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Knight Watch

Taxing the Rich: A Discussion of Qualified Small Business Stock and the Future of Code Sec. 1202

By Emily A. Risher and Kenneth W. Parsons

I. Introduction

Code Sec. 1202 provides for the partial or full exclusion of capital gains on the sale of certain qualified small business stock.[1] Enacted in 1993 to provide an incentive to invest in small businesses, Code Sec. 1202 has in turn operated to benefit not only small business owners but also investors from all levels of the economic spectrum. Although viewed by many as a societal net-positive gain exclusion mechanism, critics of the statute point to the widespread use of the provision by private equity firms and other highly sophisticated investment entities as a tax avoidance vehicle. In recent years, a call for sweeping political tax reform has increased the pressure on Congress to eliminate provisions utilized mainly by the wealthy to reduce their federal tax burdens. The Build Back Better Act passed by the U.S. House of Representatives on November 19, 2021 included a provision that limited the gain exclusion to 50 percent for those taxpayers who have an adjusted gross income equaling or exceeding $400,000, or who are a trust or estate.[2] Although unclear if this provision will be included in the final rendition of the Build Back Better Act, inclusion of Code Sec. 1202 in the current legislative proceedings highlights the increased interest in the removal of statutes that primarily benefit the wealthy from the Internal Revenue Code. This article will begin with an in-depth analysis of Code Sec. 1202, followed by a discussion pertaining to the future of Code Sec. 1202 in sight of the pending legislation.

II. Qualified Small Business

In order to determine whether Code Sec. 1202 applies to the sale of stock from a certain company, it must first be established whether the company is a qualified small business. Under Code Sec. 1202, there are five principal requirements relevant to the company's classification as a qualified

small business. In order to meet the requirements of a qualified small business, the company must (1) be a domestic C corporation, (2) have gross assets of $50 million or less at all times before and immediately after it issues the stock, (3) submit certain reports to the Secretary of the Treasury (Secretary) as required, (4) have at least 80 percent of the value of the company's assets used in the active conduct of one or more qualified businesses, and (5) not include more than 10 percent in real estate or 10 percent in portfolio stock or securities in its assets. Each of these requirements is examined in turn below.

Although Code Sec. 1202 exists in the present in its pure, unadulterated form, political influences indicate a possibility of the discontinuance of at least a portion of this provision.

First, the company must be any domestic C corporation, with the exception of a domestic international sales corporation (DISC) or former DISC, regulated investment company, real estate investment trust (REIT) or real estate mortgage investment conduit (REMIC), and a cooperative.[3] A domestic C corporation is an entity separate from its owners under the Code and the Regulations (collectively, "U.S. Federal Income Tax Law").

Second, the aggregate gross assets of the company before the issuance and immediately after the issuance of its stock cannot exceed $50 million.[4] "Aggregate gross assets" means the amount of cash and the aggregate adjusted bases of other property held by the company.[5] The calculation includes amounts received by the company when it issues stock, but not future growth of the fair market value of the assets of the company.[6] In addition, all corporations that are members of the same "parent-subsidiary controlled group" are treated as one corporation for purposes of the $50 million gross assets test.[7] A parent-subsidiary controlled group is one or more chains of corporations connected through stock ownership with a common parent corporation that owns at least 50 percent of the combined voting power or value of the stock of the other corporations.[8]

Third, the company must agree to submit certain reports to the Secretary and to its shareholders as the Secretary may require to carry out the purposes of Code Sec. 1202 and to be a qualified small business under Code Sec. 1202.[9] There is no promulgated guidance on the related timing or content requirements of such reports.[10] Thus, a company should be prepared to render information to the Secretary at any point in the life cycle of its qualified small business stock.

Fourth, the company must also meet the active business requirements of Code Sec. 1202(e) in order to be eligible for the qualified small business designation. Under Code Sec. 1202(e), at least 80 percent of the assets of the company must be used by the company in the active conduct of one or more qualified trades or businesses. "Qualified trade or business" means any trade or business other than (A) any trade or business involving the performance of services in the fields of health, law, engineering, architecture, 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 one or more of its employees; (B) any banking, insurance, financing, leasing, investing, or similar business; (C) any farming business; (D) any business involving the production or extraction of products of a character with respect to which a deduction is allowable under Code Sec. 613 or 613A (relating to mines, wells, and natural gas deposits); and (E) any business operating a hotel, motel, restaurant, or similar business.[11] These categories will be discussed in greater detail in the following section.

