A 2019 UPDATE ON TAX LAW IMPACTING AGRICULTURAL PRODUCERS & RURAL LANDOWNERS

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I. INTRODUCTION

The Tax Cuts and Jobs Act (TCJA). P.L 115-97, signed into law December 22, 2017, ushered in the most significant changes to the Internal Revenue Code in more than 30 years. Although most changes went into effect January 1, 2018, IRS guidance interpreting the provisions continues to issue.

II. KEY PROVISIONS

This paper reviews key guidance received during this past year, as well as some of the important ambiguities that continue to impact agricultural producers and landowners.

A. 199A Deduction

IRC § 199A generally allows a 20 percent deduction for "qualified business income" (QBI), defined as the "net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer." This does not include qualified REIT dividends or qualified publicly traded partnership income. IRC § 199A(c). Qualified businesses income must be "effectively connected with the conduct of a trade or business within the United States." IRC § 199A(c)(3)(A). The law specifically excepts from the definition of "qualified business income" (QBI) capital gain, dividends, interest income not allocable to a trade or business, non-business annuity income, and any losses or deductions allocable to those items. IRC § 199A(c)(3)(B). Qualified business income also does not include reasonable compensation received by an S corporation shareholder, or guaranteed payments received by a partner in a partnership. IRC § 199A(c)(4).

The § 199A deduction was designed to benefit sole proprietors and owners of pass-through businesses who would not benefit from the reduction of the highest corporate income tax rate from 35 percent to 21 percent. While the provision has proven beneficial to many taxpayers, it has also created some uncertainty.

1. Final Regulations Overview

On January 18, 2019, Treasury and IRS issued final IRC §199A regulations. Because they were issued in 2019, they were not binding on taxpayers for the 2018 tax year. However, taxpayers could rely on the final rules, in their entirety, or on the proposed regulations issued on August 16, 2018, in their entirety, for taxable years ending in calendar year 2018. The new rules clarify a number of issues, but leave others unresolved. Below are highlights from the final rules.

a. No Initial Rules for Agricultural Cooperatives and Patrons

Of particular concern to producers and their tax professionals, the agencies issued no guidance with respect to § 199A(g) when they issued the final regulations. Rather, they stated they intended "to issue a future notice of proposed rulemaking describing proposed rules" for these complicated provisions. The proposed rules, issued in June of 2019, are described below.

b. "Net Capital Gain" Defined for Taxable Income Limitation [§ 1.199A-1(b)(3)]

The IRC § 199A deduction is limited to 20 percent of taxable income minus "net capital gain." The final regulations clarify that "net capital gain" means "excess of net long-term capital gain for the taxable year over the net short-term capital loss for such year, plus any qualified dividend income."

c. "Trade or Business" [§ 1.199A-1(b)(14)]

The § 199A deduction is available for "qualified business income" arising from a "qualified trade or business." The final regulations continue to define "trade or business" as a trade or business under IRC § 162, other than the trade or business of performing services as an employee. Commenters asked for a regulatory definition, a bright-line test, or a safe harbor. The agencies maintained, however, that whether an activity rises to the level of a trade or business is inherently a factual question and specific guidance under § 162 was beyond the scope of the final regulations. The summary states that the courts have developed two definitional requirements for an activity to rise to the level of a trade or business:

- Good faith intention to make a profit
- Considerable, regular, and continuous activity

In determining whether a rental real estate activity is a § 162 trade or business, the agencies state that relevant factors might include, but are not limited to, (i) the type of rented property (commercial real property vs. residential property), (ii) the number of properties rented, (iii) the owner's or the owner's agent's day-to-day involvement, (iv) the types and significance of any ancillary services provided under the lease, and (v) the terms of the lease (net lease v. traditional; short-term v. long-term).

i. Safe Harbor

Recognizing the difficulties taxpayers and practitioners may have in determining whether a taxpayer's rental real estate activities is sufficiently "regular, continuous, and considerable" for the activity to constitute a section 162 trade or business, the agencies concurrently released Notice 2019-07. This proposed revenue procedure details a proposed safe harbor under which a rental real estate enterprise may be treated as a trade or business for 199A purposes. Details of the proposed safe harbor are reviewed here. The regulations specify that those taxpayers who treat a rental activity as a trade or business for purposes of 199A should be consistent and comply with the information return filing requirements of IRC § 6041 (filing 1099s). On September 24, 2019, the agencies issued Rev. Proc. 2019-38, to finalize this guidance.

ii. Related Person Rule

The final regulations provide that rental activity that does not rise to the level of an IRC § 162 trade or business is nevertheless treated as a trade or business for purposes of § 199A, if the property is rented to a commonly controlled trade or business. In other words, self-rental activities do not have to rise to the level of a trade or business for the rental income to qualify as QBI. Common control under the final regulations means that the same person or group of persons, directly or by attribution under IRC §§ 267(b) or 707(b), owns 50 percent or more of each trade or business. Notably, the final rule was written to exclude self-rental income received from a C corporation from this special treatment. The final rule does expand the family attribution rules to include siblings and grandparents.

d. Computational Clarifications [§ 1.199A-1(d)(2)(iii)(A)]

IRS retained the netting rules set forth in the proposed rules. This rule provides that if an individual's QBI from at least one trade or business is less than zero, the individual must offset the QBI attributable to each trade or business that produced net positive QBI with the QBI from each trade or business that produced net negative QBI in proportion to the relative amounts of net QBI in the trades or businesses with positive QBI. Final regulations provide that for taxpayers with taxable income within the phase-in range, QBI from an SSTB must be reduced by the applicable percentage BEFORE the application of the netting rule. The rules also clarify that trades or businesses conducted by a disregarded entity will be treated as conducted directly by the owner of the entity for purposes of § 199A.

e. W-2 Wages [Rev. Proc. 2019-11]

In conjunction with the final rules, the agencies issued Rev. Proc. 2019-11, final guidance for determining W-2 wages for purposes of 199A. The guidance clarifies that W-2 wages include elective deferrals to Simplified Employee Pensions, simple retirement accounts, and other qualified plans. It also specifies that amounts reported on W-2s for statutory employees (as checked in Box 13) should not be included in the calculation of W-2 wages. The summary also states that W-2 wages include amounts paid to S Corporation shareholders and common-law employees.

f. UBIA of Qualified Property [§ 1.199A-2(c)(3]

i. Property Contributed to Partnership or S Corporation in Non-Recognition Transfer

The final regulations specify that each partner's share of UBIA is determined in accordance with how depreciation would be allocated for IRC § 704(b) book purposes on the last day of the taxable year. For S Corporations, each shareholder's share of UBIA of qualified property is a share of the unadjusted basis proportionate to the ratio of shares in the S corporation held by the shareholder on the last day of the taxable year over the total issued and outstanding shares of the S corporation.

