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PROPOSED COMPUTATIONAL FRAMEWORK FOR INTERNAL REVENUE CODE § 199A

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INTRODUCTION

Among the changes introduced by the Tax Cuts and Jobs Act (TCJA) is the addition of § 199A, which is effective for taxable years beginning after 2017 and before 2026.[1] Section 199A allows individuals and certain other noncorporate taxpayers a deduction of up to 20 percent of "qualified business income" (QBI) from a partnership, sole proprietorship, or S corporation.[2] Such taxpayers can also deduct under § 199A up to 20 percent of their aggregate qualified REIT dividends, qualified publicly traded partnership income, and qualified cooperative dividends.[3] This deduction is intended to reduce the tax burden on flow-through business income such that the tax burden is closer to that imposed on corporate income at the reduced federal corporate income tax rate of 21 percent enacted by the TCJA.[4] Given the numerous

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[1] Pub. L. No. 115-97, § 11011(a), 131 Stat. 2054 (2017); I.R.C. § 199A(i).

[2] I.R.C. §§ 199A(a), 199A(b); H.R. REP. NO. 115-466, at 214 (2017) (Conf. Rep.).

[3] *Id.*

[4] I.R.C. § 11(b) (after amendment in 2017); Pub. L. No. 115-97, § 12001, 131 Stat. 2054 (2017). As explained by the Committee on Ways and Means of the House of Representatives in a report on a prior version of the bill:

> The Committee believes that a reduction in the corporate income tax rate to 20 percent provided by the bill does not completely address the income tax rate on business income…. The income of a business conducted in pass through form or in sole proprietorship form is subject to tax in the hands of their individual owners at the income tax rate of individuals. To treat corporate and noncorporate business income more similarly under the income tax law, the bill provides a

definitions and phase-ins and phase-outs in § 199A, however, the reduction of the tax burden comes at the cost of much complexity and uncertainty. This Article proposes a general framework, or step-by-step approach, for computation of the deduction under § 199A.[5]

PROPOSED FRAMEWORK FOR COMPUTATION OF § 199A DEDUCTION

Computation of the deduction under § 199A is best understood in steps. The first two steps determine which trades or businesses (T/Bs) engaged in by the taxpayer qualify for the deduction. The third step calculates the taxpayer's QBI for each qualified T/B, which is used in the fourth step to determine the tentative deductible amount for that qualified T/B. The fifth step combines these amounts with the taxpayer's qualified REIT dividends and qualified publicly traded partnership income to determine an overall tentative deductible amount. The sixth and final step accounts for the taxpayer's qualified cooperative dividends and certain limitations on the overall deduction based on the taxpayer's modified taxable income for the taxable year. Each of these steps is addressed in turn.

Step 1: Determine whether the taxpayer is engaged in a qualified trade or business.

A qualified T/B means any T/B[6] other than (i) a specified service T/B or (ii) a T/B of being an employee.[7] A specified service T/B is:

> maximum rate of 25 percent on qualified business income of individuals.

H.R. REP. NO. 115-409, at 129 (2017) (Conf. Rep.).

Note that, had a maximum federal income rate of 25 percent on flow-through business income been enacted, the reduction of the tax burden on such income would have been relatively proportionate to that imposed on corporate income at the reduced federal corporate income tax rate enacted by the TCJA. The actual tax benefit provided by the § 199A deduction, however, is much less than that provided by the reduced federal corporate income tax rate. Further, unlike the reduced federal corporate income tax rate, the § 199A deduction expires in eight years absent legislative action. I.R.C. § 199A(i).

[5] This Article focuses on the general rules of § 199A. In the case of specified agricultural or horticultural cooperatives, trusts, estates, and trades or businesses operated in Puerto Rico, special rules apply, which are not addressed in this Article.

