

QUALIFIED BUSINESS INCOME DEDUCTIONS IN THE SHARING ECONOMY

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The sharing economy allows users, through online platforms, to connect with others to effectively and efficiently share resources. From renting out extra bedrooms, driving strangers to their destinations, walking others' dogs, allowing people to rent parking spaces, leasing access to personal Wi-fi, and everything in between, these peer-to-peer transaction platforms have created a plethora of available opportunities to conveniently make extra cash and cost-efficiently acquire goods and services.

Though transformative to the global marketplace, the rise of the sharing economy has come not without its challenges. Despite the multi-billion-dollar value of the sharing economy, the current income tax models do not clearly indicate reporting and record-keeping requirements to participants in the sharing economy. Sharing economy earners are often left in the dark when it comes to tax requirements and available benefits. Enacted less than a year ago, Internal Revenue Code Section 199A allows certain businesses to take a deduction of up to 20 percent of their qualified business income. Though the statute does not clearly determine what businesses qualify for the deduction, I believe sharing economy participants can take advantage of this unique, favorable tax regime. Despite the availability of § 199A to sharing economy earners, the newly enacted statute is yet another example of the lack of ease and clarity permeating the tax requirements on the sharing economy.

In this paper, I explore the history and scope of the sharing economy, the effects of Internal Revenue Code § 199A, the ways in which those making money through the sharing economy can benefit from new tax structures, and the need for clear tax directives to better assist participants in the ever-growing peer-to-peer digital marketplace.

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INTRODUCTION

Technology continually influences business practices. Over the past few years, software programs have contributed greatly to the global economy through the sharing economy. Though there is no universally-accepted definition, the sharing economy is generally understood to be the use of technological platforms to “share” resources with others in exchange for money.¹ The sharing economy has created unique market opportunities for those willing to lend their assets to strangers. It also allows those who may not be able to afford their own product or who may not have an ongoing need for a product the opportunity to cost-efficiently borrow from others. The sharing economy also creates a unique incentive for consumers, as they may be more likely to purchase a big-ticket item if there is a potential for income generation.

Lodging programs like Airbnb, around for over ten years now, allow individuals to rent out their homes, or even just a bedroom, to strangers looking for cheaper lodging than traditional hotels.² Through ridesharing applications like Uber and Lyft, people can use their own vehicles to drive others to their destinations.³ Olio, a food-sharing platform, connects neighbors and local business with each other to reduce food waste.⁴ Sites like Rover and Wag! facilitate pet-sitting and dog-walking services between pet-owners and pet-sitters.⁵ Poshmark and ThredUp provide a forum for sellers of vintage, consignment clothing and household goods to connect with buyers. The possibilities are endless in the sharing economy.

Analysts agree that the sharing economy is not a fad, but is undoubtedly here to stay.⁶ The win-win nature of making quick cash by sharing assets combined with a cheaper cost to participate makes the sharing economy particularly favorable for consumers.

1. Bernard Marr, *The Sharing Economy - What It Is, Examples, And How Big Data, Platforms And Algorithms Fuel It*, FORBES (Oct. 21, 2016, 2:16 AM), <https://www.forbes.com/sites/bernardmarr/2016/10/21/the-sharing-economy-what-it-is-examples-and-how-big-data-platforms-and-algorithms-fuel/#5bf889fb7c5a> [https://perma.cc/G3G5-2BRU].

2. Jean Folger, *Airbnb: Advantages and Disadvantages*, INVESTOPEDIA (Apr. 11, 2019), <https://www.investopedia.com/articles/personal-finance/032814/pros-and-cons-using-airbnb.asp> [https://perma.cc/7T7D-DUR5].

3. *A Guide for How to Use Uber*, UBER, <https://www.uber.com/ca/en/ride/how-it-works/> [https://perma.cc/UF6C-5Q4L]; *Why Drive With Lyft?*, LYFT, <https://www.lyft.com/driver/why-drive-with-lyft> [https://perma.cc/V832-CHPQ].

4. *What is Olio?*, OLIO, <https://olioex.com/about/#about> [https://perma.cc/YG8A-KXQ7].

5. *What Is Rover*, ROVER, <https://support.rover.com/hc/en-us/articles/202837974-What-is-Rover> [https://perma.cc/FR37-YE5L]; *About Wag!*, WAG!, <https://wagwalking.com/about> (last visited Feb. 17, 2020).

6. See Micha Kaufman, *Trust Each Other, The Sharing Economy Is Here to Stay*, FORBES (May 16, 2014), <https://www.forbes.com/sites/michakaufman/2014/05/16/sharing-economy/#7a7a64e5e58e> [https://perma.cc/BR3P-G4SZ].

Though it is hard to put a dollar value on the sharing economy, economists place its estimated value in the billions of dollars. Approximately 44 million people in the United States alone used the sharing economy in 2016.⁷ That figure is expected to rise to approximately 86 million by 2021.⁸ In 2017, Uber customers took over four billion trips.⁹ Airbnb is valued at around \$31 billion as of 2017.¹⁰ Approximately \$23 billion in venture capital funding has poured into the sharing economy since 2010.¹¹ The sharing economy has and will continue to play an important role in the modern economic sphere.

At the end of 2017, Congress passed the Tax Cuts and Jobs Act of 2017 (the “TCJA” or the “Act”). A newly-enacted statute, as part of the TCJA, creates an even bigger incentive for people looking to make money through the sharing economy. Section 199A of the Internal Revenue Code (“§ 199A”) allows certain pass-through businesses (defined below) to deduct up to 20 percent of their qualified business income on their federal tax filings.¹² Aimed at creating tax incentives for businesses, § 199A’s language is incredibly broad and lacking clear guidance from the Internal Revenue Service (“IRS”) or Congress. Because of the TCJA’s complexity, its incentives are currently only realistically available to tax-savvy business owners with sophisticated tax counsel. The headache of taking advantage of § 199A also limits its applicability to high-income pass-through businesses.

Because sharing economy pass-through businesses are not specified service trades or businesses, as defined by the Act, and because sharing economy participants could likely argue “reputation” is not a principal asset of their businesses within the meaning of the statute, sharing economy earners are likely able to take advantage of § 199A. If sharing economy earners are able to take advantage of § 199A and offset their income by up to 20 percent, § 199A incentivizes even more people to participate in the already-growing sharing economy. That said, § 199A’s inaccessibility will likely limit its effectiveness and will hamper the ability of small

7. *Number of Sharing Economy Users in the United States from 2016 to 2021*, STATISTA, <https://www.statista.com/statistics/289856/number-sharing-economy-users-us/> [<https://perma.cc/X6N8-P5CU>].

8. *Id.*

9. See Johana Bhuiyan, *Uber Powered Four Billion Rides in 2017. It Wants to do More-and-Cheaper in 2018*, RECODE (Jan. 5, 2018), <https://www.recode.net/2018/1/5/16854714/uber-four-billion-rides-coo-barney-harford-2018-cut-costs-customer-service> [<https://perma.cc/X3PM-EGND>].

10. See Judith Wallenstein & Urvesh Shelat, *Hopping Aboard the Sharing Economy*, BOS. CONSULTING GROUP (Aug. 22, 2017), <https://www.bcg.com/en-us/publications/2017/strategy-accelerating-growth-consumer-products-hopping-aboard-sharing-economy.aspx> [<https://perma.cc/CC4Q-W65Y>].

11. *See id.*

12. 26 U.S.C. § 199A (2018).

businesses, like sharing economy earners, to take full advantage of its offered incentives.

In Part I of this paper, I express the broad scope of tax requirements and tax problems for sharing economy earners. In Part II, I explore the language and scope of § 199A. In Part III, I analyze the ways in which sharing economy earners may take advantage of the tax benefits of the TCJA, the practical steps necessary to effectuate special tax treatment, and the benefits to the sharing economy of having its participants receive special tax treatment. In Part IV, I examine the need for clear IRS and Congressional guidance on the new § 199A and propose potential solutions to its overbreadth and inaccessibility.

I. TAX ISSUES FOR SHARING ECONOMY EARNERS

A. *Background*

Sharing economy earners are familiar with income tax issues.¹³ Scholars have contemplated the incredibly complicated, inefficient, dated methods of filing taxes in the sharing economy.¹⁴ The sharing economy earner is typically not an employee.¹⁵ So, while sharing economy earners have economic freedom and control, they tend not to have steady wages, benefits, employer withholdings, and employment taxes.¹⁶ Sharing economy earners, if not sophisticated businesses, may be unsure about their necessary tax reporting, record-keeping, and paying requirements.¹⁷

The sharing economy is the fastest growing segment of the labor market and is expected to double in just a few years.¹⁸ Participating in the sharing economy grants taxpayers a platform for flexibility, but at the same time, can make filing and paying taxes a difficult process.¹⁹ Often, the complexity and ambiguity of tax reporting and filing requirements can lead to tax opportunism, unclear expectations, and incorrect filings and payment.²⁰

13. Kathleen Delaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415, 1419 (2018).

14. *Id.* at 1421.

15. *Id.* at 1421–23.

16. *Id.* at 1420.

17. *Id.* at 1428–29.

18. *Id.*

19. *Id.*

20. See generally Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 993–96 (2016).

B. *Business Ownership, Self-Employment, and Independent Contractor Status*

One of the most contested, unresolved issues in the sharing economy is whether participants are employees or independent contractors.²¹ In most instances, sharing economy earners are deemed independent contractors because of their business freedom.²² Whereas an employer-employee relationship is characterized by the employer's control over the employee's schedule, pay, work equipment, breaks, etc., sharing economy participants have quite a lot of freedom in the manner, time, and scope of how they make money.²³ Sharing economy platforms like Uber have staunchly argued that their drivers are not employees, greatly reducing both the tax and non-tax obligations of the platforms.²⁴ The Internal Revenue Service ("IRS") published a 20-question survey for a person to determine whether they are self-employed or employed by someone else.²⁵ For now, sharing economy earners are likely considered self-employed.²⁶ Unfortunately, many sharing economy earners may not be aware that they are considered self-employed independent contractors and thus may not be aware of their additional income tax obligations.²⁷

For sharing economy earners that have been deemed independent contractors, tax filing becomes much more difficult. Employers are required to withhold taxpayer earnings and hold payments to the IRS in trust to be taken out on a more frequent basis.²⁸ This process relieves the taxpayer by putting much of the tax withholding, reporting, and paying onus on the employer and allowing the taxpayer to not think much about their income tax payment

21. Andrei Hagiu & Julian Wright, *The Status of Workers and Platforms in the Sharing Economy*, J. ECON. MANAGE. STRAT. 28, 97 (2019).