The final regulations also state that qualified property contributed to a partnership or S corporation in a non-recognition transaction should generally retain its UBIA on the date it was first placed in service by the partner or shareholder. Solely for purposes of 199A, the rules provide that if qualified property is acquired in a transaction described in § 168(i)(7)(B), the transferee's UBIA in the property is the same as the transferors' UBIA in the property, decreased by the amount of money received by the transferred or increased by the amount of money paid. This rule only applies to § 199A and not for purposes of determining gain, loss, basis or depreciation.

ii. 1031 Like-Kind Exchange

The final regulations revise the harsh UBIA rule that was proposed for qualified property undergoing a like-kind exchange. The final rule provides that the UBIA of qualified like-kind property that a taxpayer receives in an IRC § 1031 like-kind exchange is the UBIA of the relinquished property. This UBIA is adjusted, however, for boot paid or received in the exchange. UBIA is adjusted downward for excess boot received, and UBIA is adjusted upward for boot paid. This rule, as opposed to the one set forth in the proposed regulations, does not penalize taxpayers who engage in a like-kind exchange with respect to UBIA. For determining the depreciable period, the placed in service date of the replacement property is equal to the placed in service date of the relinquished property, to the extent that no boot is paid. If boot is paid, that portion of the replacement property is treated as separate qualified property with a placed in service date equal to the date the replacement property was first place in service.

iii. 743 Basis Adjustment

Final regulations also change course from the proposed regulations and provide that IRC § 743(b) basis adjustments should be treated as qualified property to the extent the adjustment reflects an increase in the fair market value of the underlying qualifying property.

iv. Must be Held at End of the Year

The agencies state in the summary that the statute only allows UBIA for qualified property held at the close of the taxable year. UBIA is measured at the trade or business level. Therefore, if qualified property is held by a relevant pass-through entity (RPE), the applicable tax year is that of the RPE. If a shareholder transfers his or her interest in the RPE prior to the close of the RPE's taxable year, that shareholder is not entitled to a share of the UBIA from the RPE for that tax year.

v. Inherited Property

The final regulations clearly state that where qualified property is acquired from a decedent and immediately placed in service, the UBIA of the property will generally be the FMV at the date of the decedent's death under IRC § 1014. A new depreciable period also commences as of the date of the death.

g. Treatment of Losses [§ 1.199A-3(b)(1)(iv)]

The proposed rules provided that previously disallowed losses or deductions (under IRC §§ 465, 469, 704(d), and 1366(d)) allowed in the taxable year are taken into account for QBI if they were incurred in a tax year beginning after January 1, 2018. But previously disallowed losses incurred for taxable years beginning before January 1, 2018, cannot be taken into account for purposes of computing QBI. The final regulations provide an ordering rule for this provision. Consistent with prior DPAD rules, any losses disallowed, suspended, or limited under the provisions of §§ 465, 469, 704(d), and 1366(d) (or similar provisions) shall be used for purposes of 199A in order from the oldest to the most recent on a First in First Out basis.

Concurrent with the final regulations, the agencies published proposed regulations that treat previously suspended losses as losses from a separate trade or business for purposes of 199A. The preamble to the final regulations reviews other loss issues—such as ordering rules for the use of suspended active business losses, methods for tracing losses to various trades or businesses, whether a loss retains its character, and whether a 199A deduction is a loss for calculating the loss limitation under IRC § 461(l)—for which taxpayers need further guidance. The agencies state that these issues are beyond the scope of the 199A regulations and will be addressed in future guidance.

The final regulations retain the proposed regulations' treatment of NOLs and excess business losses with respect to calculating QBI. While a deduction under § 172 for a net operating loss is generally not considered to be with respect to a trade or business and is not taken into account in determining QBI, an excess business loss under 461(l) is treated as a net operating loss carryover to the following taxable year and is taken into account for purposes of computing QBI in the subsequent taxable year in which it is deducted.

h. Certain Above-the-line Deductions and QBI [§ 1.199A-3(b)(1)(vi)]

The proposed regulations were silent as to the treatment of the deductible portion of the self-employment income tax under § 164(f), the self-employed health insurance deduction under § 162(l), and the deduction for contributions to qualified retirement plans under § 404 for purposes of calculating QBI. The final regulations clarify that these deductions are taken into account for purposes of computing QBI to the extent that the individual's gross income from the trade or business is taken into account in calculating the allowable deduction, on a proportionate basis. The agencies declined to address whether deductions for unreimbursed partnership expenses, interest expense to acquire a partnership or S corporation interest, and state and local taxes are attributable to a trade or business for purposes of the QBI calculation.

i. Guaranteed Payments and QBI [§ 1.199A-3(b)(2)]

The final regulations did not adopt comments suggesting that guaranteed payments for the use of capital are generally attributable to a trade or business and should be QBI. The agencies state in the summary that guaranteed payments for the use of capital should be treated in a manner similar to interest income. Under the "unlikely fact pattern" that these payments are property allocated to a trade or business, they would constitute QBI. The final regulations do specify that payments to partners for services under section 707(a) are similar to guaranteed payments, reasonable compensation, and wages and are excluded from QBI.

j. Reasonable Compensation [§ 1.199A-2]

The final regulations do not impose any reasonable compensation requirement on non-S corporation entities. They do clarify that reasonable compensation is excluded from the definition of QBI, but that it is included as W-2 wages for the purposes of theW-2 wage limitation to the extent all other requirements of that provision are met. The agencies refused to provide any safe harbor or bright line guidance with respect to proper reasonable compensation.

k. Gains and Losses as QBI (1231, 1245, 1250) [§ 1.199A-3(b)(2)]

The final rules reiterate that for purposes of calculating QBI, taxpayers must net their section 1231 gains and losses from multiple trades or businesses to determine whether they have excess gain (which means no QBI) or excess loss (which means QBI loss). This includes incorporating the 1231(c) recapture rule.

