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## IRC §199A: FAQs

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### 250 HOUR SAFE HARBOR QUESTIONS

**Question:** Do we know if the IRS will have a statement or do we create for the 250 hour safe harbor?

**Mike Giangrande:** As of now, you must create your own. In Notice 2019-07, the IRS provided some basic penalty of perjury language, but that's all. We do not know if the IRS will develop a complete standard statement. Here is one I have used in my practice so far as I worked my way through my first few returns on the issue:

*The taxpayer hereby asserts that it meets the 250 hour safe harbor requirements as set forth in IRS Notice 2019-07 for the rental real estate enterprise consisting of the following rental properties:  
[LIST PROPERTIES]*

*The taxpayer meets the 250 hour safe harbor because it maintains separate books and records to reflect the income and expenses for this rental real estate enterprise and 250 hours or more of services were performed in 2018 with respect to the rental real estate enterprise.*

*Pursuant to Notice 2019-07, the requirement for contemporaneous records and logs is waived for the 2018 tax year. As such, this third requirement is not applicable for this tax year.*

*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.*

*[SIGNATURE]*

**Question:** For purposes of the 250 hour safe harbor rule, is an election required to be filed when combining multiple rental properties to qualify as a rental real estate enterprise?

**Mike Giangrande:** No, but I would include that information in the statement that must be attached and signed separately by the taxpayer.

**Question:** Does 250 hour apply to triple net leases?

**Mike Giangrande:** No. NNN are not eligible for 250 hour safe harbor.

**Question:** What if separate records are not kept for rental real estate enterprise?

**Mike Giangrande:** Then you can't meet the 250 hour safe harbor.

**Question:** If you have two rentals one with 250 hours and other with 50 hours can you aggregate them?

**Mike Giangrande:** Yes, as long as you meet the other requirements listed on page 3 of the materials.

**Question:** Can each of the residential properties have its own set of books versus them all being combined?

**Mike Giangrande:** The IRS gave no specific guidance on that issue. Notice 2019-07 simply states that separate books and records must be maintained for each rental real estate enterprise. No further guidance was provided.

**Question:** Does real estate enterprise include just one residential rental?

**Mike Giangrande:** It can be one or more rental properties.

**Question:** What's the best way to determine if a rental property with NNN would still qualify for 199A deduction?

**Mike Giangrande:** You need to make that determination on your own based on the facts and circumstances. I would look to how much time and effort is involved by the owners of the property and whether they treat the property as a true trade or business and not a passive investment.

**Question:** How can a real estate enterprise qualify as a trade or business under §162, and NOT look to safe harbor rules?

**Mike Giangrande:** There is no definitive way of doing this. You must treat the rental real estate as a true trade or business and not merely an investment. The difficulty in giving a straight answer to this question is that the issue of whether rental real estate rises to the level of a trade or business has been litigated in the tax courts for decades and no clear answers have ever been determined. Decisions are all over the place. There is no single, definitive way to prove that rental real estate is a trade or business.

My advice is to do all those things you would do for an operating business: maintain separate bank accounts, books and records (such as using bookkeeping software), if the property does not generate a profit, prove that you have changed the way you are operating the rental property and generate a profit.

**Question:** Do you have to make an election to treat your multiple rental properties as a single?