LEGISLATIVE AND REGULATORY DEVELOPMENTS IN 2018 OF INTEREST TO CHURCH-SPONSORED EMPLOYEE BENEFIT PLANS AND PROGRAMS

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LEGISLATIVE AND REGULATORY DEVELOPMENTS IN 2018 OF INTEREST TO CHURCH-SPONSORED EMPLOYEE BENEFIT PLANS AND PROGRAMS

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I. Legislation and Legislative Initiatives

A. Church Alliance Legislative Initiatives

1. 403(b)(9) Non-QCCO Legislation

During the review of pre-approved volume submitter church plan 403(b)(9) documents in early 2017, the Internal Revenue Service ("IRS") informed a submitter that qualified church controlled organizations ("QCCOs") were not eligible to participate in pre-approved 403(b)(9) plans because QCCOs could become non-QCCOs, and non-QCCOs are not eligible to participate in 403(b)(9) plans.[1] This development came as something of a shock to the entire 403(b) community, because non-QCCOs have been participating in 403(b)(9) retirement income account plans since the addition of section 403(b)(9) to the Internal Revenue Code ("Code") in 1982.

The IRS had previously issued guidance that indicated non-QCCOs can participate in 403(b)(9) plans. Because the IRS refused to change its position on the non-QCCO issue despite its prior guidance and even after meeting with Church Alliance representatives, the Church Alliance is seeking a legislative clarification of this problem. At the request of the Church Alliance, a provision was added to the Retirement Enhancement and Savings Act of 2018 ("RESA") and the Family Savings Act of 2018 which clarifies that nonqualified church-controlled organizations ("non-QCCOs") can participate in church 403(b)(9) retirement income account plans.[2]

The Church Alliance has also been actively lobbying legislators to move the 403(b)(9) provisions as a stand-alone bill[3] in the House and Senate and has been working to add Democratic and Republican cosponsors in both houses to demonstrate bipartisan support. The Church Alliance is working on a strategy for potential inclusion in tax legislation should the opportunity arise and has been staying in close contact with its champions to ensure they are prepared for any options that might become available.

[1] QCCOs and non-QCCOs are defined in section 3121(w)(3)(B) of the Code. A non-QCCO is any church-controlled tax-exempt organization described in Code section 501(c)(3) which (i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and (ii) normally receives more than 25 percent of its support from either governmental sources or receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both. A QCCO is any church-controlled tax-exempt organization that is not a non-QCCO.
[2] *See* section 113 of S. 2526, Retirement Enhancement and Savings Act of 2018 and section 108 of H.R. 6757, Family Savings Act of 2018.
[3] H.R. 5282. The lead Republican co-sponsor is Rep. Mike Kelly (R-PA) and the lead Democratic co-sponsor is Rep. Ron Kind (D-WI). This bill currently has 86 co-sponsors.

If the non-QCCO issue is clarified through legislation, the Church Alliance will then ask the IRS to re-open the pre-approved 403(b) program so that church plan sponsors can allow QCCOs and non-QCCOs to be eligible employers in 403(b)(9) pre-approved plans.

2. Commodity Pool Operator ("CPO") Fix

The Dodd-Frank Act amended the Commodity Exchange Act's definition of "commodity pool operator," expanding the universe of entities that must register as such. Under Regulation 4.5(a)(4)(v), church plans are generally excluded from the "pool" definition in Regulation 4.10(d)(1). However, there is some concern that if an entity, e.g., a church benefits board, commingles plan assets with non-plan assets, then it could qualify as a "pool" if it trades in qualifying commodity interests and therefore would be required to register as a commodity pool operator. Trading in qualifying commodity interests includes investing or retaining investment managers that invest in qualifying commodity interests.

The Church Alliance continues to work with Senator Amy Klobuchar's (D-MN) office on CPO clarification legislation, working through the last remaining differences in legislative text between the original version of the clarification used previously and a mark-up of the legislation by the Commodity Futures Trading Commission requested by Senator Klobuchar's office. The Church Alliance is meeting with various Representatives to pave the way for asking for co-sponsors for the legislation once it is introduced. The Church Alliance is also working towards introducing stand-alone CPO legislation in the House and Senate along with other interested stakeholders.

B. Enacted Legislation

1. Tax Cuts and Jobs Act

a. General provisions. The Tax Cuts and Jobs Act[4] ("TCJA") was signed into law on December 22, 2017 and provides for various changes in the taxation of individuals, corporations and other entities. The TCJA generally reduced tax rates and increased the standard deduction for individuals while suspending the deduction for personal exemptions. The TCJA also contained several provisions that impact employee benefit plans. The TCJA:

- extends the period within which a retirement plan participant may pay the amount of an "offset" of an outstanding plan loan to another qualifying plan or Individual Retirement Account ("IRA") to accomplish a tax-free rollover of the loan offset amount;
- repeals the rule allowing recharacterization of IRA contributions – an individual can no longer make a contribution to an IRA (either traditional or Roth) for a tax year and recharacterize the contribution as a contribution to the other type of IRA before the due date for the individual's income tax return for that year;
- repeals the Patient Protection and Affordable Care Act ("Affordable Care Act") individual mandate beginning in 2019;

[4] Public Law 115-97 (2017).