Despite the rule, the final regulations remove the specific reference to § 1231 and provide that any item of short-term capital gain, short-term capital loss, long-term capital gain, or long-term capital loss, including any item treated as one under any other provision of the Code, is not taken into account when calculating QBI. Conversely, if an item is not treated as capital, it is taken into account as a qualified item of income, gain, deduction, or loss. This was meant to clarify that items of gain such as 1245 recapture, not treated as capital, are included in the QBI calculation. Rather than listing specific code provisions, the agencies opted for a definitional approach.

l. Allocation of QBI among Trades or Businesses [§1.199A-3(b)(5)]

The final regulations retain the rule in the proposed regulations that taxpayers may use "any reasonable method under all facts and circumstances" to allocate QBI among several trades or businesses. Once a method is chosen, however, it must be applied consistently with respect to that item until it is no longer reasonable under the facts and circumstances.

m. Aggregation [§ 1.199A-4]

The final regulations continue to allow aggregation of multiple trades or businesses for purposes of applying the W-2 wage and UBIA of qualified property limitations.

i. Aggregation Requirements

The final regulations generally retain the aggregation factors provided in the proposed regulations, with some modifications. For example, the language was modified to clarify that real estate trades or businesses may be aggregated. The requirements in the final regulations are as follows:

- Each trade or business is a trade or business (with a special exception for self-rentals)
- The same person or group must directly or indirectly (by attribution under IRC § 267(b) or 707(b)) own 50 percent or more of each trade or business to be aggregated for a majority of the year (ownership must exist for majority of year, including the last day of the year and all of the items must be reported on returns with the same taxable year) [Note: Family attribution rules now include grandparents, adopted grandchildren and siblings, in addition to spouses, parents, and children.]
- None of the trades and businesses can be SSTBs
- Taxpayers must show that the trades or businesses meet two of the following three factors:
    - The businesses provide products, property, or services that are the same or that are customarily offered together
    - The businesses share facilities or significant centralized business elements such as personnel, accounting, legal, manufacturing, purchasing, human resources, or information technology resources
    - The businesses are operated in coordination with, or reliance on, other businesses in the aggregated group (for example, supply chain interdependencies)

ii. RPEs May Aggregate

The final regulations also permit RPEs to aggregate trades or businesses if operated directly or through lower-tier RPEs. The resulting aggregation must be reported by the RPE and by all owners of the RPE. An individual or upper-tier RPE may not separate the aggregated trades or businesses of a lower-tier RPE, but instead must maintain the lower-tier RPE's aggregation. An individual or upper-tier RPE, however, may aggregate additional trades or businesses with the lower-tier RPE's aggregation as long as the aggregation rules are satisfied.

iii. Aggregation Mechanics

The final rules specify that a taxpayer who does not aggregate may aggregate in future years. Once the taxpayer chooses to aggregate, however, the taxpayer must continue to aggregate unless there is a material change in circumstances that would cause a change to the aggregation. Moving forward, an aggregation decision may not be made on an amended return. However, the final regulations provide that taxpayer may make an initial aggregation decision on an amended return for the 2018 taxable year only. The final regulations retain the annual disclosure requirement provided in the proposed regulations. RPEs who choose to aggregate under the new rules must also follow reporting and disclosure rules. If annual disclosures are not attached to the return, IRS is permitted to disaggregate. The taxpayer would not be permitted to re-aggregate for three years. The final regulations provide aggregation examples to illustrate the rules.

n. SSTB Clarifications [§ 1.199A-5]

The final regulations make some changes and clarifications with respect to the determination of specified service trades or businesses.

i. Health

The summary of the final regulations clarifies that the sale of pharmaceuticals or medical devices by a retail pharmacy is not by itself a trade or business performing services in the field of health. The final regulations also include an example of an assisted living facility that is not considered a health care facility. The summary specifies that radiologists, veterinarians, and physical therapists are providing services in the field of health.

ii. Consulting

The final regulations specify that services provided by engineers and architects cannot be considered to be SSTB, even if their services would otherwise meet the definition of consulting services.

iii. Financial Services

The final regulations summary states that the provision of investment services by insurance agents, to the extent they are ancillary to the commission-based sale of an insurance policy, will generally not be considered the provision of financial services for purposes of section 199A.

iv. Commodities

The final regulations specify that that the definition of dealing in commodities for purposes of 199A is limited to a trade or business that is dealing in financial instruments or otherwise does not engage in substantial activities with respect to physical commodities. As such, producers, processors, grain merchants, or handlers of commodities would not be SSTB. Similarly, income, deduction, gain, or loss from a hedging transaction entered in the normal course of a commodities business will not be SSTB. A sale by a trade or business of commodities held for investment or speculation is not a qualified active sale.

v. De Minimis Rule

The proposed regulations set forth a de minimis rule that allows trades or businesses that have very little SSTB activity to benefit from the deduction. The threshold for trades or businesses with less than $25 million of gross receipts is 10 percent, and for trades or businesses with more than $25 million of gross receipts it is 5 percent. The final regulations retained the de minimis rule, but clarify that RPEs can have multiple trades or businesses and that each trade or business is separately tested to see if it is an SSTB. The de minimis threshold is applied separately to each trade or business, not in the aggregate. The regulations also clarify that this rule operates as a cliff. If the gross receipts of the SSTB activity exceeds the threshold by a dollar, the entire trade or business is an SSTB.

The final regulations do remove the 80 percent rule set forth in the proposed regulations. This rule stated that an SSTB included any trade or business with 50 percent or more common ownership (directly or indirectly) that provided 80 percent or more of its property or services to an SSTB. The final regulations instead just provide that if a trade or business provides property or services to an SSTB and there is 50 percent or more common ownership of the trade or business, the portion of the trade or business providing property or services to the commonly-owned SSTB will be treated as a separate SSTB with respect to related parties.

o. Reporting Requirements for RPEs [§ 1.199A-6]

An RPE that chooses to aggregate can report combined QBI, W-2 wages, and UBIA of all qualified property for the aggregated trades or businesses. This aggregation must then be maintained and reported by all direct and indirect owners of the RPE, including upper-tier RPEs. The final regulations clarify that if an RPE fails to report one item to its owner, all items related to 199A should not be presumed to be zero. The RPE can report W-2 wages and not UBIA. It is only the unreported item that is presumed to be zero. This information can also be reported on an amended or late filed return for any open tax year.

The final regulations make several clarifications with respect to trusts and estates. For purposes of determining whether a trust or estate has income above the threshold, the taxable income of the trust or estate is determined after taking into account any distribution deduction. The final regulations continue to require trusts that are RPEs to allocate QBI (which may be negative) to its beneficiaries, based upon the relative portions of DNI distributed to them.

p. Non Calendar-Year RPE [§ 1.199A-6]

Section 199A(f)(1) provides that 199A applies at the partner or S corporation shareholder level and that each partner or shareholder takes into account such person's allocable share of each qualified item. These include items included or allowed in determining taxable income from the taxable year. Section 199A applies to taxable years beginning after December 31, 2017. There is no statutory requirement under 199A that a qualified item arise after December 31, 2017. As such, the final regulations provide that income flowing to an individual from a partnership or S corporation is subject to the tax rates and rules in effect in the year of the individual in which the entity's year closes. Thus, if an individual receives QBI, W-2 wages, UBIA of qualified property, and the aggregate amount of qualified REIT dividends and qualified PTP income from an RPE with a taxable year that begins before January 1, 2018 and ends after December 31, 2017, such items are treated as having been incurred by the individual during the individual's tax year during which such RPE taxable year ends.

