# AN UNQUALIFIED MESS: THE PASS-THROUGH DEDUCTION'S POLICY FLAWS, WHY ITS REGULATIONS DID NOT SOLVE THEM, AND HOW IT CAN BE REFORMED

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**Abstract**

*The pass-through deduction in Section 199A of the 2017 Tax Cuts and Jobs Act ("TCJA") has been highly controversial. Shortly after Section 199A's adoption, tax scholars widely condemned it as a vehicle for tax avoidance schemes and many called for its outright repeal. This article supplements the scholarly discussion of 199A by analyzing whether the Treasury Department's regulations promulgated in the years following the TCJA actually prevented the tax avoidance schemes that scholars predicted. I conclude that the regulations close many, but not all, of the most egregious tax planning loopholes. After examining possible reforms to make the deduction more economically efficient and less prone to abuse, I conclude that repealing the pass-through deduction with a capital limitation deduction is the best way to reform this provision. Doing so would stimulate capital investments, simplify the deduction, and close many of section 199A's current loopholes that the Treasury Department thus far left open.*

## INTRODUCTION

The pass-through deduction for qualified business income provided in Section 199A of the Tax Cuts and Jobs Act ("TCJA") is controversial and under-studied. By way of a 20 percent tax deduction, this unprecedented provision taxes some business income, earned by owners of pass-through entities, at a lower rate than wage income. The pass-through deduction will expire in 2025, unless lawmakers choose to extend it.

The pass-through deduction naturally incentivizes wage earners to convert wage income into business income to earn the tax deduction. To mitigate such tax avoidance schemes, lawmakers and the Treasury Department placed restrictions on high-income service businesses that could easily recharacterize wage income as business income. For example, one limitation prohibits the deduction for businesses categorized as services—such doctors and lawyers—if they make over $415,000 for joint filers. But the limitations designed to stop tax avoidance may prove to be ineffectual, because businesses affected by the limitations may simply plan around the limitations to be eligible for the pass-through deduction. Tax scholars have yet to critically examine the effectiveness of these limitations. Most academic research on section 199A was published prior to the regulations being finalized and since then, most analysis has been confined to tax practitioners emphasizing compliance.[1] This article seeks to fill that void by providing comprehensive analysis and proposing practical reforms.

While the implemented regulations were effective against some of the most aggressive tax planning strategies, such as business owners breaking apart their service and non-service income into separate businesses to avoid the service limitation, the regulations did not foreclose all opportunities for tax avoidance. For example, new employees can still request to be classified as independent contractors to become eligible for the deduction, the regulations still allow some services to claim the deduction, and the Treasury's narrow interpretation of "reputation or skill" as a basis for denying the deduction leaves many opportunities for taxpayers to use the deduction as a means of tax avoidance.

The regulations' deficiencies leave Section 199A ripe for reform. Furthermore, the dearth of political support for eliminating the deduction suggests

[1] *See, e.g.*, David Kamin et al., *The Games They Will Play*, 103 MINN. L. REV. 1439 (2019); Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 BOS. UNIV. L. REV 651 (2020).

that lawmakers may extend the deduction beyond its nominal 2025 expiration date. Thus, it is important to evaluate how the deduction can be improved.

The first proposal analyzed in this paper is the Small Business Tax Fairness Act proposed by Senator Ron Wyden, Chairman of the Senate Finance Committee. Chairman Wyden's proposal would deny the deduction to taxpayers who earn over $500,000 and thereby eliminate the need for complicated restrictions for high-income earners.[2]

The second proposal this paper evaluates is a simplified business deduction that would allow all pass-through businesses to deduct a relatively small amount—$6,000 for joint filers—from their income taxes. Such a small deduction would likely not motivate taxpayers to game the deduction by changing their employment status.

The third proposal allows a deduction based on the adjusted basis of business property owned by a household, multiplied by a fixed rate of return. This capital limitation deduction would limit tax avoidance opportunities because pass-through business owners would have to make monetary investments to increase their deduction. This would encourage economically-productive investments.

These proposals would simplify the pass-through deduction by making it less distortionary, reducing the ability for businesses to artificially inflate their pass-through deduction, and lowering their effective tax rates. Of the various proposals, the capital limitation proposal would likely cause the biggest economic stimulus by encouraging businesses to increase investment to gain a higher pass-through deduction. Conversely, the capital limitation proposal would raise less revenue than the other two proposals. The first two proposals would have fewer direct economic benefits but would be the simplest to implement and would significantly increase federal revenues that could be used for other programs or reforms. Lawmakers can accordingly choose how to deal with the expiring deduction based on their political priorities.

## I. HOW THE DEDUCTION WORKS

Section 199A of the federal tax code allows taxpayers to deduct up to 20 percent of qualified business income, which is income from a "trade or business" other than "the trade or business of performing services as an employee."[3] This provision means that income earned from employment is not eligible for the deduction because it is not qualified business income. The deduction reduces the

[2] Small Business Tax Fairness Act, S. 2387, 117th Cong. § 2(a)(1)(B) (2021).

[3] I.R.C. § 199A(d).

maximum tax rate of pass-through businesses eligible for the deduction from 37 percent to 29.6 percent (or 33.4 percent when including the 3.8 percent Net Investment Income Tax), providing major tax savings to households who earn income from pass-through businesses.[4]

To reduce opportunities for tax avoidance, the deduction has many complicated rules designed to limit the deduction to certain types of businesses. The pass-through deduction is equal to the smaller of 20 percent of the household's eligible business income or 20 percent of the household's taxable ordinary income before calculating the pass-through deduction. For example, take an engineer who earns $50,000 from his business organized as a sole proprietorship. Assume he takes the $12,000 standard deduction, leaving him with $38,000 in taxable income. His maximum pass-through deduction is $7,600 (20 percent of $38,000 in taxable income) because it is less 20 percent of his $50,000 in eligible business income.

Upper-income households with pass-through income are subject to two complicated limits on the deduction, both of which are intended to reduce abuse. Both limits begin by incrementally phasing out taxpayers with taxable income over $157,500 (or $315,000 for married joint filers). The limits apply in full for taxpayers with taxable income over $207,500 if filing single or $415,000 if filing jointly. The first limit applies to households that receive income from a "specified service trade or business."[5] Business owners with specified service income over the phaseout amount are ineligible for the pass-through deduction.

