

VIA ELECTRONIC MAIL

September 21, 2018

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

RE: Comments on Proposed Regulations under Section 199A of the Internal Revenue Code;
IRS and REG-107892-18

Dear Sir or Madam:

We are submitting this comment letter on behalf of America's banks operating or considering operating under Subchapter S of the Internal Revenue Code (IRC). Our organizations (the American Bankers Association,¹ the Independent Community Bankers of America,² and the Subchapter S Bank Association³) collectively represent most of the banks in the United States, including those banks that have elected Subchapter S (S Banks).

Section 199A of the IRC was introduced through the Tax Cuts and Jobs Act (TCJA). This new code section provides for a 20% deduction for qualified business income earned in pass-through entities; including S Banks. Earlier this year, we submitted a comment letter to Treasury regarding our reading of the statute and included recommendations for inclusion in the proposed regulations. This letter includes selected background from our original letter and incorporates comments on and recommendations for the proposed regulations under Section 199A issued on August 8, 2018 (the proposed regulations).

We are very appreciative of how the proposed regulations address a number of issues related to banking and specifically recognize the unique nature of our business in the preamble. However, now that we have detailed proposed regulations to consider, we have received a number of inquiries and recommendations from our organizations' members and other industry participants with respect to certain issues. These issues and related recommendations are included below.

¹ The American Bankers Association is the voice of the nation's \$1 trillion banking industry, which is comprised of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend more than \$9 trillion in loans.

² The Independent Community Bankers of America®, the nation's voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With approximately 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community.

³ Subchapter S Bank Association members share a common interest in their dedication to protecting and enhancing shareholder value through subchapter S treatment. Because of this unique link between its members, the Association is able to represent the interests of its members as a whole without regard to the size, location, charter type or market coverage of the individual members.

Background

Banks Operating as Pass-Through Entities and Serving Their Communities

There are 5,670 banks in the U.S. as of December 31, 2017. Of that number, approximately 2,000 have elected Subchapter S. Nearly two thirds of those banks have total assets less than \$200M and over 200 have total assets less than \$50M. These banks play a critical role in communities across the country. They operate as, and in support of small businesses. Collectively, community banks, both in S and C status, are estimated to be responsible for over 50% of all small business loans and over 70% of all agriculture bank loans.

Our Prior and Continuing General Recommendations

The application of the Section 199A deduction to S Banks should be consistent with the language of the statute and the overall intention of Congress to help pass-through businesses remain competitive in the context of a corporate rate reduction.⁴ Moreover, S Banks are a critical source of capital for the small business community, and their eligibility for the pass-through deduction is consistent with the broader goal of Section 199A to help small businesses. Because S Banks are highly regulated and limited in their activities, rules clarifying the availability of the Section 199A to S banks should be narrow and limited in application.

We ask you to reconsider the approach taken in the proposed regulations that could be interpreted by some as limiting common banking qualified business income. As will be discussed further below, clarification is needed particularly with respect to definitions of specified service trade or businesses (SSTBs) and the creation of a de minimis test and related calculations. The approach required under the proposed regulations is complex, administratively burdensome, and may require segregation of activities that should be considered part of an integrated business; community banking. We continue to believe there is a simpler approach that would ensure that S Banks and their customers receive the full and intended benefit of tax reform while guarding against abuse.

We previously urged that the proposed regulations consider:

- Congress clearly intended banks⁵ to be excluded from the definition of “specified service trade or business” and as such, S Banks are eligible for the deduction created by Section 199A. Guidance should clarify that a “specified service trade or business” does not include banking.
- Read in context, “banking” is not a “specified service trade or business” and revenues derived from banking are “qualified business income.” If Congress wanted banks to be excluded from the deduction, the statute would have been drafted differently.
- Banks are highly regulated and their permissible activities are clearly defined by statute and regulation. Thus, all of their permissible activities should be eligible for the deduction created by Section 199A.
- A “banking trade or business” could be appropriately defined as a trade or business conducted in an entity (i) that is engaged in activities that qualify it as a bank as defined in section 2 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841) or (ii) that is engaged solely

⁴ Unless otherwise provided herein, all Section references are to the Internal Revenue Code of 1986, as amended.