2. Farm Rental Income

a. "Qualified Trade or Business"

Section 199A requires that qualified business income eligible for the 199A deduction must come from a "qualified trade or business." The proposed and final regulations have established that for purposes of 199A, IRC § 162(a) provides the most appropriate definition of "trade or business." IRS has noted that the definition is "derived from a large body of existing case law and administrative guidance interpreting the meaning of trade or business in the context of a broad range of industries." IRS states, "Defining trade or business as a section 162 trade or business will reduce compliance costs, burden, and administrative complexity." Solely for purposes of IRC § 199A, the regulations do provide that the rental of property to a related trade or business is automatically treated as a trade or business if the rental and the other trade or business are commonly controlled (regardless of whether the rental activity and the trade or business are otherwise eligible to be aggregated under § 1.199A-4(b)(1)). A rental real estate safe harbor, detailed elsewhere in this paper, has also been issued. For all other rentals, however, a fact-based determination must be made as to whether the rental is a "trade or business" before the 199A deduction may be claimed. This is because the courts have historically made trade or business determinations on a case-by-case basis after a highly factual inquiry.

The best "definition" for an IRC § 162 "trade or business" is the most recent guideline from the U.S. Supreme Court: To be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity. *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987). A sporadic activity, a hobby, or an amusement diversion does not qualify. Id. Even in issuing the standard, the *Groetzinger* court noted its difficulty:
We therefore adhere to the general position of the Higgins Court, taken 46 years ago, that resolution of this issue "requires an examination of the facts in each case."

> This may be thought by some to be a less-than-satisfactory solution, for facts vary. But the difficulty rests in the Code's wide utilization in various contexts of the term "trade or business," in the absence of an all-purpose definition by statute or regulation, and in our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code. We leave repair or revision, if any be needed, which we doubt, to the Congress where we feel, at this late date, the ultimate responsibility rests.

b. The Question Hasn't Mattered Much for Most Rentals

IRC §1402(a)(1) generally excludes rental income from the definition of net earnings from self-employment. Additionally, IRC § 212 allows taxpayers to deduct expenses associated with rental activities that do not rise to the level of a trade or business under IRC § 162. Ordinary and necessary expenses for a rental property that is a trade or business are deductible under both § 212 and § 162. *Curphey v. Commissioner*, 73 T.C. 766, 773 (1980). Consequently, the question of whether a rental is a section 162 trade or business has not been litigated enough to have a clear, consistent framework of judicial interpretation. Most modern cases exploring whether a rental activity is a trade or business address whether the taxpayer can take the home office deduction under IRC § 280A (which uses the IRC § 162 standard) or whether the sale of a rental property is the sale of a capital asset under IRC § 1221 or a trade or business asset under IRC § 1231. Because the sale of rented farm property, for example, rarely results in a loss, reporting the sale on Form 4797 or Schedule D has often been a distinction without a difference. Cases predating IRC § 212's predecessor IRC § 23(a)(2) nearly all granted trade or business status to taxpayers with rental property because to deny that status was to deny any deduction. Even after the broader deduction was allowed for property held for investment, the majority of courts continued to find that renting even a single property can rise to the level of a trade or business.

c. The Net Investment Income Tax Regulations Weighed In

In its final regulations for the net investment income tax, TD 9644 (2013), IRS acknowledged difficulties with respect to applying the trade or business standard to rental property:

> The Treasury Department and the IRS received multiple comments regarding the determination of a trade or business within the context of rental real estate. Specifically,

> commentators stated that Example 1 of proposed §1.1411–5(b)(2) is inconsistent with existing case law regarding the definition of a trade or business of rental real estate. Commentators cited cases such as *Fackler v. Commissioner,* 45 BTA 708 (1941), aff'd, 133 F.2d 509 (6th Cir. 1943); *Hazard v. Commissioner*, 7 T.C. 372 (1946); and *Lagreide v. Commissioner*, 23 T.C. 508 (1954), for the proposition that the activities of a single property can rise to the level of a trade or business. The Treasury Department and the IRS agree with commentators that, in certain circumstances, the rental of a single property may require regular and continuous involvement such that the rental activity is a trade or business within the meaning of section 162. However, the Treasury Department and the IRS do not believe that the rental of a single piece of property rises to the level of a trade or business in every case as a matter of law…

Within the scope of a section 162 determination regarding a rental activity, key factual elements that may be relevant include, but are not limited to, the type of property (commercial real property versus a residential condominium versus personal property), the number of properties rented, the day-to-day involvement of the owner or its agent, and the type of rental (for example, a net lease versus a traditional lease, short-term versus long-term lease). Therefore, due to the large number of factual combinations that exist in determining whether a rental activity rises to the level of a section 162 trade or business, bright-line definitions are impractical and would be imprecise.
This hasn't been a widespread question in the net investment income context because the question of whether a rental property is a trade or business is only relevant if the property is rented by a real estate professional. Net investment income applies to most rental activities, even if they are an IRC § 162 trade or business because rental activity not conducted by a real estate professional is generally deemed by statute to be passive (self-rentals being one exception). IRC § 1411(c)(2)(A).

d. Distinction from Investment Income

The IRS once tried to argue that the management of real property and the management of securities is similar and should be treated the same. But, courts have long recognized that the distinction between ownership and management of real property and of securities is significant in determining what constitutes a "trade or business." See *Curphey*, 73 T.C. at 774; *Rogers v. United States,* 69 F. Supp. 8, 12 (D. Conn. 1946). "In the final analysis, the issue is ultimately one of fact in which the scope of the ownership and management activities may be an important consideration." The activities must be sufficiently systematic and continuous to "place the owner in the business of real estate rental." *Id*.

The standard is not "material participation," but conducting the rental activity with "continuity and regularity," and for the primary purpose of profit. There is no bright-line hour requirement, and the question is highly factual. In the context of cash rent farmland rentals, the question is not whether the landlord is a materially participating farmer, but whether the activities of the landlord in managing his or her rental properties are sufficiently continuous and regular. For this purpose, activities conducted by a paid agent are attributed to the owner. *See, e.g. Schwarcz,* 24 T.C. 733, 739 (1955), acq., 1956-1 C.B. 5. (The fact that the taxpayer operates the rental property through an agent does not prevent him from being regularly engaged in the business.). This fact-intensive determination is made on a case-by-case basis.

e. Farm-Related Cases

The few published cases involving farm-related rentals have not provided clear analytical guidelines. In two cases below where trade or business status was not found, the taxpayer had little or no involvement with the rental property. There was no proof that the tenant did more than collect a check.