The statute defines a "specified service trade or business" as "any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees."[6] The specified service limitation specifically excludes architects and engineers from the limitation, making these professions eligible for the deduction.[7]

The "reputation or skill" language is a catch-all provision designed to capture all of the services not specifically enumerated by section 199A. The reason for this limitation is that it is easy for employees in service fields to turn wage income into business income. For example, an associate at a law firm earning $400,000 would just have to reclassify from employee to independent contractor to become eligible for the pass-through deduction without this limitation. Business

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[4] Calculation for the tax rate for pass-through businesses eligible for §199A: [.37 – (.37 * .2)] +.038.

[5] I.R.C. § 199A(d)(3)(A).

[6] I.R.C. § 199A(d)(2).

[7] *Id.*

income from these services under the $315,000 threshold is eligible for the pass-through deduction and the tax planning strategies available to taxpayers employed in these sectors is discussed in section four.

The second limitation on upper-income households is a wage or capital limitation designed to ensure that taxpayers claiming the deduction are engaged in actual business activity, mainly paying wages to employees and investing in tangible property. This limitation is that their 199A deduction is limited to the greater of 50 percent of the W-2 wages paid by the business or the sum of 25 percent of the W-2 wages of the business plus 2.5 percent of the unadjusted basis in tangible property held by the business.[8] Using the previous engineering example, the engineer now has $500,000 in pass-through income and takes $50,000 in itemized deductions. He has a tentative pass-through deduction of $90,000 (20 percent of $450,000 which is less than 20 percent of $500,000). However, because he is above the $207,500 threshold for a single filer, he is subject to the wage/capital limitation. If his share of wages paid by the business is $100,000 and his business has invested $10,000 in tangible property, his pass-through deduction is limited to $50,000 because the 50 percent wage limitation is greater than the sum of 25 percent of the wages he paid and 2.5 percent of his unadjusted basis.[9]

Important to note, dividends received from real estate investment trusts (REITS) are eligible for the deduction and not subject to the wage or capital limitations described above.[10]

## II. THE PASS-THROUGH DEDUCTION FAILS THE MAJOR PRINCIPLES OF TAX POLICY

The subsequent subsections discuss how the pass-through deduction violates the major principles of good tax policy. To summarize, it is a non-neutral provision that leads to an inefficient allocation of capital in two regards: it benefits pass-through businesses over c-corporations and benefits non-service businesses over service businesses.[11] This has the effect of decreasing the economic boost that

[8] I.R.C. § 199A(b)(2).

[9] The 50% wage limitation governs this situation because 50% of $100,000 of W-2s is $50,000. The capital wage limitation in this scenario is (25% of $100,000) + (2.5% of $10,000). This equals $25,250, which is less than $50,000.

[10] I.R.C. § 199A(b)(1)–(2).

[11] For the rest of this paper, the term "corporations" refers to C-corporations only. S-corporations are captured by the terms "pass-through businesses," "pass-through entities," "businesses," or any similar term.

deduction would otherwise create because the tax code is favoring certain businesses over others, which violates important horizontal equity principles.[12] Second, the policy is difficult to administer for the IRS because there are ample tax planning opportunities for taxpayers looking to maximize their deduction. Finally, the deduction's benefits flow primarily to high income earners, in turn reducing the progressivity of the tax code. These violations of good tax policy reduce any small economic stimulus the deduction may provide.

### *A. Horizontal Equity*

Horizontal equity is one of the most important principles of tax policy. When the tax code does not favor certain types of business over others, it leads to a more efficient allocation of capital. This efficiency occurs because investors are investing due to economic reasons and not due to tax reasons.[13] However, the pass-through deduction violates this important principle on several levels. First, the specified service limitation for upper-income households means that service-based pass-through businesses, such as accounting and law firms enumerated in the statute, are ineligible for the 20 percent deduction. This results in investors that are incentivized to invest in businesses that are eligible for the deduction over ones that are not, even though that investing in the service business might have been the more economically sound investment without section 199A.

The second way in which the pass-through deduction violates horizontal equity is that it widens the tax advantage pass-through entities have over their similar situated corporate competitors, giving pass-through businesses a structural tax advantage. For example, after the TCJA, distributed corporate profits face a maximum tax rate of 39.8 percent when factoring in the 3.8 percent Net Investment Income Tax (NIIT).[14] However, many pass-through businesses face a maximum tax rate of 33.4 percent after taking the 199A deduction and factoring in the 3.8 percent NIIT. This difference encourages investors to invest in passthroughs over corporations in a scenario where both businesses face the top maximum rate. Losses in economic output occur when investments and business decisions are motivated by differences in tax structures, rather than market conditions.[15]

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[12] *See* Eric Zwick & James Mahon, *Tax Policy and Heterogeneous Behavior*, AM. ECON. REV. 217, 245 (Jan. 2017).

[13] *See* LAURIE L. MALMAN ET AL., THE INDIVIDUAL TAX BASE: CASES, PROBLEMS AND POLICIES IN FEDERAL TAXATION (2d ed. 2002).

[14] Calculation for the top tax rate on corporate profits is as follows: [(Profit * 0.21) + (Full Dividend * 0.238)] / Profit.

[15] MALMAN ET AL., *supra* note 13.

Furthermore, the pass-through deduction creates pressure for c-corporations to re-organize as a pass-through, so they can take advantage of this favorable tax treatment, adding to the additional regulatory costs for public companies not faced by those that are private.[16] Tax-motivated reorganizations cost time, money, and other resources that could be reinvested in more productive ways, leading to another deadweight loss. The tax gap between corporations and pass-through businesses would be much narrower with TCJA tax rates and without section 199A. Without 199A, pass-through businesses would face a maximum tax rate of 40.8 percent, one percentage point higher than the maximum tax rate on corporate profits, assuming the corporate tax rate remains at 21 percent in a post 199A world. Furthermore, the progressive rate structure of the individual income tax code would mean that most pass-through businesses would face a lower effective tax rate than most corporations, even without 199A, but just not as extreme as the current tax disparity. Eliminating or reforming 199A would help equalize the tax treatment between pass-through entities and corporations, and it would lead to a more efficient tax code.

### *B. Tax Planning Opportunities*

Section 199A is a tax planner's dream because the poorly designed structure creates ample opportunities for tax avoidance. These strategies make the tax code hard to administer for the IRS, and they give some business owners a tax advantage over others just by reclassifying parts of their business or reclassifying their employment status. Section four of this paper will address whether the IRS regulations following the deduction's enactment succeeded in stopping some of these avoidance opportunities that the pure legislative text of the statute creates.