[6] Importantly, the activities of the taxpayer must constitute a T/B. With no statutory definition and no regulatory guidance having been issued, the boundaries of what constitutes a T/B for purposes of § 199A are unknown. For

- Any T/B involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, or brokerage services;[8]

- Any T/B in which the principal asset of such T/B is the reputation or skill of one or more employees or owners;[9] or

- Any T/B that involves performing services "that consist of investing and investment management trading, or dealing in certain securities (as defined in section 475(c)(2), partnership interests, or commodities (as defined in section 475(e)(2)."[10]

The scope of these categories is not precisely defined, particularly with respect to the catchall in the second bullet point. Until further guidance is provided, applying the definition of qualified T/B may be difficult.

Step 2: If the taxpayer engages in a specified service T/B, determine what portion, if any, of the specified service T/B is treated as a qualified T/B.

Notwithstanding the exclusion of specified T/Bs from the general definition of a qualified T/B, a specified service T/B nevertheless may be treated as a qualified T/B, depending on the amount of the taxpayer's taxable income. In other words, with respect to a taxable year, a taxpayer takes into account a specified service T/B as follows:

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instance, should the activities of the taxpayer be aggregated to determine whether a T/B exists?

[7] I.R.C. § 199A(d)(1).

[8] *See* I.R.C. § 199A(d)(2)(A) (defining specified service T/B to include any T/B described in § 1202(e)(3)(A), determined without regard to the words "engineering, architecture").

[9] *See* I.R.C. § 199A(d)(2)(A) (defining a specified service T/B to include any T/B described in § 1202(e)(3)(A), determined by substituting the term "employees or owners" for "employees"). Theoretically, this catchall category could include nonservice businesses. Further, it is not entirely clear whether engineering or architecture businesses, which § 199A(d)(2)(A) expressly excludes from the fields of business in § 1202(e)(3)(A), can nonetheless be included as specified service T/Bs under this catchall category. A reasonable reading of § 199A suggests any such business would not be included as a specified service T/B even if the principal asset of the business is the reputation or skill of one or more employees or owners.

[10] I.R.C. § 199A(d)(2).

- If the taxpayer's taxable income is not more than $157,500 ($315,000 for a joint return),[11] the specified service T/B is treated as a qualified T/B.[12]

- If the taxpayer's taxable income is greater than $157,500 ($315,000 for a joint return) but less than $207,500 ($415,000 for a joint return) (the phase-out range), the specified service T/B is treated as a qualified T/B, but only the applicable percentage of the relevant items from the T/B are taken into account.[13] For any taxable year, the taxpayer's applicable percentage is 100 percent, reduced (but not below zero) by a percentage equal to the ratio that the excess of the taxpayer's taxable income over $157,500 ($315,000 for a joint return) bears to $50,000 ($100,000 for a joint return).[14]

- If the taxpayer's taxable income is $207,500 or more ($415,000 for a joint return), no portion of the specified T/B is treated as a qualified T/B.[15] Thus, the taxpayer cannot take a deduction under § 199A

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[11] The threshold amounts specified in this Article are based on the amounts as of the date of this Article. For taxable years beginning after 2018, these amounts are adjusted for inflation. *See* I.R.C. § 199A(e)(2)(B).
[12] I.R.C. § 199A(d)(3).
[13] Relevant items include "qualified items of income, gain, deduction, or loss, and the W-2 wages and the unadjusted basis immediately after acquisition of qualified property." I.R.C. § 199A(d)(3)(A)(ii).
[14] *Id*. If a taxpayer's taxable income is not more than $157,500 ($315,000 for a joint return), the applicable percentage, while theoretically applicable, does not have to be calculated because it would equal 100 percent. The Joint Explanatory Statement in the Conference Committee report accompanying the substantially final version of the TCJA (Joint Explanatory Statement) provides the following illustrative example of how to calculate the applicable percentage when a taxpayer is within the phase-out range:

> Taxpayer [who is not married] has taxable income of [$180,000], of which [$100,000] is attributable to an accounting sole proprietorship after paying wages of [$50,000] to employees. Taxpayer has an applicable percentage of [55] percent [(calculated as follows: 1 – (($180,000 - $157,500)/$50,000) = 55 percent)] . . . .