> ***Good v. Commissioner***, 16 TC 906 (1951), acq., 1951-2 C.B. (20-acre pasture rental was trade or business of the taxpayer, not a capital asset; taxpayer owned 310 acres of additional farm property.)
>
> ***Anderson v. Commissioner***, TC Memo 1982-576 (Nurse-anesthetist who tried to claim §280A home office deduction first for medical work and, alternatively for 80-acre farmland rental, was denied. Did not prove rental was a trade or business. "Petitioner testified in vague generalities about using his home office to pay bills, to store records, and occasionally to talk to his tenant on the telephone, but his testimony does not establish that his activities were sufficiently regular, systematic, and continuous as to place him in the

business of farm management." "One of the key factors is the scope and extent of the taxpayer's ownership and the management activities.")

Durbin v. Birmingham, 92 F. Supp. 938 (S.D. Iowa 1950) (Iowa banker owned land in Colorado. Leased from 1908 to 1942 to various individuals on a crop sharing contract, with no personal control or management exercised on the part of Mr. Durbin over such farming operations. Received "small amounts of income" from land. No deductions were taken. Land ultimately sold at a loss for unpaid taxes (while banker was alive). IRS said trade or business/ordinary loss, but widow prevailed in argument that it was capital asset held for the production of income.)

Meinhardt v. Commissioner, 766 F.3d 917 (8th Cir. 2014) (Taxpayers owned 420 acres of farmland and a farmhouse. They cash rented the farmland, but did not lease the old farmhouse. Instead, they improved the house and allowed family members to live in the house from time-to-time, in exchange for services. Court denied an IRC § 162 deduction related to the farmhouse because the taxpayers "treated the farmhouse separately from the leased farmland, which was admittedly a business activity, and therefore expenses related solely to the farmhouse could not be deducted as ordinary and necessary expenses of the leased farmland activity.")

f. IRS Written Determinations

Several IRS written determinations have addressed the broader question:

- PLR 8350008 (Net lease at issue was 99-year lease of commercial building where owner merely received rental payment. Lessee was responsible for all taxes, maintenance, and liability. IRS said that the mere rental of real property does not constitute a trade or business under section 1231.)
- FSA 200120036 (Taxpayer leased building to his own corporation with continuity and regularity, and the taxpayer's primary purpose for engaging in the rental activity was for profit. Accordingly, the rental activity was a trade or business, and the rentals were derived in the ordinary course of a trade or business.)

g. Discussion Examples

Given the above status of the law, whether a farm rental activity is a trade or business will not always be clear. Several examples can be considered. Suggested answers are proposed, although interpretations could vary.

- Landowner A, who lives in Arizona, leases 80 acres of inherited Iowa farmland to a single tenant for a ten-year term. She collects the rent, but has little or no other contact with the tenant. She owns no other real property.

  Under this bare fact pattern, Landowner A would likely not be involved in a trade or business so as to qualify for the IRC 199A deduction. This would likely be true even though the landlord paid the taxes and/or insurance on the property. Under the IRC § 162 standard, the limited activities of this landlord do not seem to be engaged in "with sufficient continuity and regularity" to rise to the level of a trade or business. Rather, they are more akin to investment-related activities.

- Landowner B, owns 1,800 acres of farmland, which she rents out to three different tenants for one-year lease terms under fixed rent leases. Each lease is terminated and renegotiated each year, and each lease requires the tenant to report yields, soil fertility, and conservation practices, which the landlord closely monitors. The landlord is responsible for repairing drain tile, fences, and outbuildings. She works closely with her tenants to ensure farming practices that best preserve the health and sustainability of the farmland. She meets with her tenants regularly throughout the year.

  A good argument can be made that Landowner B's activities are sufficiently continuous and regular so as to qualify her as being in the trade or business of renting property, so as to qualify for the 199A deduction. Documentation of this activity is important to establish eligibility for the deduction.

- Landowner C has the same facts as Landowner B, except that he hires a farm manager to manage his farm rental business.

Landowner C should be in the same position as Landowner B because the law allows business owners to count the activity of their agents in determining whether their activity rises to the level of being a trade or business.

- Landowner D is a non-farmer with 120 acres enrolled in CRP.
  IRS' non-acquiescence to Morehouse means that Landowner D's CRP income should qualify for the 20 percent deduction, even though he is a non-farmer. IRB No. 2015-41 (2015). The Tax Court's position in Morehouse was that the non-farmer was in the trade or business of "participating in the CRP." The Eighth Circuit removed the trade or business question by deeming the CRP payments to be "rent." Morehouse v. Commissioner, 769 F.3d 616 (8th Cir. 2014), rev'g 140 T.C. 350 (2013). The IRS did not agree with the Eighth Circuit and issued an Action on Decision in 2015 stating that it would continue to litigate its position, even with respect to taxpayers in the Eighth Circuit where payments were made after 2008. That is good news for non-farmers wanting to take the 199A deduction on these payments. But unless they are on social security or disability and enjoy a statutory exclusion, they should pay SE tax if they take a deduction to avoid taking an inconsistent position on this issue.

- Landowner E is a crop share landlord who materially participates in a crop share arrangement.
  Landowner E is in the trade or business of farming (not renting property) and will qualify for the 199A deduction.

- Landowner F is a crop share landlord who does not materially participate in a crop share arrangement.
  Landowner F's eligibility for the deduction will depend upon whether his activities are sufficiently regular, systematic, and continuous to constitute a "trade or business." In most case, the income should quality.

- Landowner G receives a yearly rental payment from a wind tower that is housed on her property.
  Landowner G would not be eligible for the 199A deduction for this payment because the landowner would have no related activity beyond receiving a check. This would not qualify for trade or business status.

h. Conclusion

The question of what rental income will qualify for the 199A deduction is a key issue that impacts many taxpayers. The 199A "qualified trade or business" requirement and the regulations pointing taxpayers to IRC § 162 still leave gray area for taxpayers and their tax advisors to navigate. And this question impacts many in farm country. In Iowa, for example, 53 percent of Iowa farmland was leased in 2017, with the majority of these leases being cash rent leases.