- suspends exclusion from an individual's income of moving expense and bicycle commuting reimbursements (between January 1, 2018 and December 31, 2025);
- limits an employer's deduction for fringe benefit expenses;
- for nonprofit employers, funds used to pay for employee transportation fringe benefits and on-premises gyms are considered unrelated business taxable income; and
- For tax years 2018 until 2026, changed the definition of a casualty loss deduction under section 165 of the Internal Revenue Code of 1986, as amended ("Code") with the result that hardship distributions for damage to a principal residence due to natural disasters appear to be allowed only if the residence is located in a federally-declared disaster area.

b. UBIT Issues

i. Code section 512(a)(6). The TCJA added a new paragraph (6) to Code section 512(a) which changes the method of calculation to be used by tax-exempt organizations for tax reporting and payment for income earned through certain unrelated trades or businesses. On June 26, 2018, the Church Alliance filed a comment letter[5] on this change, asking for clarification of the definition of a "trade or business" and whether an activity such as investing constitutes "more than one unrelated trade or business," so organizations can maintain the appropriate tax records and receive guidance on how to assemble and report the necessary information. In the same comment letter, the Church Alliance asked for transition relief from the new paragraph (7) added to Code section 512(a) declaring as taxable income certain amounts paid by tax-exempt organizations (e.g., for a qualified transportation fringe benefit, parking facility used in connection with qualified parking, etc.) so that affected organizations can have time to adapt systems for reporting and payment if necessary.

In mid-August, the IRS and Treasury released guidance and interim guidance/transition rules for Code section 512(a)(6). The guidance gives stakeholders until December 3, 2018 to submit comments regarding the application of Code section 512(a)(6) to exempt organizations with more than one unrelated trade or business.[6]

ii. Code section 512(a)(7). The TCJA also added a new paragraph (7) to Code section 512(a), treating certain disallowed fringe benefits paid for by tax-exempt organizations (e.g., for a parking facility used in connection with qualified parking, for a qualified transportation fringe benefit, etc.) as unrelated business taxable income ("UBTI"). On August 7, 2018, the Church Alliance submitted a comment letter[7] to supplement its June 26, 2018 letter (discussed in the immediately preceding section) requesting a delay in implementation of

[5] The Church Alliance comment letter on Code section 512(a)(6) is included as Appendix A.
[6] The Church Alliance is in the process of preparing a comment letter on Code section 512(a)(6).
[7] The Church Alliance comment letter on Code section 512(a)(7) is included as Appendix B.

changes related to Code sections 512(a)(6) and 512(a)(7) that were enacted as part of the TCJA. In addition to again requesting a delay, the Church Alliance asked for other relief, including a request that church and church-affiliated entities that are exempt from filing Form 990 be granted an exemption from Code section 512(a)(7) so that thousands of small churches will not have to file a Form 990-T and determine how much tax to pay for employee use of their church parking lot. The Church Alliance believes that, for the vast majority of churches and ministries, parking should not be considered a fringe benefit for employees, but as support for the work of the church or ministry. If Treasury and the IRS do not agree, the Church Alliance requested clarification of the "amounts paid or incurred" phrase to allow a deduction of $1,000, or if less, the gross income derived from any unrelated trade or business, in computing UBTI.

The Church Alliance continues to play an active role in the discussion surrounding the impact of new Code subsection 512(a)(7) on tax-exempt entities.

2. Bipartisan Budget Act of 2018

The Bipartisan Budget Act of 2018,[8] ("Budget Act") enacted on February 9, 2018, contained a variety of tax law changes, including the following employee benefit plan provisions:

For plan years beginning after December 31, 2018, employees who take hardship distributions from 401(k) plans will no longer be required to have their elective deferral contributions suspended for six months. The Budget Act also added Code section 401(k)(14), providing special rules that allow hardship withdrawals from 401(k) plans to be taken from qualified nonelective contributions and qualified matching contributions and earnings on contributions. In addition, employees will not be required to take any available loan under the plan before requesting a hardship distribution.[9]

The Budget Act provides an exception to the pre-age 59½ early withdrawal tax for up to $100,000 of qualified wildfire distributions in California. These distributions are defined as any distribution from an eligible retirement plan made on or after October 8, 2017, and before January 1, 2019, to an individual whose principal place of abode during any portion of the period from October 8, 2017 to December 31, 2017, is located in the identified California wildfire disaster area, and who has sustained an economic loss by reason of the wildfires to which the declaration of such area relates. The amount of a qualified wildfire distribution may be repaid (recontributed) to an eligible retirement plan within three years.

The Budget Act also provides that the maximum retirement plan loan made to a qualified individual during the period beginning on February 8, 2018 and ending on December 31, 2018 is $100,000 (instead of $50,000) and allows for a longer repayment

[8] Public Law 115-123 (2018).
[9] See Section II.A.16 for more detail on proposed hardship distribution regulations issued by the IRS on November 9, 2018.

term for a qualified individual with an outstanding loan on or after October 8, 2017. A qualified individual is an individual whose principal place of abode during any portion of the period from October 8, 2017 to December 31, 2017, is located in the identified California wildfire disaster area, and who has sustained an economic loss by reason of the wildfires to which the declaration of such area relates.

C. Proposed Legislation

1. Retirement Enhancement and Savings Act of 2018

The Retirement Enhancement and Savings Act of 2018[10] ("RESA") amends the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 ("ERISA") to modify requirements for tax-favored retirement savings accounts, employer-provided retirement plans, and retirement benefits for federal judges. With respect to employer-provided retirement plans, the bill modifies requirements regarding:

- multiple employer plans;
- automatic enrollment and nonelective contributions;
- plan loans;
- terminating or transferring plans;
- reporting and disclosure rules;
- nondiscrimination rules;
- selecting lifetime income providers; and
- Pension Benefit Guaranty Corporation premiums.

RESA also increases the tax credit for small employer pension plan start-up costs and allows a tax credit for small employers that establish retirement plans that include automatic enrollment.

With respect to IRAs, the bill: (i) treats taxable non-tuition fellowship and stipend payments as compensation, and (ii) repeals the maximum age for traditional IRA contributions.

The bill also modifies various tax provisions to:

- reinstate and increase the tax exclusion for benefits provided to volunteer firefighters and emergency medical responders;
- revise the post-death minimum distribution requirements; and
- increase penalties for failing to file tax or retirement plan returns.

