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**Steve Leimberg's Income Tax Planning
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Subject: Alan S. Gassman, Martin M. Shenkman, Brandon L. Ketron, Christopher J. Denicolo & Kenneth J. Crotty, Proposed Regulations for 199A – The Good, The Bad, the Taxpayer-Unfriendly

"The authors believe that the Regulations proposed here are overwhelmingly taxpayer unfriendly, and that the decision to give automatic unconditional loopholes to C corporations, REIT's and publicly traded partnerships, while excluding a great many small and medium size taxpayers or requiring them to change how they do business to have better treatment, is repugnant to the tax system, fairness and the economy. As practical matter, the Regulations are intended to thwart two logical and reasonable methods of planning that practitioners had hoped to use for Section 199A purposes: (1) separating lines of income and (2) trusts.

One way practitioners had hoped to qualify at least some income from a Specified Service Trade or Business owned by a high income taxpayer was by separating out non-Specified Service Trade or Businesses that the trade or business had, which the owners could claim a Section 199A deduction on. This method is often called the "Crack-and-Pack method". For example, a related S corporation might provide management services for its own law office, as well as owning its own building, which could be separated out to a management company and rental activity that would be paid by the law firm at fair market value.

While the Regulations allow owners of non-Specified Service Trade or Businesses to aggregate some of their businesses to maximize a Section 199A deduction, they force certain Specified Service Trade or Businesses and their ancillary services to be aggregated and all considered to be Specified Service Trade or Businesses, even if the applicable services so labeled would clearly not be Specified Service Trade or Businesses if they were owned and operated by owners not related to the involved professionals. Specifically, a trade or business will be considered to be an extension of a Specified Service Trade or Business if it is 50% or more commonly controlled with a Specified Service Trade or Business and *provides 80% or more of its property or services to that Specified Service Trade or Business.*

Further, if a trade or business provides less than 80% of its property or services to a Specified Service Trade or Business, but is 50% or more commonly controlled by the owners of a Specified Service Trade or Business, the income attributable to that separate business that services or sells products to the Specified Service Trade or Business will still be considered to be Specified Service Trade or Business income, and income that is not related to providing its property or services to the Specified Service Trade or Business will be eligible for the Section 199A deduction. Practitioners will therefore seek to avoid the common the control requirement of the Regulations wherever possible in order to qualify the maximum amount of income of ancillary companies for a Section 199A deduction. For example, three separate law firms might set up a management and billing company to service all three of them, with the separate owners each owning less than 50% of the management company and profits being divided based on percentage of ownership.

It is noteworthy that when a medical, legal or other professional practice cannot be owned by anyone other than licensed professionals under state law it may still save significant tax dollars to have a separate management company that is owned by trusts or lower bracket family members that can benefit from the Section 199A deduction even if the income is considered to be Specified Service Trade or Business Income if the final Regulations include these provisions and are enforceable.

On a final note, the Regulations did not address the questions that exist for Charitable Remainder Trusts under Section 199A. In particular how income that is recognized by the trust but not taxed to beneficiaries until distributed will be treated for purposes of calculating the Section 199A deduction and if the deduction will be allowed for Charitable Remainder Trusts. The IRS did include a request for comment in these Regulations on how beneficiaries of these types of trust would be able to take a Section 199A deduction, which indicates a possibility that the Service may allow such a deduction."

Alan Gassman, **Martin Shenkman**, **Brandon Ketron, Christopher Denicolo** and **Kenneth Crotty** provide detailed commentary regarding the Proposed Regulations recently released by the IRS which takes aim at the planning strategies that practitioners had hailed to lower taxable income and to differentiate income from specified service trades and businesses ("SSTBs") from non-SSTB income, to avoid limitations under Section 199A. The authors sincerely thank **Jonathan Blattmachr** and **Scotty Schenck** for their advice and guidance with respect to this newsletter.

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Here is their commentary:

EXECUTIVE SUMMARY:

In the 2017 Tax Cuts and Jobs Act changed much of the Internal Revenue Code, including the addition of a new Section 199A, which provides for a 20% deduction for Qualified Business Income from flow-through entities, including S corporation, partnership, and Schedule C and E income as reported on Form 1040 tax returns (commonly known as sole proprietorships). This applies to income that is "effectively connected" to U.S. trades or businesses, and includes Puerto Rican trades or businesses but does not include any other territories or foreign activities.

The deduction for high wage earners is subject to limitations based on whether the entity engages in certain services (referred to as "Specified Service Trade or Businesses, or SSTBs" in the Proposed Regulations) or based on the amount of wages paid or Qualified Property held by the entity. Generally, once a taxpayer has significant taxable income ($157,500 for single filers and $315,000 for married filers), they must pass a wages or wages/Qualified Property hurdle to avoid a significant decrease, or elimination in their Section 199A deduction.

Proposed Regulations (the "Regulations") for Section 199A were released on last Wednesday, April 8, 2018 with complex provisions that will take months of study and discussion to understand, and hopefully further clarification and corrections from Treasury. By and large, the Regulations have been viewed as anti-taxpayer and detrimental to many taxpayers and their advisors who, while waiting for further guidance from the IRS, have developed potential planning strategies to take advantage of the Section 199A deduction.

The Regulations do not eliminate all potential Section 199A planning opportunities, however. Despite the proposed limitations on having related entities provide management, billing, marketing, and other services and products to a Specified Service Trade or Business, "Crack and Pack" entities can still provide significant tax savings when held at arm's-length, and owned by taxpayers who have income under the $157,500 (or $315,000 if married, filing jointly) threshold. For example, a partnership owned 51% by a dentist and 49% by the children of the dentist that receives rent or other arm's-length payments can have profits that are considered to pass 49% to the children, who may qualify for the Section 199A deduction, based upon their lower tax brackets, as applicable.

Also, the proposed "disrespecting" of separately taxed non-grantor trusts that receive Qualified Business Income seems to be outside of the scope of the authority given to the Treasury under the statute. This "disrespecting" will not affect Section 678 trusts, which are funded by a grantor and considered as owned by a beneficiary or beneficiaries who had or have the opportunity to withdraw the assets placed into trust or the income therefrom. The lower tax brackets of children and other family member can therefore be safely used for Section 199A planning without any risk of aggregation of separate Section 678 trusts.

