THE AMERICAN HEALTH CARE ASSOCIATION
AND THE NATIONAL CENTER FOR ASSISTED LIVING

Request for Guidance on the Implementation of Internal Revenue Code § 199A

April 16, 2018
I. EXECUTIVE SUMMARY

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) serve as the national representative of more than 13,500 facilities dedicated to improving the lives of more than 1.5 million Americans who live in skilled nursing facilities (SNFs), assisted living communities, and other settings throughout the United States. A majority of those facilities are for-profit enterprises that are owned and/or operated by individuals or passthrough entities such as limited liability companies (LLCs) and partnerships. As a result, the recent enactment of the Tax Cuts and Jobs Act (TCJA) and its creation of Internal Revenue Code of 1986, as amended (IRC) § 199A¹ present questions of significant importance for SNFs and assisted living communities on which guidance from the Department of the Treasury and the Internal Revenue Service (Service) (collectively, Treasury) is needed.

The principal question on which guidance is necessary is whether, or the extent to which, income derived from the ownership and/or operation of SNFs and assisted living communities falls within the definition of a “specified service trade or business” that, in turn, is excluded from the definition of a “qualified trade or business” for purposes of the new tax deduction provided by IRC § 199A. As detailed below, Treasury should issue guidance specifying that the business activities of SNFs and assisted living communities do not fall within the “specified service trade or business” category. Alternatively, Treasury should issue guidance providing that all income derived from the ownership and/or operation of SNFs and assisted living communities and attributable to business activities that do not constitute a “specified service trade or business” will qualify for favorable treatment under IRC § 199A, so long as such income can be accounted for separately from “specified service trade or business” income through the use of accounting methods or other principles based upon the business practices that already prevail in the industry.

II. DISCUSSION

A. Background

1. Factual

a. Skilled Nursing Facilities

As defined by federal law, a SNF is an institution that provides “(A) skilled nursing care and related services for residents who require medical or nursing care, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons . . . .”² Importantly, however, SNFs do more than provide the foregoing types of services to their residents. As inpatient institutions, SNFs provide a safe environment in which their residents live for weeks, months,

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² 42 U.S.C. § 1395i-3(a)(1). The foregoing definition from the Medicare Act is similar to the definition of “nursing facility” contained in the Medicaid Act. See 42 U.S.C. § 1396r(a)(1). Because approximately 93 percent of such institutions participate in both the Medicare and Medicaid programs, see AHCA/NCAL, Nursing Facility Operational Characteristics Report, table 1 (Sep. 2017), this document refers to “SNFs” throughout for simplicity’s sake.
and sometimes years at a time. SNFs must also provide residents with dietary and laundry services, as well as “an ongoing program to support residents in their choice of activities, both facility-sponsored group and individual activities and independent activities . . . .”

Reflective of the multifaceted nature of SNFs and the broad roles they serve, Medicare pays SNFs using a reimbursement methodology that takes into consideration the significant capital investment and non-direct-care personnel it takes to operate a SNF. Moreover, using information submitted by each SNF in its annual cost report, the Secretary of Health and Human Services must categorize the expenditures listed on those reports into four categories: (1) spending on direct care services (including nursing, therapy, and medical services); (2) spending on indirect care (including housekeeping and dietary services); (3) capital assets (including building and land costs); and (4) administrative services costs.

There are over 15,000 SNFs throughout the United States employing over 1.8 million individuals. Consistent with the fact that SNFs are inpatient institutions providing a range of items and services, employees of SNFs include registered nurses and licensed practical nurses; certified nursing assistants; physical, occupational, and speech therapists; food-service, maintenance, and housekeeping personnel; and administrative personnel.

Contrary to popular belief, Medicare pays for a relatively small portion (14 percent) of the items and services provided by SNFs. The majority of payment (57 percent) instead comes from state Medicaid programs, which often pay SNFs less than the actual cost of providing items and services. Not surprisingly, therefore, average profit margins for SNFs are razor thin. For example, the Medicare Payment Advisory Commission recently informed Congress that the average overall profit margin for SNFs was just 0.7 percent.

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3 See, e.g., 42 U.S.C. §§ 1395i-3(d)(3)(B) (explaining that SNFs must be “designed, constructed, equipped, and maintained in a manner to protect the health and safety of residents, personnel, and the general public”), 1396r(d)(3)(B) (requiring same under the Medicaid Act); 42 C.F.R. § 483.90 (explaining that SNFs “must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public”).