As stated earlier in Section I.A.1, RESA also includes the 403(b)(9) non-QCCO clarification requested by the Church Alliance. The Church Alliance continues to engage with a coalition of stakeholders advocating for the passage of RESA.

[10] S. 2526.

2. Family Savings Act of 2018

The U.S. House of Representatives passed the Family Savings Act of 2018[11] on September 28, 2018. The Family Savings Act of 2018 would amend the Code to modify requirements for tax-favored savings accounts and employer-provided retirement plans. The most noteworthy provisions include changes to the rules governing multiple and pooled employer retirement plans, the creation of new tax-preferred universal savings accounts to which an individual would be able to contribute up to $2,500 each year, and an exemption from required minimum distribution rules for individuals with eligible retirement account balances with an aggregate value of $50,000 or less. The Family Savings Act also allows multiple unrelated businesses to come together to form multiple employer retirement plans ("open MEPs") and repeals the age limit on making contributions to a traditional IRA. In addition, the legislation expands the uses of 529 education savings accounts to include apprenticeship fees, student loan payments and home schooling, and allows families to use retirement savings penalty-free in the event of the birth or adoption of a child.

The Family Savings Act also includes the 403(b)(9) non-QCCO clarification contained in RESA, although the effective date included in the Family Savings Act is different.[12] The Church Alliance is working to ensure that the RESA effective date is used when the legislation is passed.

II. Regulatory Initiatives and Other Guidance

A. Internal Revenue Service

1. Revisions to Church Plan Definition

The IRS is updating the existing final regulations on the definition of a church plan in Code section 414(e) to conform those regulations to changes made to Code section 414(e) in 1980. The Church Alliance submitted church plan definition pre-rulemaking comments to the IRS in August 2018.[13] In its comment letter, the Church Alliance recommended that the revised regulations:

- confirm that welfare plans, like retirement plans, may qualify as church plans;
- clarify that the term "beneficiaries" includes all individuals who benefit directly through the employee participant, such as dependents and joint annuitants;
- reverse the approach taken in existing regulations that church plan status is lost by having one or more "non-church" employers or having non-church employees in a plan, so that church plans are permitted to have an insubstantial number[14] of non-church employee participants;
- clarify that a plan will be a church plan if it is both established and maintained by a church, even if no principal purpose organization is used to administer or fund the plan, and that the definition of "principal purpose" means the majority of either the time spent or expense incurred by the organization or its members or employees related to administration or funding of employee benefits plans;

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[11] H.R. 6757.

[12] The non-QCCO provision in RESA is retroactively effective for all years before date of enactment; the Family Savings Act provision is effective for plan years beginning after December 31, 2008.

[13] The Church Alliance comment letter on revisions to the church plan regulations is included as Appendix C.

[14] For this purpose, "insubstantial" would be defined as 15% or less.

- affirm that a benefit plan administration committee with at least one member can be a principal purpose organization, that the member(s) need not be members of the church by or with which the sponsoring employer is controlled or associated, and that individuals can be designated as committee members by virtue of the office or position they hold;
- broadly define the terms "minister" and "exercise of ministry;"
- clarify that the "control" requirement of Code section 414(e)(3)(B)(ii) can be met by canonical, ecclesiastical or similar control;
- affirm the logical conclusion of reading Code section 414(e)(3)(B) and 414(e)(3)(C) together, so that an employee of two or more churches is deemed to be an employee of each church;
- provide five safe harbor tests to allow entities to determine whether they are "associated with" a church within the meaning of Code section 414(e)(3)(D);
- clarify that multiple churches maintaining a church plan together are not required to demonstrate common religious bonds and convictions between them (if each church could establish and maintain a church plan under Code section 414(e));
- clarify that the Code section 414(e)(3)(E) definition of "employee" includes former employees receiving post-separation retirement, health or welfare benefits;
- clarify that any type of failure to meet the requirements of Code section 414(e) is correctable so long as the correction is made within the correction period specified in Code section 414(e)(4); and
- expand the regulations to clarify that church plans can be administered by a separately incorporated plan administrator (such as a pension board or bank), or a separately incorporated third-party administrator (such as a medical claims administrator).

The Church Alliance plans to submit a supplemental comment letter in November or December 2018 addressing the definition of the term "association of churches" used in the church plan regulations.

2. Church Building Loan 403(b)(9) Plan Investment Option

Several denominational benefits boards offer retirement plan investment options in which participants can invest in debt instruments issued by what are commonly referred to as church extension funds. These extension funds use the funds provided through the plan investment option to make loans to churches to assist in building projects. In the fall of 2017, the IRS released a Chief Counsel Memorandum[15] stating that such investment options are not allowed in a 403(b)(9) retirement income account plan, because such funds are viewed as providing an indirect loan from the plan to the employer, thereby violating the exclusive benefit rule applicable to 403(b)(9) plans.[16] Although direct loans are prohibited by regulation,[17] indirect loans are not expressly prohibited. The Church Alliance has discussed this issue with Treasury and IRS Chief Counsel attorneys, but the author of the Chief Counsel Memorandum did not express a willingness to reconsider the

[15] CCM 201742022 (September 22, 2017).
[16] The exclusive benefit rule found in section 1.403(b)-9(a)(2)(i)(C) of the Treasury Regulations requires that the assets held in a 403(b)(9) plan account cannot be used for, or diverted to, purposes other than for the exclusive benefit of plan participants or their beneficiaries.
[17] Treasury Regulation section 1.403(b)-9(a)(2)(i)(C) prohibits any loan or extension of credit from assets in the plan to the employer.

position taken in it. Organizations affected by the Chief Counsel Memorandum and other organizations interested in providing a church building loan investment option in their 403(b)(9) plan are examining available options that might be pursued.