H.R. REP. NO. 115-466, at 217 (2017) (Conf. Rep.). The bracketed numbers in the examples provided throughout this Article reflect adjustments made to account for differences in the final bill and the Senate bill provision from which the examples were derived.
[15] I.R.C. §§ 199A(d)(2), 199A(d)(3).

for any portion of the net income of the taxpayer attributable to the T/B.

Step 3: Calculate the taxpayer's QBI for each qualified T/B.

QBI is computed separately for each of the taxpayer's qualified T/Bs.[16] The computation is made by netting qualified items of income, gain, deduction, and loss (Qualified Tax Items) from the T/B for the taxable year.[17] QBI for a qualified T/B can be positive or negative and is generally not affected by whether the taxpayer performs an active or passive role in the T/B.[18]

For any taxable year, items of income, gain, deduction, and loss from a qualified T/B are considered Qualified Tax Items if included or allowed in determining the taxpayer's taxable income and not statutorily excluded.[19] The following items are excluded from the calculation of QBI:

- Qualified REIT dividends, qualified cooperative dividends, and qualified publicly traded partnership income;[20]

- Income, gain, deduction, or loss that is not effectively connected with the conduct of a T/B within the United States;[21]

- Capital gains and losses, dividends, interest not properly allocable to the T/B, and certain other investment-related income, losses, or deductions;[22]

- Reasonable compensation paid to the taxpayer for services rendered to the T/B;[23] and

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[16] I.R.C. §§ 199A(a)(1)(A), 199A(b)(1)(A), 199A(b)(2); H.R REP. NO. 115-466, at 214 (2017) (Conf. Rep.).
[17] I.R.C. § 199A(c)(3)(A). QBI is determined by reference to the taxpayer's allocable shares of such items if the T/B is operated through a partnership or S corporation. Similar rules apply for trusts and estates.
[18] *See* I.R.C. § 199A(c), which does not reference the taxpayer's role in the T/B. In certain situations, a taxpayer's role in activities may dictate whether the taxpayer is engaged in a T/B for purposes of § 199A.
[19] I.R.C. § 199A(c)(3).
[20] I.R.C. § 199A(c)(1).
[21] I.R.C. § 199A(c)(3)(A)(i). Whether a tax item is "effectively connected" is determined under § 864(c) by substituting "qualified trade or business (within the meaning of section 199A)" for "nonresident alien individual or a foreign corporation" or "foreign corporation," each place such term appears. *Id.*
[22] *See* I.R.C. § 199A(c)(3)(B).
[23] I.R.C. § 199A(c)(4)(A).

- Guaranteed payments described in § 707(c) paid to the taxpayer in his or her capacity as a partner for services rendered with respect to the T/B or, to the extent provided in Treasury Regulations, any payments to the taxpayer described in § 707(a) (i.e., amounts paid or incurred by a partnership to a partner who is acting other than in his or her capacity as a partner) for services rendered with respect to the T/B.[24]

In the case of a partnership or S corporation, the computation of QBI occurs at the partner or shareholder level.[25] Thus, only a taxpayer-partner or taxpayer-shareholder's allocable share of Qualified Tax Items related to the qualified T/B of the partnership or S corporation, respectively, is taken into account in computing QBI.[26] For an S corporation, because the shareholders' rights to distribution and liquidation proceeds must be identical, each shareholder has a pro rata share of such items based on stock ownership.[27] The Qualified Tax Items of a partnership, on the other hand, are not required to be allocated among the partners on a pro rata basis. Consequently, a partner's allocable share of such items is generally dictated by the applicable partnership or limited liability company agreement, subject to § 704(b).

For a taxpayer engaged in a specified service T/B whose taxable income is within the phase-out range, the computation of QBI for that T/B takes into account only the taxpayer's applicable percentage of Qualified Tax Items for that T/B.[28] If such taxpayer operates the specified service T/B through a partnership or S corporation, presumably once the taxpayer's allocable share of Qualified Tax Items of the partnership or S corporation is determined, his or her applicable percentage is applied to compute QBI for that T/B.

