

October 1, 2018

Hon. Steven T. Mnuchin, Secretary
Internal Revenue Service, Room 5203
Department of the Treasury
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

Re: Comments on IRS Notice of Proposed Rulemaking titled “Qualified Business Income Deduction,” REG-107892-18, 83 *Federal Register* 40884 (August 16, 2018)

Dear Secretary Mnuchin,

The National Community Pharmacists Association (“NCPA”) submits these comments in response to the Internal Revenue Service’s (“IRS”) notice of proposed rulemaking titled “Qualified Business Income Deduction,” published in the *Federal Register* on August 16, 2018 (the “Proposed Rule”).¹ NCPA represents America’s community pharmacists, including the owners of more than 22,000 independent community pharmacies. Together they represent an \$80 billion healthcare marketplace and employ more than 250,000 individuals on a full- or part-time basis. Our members are small business owners who are among America’s most accessible healthcare providers.

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act (“TCJA”).² Section 199A of the TCJA provides individuals with a deduction of up to 20 percent of their qualified business income from a domestic business operated as a sole proprietorship, partnership, S corporation, trust, or estate (also known as the “pass-through” or “QBI” deduction).³ The qualification for this deduction builds on a number of key terms in the TCJA and existing Treasury Regulations, including section 199A(d)(2) which provides a definition for a “specified service trade or business” or “SSTB” in the field of health.⁴ In short, any business which falls under the SSTB definition will not receive the pass-through deduction, unless an exception applies. The TCJA grants the Secretary of the Treasury Department with authority to prescribe regulations that are necessary to carry out the purposes of section 199A.⁵ The comments herein focus on the Proposed Rule to implement section 199A(d)(2) which further defines an SSTB with respect to certain taxpayers in the field of health.⁶

¹ 83 Fed. Reg. 40884 (proposed Aug. 16, 2018).

² TCJA, formally known as “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,” Pub. L. No. 115-97 (Dec. 22, 2017), § 11011.

³ 26 U.S.C. § 199A (stating some exceptions apply, including individuals whose taxable income exceeds a specified “threshold amount.”).

⁴ 26 U.S.C. § 199A(d)(2).

⁵ 26 U.S.C. § 199A(f)(4).

⁶ Treas. Reg. § 1.199A-5(b)(2) (proposed Aug. 16, 2018).

During the drafting and passage of the TCJA, NCPA understood that the pass-through provisions of the TCJA would bring needed tax relief to community pharmacy owners by better aligning the tax rates paid by small businesses. Unlike large corporations, many small businesses are treated as pass-through entities under current law and are taxed at the higher personal income rate. The TCJA makes meaningful improvements to the tax code by better aligning the tax rate paid by small businesses with the corporate tax rate. As community pharmacy owners continue to experience decreased reimbursement rates for medications and other post-transaction fees, NCPA has applauded the TCJA's reduced tax burden as needed relief from some financial strain which would allow community pharmacy owners to invest more in their businesses.

NCPA is concerned, however, that the language in the recent Proposed Rule would undermine those protections for community pharmacies because the Proposed Rule adds "pharmacists" in the revised definition of "services performed in the field of health." The regulatory definition of services performed in the field of health dictates whether a healthcare professional will or will not be treated as an SSTB. Current Treasury Regulation defines services performed in the field of health as:

(ii) *Meaning of services performed in the field of health.* For purposes of paragraph (e)(4)(i)(A) of this section, the performance of services in the field of health means the provision of medical services by physicians, nurses, dentists, and other similar healthcare professionals. The performance of services in the field of health does not include the provision of services not directly related to a medical field, even though the services may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or conditioning to their customers.

Treas. Reg. § 1.448-1T(e)(4)(ii) (emphasis added).

Pharmacists are expressly excluded from the current Treasury Regulation definition. However, the revised definition in the Proposed Rule reads:

(ii) *Meaning of services performed in the field of health.* For purposes of section 199A(d)(2) and paragraph (b)(1)(i) of this section only, the *performance of services in the field of health* means the provision of medical services by individuals such as physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists and other similar healthcare professionals performing services in their capacity as such who provide medical services directly to a patient (service recipient). The performance of services in the field of health does not include the provision of services not directly related to a medical services field, even though the services provided may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or conditioning to their customers, payment processing, or the research, testing, and manufacture and/or sales of pharmaceuticals or medical devices.

Treas. Reg. § 1.199A-5(b)(2)(ii) (proposed Aug. 16, 2018; emphasis added).

First, NCPA does not support the inclusion of pharmacists in the Proposed Rule because it exceeds the original intent of the drafters of the TCJA. The drafters (more specifically, the Statement of Managers) reference current Treasury Regulation section 1.448-1T(e)(4)(i)(A) which in turn references the current definition of “services performed in the field of health” in section 1.448-1T(e)(4)(ii) (referenced herein). Thus, the Proposed Rule cannot exceed the scope of the TCJA to now include pharmacists as this inclusion was not contemplated through incorporation by reference during the drafting of the TCJA. NCPA, therefore, respectfully requests the current definition of section 1.448-1T(e)(4)(ii) remain unchanged for purposes of the application of the pass-through deduction.

Second, the Proposed Rule recognizes that the common characteristic between physicians, nurses, dentists, and other similar healthcare professionals is that these professionals provide medical services to patients. The inclusion of pharmacists in the Proposed Rule, however, is overly broad and presents some factual distinctions that are necessary for appropriate application of the pass-through deduction. For example, the inclusion of pharmacists in the Proposed Rule may lead to the potential misapplication of the pass-through deduction because in the community pharmacy sector, most pharmacy owners are also the pharmacist and the that pharmacist/pharmacy owner makes revenue from selling pharmaceuticals or medical devices that should not qualify their business as an SSTB.

In contrast, a pharmacist who operates as a consultant and is paid as an independent contractor should be considered an SSTB that is not entitled to the pass-through deduction because the revenue for their business is largely generated via services provided. The Proposed Rule should recognize this distinction in the pharmacy profession so that pharmacies and pharmacists mostly engaged in selling pharmaceuticals or medical devices will still benefit from the pass-through deduction under section 199A.

Finally, it is unclear whether the performance of services related to the field of health, including researching, testing, and manufacturing pharmaceutical or medical devices would be included in the Proposed Rule’s definition as a medical service. This Proposed Rule should provide clarity as to the types of services intended under the revised definition due to the complex nature of community pharmacy services. NCPA supports the exclusion of researching, testing, and manufacturing pharmaceutical or medical devices from the types of medical services intended under the Proposed Rule’s definition.

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Page 4

Conclusion

NCPA appreciates the opportunity to share with you NCPA's comments and suggestions on this Proposed Rule.
Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Ronna B. Hauser". The signature is written in black ink and is positioned above the typed name.

Ronna Hauser
Vice President, Pharmacy Policy and Regulatory Affairs