The easiest way for a taxpayer to game 199A and become eligible for the deduction is to reclassify their employment status. If an employer allows an employee to reclassify as an independent contractor, and if that contractor earns below the $157,500 threshold, he becomes fully eligible for the 20 percent tax deduction. Employers will likely be open to this reclassification because they can offer independent contractors fewer benefits. This is a major tax avoidance strategy for service industries where it is easier to reclassify wage income as business income. For example, a first-year law associate can form a sole-proprietorship or re-classify as an independent contractor and become eligible for the pass-through deduction if he earns less than $157,500. If he earned more than this amount, the

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[16] *See* Chris Edwards, *Corporate Power and Shared Prosperity*, CATO INST. (July 14, 2021), https://www.cato.org/testimony/corporate-power-shared-prosperity [https://perma.cc/N4C3-449Q].

specified service limitation would begin to limit his pass-through deduction until the lawyer earned above $207,500 when it would cease entirely. Therefore, some employees can receive a major tax benefit just by reclassifying their employment status, leading to greater revenue losses by the government and an easily exploitable tax provision.

The tax code already gives independent contractors benefits that employees do not receive. For example, independent contractors can deduct ordinary and necessary business expenses under section 162(a), which is not available to employees. Independent contractors are also not subject to withholdings. Instead, they must estimate their withholdings every quarter and remit. This system is a difficult and time-consuming process that leads to some independent contractors underreporting their income and paying less in income taxes than their wage-earning counterparts.[17] The benefit section 199A gives to independent contractors with these other tax benefits will just further accelerate the growth of independent contractors in the economy, which would likely further widen the tax gap as independent contractors make up a disproportional segment of the tax gap.[18] The independent contractor loophole is a significant tax avoidance opportunity that provides workers with numerous tax advantages in addition to earning the pass-through deduction.

Other tax planning strategies section 199A would allow without any accompanying regulations is what tax scholars have referred to as "cracking" and "packing".[19] These are two methods to get around the specified service limitation. The cracking strategy is simple: a business owner earning above the $207,500 (or $415,000 for married joint filers) threshold should "crack apart" his business by separating the revenue into service and non-service entities. This way, the non-service revenue of his business is eligible for the full pass-through deduction. For example, a professional baseball owner should form separate entities for the service part of his business that includes gate receipts and advertising revenue from the non-service revenues of running a baseball team like merchandise sales. This way the merchandise sales would not be subject to the specified service limitation

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[17] *See* Travis Nix, *Taxing the Gig Economy: Congress Made an Improvement but More Reforms Are Needed*, BLOOMBERG TAX (Sept. 1, 2021, 4:44 AM), https://news.bloombergtax.com/daily-tax-report/taxing-the-gig-economy-congress-made-an-improvement-but-more-reforms-are-needed [https://perma.cc/A33Y-GQXC].

[18] *Id.*

[19] Kamin, *supra* note 1; *see also* David Hochman, *IRS Proposed Section 199A Regulations Would Limit Use of "Crack and Pack" Planning*, JD SUPRA (Sept. 6, 2018), https://www.jdsupra.com/legalnews/irs-proposed-section-199a-regulations-84002/ [https://perma.cc/R8SK-J6NV].

and only be limited by the wage/capital limitations. Another way to do cracking is to use the fact that REIT income is always eligible for the maximum rate. Therefore, an accounting firm who owns its own building could form a REIT and have the REIT hold the firm's real property.[20] Then, the REIT could overcharge the accounting firm for rent, which would convert some of the accounting firm's revenue, which is not eligible for 199A due to the service limitation, into REIT dividends income which is eligible for the deduction.[21] Section 199A on its face allows cracking, which makes the specified service limitation less administrable.

Packing does the opposite of cracking. Instead of separating revenue streams, a taxpayer tries to pack a small amount of service income into non-service income, which increases his income and makes his tax deduction even larger. This way a business does not primarily offer services but can use service income that would otherwise be disqualified from 199A to increase a taxpayer's pass-through deduction.

There are also ways a taxpayer can avoid the wage limitation. The purpose of this limitation is if a business has high income from a pass-through business but is not paying wages to employees, it likely is not an actual business and just engaging in tax planning to disguise wage income as pass-through income to get a 20 percent tax deduction. However, a problem with the wage limitation is that many businesses pay more in wages than they earn in profit. Thus, the wage limitation for some businesses has little meaning because 50 percent of a business' W-2 wages will almost always be higher than its qualified business income. This encourages owners of pass-through entities to pack excess W-2 wages into businesses with high profit margins but few wages to plan around the W-2 limitation for those entities. This means that businesses with excess wages could try to acquire companies with high profit margins but few wages to try and use their excess wages. This would be similar to what companies did if they had excess

[20] REITs would be very easy to form for large partnership organizations like law firms and accounting firms who own real estate due to REIT rules that require many different shareholders. The basic rule for a REIT is that beginning in its second taxable year, a REIT must have at least 100 shareholders (the 100 Shareholder Test) and five or fewer individuals cannot own more than 50% of the value of the REIT's stock during the last half of its taxable year (the 5/50 Test). If a large accounting firm has more than 100 partners, a REIT for its real estate is simple to form.

[21] For example, a law firm who owns its building with $100 million in profits and 100 equal partners could form a REIT and charge itself $100 million in rent, immediately distribute it as a qualified REIT dividend, and receive a cumulative $20-million-dollar pass-through deduction.

investment tax credits before the Tax Reform Act of 1986 eliminated the investment tax credit.[22] Mergers and acquisitions just taking place for tax reasons are a deadweight loss as resources are being underutilized.

Ultimately, all these mentioned tax avoidance strategies increase the complexity of the tax code. The availability of these strategies ensure that business resources will be spent on tax planning instead of more economically productive uses and makes the pass-through deduction harder for the IRS to administer, meaning that 199A violates two major principles of tax policy.