Before proceeding to Step 4, all qualified T/Bs of the taxpayer are combined to determine whether the net amount of the taxpayer's Qualified Tax Items is negative, in which case the calculation under Step 4 is not necessary for that taxable year. Rather, the negative amount carries forward to the succeeding taxable year as a loss from a qualified T/B.[29]

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[24] I.R.C. §§ 199A(c)(4)(B), 199A(c)(4)(C).
[25] I.R.C. § 199A(f)(1)(A)(i).
[26] I.R.C. § 199A(f)(1)(A)(ii).
[27] *Id.*; I.R.C. § 1361(b)(1)(D); Treas. Reg. § 1.1361-1(l)(1).
[28] I.R.C. § 199A(d)(3).
[29] I.R.C. § 199A(c)(2).

Step 4: Calculate the deductible amount for each qualified T/B.

For each of the taxpayer's qualified T/Bs, the deductible amount is 20 percent of the taxpayer's QBI from that T/B, subject to a wages and capital limitation for that T/B.[30] The amount of this limitation is the greater of (a) 50 percent of the W-2 wages attributable to the T/B or (b) 25 percent of such W-2 wages, plus 2.5 percent of the unadjusted basis (immediately after acquisition) of all qualified property (Wages/Capital Limit).[31] For any taxable year, the limitation phases in at specified income levels for a qualified T/B with positive QBI[32] as follows:

- If the taxpayer's taxable income is not more than $157,500 ($315,000 for a joint return), the Wages/Capital Limit does not apply.[33]

- If the taxpayer's taxable income is greater than $157,500 ($315,000 for a joint return) but is not more than $207,500 ($415,000 for a joint return), the Wages/Capital Limit amount phases in through a proportionate reduction in the deduction of 20 percent of the QBI.[34] The reduction equals the excess of 20 percent of QBI over the Wages/Capital Limit, multiplied by a phase-in percentage.[35] This percentage equals the ratio that the excess of the taxpayer's taxable income over $157,500 ($315,000 for a joint return) bears to $50,000 ($100,000 for a joint return).[36]

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[30] I.R.C. § 199A(b)(2).
[31] I.R.C. § 199A(b)(2)(B).
[32] If a taxpayer's QBI from a qualified T/B is negative, it appears that the limitation for that T/B does not have to be calculated because the amount of the limitation cannot be less than zero. If a taxpayer's QBI from a qualified T/B is negative, the resulting negative deducible amount apparently reduces the positive deductible amounts in Step 5.
[33] I.R.C. § 199A(b)(3)(A).
[34] If there is no excess, the Wages/Capital Limit would not reduce the deductible amount.
[35] I.R.C. § 199A(b)(3)(B).
[36] *Id.* If the taxpayer's taxable income is exactly $207,500 ($415,000 for a joint return), the phase-in percentage is 100% and thus the full limitation applies. The Joint Explanatory Statement provides the following illustrative example of how to calculate a proportionate reduction in the deduction of 20 percent of QBI:

> H and W file a joint return on which they report taxable income of [$380,000]. W has a qualified trade or business that is not a specified service business, such that [20] percent of

- If the taxpayer's taxable income is greater than \$207,500 (\$415,000 for a joint return), the full Wages/Capital Limit applies.[37]

A number of definitions apply for purposes of calculating the Wages/Capital Limit: "W-2" wages for a person means, the amounts described in §§ 6051(a)(3) and 6051(a)(8) as "paid by such person with respect to employment of employees by such person during the calendar year ending during such taxable year."[38] "Qualified property" means "tangible property of a character subject to depreciation under section 167 (i) which is held by, and available for use in, the qualified [T/B] at the close of the taxable year, (ii) which is used at any point during the taxable year in the production of [QBI], and (iii) the depreciable period for which has not ended prior to the close of the taxable year."[39] "Depreciable period" means the period starting when the property is first placed in service and ending ten years after that date, or, if later, the last day of the last full year of the applicable recovery period under § 168 (determined without regard to § 168(g)).[40]