5 Id. § 483.24(c)(1).

6 See, e.g., Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2018, 82 Fed. Reg. 36,530, 36,533 (Aug. 4, 2017) (explaining that the metric used to update SNF payments on a yearly basis, known as the “market basket percentage,” takes into consideration “ancillary services” and “capital-related expenses,” among other things).


8 AHCA, Skilled Nursing Care Centers: Fast Facts (June 2015).

9 Id.

10 Id.

11 Id.

12 See Eljay, LLC, A Report on Shortfalls in Medicaid Funding for Nursing Center Care (Apr. 2016).

b. Assisted Living Communities

Assisted living communities serve individuals who need help with everyday activities but who generally do not require 24-hour skilled nursing services. These communities offer a unique mix of companionship, independence, privacy, and security in a home-like setting. Services provided often include such things as 24-hour assistance; exercise, health, and wellness programs; housekeeping and maintenance; meals and dining services; transportation services; and personal care services such as help with certain activities of daily living. Assisted living communities typically do not directly provide skilled nursing services or rehabilitation therapy.

Assisted living communities employ over 400,000 individuals in the United States. The vast majority of assisted living residents use some form of private funds to pay for the items and services they receive. Medicaid can pay for certain items and services, though the percentage nationally is small by comparison and the availability of such payment varies on a State-by-State basis. Medicare does not cover items and services provided in assisted living communities.

c. Common Business Structures

A majority of SNFs and assisted living communities are for-profit enterprises. For example, of the over 15,000 SNFs in the United States, almost 70 percent are operated with the intention of making a profit. Approximately 58 percent are affiliated with one or more additional facilities, while approximately 42 percent are independent.

Although it is not unheard of for all assets and operations of a SNF or assisted living community to be owned and conducted by a single individual or entity, that traditional model has long given way to business structures that separate facility operations and real estate into distinct entities that are often created specifically for a single facility. For example, the utilization of two or more LLCs to separate operations from real estate ownership is an especially common business structure used throughout the industry. In one commonly used structure, the operating entity holds whatever licenses are required to operate the facility, employs facility personnel, and enters into provider agreements necessary to participate in the Medicare and Medicaid programs. Meanwhile, another entity—sometimes related by common ownership, sometimes not—possesses title to the facility real estate and leases the facility to the operating entity.

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15 Id.
16 Id.
17 Id.
18 Id.
19 Id. States use various terms to refer to assisted living, such as “residential care” or “personal care homes.” For present purposes, the general term “assisted living” is used to refer to those types of communities that offer residents housing, supportive services, and personalized assistance with activities of daily living.
21 Id.
In addition to the prudent risk-management function served by such business structures, they facilitate the buying and selling of facilities and often are required in order to obtain favorable financing (including through programs administered by the Department of Housing and Urban Development). Moreover, in larger multi-facility organizations, multiple tiers of business entities are commonplace. For example, a facility-specific entity may be owned by State- or region-specific holding entities, which, in turn, are owned by a central holding entity whose profits and losses flow to the central holding entity’s individual owners for tax purposes. It is also common for related passthrough entities to work with families of individual facilities. Such related passthrough entities may be those whose function it is to assist facilities with such administrative services as marketing, payroll, group purchasing, and risk management, as well as entities that advise facilities on regulatory compliance issues.

2. IRC § 199A

Section 199A generally provides that, for tax years beginning after December 31, 2017, and before January 1, 2026, taxpayers other than C corporations (i.e., taxpayers who are owners of LLCs, partnerships, S corporations, or sole proprietorships) are allowed to deduct an amount equal to 20 percent of their “qualified business income” (QBI). QBI means, for any taxable year, the net amount of “qualified” items of income, gain, deduction, and loss with respect to any “qualified trade or business of the taxpayer” (QTOB). Subject to certain exclusions, an item is “qualified” if it is (1) “effectively connected with the conduct of a trade or business within the United States” and (2) “included or allowed in determining taxable income for the taxable year.”

