generally id.* (providing various examples of how the deduction operates).

18. Qualified Business Income Deduction, 83 Fed. Reg. at 40,887–91.

19. *See infra* Section IV.D.3.b.

20. Qualified Business Income Deduction, 83 Fed. Reg. at 40,890–91.

21. *See infra* Section IV.B.

22. *See infra* Part III.

23. *See* Qualified Business Income Deduction, 83 Fed. Reg. at 40,894–96.

24. *See* Qualified Business Income Deduction, 83 Fed. Reg. at 40,895–902.

25. *See* Qualified Business Income Deduction, 83 Fed. Reg. at 40,901–03.

but is integral to understanding how those rules apply to trusts, impacts planning ideas for multiple trusts that have interests in passthrough entities.²⁶

III. SELECTED DEFINITIONS

IRC § 199A and the Proposed Regulations contain numerous definitions.²⁷ The following list of definitions is not alphabetized, but presented in a logical order.²⁸ For an alphabetized list and precise definitions, refer to Prop. Treas. Reg. § 1.199A-1(b).²⁹

Qualified business income (QBI) broadly means the net amount of *qualified* items of income, gain, deduction, and loss with respect to any trade or business in which the taxpayer owns an interest.³⁰ Being *qualified* generally means that the income and other items have to be connected with the conduct of a U.S. trade or business.³¹ Nonetheless, a number of items are excluded, and a full discussion of what constitutes qualified and unqualified is beyond the scope of this article.³²

A trade or business (T/B) means “a section 162 trade or business other than the trade or business of performing services as an employee.”³³ In reality, there is no actual definition of a trade or business in the Internal Revenue Code or Treasury Regulations.³⁴ For purposes of § 199A, an important aspect of this definition is what it specifically excludes; as discussed below, there is a list of “specified service trades or businesses” for which there are no permissible deductions for trusts with income above a certain threshold.³⁵

A relevant pass-through entity (RPE) is a non-publicly traded partnership or an S corporation that is directly or indirectly owned by at least one individual, estate, or trust.³⁶ A trust or estate is treated as an RPE to the extent it passes through QBI, W-2 wages, UBI of qualified property, qualified REIT dividends, or PTP income to its beneficiaries.³⁷

26. See Prop. Treas. Reg. § 1.643(f)-1, 83 Fed. Reg. 40,884, 40,929 (Aug. 16, 2018).

27. See generally 26 U.S.C. § 199A (2017); see also Qualified Business Income Deduction, 83 Fed. Reg. at 40,884 (Aug. 16, 2018) (providing various useful definitions pertaining to this section).

28. See discussion *infra* Part III.

29. Prop. Treas. Reg. § 1.199A-1(b), 83 Fed. Reg. at 40,911 (Aug. 16, 2018).

30. Prop. Treas. Reg. § 1.199A-3(b)(1), 83 Fed. Reg. at 40,919 (Aug. 16, 2018).

31. See *id.* at 40,911.

32. See generally Qualified Business Income Deduction, 83 Fed. Reg. at 40,892–93 (providing a detailed description of what is qualified and unqualified income).

33. *Id.* at Prop. Treas. Reg. § 1.199A-1(b)(13), 83 Fed. Reg. 40,884, 40,911 (Aug. 16, 2018).

34. See E. John Lopez, *Defining “Trade or Business” Under the Internal Revenue Code: A Survey of Relevant Cases*, 11 FLA. ST. U. L. REV. 949, 949 (1984).

35. See *infra* Section IV.C; see Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,885 (Aug. 16, 2018).

36. Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,885 (Aug. 16, 2018).

37. *Id.* at 40,901.

The term “individual” in the § 199A Regulations specifically includes a non-grantor trust or an estate.³⁸ There is an important caveat: non-grantor trusts and estates calculate their deductions as individuals only to the extent they retain QBI and other items.³⁹ As mentioned above, to the extent a trust or estate allocates QBI and other items to its beneficiaries, it is treated as an RPE.⁴⁰

The QBI Component, in layman’s terms, is the amount of qualified business income that may be deductible for trusts (i.e., taxpayers) with income above the threshold, calculated in a complicated manner.⁴¹ Part IV explains how to calculate the QBI Component, which is the best way to understand the term.⁴²

A specified service trade or business (SSTB) is a trade or business involving the performance of services in one or more of the following: health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, investing and investment management, trading, dealing in securities, partnership interests, or commodities, or any trade or business where the principal asset is the reputation or skill of one or more of its employees.⁴³ There is a more detailed discussion below.⁴⁴

The term “unadjusted basis immediately after acquisition of qualified property” (UBIA) means the basis of qualified property on the placed-in-service date as determined under IRC § 1012 or other applicable sections of Chapter 1.⁴⁵ Qualified property is described as tangible property that is held by and available for use in the trade or business at the close of the taxable year, used at any point in the taxable year for the production of QBI, and the depreciable period for which has not ended before the close of the individual’s or passthrough entity’s taxable year.⁴⁶ The depreciable period begins the date the property is placed in service and ends on the later of the tenth anniversary or the last day of the last full year in the applicable recovery period that would apply under IRC § 168(c), regardless of IRC § 168(g).⁴⁷

References to W-2 wages loosely mean wages that are reported to the Social Security Administration and some deferred compensation.⁴⁸ Prop.

38. See *id.* at 40,885.

39. See *id.* at 40,902.

40. See Prop. Treas. Reg. § 1.199A-6(d)(1), 83 Fed. Reg. 40,884, 40,928 (Aug. 16, 2018).

41. Prop. Treas. Reg. § 1.199A-3(b), 83 Fed. Reg. at 40,912; Edward K. Zollars, *Current Federal Tax Developments*, KAPLAN: ACCOUNTING CONTINUING EDUC. 1, 6 (Aug. 13, 2018), <https://static1.squarespace.com/static/54a14f8ee4b0bc51a1228894/t/5b6f9a0ccd83663481c42dd5/1534040593096/Update+2018-08-13.pdf> [perma.cc/NL9B-B92M].

42. See *infra* Part IV.

43. Prop. Treas. Reg. § 1.199A-5(b)(1), 83 Fed. Reg. at 40,923.

44. See *infra* Section IV.C.

45. Prop. Treas. Reg. § 1.199A-2(c)(3), 83 Fed. Reg. at 40,918.

46. *Id.*

47. See Qualified Business Income Deduction, 83 Fed. Reg. at 40,888.

48. See Prop. Treas. Reg. § 1.199A-2(b)(2)(iii), 83 Fed. Reg. at 40,916.

Treas. Reg. § 1.199A-2(b) provides a detailed description.⁴⁹ The IRS released a proposed revenue procedure with additional guidance on methods for calculating W-2 wages.⁵⁰

The threshold amount is a set dollar amount used to determine whether the deduction is fully available, begins to phase-out, or becomes unavailable.⁵¹ For trusts, the threshold amount is \$157,500 for any taxable year beginning before 2019.⁵² For a taxable year beginning after 2018, the threshold amount is \$157,500, increased for the cost-of-living adjustment determined under IRC § 1(f)(3).⁵³ The same threshold amount applies to individuals, although for married taxpayers filing jointly, the threshold is \$315,000, again subject to adjustment.⁵⁴

The phase-in range is a \$50,000 range above the threshold amount for individual filers or \$100,000 for married joint filers.⁵⁵ For example, for a taxable year ending in 2018, the phase-in range for a trust is \$157,500 to \$207,500.⁵⁶

The applicable percentage equals one hundred percent reduced (but not below zero) by a fraction in which: (i) the numerator equals the taxpayer's taxable income less the threshold; and (ii) the denominator equals \$50,000 for a single filer or trust (or \$100,000 for a married joint filer).⁵⁷ The following is a formula for the applicable percentage of a trust:

$$\text{Applicable Percentage} = 100\% - \frac{\text{Taxable Income} - \text{Threshold}}{\$50,000}$$

Notice that, as a trust's taxable income increases more and more beyond the threshold, the applicable percentage decreases.⁵⁸ For example, a trust with income of \$158,000 (which is \$500 beyond the threshold) has an applicable percentage of 99%.⁵⁹ A trust with income of \$207,000 (which is \$500 below the top of the phase-in range) has an applicable percentage of 1%.⁶⁰

49. *See id.*

50. IRS Notice 2018-64, 2018-35 I.R.B. 347.

51. *See* Qualified Business Income Deduction, 83 Fed. Reg. at 40,885.