3. Revised Safe Harbor Explanations for Eligible Rollover Distributions

In Notice 2018-74,[18] the IRS modified the two safe harbor explanations in Notice 2014-74 that may be used to satisfy the requirement under Code section 402(f) that certain information be provided to recipients of eligible rollover distributions. To assist with the implementation of the modified safe harbor explanations, the notice contains two appendices. Appendix A contains two model safe harbor explanations: one for distributions that are not from a designated Roth account, and a second for distributions from a designated Roth account. Appendix B provides instructions on how to amend the safe harbor explanations contained in Notice 2014-74 to reflect the revisions included in the modified safe harbor explanations in Appendix A.

The safe harbor explanations modify the safe harbor explanations in Notice 2014-74 to reflect certain legislative changes and guidance issued after December 8, 2014, including: (1) the extended rollover deadline for qualified plan loan offset amounts under TCJA, (2) the exception to the 10% additional tax under Code section 72(t) for phased retirement distributions to certain federal retirees under MAP-21, and (3) the self-certification procedures under Rev. Proc. 2016- 47 for claiming eligibility for a waiver of the deadline for making rollovers. The safe harbor explanations also include other clarifying modifications, such as clarifying that the 10% additional tax under Code section 72(t) for early distributions applies only to amounts includable in income and recognizing the possibility that taxpayers affected by federally declared disasters and other events may have an extended deadline for making rollovers. However, the updated safe harbor explanations will not satisfy Code section 402(f) to the extent the explanations are no longer accurate because of a change in the relevant law occurring after the date Notice 2018-74 was issued.

4. Required Minimum Distributions for Missing Plan Participants and Beneficiaries

On February 23, 2018, the Department of the Treasury, Tax-Exempt/Government Entity Employee Plan (“EP”) Examinations Director issued a memorandum[19] directing EP examiners not to challenge a 403(b) plan as failing to satisfy the required minimum distribution (“RMD”) standards under Code section 403(b)(10) if the plan is unable to locate a participant or beneficiary who is required to take an age 70½ RMD, as long as the plan has taken certain steps, including: having searched plan and related employer records and publicly available directories for alternative contact information; used a commercial locator service, a credit reporting agency or a proprietary internet search tool for locating individuals; and attempted contact via the U.S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including e-mail addresses and telephone numbers).

[18] 2018-40 I.R.B. 529.
[19] Available at: https://www.irs.gov/pub/foia/tege-04-0218-0011.pdf.

5. Extension of Temporary Nondiscrimination Relief for Closed Defined Benefit Plans through 2019

In Notice 2018-69[20] the IRS extended the temporary nondiscrimination relief for closed defined benefit plans that was provided in IRS Notice 2014-5 by making that relief available for plan years beginning before June 2020 if the conditions of IRS Notice 2014-5 are satisfied. Closed defined benefit plans are those that provide ongoing accruals but that have been amended to limit those accruals to some or all of the employees who participated in the plan on a specified date. IRS Notice 2014-5 permitted plans that were closed before December 13, 2013 that satisfied certain conditions to demonstrate satisfaction of the nondiscrimination in amount requirement of Treasury Regulation section 1.401(a)(4)-1(b)(2) on the basis of equivalent benefits even if the plan does not meet any of the existing eligibility conditions for testing on that basis. The extension of this nondiscrimination relief was due to expire for plan years beginning in 2019. Proposed regulations relating to nondiscrimination requirements for closed plan were published in 2016. The IRS and Treasury Department expect that final regulations will not be published in time for plan sponsors to make plan design decisions based on the final regulations before expiration of the relief provided under IRS Notice 2014-5. Therefore, the IRS and Treasury Department extended the relief for one additional year, to plan years beginning before 2020.

6. Updated Mortality Tables for Defined Benefit Plans

IRS Notice 2018-02[21] describes updated mortality improvement rates and static mortality tables to be used in 2019 for defined benefit pension plans under Code section 430(h)(3)(A). These updated mortality improvement rates and static tables, which are issued pursuant to the regulations under Code section 430(h)(3)(A), apply to ERISA plans for purposes of calculating the funding target and other items for valuation dates occurring during calendar year 2019. The notice also includes a modified unisex version of the mortality tables for use in determining minimum present value under Code section 417(e)(3) for distributions with annuity starting dates that occur during stability periods beginning in the 2019 calendar year.

7. Updates to Employee Plans Compliance Resolution System

a. Revenue Procedure 2018-52.

On September 28, 2018, the IRS issued Revenue Procedure 2018-52,[22] Employee Plans Compliance Resolution System ("EPCRS"), that modifies and supersedes former EPCRS guidance found in Revenue Procedure 2016-51. This Revenue Procedure is effective for corrections and submissions made on or after January 1, 2019. It is a limited update and was published primarily to set forth new voluntary correction program ("VCP") submission procedures, including the required use of the www.pay.gov website.

[20] 2018-37 I.R.B. 426.
[21] 2018-02 I.R.B. 281.
[22] 2018-42 I.R.B. 611.

b. Updated VCP Fees.

In January 2018, the IRS issued Revenue Procedure 2018-04 and in it introduced a new VCP fee structure based on the amount of retirement plan assets instead of the number of plan participants.[23] Under the new fee structure, employers pay a submission fee in the amount of either $1,500, $3,000 or $3,500. Previously, small employers only had to pay a $500 fee to use the voluntary correction program. Large employers have seen a significant drop in fees; the largest plans previously paid up to $15,000 to use the program. The IRS said it adjusted fees to more accurately reflect the time it takes to evaluate each case.

