WRITERS GUILD OF AMERICA WEST

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October 1, 2018

Via www.regulations.gov

The Honorable Steven T. Mnuchin, Secretary of the Treasury
Mr. Charles P. Rettig, Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-107892-18)
Room 5203, Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comments Concerning the Definition of Specialized Service Trade or Business under the IRC Section 199A Proposed Treasury Regulations

Dear Secretary Mnuchin and Commissioner Rettig:

Writers Guild of America West ("WGAW" or "Guild") respectfully requests that the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") confirm that writers are not included in the definition of performing arts under the Internal Revenue Code ("IRC" or "Code") § 199A and the related proposed Treasury regulations ("Proposed Regulations").

I. Background

WGAW is a labor union that represents more than 10,000 writers of literary material for different platforms. Founded in 1933, the Guild negotiates and administers contracts that protect the rights of its members. It is involved in a wide range of programs that advance the interests of writers and is active in public policy and legislative matters on the local, national, and international levels.

Our members are professional writers who create content for a variety of platforms including, broadcast television, basic cable networks, pay TV, Internet services and mobile devices like cell phones and tablets. Our members' work is used in the performing arts as well as in news, documentaries, video games and other mediums. Most importantly for purposes of our comment to the Proposed Regulations, the skills of writers are not "unique to the performing arts."

II. Overview of IRC Section 199A and the Proposed Regulations

For tax years beginning after December 31, 2017, IRC section 199A generally provides an individual, and some trusts and estates, a deduction of up to 20 percent of the individual's qualified business income ("QBI") from a pass-through entity in calculating taxable income. IRC section 199A(c)(1) defines QBI as the net amount of qualified items of income, gain, deduction, and loss with respect to a qualified trade or business ("QTB") of the taxpayer.

IRC section 199A(d)(2) defines a QTB as a trade or business other than a specified service trade or business ("SSTB"), or the trade or business of performing services as an employee. An SSTB is defined as any trade or business that is described in section 1202(e)(3)(A), though excluding "engineering [and] architecture." IRC section 1202(e)(3)(A) refers to "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 [or] brokerage services . . . ." In the preamble to the Proposed Regulations, Treasury and the IRS note that the text of IRC section 1202(e)(3)(A) substantially tracks the definition of "qualified personal service corporation" under IRC section 448 and, therefore, "the guidance in Proposed Regulations §1.199A-5(b) is informed by existing interpretations and guidance under both sections 1202 and 448 when relevant."

The preamble to the Proposed Regulations also states that §1.199A-5(b) provides guidance on the definition of an SSTB based on the plain meaning of the statute, past interpretations of substantially similar language in other Code provisions, and other indicia of legislative intent. Proposed Regulations §1.199A-5(b)(2)(vi), headed *Meaning of services performed in the field of performing arts*, states that "performance of services in the field of the performing arts means the performance of services by individuals who participate in the creation of performing arts, such as actors, singers, musicians, entertainers, directors, and similar professionals performing services in their capacity as such." The provision goes on to state that the term "does not include the provision of services that do not require skills unique to the creation of the performing arts, such as the maintenance and operation of equipment or facilities for the use in the performing arts."

III. Recommendation

The text of §1.199A-5(b)(2)(vi) of the Proposed Regulations—particularly the reference to individuals "who participate in the creation" of performing arts—has created uncertainty as to the scope of the definition under IRC section 199A(d)(2)(A), including its application to the writers WGAW represents. We join the comments of others in respectfully urging a clarification of the regulation to limit the definition of "performing arts" in a manner consistent with statutory intent. As we explain below, a broad or open-ended interpretation of the term is at odds with the "existing interpretations and guidance" that the Proposed Regulations purports to follow, particularly those under §1202(e)(3)(A). Accordingly, the WGAW respectfully requests that the Treasury and IRS provide guidance confirming that the definition is limited to artists who perform before an audience. The WGAW specifically requests that Treasury and the IRS confirm that writers do not fall within the meaning of an SSTB as that term is defined in the §199A(d)(2).

IV. Analysis

The preamble to the Proposed Regulations under IRC section 199A notes that the definition of an SSTB is to be substantially similar to the list of service trades or businesses provided in IRC section 448(d)(2)(A) and, when appropriate, will draw upon the existing guidance issued under IRC section 448(d)(2). Indeed, the preamble expressly states that §1.199A-5(b)(2)(vi) of the Proposed Regulations is "informed by the definition of 'performing arts' under section 448."