Lastly, the total value of the company's assets must not include more than 10 percent in real estate or 10 percent in portfolio stock or securities.[12] Portfolio stock or securities include stocks or securities in other corporations that are not subsidiaries of such corporation. If (1) more than 10 percent of the value of a corporation's assets consist of portfolio stock or securities or (2) more than 10 percent of a corporation's assets consist of real estate not used in the active conduct of a qualified business, the corporation cannot meet the active business requirement.[13] This limitation does not apply to any assets held as part of the reasonably required working capital needs of the corporation or any assets reasonably expected to be used within two years to finance research and experimentation.[14] Further, stock and debt in any subsidiary corporation is disregarded for purposes of the test.

III. Qualified Trade or Business

The determination of whether a business qualifies under Code Sec. 1202 often hinges upon whether the business is considered a "qualified trade or business." Code Sec. 1202(e) contains a list of categories that are excluded from the definition of a "qualified trade or business"; however, there are no immediate definitions of such categories. Code Sec. 199A(d)(2)(A) incorporates (with modifications) the trades and businesses listed in Code Sec. 1202(e)(3)(A), and therefore is helpful in analyzing the meaning of such terms by providing an example of how the Internal Revenue Service ("IRS") defines certain categories. Reg. §1.199A-5 describes the categories of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, and brokerage services.[15] Although not controlling within the context of Code Sec. 1202, these definitions give some insight into the interpretation of such terms by the IRS.[16]

"Accounting" refers to those individuals performing services in the field of accounting, such as accountants, financial report preparers, auditors, and enrolled agents, whereas "actuarial sciences" refers to actuaries and those performing a similar profession.[17] Additionally, the term "performing arts" includes actors, singers, musicians, entertainers, directors, and other similar professions.[18] However, this does not include the provision of services that do not require skills unique to the creation of performing arts, such as: (1) persons who broadcast or otherwise disseminate video or audio of performing arts to the public, and (2) the maintenance and operation of equipment or facilities for use in the performing arts.[19]

The performance of services in the field of consulting means the provision of professional advice and counsel to clients to assist the clients in achieving goals and solving problems.[20] However, the performance of services in the field of consulting does not include the performance of services other than advice and counsel, such as sales (or economically similar services) or the provision of training and educational courses.[21] Further, consulting does not include the performance of consulting services embedded in, or ancillary to, the sale or manufacture of goods or performance of services on behalf of a trade or business that would not otherwise classify as a specified trade or business, if there is no separate payment for the consulting services.[22]

"Athletics" includes the performance of services in the field of athletic competition.[23] This includes athletes, coaches, professional sports club operators, and team managers for a variety of sports.[24] The performance of services in the field of athletics does not include the provision of services that (1) do not require skills unique to athletic competition, such as the maintenance and operation of equipment or facilities for use in athletic events, or (2) are provided by persons who broadcast or otherwise disseminate video or audio of athletic events to the public.[25] Further, the term "law" includes the performance of legal services by individuals such as lawyers, mediators, paralegals, arbitrators, and similar professionals.[26] The performance of services in the field of law does not include printers, delivery services, stenography services, or any services that do not require skills unique to the field of law.[27]

"Financial services" includes all services that involve the following actions: managing wealth; advising clients with respect to finances; developing retirement plans; developing wealth transition plans; advising clients with respect to valuations, mergers, acquisitions, dispositions, and restructurings; and raising financial capital by underwriting, or acting as a client's agent in the issuance of securities and similar services.[28] This category does not include taking deposits or making loans, but it does include arranging lending transactions between a lender and borrower.[29] However, it should be noted that insurance services are excluded from this category to the extent that they are ancillary to the commission-based sale of an insurance policy.[30] Similarly, "brokerage services" includes services in which a person arranges transactions between a buyer and a seller with respect to securities for a commission or fee.[31] However, "brokerage services" within the context of Code Sec. 1202(e)(3) differs from the definition of "brokerage services" under Code Sec. 199A. Under Code Sec. 1202(e)(3), the IRS has argued that a business that facilitates the leasing of property between lessors and lessees constitutes a business that involves the performance of services in the field of brokerage services within the meaning of Code Sec. 1202(e)(3)(A).[32] Therefore, the definition of "brokerage services" within the context of Code Sec. 1202(e)(3)(A) is likely broader than the restrictive definition of "brokerage services" under Code Sec. 199A, which is limited to transactions that deal with securities only.