### *C. Vertical Equity Concerns*

The pass-through deduction also creates vertical equity concerns since it makes the tax code more regressive by primarily benefiting high income earners. While pass-through businesses are commonly thought of as "small businesses," not all pass-through businesses are small. In fact, about 70 percent of all income earned by partnerships flows the top 1 percent of all U.S. income earners.[23] In 2011 as an example, 32 percent of all pass-through income was earned by taxpayers with AGI of over one million dollars.[24] While only 2.2 percent of all pass-through businesses have AGI of over $500,000, they account for a majority of income earned by all pass-through businesses.[25] These statistics raise major vertical equity concerns about section 199A; the 20 percent deduction gives these higher earning pass-through businesses the most benefit.

Economists at the Treasury Department have confirmed this suspicion. They estimate that with sufficient guardrails from the regulations that limit the deduction, the top five percent and one percent will receive 72 percent and 47 percent of all 199A tax savings, respectively.[26] Without sufficient regulatory guardrails, they estimate "that 83 percent of the total tax savings from the pass-

[22] *See, e.g.*, Smith v. Van Gorkom, 488 A. 2d. 858, 865 (Del. 1985) as an example of this strategy.

[23] *See* Arron Krupkin & Adam Looney, *9 Facts About Pass-Through Businesses*, BROOKINGS INST. (May 15, 2017), https://www.brookings.edu/research/9-facts-about-pass-through-businesses/ [https://perma.cc/P6WL-PF36].

[24] *See* Mark P. Keightley, *Who Earns Pass-Through Income? An Analysis of Individual Income Tax Return Data*, CONG. RSCH. SERV. (Oct. 24, 2017), https://sgp.fas.org/crs/misc/R42359.pdf [https://perma.cc/M2ET-VNW7].

[25] *Id*.

[26] *See* Lucas Goodman et al., *Simulating the 199A Deduction for Pass-Through Owners*, U.S. DEP'T OF TREASURY (May 2019), https://home.treasury.gov/system/files/131/WP-118.pdf [https://perma.cc/3BY5-8GCQ].

through deduction accrues to the top five percent of tax units, with 64 percent accruing to the top one percent."[27] Section four of this paper will cover how the regulations are not sufficient to stop the deduction's tax avoidance opportunities, meaning that it is likely that more than 47 percent of all 199A tax savings benefit the top one percent.

### *D. Economic Efficiency*

Since the pass-through deduction violates the principles of neutrality, simplicity, and administrability, the only way it can be justified on tax policy grounds is being economically efficient because it is equivalent to an effective rate cut. As a tax cut on business income, the deduction should spur economic growth by cutting the cost of capital. This should grow the capital stock and ultimately boost wages and create jobs by lowering the cost of economically productive investments.[28] However, the structure of 199A is likely to limit its economic effectiveness.

First, the phase-out of the deduction is a marginal tax rate increase and the phase-out combined with the service limitation means that service businesses are incentivized to keep their business income below the $207,500 (or $415,000 for married joint filers) limits to avoid all of their pass-through income becoming ineligible for the 20 percent tax deduction. This service limitation encourages businesses to limit their growth as earning just a little above this threshold can have major tax consequences. For example, a service business owner filing jointly with $355,000 in total taxable income would still be eligible for a 20 percent tax deduction on 60 percent of his business income, for a tax deduction of $42,600 provided that his firm paid W-2s greater than $71,000 to satisfy the 50 percent wage limitation.[29] However, if he earned just $55,000 more, he would lose all $42,600 which may not be worth the extra business activity. This alone is a 77.4 percent marginal tax rate.

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[27] *Id*.

[28] *See* Adam Michel, *The High Price American Workers Pay for Corporate Taxes*, HERITAGE FOUND. (Sept. 11, 2017), https://www.heritage.org/taxes/report/the-high-price-american-workers-pay-corporate-taxes [https://perma.cc/Z7UF-SDGY].

[29] Calculation for percentage of income eligible for pass-through deduction is ($415,000-$355,000)/($100,000) or ($415,000-taxable income)/(width of phaseout, which is $100,000).

Second, the deduction's aforementioned neutrality issues will lead to a less efficient allocation of capital and limit any positive effects the deduction has.[30]

Third, the deduction is set to expire in 2025, and its temporary nature will further limit its economic impact. Temporary tax laws come with economic consequences. Economists have illustrated repeatedly that temporary tax laws result in less economic growth than permanent ones because the possibility of a future tax hikes reduces the incentive to invest, especially since many major investments do not become profitable until many years in the future.[31] Business investment looks forward to the future. If a company does not think an investment will be profitable in the future due to a changing tax code, then the business will not invest. Therefore, a business owner is unlikely to reinvest his 199A tax savings into an investment that will last 30 years if he thinks that 199A will expire. Temporary tax policy increases the uncertainty of the tax code, which reduces investment and overall economic growth over the long run in comparison to permanent tax policy. Even though recent temporary tax policies have been consistently reauthorized like "tax extenders," the criticism 199A has gotten from across the political aisle makes it more likely it will not be renewed unlike other "temporary tax policies" in the tax code.[32] But, no effort to scale 199A back has been successful in Congress yet, which points to its possible renewal in the future.

Even under the rosiest projections of 199A's economic effects, the Tax Foundation has estimated that a partial repeal of 199A in 2021 would have no effect on long term GDP because it is temporary under current law.[33] Even if 199A has a positive economic effect, its violations of the tax policy principles of neutrality, simplicity, permanence, and administrability far outweigh the possible

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[30] *See* Jason Furman, *The Concept of Neutrality in Tax Policy*, BROOKINGS INST. (Apr. 15, 2008), https://www.brookings.edu/wp-content/uploads/2016/06/0415_tax-_neutrality_furman-1.pdf [https://perma.cc/X5VW-UQ3P].

[31] *See* Kyle Pomerleau, *Temporary Tax Policy in the Federal Tax Code*, TAX FOUND. (Mar. 13, 2019), taxfoundation.org/testimony-temporary-tax-policy/ [https://perma.cc/RR8V-Z39C].

[32] *See* Adam Michel & Travis Nix, *Tax Reform has Never Been So Easy*, HERITAGE FOUND. (July 25, 2019) https://www.heritage.org/taxes/commentary/tax-reform-has-never-been-so-easy [https://perma.cc/T7V9-87RT]; Samantha Jacoby, *Repealing Flawed Pass-Through Deduction Should Be Part of Recovery Legislation*, CTR. FOR BUDGET AND POLICY PRIORITIES (June 1, 2021), https://www.cbpp.org/research/federal-tax/repealing-flawed-pass-through-deduction-should-be-part-of-recovery-legislation [https://perma.cc/3QPY-CFMG].