22. See generally Alexandra J. Ravenelle, *Sharing Economy Workers: Selling, Not Sharing*, 20 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 281 (2017).

23. See Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/omribensshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#4b9f46415e55> [<https://perma.cc/F3D2-5SQ9>].

24. See Aarian Marshall, *Why Uber Thinks It Can Still Call Its Drivers Contractors*, WIRED (Sept. 12, 2019), <https://www.wired.com/story/why-uber-still-call-drivers-contractors/> [<https://perma.cc/G6NL-ANHT>]; see Hagiu & Wright, *supra* note 21, at 97–98.

25. *Independent Contractors IRS 20-Factor Test*, IRS, <https://www.regent.edu/admin/busoff/pdf/20-questions1099test.pdf> [<https://perma.cc/EW5H-654G>].

26. Gordon Gray & Stephanie Renaut, *Tax Topics: Employees and Independent Contractors in the Sharing Economy*, AM. ACTION F. (Oct. 13, 2016), <https://www.americanactionforum.org/insight/tax-topics-employees-independent-contractors-sharing-economy/> [<https://perma.cc/UU7U-FGAC>].

27. Delaney Thomas, *supra* note 13, at 1422–23.

28. *Employment Taxes and the Trust Fund Recovery Penalty (TFRP)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/employment-taxes-and-the-trust-fund-recovery-penalty-tfrp> [<https://perma.cc/WZ7D-PVGW>].

obligations.²⁹ When taxpayers are deemed self-employed, however, they are required to keep track of income taxes owed on their own, as well as make quarterly payments to the IRS and pay both the employer's and the employee's portions of employment taxes.³⁰

Employment taxes are a 15.3 percent tax on an employee's net earnings for various programs like Social Security and Medicare.³¹ In a traditional employment context, employers pay half of a taxpayer's employment tax (or 7.65 percent) and the taxpayer pays the other half through employer withholdings.³² Self-employed taxpayers are solely responsible for those employment tax payments to the IRS.³³ This process can be burdensome for self-employed taxpayers, especially those who participate in the sharing economy.³⁴ Sharing economy participants may think of their sharing economy income as "gig work," and may not characterize themselves as self-employed business owners in a traditional context.³⁵ As a result, these laborious tax filing and payment requirements may catch sharing economy earners off guard at tax-filing time.³⁶

Some argue that sharing economy platforms should be required to keep track of the transactions for each individual and report that information to the IRS, even if they are not required to pay the employer portion of employment taxes, as the platforms likely already have access to the data and disclosing it to sharing economy earners would not be extremely difficult.³⁷ Currently, however, the Internal Revenue Code has created a rule that says third party settlement organizations, i.e. non-bank entities that make payments for goods and services on behalf of others through a central account, are subject to a *de minimis* reporting rule.³⁸ In other words, sharing economy platforms are not required to report earners' incomes if the platform pays the taxpayer less than \$20,000 in a year or if the taxpayer has less than 200 transactions with the platform in a year.³⁹ Because the employee/independent contractor distinction of sharing economy earners is still hotly contested throughout the United States, sharing economy platforms are not willing to budge on making themselves seem more like employers.⁴⁰

29. Delaney Thomas, *supra* note 13, at 1422.

30. *Id.*

31. Delaney Thomas, *supra* note 13, at 1423.

32. *Id.* at 1422.

33. *Id.* at 1423.

34. *See id.* at 1418.

35. *See* Oie & Ring, *supra* note 20, at 1021–23.

36. Delaney Thomas, *supra* note 13, at 1428–29.

37. *See* Oie & Ring, *supra* note 20, at 1064–66.

38. *See* 26 U.S.C. § 6050W(e) (2018).

39. *See id.*

40. *See* Oie & Ring, *supra* note 20, at 1042–45.

Thus, they may maintain that they do not want to report sharing economy earner income to the IRS.⁴¹ As a result of this *de minimis* threshold and the incentive for sharing economy platforms to not report sharing economy income, many sharing economy earners are likely not receiving statements about their earnings and are likely on their own to report those earnings to the IRS. This places a huge burden on sharing economy earners to keep track of every single transaction, their payment amount received, and tax obligations.

C. Deductions

Though the self-employment classification comes with certain difficulties when filing and paying federal income taxes, there are certain benefits available to sharing economy participants deemed self-employed.⁴² Some argue those benefits outweigh the complications associated with being self-employed for tax purposes.⁴³ The IRS has created a “Gig Economy Tax Center” and a “Self Employed Individuals Tax Center” to provide clarification on the benefits available to sharing economy earners and other self-employed individuals,⁴⁴ though the usefulness of these resources is somewhat limited.⁴⁵ For example, the Gig Economy Tax Center wholly fails to address taking advantage of § 199A.⁴⁶ The IRS allows non-employees to deduct more of their associated business expenses (and now business income),⁴⁷ which are huge benefits to sharing economy earners, that is, if they know to take advantage of those benefits. These categories of deductions are explained in-depth below:

1. Deductions for Expenses

Congress allows taxpayers to take certain expenses associated with business.⁴⁸ Though the expense deduction right for employees

41. *Id.*; see Marshall, *supra* note 24.

42. See *Gig Economy Tax Center*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/sharing-economy-tax-center#expenses> [<https://perma.cc/X6YA-QL57>].

43. See Manoj Viswanathan, *Tax Compliance in a Decentralizing Economy*, 34 GA. ST. U. L. REV. 283, 316–18 (2018).

44. See *Gig Economy Tax Center*, *supra*, note 42; *Self-Employed Individuals Tax Center*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center> [<https://perma.cc/EEM4-3PQN>].

45. See generally Garrett Watson, *Gig Economy Workers Get Boost from New IRS Dedicated Tax Center*, TAX FOUND. (Jan. 14, 2020), <https://taxfoundation.org/irs-gig-economy-tax-center/> [<https://perma.cc/YT52-Z7A5>].

46. See *Gig Economy Tax Center*, *supra* note 42.

47. *Business Owners Can Claim a Qualified Business Income Deduction*, IRS (Oct. 25, 2018), <https://www.irs.gov/newsroom/business-owners-can-claim-a-qualified-business-income-deduction#:~:text=> [<https://perma.cc/JTQ7-8Z8F>].

48. See 26 U.S.C. § 162 (2018).

is suspended for the 2018 through 2025 years,⁴⁹ employees could traditionally take employment expenses “below-the-line.”⁵⁰ Non-employees may take their business expense deductions “above-the-line,” and those privileges have not been suspended per the TCJA.⁵¹ Above-the-line deductions allow the taxpayer to offset ordinary income dollar-for-dollar.⁵² In other words, if a non-employee taxpayer makes \$50,000 in a year and in that year incurs \$15,000 in business expenses, the non-employee taxpayer can offset that \$15,000, making their adjusted gross income \$35,000 for tax purposes.

Below-the-line deductions are calculated after the determination of the adjusted gross income.⁵³ If the total amount of the deductions exceeds the standard deduction amount (\$12,000 for 2018), the taxpayer may take the additional deduction.⁵⁴ An additional limitation applies to employees taking business deductions, which are miscellaneous deductions.⁵⁵ In effect, this means that those expenses are only deductible to the extent they exceed two percent of the employee’s adjusted gross income.⁵⁶

Though the business expense deduction for non-employees certainly provides some financial incentive, it does not come without its challenges.⁵⁷ Deducting business expenses requires filing additional documentation with the IRS, as well as keeping detailed records and learning the mechanisms for calculating these various deductions.⁵⁸ Typical business expense deductions include mileage, costs, and depreciation.⁵⁹ Those who make money through home rentals like Airbnb or HomeAway, for example, may deduct ex-

49. See *Changes to the Employee Business Expense Deduction*, BLOCK ADVISORS, <https://web.blockadvisors.com/new-changes-employee-business-expense-deduction/> [<https://perma.cc/2RGA-NB2Y>].

50. *Id.*; see William Perez, *Deduct Unreimbursed Employee Business Expenses on a 2017 Tax Return*, THE BALANCE SMALL BUS. (June 25, 2019), <https://www.thebalancesmb.com/unreimbursed-employee-business-expenses-3192841> [<https://perma.cc/NCV2-WF23>].

51. See 26 U.S.C. § 62 (2018).

52. See *id.*

53. See Sally Herigstad, *Itemized Deductions Vs. Above-the-Line Deductions*, <https://blog.taxact.com/itemized-vs-above-line-deductions/> [<https://perma.cc/JBQ2-M32Q>].

54. Bill Bischoff, *How to Game the New Standard Deduction—and 3 Other Ways to Cut Your 2018 Tax Bill*, MKT. WATCH (Dec. 31, 2018), <https://www.marketwatch.com/story/how-to-game-the-new-standard-deduction-and-3-other-ways-to-cut-your-2018-tax-bill-2018-10-15> [<https://perma.cc/7P8S-LJ4V>].

55. Perez, *supra* note 50.

56. See 26 U.S.C. § 67(a) (2018) (2018–2025 employee business deductions have been withheld entirely per the TCJA) (Pub. L. No. 115–97, 131 Stat. 2054 (2017)).

57. Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* 3, 9 (2016).