Following on this, the term "health" is the only other term that is casually defined by other secondary materials involving Code Sec. 1202(e)(3). Generally, the term "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.[33] This does not include the provision of services not directly related to a medical services field, even if the services provided relate to the health of the service recipient.[34] For example, the IRS has ruled that a pharmaceutical company that specialized in commercialization of experimental drugs was engaged in qualified trade or business under Code Sec. 1202 despite proximity of its business activities to the field of health.[35] Further, the IRS has ruled that a manufacturer of a class of products prescribed by third-party healthcare providers was engaged in a qualified trade or business under Code Sec. 1202(e)(3) although its products were associated with the health industry.[36] Additionally, the IRS has extended this treatment to the development of tools and software utilized in the healthcare industry.[37] The IRS has ruled that a developer of a tool used to provide complete and timely information to healthcare providers was engaged in a qualified trade or business under Code Sec. 1202(e)(3) because the developer did not provide healthcare professionals with diagnosis or recommendations for treating patients, the developer was not aware of the healthcare provider's diagnosis or treatment of patients, and skills that its employees have were unique to work they perform for the developer and were not useful to other employers.[38]

Further, limited guidance exists on the interpretation of the reputation and skills clause in Code Sec. 1202(e)(3)(A). However, a recent case in the U.S. Tax Court provides some enlightenment on how to interpret it. In *Owen v. Commissioner*, the Tax Court examined the reputation and skills clause of Code Sec. 1202(e)(3)(A). The issue in the case was whether the Owens family was entitled to defer capital gain from the sale of their stock in a corporation named Family First Advanced Estate Planning (FFAEP). In order to defer the capital gain from the sale of their stock under Code Sec. 1045 (relating to rollovers of gain from qualified small business stock), the stock needed to meet the requirements for "qualified small business stock" as set forth in Code Sec. 1202(c). The determination of whether the stock qualified hinged on whether FFAEP was engaged in a qualified trade or business. FFAEP was in the business of selling prepaid legal service policies, including estate planning services. Independent contractors generally sold the products and services offered by FFAEP. The Tax Court rejected the government's argument that FFAEP was not a qualified business because one of the principal assets of FFAEP was the skill of its owner, Mr. John Owen.[39] Instead, the Tax Court held that the principal asset of the business was the training and organizational sales structure that used independent contractors (including Mr. Owen) who sold the policies that earned premiums. The principal asset was a tangible asset used to create value for FFAEP's customers, in addition to the service component of the business. Therefore, the court found that FFAEP was a qualified small business.[40]

In a number of Private Letter Rulings, the IRS has followed the line of thought employed by the Tax Court in *Owen*.[41] In analyzing these rulings, a common theme appears across the different circumstances: If the business in the ruling provided a service, then it was only a trade or business that qualified as a small business under Code Sec. 1202 if the business also offered value to customers by using the company's tangible assets, proprietary methods, or other intellectual property.[42] For example, in Private Letter Ruling 201436001, the company's development of specific manufacturing and intellectual property assets to create value for customers was the primary reasoning behind the IRS' decision that the company was not performing services in the health industry within the meaning of Code Sec. 1202(e)(3). Not only did the company offer a service but it also offered tangible assets to its customers. This reasoning, combined with that found in *Owen*, indicates that the IRS will likely view businesses that employ a tangible asset in producing value for customers, in addition to the service component, as qualified small businesses.[43]

Two terms that are not specifically defined in either Code Sec. 1202 or 199A are "architecture" and "engineering." "Architecture" is generally defined as the art and study of designing buildings.[44] "Engineering" is defined as the branch of science and technology concerned with the development and modification of engines (in various senses), machines, structures, or other complicated systems and processes using specialized knowledge or skills, typically for public or commercial use.[45] Both of these definitions are relevant to the interpretation of the term "architecture" and "engineering" in the Code. The IRS previously has taken to utilizing definitions within *Black's Law Dictionary* to determine whether a particular set of services qualified as "brokerage services" under Code Sec. 1202.[46] However, because the IRS has not opined on the meanings of "architecture" and "engineering" specifically, the *Oxford English Dictionary* definitions are not necessarily controlling.