In addition, the new regulations under Section 643(f) with respect to multiple trusts will not apply if there are completely separate lifetime beneficiaries as demonstrated in 1.643(f)-1(c), Example 2, which is discussed below, so long as the principal reason in establishing the trusts is not tax avoidance.

The following are abbreviation that are used in the Regulations, and their meaning:

The Regulations use the following new abbreviations.	**Meaning**
PTP	Publicly Traded Partnership
QBI	Qualified Business Income
REIT	Real Estate Investment Trust
RPE	Relevant Pass-Through Entity
SSTB	Specified Service Trade or Business
UBIA	Unadjusted Basis Immediately After Acquisition (of Qualified Property)
DNI	Distributable Net Income (referring to trusts and estates)

This newsletter highlights the most prominent provisions of the Regulations are as follows and will be refined and set forth in more detail as we progress with our analysis, which will be provided in depth for our scheduled **LISI** 90-minute webinar scheduled for August 20th at 3:00p.m. ("199A Planning Under the Proposed Regulations: Choosing Planning Strategies to Position Clients for Optimum Tax Avoidance") and our Section 199A and 1202 Handbook, which will be released shortly thereafter.

The Regulations are comprised of seven sections, with six dedicated to Section 199A, and one dedicated to Section 643. They are as follows:

- 1.199A-1 covers calculation rules of Section 199A, as well as definitional guidance on the standard of being engaged in a trade or business, and loss carry-over rules
- 1.199A-2 covers the rules regarding the determination of W-2 wages and unadjusted basis immediately after acquisition of Qualified Property
- 1.199A-3 provides guidance surrounding the terms and calculations regarding Qualified Business Income, Real Estate Investment Trust dividends, and qualified Publicly Traded Partnership income
- 1.199A-4 covers the rules relating to aggregation non-Specified Service Trades or Businesses and Specified Service Trades or Businesses
- 1.199A-5 covers definitional guidance of Specified Service Trades or Businesses
- 1.199A-6 covers computational guidance for individuals who own or are beneficiaries of Relevant Pass-Through Entities, Publicly Traded Partnerships, trusts and estates
- 1.643(f)-1 covers the treatment of multiple trusts, and possible aggregation thereof, when the trusts have significantly the same beneficiaries and the same grantors, namely that the IRS has the power to aggregate them into singular trusts

It is important that practitioners remember that these are only proposed regulations and do not have the force of final regulations unless taxpayers choose to rely on them, and some of these regulations seem to exceed the authority granted by statute to the IRS. For reference, we have included the subsections and text of the grants of authority below for readers:

Topic:	Code Section:	Specific Language:
Short Taxable Years	§ 199A(b)(5)	"The Secretary shall provide for the application of this subsection in cases of a short taxable year or where the taxpayer acquires, or disposes of, the major portion of a trade or business or the major portion of a

Topic:	Code Section:	Specific Language:
		separate unit of a trade or business during the taxable year.”
Allocation of Items/Wages	§ 199A(f)(4)(A)	“The Secretary shall prescribe such regulations … for requiring or restricting the allocation of items and wages under this section and such reporting requirements as the Secretary determines appropriate”
Tiered Entity Situations	§ 199A(f)(4)(B)	“The Secretary shall prescribe such regulations … for the application of this section in the case of tiered entities.”
Depreciable Periods / 1031 Exchanges	§ 199A(h)	“The Secretary shall— (1) apply rules similar to the rules under section 179(d)(2) in order to prevent the manipulation of the depreciable period of qualified property using transactions between related parties, and (2) prescribe rules for determining the unadjusted basis immediately after acquisition of qualified property acquired in like-kind exchanges or

Topic:	Code Section:	Specific Language:
		involuntary conversions.
Agricultural and Horticultural Cooperatives	§ 199A(g)(3)(C) & § 199A(g)(6)	“Secretary shall prescribe rules for the proper allocation of items described in subparagraph (A) for purposes of determining qualified production activities income. Such rules shall provide for the proper allocation of items whether or not such items are directly allocable to domestic production gross receipts” & “The Secretary shall prescribe such regulations as are necessary to carry out the purposes of this subsection, including regulations which prevent more than 1 taxpayer from being allowed a deduction under this subsection with respect to any activity described in paragraph (3)(D)(i). Such regulations shall be based on the regulations applicable to cooperatives and their patrons under

Topic:	Code Section:	Specific Language:
		section 199 (as in effect before its repeal)"

FACTS:

The IRS was given the authority to interpret the statute in a number of ways and to provide legislative regulations in a number of ways. However, time will tell what final binding Regulations may say, and whether many of these proposed provisions will be within the authority of the Treasury Department to issue these Regulations.

The following are some of the key points and highlights of the Regulations:

1. The Regulations confirm that real estate leasing activities can qualify for the 20% deduction without regard to whether they are passive in nature, but only if the rental is between "commonly controlled" entities, which is defined as common ownership of 50% or more in each entity[i]. The Regulations apply the Code Section 162 definition of a trade or business for non-commonly controlled rental activities, which can be problematic for passive landlords, lessors of non-real estate personal items, and licensors of intellectual property rights that are not active enough to qualify as a Section 162 trade or business.

   The definition of "trade or business" under Section 162 of the Code, and its pre-1954 predecessor Section 23(a) of the Revenue Act of 1928,[ii] has been interpreted by court decisions and private letter rulings to require more than just the passive receipt of rent or license income to qualify. The law required a degree of activity or at least legal responsibility or risk, in order for a lease arrangement to be considered as a trade or business. This may come from the responsibility for maintenance, active tenant management or having the taxpayer active in pursuing, entering into, or selling positions in leases so that this is seen as a business of the taxpayer.

On the other hand, the Regulations give an example that seems primarily intended to provide other guidance besides the definition of trade or business where a taxpayer manages and leases vacant property to an airport and is found to qualify as a trade or business, so comments and updating of the Regulations before they become permanent may prove to allow triple net lease landlords with no other activities to qualify for the Section 199A deduction, but to be safe in the long run lease arrangements can be modified now to allow the landlord to be more active.

However, if and when these Regulations take effect, and the rental activity is commonly controlled with a Specified Service Trade or Business, the deduction all together may be disallowed altogether depending on the owners' taxable income.