58. Delaney Thomas, *supra* note 13, at 1418.

59. See *Deducting Business Expenses*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/deducting-business-expenses> [<https://perma.cc/3NDL-DGUR>].

penses associated with mortgage interest, real estate taxes, casualty losses, maintenance, utilities, insurance, and depreciation, subject to certain limitations, as found in § 280A.⁶⁰ As these additional reporting, record-keeping, and calculating requirements accumulate, more sharing businesses are opting for tax opportunism to take advantage of more lenient tax regulations.⁶¹

2. Deductions for Income

In addition to the tax benefit of deducting expenses, non-employee business owners have acquired a massive tax benefit under the TCJA. New for the 2018 tax year is a deduction of up to 20 percent of non-employee business income.⁶² In other words, as long as a taxpayer is self-employed, has a qualified business, and makes under \$157,500 (or \$315,000 if married and filing jointly), they could potentially deduct 20 percent of their business income.⁶³ This is an unprecedented benefit to non-employees, but of course comes with additional tax filing requirements and the keeping of detailed records.⁶⁴ Of course, taking advantage of the business income deduction will make the taxpayer's employment status clear for tax purposes; the taxpayer will distinguish themselves as a non-employee, which may or may not be in their best interest.⁶⁵ Not to mention, determining the deduction amount under the new law is incredibly cumbersome and requires statute-reading gymnastics of business owners.⁶⁶ This new income tax deduction is discussed in further detail below, as it relates to making money in the sharing economy.

60. *Gig Economy Tax Center*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/sharing-economy-tax-center#expenses> [<https://perma.cc/SUU4-9D83>]; see 26 U.S.C. § 280A (2018).

61. Oei & Ring, *supra* note 20, at 1028–29.

62. 26 U.S.C. § 199A (2018).

63. *See id.*

64. See Gary Guenther, Congressional Research Service, *Tax Filing Season (2018 Tax Year): Section 199A Deduction for Passthrough Business Income* (Mar. 5, 2019) <https://fas.org/sgp/crs/misc/IF11122.pdf> [<https://perma.cc/LLJ7-7QJB>].

65. *See supra* I.B.

66. Scott Greenberg & Nicole Kaeding, *Reforming the Pass-Through Deduction*, TAX FOUND. 13–14 (June 2018).

II. QUALIFIED BUSINESS INCOME DEDUCTIONS UNDER 26 USCA § 199A

A. *Background and Purpose*

Enacted in December 2017, The Tax Cuts and Jobs Act (“TCJA” or the “Act”) aimed, in part, to create tax cuts for corporations and pass-through entities like partnerships and S-corporations.⁶⁷ Among the many tax benefits to businesses, and as an equalization measure for the corporate tax rate drop from 35 to 21 percent, the TCJA created a controversial benefit to pass-through entities in § 199A—the qualified business income deduction.⁶⁸

The 2017 addition of § 199A to the Internal Revenue Code seeks to allow certain businesses to deduct up to 20 percent of their income as an effort to promote startup businesses and offset the higher income tax rates of pass-through entities compared to corporations.⁶⁹ Unlike C-corporations, pass-through entities are not subject to double-taxation, i.e. there is no taxation at the entity level because the tax liability passes through to the owners and/or partners.⁷⁰ A C-corporation, on the other hand, is taxed as an entity, and its owners are taxed for the income they receive from the corporation—a double-taxation of sorts.⁷¹ Pass-through entities are typically, though not always, smaller than C-corporations and have less assets.⁷² Section 199A seeks to provide benefits to smaller businesses, offset the low corporate tax rates, and serve as a boost to the business economy.⁷³

67. See generally *The Tax Cuts and Jobs Act*, THE WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2018/02/WH_CuttingTaxesForAmericanWorkers_Feb2018.pdf [<https://perma.cc/J9Y2-RA63>]; see also BENJAMIN H. HARRIS & ADAM LOONEY, THE TAX CUTS AND JOBS ACT: A MISSED OPPORTUNITY TO ESTABLISH A SUSTAINABLE TAX CODE 3–4 (May 4, 2018) https://www.brookings.edu/wp-content/uploads/2018/05/es_20180524_harris-looney_taxreform.pdf [<https://perma.cc/T9TJ-DMUK>].

68. 26 U.S.C. § 199A (2018).

69. See John Cunningham, *Advising Clients Under Section 199A – A Revolutionary New Field of Tax and Legal Practice*, 32 NO. 4 PRAC. TAX LAW. 43, 45 (2018).

70. See *Pass-Through Entity*, INVESTING ANSWERS, <https://investinganswers.com/financial-dictionary/businesses-corporations/pass-through-entity-1119> [<https://perma.cc/T8MZ-AKNJ>]; see also Kyle Pomerleau, *An Overview of Pass-through Businesses in the United States*, TAX FOUND. (Jan. 21, 2015), <https://taxfoundation.org/overview-pass-through-businesses-united-states/> [<https://perma.cc/N7R4-39HG>].

71. See *Pass-Through Entity*, *supra* note 70.

72. Pomerleau, *supra* note 70.

73. See *Tax Cuts and Jobs Act, Provision 11011 Section 199A - Qualified Business Income Deduction FAQs*, IRS, <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs> [<https://perma.cc/J4F9-B7G5>].

B. Actual Language and Definitions

Section 199A allows eligible taxpayers to deduct up to 20 percent of qualified business income from a domestic business operated as a sole proprietorship, or through a partnership, S-corporation, trust, or estate for taxable years 2018 to 2025.⁷⁴ The qualified business income is the net amount of qualified items of income, gain, deductions, and losses from any qualified trade or business.⁷⁵ Capital gains, capital losses, certain dividends, and interest income are excluded.⁷⁶

However, to determine the deductible amount, the taxpayer must jump through code-reading hoops. Under § 199A, taxpayers are allowed a deduction equal to the lesser of (1) the combined qualified business income amount of the taxpayer (income less any income from REITS or publicly traded partnerships) or (2) the amount equal to 20 percent of the excess of the taxable income of the taxpayer in the taxable year over the net capital gain of the taxpayer for such taxable year.⁷⁷ What this means is that taxpayers may only deduct a maximum of 20 percent of their income.⁷⁸

This statute is incredibly broad, allowing *any* pass-through entities the benefit of the qualified business income deduction if the taxpayer makes under \$157,000, the 2018 threshold.⁷⁹ If a taxpayer makes over \$157,000 (or \$315,000 if married and filing jointly) but under \$207,500, there are additional limitations, such as: for the type of business operated, the taxpayer's taxable income, the amount of W-2 wages paid by the qualified trade or business, etc.⁸⁰

If the taxpayer's income exceeds the threshold amount, they cannot take advantage of § 199A if they operate a specified service trade or business ("SSTB").⁸¹ An SSTB includes a trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, investment, trading, dealing in certain as-

74. See 26 U.S.C. § 199A (2018). A business may also be an LLC under state law, but LLCs are not recognized by the IRS. Thus, LLC members need to make sure they are treated as a partnership under the tax code. See generally *LB&I Concept Unit Knowledge Base – International*, IRS (2017) https://www.irs.gov/pub/int_practice_units/JTO_C_009_06_05_10.pdf [<https://perma.cc/ECY9-KMGM>].

75. See 26 U.S.C. § 199A (2018).

76. See *id.*

77. See *id.*

78. See 26 U.S.C. § 199A (2018); see also *Facts About the Qualified Business Income Deduction*, IRS, <https://www.irs.gov/newsroom/facts-about-the-qualified-business-income-deduction> [<https://perma.cc/DC2C-8ERG>].

79. See *id.*

80. See generally *id.*

81. See 26 U.S.C. § 199A(d) (2018).

sets, or any trade or business where the principal asset is the reputation or skill of one or more of its employees.⁸² This restriction does not apply to taxpayers and their pass-through entities making less than \$157,500 per year.⁸³

Considered a “phase-in,” taxpayers making between \$157,500 and \$207,500 (single filer) or between \$315,000 and \$415,000 (joint filer) and operating an SSTB may still be a qualified trade or business within the meaning of § 199A.⁸⁴ However, only a portion “of the qualified items of income, gain, deduction, loss, Form W-2 wages, and unadjusted basis of qualified property ... will be used” in calculating qualified business income.⁸⁵ Those taxpayers in the “phase-in” can only take a limited percentage of the qualified business income deduction.⁸⁶

For taxpayers in the phase-in, the amount of deduction will be determined by the following calculation: 100 percent – ((taxpayer income - \$157,500) / \$50,000).⁸⁷ For a joint filer, that calculation will be the same, but with a different denominator: 100 percent – ((taxpayer joint income - \$315,000) / \$100,000).⁸⁸ The remaining percentage indicates the amount of income from the SSTB that will be considered qualified business income that will determine the amount of any deduction.⁸⁹

If a taxpayer makes under \$157,500 per year or makes over that amount but does not operate an SSTB, they can deduct the lesser of: (a) 20 percent of the taxpayer’s QBI, plus 20 percent of the taxpayer’s qualified REIT dividends and qualified publicly traded partnership income; or (b) 20 percent of the taxpayer’s taxable income minus their net capital gains.⁹⁰ Again, though, this benefit is currently only available through tax year 2025, absent any legislative intervention.⁹¹

C. Scope and Effect

Approximately 95 percent of all businesses in the United States are pass-through entities which earn almost two-thirds of all

82. See 26 U.S.C. § 199A(d)(2) (2018); 26 U.S.C. § 1202(e)(3) (2018).

83. See 26 U.S.C. § 199A(b)(3)(A) (2018).

84. See 26 U.S.C. § 199A (2018); see also *Tax Cuts and Jobs At, Provision 11011 Section 199A – Qualified Business Income Deduction FAQs*, supra note 73.