Additionally, Code Secs. 1202(e)(3)(B), (C), (D), and (E) are not described in the Internal Revenue Code or Treasury Regulations. Code Sec. 1202(e)(3)(B) excludes any banking, insurance, financing, leasing, investing, or similar business from the definition of a "qualified trade or business."[47] Code Sec. 1202(e)(3)(C) excludes any farming business (including the business of raising or harvesting trees) from the definition of a "qualified trade or business," whereas Code Sec. 1202(e)(3)(D) excludes any business involving the production or extraction of products of a character with respect to which a deduction is allowable under Code Sec. 613 or 613A.[48] Code Secs. 613 and 613A both address percentage depletion with respect to mines, wells, and other natural deposits.[49] Finally, Code Sec. 1202(e)(3)(E) excludes any business operating a hotel, motel, restaurant, or similar business from the definition of "qualified trade or business."[50]

IV. Qualified Small Business Stock

Assuming the company constitutes a qualified small business, it must also be determined whether stock in the company is "qualified small business stock" within the meaning of Code Sec. 1202. Under Code Sec. 1202, there are three principal requirements relevant to this inquiry. In order to meet the requirements of qualified small business stock, the stock must (1) be held for at least five years, (2) be acquired at its original issuance by the holder, in exchange for money or property or as compensation for services provided to the company, and (3) not have been redeemed in a related redemption or a significant redemption within the relevant testing period. Each of these requirements is examined in turn below.

First, the stock must be held for at least five years.[51] To the extent that stock is held in a limited liability company, partnership, or other flow-through entity, the owners of that entity will be treated as holding qualified small business stock if (1) the entity has held the stock for at least five years, and (2) the owner has held his or her interest in the entity for the entire period of ownership.[52] Further, for stock received by gift, the recipient's holding period will include that of the transferor.[53]

Second, the stock (1) must be acquired by its holder *via* an original issuance of the stock by the corporation (*i.e.*, not acquired *via* a secondary transfer of stock from one holder to another holder), and (2) must have been exchanged for money or property (not including other stock) or as compensation for services provided to the company.[54] In certain transfers, the transferee shall be treated as having acquired the stock in the same manner as the transferor and having held such stock during any continuous period immediately preceding the transfer during which it was held by the transferor without violating the original issuance requirement.[55] These transfers include transfers by gift, at death, or from a partnership to a partner of stock with respect to which requirements under Code Sec. 1202(g) are met at the time of transfer.[56]

Third, the company must not have had a related redemption or a significant redemption within the relevant testing period. Certain redemptions can impact treatment of stock as qualified small business stock. Specifically, stock acquired by a taxpayer will not be treated as qualified small business stock if, at any time during the four-year period beginning on the date two years before the issuance of such stock, the corporation issuing such stock purchased (directly or indirectly) any of its stock from the taxpayer or from a person related to the taxpayer. The amount of stock purchased must exceed a *de minimis* amount. Stock acquired from the taxpayer or a related person exceeds a *de minimis* amount only if the aggregate amount paid for the stock exceeds $10,000 and more than 2 percent of the stock held by the taxpayer and related persons is acquired.[57] This is referred to as the related-person redemption rule. In addition, stock issued by a corporation will not be treated as qualified small business stock if, during the two-year period beginning on the date one year before the issuance of such stock, the corporation made one or more purchases of its stock with an aggregate value (as of the time of the respective purchases) exceeding 5 percent of the aggregate value of all of its stock as of the beginning of such two-year period.[58] This is referred to as the significant redemption rule. Both rules look backward and forward at the time of each stock issuance to test for redemptions.