[33] *See* Alex Durante, *Analysis of Sen. Wyden's Pass-through Deduction Proposal*, TAX FOUND. (Aug. 17, 2021), https://taxfoundation.org/wyden-199a-pass-through-deduction/ [https://perma.cc/4WSJ-225Z].

small positive economic effects. can be designed in a better way to better satisfy these important principles and have a cheaper cost.

## III. 199A'S REGULATIONS DO NOT SOLVE ALL THE DEDUCTION'S TAX PLANNING OPPORTUNITIES

The Treasury Department's regulations were an opportunity for the agency to stop some of the aggressive tax planning opportunities discussed in section three. It was also an opportunity for the Treasury to specifically define key terms such as what exactly is a specified service business that would be subject to the complete exclusion of the deduction's tax benefits for high income earners. Overall, while the regulations do stop some tax planning strategies, the Treasury Department can do more further curtail tax avoidance. To preview, the regulations do a good job at stopping most cracking and packing strategies and partially close the independent contractor loophole, the regulations do not clearly define what is a specified service business. The regulations' poor definitions keep the door open for wage earners who perform many services to convert their income into qualified business income.

Even worse, the regulations make arbitrary distinctions between different types of services with no clear explanation, making it possible that these regulations would be struck down if challenged in court under the Administrative Procedures Act (APA).

### *A. Independent Contractor Loophole is Partially Closed*

The regulations do partially close the independent contractor loophole that would make many employees eligible for the pass-through deduction by simply reclassifying their employment status from employee to independent contractor. Treasury Regulation section 1.199A-5(d)(3) creates a presumption that former employees are still employees for purposes of the deduction that can only be refuted by providing documentation, such as a contract or partnership agreement. Therefore, former employees would actually need to provide evidence that they are an independent contractor to receive the pass-through deduction, such as losing employee benefits. This presumption helps close the independent contractor loophole as there actually needs to be a change in employment status for a taxpayer to receive the pass-through deduction.[34]

[34] Treas. Reg. § 1.199A-5(d)(3).

However, this presumption still only applies to former employees. A law firm associate who makes under $157,500 could easily switch firms and be misclassified as an independent contractor and receive the 20 percent pass-through deduction. There is nothing in the regulations that stop this tax avoidance strategy.

### *B. Cracking is Largely Stopped by the Regulations*

The regulations appear to eliminate most cracking strategies, which was one of the major ways section 199A looked like it could be abused before the regulations were promulgated. The regulations state that the service exclusion applies to all business income if a pass-through owner of a non-service business has more than 50 percent common ownership with a specified service business.[35] This means that high-income business owners cannot split their profit streams into different entities, service and non-service, and receive the deduction, if they retain controlling ownership in each. Therefore, the regulation eliminates the most egregious cracking strategies.

However, there are some other cracking strategies that survive the regulation if the overhead expenses are not owned by the same people. For example, if a service business does not own its own building and the building is owned by a REIT, the service business owners could buy into the REIT (below 50 percent ownership) and agree to be overcharged in rent.[36] This strategy would convert the income stream from service income into REIT income eligible for the pass-through deduction, resulting in the service owner and the REIT controlling owner splitting the tax savings.

Although this form of cracking survives, it involves complicated business relationships that require a lot of trust between the service owners and REIT owners. This likely means that few business owners will go through the trouble of cracking their business with a REIT, just so that the service business owner can receive a tax deduction. One example, where there may be a level of trust sufficient for this type of cracking to be viable, is if the building owners and pass-through business owners have a longstanding business relationship that has lasted many years. Also, if the REIT owners are somehow a supplier for the pass-through, then

[35] Treas. Reg. § 1.199A-5(c)(2).

[36] An example of this strategy would be a law firm buying into the REIT that owns it building at 49 percent, being charged $2 million in rent instead of one million, and now the firm partners are eligible for a cumulative $196,000 199A deduction on 49% dividend they receive. They can further contract with the REIT shareholders to further split the proceeds and get back the one million dollars they lost from diluting their shares to buy into the REIT. They can contract such that both parties benefit.

this business relationship may create the level of trust needed to make this type of cracking viable. However, these business strategies are risky and likely are not worth the trouble of becoming eligible for a tax deduction.

A business owner could also split his two businesses and gift 51 percent of the non-service business to his girlfriend or to an officer of the business if they agree to split the profits. This form of cracking is less likely to happen in the real world than the previous REIT example because it requires the business owner to gift away equity in his company, which likely is not worth giving up just to have some of his income eligible for the pass-through deduction. The benefit would also disappear once the couple marries. There might also be gift tax consequences for this strategy that would further limit its viability.

### *C. The Regulations Largely End the Packing Strategy*

While a few forms of cracking may still be viable, the regulations largely end the packing strategy's viability. The regulations provide that a business with less than $25 million in gross receipts is a specified service business if more than 10 percent of the receipts is attributable to the specified services.[37] For businesses with more than $25 million in receipts, the threshold is lowered to five percent.[38] The regulation create a powerful de minimis exception because any business with any significant specified service component is ineligible for the deduction.

One of the only viable workarounds is for individual employees who can pack their skills into a goods producing business. For example, a partner at a law firm who has income ineligible for the deduction while at the firm can go in house at an engineering firm which is not a specified service under the statute and pack his legal services into a business that is eligible for the pass-through deduction.[39] This is a small workaround for a single employee that is not applicable to larger business owners with service and non-service income.

### *D. The Regulations Poorly Define Specified Service Trade or Business*

All the tax planning strategies mentioned above only matter if a high-income taxpayer has specified service trade or business income, but the regulations so narrowly define this term of art that the biggest tax avoidance strategy remaining is to just classify a taxpayer's service income as not meeting the regulations' narrow definition.

[37] Treas. Reg. § 1.199A-5(c)(1)(i).
[38] Treas. Reg. § 1.199A-5(c)(1)(ii).
[39] I.R.C. § 199A(d)(2)(A).