Divisions and ambiguities in what qualifies as a trade or business is not a new phenomenon. Specifically, the question of whether single rentals can qualify to be a trade or business, including questions of what level of activity is required, will continue to be problems in the near future.[iii] A case law example that has been cited in many cases is the 1942 Tax Court decision in *Neill v. Commissioner* in which the court held that the mere collection of rent without other activity does not constitute a trade or business.[iv] The court likened the taxpayer's ownership in the property and collection of income therefrom to an individual holding stocks and bonds and earning income. In *Schwarcz v. Commissioner*[v], the Tax Court held that where a landlord manages and operates apartment buildings, whether individually or through his or her agent, this constitutes a trade or business. In *Elek v. Commissioner*[vi] and *Lagreide v. Commissioner*[vii], the Tax Court held that ownership and renting of a single apartment building met the definition of trade or business under Section 23 of the pre-1954 Revenue Acts. The *Elek* Court also provided that having an agent actively manage and maintain rental property had no negative effects on the determination of the activity being a trade or business for the owner.

Additionally, in *Hendrickson v. Commissioner*[viii], the Tax Court held that the passive investment in an oil gas well where the owner purchased part of an oil lease, and then simply collected income from the property, did not constitute a trade or business. The court analogized this to the treatment of rental properties under Section 162.

2. The Regulations state that wages paid to "common law employees and officers" of a trade or business will be treated as having come from the actual employer, notwithstanding whether the payment is made by an employee leasing or other organization, including certified professional employer organizations under Section 7705, statutory employers under Section 1401(d)(1), and agents under Section 3504. This would include common paymaster and employee leasing scenarios.

   The Regulations further specify that wages can be considered as paid as long as they are timely recorded in an appropriate manner within sixty days after the end of the applicable calendar year in which they are paid, with a possible extension of an additional sixty days when needed to correct wage reporting returns.

   The Regulations make clear that wages are to be allocated to the trade or business that actually employed the individual, as opposed to being considered as paid by an affiliated company that might be acting as a common paymaster but did not actually use the employee in that business.

3. The Regulations further provide that wages will be tracked separately for any short years that result from the change of ownership of a trade or business by tracking the actual wages paid in each portion of the year, as opposed to prorating them.

   The vast majority of advisors are not aware that Section 199A allows certain pension plan contributions, health insurance costs, and other items of compensation to be included in the calculation of wages.

4. The Regulations confirm that Electing Small Business Trusts ("ESBTs"), which are certain trusts that are eligible to hold S corporation stock, can qualify for the 199A deduction on S corporation income, even though the ESBT statute was not properly conformed by the 2017 Tax Act to allow this. This result is precisely what Congress stated was its intent so this was an anticipated correction that is hopefully within the power of the Treasury Department, if not confirmed by a statutory change to Section 1361. Remember the *Bobrow* case[ix] where a taxpayer followed the IRS Publication on IRA rollovers when rolling over from an IRA and was penalized when the Tax Court found that the taxpayer was not able to rely upon apparently erroneous instructions in the IRS Publication so that Mr. Bobrow had to pay taxes and penalties as a result. This should not be the case with taxpayers who rely upon the Regulations, which specifically state that they can be relied upon by taxpayers until withdrawn or replaced with final Regulations.

5. The Regulations provide that entities that are set up to provide management, billing, wholesaling, or other services or products to a Specified Service Trade or Business will be considered to be an extension of that business, so that the special limitations that apply to Specified Service Trades or Businesses will apply to the separate entity as if it were a Specified Service Trade or Business if there is (1) at least 50% common ownership between them (after taking into account the Section 267(b) attribution rules) and (2) the ancillary trade or business provides 80% or more of its property/services to that Specified Service Trade or Business with which it is commonly controlled. These provisions are egregiously unfair to Specified Service Trade or Business and force different results than others not in Specified Service Trades or Businesses with identical real estate, leasing, licensing or similar non-Specified Service Trade or Business ventures. Why should an engineer who owns and operates the building where her business is have a better tax result from the building than her CPA, based upon equivalent facts? The harsh view of expanding the Specified Service Trade or Business definition to completely unrelated functions and activities is common in the Proposed Regulations and may well exceed the authority of the Treasury, with some notable

exceptions, as described below.

If the ancillary trade or business that is commonly controlled provides less than 80% of its property/services to a Specified Service Trade or Business, then only the portion of the ancillary trade or business that is attributable to the Specified Service Trade or Business will be considered Specified Service Trade or Business income.

6. The Regulations provide that property that has been received in a like kind tax-free exchange will be considered as acquired when the property that it is replacing was acquired, and will be considered to have the basis of the property that it is replacing. Advisors familiar with the Section 1031 like kind exchange rules know that it was cut back to apply only to real estate and buildings and other fixed improvements thereto, and that the older property traded away is called the “relinquished property”, and that the new property acquired is called the “replacement property”. The holding period and basis of the relinquished property is what applies under Section 199A when applying this to the 2.5% Qualified Property hurdle. If the replacement property has excess basis (that is basis in excess of the cost of the relinquished property), then such excess is treated as placed in service when the replacement property is acquired.

   Taxpayers that have previously made elections under Code Section 168(f)(1) to exclude property from standard depreciation methods (depreciation based upon MACRS tables) and use an alternative method, such as depreciation based upon units of production, can make a new election under Treas Reg. 1.168(i)-6(i)(1) to bring the replacement property back under standard deprecation methods (MACRS) in a like kind exchange, in which event the basis in the replacement property would be treated as placed in service in the year the replacement property is acquired**.**

   It is noteworthy that non-recognition provisions under Section 1031 are mandatory, and taxpayers do not have the option to elect out of Section 1031 to treat the transaction as a sale and purchase of replacement property in order to obtain a new stepped up basis in the replacement property. However, nothing prevents a taxpayer from structuring a transaction so that the exchange will not qualify as a Section 1031 exchange by exchanging non-like kind property or not meeting the applicable timing requirements. Although the failure to meet the like kind requirements will cause any gain on the transaction to be recognized, the replacement property will have a basis equal to the purchase price and a new holding period will apply for purposes of the Section 199A Qualified Property calculation. This may also be beneficial in situations where the taxpayer as an expiring loss carryforward that could be used to offset the gain on the exchange and result in a new basis for the replacement property.

7. If property is inherited and immediately placed in service by the heir, the basis in the property will generally be its fair market value at the time of the decedent's death, but the Regulations do not mention whether this resets the property's depreciation period for the purposes of Section 199A. This applies even if there is personal or other use of the property, not directly related to the applicable trade or business.