85. Magda Abdo-Gomez, *Navigating the New Deduction for Qualified Business Income*, 158 TAXNOTES 1627, 1629 (2018).

86. *Tax Cuts and Jobs At, Provision 11011 Section 199A – Qualified Business Income Deduction FAQs*, supra note 73.

87. Abdo-Gomez, supra note 85, at 1630.

88. *Id.*

89. See *id.*

90. See 26 U.S.C. § 199A (2018).

91. See 26 U.S.C. § 199A(i) (2018).

business income,⁹² indicating that § 199A has the potential to generate a massive economic impact.⁹³

As discussed below, § 199A will allow many sharing economy earners to deduct much of their income.⁹⁴ The economic effects are even greater when considering the growth estimates of the sharing economy, which project that the number of sharing economy participants will double in just a few short years.⁹⁵ With such impactful income tax incentives for sharing economy participants as § 199A, the projected growth has the potential to increase even more rapidly. That said, the difficulty of taking advantage of § 199A may limit its economic effects to high-earning taxpayers with sophisticated tax counsel to plan accordingly.⁹⁶ Section 199A is not only difficult to read, but it is also difficult to calculate and apply.⁹⁷ Small business owners may easily spend more than 20 percent of their qualified business income in hiring sophisticated tax attorneys to decipher and apply § 199A to their small business. Thus, § 199A's difficulty and short life may not benefit sharing economy earners as well as it could through better planning and easier interpretation.

III. 26 USCA § 199A APPLICATION TO SHARING ECONOMY EARNERS

Regardless of Congressional intent, the new § 199A undoubtedly applies to sharing economy earners for the reasons discussed below. Though this is a great potential financial incentive for those participating in the sharing economy, there is also a concern about the additional complexity to filing income taxes as a self-employed earner.⁹⁸ The seven-year limit on § 199A and § 199A's publicity and politicization also raise concerns about whether the economic benefit of the statute outweighs the hassle of potentially restructuring a

92. See *The Basics of Pass-Thru Entities*, HANNAH, SHERIDAN & COCHRAN BLOG, <https://hscattorneys.com/2018/05/31/the-basics-of-pass-thru-entities/> [<https://perma.cc/8MSW-ASQZ>].

93. Aaron Krupkin & Adam Looney, *9 Facts About Pass-Through Businesses*, BROOKINGS (May 15, 2017), <https://www.brookings.edu/research/9-facts-about-pass-through-businesses/> [<https://perma.cc/RDY9-E9EM>].

94. See Paayal Zaveri & Deirdre Bosa, *The New Tax Law Creates a Huge Boon for Uber and Lyft Drivers*, CNBC (Feb. 5, 2018), <https://www.cnbc.com/2018/02/05/uber-lyft-drivers-and-other-contractors-get-2018-tax-law-benefit.html> [<https://perma.cc/XL2P-L9PD>].

95. Bruckner, *supra* note 57, at 4.

96. See Qualified Business Income Deduction, 84 Fed. Reg. 2952-01, 2954 (Feb. 8, 2019) (codified at 26 C.F.R. pt. 1).

97. See 26 U.S.C. § 199A (2018); see Greenberg & Kaeding, *supra* note 66, at 14–16.

98. See Garrett Wattson, *Improving the Federal Tax System for Gig Economy Participants*, TAX FOUND. (Oct. 18, 2019), <https://taxfoundation.org/gig-economy-workers/> [<https://perma.cc/B9RJ-C2XS>].

business, paying taxes associated with that change, or learning the complexities and requirements of the new law.⁹⁹

A. *The Value of “Reputation”*

Along with excluding employees from taking the qualified business income deduction, § 199A excludes a list of SSTB pass-through businesses from the qualified business income deduction if the taxpayer makes over \$157,500, adjusted annually for inflation.¹⁰⁰ However, the statute includes a catch-all term which says that any pass-through business whose principal asset is the reputation of one or more of its employees will not be allowed to take advantage of the 20 percent qualified business income deduction.¹⁰¹ With no clear guidance from Congress on the meaning and scope of reputation in this context, taxpayers are left in the dark as to whether or not their business will qualify. One could certainly argue that any business’s principal asset is its reputation. On the other hand, one could just as easily argue that reputation is but one asset in a complex business. In the sharing economy, especially those platforms based on ratings, such as Airbnb or Lyft, reputation is certainly an important asset to a taxpayer.

However, in its regulations interpreting § 199A, the IRS claims that the “reputation” category of businesses should be narrow, including only those “in which income is received based directly on the skill and/or reputation of its employees or owners.”¹⁰² An individual is considered reputational for purposes of the statute if it receives income for endorsing products or services, if it licenses or receives income for the use of an individual’s image, likeness, name, signature, voice, trademark, etc., or if the business receives appearance fees.¹⁰³ The § 199A “reputation” qualifier thus narrowly applies to celebrities, social media influencers, etc.¹⁰⁴ Thus under the IRS interpretation, sharing economy earners making over \$157,500 would not likely be considered an SSTB and would be allowed to take the 20 percent qualified business income deduction regardless of their income.¹⁰⁵

99. See generally John Cunningham, *Advising Clients Under Section 199A – A Revolutionary New Field of Tax and Legal Practice*, 32 NO. 4 PRAC. TAX LAW. 43 (2018).

100. See 26 U.S.C.A § 199A (2018); see also Qualified Business Income Deduction, 83 Fed. Reg. 40884-01, 40899 (Aug. 16, 2019) (codified at 26 C.F.R. pt. 1).

101. Qualified Business Income Deduction, 83 Fed. Reg. at 40896.

102. *Id.* at 40899.

103. *Id.*

104. See Tony Nitti, *The New QBI Deduction is Finally Clearer*, J. OF ACCOUNTANCY (Nov. 1, 2018) (<https://www.journalofaccountancy.com/issues/2018/nov/irs-sec-199a-business-deduction.html> [<https://perma.cc/VCS8-3TXJ>]).

105. See Qualified Business Income Deduction, 83 Fed. Reg. at 40897–902.

B. The Benefits of 26 USCA § 199A to the Sharing Economy and its Participants

Sharing economy earners often look to supplement their incomes through the sharing of goods and services.¹⁰⁶ Based on the most-recent data, sharing economy participants are under 34 years of age, do not have children, and have an annual income of less than \$50,000.¹⁰⁷ Section 199A provides a massive incentive to a demographic looking for extra income. By increasing the profitability of participating in the sharing economy, people are more likely to be able to make the sharing economy a better platform for everyone involved.¹⁰⁸ For example, if an Airbnb host now has a large chunk of unexpected money from the IRS, they may invest it back into their home, which in turn could result in more income and a more pleasurable experience for renters. Additionally, using the § 199A income deduction for investing in the improvements of a home could increase the value of the asset itself.

Sharing economy businesses are often more flexible than traditional self-employed businesses.¹⁰⁹ Many sharing economy earners see their enterprises as temporary gigs, not really full-time jobs with long-term potential.¹¹⁰ Thus, whereas some businesses may be deterred from changing their business structure to accommodate § 199A's deduction, like moving from classification as a C-corporation, for example, sharing economy earners have more flexibility and less history and establishment.¹¹¹ Again, the § 199A benefit only applies for years 2018 through 2025 (though it may be extended later).¹¹² That said, restructuring an established business with many operations and activities may be quite cumbersome, and even cost ineffective. For a sharing economy earner, though, whose business is likely relatively simple and who often views their busi-

106. See Casey Leins, *Who's a Sharing Economy Worker?*, U.S. NEWS (Aug. 21, 2015), <https://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers> [<https://perma.cc/MTV8-PL92>].

107. See *The Collaborative Economy: Demographics of "Sharers,"* MARKETING CHARTS (Mar. 6, 2014), <https://www.marketingcharts.com/digital-41179> [<https://perma.cc/YM7X-HN7B>].

108. See generally Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE (Oct. 2014), <https://greattransition.org/publication/debating-the-sharing-economy> [<https://perma.cc/2MKA-B6H5>].

109. See generally *Yours, Mine and Ours: How the Sharing Economy is Transforming Business*, WASH. STATE U., <https://onlinemba.wsu.edu/blog/how-the-sharing-economy-is-transforming-business/> [<https://perma.cc/2559-CX62>].

110. See Kylie Anderson, *The New Normal: Living and Working in the Sharing Economy*, ZIPRECRUITER BLOG, <https://www.ziprecruiter.com/blog/the-new-normal-living-and-working-in-the-sharing-economy/> [<https://perma.cc/ST43-Y8QL>].

111. See generally *Yours, Mine and Ours: How the Sharing Economy is Transforming Business*, *supra* note 109.

112. Greenberg & Kaeding, *supra* note 66.

ness as a short-term one anyway, the benefit may be worth the hassle. Thus, the sharing economy and its participants may benefit more than other industries because of its unique nature.

On the other hand, sharing economy earners may be less business savvy than other pass-through entities and may not fully understand how to take advantage of § 199A, given what we know about sharing economy earner demographics. With the already difficult tax hurdles facing sharing economy earners, the financial benefit may not be worth a restructuring or otherwise dealing with § 199A. Additionally, for taxpayers in the phase-in income bracket, the law incentivizes hiring employees by allowing taxpayers to deduct a portion of their paid W-2 income. This does not really help most sharing economy earners, who are typically working for themselves, below the phase-in, and without employees.

Nevertheless, the benefits of § 199A still generally apply to the sharing economy. Congress's generous treatment of pass-through entities not only may provide a benefit to sharing economy earners, but may also increase the value of the sharing economy itself. As the word gets out about the tax benefit offered by § 199A, more people may be incentivized to participate in the sharing economy, both as earners and as consumers. The sharing economy has grown exponentially every year, as more people become comfortable with the idea of sharing spaces, products, and services with strangers.¹¹³ In an era where many people work multiple jobs to make ends meet, the sharing economy will continue growing because of its offered flexibility and freedom.¹¹⁴

Presumably, sharing economy platforms will share this new tax benefit with participants, and will advertise this information to others in recruitment efforts. Those efforts may result in more sharing economy participants and a higher value of sharing economy platform stock. A 20 percent deduction of income is a great benefit, particularly to non-SSTB entities.¹¹⁵

113. See Daniel B. Kline, *Millennials Have No Problem with Strangers Sleeping on Their Couch*, CNN BUS. (Aug. 27, 2016), <https://money.cnn.com/2016/08/27/investing/shared-economy-millennial/> [https://perma.cc/RDW3-4QN2].

