By Electronic Submission

October 1, 2018

CC:PA:LPD:PR (REG-107892-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Request to Testify, October 16, 2018 Public Hearing
Qualified Business Income Deduction (REG-107892-18)

Dear Sir or Madam:

TechServe Alliance requests the opportunity to present testimony at the October 16, 2018 public hearing on Proposed Regulations, REG-107892-18, to implement the Qualified Business Income ("QBI") Deduction included in the Tax Cuts and Jobs Act, P.L. 115-97.

Specifically, we would like to provide the IT & Engineering staffing industry's position on provisions related to Section 199A of the Internal Revenue Code (IRC), Proposed Regulation Section 1.199A-5 - the definition of specified service trade or business ("SSTB"). TechServe Alliance submitted written comments regarding the Proposed Regulations, a copy of which is attached.

Our public testimony, to be presented by TechServe Alliance's tax counsel Kent Mason of Davis & Harman LLP, will briefly discuss our support for the adoption of the Proposed Regulations and will focus on the following areas in our written comments:

I. Staffing Firms are not SSTBs under the Proposed Regulations
II. IT/Engineering Staffing Firms That Serve SSTBs are Not SSTBs
III. Consistent with the Proposed Regulation's intent, TechServe Recommends Modifying Example 3, "Consulting" and Adding Additional "Consulting" Example Related to Staffing Firms

Thank you for your consideration of TechServe Alliance's request to testify.

If you have any questions or need additional information, please do not hesitate to contact us.

Sincerely,

Mark Roberts
Chief Executive Officer
roberts@techservealliance.org
By Electronic Submission

October 1, 2018

CC:PA:LPD:PR (REG-107892-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Qualified Business Income Deduction (REG-107892-18)

Dear Sir or Madam:

TechServe Alliance submits these comments in response to Proposed Regulations published on August 16, 2018 to implement the Qualified Business Income ("QBI") Deduction included in the Tax Cuts and Jobs Act, P.L. 115-97. Specifically, we provide the IT & Engineering staffing industry's position on provisions related to Section 199A of the Internal Revenue Code (IRC), Proposed Regulation Section 1.199A-5 – the definition of specified service trade or business ("SSTB").

TechServe Alliance is the national trade association representing IT and engineering staffing firms dedicated to advancing excellence and ethics. TechServe Alliance represents hundreds of member companies and serves as the voice of the industry before the policymakers and the national and trade press.

By providing access to the knowledge and best practices of an entire industry, TechServe Alliance supports its members in the efficient delivery of best-in-class IT & Engineering staffing and solutions for clients and exceptional career opportunities for IT professionals. Most of our members operate as sole proprietorships, limited liability corporations, partnerships, or S corporations with less than $20 million in annual revenue.

TechServe Alliance, its chapters, and its individual member companies appreciate the effort and expertise of the Department of the Treasury and Internal Revenue Service (IRS) staff in drafting these Proposed Regulations. Based on our careful review, we believe that the Proposed Regulations make it clear that IT and engineering staffing industry firms are not SSTBs. As discussed below, we also offer suggested clarifications regarding the definition of an SSTB related to "consulting" that would strengthen the Proposed Regulations, consistent with their intent.

I. QUALIFIED BUSINESS INCOME DEDUCTION STATUTORY BACKGROUND

As explained in the preamble to the Proposed Regulations, "[t]he QBI component of the section 199A deduction . . . is subject to limitations for individuals with taxable income exceeding the threshold amount. These limitations include the exclusion or reduction of items from an SSTB." In application, this means that certain taxpayers receiving income from businesses that perform services as an SSTB will not be eligible for the section 199A deduction.
For purposes of the section 199A deduction, an SSTB is defined as “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 one or more of its employees or owners, and (2) any trade or business that involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in section 475(c)(2)), partnership interests, or commodities (as defined in section 475(e)(2)).”

II. STAFFING FIRMS ARE NOT SSTBS

Neither the statutory definition of SSTBs nor the examples included in the proposed regulation include IT/Engineering staffing firms as an SSTB.