   Property owned by a partnership will not receive a step-up in basis upon the death of a partner or sale of a partnership interest, as the Regulations state that basis adjustments under Sections 734(b) and 743(b) (when a 754 election is in effect for the partnership) will not be taken into account in determining the entity's unadjusted basis Qualified Property. Although further analysis is necessary, at first blush it appears that if a partnership owning appreciated property is liquidated prior to the death of a partner or the sale of a partnership interest, then the property may benefit from a full basis step-up upon the partner's death or the sale of the partnership interest, which would not occur if the property were still held in the partnership, even if a 754 election was in place. Because many taxpayers will not benefit from discounts these entities afford for estate tax purposes while exemptions are high, it may be advantageous to liquidate entities before a partner's death or before the sale of a partnership interest in some instances.

This could allow for various planning techniques where the partnership distributes the property to its partners before the death of a partner or a combined sale of the partnership interest and the appreciated property. Some practitioners have indicated that the partnership should hold the property until after the death of a partner or sale of the partnership interest, and distribute the property immediately thereafter. This apparently would allow the appreciated property to receive a basis increase due to Section 1014 and the Section 754 election, and the heir can place the property back into the partnership with an increased basis for the purposes of Section 199A. It is unclear whether the step-up in basis from Section 1014 is accompanied by a new depreciable period under the statute.

8. The Regulations also disallow including Qualified Property under the 2.5% test if it is purchased within 60 days of the end of the taxable year and disposed of within 120 days, if the trade or business does not use the property for at least 45 days prior to disposition, unless the principal purpose of the acquisition and disposition was for other than increasing the Section 199A deduction.

9. Improvements to Qualified Property are treated as a separate Qualified Property, with its own basis. Therefore, if a taxpayer buys a new air-conditioning system for a building in year 1, it would constitute Qualified Property through year 10, and then if the taxpayer adds additional components to the system in year 3, the cost of the additional components can be considered as Qualified Property until year 13. The recordkeeping impositions of the new Regulations and other rules under the statute, will be quite difficult and costly for many taxpayers.

10. It is surprising that the Regulations provide that Qualified Property that is contributed tax-free to an S corporation will have its basis for the 2.5% calculation based upon the depreciated basis of the property on the date of the transfer to the S corporation, instead of original cost. This will punish taxpayers who wish to convert their Schedule E or C trades or

businesses into S corporations. Inconsistently, the Regulations require that the depreciation and ten year time limit will still be based upon when the property was originally acquired and placed in service by the contributing shareholder.

11. When an entity conducts multiple trades or businesses, as determined under Code Section 162, wages and Qualified Property must be allocated among the trades or businesses using reasonable allocation methods, which include gross income or direct tracing methods. While there appears to be some flexibility in these rules there does not appear to be an offset for the harsh treatment intended for Specified Service Trades or Businesses. The Regulations provide that taxpayers may make an election to aggregate businesses, which is discussed in more detail below, and provides details on the netting of losses and profits on various businesses.

12. The Regulations do not use the Section 469 passive loss rules for grouping trades or businesses, but instead the Regulations explain that Section 469 dealt with the level of taxpayer involvement in a particular endeavor and that this not the paradigm under 199A. The Regulations also explain that the substantial existing body of law under Section 162 is what was used instead as the reference. Further, the Regulations create a new method of aggregation of trades or businesses so that taxpayers can combine multiple trades or businesses for the purposes of applying the wage and Qualified Property limitations and maximizing the deduction. In order to be aggregated, the businesses must meet the following requirements:

    a. The same person or group of persons directly or indirectly own 50% or more of each trade or business;

    b. For purposes of determining ownership under this subsection, ownership by spouses, as well as children, grandchildren, and parents, can be attributed to each other;

    c. The ownership existed for a majority of the tax year;

d. The items must be reported on returns within the same taxable year;

e. None of the businesses must be a Specified Service Trade or Business; and

f. The aggregated trades or business must also satisfy at least two of the following factors:

   i. The trade or businesses provide products or services that are the same or customarily offered together;

   ii. The trade or businesses share facilities or significant centralized business elements such as personnel, accounting, legal, manufacturing, purchasing, human resources, or information technology resources; and

   iii. The trades or businesses are operated in coordination with, or reliance upon, one or more of the businesses in the aggregated group (for example, supply chains interdependencies).

A series of fourteen well-written examples beginning at Section 1.199A-4(d) demonstrate that a taxpayer owning less than 50% of multiple entities when another taxpayer owns more than 50% of each entity, and elects to aggregate the minority interests therein, if the other rules are satisfied.

Aggregation will allow wages and Qualified Property to be considered as paid for all of the entities, so that the deduction can be taken for an entity that has little or no wages or Qualified Property if another entity has sufficient wages and Qualified Property for both its own income and the income of affiliates. The examples point out that losses from an entity that could be aggregated must be netted against the aggregate profits of other applicable entities, if any aggregation occurs.

One example indicates that ownership of a sailboat racing team and a marina by separate companies would not be aggregated, but that ownership of a trucking company that delivers lumber and other supplies in one company, operation of a lumber yard in another company, and operation of a construction business that presumably uses lumber and other supplies, can be aggregated.

Once a taxpayer chooses to aggregate two or more trades or businesses, they must be consistently reported and aggregated for all subsequent taxable years, unless there is a change in facts and circumstance so that a taxpayer’s prior aggregation no longer qualifies for aggregation. The implications of all of this to professional advisers can be daunting. In some instances, modeling the various options may be the only way to determine what the actual impact of various decisions might be. Practitioners should be cautious about providing conclusions to clients with specificity without the opportunity to perform the appropriate analysis. The costs of the level of detailed analysis that might be necessary in many instances will be a concern for many clients. It will be easy to make mistakes in advising on this law, which raises the stakes by lowering the substantial understatement threshold to 5% of the tax required to be reported for the year (essentially what the IRS says you should have paid), in lieu of the normal 10% threshold that applies. There is no explanation as to why taking a Section 199A deduction would cause this unfair tripwire standard that will apply to many innocent taxpayers who may not even know that they are eligible for the deduction and may not even claim the deduction or reduce tax liability as the result of it.

Many people incorrectly believe that tax penalties are only exacted on those who show bad intent or negligence, but this is not the case. There are eight enumerated ways for the IRS to impose accuracy-related penalties, and while negligence is one of these reasons, the IRS only needs to demonstrate that the taxpayer substantially underpaid their taxes in order to impose a sanction on the taxpayer under Section 6662 which provides an additional tax of 20% of the underpayment. There is a reasonable cause exception where no penalty will apply if the taxpayer can show there was reasonable cause for the understatement and that the taxpayer acted in good faith.