3. Rental Safe Harbor (IRS Notice 2019-07)

On January 18, 2019, in conjunction with issuing the final 199A regulations, Treasury and IRS released IRS Notice 2019-07, a proposed revenue procedure to provide a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for purposes of IRC § 199A. This safe harbor, which includes a 250-hour per year activity requirement, was offered to give taxpayers and their practitioners more certainty with respect to the application of the 199A deduction to some rental real estate activities. The rule does little to help typical landlords who lease Iowa farmland to an unrelated party. The agencies issued final Rev. Proc. 2019-38 on September 24, 2019. It tracked the proposed revenue procedure quite closely, with a few minor changes.

a. Trade of Business Requirement

The new § 199A 20 percent deduction is available for "qualified business income" arising from a "qualified trade or business." Final Treas. Reg. § 1.199A-1(b)(14) defines "trade or business" as a trade or business under IRC § 162, other than the trade or business of performing services as an employee. This is generally the same definition that was set forth in the proposed regulations. In response to many comments, however, the agencies acknowledge that whether an activity rises to the level of an IRC §162 trade or business is inherently a factual question and that taxpayers and practitioners may have difficulties in determining whether a taxpayer's rental real estate activity is sufficient to meet this standard.

b. New Safe Harbor for Real Estate Trade or Business

In response to the requests for more certainty, the agencies released Notice 2019-07, a proposed safe harbor under which a rental real estate enterprise may be treated as a trade or business solely for purposes of § 199A.

> ***Note***: If an enterprise fails to satisfy the requirements of the new safe harbor, the rental real estate enterprise may still be treated as a trade or business for purposes of § 199A if it otherwise meets the definition of trade or business in § 1.199A-1(b)(14). The safe harbor merely provides assurance for those who meet its parameters.

The safe harbor applies to individuals or relevant pass through entities (RPEs) holding their interest in rental property directly or through a disregarded entity. Taxpayers must either treat each property held for the production of rents as a separate enterprise or treat all similar properties held for the production of rents (with the exception of properties rented under a triple net lease) as a single enterprise. Commercial and residential real estate may not be part of the same enterprise. Taxpayers may not vary this treatment from year-to-year unless there has been a significant change in facts and circumstances.

c. Safe harbor Factors

To meet the safe harbor requirements, the taxpayer must satisfy the following factors during the taxable year:

- Maintain separate books and records to reflect income and expenses for each rental real estate enterprise;
- For taxable years beginning prior to January 1, 2023, perform 250 or more hours of rental services per year with respect to the rental enterprise.
- For taxable years beginning after December 31, 2022, in any three of the five consecutive taxable years that end with the taxable year (or in each year for an enterprise held for less than five years), 250 or more hours of rental services are performed per year with respect to the rental real estate enterprise; and
- The taxpayer maintains contemporaneous records, including time reports, logs, or similar documents, regarding the following:
  - hours of all services performed;
  - description of all services performed;
  - dates on which such services were performed; and
  - who performed the services.

  These records are to be made available for inspection at the request of IRS. The contemporaneous records requirement will not apply to taxable years beginning prior to January 1, 2019.

d. What rental services qualify?

Rental services, for purposes of the revenue procedure, include the following:

- Advertising to rent or lease the real estate
- Negotiating and executing leases
- Verifying information contained in the prospective tenant applications
- Collection of rent
- Daily operation, maintenance, and repair of the property, *including the purchase of materials and supplies* (italicized phrase added by final revenue procedure)
- Management of the real estate
- Purchase of materials
- Supervision of employees and independent contractors

These activities may be performed by owners or employees, agents, or independent contractors of the owners.

e. What activities do not count?

Time devoted to the following financial or investment management activities will not constitute rental activities and cannot be counted toward the 250-hour requirement:

- Arranging financing

- Procuring property
- Studying and reviewing financial statements or reports on operations
- Planning, managing, or constructing long-term capital improvements (final revenue procedure says, "improving property under § 1.263(a)-3(d)")
- Hours spent traveling to and from the real estate

f. Excluded from the Safe Harbor

The proposed revenue procedure excludes two types of rental arrangements from the protection of the safe harbor. These include:

- Real estate used by the taxpayer (or owner or beneficiary of a pass-through entity) as a residence for any part of the year
- Real estate rented or leased under a triple net lease (Final revenue procedures defines a triple net lease as an agreement that "requires the tenant or lessee to pay taxes, fees, and insurance, and to pay for maintenance activities for a property in addition to rent and utilities.")

g. Procedural Requirements

A taxpayer or RPE using the safe harbor must include a statement attached to the return specifying that the requirements of the revenue procedure have been satisfied. The statement must be signed by the taxpayer, or an authorized representative of an eligible taxpayer or RPE. The proposed revenue procedure provided that it must say, "Under penalties of perjury, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete." The individual or individuals who sign must have personal knowledge of the facts and circumstances related to the statement. The final revenue procedure eliminated the "under the penalties of perjury" statement.

h. Effective Date

The proposed revenue procedure may be applied generally to taxpayers with taxable years ending after December 31, 2017. Taxpayers were allowed to rely on it until final guidance was issued. The final revenue procedure states that it applies to taxable years ending after December 31, 2017. Taxpayers could rely on the proposed revenue procedure for the 2018 taxable year. The contemporaneous records requirement will not apply to taxable years prior to January 1, 2020; however, taxpayers bear the burden of showing the right to a claimed deduction.

4. Rules for Agricultural Cooperatives and Patrons

a. "Grain Glitch Fix"

The Consolidated Appropriations Act, 2018, H.R. 1625, signed into law March 23, 2018, fixed the "grain glitch" and gave cooperative patrons a deduction that blends the new 199A deduction with the old 199 DPAD deduction (all within the new 199A). Depending upon their individual situations, cooperative patrons may be advantaged, disadvantaged, or essentially treated the same by selling to a cooperative rather than selling to a non-cooperative.

First, patrons calculate their 20 percent QBI (199A(b)(2)) deduction. The patron must then, pursuant to 199A(b)(7), subtract from that initial QBI deduction calculation whichever of the following is smaller:

- 9 percent of net income attributable to qualified payments received from a cooperative (including PURPIM AND patronage dividends) OR
- 50 percent of W-2 wages they paid to earn that income from the cooperative

Note that if the patron does not pay W-2 wages to any employees, no reduction is required.

In addition to the sometimes-reduced 199A deduction, patrons may also take any new DPAD deduction passed through to them by the cooperative pursuant to 199A(g)(2)(A). The determination of the amount of this new DPAD deduction will generally range from 0 to 9 percent of the cooperative's qualified production activities income (QPAI) attributable to that patron's sales. The final amount passed through to the patron is at the discretion of the cooperative. It is governed by language copied directly from the old DPAD provision. In any event, the overall amount a cooperative can choose to pass through to its members cannot exceed 50 percent of the value of the wages the cooperative pays to its employees. The farmer's 199A(g) DPAD deduction cannot exceed taxable income (subtracting the 20 percent QBI deduction detailed above, but not subtracting capital gain).

b. Transition Rule

The grain glitch fix is complicated and creates a separate qualified business income deduction (QBID) calculation for income flowing to a patron from a sale to an agricultural or horticultural cooperative. Also included in this "fix" was a transition rule.