⁵ Wherever we refer to “banks” in this letter, we are also referring to federal and state savings associations and savings banks.

in activities permissible under section 4 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. §1843), and regulations issued thereunder, and is regulated by the Board of Governors of the Federal Reserve System.

- Certain references to ancillary activities in the statute (such as “dealing in securities”) should be read narrowly, consistent with congressional intent, to capture only those entities that were intended to be excluded from the 199A benefits.

Banks are Highly Regulated Entities

All banks operate under either a state or a federal charter. State chartered banks are regulated at the state level and federally chartered banks are regulated by the Comptroller of the Currency. In addition, at the federal level, state chartered non-member (that is, not members of the Federal Reserve System) banks are regulated by the Federal Deposit Insurance Corporation (FDIC), and state member banks are regulated by the Federal Reserve. The FDIC, as provider of federal deposit insurance, has back-up regulatory authority with respect to all FDIC insured banks it does not regulate directly. All bank holding companies are regulated by the Federal Reserve. As discussed further below, the activities of banks and bank holding companies are carefully circumscribed: banks by their charters and by state and federal law; and bank holding companies by federal law. These limitations on the activities of banks and bank holding companies are enforced by their regulators, including through examinations on a regular basis.

Subchapter S banks are typically organized with a holding company that makes the S election. The subsidiary bank makes an election to be a Qualified Subchapter S Subsidiary (Q Sub). Generally, the holding company and the bank are treated as a single taxpayer, similar to the treatment of a single member limited liability corporation (also known as an “LLC”). Certain tax rules unique to banks also apply to S banks. A Q Sub bank or its holding company may have subsidiaries which engage in banking activities.

All of the activities of a bank or bank holding company are regulated activities, regardless of whether the activities are in a separate subsidiary or conducted directly by the bank or its holding company.

Eligibility of Banking Income for the Section 199A Deduction

Section 199A provides that an individual taxpayer generally can deduct 20 percent of qualified business income from a partnership, S corporation or sole proprietorship. Qualified business income is determined for each qualified trade or business of the taxpayer. A qualified trade or business generally means any trade or business other than a specified service trade or business and other than the trade or business of being an employee.

A specified service trade or business is defined in Sections 199A(d)(2)(A) and (B). Section 199A(d)(2)(A) cross references Section 1202(e)(3)(A) and generally provides the businesses enumerated in that section, including “financial services,” are specified service trades or businesses. Financial services are, however, clearly something other than banking, which is a separate business activity listed in Section 1202(e)(3)(B). The list in Section 1202(e)(3)(B) refers to “any *banking*, insurance, financing, leasing, investing or similar business.” Had Congress meant to treat banking as a specified service trade or business, drafters simply would have extended the cross reference to Section 1202(e)(3)(B). As discussed below, banking is specifically cited in the preamble to the proposed regulations as falling outside the definition of “financial services.” We are appreciative of this guidance and include a recommendation for additional clarification in an addendum to this letter.

While we believe this analysis alone should be conclusive, there have been questions about the application of the second part of the “specified service trade or business” definition in Section 199A(d)(2)(B). Section 199A(d)(2)(B) defines specified service trades or businesses to include a trade or business “which involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in section 475(c)(2), partnership interests, or commodities (as defined in section 475(e)(2))....” “Investing and investment management as well as trading or dealing in securities” are traditional activities that banks are permitted to conduct.