Accordingly, the starting point for determining whether an IRC § 199A deduction is available is the initial determination as to whether the taxpayer has income from a QTOB. A QTOB is defined, by exclusion, as any trade or business other than (1) a “specified service trade or business” (SSTOB) or (2) the “trade or business of performing services as an employee.” Of central importance here, a SSTOB is defined by statute to mean any trade or business “which is described in [IRC § 1202(e)(3)(A)] (applied without regard to the words ‘engineering, architecture,’) or which would be so described if the term ‘employees or owners’ were substitut-

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23 See, e.g., Dep’t of Housing & Urban Dev., Section 232 Handbook § II, ch. 2, p. 6 (2014) (describing general requirement that SNFs and assisted living communities use single-purpose entities in order to secure mortgage insurance under section 232 of the National Housing Act, 12 U.S.C. § 1715w).
24 IRC § 199A(b)(2)(A). Such taxpayers are also generally entitled to claim as a deduction 20 percent of the aggregate amount of qualified real estate investment trust dividends and qualified publicly traded partnership income. See IRC § 199A(b)(1)(B).
25 IRC § 199A(c)(1).
26 IRC § 199A(c)(3)(A).
27 IRC § 199A(d)(1). In fact, IRC § 199A(d)(3) allows taxpayers with taxable income below a threshold amount plus $50,000 (or $100,000 in the case of a joint return) to treat even SSTOB income in whole or in part as QBI.
ed for ‘employees’ therein.’

Thus, a SSTOB—by virtue of the cross-reference to IRC § 1202(e)(3)(A) and modifications to the language thereof—means:

Any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees or owners.

With the exception of two recent private letter rulings issued by the Service (discussed in detail below), there exists little guidance regarding the interpretation of IRC § 1202(e)(3)(A). However, the legislative history of the TCJA provides some evidence regarding how Congress intended the term SSTOB could be interpreted.

In discussing the Senate amendment to House Bill 1 that provided the language and structure of what would become IRC § 199A, the Conference Committee Report observed that a “similar list of service trades or business is provided in” yet another provision of the IRC, IRC § 448(d)(2)(A). By way of background, IRC § 448 imposes limits on a C corporation’s use of the cash method of accounting. These limits, however, do not apply to a “qualified personal service corporation,” which is defined to include certain corporations “substantially all of the activities of which involve the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, or consulting.” In a series of footnotes, the Conference Committee Report made three extensive references to the Temporary Treasury Regulations under IRC § 448 with respect to the interpretation of (1) the performance of services in the field of health, (2) the performance of services in the field of the performing arts, and (3) the performance of services in the field of consulting. Each of the cited examples applies a narrow interpretation of the relevant field of service (as discussed in more detail below).

A final, important background element of new IRC § 199A is its general rulemaking provision, which instructs that the Secretary of the Treasury “shall prescribe such regulations as are necessary to carry out the purposes of” IRC § 199A. Such regulations shall include those “for requiring or restricting the allocation of items and wages under [IRC § 199A] and such reporting requirements as the Secretary [of the Treasury] determines appropriate,” as well as regulations

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28 IRC § 199A(d)(2)(A). A SSTOB also is defined to include any trade or business “which involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in [IRC § 475(c)(2)]), partnership interests, or commodities (as defined in [IRC § 475(e)(2)]).” This definition is not pertinent to the discussion herein.
30 IRC § 448(d)(2)(A).
31 H.R. Rep. No. 115-466, at 216 n.44 (citing Treas. Reg. § 1.448-1T(e)(4)(ii)).
32 Id. at 216 n.45 (citing Treas. Reg. § 1.448-1T(e)(4)(iii)).
33 Id. at 216 n.46 (citing Treas. Reg. § 1.448-1T(e)(4)(iv)).
34 IRC § 199A(f)(4).
35 IRC § 199A(f)(4)(A).
“for the application of this section in the case of tiered entities.”\textsuperscript{36} The statutory language does not, however, limit the grant of rulemaking authority to those enumerated items.

B. Requested Guidance

1. Overview

SNFs and assisted living communities produce hundreds of thousands of American jobs and provide items and services vital to our national economy. As will be discussed in further detail below, much of the income realized by such businesses should constitute QBI and should benefit from IRC § 199A. Moreover, industry practice and existing legal and operational structures should facilitate the natural and non-abusive delineation of QBI from other income realized by SNFs and assisted living communities.