52. Prop. Treas. Reg. § 1.199A-6(d)(3)(iii), 83 Fed. Reg. 40,884, 40,928 (Aug. 16, 2018).

53. *Id.*

54. Prop. Treas. Reg. § 1.199A-1(b)(11), 83 Fed. Reg. at 40,911.

55. *Id.*

56. *See id.*

57. *Id.*

58. *See id.*

59. *See id.*

60. *See id.*

IV. MECHANICAL ANALYSIS OF THE DEDUCTION

The mechanics of the deduction are somewhat complicated, but can be broken down into pieces.⁶¹ What follows is a step-by-step guide that is close to what is set out by the Proposed Regulations, with some interpretation.⁶² The Proposed Regulations do not define the calculations by steps; this article does, but only as an aid with the concepts.⁶³ In other words, practitioners and taxpayers must refer to the actual Proposed Regulations and IRC § 199A to calculate deductions.⁶⁴

For purposes of the discussion and examples below, this article makes a few assumptions.⁶⁵ The tax year is assumed to be 2018.⁶⁶ All income remains in the trust, meaning none is distributed to the beneficiaries; otherwise it would render the trust an RPE.⁶⁷

A. Step 1: Identify Whether the Trust is Below, Above, or Within Phase-in Range

Whether the income of the trust is below, above, or within the phase-in range of the threshold has a serious impact on the deduction.⁶⁸ Consequently, this categorization is the first step to understanding the deduction.⁶⁹ Prop. Treas. Reg. § 1.199A-1 effectively sets out the rules according to whether the taxpayer (or the trust) has taxable income that does not exceed the threshold versus those that have taxable income exceeding the threshold.⁷⁰

As mentioned above, the threshold for trusts is \$157,500, indexed for the cost-of-living adjustment.⁷¹ For simplicity, the remainder of the discussion will assume the tax year is 2018 and the threshold simply is \$157,500.⁷² Trusts with taxable income below the threshold will be able to make full use of the deduction; trusts with taxable income above the threshold may have a limited deduction or none at all.⁷³

61. See Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. 40,884, 40,911–16 (Aug. 16, 2018).

62. See *infra* Sections IV.A–E.

63. See generally Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,884 (Aug. 16, 2018) (providing the operational rules for the proposed regulation without calculation steps).

64. See *id.*

65. See *infra* Section IV.B–Part VIII.

66. See *id.*

67. See *id.*

68. See Qualified Business Income Deduction, 83 Fed. Reg. at 40,885.

69. See generally *id.* (providing guidance for determining the first step for below, within, or above the phase-in range).

70. See Prop. Treas. Reg. § 1.199A-1(c)–(d), 83 Fed. Reg. 40,884, 40,911–16 (Aug. 16, 2018).

71. *Id.* at 40911.

72. See *infra* Section IV.B–Part VIII.

73. See generally Qualified Business Income Deduction, 83 Fed. Reg. at 40,886 (discussing the limitations for income below or above the threshold limits).

The Proposed Regulations do not provide a separate definition for taxable income.⁷⁴ IRC § 63 defines taxable income as gross income less deductions.⁷⁵ For trusts, the taxable income is determined before taking into account any distribution deduction under IRC § 651 or IRC § 661.⁷⁶ The multiple trust rules, which are discussed below, require the taxable income of multiple trusts to be combined in certain situations.⁷⁷

Step 1 is simple: Identify where the taxable income of the trust falls in the first column of the table below, and then proceed to Step 2 or 3 (and then 4 or 5) as appropriate:

Table 1

Taxable Income	Step 1 Result	GO TO
Less than or equal to \$157,500	Below	Step 2
Greater than \$157,500 <u>and</u> less than or equal to \$207,500	Within Phase-in	Step 3, then Step 5
Greater than \$207,500	Above	Step 3, then Step 4

B. Step 2: Calculate the Deduction for a Trust Below the Threshold

The calculation of the deduction for a trust with taxable income below the threshold is straightforward.⁷⁸ The deduction equals the lesser of: (i) the total Qualified Business Income Amount for the trust; and (ii) twenty percent of the taxable income net capital gain for the trust.⁷⁹

The total Qualified Business Income Amount (Total QBI Amount) equals twenty percent of the QBI for the trades or businesses owned by the trust plus twenty percent of the aggregate qualified REIT dividends and qualified PTP income.⁸⁰ Because the trust income is below the threshold, it does not matter whether the trades or businesses are SSTBs.⁸¹

If the total QBI is negative, then the QBI is zero for that taxable year.⁸² The negative QBI is treated as negative QBI from a separate T/B in the next taxable year.⁸³ There is a similar carryover rule for negative combined qualified REIT and publicly traded partnership income.⁸⁴ The following

74. See Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. 40,884, 40,911 (Aug. 16, 2018).

75. 26 U.S.C. § 63 (2006).

76. Prop. Treas. Reg. § 1.199A-6(d)(3)(iii), 83 Fed. Reg. at 40,928 (Aug. 16, 2018).

77. See Qualified Business Income Deduction, 83 Fed. Reg. at 40,902 (Aug. 16, 2018).

78. See *id.* at 40,886 (Aug. 16, 2018).

79. *Id.*

80. Prop. Treas. Reg. § 1.199A-1(d)(1), 83 Fed. Reg. 40,884, 40,912 (Aug. 16, 2018).

81. See *generally* Qualified Business Income Deduction, 83 Fed. Reg. at 40,886 (describing the meaning of below threshold income).

82. Prop. Treas. Reg. § 1.199A-1(c)(2)(i), 83 Fed. Reg. 40,884, 40,911 (Aug. 16, 2018).

83. *Id.*

84. Qualified Business Income Deduction, 83 Fed. Reg. at 40,886.

selected examples are from Prop. Treas. Reg. § 1.199A-1(d)(iv)(B), modified for trusts.⁸⁵

1. Example 1

A trust owns a computer repair shop through an LLC. The shop generates \$100,000 in net taxable income from operations in 2018. The trust has no capital gains or losses. After deductions (other than the § 199A deduction), the trust has taxable income of \$81,000. The QBI is \$100,000, so the QBI Amount is \$20,000 (20% of \$100,000). The calculation of twenty percent of taxable income less gain yields \$16,200 (20% of \$81,000). Accordingly, the § 199A deduction equals the lesser of the two figures calculated above, which is \$16,200.⁸⁶

2. Example 2

Similar facts as Example 1, except that the trust has taxable income of \$74,000, of which \$7,000 is net capital gain.⁸⁷ QBI is \$100,000, so the QBI Amount is \$20,000 (20% of \$100,000). This is the same as Example 1. Now, however, taxable income less gain is $\$74,000 - \$7,000 = \$67,000$; and 20% of taxable income less gain is $\$13,400$ (20% of \$67,000). This number is less than in Example 1. The § 199A deduction equals the lesser of the two figures calculated above, which is \$13,400. Accordingly, the deduction in Example 2 is less than the deduction in Example 1 because some of the trust's total taxable income was from capital gain, and the net result was less than twenty percent of the QBI Amount.⁸⁸

Note that the examples above assume that the entity is a computer repair business, which is not a specified service trade or business (SSTB).⁸⁹ Because the trust amount is below the threshold, even if the business were, say, a sports team, the calculation should be the same, even though a sports team is an SSTB.⁹⁰ In contrast, if the interest was of a limited partnership that held passive investments, then there would be no QBI from those passive investments because those would not be trades or businesses.⁹¹

85. See *infra* Section IV.B.1–2; see also Prop. Treas. Reg. § 1.199A-1(d)(iv)(B), 83 Fed. Reg. at 40,912–13.

86. See Prop. Treas. Reg. § 1.199A-1(c)(1), 83 Fed. Reg. at 40,911; The above hypothetical was created by the author for the purposes of this article.

87. See *supra* Section IV.B.1.

88. See *supra* Section IV.B.1.; The above example was created by the author for the purposes of this article.

89. See Qualified Business Income Deduction, 83 Fed. Reg. at 40,899; see also Prop. Treas. Reg. § 199A-5(a)(1), 83 Fed. Reg. at 40,923.