Liquidity and diversification of the loan portfolio are critical to bank safety and soundness. Therefore, community banks routinely sell loans in whole, in part and in securitized pools. For example, a community bank that makes a significant amount of mortgage loans will often sell some of them to provide liquidity and to avoid an over-concentration in that business. While such activities, in certain cases, may technically involve dealing in securities within the meaning of Section 475(c)(1), we do not believe the definition in Section 199A(d)(2)(B) includes banks in such cases. The phrase “involves the performance of services,” which appears in Section 1202(e)(3)(A) and also in Section 199A(d)(2)(B), is properly understood to mean rendering services to unrelated third parties. Otherwise, any business that employs a general counsel or maintains an accounting department, for example, would be a specified service trade or business within the meaning of Section 199A(d)(2)(A), because the business “involves the performance of services” in the fields of law or accounting. Properly understood, the definition in Section 199A(d)(2)(A) applies to law and accounting firms, the businesses of which involve the performance of legal and accounting services for third parties, but not to a widget maker that employs an in-house lawyer or accountant. Similarly, the definition in Section 199A(d)(2)(B) should not apply to a bank that sells its loans or participations in loans. Making loans and the sale of a bank’s loans and participations in loans, just like taking deposits, is a long-standing, fundamental part of the business of banking and is significantly regulated by governmental agencies as one business line, governed by safe and sound lending practices, not multiple lines. We believe the proposed regulations are helpful in this area. This issue is discussed further below.

There have been some suggestions, for tax purposes, that a bank be required to split its business into qualified and non-qualified activities. We believe that the core business of banking includes well understood and integrated activities regulated as banking activities. These activities should not be split up. Any such effort would not be consistent with our understanding of the intent of policy makers. Moreover, any artificial separation of these activities would impose a significant and unnecessary administrative burden on banks, complicate tax administration, and ultimately raise costs for borrowers, including small businesses, undermining the objective of the tax law changes.

Moreover, Congress provided C corporation banks, along with other C corporations, a steep reduction in tax rates from 35% to 21% and clearly intended Section 199A to accomplish the same relative goals for S Banks. It would be unfair to provide a different result for S Banks by requiring them to separate out SSTB-like income. We were active participants in the legislative process that resulted in the TCJA and are confident that is not what Congress intended.

To address any potential ambiguity in the interpretation of Section 199A, we suggest that final regulations provide guidance that clarifies income from a “banking trade or business” is qualified income for purpose of the Section 199A deduction. Properly defined, a “banking trade or business” will include only the limited set of activities in which regulated banks and bank holding companies are permitted to engage, and the clarification does not run the risk of becoming an unintended loophole.

Banking Regulations Provide a Natural Governor on the Activities of Banks

Banks and bank holding companies are regulated entities with significant capital, employees, technology, premises, processes, etc. that represent an integrated business. The regulation of banks and bank holding companies is significant and includes reviews of compensation practices.

Banks and bank holding companies may only engage in activities that are considered permissible under banking law. Examples of such activities include trust and fiduciary services, insurance brokerage, originating and selling mortgages, assisting customers in retirement planning, safe deposit and safe-keeping of customer assets, and other related financial service activities. These activities may be performed in a bank holding company, a bank, or in one of more subsidiaries.

There are significant financial requirements and regulatory supervision for forming a new bank, purchasing a bank and ongoing operations. As noted above, we believe these requirements provide a safeguard against unsafe banking practices and would also deter any alleged tax planning or abusive structures to allow the benefits of the 199A deduction for unintended purposes.

It is also important to note that Congress has long recognized that banks may perform certain brokerage activities without being considered to be a broker under federal securities law, because those activities are part of traditional banking activities.

In recent surveys conducted by ICBA and the Subchapter S Bank Association, S banks indicated that they provide a variety of services in addition to accepting deposits and making loans. The level of revenue and income generated by these activities is dependent on the individual bank. For the vast majority of banks, these activities represent a relatively small portion of the activities of the bank. As discussed below, the de minimis tests in the proposed regulations, though exceptionally low, may provide relief from a potential SSTB classification.

All of these permissible activities are part of an integrated business activity: banking. In fact, the services in question are vital aspects that are often required to support the safety and soundness of a banking institution in addition to serving the needs of communities in which such services would not otherwise be locally available.