Unfortunately, certain ambiguities regarding what constitutes a SSTOB under IRC § 199A present SNFs and assisted living communities with great uncertainty. AHCA/NCAL respectfully request that Treasury use the grant of rulemaking authority under IRC § 199A(f)(4) to promulgate Treasury Regulations and other guidance that will permit SNFs and assisted living communities to appropriately access the benefits of IRC § 199A. Specifically, AHCA/NCAL request that Treasury clarify that SNFs and assisted living communities are not engaged in a SSTOB within the meaning of IRC § 199A.

Alternatively, even if Treasury were to conclude that SNFs and/or assisted living communities do realize some income that is attributable to a SSTOB, SNFs and assisted living communities should be treated as earning QBI to the extent of income attributable to activities that (1) could clearly constitute a “trade or business” in their own right, (2) do not fall within the definition of a SSTOB (utilizing the classification standards discussed below), and (3) are distinctive from and not incidental to a SSTOB. If such a partial QBI solution is implemented, we additionally request that Treasury make clear that the reasonable accounting and reporting methods, based upon current industry practices and standards, may be used to identify QBI and that separate QBI and non-QBI income streams of SNFs and assisted living communities not be denied benefits under IRC § 199A under any future anti-abuse rules in cases where such separate income streams have arisen as a result of pre-TCJA arrangements or industry practices that have not been tax-motivated but, rather, have arisen due to risk-management concerns and other commercial considerations.

2. SNFs and Assisted Living Communities Should Not Be Treated as Engaged in a SSTOB to Any Extent

The plain language of IRC § 199A and its legislative history do not speak to the precise question of whether, or to what extent, SNFs and assisted living communities constitute a SSTOB. For the reasons outlined below, Treasury should issue guidance clarifying that neither SNFs nor assisted living communities are a SSTOB for purposes of IRC § 199A.

\textsuperscript{36} IRC § 199A(f)(4)(B).
Assisted living communities present the most straightforward of the two facility types to categorize for present purposes. Such communities do not fall within the definition of a SSTOB for the fundamental reason that they are neither a trade nor business involving the performance of services in the field of health, specifically, nor are they any other type of SSTOB within the meaning of IRC § 199A(d)(2). As discussed above, assisted living communities focus on providing a home-like atmosphere for their residents by providing such things as exercise, health, and wellness programs in addition to housekeeping and maintenance services. Assisted living communities typically do not provide skilled nursing services or rehabilitation therapy (though the latter can be arranged through third-party providers). Such communities are thus, at most, akin to the “health clubs or health spas” example of what Treasury found was not the performance of services in the field of health in its temporary regulations promulgated under IRC § 448.37 Therefore, Treasury should issue guidance clarifying that assisted living communities are not a SSTOB, and as such income derived from their operation qualifies for the 20-percent QBI deduction (assuming all other requirements of IRC § 199A are satisfied).

SNFs also should not be classified as a SSTOB. While it cannot be denied that, in isolation, the delivery of skilled nursing services and rehabilitation therapy by medical professionals may qualify as providing services in the field of health under the Temporary Treasury Regulations promulgated under IRC § 448,38 the fact that certain footnotes in the Conference Committee Report mention the Temporary Treasury Regulations does not mean that Congress has required Treasury to implement IRC § 199A in a manner completely identical to that of IRC § 448.

As the Supreme Court of the United States has explained, the “language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history.”39 Treasury is also free to interpret statutory language differently even if the same phrase is used multiple times in the same act.40 And if Congress had intended to essentially require that the temporary regulations under IRC § 448 be used in implementing IRC § 199A(d)(2)(A), Congress could easily have used the type of language found elsewhere within IRC § 199A whereby Treasury is instructed on two occasions to use rules “similar to the rules under” other portions of the IRC.41 In fact, in addition to the two instances within IRC § 199A itself, the TCJA uses such language over a dozen times.42