90. See *id.*

91. See *id.*

C. Step 3: Identify Any Specified Service Trades or Businesses

The remaining steps apply only if the trust's taxable income is greater than the threshold amount.⁹² In this situation, any qualified business income from specified service trades or businesses (SSTBs) will either be reduced or zero.⁹³ Before getting into the limitation, it is important to understand the notion of an SSTB.⁹⁴

As explained above, an SSTB is a trade or business involving the performance of services in one or more of the following: health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, investing and investment management, trading, dealing in securities, partnership interests, or commodities, or any trade or business where the principal asset is the reputation or skill of one or more of its employees.⁹⁵ Prop. Treas. Reg. § 1.199A-5(b)(2) gives much more thorough explanations as to what is meant by each of the general types of services described above.⁹⁶

Until the issuance of the Proposed Regulations, there was uncertainty as to what it means to be a trade or business when the principal asset was the reputation or skill of one or more of its employees.⁹⁷ An aircraft maintenance business, for example, which does not appear on the list of SSTBs, may have built its reputation around the skill of one well-known mechanic.⁹⁸ These concerns are addressed in the Proposed Regulations.⁹⁹ Indeed, a trade or business for which the reputation or skill of one or more of its employees is any of the following: a trade or business in which a person receives fees, compensation, or other income for endorsing products or services; a trade or business in which a person licenses or receives fees, compensation, or other income for the use of an individual's image, likeness, name, signature, voice, trademark, or any other symbols associated with the individual's identity; or receiving fees, compensation, or other income for appearing at an event or on radio, television, or another media format.¹⁰⁰

As an example, suppose a famous chef builds an empire of restaurants. The chef creates a trust and transfers to that trust an interest in an LLC that owns the restaurants. The LLC is in the trade or business of owning restaurants, and that is not an SSTB. Due to her fame, the chef also receives an endorsement of \$500,000 to use her image on a line of cookware, and she

92. Prop. Treas. Reg. § 199A-1(d), 83 Fed. Reg. at 40,912.

93. *Id.*

94. Prop. Treas. Reg. § 199A-5, 83 Fed. Reg. at 40,923–27.

95. *Id.* at 40,923.

96. *See id.* at 40,924.

97. *See* Qualified Business Income Deduction, 83 Fed. Reg. at 40,896.

98. *See id.*

99. *See* Prop. Treas. Reg. § 199A-5, 83 Fed. Reg. at 40,923–27.

100. Qualified Business Income Deduction, 83 Fed. Reg. at 40,899.

transfers some of that compensation to the trust. The receipt of that endorsement fee for her skill and reputation is an SSTB.¹⁰¹

There are many businesses that include both SSTB and non-SSTB components.¹⁰² For example, a law firm may provide legal services and own its building that it also leases to other unrelated businesses.¹⁰³ The Proposed Regulations provide special rules for this situation, aptly dubbed “Special Rules” in Prop. Treas. Reg. § 1.199A-5(c).¹⁰⁴

1. De Minimis Rule

There is a de minimis rule that applies if only a small portion of a business would otherwise constitute an SSTB.¹⁰⁵ If the gross receipts are twenty-five million dollars or less, and less than ten percent of the gross receipts are attributable to services that otherwise would qualify as an SSTB, then the trade or business is not an SSTB.¹⁰⁶ If the gross receipts are more than twenty-five million, then the same rule applies, but with five percent substituted for ten.¹⁰⁷

2. Services or Property to an SSTB

If a business provides eighty percent or more of its property or services to an SSTB and there is fifty percent or more common ownership between the business and SSTB, then the business is treated as part of the SSTB.¹⁰⁸ If the business provides less than eighty percent, but there still is the fifty percent common ownership, then that portion of the business providing property or services to the fifty percent common owners is treated as part of the SSTB.¹⁰⁹

As an example, suppose a law firm is a partnership that owns its own building. The partners divide the firm into two partnerships, with all of the same partners. One partnership performs legal services to clients, and this partnership clearly is an SSTB under Prop. Treas. Reg. § 1.199A-5(b)(1)(ii). The other partnership owns the building and leases the entire building to the first partnership. That partnership will be treated as part of the SSTB. If the second partnership leases twenty percent or more of the building to other

101. See *id.*; The above hypothetical was created by the author for purposes of this article.

102. Prop. Treas. Reg. § 1.199A-5(c), 83 Fed. Reg. at 40,926 (Aug. 16, 2018).

103. See *id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

renters, however, then that portion should not be considered part of the SSTB.¹¹⁰

3. *Incidental to an SSTB*

If a business that would not otherwise be an SSTB has fifty percent or more common ownership with an SSTB, including related parties, and has shared expenses, then the business is incidental to and part of the SSTB unless the gross receipts of that business represent more than five percent of the total receipts for the business and SSTB for that taxable year.¹¹¹

As an example, a dermatologist who owns a dermatology clinic also sells skin care products by displaying them in the dermatologist's waiting room. The dermatologist's employees handle the sales of the skin care products. Unless the gross receipts from the sale of skin care products exceed five percent of the total receipts of the dermatology clinic (including the receipts attributable to the skin care product sales), the sale of skin care products is treated as incidental to and part of the SSTB.¹¹²

The concept of Step 3 is to flag any SSTBs in the trust.¹¹³ If the income of the trust is above the threshold, then the QBI, W-2 wages, and UBI for that SSTB either will be reduced or equal zero.¹¹⁴ These calculations are discussed in more detail in Steps 4 or 5.¹¹⁵ Once Step 3 is complete, the next task is to determine whether the trust's taxable income is above the phase-in range (i.e., above \$207,500), which is covered by Step 4, or within the phase-in range, which is covered by Step 5.¹¹⁶ These two last steps may appear out of order, but in reality, the calculation for trusts within the phase-in range (Step 5) are more complicated and built on concepts more easily understood for trusts with incomes above the phase-in range (Step 4).¹¹⁷ So, it is easier to understand the mechanics by going through the "above phase-in" calculations first, which is why those are in Step 4.¹¹⁸

D. Step 4: Calculate the Deduction for a Trust Above the Phase-in Range

The formula for the deduction if the trust income is above the phase-in range (\$207,500) is more complicated, because there are limitations on QBI.¹¹⁹ Instead of the QBI Amount, the calculation uses a "QBI

110. *See id.*

111. *Id.*

112. *See id.*

113. *See id.*

114. *See* Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,886 (Aug. 16, 2018).

115. *See infra* Section IV.D–E.

116. *See infra* Section IV.D–E.

117. *See infra* Section IV.D–E.

118. *See infra* Section IV.D–E.

119. *See* Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. 40,884, 40,912 (Aug. 16, 2018).

Component.”¹²⁰ Steps 4 and 5 are divided into parts.¹²¹ These parts are not in the Proposed Regulations: again, the parts are presented here to aid in conceptual understanding.¹²²

1. Part 1

If the trust has multiple trades or businesses that qualify for aggregation, then the trustee may choose to aggregate the QBI, W-2 wages, and UBIA of those entities.¹²³ If it so chooses, the aggregation is done before applying the W-2 wages and UBIA limitations discussed below.¹²⁴ Aggregation is discussed further below and covered in detail by Prop. Reg. § 1.199A-4.¹²⁵

2. Part 2

Identify any negative QBI.¹²⁶ If there are other entities with positive QBI, then the positive QBI is offset by the negative QBI.¹²⁷ If there are multiple entities with positive QBI, then the offset is proportional among those entities.¹²⁸ The W-2 wages and QBIA for any entity that produced negative QBI are ignored.¹²⁹ This process is called “netting.”¹³⁰ If the total QBI from all T/Bs is negative, then the QBI Component is zero for that year.¹³¹ The negative amount carries over to the next year, in which it is treated as negative QBI from a separate T/B, but the W-2 wages and UBIA do not carry over.¹³²

3. Part 3

Calculate the QBI Component.¹³³ For each T/B, calculate what this article calls the “QBI Sub-component.”¹³⁴

120. *Id.*

121. *See infra* Parts IV.D–E.

122. *See infra* Parts IV.D–E.

123. Prop. Treas. Reg. § 1.199A-1(d)(2)(ii), 83 Fed. Reg. 40,884, 40,912 (Aug. 16, 2018).

124. *Id.*

125. Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. at 40,921–23 (Aug. 16, 2018).