Congressional Intent

During the development and drafting of the TCJA legislation, we had extensive discussions with Congressional staff and various members in both the House and Senate. In the course of these discussions, we were assured repeatedly that S Banks would qualify for the lower tax rate for pass-through businesses provided by Section 199A. Since the passage of the TCJA, we have met with staff of the tax-writing committees and various Members who have confirmed the intent of policy makers with respect to S banks.

Our Specific Comments on the Proposed Regulations

- We are appreciative of the guidance in the preamble suggesting a narrow interpretation of financial services included in section 1202(e)(3)(A) that is referenced in section 199A(d)(2)(A). Further, the reference to banking and taking deposits and making loans provides welcomed assurance that traditional banking business is not a SSTB. We respectfully ask that this

important guidance be clarified to include all permissible activities conducted by a bank. Our arguments for this approach were made previously and we believe are in line with the intent of the policy makers.

- In line with our position regarding permissible activities in a bank, we similarly believe that the SSTB's included in Section 199A(d)(2)(B) should not be applicable for a bank. There are important questions about whether certain activities in Section 199A(d)(2)(B) are applicable to traditional banking activities. The issues are discussed below. Regardless, we respectfully ask that guidance be included to exempt permissible banking activities from the SSTB definition of Section 199A(d)(2)(B). Again, our arguments for this approach were made previously and we believe are in line with the intent of the policy makers.
- As a result of the requested guidance above, we are hopeful that the application of the SSTB restrictions will not be applicable to banks. That said, we urge you to consider additional guidance in the following areas:
 - There is uncertainty on how to define a trade or business. This has important implications for purposes of identifying and quantifying a potential SSTB limitation. If a reporting pass-through entity (RPE) has multiple trades or businesses that includes both qualified business income (QBI) and SSTB income, Treasury should clarify that the language of the de minimis rule is not intended to imply that a non-SSTB trade or business becomes an SSTB if the gross receipts attributable to the associated SSTB activity are at or above the de minimis threshold. Treasury should make clear in that event the SSTB activity will be treated as a separate trade or business (if it qualifies as a separate trade or business under the principles of section 162) and that it will not be aggregated with a trade or business that is not an SSTB. This approach is consistent with the rule that an SSTB may not be aggregated with another trade or business set forth in proposed regulations section 1.199A-4(b)(1).
 - The de minimis thresholds seem exceptionally low and may not achieve the intended result of avoiding unnecessary administrative burden for relatively small amounts of SSTB income. We recommend increasing the threshold to a flat rate of 25%, regardless of gross receipts level. Revenue from SSTBs may be highly variable from year to year due to factors outside of a bank's control. Banks that do not exceed the thresholds today may well exceed them in the future as they evolve to meet the needs of their markets. Asset and revenue growth may shift many banks from the 10 percent to the 5 percent threshold, especially since the gross receipts threshold is not indexed. In addition, the proposed rule could have a chilling effect on a bank's ability to raise capital as investors understandably require certainty as to whether the deduction will be available at the time of investment and in the future.
 - The proposed regulations contain a favorable rule for consulting services that are ancillary to a sale of goods or to another non-SSTB service business (the "ancillary services" rule), which was added in response to "the concern noted by commenters that in certain kinds of sales transactions it is common for businesses to provide consulting services in connection the purchase of goods by customers." According to the preamble of the proposed regulations, if a trade or business involves the selling or manufacturing of goods, and such trade or business provides ancillary consulting

services that are not separately purchased or billed, then such trades or businesses are not in a trade or business in the field of consulting. Accordingly, proposed regulation section 1.199A-5(b)(2)(vii) provides that the field of consulting does not include consulting that is embedded in, or ancillary to, “the sale of goods or the performance of services on behalf of a trade or business that is not otherwise an SSTB . . . if there is no separate payment for the consulting services.” The preamble indicates in this regard that the de minimis rule may not always provide adequate relief for such services. There is no good or clear reason for also carving out such embedded or ancillary services from other non-SSTB trades or businesses. Indeed, while commentators have referred to “widget manufacturers,” the proposed regulation also refers to consulting services provided that are ancillary to the performance of services that themselves would not be an SSTB. We think the Treasury should make the ancillary services rule generic.