TechServe Alliance member companies provide computer and engineering professionals on a contract basis to support the technical projects of business of all sizes, from Fortune 100 to smaller high-growth companies. Potential clients include healthcare, law firms, telecom, and financial services companies. By placing the right talent at the right time to meet the technical and business needs of their clients, these firms foster economic growth and job creation.

A. IT/Engineering Staffing Firms That Serve SSTBs are Not SSTBS

While TechServe Alliance members work with clients in all sectors, including entities that perform services as SSTBs, the Proposed Regulations clearly affirm that providing IT and engineering staffing services to an SSTB does not make that service provider an SSTB. We commend the Treasury Department and IRS for offering examples that make this point clear.

The Proposed Regulations define what is meant by “services performed in the field of law” by expressly excluding “the provision of services that do not require skills unique to the field of law, for example, the provision of services in the field of law does not include the provision of service by printers, delivery services, or stenography services.” We believe that the examples of services that are not the “provision of services in the field of law” are directly analogous to the staffing services offered by the members of TechServe Alliance. IT staffing firms—like printing, delivery services, and stenography services—may provide services that are critical to the conduct of a law firm or other SSTB, but IT staffing firms are not SSTBs because they do not provide legal services or any of the other SSTB services.

B. “Consulting” and “Reputation or Skill Trades or Businesses”

The statutory definition of SSTB includes two descriptions of trades or businesses that could be interpreted to cast an inappropriately wide net over virtually all service trades or businesses: (1) services performed in the field of consulting; and (2) trades or businesses where the principal asset of such trades or businesses is the reputation or skill of one or
more employees or owners. The Proposed Regulations provide specific examples of both types of services to further make clear that IT and Engineering staffing firms are not SSTBs.

However, to provide additional clarity to the definition of “consulting,” we encourage Treasury and IRS to: (1) modify Example 3 under proposed Treasury Regulation section 1.199A-5(b)(3); and (2) provide an additional example to clarify that staffing services are generally not considered to be performing services in the field of consulting.

1. Proposed Definition of “Consulting” Excludes Staffing Firms When There is No Separate Payment for Consulting Services

Section (b)(2)(vii) of proposed Treasury Regulation section 1.199-5 explains that

“the performance of services in the field of consulting means the provision of professional advice and counsel to clients to assist the client in achieving goals and solving problems . . . 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. For purposes of the preceding sentence, the determination of whether a person’s services are sales or economically similar services will be based on all the facts and circumstances of that person’s business. Such facts and circumstances include, for example, the manner in which the taxpayer is compensated for the services provided. Performance of services in the field of consulting does not include the performance of consulting services embedded in, or ancillary to, the sale of goods or performance of services on behalf of a trade or business that is otherwise not an SSTB (such as typical services provided by a building contractor) if there is no separate payment for the consulting services.”

We interpret the proposed definition to exclude staffing firms when there is no separate payment for consulting services.

For example, in a typical transaction between an IT staffing firm and its client, the transaction revolves around (1) the client presenting our member with an IT staffing need; and (2) our member providing personnel to fill that need. Over the course of these transactions, our members may also provide recommendations on the personnel that will best suit the client’s needs or provide other ancillary advice, such as feedback on their client’s IT infrastructure.

While those recommendations and advice could, if offered alone for a fee, be considered “consulting” under a broad interpretation of that term, clients generally do not pay for such recommendations or advice. Instead, they simply pay for the personnel placed by the staffing firm to perform IT services. Accordingly, we understand the proposed definition of “services performed in the field of consulting” to exclude our members’ core business model of connecting clients to qualified IT staffing personnel.

---

1 The Proposed Regulations address the “principal asset” issue in a very appropriate manner, and we have no comment in this regard other than to commend Treasury and IRS on the proposal.
2. TechServe Recommends Modifying “Consulting” Example 3

To provide further clarity, we recommend that Treasury and IRS should: (1) modify Example 3 under proposed Treasury Regulation section 1.199A-5(b)(3); and (2) provide an additional example to clarify that staffing services are generally not considered “services performed in the field of consulting.”