The Wages/Capital Limit for the qualified T/B of a partnership or an S corporation applies at the partner or shareholder level.[41] A taxpayer-partner or taxpayer-shareholder's allocable share of the partnership or S corporation's W-2 wages and unadjusted basis (immediately after acquisition) of qualified property is determined in the same manner as the taxpayer's share of wage expense and depreciation, respectively.[42] In the case of a taxpayer engaged in a specified service T/B whose taxable income is within the phase-out range, the computation of the Wages/Capital Limit takes into account only the taxpayer's applicable percentage of W-2 wages and the unadjusted basis (immediately after acquisition) of qualified property relating to that

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> the qualified business income with respect to the business is \$15,000. W's share of wages paid by the business is \$20,000, such that 50 percent of the W-2 wages with respect to the business is \$10,000. The \$15,000 amount is reduced by [65 percent [(calculated as follows: (\$380,000 - \$315,000)/\$100,000 = 65 percent)] of the difference between \$15,000 and \$10,000, or [\$3,250] … .

H.R. REP. NO. 115-466, at 218 (2017) (Conf. Rep.).

[37] I.R.C. § 199A(b)(2). At this income level, the deductible amount is the lesser of (a) 20 percent of QBI, or (b) the Wages/Capital Limit.

[38] I.R.C. § 199A(b)(4)(A). To qualify, however, W-2 wages must be both properly allocable to QBI and properly included in a timely filed return with the Social Security Administration. *See* I.R.C. §§ 199A(b)(4)(B), 199A(b)(4)(C).

[39] I.R.C. § 199A(b)(6)(A).

[40] I.R.C. § 199A(b)(6)(B).

[41] I.R.C. § 199A(f)(1)(A)(i).

[42] I.R.C. § 199A(f)(1) (flush language).

T/B. If such taxpayer operates the specified service T/B through a partnership or S corporation, presumably the taxpayer takes into account the applicable percentage of the taxpayer's allocable share of such items.

Step 5: Calculate the taxpayer's combined QBI amount.

For any taxable year, the taxpayer's combined QBI amount equals (a) the sum of the deductible amounts determined in Step 4 (apparently, whether positive or negative) for all of the taxpayer's qualified T/Bs, plus (b) 20 percent of the taxpayer's qualified REIT dividends and qualified publicly traded partnership income.[43] For purpose of calculating the amount described in (a) for a taxable year, 20 percent of any cumulative qualified business loss of the taxpayer carried over from prior taxable years is treated as a negative deductible amount from a qualified T/B carried on by the taxpayer.[44] The Joint Explanatory Statement provides the following illustrative examples of how to account for a taxpayer's negative qualified T/B deductible amounts:[45]

> H and W file a joint return on which they report taxable income of $200,000 (determined without regard to this provision). H has a sole proprietorship qualified trade or business that is not a specified service business ("qualified business A"). W is a partner in a qualified trade or business that is not a specified service business ("qualified business B"). H and W have a carryover qualified business loss of $50,000.
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> H's qualified business income from qualified business A is $150,000, such that [20] percent of the qualified business income with respect to the business is [$30,000]. As H and W's taxable income is below the threshold amount for a joint return, the wage limit does not apply to qualified business A. H's deductible amount for qualified business A is [$30,000].
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> W's allocable share of qualified business loss is $40,000, such that [20] percent of the qualified business loss with respect to the business is [$8,000]. As H and W's taxable income is below

43 I.R.C. § 199A(b)(1).
44 I.R.C. § 199A(c)(2); H.R. REP. NO. 115-466, at 220-22 (2017) (Conf. Rep.).
45 While the example provided in the Joint Explanatory Statement is helpful, how negative qualified T/B amounts are accounted for in certain more complex situations remains unclear.