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37 Treas. Reg. § 1.448-1T(e)(4)(ii).
38 Cf. Treas. Reg. § 1.448-1T(e)(4)(ii) (“[T]he performance of services in the field of health means the provision of medical services by physicians, nurses, dentists, and other similar healthcare professionals.”) (emphasis added); see also PLR 9222004 (Jan. 8, 1992) (finding that a taxpayer “engaged solely in the business of providing physical therapy services” was engaged in the performance of services in the field of health) (emphasis added).
41 See IRC § 199A(f)(1)(B) (“Rules similar to the rules under section 199(d)(1)(B)(i) (as in effect on December 1, 2017) for the apportionment of W-2 wages shall apply to the apportionment of W-2 wages and the apportionment of unadjusted basis immediately after acquisition of qualified property under this section.”), (h)(1) (instructing Treasury to “apply rules similar to the rules under section 179(d)(2) in order to prevent the manipulation of the depreciable period of qualified property using transactions between related parties”).
42 See (1) TCJA § 11028(b)(1)(E)(ii), 131 Stat. at 2079 (instructing that “rules similar to the rules of subparagraph (E) of section 408A(d)(3) of the Internal Revenue Code of 1986 shall apply”) (uncodified); (2) TCJA (continued)
No such statutory command exists with respect to IRC § 199A(d)(2)(A). Instead, under the broad grant of regulatory authority provided by IRC § 199A(f)(4), Congress gave Treasury the discretion to tailor the implementation of IRC § 199A in order to meet the unique purpose served by the statute.

Permitting SNFs to take the 20-percent QBI deduction serves the fundamental purpose of IRC § 199A, which was designed primarily to help level the playing field when it comes to the taxation of United States income earned by “main street” employers that provide hundreds of thousands of much-needed jobs to Americans and do business using pass-through entities, on the one hand, and large C corporations that received tax relief elsewhere within the TCJA.\(^{43}\) For example, unlike such things as physician or dental practices with relatively modest capital investment and few employees that do anything other than provide direct medical services to patients in an outpatient office setting, SNFs are inpatient institutions that provide an array of items and services to their residents that have nothing to do with the provision of medical services, such as housing, food services, and laundry services. SNFs, therefore, share traits similar to a class of enterprises that the TCJA—through its precise cross-reference to IRC

\(^{43}\) See, e.g., 163 Cong. Rec. S7370 (daily ed. Nov. 29, 2017) (statement of Sen. Hatch) (“For most small businesses that pay taxes on the owners’ individual returns, or pass-throughs, the bill provides significant relief in the form of a simple tax reduction applied to qualified business income. This will reduce the overall tax burden for pass-through businesses, which are the primary engines of our job creation in the United States. . . . All told, this means more expansion, more investment, and more jobs for U.S. workers employed by small businesses.”); 163 Cong. Rec. S7675 (daily ed. Dec. 1, 2017) (statement of Sen. Portman) (explaining that what would become IRC § 199A was designed to provide “more parity between the pass-through companies and the so-called C corporations”).
§ 1202(e)(3)(A) and no other provision within IRC § 1202—chose not to include in the definition of a SSTOB for purposes of IRC § 199A: i.e., the “business of operating a hotel, motel, restaurant, or similar business.”

3. **Alternatively, SNFs and Assisted Living Communities Should Still Be Entitled to the Benefits of IRC § 199A With Respect to Their Income That Is Attributable to Activities that Constitute a Distinct QTB and That Can Be Appropriately Accounted for on a Separate Basis**

a. **Much Income Generated by SNFs and Assisted Living Communities Is Attributable to Activities That Constitute a QTB Distinct from Any Activities That May Arguably Constitute a SSTOB**

Both assisted living communities and SNFs provide a broad array of goods and services that (1) could clearly constitute a “trade or business” in their own right, (2) do not fall within the definition of a SSTOB, and (3) are distinctive from and not incidental to a SSTOB. For example, SNFs and assisted living communities earn income from activities including, but not limited to:

- Residential housing rental;
- Sales of meals, snacks, and beverages;
- Transportation for non-medical reasons (e.g., shopping and entertainment excursions);
- Security;
- Laundry and dry-cleaning services;
- Non-medical, non-therapeutic health club and exercise services in the case of assisted living communities;
- Personal grooming services (e.g., haircuts, nail services, etc.);
- Mailroom services; and
- Entertainment.

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44 IRC § 199A(d)(2)(A).
45 IRC § 1202(e)(3)(E).
46 See IRC § 162.
47 For purposes of our analysis, we assume that the only SSTOB activities potentially relevant for SNFs and assisted living communities would be the “performance of services in the field[] of health,” IRC § 1202(e)(3)(A), as none of the remaining portions of the SSTOB definition appear even remotely applicable.
These activities, by common usage, do not constitute services in the field of health. Moreover, if the Temporary Treasury Regulations under IRC § 448 are used by way of analogy, these activities should similarly be treated as distinctive QTB activities.