13. The Regulations enumerate the categories of Specified Service Trades or Businesses, which are treated differently because income derived therefrom by high earner taxpayers (over $157,500 for single filers, and $315,000 for married filing joint filers) will be limited during the $100,000 phase-out range (a $50,000 phase out range applies for single filers) and not qualify for the deduction above that phase-out range. The Regulations give some useful examples of what functions are considered to be under these definitions and what functions are not, and the following chart illustrates all of the points made in the Regulations in this regard. While there are a few points of leniency, overall the tone of the Regulations is to broadly ensnare as much as possible under the Specified Service Trade or Business taint.

    It is notable that the Regulations specifically state that banking, real estate brokerage services and liability and casualty insurance agencies are not Specified Service Trades or Businesses. However, investment banking, hedge funds management, lobbying and veterinary medicine are Specified Service Trades or Businesses.

The following are the types of activities that are considered to be Specified Service Trades or Businesses for the purposes of Section 199A:

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Health	The provision of medical services by physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists, and other similar healthcare professionals who provide medical services directly to the patient.	The provision of services not directly related to a medical field, even though the services may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or conditioning to their customers, payment processing, or research, testing and manufacture and/or sales of pharmaceuticals or medical devices. Payment processing is quite limited and would not appear to facilitate medical practices dividing off significant practice administrative activities as producing non-Specified Service Trade or Business revenue. Practitioners also need to read these very limited exclusions with consideration to the broad aggregation rules which further limit planning.

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Law	The provision of services by lawyers, paralegals, legal arbitrators, mediators, and similar professionals in their capacity as such. Please note that in most states mediators do not need to be licensed lawyers.	The provision of services that do not require skills unique to the field of law, for example, the provision of services in the field of law does not include the provision of services by printers, delivery services, or stenography services. Excluding delivery services is of no help and demonstrates the broad all-encompassing view the Regulations have taken of Specified Service Trades or Businesses. There is no discussion as to whether trustee and executor and executrix, title insurance and other services that do not require a law license are considered to be legal services.
Accounting	The provision of services by accountants, enrolled agents, return preparers, financial auditors, and similar professionals in their capacity as such.... accounting is not limited to services requiring state licensure as a certified public accountant (CPA)... which includes tax return and bookkeeping services, even though the provision of such services may not require the same education, training, or mastery of accounting principles as a CPA.	Payment processing and billing analysis. The inclusion of bookkeeping services, an activity that does not require the professional training or licensing of a CPA further illustrates the broad Specified Service Trade or Business view of the Regulations.
Actuarial Science	Is based on the ordinary meaning “actuarial science” and provides that the term “performance of services in the field of actuarial science” means payment processing and billing analysis.	The provision of services by analysts, economists, mathematicians, and statisticians not engaged in analyzing or assessing the financial costs of risk or uncertainty of events.

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Performing Arts	The performance of services by individuals who participate in the creation of performing arts, such as actors, singers, musicians, entertainers, directors, and similar professionals performing services in their capacity as such.	The provision of services by persons who broadcast or otherwise disseminate video or audio of performing arts to the public. Does not include the performance of services that do not require skills unique to the creation of performing arts, such as maintenance and operation of equipment or facilities used in the performing arts.
Consulting	The provision of professional advice and counsel to clients to assist the client in achieving goals and solving problems...includes providing advice and counsel regarding advocacy with the intention of influencing decisions made by a government or governmental agency and all attempts to influence legislators and other government officials on behalf of a client by lobbyists and other similar professionals performing services in their capacity as such.	The performance of services other than advice and counsel. This determination is made based on all the facts and circumstances of a person's business. Does not include the performance of services in the field of consulting services embedded in, or ancillary to, the sale of goods or performance of services on behalf of a trade or business that is not otherwise an Specified Service Trade or Business (e.g., services provided by a building contractor) if there is no separate payment for the consulting services. This may require some businesses to modify their billing practice and incorporate fees for what would otherwise have been separately stated services into the product price.

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Athletics	Is most similar to the field of performing arts.... provides that the term “performance of services in the field of athletics” means the performances of services by individuals who participate in athletic competition such as athletes, coaches, and team managers in sports such as baseball, basketball, football, soccer, hockey, martial arts, boxing, bowling, tennis, golf, skiing, snowboarding, track and field, billiards, and racing.	The provision of services that do not require skills unique to athletic competition, such as the maintenance and operation of equipment or facilities for use in athletic events; the provision of services by persons who broadcast or otherwise disseminate video or audio of athletic events to the public.
Financial Services	Limits the definition of financial services to services typically performed by financial advisors and investment bankers and provides that the field of financial services includes the provision of financial services to clients including managing wealth, advising clients with respect to finances, developing retirement plans, developing wealth transition plans, the provision of advisory and other similar services regarding valuations, mergers, acquisitions, dispositions, restructurings (including in Title 11 or similar cases), and raising financial capital by underwriting, or acting as the client’s agent in the issuance of securities, and similar services... services provided by financial advisors, investment bankers, wealth planners, and retirement advisors and other similar professionals.	Taking deposits or making loans. Please note that interest earned on notes owed by customers or on notes receivable resulting from the financed sale of products to customers will be included in 199A income, but that normal interest income earned on accounts owned by a trade or business will not.

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Brokerage Services	The performance of services in the field of brokerage services includes services in which a person arranges transactions between a buyer and a seller with respect to securities for a commission or fee. This includes services provided by stock brokers and other similar professionals.	Does not include services provided by real estate agents and brokers, or insurance agents and brokers
Investment Management	The performance of services that consist of investing and investment management refers to a trade or business involving the receipt of fees for providing investing, asset management, or investment management services, including providing advice with respect to buying and selling investments.	The performance of services of investing and investment management does not include directly managing real property.
Trading Services	The performance of services that consist of trading means a trade or business of trading in securities, commodities, or partnership interests. Whether a person is a trader in securities, commodities, or partnership interests is determined by taking into account all relevant facts and circumstances, including the source and type of profit that is associated with engaging in the activity regardless of whether that person trades for the person's own account, for the account of others, or any combination thereof.	A taxpayer who engages in hedging transactions as part of their business is not considered to be engaged in the trade or business of trading commodities.