For example, broadcasters and announcers, who are clearly providing a service to TV viewers, are specifically enumerated in the regulations as not being in the disqualified service of athletics or in the disqualified field of performing arts.[40] Let's take Harry Caray as an example, one of the most famous announcers of all time. No one ever disputed that Harry Caray performed a service of announcing baseball games for the Chicago Cubs, but under these regulations if he were alive and still broadcasting ballgames, he could have formed a sole proprietorship and contracted with the Cubs to announce games and received 20 percent tax deduction because he performed a service that is specifically classified as not a service in the regulations. The IRS comments accompanying the final regulations do not offer any reason for excluding broadcasters from the categories of performing arts and athletics.[41]

Now, the IRS may argue that in this example that Harry Caray cannot claim the pass-through deduction because he relies on his "reputation or skill" as an announcer and is therefore disqualified from the deduction because the deduction has a catch-all provision that a business is a specified service trade or business if the principal asset of such trade or business is the reputation or skill of one or more employees or owners.[42] At first glance, Harry Caray would appear to be disqualified from the deduction because he relies on his skill and reputation as an announcer. After all, he is a Hall of Fame announcer, with his own catchphrases[43] and has a loyal fan base for simply being Harry Caray. However, the regulations say the reputation or skill catch-all provision only applies in three circumstances: (1) income from product endorsements; (2) licensing fees for use of one's image, name, and so on; and (3) fees for appearances at events, on radio, on television, or through other media formats.[44] This is such a narrow definition that it is hardly a "catch-all" provision at all as it prevents so few service businesses from claiming the deduction.

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[40] Treas. Reg. §§ 1.199A-5(b)(2)(vi), (viii).

[41] *See Treasury, IRS Issue Final Regulations, Other Guidance on New Qualified Business Income Deduction; Safe Harbor Enables Many Rental Real Estate Owners to Claim Deduction*, INTERNAL REVENUE SERV. (Jan. 18, 2019), https://www.irs.gov/newsroom/treasury-irs-issue-final-regulations-other-guidance-on-new-qualified-business-income-deduction-safe-harbor-enables-many-rental-real-estate-owners-to-claim-deduction [https://perma.cc/F6EW-9JSA].

[42] Treas. Reg. § 1.199A-5(b)(2)(xiv).

[43] Exclaiming "Holy Cow!" after a Cubs homerun is Caray's most famous catchphrase.

[44] Treas. Reg. § 1.199A-5(b)(2)(xiv).

To illustrate how narrow this definition is, the examples in the regulation provide that a celebrity chef who opens and owns a restaurant can claim the deduction even though the business relies on his reputation as a chef to succeed.[45] Thus, this catch-all provision would not stop celebrity chef Gordon Ramsay from claiming the deduction for his restaurants with his name on them and it would not stop Harry Caray either. The catch-all provision would not cover Harry Caray because he would not be receiving fees for only appearing on radio or television, he would be receiving payment for broadcasting Cubs games. The regulations' examples confirm this fact. The examples only provide two scenarios of activities that meet this narrow catch all provision and these are endorsement fees for an actor and celebrity chef endorsing a product on TV.[46] Caray's broadcasting fees are not endorsement fees or appearance fees for him to sell a product on TV, making his income eligible for the pass-through deduction. The provision is so narrow that it has led to some practitioners to labeling the provision as the "Kardashian provision" since it would only seem to cover the Kardashians' product lines and makeup endorsements.[47]

The Harry Caray example is just one example of how narrow the regulations' definitions are. Under the regulations, owning health clubs is not performing a service in the field of health and making loans is not performing a service in the field of financial services.[48] There are major tax planning strategies available to Americans if they can argue that their service is not covered by the narrow regulatory definitions provided.

An additional downfall of these regulations is that they make arbitrary distinctions that seemingly violate the ordinary meaning of terms like "health" and "financial services." It is possible that if the IRS does peruse an enforcement action against a taxpayer for claiming the deduction even though his business is a specified service business, the taxpayer would be able to strike down the regulations for violating the APA. The Supreme Court has ruled that when agencies use notice and comment rulemaking, as was the case with the pass-through deduction regulations, the agency must provide a reasoned analysis if the

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[45] Treas. Reg. § 1.199A-5(b)(3)(xv).

[46] Treas. Reg. §§ 1.199A-5 (b)(3)(xv), (xvi).

[47] *See, e.g.*, Crystal Christenson, *IRS Issues Guidance on Section 199A: The 20 Percent Passthrough Deduction*, WIPFLI (Aug. 29, 2018), https://www.wipfli.com/insights/articles/tax-irs-issues-guidance-on-section-199a--the-20-percent-passthrough-deduction [https://perma.cc/EP7C-2MJ7].

[48] Treas. Reg. §§ 1.199A-5(b)(2)(B)(ii), (ix).

regulation is upheld.[49] While the Treasury did receive 124 comments from industry interests and trade associations that asked the IRS for guidance defining if their industry was a specified service, the record lacks reasoning for many of their decisions. For example, there is no indication why broadcasting is specifically excluded from the service of performing arts or why owning a health club or gym is not in the field of health.[50] Therefore, if a physical therapist is denied the deduction for being in the service of health, the business owner could win a suit on the theory that the regulation's distinctions are arbitrary and capricious and violate the APA since a similar gym owner would be eligible for the deduction. Beyond opening the door to tax avoidance, the few lines the regulations do draw do not appear to be substantiated by the agency through reasoned decision making which could violate the APA.

## IV. METHODS TO REFORM 199A

Section 199A has clear areas for improvements. Particularly, there are three ways lawmakers can reform the deduction, each with different benefits and costs. It is important to note that any pass-through deduction will inherently violate horizontal equity principles because the tax break will be unavailable to competing c-corporations. Two of these policy options include Senator Wyden's proposal to simply eliminate the deduction for business owners with income over $500,000 and a simplified pass-through deduction that would give pass-through businesses a small below the line deduction. Both of these changes should raise revenue and simplify the deduction. The third option is a capital investment limitation that multiplies a business' adjusted basis by a set rate of return. This proposal would provide fewer tax avoidance opportunities for employees and businesses to exploit and provide the biggest economic boost of all the proposals by moving the tax code closer to full expensing. However, it would provide less revenue gain than the other two proposals.

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[49] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 30 (1983). There are also arguments that agency decisions that don't have the force of law such as revenue rulings should be subject to State Farm. *See* Kristen E. Hickman & Gerald Kerksa, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1716 (2017).

[50] Treas. Reg. §§ 1.199A-5 (b)(3)(xv), (xvi).

*A. Wyden's Proposal is Simple, but the Legislative Text Needs Changing to Improve the Proposal*

Wyden's pass-through deduction proposal would eliminate 199A's complex limitations for upper-income earners reform by disallowing the deduction for taxpayers earning above $500,000 with a phaseout beginning at $400,000.[51] By eliminating the wage/capital limitations, 199A becomes much simpler for business owners. This reduces compliance costs associated with the deduction, allowing business owners to be more productive instead of having to figure out their 199A deduction.