However, a stock purchase is disregarded under these rules if the stock was acquired by the seller in connection with the performance of services as an employee or director and the stock is purchased from the seller incident to the seller's retirement or other *bona fide* termination of such services.[59] Committee Report H.R. 103-111, P.L. 103-66 provides insight into the meaning of the term "in connection with the performance of services." In this Committee report, stock received in connection with the performance of services is treated as issued by the corporation and acquired by the taxpayer when included in the taxpayer's gross income in accordance with the rules of Code Sec. 83.[60] Code Sec. 83 addresses the transfer of property in connection with the performance

of services. Therefore, if stock is viewed as transferred in connection with the performance of services under Code Sec. 83, then it is almost certain that it will also qualify as "in connection with the performance of services" under Code Sec. 1202. In *Alves v. Commissioner*, for example, the court addressed the issue of whether employer stock purchased by an executive was subject to Code Sec. 83 even though the executive paid full price for the stock.[61] In the executive's employment agreement, the company agreed to sell the executive 40,000 shares of common stock at 10 cents per share in order to raise capital for the company's initial operations. The court found that even though the executive paid full price for the stock, the stock was still transferred in connection with the performance of services.[62] Because the term "in connection with the performance of services" is treated similarly under Code Secs. 83 and 1202, *Alves* stands for the proposition that employer stock purchased by an executive is still regarded as transferred "in connection with the performance of services" for purposes of Code Sec. 1202.

V. Current Assessment on the Longevity of Code Sec. 1202

Although not currently enacted into law, the presence of substantial amendments to Code Sec. 1202 in potential legislation serves as a threat to the viability of Code Sec. 1202. Under Section 138150 of the "Build Back Better Act," which was passed by the House in November 2021, the exclusion of gain from the sale of qualified small business stock from an individual's income allowed under Code Sec. 1202 would be capped at 50 percent for taxpayers with adjusted gross income exceeding $400,000, and for all trusts and estates.[63] This amendment would apply to all sales and exchanges made on or after September 13, 2021, with the exception of any sales or exchanges made pursuant to a written binding contract that was in effect on September 12, 2021, and is not modified in any material respect thereafter.[64] Importantly, this provision would effectively limit gains on qualified small business stock acquired when the full tax exclusion was in place. At the time of this writing, certain members of the Senate have rejected the bill as currently written.[65] Although it has not been brought to an official vote, without the support of these certain members, the bill will not pass the Senate.[66]

However, there are current discussions surrounding the partitioning of the Build Back Better Act. Although discussions have been stalled by the Ukrainian–Russian conflict, Democrats have vowed not to give up on the Build Back Better Act in its entirety.[67] There is a substantial chance that the original Build Back Better Act will be subdivided into more manageable pieces of legislation, with the most highly contentious portions put aside.[68] In the original bill, controversy arose mainly in regard to the increase in government spending, lack of targeting to needy Americans, and provisions likely to hurt the fossil fuel industry.[69] Notably missing from this list of objections are any provisions that would likely increase government funding, such as the revision of Code Sec. 1202. Because this provision of legislation would actually be a source of revenue for the U.S. government, it seems unlikely that the Code Sec. 1202 provision in particular will be removed from any new partitioned versions of the Build Back Better Act.

Further, popular opinion appears to confirm this theory, as many criticize Code Sec. 1202 as a tax-avoidance mechanism for the wealthy.[70] Especially when utilizing the qualified small business stock exception in a manner known as "stacking," many investors in tech start-up companies and various other industries have been able to exclude capital gains on millions of dollars.[71] Academics have also criticized the inclusion of Code Sec. 1202 in the U.S. tax code, citing the provision as "flawed tax policy, with little connection between the statute's main beneficiaries and its putative goals."[72] Although common perception does not necessarily affect political legislation in all cases, lost tax revenue typically does. The Joint Committee on Taxation's estimate for tax revenue lost from Code Sec. 1202 ranges between $1.1 billion and $1.3 billion in 2019 alone.[73] Other scholars estimate that this figure is actually much larger in practice.[74] As a result of the substantial losses in revenue, it is even more likely that Code Sec. 1202 will be addressed in the upcoming legislation. Because President Joe Biden is focused on constructing a large social spending bill this year, income-producing provisions similar to Section 138150 in the Build Back Better Act are likely to make the final cut.

VI. Conclusion

Although Code Sec. 1202 exists in the present in its pure, unadulterated form, political influences indicate a possibility of the discontinuance of at least a portion of this provision. Investors and business owners alike should stay abreast of the decisions made regarding the

statute, as well as any possible retroactive applicability. Those affected should consider lobbying against such legislation, since those individuals that have acquired qualified small business stock with the understanding that they would receive a full gain exclusion may not be able to take advantage of this provision due to the retroactive nature of the potential changes to the statute. It is recommended to retain counsel regarding this topic in order to carefully plan any future divestments of qualified small business stock.