Example 3 under proposed Treasury Regulation section 1.199A-5(b)(3) says

“C is in the business of providing services that assist unrelated entities in making their personnel structures more efficient. C studies its client’s organization and structure and compares it to peers in its industry. C then makes recommendations and provides advice to its client regarding possible changes in the client’s personnel structure, including the use of temporary workers. C is engaged in the performance of services in an SSTB in the field of consulting within the meaning of paragraphs (b)(1)(vi) and (b)(2)(vii) of this section (emphasis added).”

We recommend Treasury and IRS clarify this example by expressly stating that Example 3 assumes that C does not provide any of the temporary workers and C’s compensation and fees are not affected by whether C’s clients use temporary workers. The rationale supporting our suggested modification is to prevent Example 3 from being broadly interpreted as treating any recommendation for a business to use temporary workers as consulting services. It would be inappropriate to treat a staffing firm as providing consulting services solely by reason of recommending its own personnel to perform services for a client; if that were the case, all service providers would be consultants.

3. TechServe Recommends Additional “Consulting” Example Related to Staffing Firms

Because of the breadth of the basic definition of “consulting” services, it would be very helpful for Treasury and IRS to include an example that clearly prevents staffing firms from being treated as though they perform services in the field of consulting. Specifically, we recommend that Treasury and IRS add the following example:

A taxpayer is in the business of assisting businesses meet their personnel needs by supplying staffing. The taxpayer may be informed by potential clients of their personnel needs, or, alternatively, the taxpayer may become aware of the client’s personnel requirements after the taxpayer studies and examines the client’s management, structure, and other business needs. The taxpayer’s compensation is based on whether the business seeking to fill its personnel needs retains workers provided by the taxpayer. The taxpayer is not considered to be engaged in the performance of services in the field of consulting. The taxpayer is involved in sales, or economically similar services. Relevant to this determination is the fact that the compensation of the taxpayer for its services is contingent upon the consummation of the transaction the services were intended to effect (i.e., the placement of staffing personnel), and there is no separate fee for any incidental consulting services.
Our recommended example is very similar to an example already published by the IRS to clarify what is not considered to be “services performed in the field of consulting” under its temporary regulations interpreting a nearly identical concept under Code section 448.2

Relevantly, Example 7 of Treasury Regulation section 1.448-1T(e)(4)(iv)(B) concludes that a business that assists other businesses in meeting their personnel needs by referring job applicants to them does not engage in the performance of services in the field of consulting, when the compensation for the business referring job applicants is based on whether recommended applicants accept employment positions with the businesses searching for employees. This characterization is made notwithstanding the fact that the example assumes that “the taxpayer may become aware of the client’s personnel requirements after the taxpayer studies and examines the client’s management and business structure.”

While Example 7 is in many ways analogous to the services offered by our member staffing firms that offer advice as part of their sales discussions and only receive compensation when a client utilizes their personnel, the Proposed Regulations under Code section 199A do not include a fact pattern like Example 7. Accordingly, we encourage Treasury and IRS to include the recommended example above to clarify that staffing firms do not perform services in the field of consulting.

III. CONCLUSION

Thank you for your consideration of TechServe Alliance’s comments. We also appreciate the opportunity to present these comments at the October 16, 2018 public hearing. We will file a separate request to testify.

If you have any questions or need additional information, please do not hesitate to contact us.

Sincerely,

Mark Roberts
Chief Executive Officer
roberts@techservealliance.org

2 Treasury Regulation § 1.448-1T(e)(4)(iv) (“For purposes of paragraph (e)(4)(i)(H) of this section, the performance of services in the field of consulting means the provision of advice and counsel. 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 brokerage services, or economically similar services. For purposes of the preceding sentence, the determination of whether a person’s services are sales or brokerage services, or economically similar services, shall be based on all the facts and circumstances of that person’s business. Such facts and circumstances include, for example, the manner in which the taxpayer is compensated for the services provided (e.g., whether the compensation for the services is contingent upon the consummation of the transaction that the services were intended to effect).”).