126. Prop. Treas. Reg. § 1.199A-1(d)(2)(iii), 83 Fed. Reg. at 40,912.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *See id.*

a. TASK: Calculate Twenty Percent of the QBI for That T/B

If the T/B is an SSTB, then QBI equals \$0 for that T/B.¹³⁵ This reduction commonly is referred to as the SSTB limitation.¹³⁶ If the trustee wants to aggregate T/Bs, then the QBI is the combined QBI for the T/Bs being aggregated.¹³⁷ If the QBI is negative, it will offset positive QBI from other T/Bs.¹³⁸ If the total QBI is negative, or if there is no positive QBI to offset, then the QBI is zero for this year and the negative carries over to the next year.¹³⁹ Likewise, if there was negative QBI in the prior year that carried over, that negative QBI is treated as a separate T/B this year, but with no W-2 wages or UBIA carryover.¹⁴⁰

b. TASK: Calculate the Wage-Basis Limit

The wage-basis limit is the *greater* of: (i) 50% of the W-2 wages for that T/B; or (ii) the sum of 25% of the W-2 wages plus 2.5% of the UBIA of qualified property for that T/B.¹⁴¹ If the T/B is an SSTB, then W-2 wages and UBIA equal \$0 for that T/B.¹⁴² If the trustee wants to and can aggregate T/Bs, then the W-2 wages and UBIA are combined for the T/Bs being aggregated.¹⁴³ If the QBI is negative, W-2 wages and UBIA are ignored.¹⁴⁴

Next, determine the QBI Sub-component for that T/B, which equals the lesser of (a) twenty percent of QBI, or (b) the wage-basis limit.¹⁴⁵ Then, add up all of the QBI Sub-components.¹⁴⁶ This is the QBI Component.¹⁴⁷ All of the examples in this article assume that the trust holds an interest only in one entity, so the QBI Component and the QBI Sub-component are the same for the examples that are discussed below.¹⁴⁸

135. *See id.*

136. *See* Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,886 (Aug. 16, 2018); *see also* Tax Cuts and Jobs Act, Provision 11011 Section 199A – Qualified Business Income Deduction FAQs, IRS (Nov. 5, 2018), <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs> [perma.cc/4U22-NYFV] (answering who may take the deduction, how the provision affects S corporations and partnerships, and other basic questions).

137. Prop. Treas. Reg. § 1.199A-4(a), 83 Fed. Reg. 40,884, 40,921–923 (Aug. 16, 2018).

138. *See id.*

139. Prop. Treas. Reg. § 1.199A-1(d)(2)(iii)(B), 83 Fed. Reg. at 40,912.

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See infra* Section IV.D.4.

4. Part 4: Calculate the § 199A Deduction

Add the QBI Component plus twenty percent of the qualified REIT dividends and PTP income.¹⁴⁹ The § 199A deduction equals the lesser of: (i) the sum of the QBI Component and twenty percent of the qualified REIT and PTP income; or (ii) twenty percent of the taxable income above net capital gain for the trust.¹⁵⁰ In essence, the basic formula is the same for the trust with income above the phase-in range, except that the SSTB and wage-basis limit come into play and need to be applied in a specific order.¹⁵¹ The QBI Component calculation captures those limitations.¹⁵²

a. Example 1

The trust owns an interest in a business that leases property to several suburban airports for parking lots. The QBI generated by the business that is allocable to the trust equals \$1,000,000. The business paid no wages. The property was not depreciable so it was not qualified property. After allowable deductions, the trust income was \$980,000. There is no REIT or PTP income. The trust income is above the phase-in range. Run through the process.

Part 1: Nothing to aggregate.

Part 2: No negative QBI.

Part 3: QBI Sub-component: Calculate 20% of QBI, which equals \$200,000. The wage-basis limit is \$0 because there were no W-2 wages or qualified property. The QBI Sub-component for this T/B is \$0, the lesser \$200,000 or \$0.

Part 4: There is only one entity, so the QBI Component is \$0. The § 199A deduction is the lesser of the QBI Component, which is \$0, or 20% of the trust taxable income, which is \$196,000, so the deduction is \$0.¹⁵³

b. Example 2

Similar facts, except the business spends \$10,000,000 building parking structures that it leases along with the land. The structures are depreciable. QBI is \$4,000,000. Trust taxable income is \$3,980,000.

Parts 1 and 2: The same – no impact.

Part 3: QBI Sub-component: Calculate twenty percent of QBI, which equals \$800,000. This figure is much greater than in Example 1.¹⁵⁴ The

149. Prop. Treas. Reg. § 1.199A-1(d)(2)(iv), 83 Fed. Reg. 40,884, 40,912 (Aug. 16, 2018).

150. Prop. Treas. Reg. § 1.199A-1(c)(1), 83 Fed. Reg. at 40,911.

151. *Id.*

152. *Id.*

153. See Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. at 40,911–16; This hypothetical was created by the author for the purposes of this article.

154. See *supra* Section IV.D.4.a.

wage-basis limit is the greater of: (i) fifty percent of W-2 wages, which equals \$0; or (ii) 25% of W-2 wages plus 2.5% of UBIA, which here equals \$250,000 (because UBIA equals \$10,000,000, so 2.5% equals \$250,000, and $\$0 + \$250,000 = \$250,000$). The wage-basis limit is \$250,000. Because the wage-basis limit is less than twenty percent of QBI, and the trust is above the phase-in range, the QBI Sub-component equals wage-basis limit of \$250,000.

Part 4: Because there is only one entity, the QBI Component is \$250,000. Calculate twenty percent of the trust taxable income, which equals \$796,000. The § 199A deduction is the lesser of the two, which is \$250,000.¹⁵⁵

E. Step 5: Calculate the Deduction for a Trust Within the Phase-in Range

There are two differences between Step 4 and Step 5.¹⁵⁶ The first difference is the treatment of SSTBs.¹⁵⁷ In Step 4, for trusts with income above the phase-in range, QBI, W-2 wages, and UBIA for SSTBs equaled \$0.¹⁵⁸ In contrast, in Step 5, for trusts with income within the phase-in range, QBI, W-2 wages, and UBIA that do not equal zero; instead, those figures are multiplied by the applicable percentage.¹⁵⁹ The second difference is the impact of the wage-basis limit.¹⁶⁰ In Step 4, if the wage-basis limit was less than twenty percent of QBI, then the QBI sub-component equaled the wage-basis limit, meaning that the wage basis limit was a true *limit*.¹⁶¹ In contrast, in Step 5, if the wage-basis limit is less than twenty percent of QBI, the QBI sub-component does not equal the wage-basis limit, but instead equals a reduced version of the twenty percent of QBI.¹⁶² These differences are discussed in detail below.¹⁶³ Step 5 does have the same overall “parts” as Step 4, as follows.¹⁶⁴

1. Part 1

If the trust has multiple trades or businesses that qualify for aggregation, and the trustee chooses to aggregate, then aggregation is first.¹⁶⁵ As

155. See Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. at 40,911–16 (Aug. 16, 2018); This hypothetical was created by the author for the purposes of this article.

156. See Prop. Treas. Reg. § 1.199A-5, 83 Fed. Reg. at 40,923 (Aug. 16, 2018); compare *supra* Section IV.D (calculating the deduction for a trust above the phase-in range), with *infra* Section IV.E (calculating the deduction for a trust within the phase-in range).

157. See Prop. Treas. Reg. § 1.199A-5, 83 Fed. Reg. at 40,923.

158. See *supra* Section IV.D.4.

159. See *infra* Section IV.E.4.

160. Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. at 40,911.

161. See *supra* Section IV.D.4.

162. See examples *infra* Section IV.E.4.

163. See discussion *infra* Section IV.E.

164. See discussion *infra* Section IV.E.

165. See Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,895 (Aug. 16, 2018).

mentioned above, aggregation is covered in detail by Prop. Reg. § 1.199A-4.¹⁶⁶

2. Part 2

Identify any negative QBI.¹⁶⁷ If there are other entities with positive QBI, then the positive QBI is offset by the negative QBI.¹⁶⁸ If there are multiple entities with positive QBI, then the offset is proportional among those entities.¹⁶⁹ Ignore the W-2 wages and QBIA for any entities that produced negative QBI.¹⁷⁰ As mentioned above, this process is called “netting.”¹⁷¹ If the total QBI from all T/Bs is negative, then the QBI Component is zero for that year.¹⁷² The negative amount carries over to the next year, in which it is treated as negative QBI from a separate T/B.¹⁷³ The W-2 wages and UBIA do not carry over.¹⁷⁴

3. Part 3

Calculate the QBI Component.¹⁷⁵ For each T/B, calculate what this outline calls the QBI Sub-component.¹⁷⁶

a. TASK: Calculate Twenty Percent of the QBI for that T/B

If the T/B is an SSTB, then multiply QBI by the applicable percentage.¹⁷⁷ Recall that the applicable percentage reflects how far the trust’s taxable income is above the threshold.¹⁷⁸ If the trust’s taxable income is, for example, \$108,000, then the applicable percentage is 99%.¹⁷⁹ Accordingly, the trust will use 99% of its QBI.¹⁸⁰ This relationship makes sense: if the income is just a little bit above the threshold, then the penalty will be minimal and the trust still will have most of its available deduction.¹⁸¹ In contrast, if the trust’s income is \$207,000, which then the applicable percentage will be one percent, so QBI will be nominal and the deduction

166. See Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. 40,884, 40,921–23 (Aug. 16, 2018).

167. Prop. Treas. Reg. § 1.199A-1(d)(2)(iii), 83 Fed. Reg. at 40,912.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*; see *supra* Section IV.D.