ENDNOTES

1 All references to the Internal Revenue Code shall refer to the Internal Revenue Code of 1986, as amended, and all Reg. §references are to the final regulations promulgated thereunder, all as in effect as of the date of this article.

2 H.R. 5376, Report No. 117-130 117th Cong. §138150 (2021).

3 Code Sec. 1202(d)(1); Code Sec. 1202(e)(4).

4 Code Sec. 1202(d)(1)(A)-(B).

5 Code Sec. 1202(d)(2)(A).

6 Code Sec. 1202(d)(2)(B).

7 Code Sec. 1202(d)(3).

8 Code Sec. 1202(e)(5)(C).

9 Code Sec. 1202(d)(1)(C).

10 David Strong, *Section 1202 Qualified Small Business Stock*, Wilson Sonsini Goodrich and Rosati (Aug. 17, 2021).

11 Code Sec. 1202(e)(3).

12 Code Sec. 1202(e)(5)(B); Code Sec. 1202(e)(7).

13 Each limitation applies separately, so that a company may hold up to 10 percent of its assets in real estate and up to 10 percent of its assets in portfolio stock or securities. Code Sec. 1202(e)(5)(B); Code Sec. 1202(e)(7).

14 Code Sec. 1202(e)(6).

15 Reg. §1.199A-5(b)(1).

16 Reg. §1.199A-5(b)(2)(i)(A).

17 Reg. §§1.199A-5(b)(2)(iv) and 1.199A-5(b)(2)(v).

18 Reg. §1.199A-5(b)(2)(vi).

19 *Id*.

20 Temporary Reg. §1.448-1T(e)(4)(iv); Reg. §1.199A-5(b)(2)(vii).

21 *Id*.

22 Temporary Reg. §1.448-1T(e)(4)(iv); Reg. §1.199A-5(b)(2)(vii).

23 Reg. §1.199A-5(b)(2)(viii).

24 *Id*.

25 *Id*.

26 Reg. §1.199A-5(b)(2)(iii).

27 *Id*.

28 Reg. §1.199A-5(b)(2)(ix).

29 *Id*.

30 Preamble to T.D. 9847, IRB 2019-9, 670, Feb. 8, 2019.

31 Reg. §1.199A-5(b)(2)(x).

32 Chief Counsel Advice 202204007 (Jan. 28, 2022).

33 Reg. §1.199A-5(b)(2)(ii).

34 *Id*.

35 LTR 201436001 (Sep. 5, 2014).

36 LTR 202125004 (Jun. 25, 2021).

37 LTR 201717010 (Apr. 28, 2017); LTR 202144026 (Nov. 5, 2021) (ruling that a technology company that developed and commercialized software to assist medical providers in providing medical treatment to individual patients was engaged in a qualified trade or business under Code Sec. 1202(e)(3); where, although its products were associated with health industry, its trade or business was not involved in performance of health services or its principal asset of its trade or business did not involve reputation or skill of its employees).

38 LTR 201717010 (Apr. 28, 2017).

39 *J.P. Owen*, 103 TCM 1135, Dec. 58,923(M), TC Memo. 2012-21 (2012).

40 *Id*.

41 *See* LTR 201436001 (Sep. 5, 2014) (ruling that a pharmaceutical company that specialized in commercialization of experimental drugs was engaged in a qualified trade or business under Code Sec. 1202 despite proximity of its business activities to the health field); LTR 201717010 (Apr. 28, 2017) (ruling that a developer of a tool used to provide complete and timely information to healthcare providers was engaged in a qualified trade or business under Code Sec. 1202(e)(3); where it did not provide healthcare professionals with diagnosis or treatment recommendations for treating patients, taxpayer was not aware of healthcare provider's diagnosis or treatment of patients, and skills that its employees have were unique to work they perform for taxpayer and weren't useful to other employers); LTR 202114002 (Apr. 9, 2021) (ruling that an insurance company representative/appointed agent/business that worked with customers to obtain insurance and performed administrative services, including reporting all known incidents, claims, suits, and notices of loss to the insurance company, was engaged in a qualified trade or business under Code Sec. 1202(e)(3)); LTR 202125004 (Jun. 25, 2021) (ruling that a manufacturer of class of products prescribed by third-party healthcare providers was engaged in qualified trade or business under Code Sec. 1202(e)(3); where, although its products were associated with the health industry, its trade or business wasn't involved in performance of health services or its principal asset of its trade or business did not involve reputation or skill of its employees); LTR 202144026 (Nov. 5, 2021) (ruling that a technology company that developed and commercialized software to assist medical providers in providing medical treatment to individual patients was engaged in a qualified trade or business under Code Sec. 1202(e)(3); where, although its products were associated with health industry, its trade or business was not involved in performance of health services or its principal asset of its trade or business didn't involve reputation or skill of its employees).