ACTIVITY CHART		
Activity	**Includes**	**Does Not Include**
Dealing in Securities	The performance of services that consist of dealing in securities means regularly purchasing securities from and selling securities to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in securities with customers in the ordinary course of a trade or business.	A taxpayer that regularly originates loans in the ordinary course of a trade or business of making loans but engages in no more than negligible sales of the loans is not dealing in securities.
Dealing in Commodities	The performance of services that consist of dealing in commodities means regularly purchasing commodities from and selling commodities to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in commodities with customers in the ordinary course of a trade or business.	A taxpayer who engages in hedging transactions as part of their business is not considered to be engaged in the trade or business of trading commodities.
Where the Principal Asset of The Trade or Business is the Reputation or Skill of One or More Employees or Owners	**SEE DISCUSSION BELOW**	

14. The final category of a Specified Service Trade or Business involves a situation where the principal asset of the trade or business is the reputation or skill of one or more employees or owners. Many advisors were concerned with the potential breadth of this “catch all” provision. This was one of the few leniencies provided for in the Regulations.

Fortunately, under the Regulations, the Treasury choose to narrowly construe this category, and it will not apply unless one of the following exists:

(A) Fees or other compensation is received for endorsement of products or services;
(B) License or fees are received for the use of an individual's image, likeness, name, signature, voice, trademark, or any other symbols associated therewith; or
(C) Compensation is received for appearing at an event or on radio, television, or other media.

For the purposes of the above, compensation includes ownership in a business entity that is received in lieu of cash.

An example in the Regulations is that a famous chef may own a restaurant, and the income from the restaurant would qualify for the Section 199A deduction, but any income earned as a license fee for the use of his or her name to brand the restaurant or sell cookware would be considered as income from a Specified Service Trade or Business. What if instead of a pure license fee for the use of the chef's name on the island-themed margarita cookware instead the chef received a share in the profits from the sales of cookware? Would that instead be characterized as non Specified Service Trade or Business income? Consideration should be given to how to structure license arrangements in light of this. It therefore appears that not all of Jimmy Buffet's Section 199A deduction will get wasted away in Margaritaville. [x]

15. There is also a ***de minimis* exception** that applies when income from a Specified Service Trade or Business is less than 10% of gross receipts, if the entity has $25,000,000 or less of annual receipts or 5% of gross receipts if annual receipts are greater than $25,000,000.

For example, a consultant could join an engineering firm with less than $25,000,000 in annual receipts, and qualify non-employment income for the exemption, if the consulting revenue is less than 10% of total revenue. A 5% threshold will apply if the engineering firm has more than $25,000,000 a year of revenues.

The Regulations state that an individual who was formerly treated as an employee for federal income tax purposes, and who is subsequently characterized as an independent contractor and provides services for the same individual or entity, will be presumed to continue to be an employee, or to be ineligible for the Section 199A deduction by reason of being "in the trade or business of performing services as an employee." Thus, employee relationships will be viewed as "sticky" and not easy or safe to change or adapt.

For example where a lawyer employed by Law Firm 1 joins Law Firm 2, which provides services for Law Firm 1 on a contractor arrangement, and uses such lawyer to provide services under the contractor relationship. The lawyer is considered to be an employee of Law Firm 1, so her income from Law Firm 2 is considered to be ineligible to qualify for the Section 199A deduction unless she can prove that she is truly an independent contractor as to Law Firm 1.

16. For trusts and trust beneficiaries, it is important to note that the $157,500 threshold is measured at the trust level without taking into account any distribution deduction for "Distributable Net Income" (DNI) distributed to beneficiaries.

> Specifically, subsection 1.199A-6(d)(3)(iii) states that:
>
> For purposes of determining whether a trust or estate has taxable income that exceeds the threshold amount, the taxable income of a trust or estate is determined before taking into account any distribution deduction under sections 651 or 661.

For example, if A was to establish a trust that owns a portion of a flow-through entity for the benefit of B, the trust can accept $157,500 of taxable income without being subject to any limitations of Section 199A. If the trust made a distribution to B of $50,000 and retained $157,500 for the taxable year, the trust would be considered to have $207,500 in taxable income for the year, and would be subject to the wage/Qualified Property limitation of Section 199A.

As a result, the trust in the above example cannot distribute amounts in excess of $157,500 to one or more trust beneficiaries and take a distribution deduction to remain under the $157,500 threshold.

If the trust exceeds the $157,500 threshold, then the trust and trust beneficiaries must each satisfy the wage/Qualified Property test, with wages and Qualified Property being allocated among the trust and the trust beneficiaries in proportion to DNI distributed to the beneficiaries or retained by the trust. For example, if the trust has $257,500 of income and distributes $100,000 of income to a trust beneficiary, then the trust exceeds the $157,500 threshold and wages and qualified property would be allocated 61% ($157,500 / $257,500) to the trust and 39% ($100,000 / $257,500) to the beneficiary.

17. Many taxpayers will establish trusts for children or others that are separately taxed and can own interests in S corporations and partnerships, and qualify for the deduction under situations where the parents would not qualify because of their income levels or other factors. The Regulations specifically state that "Trusts formed or funded with a significant purpose of receiving a deduction under Section 199A will not be respected for purposes of Section 199A" under the title "Anti-Abuse Rule for Creation of Multiple Trusts to Avoid Exceeding the Threshold Amount." This is controversial and appears to exceed the scope of the statute.

    Furthermore, the authors are not certain what it means to "not respect" a trust.[xi] Does this mean that the IRS will simply ignore the trust? Will they aggregate these trusts, or substitute the beneficiaries or the grantor as the taxpayer, in lieu of the trust itself?

    A much grander concern is where the IRS is given the ability to issue such a broad power to itself. The apparent authority for this statement in the Regulations would be the following language under Code Section 199A(f)(4), ("Anti-Abuse Rules"), which is the only subsection of 199A to grant the Secretary authority to issue anti-abuse rules and does not in the opinion of the authors authorize such a discriminatory provision:

The Secretary shall prescribe such Regulations as are necessary to carry out the purposes of this section, including Regulations—

(A) for requiring or restricting the allocation of items and wages under this section and such reporting requirements as the Secretary determines appropriate, and

(B) for the application of this section in the case of tiered entities.