172. Prop. Treas. Reg. § 1.199A-1(c)(1), 83 Fed. Reg. at 40,912.

173. Prop. Treas. Reg. § 1.199A-1(c)(2), 83 Fed. Reg. at 40,911.

174. See *id.*

175. Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

176. *Id.*

177. *Id.*

178. Prop. Treas. Reg. § 1.199A-1(b)(2), 83 Fed. Reg. at 40,911.

179. See *id.*

180. Prop. Treas. Reg. § 1.199A-1(d)(2)(iv)(A), 83 Fed. Reg. at 40,912.

181. See *id.*

likely will be nominal for the SSTB.¹⁸² If the T/B is not an SSTB, do not multiply by the applicable percentage.¹⁸³ The applicable percentage is a concept that applies only to SSTBs.¹⁸⁴ If the trustee wants to aggregate T/Bs, then the QBI is the combined QBI for the T/Bs being aggregated.¹⁸⁵ Note that it makes no sense to aggregate SSTBs.¹⁸⁶ If the QBI is negative, remember that it will offset positive QBI from other T/Bs.¹⁸⁷ If the total QBI is negative, or if there is no positive QBI to offset, then the QBI carries over to the next year.¹⁸⁸ Likewise, if there was negative QBI in the prior year that carried over, that negative QBI is treated as a separate T/B this year, but with no W-2 wages or UBI carryover.¹⁸⁹

b. TASK: Calculate the Wage-Basis Limit

The wage-basis limit is the *greater* of: (i) fifty percent of the W-2 wages for that T/B; or (ii) the sum of twenty-five percent of the W-2 wages plus 2.5% of the UBI of qualified property for that T/B.¹⁹⁰ If the T/B is an SSTB, then multiply W-2 wages and UBI by the applicable percentage, as was done above for QBI.¹⁹¹ If the T/B is not an SSTB, then do not multiply by the applicable percentage.¹⁹² If the trustee wants to aggregate T/Bs, then the W-2 Wage and UBI are combined for the T/Bs being aggregated.¹⁹³ If the QBI is negative, W-2 wages and UBI effectively are ignored.¹⁹⁴

c. TASK: Determine the Lesser of Twenty Percent of QBI or the Wage-Basis Limit and Determine the QBI Sub-Component

If twenty percent of QBI is the lesser number, then the QBI Sub-component equals this number.¹⁹⁵ If the wage-basis limitation is the lesser number, then the QBI Sub-component is modified to equal twenty percent of QBI reduced by the reduction amount.¹⁹⁶ The reduction amount equals the excess amount multiplied by the ratio that the trust income exceeds

182. *See id.*

183. *See id.*

184. *See* Qualified Business Income Deduction, 83 Fed. Reg. 40,884, 40,886 (Aug. 16, 2018).

185. Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. 40,884, 40,921 (Aug. 16, 2018).

186. *See id.*

187. *See* Prop. Treas. Reg. § 199A-1(d), 83 Fed. Reg. at 40,912–13.

188. *Id.*

189. *Id.*; *see also* Prop. Treas. Reg. § 1.199A-1(d)(2)(iii), 83 Fed. Reg. at 40,912.

190. Prop. Treas. Reg. § 1.199A-1(d)(2)(iv), 83 Fed. Reg. at 40,912.

191. *See supra* Section IV.E.3.a.

192. Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

193. *Id.*

194. *Id.*

195. *Id.* at 40,912–13.

196. *Id.* at 40,912.

the threshold bears to \$50,000.¹⁹⁷ The excess amount equals twenty percent of the QBI, reduced by the wage-basis limitation.¹⁹⁸ If the entity is an SSTB, then each of the above is multiplied by the applicable percentage.¹⁹⁹ Add up all of the QBI Sub-components.²⁰⁰ This is the QBI Component.²⁰¹

4. Part 4

Calculate the § 199A Deduction.²⁰² Add the QBI Component plus twenty percent of the qualified REIT dividends and PTP income.²⁰³ The § 199A deduction equals the lesser of: (i) the sum of the QBI Component and twenty percent of the qualified REIT and PTP income; or (ii) twenty percent of the taxable income net capital gain for the trust.²⁰⁴ The benefit of being in the phase-in range is that the effects of the SSTB limitation and wage-basis limitation are reduced.²⁰⁵ The following examples are from Prop. Treas. Reg. § 1.199A-1(d)(4), modified for trusts.²⁰⁶

a. Example 1

The trust is a shareholder in an S corporation that conducts a single T/B that is not an SSTB. The corporation owns no qualified property. The trust's share of QBI is \$180,000, and the share of W-2 wages is \$40,000. There is no REIT or PTP income. After allowable deductions, the trust income is \$170,000, which is in the phase-in range.

Part 1: No aggregation.

Part 2: No negative QBI.

Part 3: Calculate the QBI Sub-component. First, calculate twenty percent of QBI, which equals \$36,000. Second, calculate the wage-basis limit, which equals the greater of: (i) fifty percent of W-2 wages, or \$20,000 (= fifty percent of \$40,000); or (ii) 25% of W-2 wages (\$10,000) + 2.5% UBI (\$0), which equals \$10,000. The wage-basis limit is \$20,000. The wage-basis limit (\$20,000) is less than twenty percent of QBI (\$36,000). Unlike in Step 4, in which the QBI Sub-component would equal the wage-basis limit, in Step 5, the QBI Sub-component is modified to equal \$36,000 reduced by the reduction amount. The reduction amount is: [twenty percent of the QBI] – [the wage-basis limitation], which is \$36,000 – \$20,000

197. Prop. Treas. Reg. § 1.199A-1(b)(8), 83 Fed. Reg. 40,884, 40,911 (Aug. 16, 2018).

198. *Id.*

199. Prop. Treas. Reg. § 1.199A-1(d)(2)(iv)(A), 83 Fed. Reg. at 40,912.

200. *See id.*

201. *See id.*

202. *See* Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

203. *Id.*

204. *Id.*

205. *See* Prop. Treas. Reg. § 1.199A-1(d)(2)(i), 83 Fed. Reg. at 40,912.

206. *See* Prop. Treas. Reg. § 1.199A-1(d)(4), 83 Fed. Reg. at 40,913–15.

= \$16,000 (called the “excess”), multiplied by the ratio that the trust income exceeds the threshold bears to \$50,000, which is $[\$170,000 - \$157,500] \div \$50,000$, or twenty-five percent; accordingly, the reduction amount is the “excess” multiplied by 25%, which equals \$16,000 times 25%, or \$4,000. The QBI Sub-component therefore is \$36,000 minus \$4,000, which equals \$32,000.

Part 4: There is only one entity, so the QBI Component is \$32,000. There is no REIT or PTP income, so the § 199A deduction equals the lesser of \$32,000 or 20% of the trust taxable income, which is 20% times \$170,000, or \$34,000. The § 199A deduction equals \$32,000.²⁰⁷

b. Example 2

Assume the same facts as above, except the business is an SSTB:

Parts 1 and 2: Still not an issue.

Part 3: QBI Sub-component. The business is an SSTB. The QBI and W-2 wages now are multiplied by the applicable percentage. If there was UBI, that would be multiplied by the applicable percentage as well. The calculation of twenty percent of QBI equals \$36,000. The applicable percentage equals $100\% - [(\text{Taxable Income} - \text{Threshold}) \div \$50,000]$, or $100\% - [(\$170,000 - \$157,500) \div \$50,000]$, which equals $100\% - [\$12,500 \div \$50,000] = 100\% - 25\% = \text{seventy-five percent}$. Accordingly, \$36,000 is multiplied by seventy-five percent, and the result is \$27,000. The wage-basis limit equals the greater of: 50% of W-2 wages times the applicable percentage, or \$15,000 (=50% of \$40,000 times seventy-five percent); or twenty-five percent of W-2 wages plus 2.5% UBI (both multiplied by the applicable percentage), or $\$7,500 + \0 , which equals \$7,500. The wage-basis limit is \$15,000. Because the wage-basis limit (\$15,000) is less than twenty percent of modified QBI (\$27,000), the QBI Sub-component is modified to equal \$27,000 reduced by the reduction amount. The reduction amount equals twenty percent of the modified QBI reduced by the wage-basis limit, which is $\$27,000 - \$15,000$, or \$12,000 (this is the excess amount), multiplied by the ratio that the trust income exceeds the threshold bears to \$50,000, which is $[\$170,000 - \$157,500] \div \$50,000$, or twenty-five percent. The reduction amount therefore equals \$12,000 times twenty-five percent, or \$3,000. The QBI Sub-component therefore is \$27,000 minus \$3,000, which equals \$24,000.