Authorities under IRC section 448 uniformly support a narrow interpretation of the performing arts exception, limited to those artists who perform in front of an audience. Treasury Regulation §1.448-1T(e)(4)(iii) provides that the performance of services in the field of the performing arts includes those services provided by actors, actresses, singers, musicians, entertainers, and similar artists in their capacity as such. The regulation specifies that "[t]he 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 the trade or business that relates to the performing arts)."

Applying that regulation, in TAM 9416006 the IRS held that motion picture directing is *not* within the field of the performing arts. In that memorandum, the IRS concluded that that the term "'performing arts' is generally defined as arts such as drama, dance, and music that involve performance before an audience" and, as such, "persons who perform services that relate to the performing arts, but who do

not perform before an audience, will not be considered to perform services in the field of the performing arts."

The foregoing interpretations under IRC section 448 posit a bright line test. The meaning of "services performed in the field of performing arts" is limited to artists who perform before an audience. Congress is presumed to have been aware of these interpretations when it utilized parallel language in IRC section 1202(e)(3)(A), and the current Proposed Regulations under IRC section 199A state the intent to be guided by those IRC section 448 authorities. There is no rationale, in statute or in legislative history, for extending the definition to a broader and harder to define universe of individuals who "participate in the creation" of performing arts.

The direction that Treasury and IRS apply existing interpretations and guidance under IRC sections 448 and 1202 is rooted in the language Congress chose in drafting IRC section 199A and in the corresponding legislative history. Under IRC section 199A, Congress did not direct the Treasury to expand the term "specified service trade or business" but instead simply cross-referenced the list already set forth in IRC section 1202(e)(3)(A), with some exceptions. In the same way, IRC section 1202(e)(3)(A) largely follows the text of another, pre-existing statute, IRC section 448. The clear legislative intent was that Treasury and the IRS would follow existing definitions and guidance. Treasury and IRS acknowledged this much in the preamble to the Proposed Regulations, noting that the definition of an SSTB incorporates, with modifications, the text of section 1202(e)(3)(A) and that section 1202(e)(3)(A) substantially tracks the definition of "qualified personal service corporation" under section 448. The preamble also states that "consistent with ordinary rules of statutory construction, the guidance proposed in §1.199A-5(b) is informed by existing interpretations and guidance under both sections 1202 and 448 when relevant."

The conference report accompanying the Tax Cuts and Jobs Act states that the conference agreement adopted, with some modifications, the Senate amendment of the SSTB provision.[1] The Senate version of the definition of an SSTB regarding any trade or business involving the performance of services in the field of performing arts specifically cites the Treasury Regulations under IRC section 448. This further illustrates that Congress intended to keep the definition of any trade or business involving the performance of services in the field of performing arts consistent with IRC section 448 and its related regulations and guidance.[2] Congress simply did not authorize Treasury and IRS to expand the meaning of the term "field of performing arts" beyond the meaning in IRC sections 448 and 1202.

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[1] *See* H.R. Rep. No. 115-466, at 222 (2017) (Conf. Rep.) (stating that the conference agreement follows the Senate Amendment with modifications).

[2] *See id.* at 216, footnote 45.

Finally, even if the Treasury and IRS were to conclude that they were acting within their authority in broadening the definition of "field of performing arts," there is a second reason why writers fall outside the definition. Proposed Regulation §1.199A-5(b)(2)(vi) provides that the performance of services in the field of performing arts does not include the provision of services that do not require skills unique to the creation of performing arts. The operative term is "unique." The Proposed Regulations list the "maintenance and operation of equipment or facilities for the use in the performing arts" as examples of services that do not require skills unique to the creation of the performing arts. The same, of course, can be said of writing. In addition to screenplays, plays, and scripts, writers create a wide variety of works not intended to be performed before an audience, such as novels, poetry, textbooks, reference works, investigative reports and even statutes and regulations.

V. Action Requested

Based on the foregoing, Treasury and the IRS should modify the Proposed Regulations to clarify that writers are not taxpayers engaged in a trade or business involving the performance of services in the field of performing arts within the meaning of IRC section 1202(e)(3)(A).

We appreciate your consideration and welcome the opportunity to discuss our comments and recommendations with you or your staff.

Sincerely,

WRITERS GUILD OF AMERICA WEST

Anthony R. Segall
General Counsel

cc: The Honorable David J. Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Mr. Thomas West, Tax Legislative Counsel, Department of the Treasury
Mr. William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), IRS