8. FAQs on Rollovers and Roth Conversions

The IRS published a list of rollover and Roth conversion FAQs[24] on February 18, 2018. The FAQs remind retirement plan participants that they can roll over their IRA into a qualified retirement plan or 403(b) plan, assuming the plan has language allowing it to accept the IRA rollover or transfer. Roth IRAs can only be rolled over to another Roth IRA. The IRS also reminded retirement plan participants they can roll over their workplace retirement plan account into an IRA except for certain types of distributions, such as required minimum distributions and hardship distributions. A rollover must be completed by the 60th day following the day on which the distribution is received by the plan participant. To avoid the 10% additional tax on early withdrawals (withdrawals taken before age 59½), a retirement plan distribution can be rolled into an IRA and then withdrawn from the IRA to be used for the first-time homebuyers down payment. Finally, the FAQ discusses how to convert a traditional IRA to a Roth IRA via rollover, trustee-to-trustee transfer, or same trustee transfer.

9. Disaster Relief – Hurricane Florence and Hurricane Michael

Congress has not enacted special legislation allowing expanded access to retirement plan assets to alleviate hardships for individuals affected by Hurricane Florence and Hurricane Michael. However, the IRS has issued certain relief, mainly extending various tax filing deadlines for individuals living in the federally-declared disaster areas.[25] The IRS, in connection with the issuance of proposed hardship distribution rules on November 9, 2018, extended the relief provided under Notice 2016-37 to victims of the recent hurricanes and wildfires. See Section II.A.16 for a more detailed discussion of this issue.

10. Qualified §529 Tuition Program Guidance

The IRS released Notice 2018-58[26] on July 30, 2018, offering guidance on recent 529 education savings plan changes. Under Code section 529, a state may establish or maintain a program that permits a person to prepay or contribute to an account for a designated beneficiary's

[23] 2018-01 I.R.B. 146.
[24] Available at: https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras-rollovers-and-roth-conversions.
[25] Available at: https://www.irs.gov/newsroom/help-for-victims-of-hurricane-florence, https://www.irs.gov/newsroom/help-for-victims-of-hurricane-michael.
[26] 2018-33 I.R.B. 305.

qualified higher education expenses, called section 529 qualified tuition programs. Distributions from 529 programs are not included in a taxpayer's gross income if such distributions do not exceed the designated beneficiary's qualified higher education expenses.

In the notice, the IRS and Treasury Department announced their intent to issue regulations on three recent tax law changes affecting 529 education savings plans:

- the PATH Act added a special rule for a beneficiary of a 529 plan, usually a student, who receives a refund of tuition or other qualified education expenses (for example, when a student drops a class mid-semester). If the beneficiary recontributes the refund to his or her 529 plan within 60 days, the refund is tax-free. The IRS and Treasury plan to issue future regulations simplifying the tax treatment of these transactions. Re-contributions would not count against a 529 plan's contribution limit;
- a change contained in the TCJA allows distributions from 529 plans to be used to pay up to a total of $10,000 of tuition per beneficiary (regardless of the number of contributing plans) each year at an elementary or secondary (K-12) public, private or religious school of the beneficiary's choosing; and
- another change in the TCJA allows funds to be rolled over from a designated beneficiary's 529 plan to an ABLE account for the same beneficiary or a family member. ABLE accounts are tax-favored accounts for certain people who become disabled before age 26, designed to enable these people and their families to save and pay for disability-related expenses. Future regulations will provide that rollovers from 529 plans, together with any contributions made to the designated beneficiary's ABLE account (other than certain permitted contributions of the designated beneficiary's compensation) cannot exceed the annual ABLE contribution limit ($15,000 for 2018).

Taxpayers may rely on these rules until final regulations are issued.

11. Flexibility on Use of Forfeited Employer Matching Contributions

Final IRS rules issued on July 19, 2018[27] allow employers who match contributions made to employees' retirement plan accounts more flexibility in using former participants' forfeited amounts to fund qualified matching contributions ("QMACs") and qualified nonelective contributions ("QNECs"). Until this final rule was issued, QMACs and QNECs were required to satisfy certain nonforfeitability requirements and distribution limitations when they were contributed to the plan. Increased flexibility is now permitted because the IRS amended the definition of QMAC and QNEC to provide that employer contributions to a plan are QMACs or QNECs if they satisfy applicable nonforfeitability requirements and distribution limitations at the time they are allocated to a participant's account (the contributions do not need to meet these requirements or limitations when they are contributed to the plan). Accordingly, these regulations permit forfeitures of prior contributions to be used to fund QMACs and QNECs.

[27] 83 Fed. Reg. 34,469 (July 20, 2018).

12. Possible Expansion of IRS Determination Letter Program

Effective January 1, 2017, the sponsor of an individually-designed retirement plan can only submit a determination letter application for initial plan qualification, for qualification upon plan termination, and in certain other limited circumstances identified in subsequent published guidance. In IRS Notice 2018-24,[28] the IRS requested comments on the potential expansion of the scope of the determination letter program for individually-designed plans during the 2019 calendar year. After reviewing the comments received (comments were due on June 4, 2018), the IRS plans to issue guidance if it identifies additional types of plans for which plan sponsors can request determination letters during the 2019 calendar year. Circumstances the IRS will consider include significant law changes, new approaches to plan design, and the inability of certain plans to convert to pre-approved plan documents.