Nowhere under Section 199A is the Secretary given the authority to issue regulations regarding the treatment of trusts, nor is the Secretary given the ability to treat discriminatorily or to "disrespect" (for lack of a better term) within a specific class of taxpayers eligible under the statute.

The more reasonable authority for this power seems to be under Section 643, which provides for the aggregation of multiple trusts if there are not significant non-tax differences between the trusts and the trusts have substantially the same grantors and beneficiaries. The authors believe it is likely that the IRS could be (in a rather disingenuous and deceptive way) stating that trusts established for the primary purpose of qualifying for Section 199A will not be considered to have significant non-tax purposes under Section 643. If this is true, it drastically reduces the threat the Regulations pose to trust planning under Section 199A

18. In 1989, Section 643(f) was enacted to provide that Regulations could be issued to allow the IRS to treat two or more trusts as a single trust if they (1) were formed by substantially the same

grantor, (2) had substantially the same primary beneficiaries,[xii] and (3) were formed for the principal purpose of avoiding income taxes. Regulations were never issued, and some commentators (writing in LISI and elsewhere) pointed out that the IRS could not assert the multiple trust provision of the Code without having Regulations issued. It appears that the Regulations specifically intend to address this point by including provisions under 643(f). However, the Regulations as proposed appear excessive and to exceed the scope of the statute. More particularly, they appear to ignore the requirement of the statute that all three conditions must be met before trusts can be aggregated or ignored.

The Regulations under Section 199A were connected to new Regulations under Section 643, and the Section 643 Regulations state that a principal purpose will be presumed if it results in a significant income tax benefit, unless there are significant non-tax purposes that could not have been achieved without the creation of the separate trust.

What is not clear is how the Regulations will handle trusts established solely for the purpose of qualifying for Section 199A, and this subsection does not give any examples of how this applies. As discussed above, the authors believe the text of subsection 1.199A-6(d)(3)(v), which provides that trusts "formed or funded with a significant purpose of receiving a deduction under Section 199A will not be respected for purposes of Section 199A. See also Section 1.643(f)-1 of the regulations," if taken literally would overstep the IRS's grant of authority. However, the Regulations for Section 643, do give an example for the consolidation of trusts, a condensed version is as follows:

> A flow-through business owner decides to set up trusts for family members for the explicit reason of avoiding the wage/Qualified Property limitations of Section 199A, and the owner is not engaged in a Specified Service Trade or Business for the purposes of this example. He establishes three trusts with following beneficiaries: Trust 1 for the owner's sister, B, and the owner's brothers, C and D;

> Trust 2 the owner's other sister, E, and for C and D; and Trust 3 for E.
>
> The result is that the trusts would be aggregated and treated as a single trust. However, a key fact specified in this example is that the owner would not have created or funded the trusts but for his desire to qualify for the Section 199A deduction.

If the IRS intends to disregard trusts that are formed to take the Section 199A deduction, it seems that the IRS would want to completely invalidate the trusts altogether, as the aggregated trust is still established only for qualifying the owners for the Section 199A deduction, and even when aggregated the trust helps the owner avoid the wage/Qualified Property limitations because it is still lowering the owner's taxable income. This gives credence to the view that the IRS only meant to ignore trusts to the extent of its power under Section 643, or put simply, that establishing a trust for the purposes of Section 199A is not a "significant non-tax purpose" under Section 643.

In the end, we may find that any trust that has a reasonable family planning purpose will be respected, but that multiple trusts will be aggregated for tax purposes, if they have common beneficiaries and would save tax dollars. The example provided near the end of the Regulations at 1.643(f)-1(c), Example 2 seems to suggest that having different siblings as beneficiaries suffices to break the substantially same primary beneficiary test, but the Regulation then appears to make the tax avoidance motive the sole condition to trigger the multiple trust rule even if either the grantors or the primary beneficiaries differ.

19. The Regulations provide that trusts which are treated as owned by an individual under the grantor trust rules will cause the grantor or applicable income tax owner of the trust to be considered to be the owner of trade or business interests held by the trust. This means that a grantor could establish a trust considered as owned by a named beneficiary pursuant to Section 678, and the individual beneficiary will be considered

to be the owner of the Section 199A interest without application of the anti-abuse rules above that would apply to a non-grantor ("complex") trust.

20. The Regulations state that the term "reasonable compensation," which is not includable in Qualified Business Income under Section 199A, refers to the traditional concept that applies to S corporations paying their employee/owners a wage. In other words, profits or K-1 income from partnerships and disregarded entities could not be re-characterized as money earned for personal services rendered, and thus are not eligible for the 199A deduction.

21. The Regulations provide that losses that were built up through December 31, 2017 will not reduce Qualified Business Income.

22. Almost uniformly, the Regulations provide that S corporations, trusts, estates and partnerships that are not on a calendar year basis for 2017 and 2018 will be considered to have all items of income and deduction occur for Section 199A calculation purposes for the period ending in 2018. The Regulations appear to contemplate that the income and deductions that such entities will have for the fiscal year beginning in 2018 will be counted in 2019 when the subsequent fiscal year ends, but this is not specifically mentioned so it is not clear what becomes of income and deductions for fiscal years that begin in 2018 and will end in 2019.

    Where Internal Revenue Code provisions block and delay the recognition of losses, such as under the passive loss rules under Section 469, and the S corporation rules that limit losses to the basis of stock, the losses that are released after 2017 will only reduce qualified business income to the extent accumulated after 2017.

23. Net operating losses that are unrelated to a given trade or business will not cause a reduction in the Section 199A deduction for unrelated trades or business, but this does not apply to net operating losses attributable to a relevant trade or

business that are disallowed under IRC Section 461(l).

COMMENT:

The authors believe that the Regulations proposed here are overwhelmingly taxpayer unfriendly, and that the decision to give automatic unconditional loopholes to C corporations, REIT's and publicly traded partnerships, while excluding a great many small and medium size taxpayers or requiring them to change how they do business to have better treatment, is repugnant to the tax system, fairness and the economy. As practical matter, the Regulations are intended to thwart two logical and reasonable methods of planning that practitioners had hoped to use for Section 199A purposes: (1) separating lines of income and (2) trusts.

One way practitioners had hoped to qualify at least some income from a Specified Service Trade or Business owned by a high income taxpayer was by separating out non-Specified Service Trade or Businesses that the trade or business had, which the owners could claim a Section 199A deduction on. This method is often called the "Crack-and-Pack method". For example, a related S corporation might provide management services for its own law office, as well as owning its own building, which could be separated out to a management company and rental activity that would be paid by the law firm at fair market value.

