



May 3, 2019

Via Electronic Filing

Internal Revenue Service
CC:PA:LPD:PR (Notice 2019-09)
Room 5203
P.O. Box 7604,
Ben Franklin Station
Washington, DC 20044.

Re: MFA Comments on Interim Guidance Under Section 4960

Dear Ladies and Gentleman:

Managed Funds Association (“MFA”)¹ appreciates the opportunity to respond to the Interim Guidance Under Section 4960 (the “Interim Guidance”)² of the Internal Revenue Code of 1986, as amended (the “Code”). Our comments are focused on the provisions in the Interim Guidance that would apply the 21 percent excise tax to remuneration above the statutory threshold paid to a covered employee by a related organization to an applicable tax-exempt organization (“ATEO”) with respect to that employee’s employment by that related organization. We believe that the application of the excise tax to remuneration paid by a related organization for services provided to the related organization and not to the ATEO goes well beyond Congressional intent when enacting Section 4960 as part of the recent tax legislation.³

Section 4960 was intended to apply an excise tax on remuneration paid by an ATEO above a certain threshold, similar to the existing limitation on a publicly traded corporation’s ability to deduct employee remuneration above a specified threshold under Section 162(m). In that regard, we believe that the most straightforward and reasonable interpretation of Section 4960(c)(4), which addresses remuneration paid by an ATEO’s related organization, is that remuneration paid by a

¹ The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

² Section references in this letter refer to Code sections, unless otherwise indicated.

³ An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Public Law 115-97 (2017) (the “TCJA”).

related organization to a covered employee for services provided to an ATEO should be considered for purposes of determining whether an organization is subject to the excise tax.

In implementing that provision, we understand that Treasury and the IRS may have chosen to take a broad approach with respect to the definition of “related organization” and the definition of “control” to address concerns about ATEOs and related companies structuring their employment or compensation arrangements to avoid application of the excise tax. We are concerned, however, that the broad definitions proposed in the Interim Guidance would go far beyond anti-abuse concerns and would instead apply an excise tax on employment unrelated to the policy issue underlying Section 4960. We also are concerned that an overly broad application of the excise tax will create a disincentive for individuals and businesses to establish or maintain charitable foundations or other philanthropic organizations. To avoid this unintended consequence and better tailor the Interim Guidance to the policy concern underlying Section 4960, we encourage Treasury and the IRS to provide additional guidance to limit the application of the excise tax with respect to an ATEO’s related organization.

Specifically, we encourage Treasury and the IRS to provide additional guidance to clarify that an officer of an ATEO who provides a *de minimis* amount of service to the ATEO and who is not entitled to receive remuneration from the ATEO, either directly or indirectly, will not be treated as an employee (or a covered employee) of the ATEO for purposes of Section 4960. This approach would be consistent with the determination of whether an officer should be treated as an employee in other parts of the Code and the regulations thereunder.⁴ Because these individuals are not receiving any remuneration in connection with the limited services they provide to an ATEO, either directly or indirectly, these types of relationships do not present the policy concern Congress sought to address in enacting Section 4960.

As noted above, we believe that Congress included ATEO’s related organizations within the scope of Section 4960 to address situations where an employee of an ATEO receives remuneration from a related entity for services provided to the ATEO when such remuneration would be subject to Section 4960 if it were paid directly by the ATEO, which is the fact pattern described in A.10(a) in the Interim Guidance. We are concerned, however, with the broad impact of the language included A.12(c) in the Interim Guidance, which would go well beyond any anti-abuse concern and would instead apply the excise tax to a related organization on the basis of remuneration paid to a covered employee by the related organization with respect to the employee’s employment by that related organization.

We believe that subjecting a related organization to the excise tax because of remuneration paid for services provided to the related organization and not for services provided to the ATEO was neither intended under Section 4960 nor justified by the policy objective underlying Section 4960. Accordingly, we encourage Treasury and the IRS to provide additional guidance that remuneration paid by a related organization to an individual who is a covered employee of an ATEO for services rendered to the related organization (and not to the ATEO) will not be treated as remuneration for purposes of Section 4960, subject to Treasury’s and the IRS’ anti-abuse authority to address specific fact patterns that are inconsistent with the statutory intent.

⁴ See, e.g., Section 3401 and 26 CFR § 31.3401(c)-1(f).

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MFA and its members would welcome an opportunity to meet with the staff from Treasury and the IRS to discuss these and any other issues in connection with implementation of the Proposed Regulations. If you have any questions regarding any of these comments, or if we can provide further information with respect to these or other issues, please do not hesitate to contact the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Mark D. Epley

/s/ Benjamin Allensworth

Mark D. Epley

Benjamin Allensworth

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