- We appreciate the guidance provided with respect to the definition of dealing in securities in both the preamble and the proposed regulations. As discussed above, originating and in certain circumstances, selling loans, is a critical part of the banking business. The language in the preamble and the Proposed Regulations provides helpful language that is distinguishable from the dealer definition found in section 475 and should exempt most traditional bank activities. We respectfully ask for an additional clarification regarding the definition of customer that should resolve questions in this activity.

We have attached an addendum with suggested modifications to the preamble and the proposed regulations that we hope you find helpful in considering these issues.

In summary, it is clear from the statute that banking is a qualified trade or business. It is our position that the definition of banking should include activities that fall within the scope of well understood permissible, regulated banking activities. The definition should include activities that are conducted either inside a bank legal entity, its holding company, or their regulated subsidiaries. As noted elsewhere, a regulated banking organization operates under very specific rules as to what is permissible.

Thank you for your consideration. Please do not hesitate to contact us with any questions or requests for further information. Our contact information is below.

Sincerely,

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Attachment

Addendum to Comment Letter on Proposed Regulations Under Section 199A Suggested Modifications to the Preamble and the Proposed Regulations

Preamble Language:

Pages 51-52:

Section 199A defines an SSTB to include any trade or business that “involves the performance of services in” a specified service activity. Although the statute, read literally, does not suggest that a certain quantum of specified service activity is necessary to find an SSTB, the Treasury Department and the IRS believe that requiring all taxpayers to evaluate and quantify any amount of specified service activity would create administrative complexity and undue burdens for both taxpayers and the IRS. Therefore, analogous to the regulations under section 448, it is appropriate to provide a *de minimis* rule, under which a trade or business will not be considered to be an SSTB merely because it provides a small amount of services in a specified service activity.

Accordingly, proposed §1.199A-5(c)(1) provides that a trade or business (determined before the application of the aggregation rules in proposed §1.199A-4) is not an SSTB if the trade or business has gross receipts ~~of \$25 million or less (in a taxable year) and less than 1025~~ percent of the gross receipts of the trade or business that is attributable to the performance of services in an SSTB. ~~For trades or business with gross receipts greater than \$25 million (in a taxable year), a trade or business is not an SSTB if less than 5 percent of the gross receipts of the trade or business are attributable to the performance of services in an SSTB.~~

Pages 61-62:

h. Financial services

Commenters requested guidance as to whether financial services includes banking. These commenters noted that section 1202(e)(3)(A) includes the term financial services, but that banking is separately listed in section 1202(e)(3)(B) which suggests that banking is not included as part of financial services in section 1202(e)(3)(A). The Treasury Department and the IRS agree with such commenters that this suggests that financial services should be more narrowly interpreted here. Therefore, proposed §1.199A-5(b)(2)(ix) 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. This includes services provided by financial advisors, investment bankers, wealth planners, and retirement advisors and other similar professionals, but does not include taking deposits, ~~or~~ making loans or other permissible activities conducted by a bank.

Pages 66-68:

SSTBs described in 199A(d)(2)(B)

As mentioned previously, section 199A(d)(2)(B) provides that an SSTB also includes any trade or business that involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in section 475(c)(2)), partnership interests, or commodities (as defined in section 475(e)(2)). This rule does not appear in section 1202(e)(3)(A) or section 448(d)(2).

Section 475(c)(2) provides a detailed list of interests treated as securities, including stock in a corporation; ownership interests in widely held or publicly traded partnerships or trusts; notes, bonds, debentures, or other evidences of indebtedness; interest rate, currency, or equity notional principal contracts; evidences of an interest in, or derivative financial instruments in any of the foregoing securities or any currency, including any option, forward contract, short position, or any similar financial instruments; and certain hedges with respect to any such securities. Section 475(e)(2) provides a similarly detailed list of property treated as a commodity, including any commodity which is actively traded (within the meaning of section 1092(d)(1)) or any notional principal contract with respect to any such commodity, evidences of an interest in, or derivative financial instruments in any of the foregoing commodities, and certain hedges with respect to any such commodities.