> The new law also includes a transition rule for farmers who receive a cooperative payment in 2018 that is attributable to QPAI for which the old DPAD deduction was applicable. This includes any QPAI attributable to a cooperative tax year beginning before 2018. See Section 101(c)(2). With the original DPAD gone in 2018, taxpayers were left to wonder how to report such DPAD allocations. The law clarifies that such farmers will still be able to take the old DPAD deduction in 2018, as long as it is attributable to QPAI which was allowed to the cooperative for a tax year beginning before 2018***. No 199A deduction, however, will be allowed for such payments.***

This transition rule has impacted many returns during the 2019 filing season. It provides that qualified payments attributable to cooperative fiscal years beginning in 2017 and ending in 2018 are not eligible for the 199A QBID. If the cooperative passes through a 199 DPAD (old) deduction in box 6 of the 1099-PATR, the taxpayer may take the DPAD deduction in 2018. That DPAD is reported on line 36 of the 1040 (see draft 1040 instructions). But those qualified payments (presumably offset by their associated expenses) cannot be considered in making the 2018 QBID calculation. This would be true even if the fiscal year cooperative chose not to pass the 199 DPAD (old) through.

Qualified payments received by patrons from transactions with cooperatives with tax years beginning after December 31, 2017, are eligible for the 199A QBID deduction and the 199A(g) pass-through "DPAD" deduction as explained above. The old 199 DPAD does not apply to these transactions.

c. Proposed Regulations

On June 18, 2019, IRS and Treasury issued proposed regulations for the application of IRC §199A to cooperatives and their patrons. These rules were a missing piece of the initial §199A regulatory package.

The guidance provided: (1) rules for how patrons of cooperatives calculate their §199A QBI deduction by applying the potential reduction, and (2) rules for how Specified Cooperatives calculate and pass through the §199A(g) deduction (the new DPAD). Both sections incorporate new reporting requirements for cooperatives. They also contained specific requests for comments from practitioners.

B. Bonus Depreciation

The TCJA allows 100 percent bonus depreciation through 2022 for qualifying property acquired and placed into service after September 27, 2017. IRC § 168(k)(6)(A). The percentage then phases down over the next four years, in increments of 20. IRC § 168(k)(A). This phase-out is as follows:

- 2023: 80 percent bonus,
- 2024: 60 percent bonus,
- 2025: 40 percent bonus, and
- 2026: 20 percent bonus.

After 2026, bonus depreciation ends. Property acquired before September 28, 2017, but placed in service on or after that date, is subject to pre-Act phase-down limits (i.e. 40 percent in 2018). Notably, the TCJA extended bonus depreciation to **used** property, as well as new property, by removing the requirement that the first use of the property originate with the taxpayer. IRC § 168(k)(2)(A)(ii). For qualifying property, additional first-year depreciation is automatic. Taxpayers must affirmatively elect out of the deduction for any class of property to which they do not want bonus depreciation to apply. IRC § 168(k)(7). During the first tax year ending after September 27, 2017, taxpayers may also choose to elect 50 percent bonus, instead of 100 percent bonus. IRC § 168(k)(10)(A). Once these elections are made, they cannot be changed without IRS consent.

1. Regulations

On August 3, IRS issued proposed regulations, REG-104397-18, to detail how bonus depreciation (the additional first- year depreciation deduction) under IRC § 168(k) should work in light of changes made by the Tax Cuts and Jobs Act. PL 115-97. Guidance provided in the proposed regulations closely tracks the statutory language, updates existing guidance (Prop. Treas. Reg. § 1.168(k)-1) and creates a new subsection of rules (Prop. Treas. Reg. § 1.168(k)-2). Final regulations, T.D. 9874, were issued on September 13, 2019.

a. Eligibility Requirements

Generally, the TCJA and regulations require that to qualify for bonus depreciation:

- the depreciable property must be of a specified type
- the original use of the depreciable property must commence with the taxpayer or used depreciable property must meet certain acquisition requirements
- the depreciable property must be placed in service by the taxpayer within a specified time period or must be planted or grafted by the taxpayer before a specified date
- the depreciable property must be acquired by the taxpayer after September 27, 2017

b. Qualified Property

Specifically, the regulations track the TCJA and provide that, to be qualified property, it must be:

- MACRS property that has a recovery period of 20 years or less
- Computer software as defined in, and depreciated under, IRC § 167(f)(1)
- Certain water utility property
- Certain qualified film or television productions
- Certain qualified live theatrical productions
- A specified plant as defined in section 168(k)(5)(B) and for which the taxpayer has made an election to apply section 168(k)(5)
- Qualified improvement property acquired after September 27, 2017, and placed in service after September 27, 2017, and before January 1, 2018

c. Qualified Improvement Property

The regulations allow additional first-year depreciation only on qualified improvement property acquired and placed in service after September 27, 2017, and before January 1, 2018. The regulations leave it to Congress to make a technical correction for qualified improvement property placed in service after December 31, 2018. For now, this property remains 39-year property, not eligible for bonus.

d. Property Not Eligible for Bonus Depreciation

The following types of property are generally not eligible for the additional first-year depreciation deduction:

- Property described in IRC § 168(f), such as automobiles for which the taxpayer uses the optional business standard mileage rate
- Property required to be depreciated under ADS
- Property in a class for which the taxpayer elects not to take bonus
- A specified plant for which the taxpayer made an election to apply the special bonus depreciation allowed under IRC § 168(k)(5) during a prior tax year
- Property placed in service and disposed of in the same taxable year (except in the case of the technical termination of a partnership)

e. Used Property Requirements

The regulations largely point to provisions already in place for IRC § 179 to prevent potential abuse related to taxpayers claiming bonus depreciation for used property. Three requirements must be met for used property to qualify:

- The property must not have been previously used by the taxpayer or a predecessor prior to acquisition.
    - This previous use is limited to situations where the taxpayer had a depreciable interest in the property
- The acquisition cannot be from certain related parties or received by gift or inheritance
- The regulations also include provisions restricting bonus in certain series of related transactions involving members of consolidated groups
- The cost of the acquired property cannot depend on the basis of other property held by the purchaser

Proposed regulations issued along with the final regulations include a de minimus-use rule for use in determining whether the property was previously used by the taxpayer.