Part 4: There is only one entity, so the QBI Component is \$24,000. There is no REIT or PTP income, so the § 199A deduction equals the lesser of \$24,000 or twenty percent of the trust taxable income, which equals twenty

207. See Prop. Treas. Reg. § 1.199A-1(d)(4), 83 Fed. Reg. at 40,913; The above example was created by the author for the purposes of this article.

percent times \$170,000, or \$34,000. The § 199A deduction equals \$24,000.²⁰⁸

There are several takeaways from the mechanical analysis of IRC § 199A.²⁰⁹ First, the deduction will always be limited by twenty percent of the trust's taxable income net gain.²¹⁰ This limitation applies regardless of how the trust's taxable income compares to the threshold amount.²¹¹ Second, there are two additional limitations: the SSTB limitation and the wage-basis limitation, that apply if the trust's income is above the threshold.²¹² If the trust's income is only slightly above the threshold, then the impact of the limitations will be minimal.²¹³ If the trust's income is significantly above the threshold, then the limitations will be more severe.²¹⁴

V. AGGREGATING ENTITIES FOR THE QBI COMPONENT

For trusts with income above the threshold amount, the wage-basis limit applies.²¹⁵ If a trust has three entities, one of which has all of the income, the other of which pays all of the wages, and the third of which owns all of the depreciable property, then the deduction may very well be zero.²¹⁶ Imagine having QBI but no W-2 wages or UBIA.²¹⁷ Or having W-2 wages but no QBI.²¹⁸ There will be no deduction.²¹⁹ If the entities satisfy certain criteria, then the trust can aggregate the QBI, W-2 wages, and UBIA for the entities.²²⁰

This concept is appropriately referred to as aggregation, and is explained in detail in Prop. Treas. Reg. § 1.199A-4.²²¹ Once a trustee aggregates a group of trades or businesses, it must do so for subsequent tax years, although it can add to the group of trades or businesses being aggregated.²²² Multiple owners of a pass-through entity do not have to aggregate in the same manner, so the trustee does not have to be concerned whether another member of one of the entities aggregates that entity with others.²²³

There are five requirements for a trustee to aggregate interests in entities.²²⁴ First, the trust must own fifty percent or more of each trade or

208. *Id.*; The above example was created by the author for the purposes of this article.

209. See 26 U.S.C. § 199A (2017).

210. Prop. Treas. Reg. § 1.199A-1(c)(1), (d)(1), 83 Fed. Reg. at 40,911–12.

211. See *id.*

212. Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

213. See *id.*

214. See *id.*

215. See Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

216. See *id.*

217. See *id.*

218. See *id.*

219. See *id.*

220. See *id.*; see also Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. at 40,921.

221. See *id.*

222. Prop. Treas. Reg. § 1.199A-4(c)(1), 83 Fed. Reg. at 40,921.

223. *Id.*

224. Prop. Treas. Reg. § 1.199A-4(b), 83 Fed. Reg. at 40,921.

business, either directly or indirectly.²²⁵ Interestingly, when this requirement is applied to human taxpayers (as opposed to trusts), ownership by a person's spouse, children, grandchildren, and parents are attributed to the individual.²²⁶ It is not clear whether or how the family attribution rules would apply to trusts.²²⁷ Second, the ownership described above exists for a majority of the taxable year.²²⁸ Third, "[a]ll of the items attributable to each trade or business to be aggregated are reported on returns with the same taxable year."²²⁹ Fourth, "[n]one of the trade or businesses to be aggregated" are SSTBs.²³⁰ Fifth and lastly, the trades or businesses must satisfy at least two of the following relationship factors: (i) they "provide products and services that are the same or customarily offered together"; (ii) they "share facilities or share significant centralized business elements, such as personnel, accounting, legal, manufacturing, purchasing, human resources, or information technology resources"; and (iii) they are "operated in coordination with, or reliance upon, one or more other trades or businesses in the aggregated group."²³¹

The following is a modification of Example 14 from Prop. Treas. Reg. § 1.199A-4(c)(1).²³² A trust wholly owns LLC1, LLC2, and LLC3.²³³ LLC1 operates a construction company and buys lumber from LLC2, which operates a lumber yard.²³⁴ LLC3 is a trucking company that transports the lumber from LLC2 to LLC1.²³⁵ The LLCs share a centralized human resource, accounting, and payroll department.²³⁶

The trustee determines whether it can aggregate the QBI, W-2 wages, and UBI of the three LLCs as follows.²³⁷ The same trust owns one hundred percent, which is more than fifty percent, of each LLC.²³⁸ It is assumed that the trust owns the entities for the majority of the year, and that the items attributable to each LLC are reported on returns within the same taxable year.²³⁹ None of the LLCs are SSTBs.²⁴⁰ The LLCs share significant centralized business elements, and are operated in coordination with each other, so they satisfy at least two of the three relationship factors in Prop.

225. *See id.*

226. *See id.*

227. *See id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Prop. Treas. Reg. § 1.199A-4(c)(1), 83 Fed. Reg. at 40,923.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* Prop. Treas. Reg. § 1.199A-4(b), 83 Fed. Reg. at 40,921–22.

238. *See id.*

239. *See id.*

240. *See id.*

Treas. Reg. § 1.199A-4(b)(1)(v).²⁴¹ The result is that the trustee can aggregate the LLCs.²⁴²

The advantage of aggregation may be significant.²⁴³ The following example illustrates how aggregating three entities may increase the deduction:

Table 2				
	No Aggregation			Aggregation
	Entity 1	Entity 2	Entity 3	Aggregated
QBI	\$700,000	\$200,000	\$20,000	\$920,000
W-2 Wages	\$250,000	\$50,000	\$70,000	\$370,000
UBIA	\$10,000	\$0	\$200,000	\$210,000
20% QBI	\$140,000	\$40,000	\$4,000	\$184,000
<i>Wage-basis limit:</i>				
50% of W-2 wages	\$125,000	\$25,000	\$35,000	\$185,000
25% of W-2 wages +				
2.5% UBIA	\$62,750	\$12,500	\$22,500	\$97,750
Wage-basis limit:	\$125,000	\$25,000	\$35,000	\$185,000
QBI Sub-component	\$125,000	\$25,000	\$4,000	\$184,000
QBI Component	\$154,000			\$184,000

Assuming that the trust has enough income, the deduction will equal the QBI Component.²⁴⁴ In this example, aggregating yields a deduction that is \$30,000 greater than without aggregation.²⁴⁵ Entity 1 and 2 had much more QBI than W-2 wages or UBIA, so the wage-limit controlled.²⁴⁶ By aggregating, Entity 3 effectively gave a needed boost of W-2 wages and especially UBIA.²⁴⁷ As a result, the wage-basis limit of the aggregated entities was greater than twenty percent of the aggregated QBI, which meant

241. Prop. Treas. Reg. § 1.199A-4(b)(1)(v), 83 Fed. Reg. at 40,921.

242. See Prop. Treas. Reg. § 1.199A-4(b), 83 Fed. Reg. at 40,921.

243. See *id.*

244. See Prop. Treas. Reg. § 1.199A-1(d), 83 Fed. Reg. at 40,912.

245. See Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. at 40,921.

246. See Prop. Treas. Reg. § 1.199A-1, 83 Fed. Reg. at 40,911.

247. See Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. at 40,921.

that the wage-basis limit did not impact the deduction.²⁴⁸ Aggregating here was a way to mitigate the impact of the wage-basis limit.²⁴⁹

VI. CERTAIN REPORTING REQUIREMENTS

The reporting requirements dictate how entity owners will obtain the information needed to calculate the deduction.²⁵⁰ The burden is on the relevant pass-through entity to report the necessary information to the owners for determining the deduction, such as whether it is engaged in a trade or business, the QBI, W-2 wages, and UBI for each trade or business, and whether the trade or business is an SSTB.²⁵¹ The trust should receive this information from the entity via the K-1.²⁵² The grantor of a grantor trust, or other person if that person is treated as owning a trust under IRC §§ 671–679, computes the § 199A deduction as if that person directly conducted the activities of the trust.²⁵³

As mentioned earlier, the trust (or an estate) is treated as a relevant pass-through entity to the extent it allocates QBI and other items to beneficiaries.²⁵⁴ Accordingly, the trustee calculates its QBI, W-2 wages, UBI of qualified property, qualified REIT dividends and PTP income at the entity level.²⁵⁵ The trustee then allocates these items to the beneficiaries based on the relative proportion of the distributable net income (DNI).²⁵⁶ For this purpose, DNI is calculated without regard to the § 199A deduction.²⁵⁷ If the trust has no DNI, then the items are allocated to the trust; i.e., if there is no DNI, the trust is not treated as a relevant pass-through entity.²⁵⁸ There is a very detailed example in Prop. Treas. Reg. § 1.199A-6(d)(3)(vi) that is worthwhile reading, although too long to include in this article.²⁵⁹

There is a stiff penalty if a relevant pass-through entity fails to report the required information.²⁶⁰ In such a scenario, the owner's share of positive QBI, W-2 wages, and UBI is presumed to be \$0.²⁶¹ Accordingly, although the burden is on the relevant pass-through entity, the punishment appears to be allocated to the owner.²⁶² For minority owners, this displacement of

248. *See id.*

249. *See id.*

250. Prop. Treas. Reg. § 1.199A-6, 83 Fed. Reg. at 40,927.

251. *See id.*

252. *Id.* at 40,928.