42 Benetta P. Jenson and Stuart J. Kohn, *Maximize Qualified Small Business Stock Exclusion*, 45 Est. Plan. 3 (Oct. 2018). This proposition is further explored in *Putting It On and Taking It Off: Managing Tax Basis Today (For Tomorrow)* by Paul S. Lee (Jun. 2018). After analyzing LTR 201436001 and LTR 201717010, Lee finds that "it seems important that there must exist a physical asset, process, proprietary methodology, technology, patent, or other intellectual property such as that it is not a company where 'the principal asset of the trade or business is the reputation or skill of one or more of its employees.'"

43 This is assuming that the business does not fall into one of the other categories listed under Code Sec. 1202(e).

44 "Architecture," *Oxford English Dictionary*.

45 "Engineering," *Oxford English Dictionary*.

46 Chief Counsel Advice 202204007 (Jan. 28, 2022).

47 Code Sec. 1202(e)(3)(B).

48 Code Sec. 1202(e)(3)(C), (D).

49 Code Sec. 613, 613A.

50 Code Sec. 1202(e)(3)(E).

51 Code Sec. 1202(a)(1).

52 Code Sec. 1202(g).

53 Code Sec. 1202(h).

54 Code Sec. 1202(c)(1).

55 Code Sec. 1202(h)(1).

56 *Id*.

57 Reg. §1.1202-2(a)(2).

58 Reg. §1.1202-2(b).

59 Reg. §1.1202-2(d)(1)(i).

60 H.R. No. 103-111 (P.L. 103-66) pg. 603.

61 *L.J. Alves*, CA-9, 84-2 USTC ¶9546, 734 F2d 478 (1984).

62 *Id*.

63 H.R. 5376, Report No. 117-130 117th Cong. §138150 (2021).

64 *Id*.

65 Failure to attain the vote of Sen. Joe Manchin (D-W.Va.) led to the stalling in talks over this bill. *See* B. Everett, *Dems face a sobering possibility: Build Back ... never*, Politico (Feb. 10, 2022) *www.politico.com/news/2022/02/10/democrats-social-spending-dreams-stuck-in-winter-purgatory-00007557*.

[66] B. Everett, *Dems face a sobering possibility: Build Back ... never*, Politico (Feb. 10, 2022) *www.politico.com/news/2022/02/10/democrats-social-spending-dreams-stuck-in-winter-purgatory-00007557*.

[67] P. Mattingly, *The Democratic balancing act as they eye the resurrection of Build Back Better: 'Timing. Is. Everything.'*, CNN Politics (Feb. 10, 2022) *www.cnn.com/2022/02/10/politics/white-house-state-of-play/index.html*.

[68] *Id.*

[69] K. Wadington and S. Rossman, *Sen. Joe Manchin says he won't support Biden's Build Back Better social spending bill*, USA Today (Dec. 19, 2021) *www.usatoday.com/story/news/politics/2021/12/19/sen-joe-manchin-wont-support-build-back-better-legislation/8960337002/*.

[70] J. Drucker and M. Farrell, *A Lavish Tax Dodge for the Ultrawealthy Is Easily Multiplied*, The New York Times (Dec. 28, 2021) *www.nytimes.com/2021/12/28/business/tax-break-qualified-small-business-stock.html*.

[71] *Id.*

[72] M. Viswanathan, *The Qualified Small Business Stock Exclusion: How Startup Shareholders Get $10 Million (or More) Tax-Free*, Columbia Law Rev., 120, 1 (*columbialawreview.org/content/the-qualified-small-business-stock-exclusion-how-startup-shareholders-get-10-million-or-more-tax-free/*).

[73] *Id.*

[74] *Id.*