114. See Chizoba Morah, *Can I Use Profit Sharing Plan Funds for a Down Payment on a Home?*, INVESTOPEDIA (Nov. 19, 2019), <https://www.investopedia.com/articles/personal-finance/053014/make-money-fast-new-sharing-economy.asp> [https://perma.cc/9DRF-YEWL]; see also Lisa K. Bates, *Gigs, Side Hustles, Freelance: What Work Means in the Platform Economy City*, 20 PLANNING THEORY & PRACTICE 423, 425–429 (2019).

115. See Alan Gassman, *Beautiful Losers: The Discriminatory Nature of the 199A Proposed Regulations*, FORBES (Aug. 22, 2018, 12:56 PM), <https://www.forbes.com/sites/alangassman/2018/08/22/beautiful-losers-the-discriminatory-nature-of-the-199a-proposed-regulations/#616c100c201c> [https://perma.cc/K7MZ-CPWC].

C. Practical Steps to Take Advantage of 26 USCA § 199A

1. Establish a Pass-Through Entity

The most important first step for sharing economy earners to take advantage of § 199A is to establish a pass-through entity.¹¹⁶ Pass-through entities include sole proprietorships, S corporations, limited liability companies (“LLCs”), and partnerships.¹¹⁷ The LLC and the S-corporation are arguably the most difficult pass-through entities to establish, but, in most jurisdictions, simply require choosing a name, selecting a registered agent (the contact person for the business), filing articles of incorporation with the Secretary of State in the state of organization,¹¹⁸ and filing a Form 2553 for an S-corporation¹¹⁹ or 8832 for an LLC with the IRS for tax purposes.¹²⁰ Despite the simplicity of establishing pass-through entities, doing so is imperative to take advantage of § 199A.¹²¹

Establishing a pass-through entity is also beneficial in limiting the taxpayer’s liability.¹²² Whereas operating a business as an individual taxpayer without limited liability protection could allow a creditor to reach the assets of the individual when collecting on business matters, when a taxpayer establishes a pass-through entity with limited liability, creditors rarely, if ever, “pierce the veil” and collect personal assets of the business owner.¹²³ Creditor claims are limited to the business entity itself where the taxpayer establishes a pass-through entity with limited liability protections.¹²⁴

116. See LUCAS GOODMAN, KATHERINE LIM, BRUCE SACERDOTE AND ANDREW WHITTEN, *SIMULATING THE 199A DEDUCTION FOR PASS-THROUGH OWNERS* 10–18 (2019).

117. *What Are Pass Through Businesses?*, TAX POLICY CENTER, <https://www.taxpolicycenter.org/briefing-book/what-are-pass-through-businesses> [<https://perma.cc/V93K-S864>].

118. J. DENNIS HYNES & MARK J. LOEWENSTEIN, *AGENCY, PARTNERSHIP, AND THE LLC* 859 (9th ed. 2015).

119. *S Corporations*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations> [<https://perma.cc/9DJT-3QWP>].

120. *Limited Liability Company (LLC)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc> [<https://perma.cc/YY39-7G9E>].

121. See Jamie Hopkins, *Understanding the 199A Deduction After The New IRS Final Regulations*, FORBES (Feb. 13, 2019, 10:08 AM), <https://www.forbes.com/sites/jamiehopkins/2019/02/13/understanding-the-199a-deduction-after-the-new-irs-final-regulations/#1e0c30575770> [<https://perma.cc/RTE5-4LXQ>].

122. *Pass Through Entity: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/pass-through-entity> [<https://perma.cc/7YDD-BJ45>].

123. See Elizabeth S. Miller, Professor of Business and Transactional Law, *The Limits of Limited Liability: Veil Piercing and Other Bases of Personal Liability of Owners, Governing Persons, and Agents of Texas Business Entities*, Presentation at the State Bar of Texas 13th Annual Advanced Real Estate Strategies (Dec. 5, 2019).

124. *Does An LLC Protect Personal Assets*, UPCOUNSEL, <https://www.upcounsel.com/does-an-llc-protect-personal-assets> [<https://perma.cc/U8QB-7PPM>]; *Litchfield Asset Management Corp. v. Howell*, 799 A.2d 298, 310 (Conn. App. Ct. 2002).

Individuals that earn money through their pass-through entities should make sure to keep their business affairs distinct from their personal affairs in order to keep their tax incentives, and protect themselves personally from business creditor claims.¹²⁵ The IRS has been clear that it will not tolerate any attempts to shield personal affairs as business affairs.¹²⁶ Thus, sharing economy earners should keep detailed records of their earnings, expenses, and assets associated with their business and keep those separate from personal affairs. In the sharing economy where the very nature of the model is “sharing” personal goods and services, taxpayers should be especially careful to maintain separation in their business from their personal affairs.

2. Filing Process

Because there is no separate taxation of pass-through entities, filing taxes as a pass-through entity is somewhat simple.¹²⁷ Essentially, taxpayers making money through a pass-through entity file an additional schedule and an additional form attached to their individual income tax return.¹²⁸ Not only is keeping business affairs separate from personal affairs important for limited liability reasons and for the establishment of a separate entity for tax purposes, it is also key for filing accurate income taxes.¹²⁹ The IRS requires taxpayers engaged in pass-through entity business to keep pass-through income and deductions separate from personal affairs.¹³⁰

Additionally, if a taxpayer elects to put their business in an LLC, they should note that LLCs are not recognized under federal law for tax purposes.¹³¹ The IRS allows the taxpayer to select, within limitations, how the taxpayer wants its LLC to be classified for income tax filing purposes. Of course, this typically requires filing of an additional form. If an LLC has two or more members, the

125. HYNES & LOEWENSTEIN, *supra* note 118, at 879; see *Litchfield Asset Management Corp.*, 799 A.2d at 312.

126. See Robert W. Wood, *Confusing Personal with Business on Your Taxes Can Mean IRS Penalties or Jail*, FORBES (Mar. 18, 2016, 8:49am), <https://www.forbes.com/sites/robertwood/2016/03/18/confusing-personal-with-business-on-your-taxes-can-mean-irs-penalties-or-jail/#30a614b965a1> [<https://perma.cc/Y4VC-P9XF>].

127. See *LLC Filing as a Corporation or Partnership*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership> [<https://perma.cc/72WX-TM7S>].

128. *Id.*

129. See *Calculating W-2 Wages for Limitations on the QBI Deduction*, MITCHELL WIGGINS, <https://mwcpa.com/tax/calculating-w-2-wages-for-limitations-on-the-qbi-deduction/> [<https://perma.cc/N9JX-2C5Z>].

130. See *Publication 583 (01/2015), Starting a Business and Keeping Records*, IRS (Jan. 2015) <https://www.irs.gov/publications/p583> [<https://perma.cc/8MW2-597W>].

131. IRS PUBLICATION 3402, TAXATION OF LIMITED LIABILITY COMPANIES 2 (Mar. 2020), <https://www.irs.gov/pub/irs-pdf/p3402.pdf> [<https://perma.cc/Y98N-YX3E>].

business will be classified as a partnership by default.¹³² The taxpayer generally must then file a Form 1065 in addition to their Form 1040.¹³³ An LLC with just one member will be treated as a sole proprietorship separate from the taxpayer, a “disregarded entity.”¹³⁴ The taxpayer in a single-member LLC will then need to file an additional Schedule C and a Schedule E along with the Form 1040.¹³⁵

Ultimately, establishing a pass-through entity is relatively simple.¹³⁶ The most difficult part of the process lies in the inconsistent recognition of LLCs, as they are recognized at the state level, but not at the federal level for tax purposes.¹³⁷ Despite this extra step, an increasing number of people choose to put their businesses into LLCs because of the flexibility and limited liability offering.¹³⁸ However, even with the complicated processes, with a clear understanding of how to make the appropriate tax designation, taking advantage of § 199A is relatively simple once the taxpayer ensures they have made the required steps in creating a pass-through entity, making the right designations, and maintaining detailed, separate business records.¹³⁹

3. Reporting W-2 Wages and Unadjusted Basis of Property Acquired

W-2 wages paid to employees are another factor to consider in calculating the § 199A deduction.¹⁴⁰ For individuals making more than the threshold amount (\$157,500 for individuals or \$315,000 for joint returns), the business income deduction is limited based on the greater of half of the W-2 wages paid or a combination of one-quarter of the W-2 wages paid plus 2.5 percent of the unadjusted

132. *Id.*

133. *See id.*

134. *Id.* at 2–3.

135. *Id.* at 3.

136. *See* Krupkin & Looney, *supra* note 93.

137. *LLC Filing as a Corporation or Partnership*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership> [<https://perma.cc/897U-S8G4>].

138. CT Corporation Staff, *LLC vs. S Corporation: Advantages and Disadvantages*, WOLTERS KLUWER (June 1, 2018), <https://ct.wolterskluwer.com/resource-center/articles/llc-vs-s-corp-advantages-and-disadvantages> [<https://perma.cc/4PEB-84DH>].

139. *See generally* Tony Nitti, *IRS Publishes Final Guidance On The 20% Pass-Through Deduction: Putting It All Together*, FORBES (Jan. 19, 2019), <https://www.forbes.com/sites/anthonyнити/2019/01/19/irs-publishes-final-guidance-on-the-20-pass-through-deduction-putting-it-all-together/#59c2611d9f0b> [<https://perma.cc/86RS-M2CU>].

