

October 28, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, DC 20515

The Honorable Charles Schumer
Senate Majority Leader
United States Senate
Washington, DC 20510

The Honorable Kevin McCarthy
House Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, DC 20515

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
Washington, DC 20510

Dear Speaker Pelosi, Leader McCarthy, Leader Schumer, and Leader McConnell:

On behalf of the S Corporation Association (S-Corp) I wanted to express our strong opposition to the changes to the excess business loss provisions included in H.R. 5376, the Build Back Better (BBB) Act. These proposed changes not only make certain passthrough loss limitations permanent, but also modify the loss carryforward rules such that passthrough entities would be subjected to considerably more onerous rules than other entities. At a time when Main Street businesses are still working to recover from the impacts of a global pandemic, these provisions threaten to derail that recovery, harming the very Main Street workers and communities this legislation is aiming to help.

H.R. 5376 makes permanent and modifies section 461(l) of the Internal Revenue Code. Section 461(l), known as the excess business loss (EBL) limitation rule, was enacted as part of the 2017 Tax Cuts and Jobs Act (TCJA). Today, as in 2017, we oppose this EBL limitation because of its harmful economic effects on S corporations and other private employers which operate as passthroughs. Further, we note that while Congress originally intended this provision to serve as a partial offset for the creation of section 199A, the qualified business income deduction, this legislation would make this tax increase permanent, but the section 199A deduction is limited and not extended. In fact, for tax years after 2025, passthrough taxpayers, including our Main Street businesses, are targeted for a significantly higher tax burden than what was in effect prior to the 2017 TCJA.

As damaging as making permanent the onerous EBL limitation rule would be, H.R. 5376 also includes modifications that, if enacted, would double down on that damage. By further restricting the use of all active business losses for passthrough entities within a new category of active business losses, these modifications carry the potential effect of permanently disallowing losses that result from ordinary and necessary trade or business expenses. In so doing, the proposed modifications undermine the fundamental tax accounting principle of matching expenses and revenue. To cap it off, active business losses would be treated more adversely than passive activity losses. For instance, the passive activity loss rules allow the use of suspended losses once an entire interest in an activity is disposed. No analog exists in the revised version of section 461(l). The potential harm of this provision is so extensive that the American Institute of Certified Public Accountants (“AICPA”), a leading tax practitioner group, has stated that “(i)f

this provision is ultimately adopted, there are several collateral matters that must be addressed in the legislation to make the provision fair and administrable.”

The proposed changes to the EBL limitation rules in H.R. 5376 threaten to harm thousands of successful Main Street businesses, their employees, and their communities while larger businesses that have been better able to weather this global downturn face no similar increase in tax liability or complexity. If Congress truly wishes to “build back better,” we strongly urge that it strike these modifications to the EBL limitation rules.

We appreciate your time and consideration of this matter and look forward to hearing from you on this vital issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian Reardon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brian Reardon
S Corporation Association

CC: Chairman Richard Neal, Ranking Member Kevin Brady, Chairman Ron Wyden, Ranking Member Mike Crapo, Thomas Barthold