Consistent with the guidance provided for banks under 199A(d)(2)(A), for purposes of Section 199A(d)(2)(B), permissible activities conducted by a bank shall not be considered a SSTB.

a. Investing and investment management

Proposed §1.199A-5(b)(2)(xi) uses the ordinary meaning of “investing and investment management” and provides that any trade or business that involves the “performance of services that consist of investing and investment management” means a trade or business that earns fees for investment, asset management services, or investment management services including providing advice with respect to buying and selling investments. The performance of services that consist of investing and investment management would include a trade or business that receives either a commission, a flat fee, or an investment management fee calculated as a percentage of assets under management. The performance of services of investing and investment management does not include directly managing real property.

b. Trading

Proposed §1.199A-5(b)(2)(xii) provides that any trade or business involving 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 is determined taking into account the relevant facts and circumstances. Factors that have been considered relevant to determining whether a person is a trader include the source and type of profit generally sought from engaging in the activity regardless of whether the activity is being provided on behalf of customers or for a taxpayer’s own account. See *Endicott v. Commissioner*, T.C. Memo 2013-199; *Nelson v. Commissioner*, T.C. Memo 2013-259, *King v. Commissioner*, 89 T.C. 445 (1987). A person that is a trader under these principles will be treated as performing the services of trading for purposes of section 199A(d)(2)(B).

c. Dealing in securities, partnership interests, and commodities

For purposes of proposed §1.199A-5(b)(2)(xiii), the “performance of services that consist of dealing in securities (as defined in section 475(c)(2))” 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. For purposes of the preceding sentence, a taxpayer that regularly originates loans in the ordinary course of a trade or business of making loans but engages in no more than negligible sales of the loans to customers is not dealing in securities—for purposes of section 199A(d)(2). See §1.475(c)-

1(c)(2) and (4) for the definition of negligible sales. Further, for purposes of this section, selling loans to customers does not include sales to government sponsored entities, loan aggregators, broker-dealers, or other parties for purposes of management of liquidity, capital, interest rate, credit risk or other related business reasons.

For purposes of proposed §1.199A-5(b)(2)(xiii), “the performance of services that consist of dealing in partnership interests” means regularly purchasing partnership interests from and selling partnership interests to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in partnership interests with customers in the ordinary course of a trade or business.

For purposes of proposed §1.199A-5(b)(2)(xiii), “the performance of services that consist of dealing in commodities (as defined in section 475(e)(2))” means regularly purchasing commodities from and selling commodities to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in commodities with customers in the ordinary course of a trade or business.

Proposed Regulations:

Page 160: Add new paragraph (b)(2)(ii) and renumber proposed paragraphs (b)(2)(ii) through (xiv)

(ii) Ancillary services. The performance of services in one of the fields listed in paragraph (b)(1) of this section (“listed services”) does not include the performance of such listed services embedded in, or ancillary to, the sale of goods or the performance of services on behalf of a trade or business that is otherwise not an SSTB if there is no separate payment for the listed services. For example, “consulting services” do not include the typical services provided by a building contractor.

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(ix) Meaning of services performed in the field of financial services. For purposes of section 199A(d)(2) and paragraph (b)(1)(viii) of this section only, the performance of services in the field of financial services means 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 a client’s agent in the issuance of securities and similar services. This includes services provided by financial advisors, investment bankers, wealth planners, and retirement advisors and other similar professionals performing services in their capacity as such, but does not include taking deposits, making loans or other permissible activities conducted by a bank.

(x) Meaning of services performed in the field of brokerage services. For purposes of section 199A(d)(2) and paragraph (b)(1)(ix) of this section only, 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 (as defined in section 475(c)(2)) for a commission or fee. This includes services provided by stock brokers and other similar professionals, but does not include services provided by real estate agents and brokers, or insurance agents and brokers.