140. Jin Dong Park & Zhen Zhang, *W-2 Wages and Sec. 199A*, J. OF ACCOUNTANCY (July 1, 2019), <https://www.journalofaccountancy.com/issues/2019/jul/w-2-wages-sec-199a.html> [<https://perma.cc/ZCE5-JVK7>].

basis of property acquired for the trade or business.¹⁴¹ Because the business income deduction of § 199A considers each trade or business individually, even if owned by the same person, wages paid to employees must be considered separately.¹⁴² This limitation does not apply to pass-through entities making less than the threshold amounts.¹⁴³ As discussed previously, § 199A also employs a phase-in period for businesses over the threshold to take limited advantage of its provisions.¹⁴⁴

In the sharing economy, if a home rental business making more than the threshold amount pays W-2 wages to management or cleaning service providers, those wages paid will be considered in determining the amount of the deduction allowable.¹⁴⁵ Additionally, the taxpayer will be allowed to consider the unadjusted basis of any property acquired for the business in its determination of the deduction.¹⁴⁶ Thus, sticking with the home rental example, a taxpayer over the income threshold operating a qualified business may be able to consider 2.5 percent of their basis in a home purchased for trade or business purposes.¹⁴⁷

There is an administrative issue, though, where the owner of a qualified business is above the threshold income and takes advantage of the W-2 wage calculation.¹⁴⁸ Section 199A requires the taxpayer to report those wages paid to the Social Security Administration within 60 days of the January 31 deadline.¹⁴⁹ Thus, the taxpayer who submits records of the W-2 wages paid with their income tax returns in April of the following year will not be able to take advantage of the deduction because they did not file in time with the Social Security Administration: this reality raises the stakes for pass-through entities looking to deduct their paid W-2 wages.¹⁵⁰ A late Social Security Administration filing could now

141. See *Calculating W-2 Wages for Limitations on the QBI Deduction*, *supra* note 129.

142. See *id.*

143. See *id.*

144. *Tax Cuts and Jobs Act, Provision 11011 Section 199A - Qualified Business Income Deduction FAQs*, IRS, <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs> [<https://perma.cc/D528-C66W>].

145. See Nitti, *supra* note 139.

146. *Id.*

147. See *Calculating W-2 Wages for Limitations on the QBI Deduction*, *supra* note 129.

148. See Joel Busch, *The Legal Landmines and Rewards of Section 199A's QBI Deduction*, TAX NOTES (Nov. 5, 2018), <https://www.taxnotes.com/tax-notes-federal/corporate-taxation/legal-landmines-and-rewards-section-199as-qbi-deduction/2018/11/05/28jkg> [<https://perma.cc/GP47-MJBQ>].

149. 26 U.S.C. § 199A(b)(4)(C) (2018).

150. See Busch, *supra* note 148.

have major implications, especially for unsophisticated business owners.¹⁵¹

Unadjusted basis, for Unadjusted Basis Immediately after Acquisition (UBIA) purposes, will generally mean the property's cost as of the date placed in service under 26 U.S.C.A. § 1012.¹⁵² For property contributed to a partnership in exchange for a partnership interest and immediately placed in service, UBIA will be the contributing partner's adjusted basis plus any gain recognized to the contributing partner.¹⁵³

The IRS was concerned that people would be able to manipulate the UBIA of qualified property by simply acquiring property at the end of the year for the sole purpose of taking advantage of the business income deduction.¹⁵⁴ Thus, property is not qualified property if it is acquired within 60 days of the end of the taxable year and disposed of within 120 days without use in a trade or business for at least 45 days before disposition.¹⁵⁵ Therefore, unless the taxpayer can show a reason, other than improperly gaming the § 199A deduction, for the acquisition and disposition, they will not be able to take the business income deduction.

Because obtaining property contributes to the qualified deduction under § 199A, those making money in the sharing economy are well-suited to take advantage of the above-threshold income deduction. After all, the sharing economy is entirely based on sharing owned assets with others for monetary compensation.¹⁵⁶ Other pass-through entities operating in industries that rely heavily on rented property cannot use those rentals in the formulation of their qualified deduction. This provision allows sharing economy earners to obtain better goods to run their businesses, with the promise that their basis will count toward the deduction.

151. *Id.*

152. 26 C.F.R. § 1.199A-2(c)(3) (2020); *see* 26 U.S.C. § 1012 (2018); 26 U.S.C. § 1016 (2018).

153. 26 C.F.R. § 1.199A-2(a)(3)(iv) (2020); *see* 26 U.S.C. § 723 (2018).

154. *See* Judith Folse Witteman, *Sec. 1099A: Regulations shed light on QBI deduction*, J. OF ACCOUNTANCY (Feb. 1, 2019), <https://www.journalofaccountancy.com/issues/2019/feb/irs-sec-199a-qbi-deduction.html> [<https://perma.cc/JNL7-Z2NT>].

155. *Id.*

156. April Rinne, *What Exactly is the Sharing Economy?*, WORLD ECONOMIC FORUM (Dec. 13, 2017), <https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/> [<https://perma.cc/VJ54-L5KJ>].

IV. THE NEED FOR CLEAR GUIDANCE FROM THE IRS AND CONGRESS

A. *Congressional Goals and the Inclusive § 199A*

In passing the TCJA in 2017, Congress sought to provide financial incentives to businesses—both C-corporations and pass-through entities.¹⁵⁷ Given that nearly 95 percent of businesses are pass-through entities, Congress was fully aware of the benefits it was providing to these businesses in particular.¹⁵⁸ The TCJA drastically lowered the corporate tax rate from 35 percent to 21 percent.¹⁵⁹ Congress perhaps knew that in reducing the corporate tax rate, it needed to provide some incentive to partnerships, LLCs, and other pass-through entities, or else there may have been an incentive for owners and members in those entities to re-classify as corporations, disrupting the tax structure in unexpected ways.¹⁶⁰ Moving from a partnership to a corporation involves far less tax liability than moving a corporation to a pass-through entity.¹⁶¹ Corporate restructuring will involve significant tax and time consequences.¹⁶² Though individuals making money through corporations are subject to a double-taxation of sorts,¹⁶³ the individual rate is based on the post-tax amount for the corporation, which is now at 21 percent.¹⁶⁴ Thus, depending on the individual, corporate formation may be financially better than the pass-through treatment.

Those making money in the sharing economy may not have been at the forefront of Congress's § 199A initiative. That said, its

157. See Rick Woods, *Tax Cuts and Jobs Act Offers Favorable Tax Breaks for Businesses*, MCM CPAS & ADVISORS (Jan. 5, 2018), <https://mcmcpa.com/tax-cuts-and-jobs-act-offers-favorable-tax-breaks-for-businesses/> [https://perma.cc/LS8F-526P].

158. Krupkin & Looney, *supra* note 93.

159. Kyle Pomerleau, *The United States' Corporate Income Tax Rate is Now More in Line with Those Levied by Other Major Nations*, TAX FOUND. (Feb. 12, 2018), <https://tax-foundation.org/us-corporate-income-tax-more-competitive/> [https://perma.cc/2VHY-AJZM].

160. See Charles A. Borek, *Looking at new Code Section 199A*, MINN. SOC'Y OF CERTIFIED PUB. ACCOUNTANTS (Jan. 4, 2019), <https://www.mncpa.org/publications/footnote/2018-08/section-199a-tax-reform/> [https://perma.cc/XJ3J-XF7D].

161. Fiona Chambers et al., *Entity Choice in the Post-TCJA World: One Year Later*, 60 TAX MANAGEMENT MEMORANDUM 5 (Mar. 4, 2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-entity-choice-in-the-post-tcja-world-one-year-later.pdf> [https://perma.cc/5LTY-36N9].

162. See Sheila A. Owen, *Conversion of a C Corporation to an LLC*, THE TAX ADVISER (July 1, 2019), <https://www.thetaxadviser.com/issues/2019/jun/conversion-c-corporation-llc.html> [https://perma.cc/TS83-GN9Z].

163. See *Forming a Corporation*, IRS (Jan. 16, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation> [https://perma.cc/3FVB-K2BH] (“The profit of a corporation is taxed to the corporation when earned, and then is taxed to the shareholders when distributed as dividends. This creates a double tax.”).

164. 26 U.S.C. § 11 (2018).

effects apply all the same. The economic effects of the sharing economy are monumental and projected to continue growing at a rapid rate.¹⁶⁵ Section 199A may serve as an unanticipated boost to those projected effects. On the other hand, the added tax complications in an already-difficult tax regime may simply be too much for many sharing economy earners.

B. IRS Interpretation

The IRS has recently issued regulations and revenue rulings interpreting § 199A's scope and effects.¹⁶⁶ Without the IRS guidance, the statute itself is somewhat vague. The issued regulations and revenue rulings, however, provide some clarity to the ambiguous rules of § 199A.

1. General Guidelines of Regulations

The IRS regulations¹⁶⁷ provide definitions, computation rules, and general guidance regarding the new qualified business income deduction of § 199A. The six new regulations also create § 199A abuse protections by preventing taxpayers from abusing § 199A's liberal grant of a 20 percent income deduction.¹⁶⁸

An important rule promulgated through the regulations involves the qualified business income carryforward. In effect, if a pass-through entity has a loss for the year, the qualified business income cannot be less than zero. If a taxpayer generates a loss through their pass-through business for the taxable year, their business income deduction can carry forward into the next year.¹⁶⁹ For an unsophisticated business owner in the sharing economy, generating a loss in the first year or two while figuring out the ins and outs of running a business can be carried forward to reduce the next year's qualified business income.¹⁷⁰

The regulations also clarify that for taxpayers with multiple trades or businesses, losses are netted with income before the application of limitations for taxpayers over the income threshold,

165. See *supra* Introduction.

166. See Qualified Business Income Deduction, 84 Fed. Reg. 2952-01, 2952 (Feb. 8, 2019) (codified at 26 C.F.R. pt. 1).

167. See 26 C.F.R. §§ 1.199A-1–1.199A-6 (2020).

168. See Busch, *supra* note 148.

169. See Witteman, *supra* note 154.

170. *Tax Cuts and Jobs Act, Provision 11011 Section 199A - Qualified Business Income Deduction FAQs*, IRS, <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-qualified-business-income-deduction-faqs> [<https://perma.cc/PGS9-HD7L>].