13. Expanded Use of HRAs

In response to President Trump's executive order requesting the broadening of employers' ability to offer HRAs to their employees, the IRS, Department of Labor ("DOL") and Department of Health and Human Services ("HHS") recently released proposed regulations[29] that expand the use of health reimbursement arrangements ("HRAs") and other account-based group health plans. The proposed rule:

- allows employers to offer a new type of HRA that can be integrated with individual health insurance coverage[30] if certain conditions are met. The HRA participant would be required to substantiate enrollment in individual health coverage through an exchange plan or a plan purchased on the individual insurance market (including student health insurance). Employers could not offer an integrated HRA to employees participating in the employer's group health plan; however, employers would be allowed to offer a group health plan to one specified category of employees and an integrated HRA to another specified category of employees based on employment status (i.e. full-time/part-time/seasonal) and other specified categories defined in the proposed regulation. If the health insurance premium is not fully covered under the HRA, employees would be allowed to pay for non-exchange coverage on a pre-tax basis through the employer's cafeteria plan;
- allows employees to opt out of their employer's integrated HRA if they are eligible for a premium tax credit on an exchange;
- allows employers to offer a new type of HRA that reimburses limited excepted benefits such as dental and vision coverage, short-term limited-duration premiums and COBRA premiums. Employers must offer other group health coverage to the same classes of employees to whom they offer an excepted benefits HRA, but employees could participate in the excepted benefit HRA without enrolling in health coverage. Employers can contribute up to $1,800/year to each employee's excepted benefits HRA;
- provides clarification to assure plan sponsors that the individual health insurance coverage (the premiums of which are reimbursed by a HRA or a qualified small employer health

[28] 2018-17 I.R.B. 507.
[29] 83 Fed. Reg. 54,420 (October 29, 2018).
[30] Currently, the Affordable Care Act prohibits the use of HRAs that reimburse employees for the cost of individual health insurance.

reimbursement arrangement ("QSEHRA")) does not become part of an ERISA plan, provided certain conditions are met; and

- provides a special enrollment period in the individual market for individuals who gain access to an HRA integrated with individual health insurance coverage or who are provided a QSEHRA.

Employers would be required to make the integrated HRA and/or excepted benefits HRA available on the same terms to all similarly situated employees to prevent discrimination based on health status. This new regulation would apply for plan years starting on or after January 1, 2020. Comments on the proposed rules are due on or before December 28, 2018.

The IRS issued Notice 2018-88[31] on November 19, 2018, to initiate and inform the process of developing guidance that would address issues raised by employers offering integrated HRAs to their employees, including the application of Code section 4980H (the employer shared responsibility provisions) and Code section 105(h) (addressing discriminatory self-insured group health plans). In this notice, the Treasury Department and IRS describe potential approaches to help employers understand how to structure integrated HRAs to avoid assessable payments under Code section 4980H and potential loss of the exclusion from income for employer-provided health benefits under Code section 105(h).

The notice explains how Code sections 4980H(a) and (b) would apply to an applicable large employer that offers an individual coverage HRA (including the current affordability safe harbors) and describes examples of potential additional affordability safe harbors. The notice also addresses certain individual coverage HRAs offered to one or more highly compensated individuals that would be subject to the nondiscrimination rules under Code section 105(h) and related regulations and provides examples of safe harbors that may be included in future Code section 105(h) guidance.

14. <u>Required Amendments List</u>

On December 5, 2017, the IRS issued Notice 2017-72[32] which contains the list of amendments certain retirement plans need to make for the 2018 plan year. This list will be issued annually by the IRS now that the 5-year remedial amendment cycle for individually-designed plans has been discontinued. The 2018 required amendments (required to be adopted by December 31, 2019) include changes for cash balance plans required by final regulations issued in 2015, changes to benefit restrictions for eligible cooperative or charity plans and a change for pension plans allowing participants to receive their benefits in both a lump-sum and annuity payment. Plan sponsors will generally be required to adopt an item on the required amendment list by the end of the second calendar year following the year the required amendments list is published.

15. <u>Plan Contributions Tied to Student Loan Repayment</u>

The IRS issued a private letter ruling on August 17, 2018, approving an employer's proposal to offer a student loan repayment nonelective contribution under its 401(k) plan.[33]

[31] Available at: https://www.irs.gov/pub/irs-drop/n-18-88.pdf.
[32] 2017-52 I.R.B. 601.
[33] PLR 201833012.

Although private letter rulings ("PLRs") can only be relied on by the taxpayer requesting the ruling, the release of this PLR has generated interest in the retirement plan community, where plan sponsors are looking for ways to help employees with high student loan debt save for retirement. Under the facts presented in the PLR, the employer proposed to make a nonelective employer contribution for each pay period during which an employee made a sufficient student loan repayment. The nonelective contribution would be offered in addition to the plan's matching contribution and would be provided whether or not the employee made any elective deferral contributions. In finding that the nonelective contribution structure did not violate the contingent benefit prohibition precluding a 401(k) plan from conditioning non-matching benefits on an employee's election to defer or not defer compensation to the plan in lieu of receiving compensation as taxable wages, the IRS noted the nonelective contribution was conditioned on the employee making student loan payments outside of the plan rather than being conditioned on the employee making elective deferral contributions to the plan. The IRS also found the fact that employees could still make elective deferral contributions to the plan while participating in the student loan repayment contribution program relevant.

It is not clear whether the IRS would permit student loan repayment contributions to be offered under retirement plans other than 401(k) plans. Practitioners have also pointed out that is not clear how plan sponsors should substantiate and monitor employee student loan payments. Also, if student loan repayment contributions are made for highly compensated employees, nondiscrimination rules must be considered.

16. <u>Hardship Distribution Changes</u>

On November 9, 2018, the IRS issued a proposed rule[34] describing amendments to the hardship distribution provisions in the Treasury Regulations reflecting statutory changes, including recent changes made by the TCJA and the Budget Act.

Code sections 401(k)(2)(b) and 403(b)(11) provide that employee elective deferrals may be distributed from a plan only on or after the occurrence of certain events, including hardship. Treasury Regulation section 1.403(b)-6(d)(2) provides that a 403(b) hardship distribution is subject to the rules and restrictions set forth in Treasury Regulation section 1.401(k)-1(d)(3) and is limited to the aggregate dollar amount of a participant's section 403(b) elective deferrals, without earnings thereon. Code section 403(b)(11) provides that no income attributable to employee elective deferral contributions may distributed.