f. Partnership Adjustment Issues Stemming from Used Property Requirements

IRC § 704(c) allows depreciation of remedial allocations in situations where partners contribute depreciable property to a partnership and the partnership's book value in the property is higher than its adjusted tax basis. The regulations state that these remedial allocations do not qualify for bonus depreciation. This is because in such transactions, the partnership's basis is determined by reference to the contributing partner's basis, thus violating IRC § 179(d)(2)(C). The regulations also provide that IRC § 734(b) basis step-ups are not eligible for the additional first-year depreciation deduction. In contrast, the regulations generally allow bonus depreciation for some partnership IRC § 743 adjustments made when a new partner enters a partnership and a section 754 election is made.

g. Elections

The regulations retain the general rule that elections out of bonus depreciation can be made on a class-by-class basis. The special election to apply 50 percent bonus to property acquired by a taxpayer and placed in service during its taxable year that includes September 28, 2017, however, must be made for all qualifying property or not at all.

h. Application

Until final regulations were issued, taxpayers could apply the proposed regulations to property placed in service after September 27, 2017. The final regulations are effective on their date of publication in the federal register. Taxpayers could continue to rely on the proposed regulations for tax years ending before the date of publication.

C. Vehicle Depreciation

1. 2018 Limits for "Passenger Automobiles"

For passenger automobiles placed into service after December 31, 2017, section 13202 of the TCJA significantly increased the dollar limitations on depreciation and expensing for passenger automobiles. For 2019, the amount of the depreciation and expensing deduction for a passenger car or light duty truck or van shall not exceed—

- $10,100 for the 1st taxable year in the recovery period,
- $16,100 for the 2nd taxable year in the recovery period,
- $9,700 for the 3rd taxable year in the recovery period, and
- $5,760 for each succeeding taxable year in the recovery period.

These numbers shall be adjusted for inflation annually. The TCJA retained the $8,000 limit for additional first-year depreciation for passenger automobiles. So in 2019, the maximum amount a taxpayer can deduct for a passenger automobile in the first year is $18,100.

2. **The Unusual Interplay of 100 Percent Bonus and IRC § 280F**

Taxpayers who purchase a passenger automobile subject to the IRC § 280F limitations must consider the impact of taking bonus depreciation on future depreciation deductions. The last time we had 100 percent bonus, Rev Proc. 2011-26 stated that If the unadjusted depreciable basis of a passenger automobile exceeded the first-year limitation amount under § 280F(a)(1)(A)(i), the excess amount was the unrecovered basis of the passenger automobile for purposes of § 280F(a)(1)(B)(i) and, therefore, not deductible until the first taxable year succeeding the end of the recovery period. And then it was subject to the limitation under § 280F(a)(1)(B)(ii). In other words, under this interpretation, if a taxpayer bought a $45,000 car in 2018, he or she could immediately depreciate $18,000, but the remaining $27,000 would not be depreciable until year 2024. On February 13, 2019, IRS issued Rev. Proc. 2019-13, a safe harbor addressing this "anomalous" issue.

This safe harbor method of accounting applies to a passenger automobile (other than a leased passenger automobile):

- That is acquired and placed in service by the taxpayer after September 27, 2017;
- That is qualified property under IRC § 168(k) for which the 100-percent additional first year depreciation deduction is allowable;
- That has an unadjusted depreciable basis exceeding the first-year limitation amount under IRC § 280F(a)(1)(A)(i); and
- For which the taxpayer did not elect to treat the cost or a portion of the cost as an expense under § 179.

The safe harbor works as follows:

- The taxpayer must use the applicable optional depreciation table for computing the depreciation deductions for the passenger automobile;
- For the placed-in-service year of the passenger automobile, the taxpayer deducts the first year limitation amount under § 280F(a)(1)(A)(i). See Table 2 of Rev. Proc. 2018-25 for calendar year 2018;
- For the 12-month taxable year subsequent to the placed-in-service year and for each succeeding 12-month taxable year in the recovery period, the taxpayer determines the depreciation deduction for the passenger automobile by multiplying the remaining adjusted depreciable basis of the passenger automobile by the annual depreciation rate for each taxable year subsequent to the placed-in-service year specified in the applicable optional depreciation table (subject to the limitation amounts under IRC § 280F(a)(1)(A));
- The adjusted depreciable basis of the passenger automobile as of the beginning of the first taxable year succeeding the end of the recovery period is treated as a deductible depreciation expense for the first taxable year succeeding the end of the recovery period, subject to the limitation under § 280F(a)(1)(B)(ii). Any excess is treated as a deductible depreciation expense for the succeeding taxable years (subject to the limitation under § 280F(a)(1)(B)(ii)) and
- If § 280F(b) applies to the passenger automobile in a taxable year subsequent to the placed-in-service year, the safe harbor method of accounting ceases to apply beginning for the first year in which § 280F(b) applies. Any passenger automobile that is not predominantly used in a qualified business use, as defined in § 280F(d)(6)(B) and (C), for any taxable year is subject to § 280F(b) for such taxable year and any subsequent taxable year.

D. **Farm Equipment Depreciation**

Beginning in 2018, *new* farm machinery or equipment is depreciated over a period of five years, instead of seven. IRC § 168(e)(3)(B)(vii). This change does not apply to grain bins, cotton ginning assets, fences, or other land improvements. The TCJA also provides that farmers will use the 200 percent declining balance method of MACRS depreciation for many farming assets, unless they elect to use another method. IRC § 168(b)(2). Before this change, most farming property had to be depreciated using the 150 percent declining balance method. This change does not generally apply to (1) buildings and trees or vines bearing fruits or nuts, (2) property for which the taxpayer elects either the straight-line method or 150% declining balance method, (3) 15 or 20-year MACRS property that must be depreciated under the 150% declining balance method, or (4) property to which the alternative depreciation system applies.

It should be noted that the 2018 Publication 225 erroneously suggested that all farm machinery and equipment is now depreciated over five years. Used farm machinery and equipment, however, continues to be depreciated over seven years, not five.

III. CONCLUSION

The new tax law has significantly impacted agricultural producers and landowners. On February 28, 2019, IRS delayed the filing deadline for farmers who had not paid their estimated taxes. IRS announced in Notice 2019-17 an extension to the March 1 deadline for farmers who did not make estimated tax payments by January 15, 2019. Under this Notice, farmers had until April 15 (April 17 in Maine or Massachusetts) to file their 2018 returns and pay in full any tax due. The Notice waived the IRC section 6654 penalty for failure to make estimated tax payments for these farmers and fishermen, but the relief had to be requested.