



December 2, 2019

**Via Electronic Filing**

Internal Revenue Service  
CC:PA:LPD:PR (REG-104223-18)  
Room 5203  
P.O. Box 7604,  
Ben Franklin Station  
Washington, DC 20044.

**Re: MFA Comments on IRS Proposed Regulation 104223-18, Ownership Attribution Under Section 958 Including For Purposes of Determining Status as Controlled Foreign Corporation or United States Shareholder and Revenue Procedure 2019-40**

Dear Ladies and Gentleman:

Managed Funds Association (“MFA”)<sup>1</sup> appreciates the opportunity to provide comments in response to the proposed regulations issued by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”), Ownership Attribution Under Section 958 Including For Purposes of Determining Status as Controlled Foreign Corporation or United States Shareholder (the “Proposed Regulations”) and Revenue Procedure 2019-40. We agree with the approach taken in the Proposed Regulations to ensure that the operation of certain rules that are relevant to U.S. persons owning foreign corporations is consistent with their application before the Tax Cuts and Jobs Act’s (“TCJA”) repeal of section 958(b)(4) from the Internal Revenue Code of 1986, as amended (the “Code”).<sup>2</sup> We also agree with the safe harbor provided in Section 4 of Revenue Procedure 2019-40 regarding the information a U.S. person may rely on to determine if a foreign corporation is a controlled foreign corporation (“CFC”).

As Treasury and the IRS note in the preamble to the Proposed Regulations, the legislative intent in repealing section 958(b)(4) was to address certain types of transactions that were structured to inappropriately avoid the provisions of Subpart F (*e.g.*, de-control transactions among related parties). As explained in the Senate Finance Committee Report and the Conference Report

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<sup>1</sup> 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.

<sup>2</sup> Section references in this letter refer to Code sections, unless otherwise indicated.

accompanying the enactment of the TCJA, the repeal of section 958(b)(4) was not intended to cause a foreign corporation to be treated as a controlled foreign corporation with respect to a U.S. shareholder as a result of attribution of ownership under section 318(a)(3) to a U.S. person that is not a related person to the U.S. shareholder.<sup>3</sup> Given the clear Congressional indication of the intended scope of the repeal of section 958(b)(4), we support the approach taken in the Proposed Regulations to limit the unintended consequences of requiring U.S. persons to apply broad downward attribution requirements when making CFC status determinations.

While the Proposed Regulations helpfully address a number of rules impacted by the repeal of section 958(b)(4), we encourage Treasury and the IRS also to modify its rules under section 1248. Under section 1248, a U.S. person who sells or exchanges stock in a CFC and who owns (under section 958(a)) or is deemed to own (under section 958(b)) at least ten percent of the CFC generally is treated as receiving a deemed dividend instead of capital gains with respect to at least a portion of the gain from the sale or exchange. For U.S. partnerships subject to section 1248, this can significantly increase their tax liabilities associated with the sale of a CFC, while other types of U.S. persons could potentially decrease their tax liabilities. To the extent a U.S. person is deemed to own at least ten percent of a CFC solely because of the TCJA repeal of section 958(b)(4), we believe the application of section 1248 is an unintended consequence of the TCJA provision. Accordingly, consistent with the approach taken in the Proposed Regulations, we encourage Treasury and the IRS to modify the rules under section 1248 to apply section 958(b) without regard to the repeal of section 958(b)(4).

Even with helpful modifications to rules impacted by the repeal of section 958(b)(4), the obligation for taxpayers to determine the CFC status of foreign corporations with broad downward attribution rules creates significant burdens for many of those taxpayers. In that regard, we agree with Treasury and the IRS that it may not be possible for a U.S. shareholder to obtain information necessary to determine whether a foreign corporation is a CFC following the repeal of section 958(b)(4). To address this important issue, we support the safe harbor contained in Section 4 of the Revenue Procedure and we encourage Treasury and the IRS to continue to engage with market participants to ensure the safe harbor works in practice as intended.

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<sup>3</sup> See, H.R. REP. NO. 115-466 (December 2017) page 507. See also, Committee Print, *Reconciliation Recommendations Pursuant to H. Con. Res. 71*, S. Prt. 115-20, (December 2017), p. 383, available at <https://www.govinfo.gov/content/pkg/CPRT-115SPRT27718/pdf/CPRT-115SPRT27718.pdf>.

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MFA appreciates the work Treasury and the IRS have undertaken to mitigate the unintended consequences of the repeal of section 958(b)(4). 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 us at (202) 730-2600.

Respectfully submitted,

/s/ Mark D. Epley

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