The proposed rule:

- Modifies the safe harbor list of expenses for which distributions are deemed to be made on account of immediate and heavy financial need by:
    - adding "primary beneficiary under the plan" as an individual for whom qualifying medical, educational, and funeral expenses may be incurred;
    - modifying the safe harbor provision permitting a hardship distribution related to damage to a principal residence that would qualify for casualty deduction under

[34] 83 Fed. Reg. 56,763 (Nov. 14, 2018).

Code section 165 to provide that the new limitations added by the TCJA and set forth in Code section 165(h) do not apply; and
    - adding a new type of expense to the list relating to expenses incurred as a result of certain natural disasters relating to losses, including loss of income, provided the employee's principal residence or principal place of employment at the time of the disaster was located in an area designated by the Federal Emergency Management Agency ("FEMA") for individual assistance with respect to the disaster.

  The revised list of safe harbor expenses may be applied to distributions made on or after a date that is as early as January 1, 2018. Thus, for example, a plan that made hardship distributions relating to casualty losses deductible under Code section 165 without regard to changes made to Code section 165 by the TCJA may be amended to apply the revised safe harbor expense relating to casualty losses to distributions made in 2018 so that plan provisions will conform to the plan's operation.

- Effective for plan years beginning after December 31, 2018, modifies the rules for determining whether a distribution is necessary to satisfy an immediate and heavy financial need by eliminating:

    - any requirement to take plan loans prior to obtaining a hardship distribution (this is not a required mandatory elimination – plan sponsors can still choose to use this as a requirement for a hardship distribution); and
    - any requirements that an employee be prohibited from making elective contributions and employee contributions after receipt of a hardship distribution. The proposed regulations <u>do not permit</u> a plan to provide for a suspension of elective contributions as a condition of obtaining a hardship distribution. However, this prohibition only applies for distributions made on or after January 1, 2020. In addition, the prohibition for suspending an employee's elective deferral contributions as a condition of obtaining a hardship distribution may be applied as of the first day of the first plan year beginning after December 31, 2018, even if the distribution was made in the prior plan year. Therefore, a calendar year plan that provides for hardship distributions may be amended to provide that an employee who receives a hardship distribution in the second half of the 2018 plan year will be prohibited from making any elective deferral contributions only until January 1, 2019 or may continue to provide that contributions will be suspended for the originally scheduled 6 months.

- Eliminates the rules under which the determination of whether a distribution is necessary to satisfy a financial need is based on all relevant facts and circumstances and instead providing one general standard for determining whether a distribution is necessary. Under this new general standard:

    - a hardship distribution may not exceed the amount of an employee's need (including any amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution);
    - the employee must have obtained other available distributions under the employer's plans; and

- the employee must represent that he or she has insufficient cash or other liquid assets to satisfy the financial need. A plan administrator may rely on such a representation unless the plan administrator has actual knowledge to the contrary. (The requirement to obtain this representation would only apply for a distribution that is made on or after January 1, 2020).

- For 401(k) plans, permits hardship distributions from employee elective contributions, QNECS, QMACS and earnings on these contributions, regardless of when contributed or earned. 401(k) plans may limit the type of contributions available for hardship distributions and whether earnings on those contributions are included. For 403(b) plans, the proposed rule permits hardship distributions from employee elective contributions, and QNECS and QMACS that are not held in a custodial account. Because of the limitation in Code section 403(b)(11), income attributable to elective deferrals will continue to be ineligible for distribution on account of hardship in 403(b) plans.

- Extends relief for hurricane and wildfire victims provided under IRS Announcement 2017-15 to similarly situated victims of Hurricanes Florence and Michael, except that the "incident dates" are as specified by FEMA for the 2018 hurricanes; relief is provided through March 15, 2019; and any necessary amendments must be made no later than the end of the plan year in which the plan amendment is operationally put into effect. A plan may be amended to apply the revised safe harbor expenses relating to losses, including loss of income, incurred by an employee on account of a disaster that occurs in 2018 (such as Hurricane Florence or Hurricane Michael) provided the employee's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.

Plan amendments for these changes are not required until after the regulations are finalized (except as described above). For an individually-designed plan, the deadline to amend a plan to reflect these changes will be the end of the second calendar year that begins after the issuance of the required amendments list that includes the change.

17. Retirement Plan Limits for 2019

The cost-of-living and required statutory limit adjustments applicable to retirement plans for 2019 are as follows:[35]

Contribution limit for defined contribution plan under Code § 415(c)	**$56,000** (*$1,000 increase*)
Benefit limitation for defined benefit plan under Code § 415(b)	**$225,000** *($5,000 increase)*
Elective deferral limit under Code § 402(g)	**$19,000** *($500 increase)*
Age 50 catch-up contribution limit under Code § 414(v)	**$6,000** *(no increase)*
Age 50 catch-up contribution limit for SIMPLE plan	**$3,000** (*no increase*)
Contribution limit for a Code § 457(b) eligible deferred compensation plan	**$19,000** (*$500 increase*)

[35] 2018-45 I.R.B. 486.

Annual compensation limit under Code § 401(a)(17)	**$280,000** (*$5,000 increase)*
HCE compensation definition dollar threshold	**$125,000** *($5,000 increase)*
Dollar threshold limitation for key employee determination in top-heavy plan	**$180,000** *($5,000 increase*)
Contribution limit for a SIMPLE retirement plan	**$13,000** *($500 increase)*
Participant compensation eligibility amount under Code § 408(k)(2)(C) for simplified employee pension (SEP) employer contributions	**$600** *(no increase)*

B. Department of Labor

1. DOL Fiduciary Rule Struck Down

In October of 2010, the DOL proposed a rule[36] to update and expand the 35-year old regulation containing the definition of the term "fiduciary" under ERISA to more broadly cover those who provide retirement investment advice. That proposal encountered strong resistance from the financial services industry, which claimed that the added compliance costs and the increased legal liability for advisors would limit both general financial education and individual advice available to account holders with modest savings.