(xi) Meaning of the provision of services in investing and investment management. For purposes of section 199A(d)(2) and paragraph (b)(1)(x) of this section only, 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.

(xii) Meaning of the provision of services in trading. For purposes of section 199A(d)(2) and paragraph (b)(1)(xi) of this section only, the performance of services that consist of trading means a trade or business of trading in securities (as defined in section 475(c)(2)), commodities (as defined in section 475(e)(2)), or partnership interests. 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, such as a manufacturer or a farmer, who engages in hedging transactions as part of their trade or business of manufacturing or farming is not considered to be engaged in the trade or business of trading commodities.

(xiii) Meaning of the provision of services in dealing--(A) Dealing in securities. For purposes of section 199A(d)(2) and paragraph (b)(1)(xii) of this section only, the performance of services that consist of dealing in securities (as defined in section 475(c)(2)) 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. For purposes of the preceding sentence, however, a taxpayer that regularly originates loans in the ordinary course of a trade or business of making loans but engages in no more than negligible sales of the loans to customers is not dealing in securities for purposes of section 199A(d)(2) and this section. See §1.475(c)-1(c)(2) and (4) for the definition of negligible sales. Further, for purposes of this section, selling loans to customers does not include sales to government sponsored entities, loan aggregators, broker-dealers, or other parties for purposes of management of liquidity, capital, interest rate, credit risk or other related business reasons.

(B) Dealing in commodities. For purposes of section 199A(d)(2) and paragraph (b)(1)(xii) of this section only, the performance of services that consist of dealing in commodities (as defined in section 475(e)(2)) means regularly purchasing commodities from and selling commodities to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in commodities with customers in the ordinary course of a trade or business.

(C) Dealing in partnership interests. For purposes of section 199A(d)(2) and paragraph (b)(1)(xii) of this section only, the performance of services that consist of dealing in partnership interests means regularly purchasing partnership interests from and selling partnership interests to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in partnership interests with customers in the ordinary course of a trade or business.

Pages 166-169:

3) Examples. The following examples illustrate the rules in paragraphs (a) and (b) of this section. The examples do not address all types of services that may or may not qualify as specified services. Unless otherwise provided, the individual in each example has taxable income in excess of the threshold amount.

Example 1. A, a singer, records a song. A is paid a mechanical royalty when the song is licensed or streamed. A is also paid a performance royalty when the recorded song is played publicly. A is engaged in the performance of services in an SSTB in the field of performing arts within the meaning of paragraphs (b)(1)(v) and (b)(2)(vi) of this section. The royalties that A receives for the song are not eligible for a deduction under section 199A.

Example 2. B is a partner in Partnership, which solely owns and operates a professional sports team. Partnership employs athletes and sells tickets to the public to attend games in which the sports team competes. Therefore, Partnership is engaged in the performance of services in an SSTB in the field of athletics within the meaning of paragraphs (b)(1)(vii) and (b)(2)(viii) of this section. B is a passive owner in Partnership and B does not provide any services with respect to Partnership or the sports team. However, because Partnership is engaged in an SSTB in the field of athletics, B's distributive share of the income, gain, loss, and deduction with respect to Partnership is not eligible for a deduction under section 199A.

Example 3. C is in the business of providing services that assist unrelated entities in making their personnel structures more efficient. C studies its client's organization and structure and compares it to peers in its industry. C then makes recommendations and provides advice to its client regarding possible changes in the client's personnel structure, including the use of temporary workers. C is engaged in the performance of services in an SSTB in the field of consulting within the meaning of paragraphs (b)(1)(vi) and (b)(2)(vii) of this section.

Example 4. D is in the business of licensing software to customers. D discusses and evaluates the customer's software needs with the customer. The taxpayer advises the customer on the particular software products it licenses. D is paid a flat price for the software license. After the customer licenses the software, D helps to implement the software. D is engaged in the trade or business of licensing software and not engaged in an SSTB in the field of consulting within the meaning of paragraphs (b)(1)(vi) and (b)(2)(vii) of this section.