“based on W-2 wages and UBIA of qualified property” and determining qualified business income.¹⁷¹ The § 199A deduction does not, however, affect self-employment taxes or net investment income under § 1402 and § 1411.¹⁷² In effect, the qualified business income deduction is determined after the amount due for self-employment taxes and investment income.¹⁷³

The regulations also impose a *de minimis* SSTB rule—any trade or business with gross receipts less than \$25 million whose SSTB services constitute less than 10 percent of gross receipts will be able to take advantage of the § 199A deduction.¹⁷⁴ This rule helps protect businesses that may perform some SSTB activity, but that SSTB activity is not a substantial portion of the business.¹⁷⁵ Thus, for complex business entities that perform some SSTB services, like accounting, for instance, § 199A is not precluded.¹⁷⁶

For the sharing economy, the regulations provide some clarity regarding the statute’s scope. That said, the regulations do not do much for small business owners navigating this unusually difficult benefit.¹⁷⁷ There is very limited practical guidance for sharing economy earners and other small businesses within the regulations. Some IRS guidance on § 199A has led to more confusion for the small business owner including the revenue ruling below:

2. Real Estate Rentals Inclusion

The IRS has issued a revenue ruling on the inclusion of rental income property specifically for purposes of § 199A.¹⁷⁸ Section 199A allows the 20 percent qualified income deduction for certain trades and businesses. Section 199A was silent regarding whether a rental real estate enterprise would be considered a trade or business. That said, the IRS has created a specific safe harbor for rental real estate enterprises to be included as trades and businesses under § 199A.¹⁷⁹ As long as the taxpayer holds the interest directly or through a pass-through entity, maintains separate books and records for each real estate rental enterprise, and performs at least

171. See I.R.C. §§ 1.199A-1–1.199A-6 (2020).

172. *Id.*

173. *See id.*

174. 26 C.F.R. § 1 (2020).

175. *Id.*

176. *See id.*

177. *See generally* Jamie Hopkins, *Understanding the 199A Deduction After The New IRS Final Regulations*, FORBES (Feb. 13, 2019), <https://www.forbes.com/sites/jamiehopkins/2019/02/13/understanding-the-199a-deduction-after-the-new-irs-final-regulations/#36ccca405770> [<https://perma.cc/YR3T-TD7D>].

178. 26 C.F.R. § 1.199A-1 (2020).

179. 26 C.F.R. § 1 (2020).

250 hours of rental services annually,¹⁸⁰ they will be included as a trade or business for § 199A qualified income deduction purposes.¹⁸¹

Rental services, as defined by the revenue ruling, is a fairly broad category, and includes advertising, negotiating and executing leases, verifying tenant information, collecting rent, performing daily operation, maintaining the property, completing repairs, managing the property, purchasing materials, and supervising employees and independent contractors.¹⁸²

The revenue ruling explicitly excludes real estate used by the taxpayer as a residence under § 280A from the safe harbor,¹⁸³ however, this means that people who use their real estate as a personal residence at some point in the year (even if they designate a certain portion of that real estate to full time rental use) will not be protected from the safe harbor.¹⁸⁴ Those making money through Airbnb, HomeAway, or VRBO by renting out an extra bedroom or their house while they are away thus may not qualify for the safe harbor protection issued by the IRS. In effect, though, any business will be able to take advantage of the income deductions of § 199A if they satisfy the definition of trade or business in the regulations. Under the regulations,¹⁸⁵ a trade or business, for § 199A purposes, is an activity the taxpayer is regularly involved in and the taxpayer's primary purpose is for income or profit.¹⁸⁶

Despite the limitation of the IRS revenue ruling, as long as the rental real estate enterprise satisfies the above definition, it will be able to take advantage of the § 199A qualified income deduction. Accordingly, as long as an Airbnb, HomeAway, or VRBO enterprise is a regularly-involved, income-driven activity for the taxpayer, they will fit within the statute's scope. At first glance of the revenue ruling, though, a taxpayer operating a home rental business through the sharing economy may not think they are eligible.

180. *Internal Revenue Bulletin*: 2019-09, IRS, https://www.irs.gov/irb/2019-09_IRB.

181. *See Notice 2019-07: Section 199A Trade or Business Safe Harbor: Rental Real Estate*, IRS, <https://www.irs.gov/pub/irs-drop/n-19-07.pdf> [<https://perma.cc/W5J9-CMPF>].

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* 26 C.F.R. § 1 (2020).

186. *See* 26 U.S.C. § 162 (2018); *see* 26 U.S.C. § 7701(a)(26) (2018); *see* *Commissioner v. Groetzinger*, 480 U.S. 23 (1987).

C. Remaining Ambiguities

1. § 1231 Gain

Despite the extensive legislative history and regulatory framework surrounding § 199A's business income deduction, the statute is silent regarding § 1231 gain affecting qualified business income.¹⁸⁷ Section 1231 protects the sale of certain assets from receiving ordinary gain treatment.¹⁸⁸ In effect, if a person sells a depreciable asset used in a trade or business for more than one year, any gain on that sale will be treated as a capital gain for the seller.¹⁸⁹ Any loss on the sale will be treated as an ordinary loss for the seller.¹⁹⁰

This tax treatment is a benefit to the seller, as ordinary losses can offset ordinary income (as opposed to capital losses which can only offset capital gains) and capital gains are taxed at a lower rate than ordinary income.¹⁹¹ Though neither § 199A nor its applicable regulations indicate whether § 1231 income should be included for qualified income deduction purposes, we can likely infer, based on legislative intent, that Congress intended § 1231 income to be included for qualified business income purposes.¹⁹² Because Congress stressed that "investment-related income" would not be included in qualified business income, and because a § 1231 sale is not treated as investment-related income, § 1231 gains and losses are likely considered qualified business income.¹⁹³

That said, without clarification from Congress or the IRS, taxpayers cannot be entirely sure of the treatment of § 1231 sales. Those in the sharing economy could easily have income from a § 1231 sale or exchange.¹⁹⁴ Most assets are depreciable—vehicles, buildings, machinery, computers, office equipment, etc.¹⁹⁵ It is not out of the ordinary to imagine a sharing economy earner selling

187. See Tony Nitti, *Understanding the New Sec. 199A Business Income Deduction*, THE TAX ADVISER (Apr. 1, 2018), <https://www.thetaxadviser.com/issues/2018/apr/understanding-sec-199A-business-income-deduction.html> [<https://perma.cc/8Q8P-ZT2J>].

188. See Tony Nitti, *Tax Geek Tuesday: The Different Types of Gain – Making Sense of Section 1231, 1245, and 1250*, FORBES (July 14, 2015, 8:49 AM), <https://www.forbes.com/sites/anthonymitti/2015/07/14/tax-geek-tuesday-the-different-types-of-gain-making-sense-of-sections-1231-1245-and-1250/#6b54f9ab7902> [<https://perma.cc/RX8-MSUX>].

189. See I.R.C. § 1231 (2020).

190. *Id.*

191. See Nitti, *supra* note 188.

192. *See id.*

193. *See id.*

194. *See id.*

195. See Krishna Kumar Shah, *Analysis of Depreciation Policy Based on Effective Tax Rate*, 4 ACAD. VOICES: A MULTIDISCIPLINARY J. 21, 22 (2014).

their assets in order to upgrade and better serve their business needs. An Uber or Lyft driver could easily sell their vehicle, which is used in a trade or business for at least a year, to get a better car. Such a sale would be included as a § 1231 gain or loss, and thus would be considered in the calculations for § 199A. Without clear directives from Congress and the IRS, though, that assumption is not entirely founded. A taxpayer without lots of expendable income will not likely to go out on a limb only to face higher taxes later. This is yet another example of the lack of clarity regarding § 199A's potential benefits.

2. Longevity of § 199A

Section 199A has been quite complicated since its enactment.¹⁹⁶ Under the TCJA, the new provision is only scheduled to last for seven years.¹⁹⁷ Depending on its success and on the political shifts in Congress, it may be extended.¹⁹⁸ Section 199A has substantial economic impact projections, as well. If the statute generates an extreme negative economic impact, its life may be even shorter. However, even if everything works out with § 199A, and it only lasts for the scheduled seven years, the short nature of the statute may not properly incentivize small businesses to restructure, especially corporations that will undoubtedly face tax implications for moving out of a corporate form.

Sharing economy earners are unlikely to have put their businesses into corporations, given the increased headache and increased tax obligations.¹⁹⁹ Nevertheless, the limited scope of § 199A may be prohibitive for sharing economy earners. These taxpayers are more likely to be young, unsophisticated tax parties.²⁰⁰ Thus, it is perhaps more likely that by the time that a sharing economy taxpayer learns of § 199A, the statute will only be in effect for a few more years. Even if a sharing economy participant knew of § 199A upon its enactment, the amount of money they make in the sharing

196. See Deborah Fields, *Section 199A – Big Changes, Important Questions*, KPMG, <https://tax.kpmg.us/articles/2019/section-199a-explained-in-video.html> [<https://perma.cc/4U38-3U8N>].

197. See *Tax Cuts and Jobs Act: Overview of Provisions That Sunset (Expire)*, MAXWELL LOCK & RITTER (Jan. 11, 2018), <https://www.mlrpc.com/articles/tax-cuts-jobs-act-overview-provisions-sunset-expire> [<https://perma.cc/HK5U-XG6V>].