Furthermore, Wyden's proposal is a revenue raiser as his proposed reforms to the deduction is projected to raise $112 billion over the next four years according to the Tax Foundation.[52] This extra revenue could be used for a variety of economically productive activities such as deficit reduction, other tax cuts, or social spending.

However, the plan suffers from two major tax policy flaws and a smaller third flaw. First, it encourages business owners to keep their income below $500,000. There would be major tax consequences for business owners who earn slightly above the threshold. For example, a business owner who files jointly and reports $400,000 in business income would receive the full 20 percent deduction which amounts to a tax savings of $80,000. However, a business owner with $501,000 in income would not receive any deduction. This plan creates what is effectively a tax cliff with an 80 percent marginal tax rate. In other words, there is a big disincentive for additional business activity under Senator Wyden's plan that could constrain economic growth. This plan, combined with other policies such as the Affordable Care Act mandating that employers with over 50 employees provide their employees' health insurance, makes it more costly for businesses to expand, and reduces the incentive for entrepreneurs to grow their businesses.[53] If one of the rationales for the pass-through deduction's existence is to promote small businesses and their growth, then Senator Wyden's strict cap deduction policy is not the way to achieve more business activity.

The legislative text needs to be updated to make the phaseout longer, as the current phaseout range of $400,000-$500,000 creates significantly high marginal tax rates. The current pass-through deduction has a similar cliff for specified

[51] Small Business Tax Fairness Act, S. 2387, 117th Cong. § 2(a)(1)(B) (2021).

[52] Durante, *supra* note 33.

[53] *See* Casey Mulligan, *Has Obamacare Been Good for the Economy?*, MANHATTAN INST. (2016), https://media4.manhattan-institute.org/sites/default/files/IB-CM-0616.pdf.

service businesses, but this limitation applies to fewer businesses. It is easier to avoid than Wyden's proposal, due to the poorly defined regulations.

Second, Senator Wyden's plan expands the deduction to service businesses, which increases tax planning strategies for these businesses. For example, under this plan and the existing regulatory framework for an employee, a big law associate could easily switch firms and re-classify as an independent contractor and take the 20 percent deduction. Under existing law, most big law associates cannot take the deduction because they earn too much money, but Senator Wyden's proposal makes it easier for wealthy doctors and lawyers making under $500,000 to take the deduction. Under current law, these individuals would be barred by the specified service limitation. While Senator Wyden's proposal is overall progressive, it provides a significant tax cut for higher-income businesses that are currently covered by deduction's the specified service limitation.

A final, yet smaller, flaw of Senator Wyden's proposal is that it would create a marriage penalty for the pass-through deduction because it does not double the threshold amount for joint filers. For the current deduction's flaws, it does not have a marriage penalty. Marriage penalties in the tax code make the code less neutral and can affect how many hours the second income earner in the household works or change decisions to get married in the first place.[54] Marriage penalties are especially bad in the 199A context because lower income gig economy workers are eligible for the deduction and would be faced with this marriage penalty, in addition to any other marriage penalties they already face. The introduction of marriage penalties into the pass-through deduction should be avoided.

### *B. Simplified Business Deduction Improves 199A*

A second way to reform section 199A is to replace the 20 percent deduction with a set business deduction. Scott Greenberg, formerly of the Tax Foundation, proposed setting the simplified business deduction at $3,000 for individuals and $6,000 for taxpayers filing jointly.[55]

Similar to Senator Wyden's plan, a simple, standard deduction makes the proposal more progressive by making the deduction smaller. A $3,000 deduction is more regressive than a 20 percent deduction for a taxpayer with $10,000,000 in

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[54] *See* Kyle Pomerleau, *Understanding Marriage Penalties and Bonus*, TAX FOUND. (Apr. 23, 2015), https://taxfoundation.org/understanding-marriage-penalty-and-marriage-bonus/ [https://perma.cc/JSQ4-ZKV8].

[55] *See* Scott Greenberg, *Reforming the Pass-Through Deduction*, TAX FOUND. (June 21, 2018), https://taxfoundation.org/reforming-pass-through-deduction-199a/ [https://perma.cc/C2H9-WK4F].

QBI. By resembling the standard deduction, this idea would drastically simplify the deduction and raise significant revenue that can be used productively.

Another benefit of this small deduction is it does not widen pass-through business's tax advantage over c-corporations as much as other proposals that offer larger deductions as a percent of income. This will move the tax code closer to rate parity between business entities. It also promotes horizontal equity in another way by allowing all pass-through businesses to take the deduction regardless of industry and income level.

The policy's flaw is that it does not close the door to tax avoidance. A big law associate might still want to reclassify his employment status to take the deduction as an example. However, because the deduction is so small there is not much incentive for employees to game this provision as the potential loss of benefits in reclassifying would likely outweigh any tax savings. This incentivize ironically rises the less money a taxpayer earns because the small deduction is worth more to low-income earners. Therefore, while this plan would still allow tax avoidance, a small deduction would drastically reduce the incentive for wage earners to try to claim the deduction. If this reform proposal is considered, lawmakers should set the deduction at a low dollar figure to reduce incentives for tax avoidance and move the tax code closer towards rate parity between business entity types.

### *C. Capital Investment Limitation Reform Would Produce the Biggest Economic Boost*

The final way that lawmakers could reform section 199A is to replace it with a capital investment limitation where pass-through owners would receive a deduction for their adjusted basis in investment property multiplied by a set rate of return. This proposal would make the deduction simpler, stimulate the economy, and create fewer tax panning opportunities. This reform proposal was initially proposed by Scott Greenberg, and he proposed the return to be 5.5 percent as that represents a typical household's nominal risk-free discount rate but it could be any rate of return lawmakers wish.[56] As an example, a pass-through business that purchased its office building for $800,000 five years ago, took $100,000 in depreciation deductions, and fully expensed all other assets would have an adjusted basis of $700,000 and a pass-through deduction of $38,500 (5.5 percent of 700k).

[56] Greenburg notes that this rate is chosen to cleanly ensure that most of the income is normal returns while also balancing that maximum business income will be eligible for the deduction. A lower rate of return chosen by lawmakers would mean that only normal returns are captured, but it would also lead to a smaller deduction.