253. Qualified Business Income Deduction, 83 Fed. Reg. at 40,902.

254. *See* Prop. Treas. Reg. § 1.199A-6(d)(1), 83 Fed. Reg. at 40,928.

255. *Id.*

256. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(ii), 83 Fed. Reg. at 40,928.

257. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(i), 83 Fed. Reg. at 40,928.

258. Prop. Treas. Reg. § 1.199A-6(d)(3)(ii), 83 Fed. Reg. at 40,928.

259. Prop. Treas. Reg. § 1.199A-6(d)(3)(vi), 83 Fed. Reg. at 40,928–29.

260. Prop. Treas. Reg. § 1.199A-6(b)(3)(iv)(3)(B)(iii), 83 Fed. Reg. at 40,928.

261. *See id.*

262. *See id.*

punishment is particularly hazardous, as the minority owner cannot force the entity management to produce the K-1s.²⁶³ Hopefully, this issue will be clarified or rectified with the final regulations.

The trustee of a trust with interests in pass-through entities now has one more task to add to the list of fiduciary duties.²⁶⁴ The trustee should review the K-1s that it receives carefully, and monitor for QBI, W-2 wages, UBI, and a determination as to whether the entity is an SSTB.²⁶⁵ For trustees with controlling interests in pass-through entities, it is interesting to think about whether there is another additional fiduciary duty in positioning the entity to better maximize the deductions available.²⁶⁶ For example, when deciding whether to invest in depreciable property, the trustee now would consider whether doing so would yield a better § 199A deduction, and whether the benefit of that deduction is sufficient to justify the investment.²⁶⁷ The § 199A deduction gives at least another factor for consideration by trustees.²⁶⁸

VII. MULTIPLE TRUST RULES

If a trust has income that is above the threshold and cannot avail itself of the full deduction, an understandable reaction would be to divide the trust into multiple trusts such that each new trust would have income below the threshold.²⁶⁹ This concept is anticipated in an existing rule and in the Proposed Regulations, which often are referred to as the “multiple trust rules.”²⁷⁰

The already-existing IRC § 643(f) provides that, for purposes of subchapter J, “under regulations prescribed by the Secretary, 2 or more trusts shall be treated as 1 trust if (1) such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and (2) a principal purpose of such trusts is the avoidance of tax imposed by this chapter.”²⁷¹ A husband and wife are treated as one person in this context.²⁷²

Prop. Treas. Reg. § 1.643(f)-1 adds a very significant new variable—a presumption.²⁷³ Under Prop. Treas. Reg. § 1.643(f)-1(b), “[a] principal purpose for establishing or funding a trust will be presumed if it results in a significant income tax benefit unless there is a significant non-tax (or

263. *See id.*

264. *See* Prop. Treas. Reg. § 1.199A-6(b)(2)(i)–(iii), 83 Fed. Reg. at 40,928.

265. *See id.*

266. *See* Prop. Treas. Reg. § 1.199A-6(d)(1), 83 Fed. Reg. at 40,928.

267. *See id.*

268. *See id.*

269. *See* Prop. Treas. Reg. § 1.643(f)-1, 83 Fed. Reg. at 40,929.

270. *See id.*

271. *See* 26 U.S.C. § 643(f) (2017).

272. *Id.*

273. Prop. Treas. Reg. § 1.643(f)-1, 83 Fed. Reg. at 40,929.

non-income tax) purpose that could not have been achieved without the creation of these separate trusts.”²⁷⁴

In addition, Prop. Treas. Reg. § 1.199A-6(d)(3)(v) specifically addresses multiple trusts and the IRC § 199A deduction.²⁷⁵ The title is “Anti-abuse rule for creation of multiple trusts to avoid exceeding the threshold amount,” which about sums up the premise.²⁷⁶ The actual language says “[t]rusts formed or funded with a significant purpose of receiving a deduction under section 199A will not be respected for purposes of section 199A.”²⁷⁷ It is not clear what is meant by “will not be respected.”²⁷⁸ Most likely, the proposed rule means to eliminate the deduction for multiple trusts that are designed to take better advantage of the deduction.²⁷⁹

When Prop. Treas. Reg. § 1.199A-6(d)(3)(v) is combined with the presumption created by Prop. Treas. Reg. § 1.643(f)-1, one wonders whether the presumption will be triggered if, as a consequence of creating multiple trusts, a greater overall § 199A deduction is a by-product.²⁸⁰ Prop. Treas. Reg. § 1.643(f)-1(c) gives two examples that illustrate when the presumption is and is not triggered, although there is no cross-reference to Prop. Treas. Reg. § 1.199A-6(d)(3)(v).²⁸¹

In Example 1, a settlor owns and operates a pizzeria and several gas stations.²⁸² The settlor’s taxable income is too high to take full advantage of the § 199A deduction.²⁸³ The settlor creates three non-grantor trusts for various siblings.²⁸⁴ The beneficiaries differ slightly, some are the same, but the dispositive terms are identical.²⁸⁵ The trustee is the same for all three trusts.²⁸⁶ Under these circumstances, the presumption is triggered and the trusts are aggregated and treated as a single trust.²⁸⁷

In Example 2, a settlor creates two, presumably non-grantor, trusts for a son and daughter.²⁸⁸ For Trust #1, all income is paid to son for son’s life, with remainder to daughter.²⁸⁹ For Trust #2, income is discretionary for daughter’s education, support, and maintenance, while income and principal

274. See Prop. Treas. Reg. § 1.643(f)-1(b), 83 Fed. Reg. at 40,929.

275. Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

276. *Id.*

277. *Id.*

278. See *id.*

279. See *id.*

280. See Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928; Prop. Treas. Reg. § 1.643(f)-1, 83 Fed. Reg. at 40,929.

281. See Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. at 40,929–30.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. at 40,930.

289. *Id.*

payments are discretionary for son's medical expenses.²⁹⁰ Daughter receives the principal upon the son's death.²⁹¹ Because of the "significant non-tax differences between the substantive terms" of the trusts, tax avoidance is not presumed and the trusts are not aggregated.²⁹²

The lessons learned from the examples are twofold.²⁹³ First, changing up only the beneficiaries, but keeping the same dispositive provisions, likely triggers the presumption.²⁹⁴ Two, significant changes in the dispositive provisions, even with the same universe of beneficiaries, may be enough to prevent triggering the presumption.²⁹⁵ With that said, the examples do not reference Prop. Treas. Reg. § 1.199A-6(d)(3)(v), so if the trusts in Example 2 resulted in a greater overall § 199A deduction, it is not clear whether that attribute would trigger the presumption.²⁹⁶

There likely will be significant focus on the dispositive terms of trusts when applying the proposed new multiple trust rules.²⁹⁷ The reasons for creating the separate trusts will need to be evident with the different dispositive terms.²⁹⁸ Whether the distributions are mandatory versus discretionary and the purposes for discretionary distributions appear to be noteworthy.²⁹⁹

The multiple trust rules focus on the words "formed or funded."³⁰⁰ This language presents an interesting issue for trusts that are decanted.³⁰¹ Suppose a settlor has four existing trusts. Trusts 1 and 2 would violate the multiple trust rules.³⁰² Trusts 3 and 4 would not violate the rules because they have significant non-tax purposes.³⁰³ If the trustee of Trust 1 decants the assets into Trust 3, and the trustee of Trust 2 decants its assets into Trust 4, do Trusts 3 and 4 still withstand the multiple trust rules?³⁰⁴ The answer may turn on whether a court would view decanting as funding.³⁰⁵ If so, then Trusts 3 and 4 likely would not be able to separately calculate the deduction.³⁰⁶ If not,

290. *Id.*

291. *Id.*

292. *Id.*

293. *See* Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. at 40,929–30.