198. See Scott Greenberg, *Reforming the Pass-Through Deduction*, TAX FOUND. (June 21, 2018), <https://taxfoundation.org/reforming-pass-through-deduction-199a> [<https://perma.cc/E774-XP9J>].

199. See *Should I Incorporate or LLC My Rideshare Income?*, SHARED ECONOMY TAX (Dec. 28, 2015), <https://sharedeconomy.com/blog/should-i-incorporate-or-llc-my-rideshare-income> [<https://perma.cc/H7MW-ZLY9>] (discussing the complexity in maintaining the tax documentation necessary for an S-Corporation).

200. See generally JOE SHAW & MARK GRAHAM, *TOWARDS A FAIRER GIG ECONOMY* (2017); see also Delaney Thomas, *supra* note 13.

economy may not justify interpreting and implementing the statutory benefit.

D. Practical Steps to Better Reflect Congressional Intent

Ultimately, § 199A and its corresponding regulations are aimed at sophisticated business entities who can readily employ the complicated statutory regime. Many of the benefits are likely lost on sharing economy businesses. Given the scholarship on the tax difficulties in the sharing economy pre-dating § 199A, the IRS and Congress should develop a unique scheme for different types of sharing economy participants based on the nature of their businesses. Accordingly, guidance will be much easier to provide when Congress and the IRS addresses different types of businesses in the sharing economy.

1. Similarities to Online Businesses

In the late 1990s and early 2000s, new online consumer-to-consumer sales sites like eBay created a unique tax issue.²⁰¹ There was a clear line between those who used eBay more like a garage sale, selling used household items at a low price, and those who created sophisticated online businesses with a strong profit motive.²⁰² The Treasury created three distinct categories to distinguish between the types of eBay sellers: (1) occasional garage sellers, (2) hobbyists, and (3) businesses.²⁰³ The idea behind this distinction was that those making a living off online sales should be treated differently than people making quick cash by selling extra items around their homes.²⁰⁴

In distinguishing between these online sales, the IRS looks to the amount earned, and amount of time contributed to the activity to determine the character of the activity, though it is not an exact science.²⁰⁵ For occasional garage sellers, they do not have to report income to the IRS but they also cannot claim a loss.²⁰⁶ Any losses would be within personal activity, which does not afford the taxpayer a deduction. Hobbyists, on the other hand, must report their income to the IRS, but likewise cannot take a deduction for their

201. See DIANE KENNEDY & JANELLE ELMS, *TAX LOOPHOLES FOR EBAY SELLERS: PAY LESS TAX AND MAKE MORE MONEY* (2006).

202. See *id.*

203. See *A Tax Filing Factsheet for eBay Sellers*, INTUIT TURBOTAX, <https://turbotax.intuit.com/tax-tips/self-employment-taxes/a-tax-filing-factsheet-for-ebay-sellers/L7h6uJr0i> [<https://perma.cc/7F2G-KKKY>].

204. See *id.*

205. See *id.*

206. See *id.*

hobby expenses.²⁰⁷ Additionally, hobbyists cannot use their losses as a deduction.²⁰⁸ Businesses, however, can claim their losses to offset ordinary income.²⁰⁹

The IRS understood that within the online marketplace, participants have different levels of sophistication and motivation.²¹⁰ Accordingly, it provided clear, accessible guidance on the different categories of participants and their relevant tax expectations.²¹¹ Similarly, within the sharing economy, there are vastly differing levels of sophistication, profitability, and business nature.²¹² The IRS and Congress should recognize that not everyone in the sharing economy should be treated like “sharing economy businesses” but like different types of businesses operating on different platforms with different motivations. A diversified structure would better serve the government’s tax models and the sharing economy earners themselves.

2. Applicability to the Sharing Economy

Like the sharing economy, eBay took the internet by storm.²¹³ Not only did eBay create a global web-based marketplace, it created opportunities for individuals to make money online through sales of goods.²¹⁴ These individuals had varying motivations for their eBay sales—some looked to make quick cash through getting rid of extra clutter around their houses while others developed their eBay usage into thriving successful online businesses.²¹⁵ Some landed somewhere in the middle—actively looking for extra cash while not investing in a comprehensive business plan.²¹⁶

Similarly, in the sharing economy, motivations are all along the spectrum. Some sharing economy participants have looked to

207. See Tony Nitti, *The Top Tax Court Cases of 2018: Reunited with the Hobby Loss Rules and it Feels So Good*, FORBES (Dec. 9, 2018), <https://www.forbes.com/sites/anthonyнити/2018/12/09/the-top-tax-court-cases-of-2018-reunited-with-the-hobby-loss-rules-and-it-feels-so-good/#509d380424cb> [<https://perma.cc/G3ZP-DPYD>] (“So you get the idea: from 2017 on, if you’re conducting a hobby, and not a business, you have to include all of the income, but can’t deduct any of the expenses.”).

208. See *id.*

209. See Nitti, *supra* note 207.

210. See *A Tax Filing Factsheet for eBay Sellers*, *supra* note 203.

211. See *id.*

212. See Brian Scudamore, *How the Gig Economy Is Fueling a New Type of Entrepreneur*, FORBES (May 9, 2018), <https://www.forbes.com/sites/brianscudamore/2018/05/09/how-the-gig-economy-is-fueling-a-new-type-of-entrepreneur/#66c402d66e11> [<https://perma.cc/CBH6-2W5U>].

213. ADAM COHEN, *THE PERFECT STORE: INSIDE EBAY 5* (2003).

214. *Id.* at 7.

215. See DAVID BUNNELL, *THE EBAY PHENOMENON: BUSINESS SECRETS BEHIND THE WORLD’S HOTTEST INTERNET COMPANY 3–4* (2001).

216. See *A Tax Filing Factsheet for eBay Sellers*, *supra* note 203.

walk a few dogs to make rent that month.²¹⁷ Others have bought entire apartment complexes for use as Airbnb, HomeAway, or VRBO rentals.²¹⁸ Clearly, sharing economy participants are all engaged in a trade or business with profit motivations. However, there are different levels of businesses within the sharing economy. Those different motivations should be taken into account. For the occasional, unsophisticated sharing economy business owner, fulfilling tax obligations should be easier than the current structure.

3. Benefits of Restructure

By creating tax regimes for different business types within the sharing economy, the IRS could better serve its objectives. For the occasional dog-walker making a minimal amount through a sharing economy platform, the IRS could have a simple line on the 1040 for approximate income under a certain threshold. For the mid-level sharing economy earner who supplements their income on a semi-regular basis through the sharing economy, the IRS could better clarify and amend record-keeping and reporting requirements to reduce headache for taxpayers and improve income tax accuracy. For the sophisticated individual making regular income over a certain threshold in the sharing economy, expectations should be clear and direct to reduce tax opportunism and maintain accuracy. Ultimately, though, through treating sharing economy taxpayers differently, the IRS could think about its objectives regarding the sharing economy and enact policies to better serve those unique objectives. Until then, policies like § 199A that technically benefit sharing economy earners in theory will not serve them in reality because of difficult, multi-faceted steps aimed at more sophisticated taxpayers.

CONCLUSION

The sharing economy, though fairly new, is a massive contributor to the global economy at-large. The sharing economy is projected to continue growth as more people become familiar with the industry and comfortable with sharing.²¹⁹ Despite the massive impact of the sharing economy, Congress and the IRS have not caught

217. See Allyson Laquian, *Can You Make Real Money on a Dog-Walking App?*, BUZZFEED NEWS (June 9, 2017), <https://www.buzzfeednews.com/article/allysonlaquian/can-you-make-real-money-on-a-dog-walking-app> [<https://perma.cc/D8XA-CK4Y>].

218. See *Apartment Owner Converting ENTIRE 328-Unit Building to Airbnb-Branded Complex*, MILLION MILE SECRETS (Aug. 25, 2018), <https://millionmilesecrets.com/news/apartment-owner-converting-entire-328-unit-building-to-airbnb-branded-complex> [<https://perma.cc/7LC5-CA2N>].

219. See *supra* Introduction; see Nick Horney, *The Gig Economy: A Disruptor Requiring HR Agility*, 39 PEOPLE+STRATEGY (2016).

up in dealing with the unique issues sharing economy taxpayers face. While sophisticated lobby groups push for their relevant agendas in tax policy-making, the sharing economy earner, who is most likely looking to make quick cash in their free time, does not typically have the time or the know-how to push for clear tax objectives and necessary reform.

Regardless of whether Congress intended to provide tax benefits to sharing economy earners when it passed § 199A, the new law, as it stands, provides the young, lower-income taxpayer an unprecedented tax advantage. The problem, however, is that in a tax world where there are many ambiguities, contradictions, and unclear expectations from Congress and the IRS of sharing economy earners to properly pay income taxes and keep up with reporting requirements, the benefits of § 199A may fall to the wayside as sharing economy earners determine the tax benefits may not justify the headache of more tax hurdles, provided they are even made aware of the potential tax benefit of § 199A.

Whereas a sophisticated business entity may very well have the ability to consult with tax counsel on expectations and available tax benefits, those looking to supplement their income through renting out an extra bedroom, walking neighborhood dogs, or serving as a taxi in the evenings may not be able to seek sophisticated tax advice and thus benefit from the new law.

Further, because § 199A will only be in effect for seven years, people without ample business savvy may think the hassle outweighs the benefit. Thus, if the IRS and Congress want small businesses to take advantage of § 199A, clearer expectations and guidance need to be provided. Similarly, though the IRS regulations interpreting § 199A provide some clarity and rein in the incredibly broad rules of § 199A, the IRS has left several open doors that need to be closed.

Further, the IRS and Congress should relax the reporting and filing obligations for certain small pass-through entities. Like online eBay sellers, sharing economy earners have different expectations and goals for their participation in the online peer-to-peer marketplace. With clarification and distinguished categories of sharing economy earners for tax purposes, filing and paying taxes as a sharing economy earner would be less of a complicated, headache-inducing process for taxpayers of all income tax knowledge levels.