This proposal simplifies the current-law pass-through deduction as all businesses already track their adjusted basis in property but is still more complicated than the other two proposals.

Greenberg's capital investment limitation also moves the code closer to full expensing by giving a tax break to investments that cannot be fully depreciated right away. One important goal for Republican lawmakers in the TCJA was moving the tax code closer to a consumption base. A key way they did this was through expensing. Full expensing has been a bipartisan priority with temporary full expensing receiving 284 combined Democrat votes in the House and Senate in 2010.[57] Lawmakers can continue to move the tax code closer to full expensing through this reform if they choose.

This proposal also carries with it some of full expensing's economic benefits. It would cut the cost of capital, which in standard economic models used by mainstream economists across the political spectrum leads to additional investment and a more productive economy with higher wages and more jobs. There is an economic consensus around the benefits of full expensing across the political spectrum. President Obama's Treasury Department, the Heritage Foundation, and academics have found that it would increase investment, productivity, jobs, wages, and overall economic output.[58] Policymakers could expect greater economic benefits from a capital investment limitation compared to the other proposals discussed above. If lawmakers are going to offer pass-through businesses a tax break at all, they might as well design it in a way that encourages economically productive behaviors.

This reform proposal would also reduce tax planning opportunities and instead encourage investment. For example, new employees would no longer receive a 20 percent tax deduction just by classifying as an independent contractor because they have no capital assets, as personal residences cannot be depreciated. Capital investments are a clean way to separate legitimate pass-through businesses from illegitimate pass-through businesses, something the current deduction tries to

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[57] *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, I.R.C. § 168(k) (2011).

[58] *See The Case for Temporary 100 Percent Expensing: Encouraging Business to Expand by Lowering the Cost of Investment*, U.S. DEP'T OF TREASURY (Oct. 29, 2010), https://home.treasury.gov/system/files/131/Report-Temporary-100percent-Expensing-2010.pdf [https://perma.cc/SS3F-972U]; Adam Michel & Peter Shephard, *Simple Changes Could Double the GDP From Tax Reform*, HERITAGE FOUND. (May 14, 2018), https://www.heritage.org/taxes/report/simple-changes-could-double-the-increase-gdp-tax-reform [https://perma.cc/4W7R-GUPQ]; Georgia Maffini et al., *The Impact of Investment Incentives: Evidence from UK Corporation Tax Returns*, AM. ECON. REV. 361, 370 (2019).

do through the capital limitation. But the current limitation does not eliminate all tax avoidance because the limitations only apply to high income earners and is paired with a wage limitation that can be avoided through inefficient mergers as explained previously.

The capital investment limitation is less prone to abuse than the current deduction because actual investment must occur to receive the deduction under the Greenburg proposal. There would be no cracking, packing, or independent contractor loophole with a pass-through deduction with a capital investment limitation.

One anti-abuse rule that would have to be in place for this new proposal to work is that businesses would be ineligible from including purchases of used property in their adjusted basis calculation. Without this rule, corporations would transfer assets to any owned subsidiary classified as a pass-through business to claim a major tax deduction. This anti-abuse rule is simple to implement, and it was the norm prior to the TCJA as used property was ineligible for bonus depreciation to avoid tax avoidance between subsidiaries and parent business.[59] Other rules could be added to address concerns about businesses using non-recourse debt to finance investments if lawmakers wish.

One of the capital investment limitations' drawbacks is it could be a windfall to pass-through businesses that own their buildings. However, for policymakers who favor a full implementation of expensing, this proposal would simply be extending a tax break to the only asset class that is currently ineligible for full current year write offs. To limit the windfall, lawmakers could choose to apply it to only new investments. It also would not likely be a major windfall for capital intensive industries like the energy sector. The energy sector can already expense most of their costs such as intangible drilling costs, so the industry does not necessarily have property with a lot of adjusted bases as most of their property should already be expensed.[60]

Its largest downfall is that this proposal would be more expensive than the other two proposals as it would be a tax break based on real investments that for many businesses could be more than current or other proposed formulations. Full

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[59] I.R.C. § 168(k)(2)(E)( IV)(ii) (2015).

[60] *See* Travis Nix, *Sanders Tax Bill Would Hurt U.S. Oil Producers and Workers*, NAT'L REVIEW (June 8, 2021, 6:30 AM), https://www.nationalreview.com/2021/06/sanders-tax-bill-would-hurt-u-s-oil-producers-and-workers/ [https://perma.cc/S7HR-VR68].

expensing's estimated cost for structures is $322 billion over 10 years.[61] This capital limitation proposal would cost less than that figure and likely even raise revenue compared to the current 199A deduction. Currently, 199A reduces federal revenues by an estimated $50 billion a year, so the deduction would have a 10-year cost of around $500 billion if made permanent.[62] The capital limitation proposal would likely raise revenue as full expensing for structures is cheaper than the current 199A deduction over time.

## CONCLUSION

Section 199A is broken and violates many principles of good tax policy. Its regulations did not entirely fix all the legislative text. It is an unqualified mess that tries to separate qualified business income from unqualified business income, which is an impossible task. The regulations still allow many employees in the service sector to be eligible for the deduction by reclassifying as an independent contractor with a new employer. While the regulations do an adequate job at ending most packing and cracking tax planning strategies, the arbitrary and weak rules for specified service industries remain the deduction's biggest flaw. Easy fixes to the regulations include enumerating more businesses as specified service businesses and strengthening the provision's catch all-provision. However, these improvements would still leave a complex pass-through deduction that is not neutral between all business types.

The three overhauls of 199A discussed in this paper all come with different benefits and drawbacks. Senator Wyden's proposal and the simplified business deduction would both drastically simply the deduction and raise a lot of revenue. The capital investment limitation would likely produce the biggest economic boost but not raise as much revenue as the other two proposals. Lawmakers can use the ideas presented in this paper to reform section 199A based on their specific policy priorities and weigh the benefits and costs of each based on the political climate when it becomes time to reform the pass-through deduction. A day we can all agree cannot come soon enough.

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[61] *See* Erika York, *Economic and Budgetary Impact of Extending Full Expensing to Structures*, TAX FOUND. (Jan. 7, 2020), https://taxfoundation.org/depreciation-of-structures/ [https://perma.cc/RNQ3-VE2W].

[62] Jacoby, *supra* note 32.