Example 5. E is in the business of providing services to assist clients with their finances. E will study a particular client's financial situation, including, the client's present income, savings and investments, and anticipated future economic and financial needs. Based on this study, E will then assist the client in making decisions and plans regarding the client's financial activities. Such financial planning includes the design of a personal budget to assist the client in monitoring the client's financial situation, the adoption of investment strategies tailored to the client's needs, and other similar services. E is engaged in the performance of services in an SSTB in the field of financial services within the meaning of paragraphs (b)(1)(viii) and (b)(2)(ix) of this section.

Example 6. F is in the business of executing transactions for customers involving various types of securities or commodities generally traded through organized exchanges or other similar networks. Customers place orders with F to trade securities or commodities based on the taxpayer's recommendations. F's compensation for its services typically is based on

completion of the trade orders. F is engaged in an SSTB in the field of brokerage services within the meaning of paragraphs (b)(1)(ix) and (b)(2)(x) of this section.

Example 7. G owns 100% of Corp, an S corporation, which operates a bicycle sales and repair business. Corp has 8 employees, including G. Half of Corp's net income is generated from sales of new and used bicycles and related goods, such as helmets, and bicycle-related equipment. The other half of Corp's net income is generated from bicycle repair services performed by G and Corp's other employees. Corp's assets consist of inventory, fixtures, bicycle repair equipment, and a leasehold on its retail location. Several of the employees and G have worked in the bicycle business for many years, and have acquired substantial skill and reputation in the field. Customers often consult with the employees on the best bicycle for purchase. G is in the business of sales and repairs of bicycles and is not engaged in an SSTB within the meaning of paragraphs (b)(1)(xiii) and (b)(2)(xiv) of this section.

Example 8. H is a well-known chef and the sole owner of multiple restaurants each of which is owned in a disregarded entity. Due to H's skill and reputation as a chef, H receives an endorsement fee of \$500,000 for the use of H's name on a line of cooking utensils and cookware. H is in the trade or business of being a chef and owning restaurants and such trade or business is not an SSTB. However, H is also in the trade or business of receiving endorsement income. H's trade or business consisting of the receipt of the endorsement fee for H's skill and/or reputation is an SSTB within the meaning of paragraphs (b)(1)(xiii) and (b)(2)(xiv) of this section.

Example 9. J is a well-known actor. J entered into a partnership with Shoe Company, in which J contributed her likeness and the use of her name to the partnership in exchange for a 50% interest in the capital and profits of the partnership and a guaranteed payment. J's trade or business consisting of the receipt of the partnership interest and the corresponding distributive share with respect to the partnership interest for J's likeness and the use of her name is an SSTB within the meaning of paragraphs (b)(1)(xiii) and (b)(2)(xiv) of this section.

Example 10. M is a shareholder of a regulated bank that has elected S corporation status. In addition to making loans and taking deposits, the bank may sell selected loans to government sponsored entities as part of its trade or business for purposes of managing liquidity, capital and interest rate risk. These activities do not constitute dealing in securities within the meaning of Section 199A(d)(2)(B).

(c) Special rules. (1) De minimis rule. ~~-(i) Gross receipts of \$25 million or less. For a trade or business with gross receipts of \$25 million dollars or less for the taxable year, a~~ trade or business is not an SSTB if less than 4025 percent of the gross receipts of the trade or business are attributable to the performance of services in a field described in paragraph (b) of this section. For purposes of determining whether this 4025 percent test is satisfied, the performance of any activity incident to the actual performance of services in the field is considered the performance of services in that field. If the gross receipts attributable to the performance of services in a field described in paragraph (b) of this section exceed the de minimis threshold, such activity shall be treated as a separate trade or business (if it qualifies as a separate trade or business under the principles of section 162) that shall not be aggregated with the trade or business that is not an SSTB.

~~(ii) Gross receipts of greater than \$25 million. For a trade or business with gross receipts of greater than \$25 million for the taxable year, the rules of paragraph (c)(1)(i) of this section are applied by substituting “5 percent” for “10 percent” each place it appears.~~