For example, Temp. Treas. Reg. § 1.448-1T(e)(4)(ii) provides that “the performance of services in the field of health means the provision of medical services by physicians, nurses, dentists, and other similar healthcare professionals.” (Emphasis added.) Thus, the Temporary Treasury Regulations under IRC § 448 require that a service both (1) be the provision of medical services and (2) be provided by a healthcare professional. The activities listed above do not meet either of these criteria. Additionally, Temp. Treas. Reg. § 1.448-1T(e)(4)(ii) provides that “[t]he 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.” (Emphasis added.)

This narrow reading is consistent with the few items of guidance under IRC § 1202(e)(3)(A), which is directly cross-referenced by IRC § 199A(d)(2)(A). For example, in Priv. Ltr. Rul. 201717010 (Apr. 28, 2017), the Service was asked to consider, among other things, whether the activities of a taxpayer involved the performance of services in the field of health. Under the facts of the ruling, the taxpayer used proprietary technologies for the precise detection of certain medical conditions, analyzed the results of testing, and then prepared laboratory reports for healthcare providers (i.e., doctors and other healthcare providers). The taxpayer did not diagnose or recommend treatment, nor did the taxpayer discuss diagnosis or treatment with any healthcare provider, nor was it informed by the healthcare provider as to the healthcare provider’s diagnosis or treatment. The taxpayer’s laboratory director was required to be an M.D., D.O., or Ph.D. as required by the laboratory personnel requirement of federal law. The laboratory director reviewed results for quality control and quality assurance. However, none of the taxpayer’s personnel diagnosed, treated, or managed any aspect of any patient’s care. Based on these represented facts, the Service concluded that for purposes of IRC § 1202(e)(3)(A), the taxpayer was not in a trade or business involving the performance of services in the field of health. This was true even though the taxpayer’s services were vital to the performance of healthcare services by healthcare professionals and even though it would have appeared that the taxpayer would not have been involved in a trade or business but for the provision of services in the field of health by others (i.e., doctors and other healthcare providers).

A similarly narrow interpretation of what constitutes services in the field of health is found in Priv. Ltr. Rul. 201436001 (Sep. 5, 2014). There the Service considered a situation where a taxpayer provided products and services primarily in connection with the pharmaceutical industry. Specifically, the taxpayer worked with clients to help commercialize experimental drugs. Its business activities included research, development, manufacturing, and commercialization. In addition, the taxpayer worked with clients to solve problems in the pharmaceutical industry, such as developing successful drug manufacturing processes. Based on these facts, the Service concluded that “although [the taxpayer] works primarily in the pharmaceutical industry,

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48 While such private letter rulings cannot be cited as precedent, see IRC § 6110(k)(3), that ruling and Priv. Ltr. Rul. 201436001 (Sep. 5, 2014) (discussed below) are relevant to the analysis herein as demonstrations of the Service’s historical views on the interpretation of services within the field of health.
which is certainly a component of the health industry,” the taxpayer itself did not perform services in the field of health within the meaning of IRC § 1202(e)(3)(A).

The language of Temp. Treas. Reg. § 1.448-1T(e)(4)(ii) and the Service’s conclusions in the two private letter rulings discussed above suggest that Treasury should utilize a common-sense interpretation of the phrase “services in the field[] of health” when considering and classifying the various activities of SNFs and assisted living communities. Simply put, such activities should not constitute services in the health field, as they are neither medical services nor performed by healthcare professionals. In addition, these services should not be treated as services in the health field simply because they occur in conjunction with services (such as nursing services) that may be services in the health field. In this regard, it is useful to observe that Temp. Treas. Reg. § 1.448-1T(e)(4)(i) provides that only “the performance of any activity incident to the actual performance of services in [the health field] is considered the performance of services in [the health field].” (Emphasis added.) The many services enumerated above, and similar services, that are performed by SNFs and assisted living communities are not simply “incident” to the performance of health services. Rather, they would be necessary services that could be provided—and regularly are provided—to individuals who are not receiving any form of health services.