While the Regulations allow owners of non-Specified Service Trade or Businesses to aggregate some of their businesses to maximize a Section 199A deduction, they force certain Specified Service Trade or Businesses and their ancillary services to be aggregated and all considered to be Specified Service Trade or Businesses, even if the applicable services so labeled would clearly not be Specified Service Trade or Businesses if they were owned and operated by owners not related to the involved professionals. Specifically, a trade or business will be considered to be an extension of a Specified Service Trade or Business if it is 50% or more commonly controlled with a Specified Service Trade or Business and provides 80% or more of its property or services to that Specified Service Trade or Business.

Further, if a trade or business provides less than 80% of its property or services to a Specified Service Trade or Business, but is 50% or more commonly controlled by the owners of a Specified Service Trade or

Business, the income attributable to that separate business that services or sells products to the Specified Service Trade or Business will still be considered to be Specified Service Trade or Business income, and income that is not related to providing its property or services to the Specified Service Trade or Business will be eligible for the Section 199A deduction. Practitioners will therefore seek to avoid the common the control requirement of the Regulations wherever possible in order to qualify the maximum amount of income of ancillary companies for a Section 199A deduction. For example, three separate law firms might set up a management and billing company to service all three of them, with the separate owners each owning less than 50% of the management company and profits being divided based on percentage of ownership.

It is noteworthy that when a medical, legal or other professional practice cannot be owned by anyone other than licensed professionals under state law it may still save significant tax dollars to have a separate management company that is owned by trusts or lower bracket family members that can benefit from the Section 199A deduction even if the income is considered to be Specified Service Trade or Business Income if the final Regulations include these provisions and are enforceable.

On a final note, the Regulations did not address the questions that exist for Charitable Remainder Trusts under Section 199A. In particular how income that is recognized by the trust but not taxed to beneficiaries until distributed will be treated for purposes of calculating the Section 199A deduction and if the deduction will be allowed for Charitable Remainder Trusts. The IRS did include a request for comment in these Regulations on how beneficiaries of these types of trust would be able to take a Section 199A deduction, which indicates a possibility that the Service may allow such a deduction.

Conclusion

Conscientious advisors will need to carefully study the Regulations and analysis thereof, in order to best advise clients on how to proceed with their planning. It is quite probable that significant aspects of these Regulations will not be finalized, given possible lack of authority and political and fairness issues that are sure to be loudly voiced by many interest groups.

Most importantly of all, remember that these Regulations are only proposed, and do not have the force of law, and therefore may not necessarily reflect what the IRS's position will be if and when final Regulations are ever promulgated. There will be inevitable errors made by those of us who draw conclusions about the Regulations early in the process. Concerned tax advisors and practitioners should send comments to the IRS during the public commenting period.

The Regulations provide that a public hearing is scheduled to discuss the Regulations on October 16, 2018 at 10:00 a.m., and comments may be sent to Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C., 20044, or hand delivered at the Courier's Desk of the Internal Revenue Service Offices at 1111 Constitution Avenue NW, Washington, D.C. 20224, or via the federal eRulemaking which can be found here.

We welcome questions, comments and suggestions with respect to this big job of applying the law to the situations of taxpayers to make the best of a complicated but fascinating law that advisors can use to help their clients save significant taxes.

The Regulations mention that an estimated 10,000,000 taxpayers will be impacted by this tax provision, and that over 25 million hours will be spent complying with this one code provision. Let's make sure that the tax savings will be maximized to make all of this worthwhile!

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan S. Gassman

Martin M. Shenkman

Brandon L. Ketron

Christopher J. Denicolo

Kenneth J. Crotty

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[i] Prop. Reg. § 1.199A-1(b)(13).

[ii] IRC § 162(a) is as follows: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including— …" (emphasis added). Revenue Act of 1928, 45 Stat. 791, § 23(a) began as follows: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including …" (emphasis added). The predecessor to § 23(a), Revenue Act of 1913, 38 Stat. 167, § II B was as follows: "there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business."

[iii] Note, *The Single Rental as a "Trade or Business" under the Internal Revenue Code*, 23 U. Chi. L. Rev. 111, (1955).

[iv] This case is interesting, as it defines "trade or business" for § 211(b) of Revenue Act of 1938 that deals with tax on non-resident individuals, yet it has been cited in leasing cases such as *Bennett v. Commissioner*, where the Tax Court held that a man's leasing of lottery equipment met the definition of "trade or business" for IRC § 1401, which has "the same meaning as when used in section 162."

[v] *Schwarcz v. Commissioner,* 24 T.C. 733 (1955)

[vi] *Elek v. Commissioner*, 30 T.C. 731 (1958)

[vii] *Lagreide v. Commissioner*, 23 T.C. 508 (1954)

[viii] *Hendrickson v. Commissioner*, 54 T.C.M. (CCH) 1079 (1987)

[ix] *Bobrow v. Commissioner*, 107 T.C.M. (CCH) 1110 (2014)

[x] Some of them are running to lovers
Leaving no forward address
Some of them are running tons of ganja
Some are running from the IRS
Late at night you will find them
In the cheap hotels and bars
Hustling the senoritas
While they dance beneath the stars
Spending those renegade pesos
On a bottle of rum and a lime
Singin' give me some words I can dance to
Or a melody that rhymes

from BANANA REPUBLIC BY JIMMY BUFFETT

[xi] If Aretha Franklin knew about these regulations, she might have said “R-E-S-P-E-C-T , what the hell are you going to do to my trust and me?” Aretha Franklin’s hit song “Respect” was recorded in February 14, 1967 in New York’s Atlantic Studios, and the song won Franklin two Grammy awards.

[xii] Section 643(f) explicitly aggregates multiple trusts where the trusts have substantially the same grantors and primary beneficiaries, and a principal purpose of such trusts is the avoidance of income tax. It seems that separate trusts can be established which have different primary beneficiaries and remainder beneficiaries, and significant non-tax differences, and that such trusts would not be subject to aggregation. For example, if Trust 1 is established with A as the primary beneficiary and B as the remainder beneficiary, and Trust 2 is established with B as the

primary beneficiary and A as the remainder beneficiary, this does not seem to implicate the § 643(f) aggregation rules, based upon Example 2 of Prop. Reg. § 1.643(f)-1.