> the threshold amount for a joint return, the wage limit does not apply to qualified business B. W's deductible amount for qualified business B is a reduction to the deduction of [$8,000].
>
> H and W's combined qualified business income amount of [$12,000] is comprised of the deductible amount for qualified business A of [$30,000], the reduction to the deduction for qualified business B of [$8,000], and the reduction to the deduction of [$10,000] attributable to the carryover qualified business loss . . . .[46]

The taxpayer's combined QBI amount includes not only his or her qualified T/B deductible amounts, but also 20 percent of the taxpayer's qualified REIT dividends and qualified publicly traded partnership income. For purposes of § 199A, a qualified REIT dividend is any dividend from a taxable real estate investment trust that is neither a capital gain dividend nor qualified dividend income (as defined in §§ 1(h)(11) and 875(b)(3)), respectively).[47] In general, qualified publicly traded partnership income for any qualified T/B of the taxpayer means the sum of (i) the net amount of such taxpayer's allocable share of Qualified Tax Items from a publicly traded partnership (as defined in § 7704(a)) that is not treated as a corporation under § 7704(c), and (ii) "any gain recognized by such taxpayer upon disposition of its interest in such a partnership to the extent the resulting gain is treated as an amount realized from the sale or exchange of property other than a capital asset under section 751(a)."[48]

Step 6: Calculate the taxpayer's deduction under § 199A.

After completing Steps 1 through 5, the amount of the taxpayer's deduction under § 199A is calculated. The deduction equals the sum of (a) and (b):

(a) The lesser of,

(1) the taxpayer's combined QBI determined in Step 5 for the taxable year; or

(2) 20 percent of the amount by which the taxpayer's taxable income exceeds the sum

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[46] H.R. REP. NO. 115-466, at 220-22 (2017) (Conf. Rep.).
[47] I.R.C. § 199A(e)(3).
[48] I.R.C. § 199A(e)(5).

of the taxpayer's net capital gain[49] and qualified cooperative dividends[50] for the taxable year.

(b) The lesser of,

(1) 20 percent of the taxpayer's qualified cooperative dividends for the taxable year; or

(2) the taxpayer's taxable income, less net capital gain, for the taxable year.[51]

The sum of these amounts cannot be greater than the taxpayer's taxable income, less net capital gain, for the taxable year.[52] The computation of the § 199A deduction should be a final step in determining the taxpayer's tax liability.

CONCLUSION

The framework described in this Article will help taxpayers and their advisors work through the computation of the deduction under § 199A. Aspects of the computation are complex and there are many uncertain areas, particularly for taxpayers engaged in a specified service T/B whose taxable income is within the phase-out range. Consequently, it is not surprising that "[c]omputational, definitional, and anti-avoidance guidance" under § 199A is identified by the Treasury Department as a priority item in an update to the Department of the Treasury's 2017-2018 Priority Guidance Plan, with guidance planned to be issued before June 30, 2018.[53] This forthcoming guidance, while certainly welcome and hopefully

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[49] For purposes of § 199A, net capital gain is defined by reference to § 1(h). I.R.C. § 199A(a)(1)(B)(ii). For purposes of § 1(h), "net capital gain" generally means the excess of net long-term capital gain over net-short term capital loss, increased by qualified dividend income and subject to certain adjustments. *See* I.R.C. §§ 1(h), 1222.

[50] For purposes of § 199A, a qualified cooperative dividend generally means a patronage dividend, per unit retain allocation, qualified written notice of allocation, or similar amount included in the taxpayer's income and received from an identified tax-exempt entity or cooperative. *See* I.R.C. § 199A(e)(4) (identifying certain tax-exempt entities and cooperatives for this purpose).

[51] I.R.C. § 199A(a).

[52] I.R.C. § 199A(a) (flush language).

[53] *See* DEP'T OF THE TREASURY, 2017-2018 PRIORITY GUIDANCE PLAN (updated Dec. 31, 2017), https://www.irs.gov/pub/irs-utl/2017-2018_pgp_2nd_quarter-_update.pdf.

comprehensive, may leave many relevant questions unanswered.[54] The Internal Revenue Service and taxpayers will likely struggle with how to compute the deduction under § 199A for years to come.

[54] For a discussion of issues and concerns regarding calculation of the deduction § 199A *see* AICPA, REQUEST FOR IMMEDIATE GUIDANCE REGARDING IRC SECTION 199A–DEDUCTION FOR QUALIFIED BUSINESS INCOME OF PASS-THROUGH ENTITIES (Pub. L. No. 115-97, Sect. 11011), 2018 TNT 36-31 (Feb. 21, 2018).