In considering the distinction between the health services that a resident might receive in a SNF, for example, and other services, it is useful to consider the fact that residents typically are treated by attending physicians who are not employees or agents of the SNF. Rather these professionals are independent third parties who typically come to the SNF to perform their independent services. The SNF may be involved in helping manage physicians’ access to residents, but this sort of management activity is not, itself, a healthcare service. Rather, such management activity is akin to the role played by the laboratory director in Priv. Ltr. Rul. 201717010 or to the management activity with respect to a specified service under IRC § 488 that was not, itself, treated as a specified service pursuant to Temporary Treasury Regulations favorably cited by the Conference Committee Report accompanying the TCJA.49 Such managers typically do not diagnose or treat a given resident. Thus, the only services provided by SNFs that might arguably constitute medical services performed by healthcare professionals would be skilled nursing services and rehabilitation therapy.

As should be clear from the discussion above, most assisted living communities and SNFs provide a broad array of goods and services that clearly constitute a “trade or business” that are not healthcare services and that are distinct from healthcare services. At a minimum, the income attributable to these activities should be allowed the benefits of IRC § 199A, as the

49 See H.R. Rep. No. 115-466, at 216 n.45 (“For purposes of the similar list of services in section 448, Treasury regulations provide that the performance of services in the field of the performing arts means the provision of services by actors, actresses, singers, musicians, entertainers, and similar artists in their capacity as such. The performance of services in the field of the performing arts does not include the provision of services by persons who themselves are not performing artists (e.g., persons who may manage or promote such artists, and other persons in a trade or business that relates to the performing arts). Similarly, the performance of services in the field of the performing arts does not include the provision of services by persons who broadcast or otherwise disseminate the performance of such artists to members of the public (e.g., employees of a radio station that broadcasts the performances of musicians and singers). See Treas. Reg. § 1.448-1T(c)(4)(iii).”)
income supports the sort of American jobs and business activity Congress clearly meant to promote by enacting the TCJA.

b. SNFs’ and Assisted Living Communities’ QBI Can Be Appropriately Accounted For on a Separate Basis

Not only do SNFs and assisted living communities generate significant income that should constitute QBI, but the nature of those facilities, common regulatory reporting methods, and common legal structures lend themselves to clear delineation between QBI and income that may be attributable to a SSTOB. For example, as it relates to SNFs, the Secretary of Health and Human Services is required by statute to categorize the expenditures listed on SNFs’ annual cost reports into four categories: (1) spending on direct care services (including nursing, therapy, and medical services); (2) spending on indirect care (including housekeeping and dietary services); (3) capital assets (including building and land costs); and (4) administrative services costs.\(^{50}\)

In addition to these reporting practices, there is a naturally arising segregation of various commercial activities within most SNFs and assisted living communities. For example, many such enterprises currently hold their real estate operations in an entity separate from their general client service operations. Such structures are long-standing and motivated by risk-management concerns and commercial considerations such as lending-related practices required by, among others, the Department of Housing and Urban Development.\(^{51}\)

We anticipate that Treasury may be considering anti-abuse provisions under IRC § 199A in response to press reports that certain taxpayers are exploring or even implementing steps that will attempt to separate what they purport is QBI from income that would be attributable to a SSTOB.\(^{52}\) Although AHCA/NCAL understand the potential need for such anti-abuse rules, AHCA/NCAL would not expect such rules to deny benefits to the existing structures used by SNFs and assisted living communities. Current industry practices, both with respect to delineation of services and the legal separation of real property and certain services from other services (which may or may not be attributable to a SSTOB) long precede the enactment of the TCJA and were implemented with no intent to obtain any sort of federal income tax benefit. Instead, such separations and distinctions have been motivated primarily by risk-management concerns and the need to secure favorable financing. Accordingly, anti-abuse standards that might indict non-tax-motivated structures by using broad “relatedness” standards (such as IRC §§ 267(b), 707(a), or similar provisions) or by imposing a test leveraging off the receipt of a substantial amount of “related party” income would inappropriately deny IRC § 199A benefits to SNFs and assisted living communities that have never engaged and will not be engaging in efforts to “game” the statute.

\(^{50}\) 42 U.S.C. § 1395yy(f)(3).
III. CONCLUSION

SNFs and assisted living communities serve critical roles in our national economy. They not only provide important items and services to the public, they also provide much-needed jobs for hundreds of thousands of Americans. The public’s need for SNFs and assisted living communities will only grow in the coming years as members of the Baby Boom generation continue to age, leading to what many refer to as the “silver tsunami.” It is therefore vitally important that the job-creating taxpayers who derive income from the ownership and/or operation of SNFs and assisted living communities achieve the maximum tax savings possible under IRC § 199A.