294. *See* Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. at 40,930.

295. *See id.*

296. *See* Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. at 40,929–30.

297. *Id.*

298. *Id.*

299. *See id.*

300. Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928; Prop. Treas. Reg. § 1.643(f)-1(b), 83 Fed. Reg. at 40,929.

301. *See id.*

302. *See* Prop. Treas. Reg. § 1.643(f)-1(a), 83 Fed. Reg. at 40,929.

303. *See* Prop. Treas. Reg. § 1.643(f)-1(b), 83 Fed. Reg. at 40,929.

304. *See id.*

305. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

306. *See* Prop. Treas. Reg. § 1.643(f)-1(b), 83 Fed. Reg. at 40,929.

then they each could calculate their own deduction.³⁰⁷ The answer is unknown.

The ability to divide an entity between multiple trusts, if possible without violating the rules, may allow each trust to fall below the income threshold.³⁰⁸ If one trust has taxable income of \$300,000, then the SSTB and wage-basis limit will fully apply.³⁰⁹ If, instead, there can be two trusts, each of which has income of \$150,000, then those limits would not apply at all.³¹⁰

There are a myriad of reasons to create separate trusts other than reducing or avoiding income tax.³¹¹ Children have different needs that require trusts with different dispositive or administrative provisions.³¹² Separate trusts are needed for generation-skipping transfer tax purposes, so that some are exempt and others nonexempt.³¹³ Separate trusts are needed to hold different types of assets, such as trusts that hold stock in S corporations.³¹⁴ If the designer of the trusts wants to prevent triggering the presumption, then care should be taken to really hash out the differences with the dispositive terms.³¹⁵

VIII. CONCLUSIONS/PLANNING THOUGHTS

Trustees of trusts with interests in passthrough entities need to educate themselves on the availability of IRC § 199A deductions.³¹⁶ The issue is not just whether or not the deduction is available, but whether design techniques are available to increase the deduction or make the deduction available if it is not already.³¹⁷ Much of the consideration will be on trust income and if there is a way to reduce the income below the threshold.³¹⁸ For trustees with majority ownership interests, consider whether the entities themselves can be better structured, investments can be made, or wages can be paid, to increase the deduction.³¹⁹

If the trustee owns interests in entities with SSTB and non-SSTB components, it needs to analyze the resulting impact.³²⁰ If the SSTBs are not

307. See Prop. Treas. Reg. § 1.643(f)-1(a), 83 Fed. Reg. at 40,929.

308. See Prop. Treas. Reg. § 1.199A-6(d)(3)(iii), 83 Fed. Reg. at 40,928.

309. See Qualified Business Income Deduction, 83 Fed. Reg. at 40,895–96.

310. See *id.*

311. See Kevin Duncan, *Be Fair to Your Heirs*, FIDUCIARY TR. INT'L, <https://www.fiduciarytrust.com/insights/commentary?commentaryPath=templatedata/gw-content/commentary/data/en-us/en-us-ftci/trust-estate/2015-08-treating-childrenfairly&commentaryType=TRUST%20&%20ESTATE%20PLANNING> [perma.cc/EHQ6-48AP] (last visited Dec. 2, 2018).

312. *Id.*

313. See *id.*

314. See 33 AM. JUR. 2D *Federal Taxation* ¶ 4724 (2018).

315. See Prop. Treas. Reg. § 1.643(f)-1(c), 83 Fed. Reg. 40,884, 40,929–30 (Aug. 16, 2018).

316. See 26 U.S.C. § 199A (2017).

317. *Id.*

318. See *supra* Part IV.

319. See 26 U.S.C. § 199A (2017).

320. See Prop. Treas. Reg. § 1.199A-5, 83 Fed. Reg. 40,884, 40,923 (Aug. 16, 2018).

separated already, one may consider separating them into independent entities.³²¹ Beware, however, of the Special Rules in Prop. Treas. Reg. § 1.199A-5(c).³²² There is a de minimis rule that renders an entity a non-SSTB if its SSTB component is de minimis.³²³ If the entities are separated such that a non-SSTB provides services or property to an SSTB, then that non-SSTB may still be treated as an SSTB.³²⁴ And if the non-SSTB is incidental to the SSTB, then it may be treated as part of the SSTB.³²⁵

If the trust income is above the threshold, the trustee needs to evaluate whether there is any benefit to aggregate the entities.³²⁶ Aggregating can increase the available deduction.³²⁷ Aggregation is not always available, however, and there are five requirements as discussed above.³²⁸

For a settlor engaging in estate planning and starting with a new trust, can the settlor create multiple trusts that do not run afoul of the multiple trust rules but yield a better deduction?³²⁹ Recall that the Prop. Treas. Reg. § 1.199A-6(d)(3)(v) is an anti-abuse rule specifically designed to prevent the creation of multiple trusts to take advantage of the § 199A deduction.³³⁰ Still, creating trusts with significantly different dispositive terms, for non-tax purposes, may be a worthwhile planning consideration.³³¹ It is unclear whether if, as a by-product the trusts receive a greater deduction, there will be a presumption that the trusts were created to avail themselves of the deduction and therefore violate the multiple trust rules.³³²

If a family has a set of existing trusts that already own interests in trades or businesses, but the dispositive terms are similar, then the multiple trust rules may not be an issue.³³³ Prop. Treas. Reg. § 1.199A-6(d)(3)(v) and Prop. Treas. Reg. § 1.643(f)-1(b) use the language “[t]rusts formed or funded” and “establishing or funding a trust.”³³⁴ If the trusts already are formed and funded, then the rules would not apply to a literal reading.³³⁵ These trusts may be well poised to take advantage of the deduction.³³⁶

321. *See id.*

322. *See* Prop. Treas. Reg. § 1.199A-5(c), 83 Fed. Reg. at 40,926.

323. *Id.*

324. *Id.*

325. *Id.*

326. *See* Prop. Treas. Reg. § 1.199A-4, 83 Fed. Reg. at 40,921–23.

327. *See id.*

328. *See infra* Part V.

329. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

330. *Id.*

331. Prop. Treas. Reg. § 1.199A-6, 83 Fed. Reg. at 40,928.

332. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

333. *See id.*

334. Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928; Prop. Treas. Reg. § 1.643(f)-1(b), 83 Fed. Reg. at 40,929–30.

335. *See id.*

336. *See id.*

Existing trusts that could take better advantage of the deduction with a little shifting present a more interesting challenge.³³⁷ As discussed above, it will be interesting to learn in the future what the position will be regarding trust decanting.³³⁸ Numerous states have decanting statutes.³³⁹ Decanting from one trust to another is not per se funding, because the trust already is funded.³⁴⁰ Another interesting question is whether modifying an existing trust or trusts will exempt a set of trusts from the multiple trust rules.³⁴¹

Much of the information regarding § 199A comes from the Proposed Regulations.³⁴² As mentioned above, these Proposed Regulations were released in August of 2018 and the comment period ended on October 1, 2018.³⁴³ A public hearing was scheduled for October 16, 2018.³⁴⁴ Regardless of whether the final regulations are adopted in current form or are clarified or changed, one thing is for sure: trustees of trusts with interests in pass-through entities need to be aware of these rules and evaluate how they may benefit the trusts.³⁴⁵

337. *See id.*

338. *See supra* Part VII; Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

339. Susan T. Bart, *Summaries of State Decanting Statutes*, SCHIFF HARDIN (Aug. 22, 2014), <https://www.actec.org/assets/1/6/Bart-State-Decanting-Statutes.pdf> [perma.cc/6Y95-EFSN].

340. *See generally* Crystal Rose, Comment, *Decanting More Than Just Wine: Revocability in Irrevocable Texas Trusts*, 7 *EST. PLAN. & COMMUNITY PROP. L.J.* 385, 385 (2014) (defining decanting as “decanting a trust allows a trustee to pour assets from one trust into another trust, often for the purpose of breathing life into the previous irrevocable trust.”).

341. *See* Prop. Treas. Reg. § 1.199A-6(d)(3)(v), 83 Fed. Reg. at 40,928.

342. *See* Prop. Treas. Reg. § 1.199A, 83 Fed. Reg. at 40,911–30.

343. *Id.*

344. *Id.*

345. *Id.*