Subsequently, in September 2011, the DOL announced that it would withdraw and re-propose the fiduciary rule to "protect consumers while avoiding unjustified costs and burdens."[37] The DOL also indicated its re-proposed rule would only impose fiduciary status on those advisors who provide individualized advice to plan clients, which would allow advisers to provide general education on retirement savings to plan participants without triggering fiduciary duties.

On April 14, 2015, the DOL issued the re-proposed rule defining who is a "fiduciary" of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries.[38] The proposed rule also applied to an IRA by way of Code section 4975. The proposed rule treated persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner as fiduciaries under ERISA and/or the Code in a wider array of circumstances than under existing ERISA and Code regulations.

On April 6, 2016, the DOL unveiled a substantially revised final version of the fiduciary rule[39] that was intended to ensure that retirement plan participants obtain investment advice which is in their best interest. The final rule applied to ERISA plans and IRAs, but not health and welfare plans without an investment component, such as health savings accounts ("HSAs"). The rule stated that a person renders "investment advice" and becomes a fiduciary if the person makes a recommendation to a plan, plan fiduciary, participant, beneficiary, IRA or IRA owner for a fee or

[36] 75 Fed. Reg. 65,263 (Oct. 22, 2010).
[37] EBSA News Release (Sept. 19, 2011).
[38] 80 Fed. Reg. 21,928 (Apr. 20, 2015).
[39] 81 Fed. Reg. 20,946 (Apr. 8, 2016).

compensation to act or refrain from acting with respect to investment decisions, investment management or IRAs (including rollovers, transfers or distributions).

The fiduciary rule was scheduled to go into effect on April 10, 2017. On February 3, 2017, President Trump issued a memorandum[40] stating that the fiduciary rule may not be consistent with the policies of his administration and directing the DOL to examine the fiduciary rule to determine if there is potential harm to investors and if so, to publish a proposed rule rescinding or revising the fiduciary rule.

On March 1, 2017, the DOL issued a rule proposing a 60-day delay in the effective date of the fiduciary rule. On April 4, 2017, the DOL released the final rule[41] extending the effective date of the application of the fiduciary rule from April 10, 2017 to June 9, 2017. Certain requirements under the rule (including the "best interest contract" exemption) had a phased implementation period ending on January 1, 2018, and the DOL has proposed to extend the end of this period until July 1, 2019.[42]

On March 15, 2018, in *U.S. Chamber of Commerce v. DOL*,[43] the United States Court of Appeals for the Fifth Circuit struck down the DOL's 2016 fiduciary rule, finding that the DOL exceeded its authority in promulgating the rule. The Department of Justice, acting on behalf of the DOL, declined to appeal the Fifth Circuit's March 15 decision. On June 21, 2018, the Fifth Circuit appellate court issued a mandate officially vacating the DOL's fiduciary rule, including the "best interest contract" exemption, and the DOL's other related 2016 prohibited transaction exemptions.

2. Association Health Plans

The DOL released its final rule on association health plans[44] on June 21, 2018. The final rule modifies the definition of "employer" under ERISA to expand the pool of employers who may join together and sponsor group health coverage so that small employers meeting the new "commonality of interest" test are able to offer an association health plan. Under Section 3(5) of ERISA, an "association of employers" is allowed to manage employee benefit plans offering health insurance to the member employers. The final rule broadens the scope of employers and sole proprietors that can participate in association health plans.

The rule also establishes "alternative criteria" for determining whether employers have the required commonality of interest. An association of employers can meet the commonality of interest test by having "one substantial purpose unrelated to the provision of benefits," even if the group or organization's principal purpose is the provision of insurance benefits. The purpose must be "substantial enough that the association would be a viable entity even in the absence of acting as a sponsor of an association health plan."

[40] Available at: https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.
[41] 82.Fed. Reg. 16,902 (Apr. 7, 2017).
[42] 82 Fed. Reg. 41,365 (Aug. 31, 2017).
[43] No. 17-10238 (5th Cir. 2018). Available at: https://www.ca5.uscourts.gov/opinions/pub/17/17-10238-CV0.pdf.
[44] 83 Fed. Reg. 28,912 (June 21, 2018).

Employers must either be in the same "trade, industry, line of business or profession" or have a principal place of business (of the employers that are participating) in the same region that does not exceed the boundaries of a single State or metropolitan area – even if the metropolitan area includes more than one State.

The rule does not require that employer-members engage in day-to-day management of the association or association health plan, but employer control is still necessary to meet the requirements to have an association health plan. The DOL has indicated that the following factors are sufficient to show employer control: (1) employer members nominate and elect directors; (2) employer members can remove a director with or without cause; and (3) participating employer members have the authority and opportunity to approve or veto decisions which relate to formation, design, amendment and termination of the plan, focusing on changes to coverages, benefits and premiums.

The final rule allows individuals who operate without common law employees to qualify as both an employer and an employee, and thus can join an association health plan as an employer and receive health coverage as an employee. A sole proprietor can be counted as an employee of a single group or association employer.

3. Economically Targeted Investments

On April 23, 2018 the DOL issued Field Assistance Bulletin 2018-01[45] in which it provides guidance to the Employee Benefit Security Administration's national and regional offices for questions from ERISA plan fiduciaries relating to the exercise of shareholder rights and written statements of investment policy in Interpretive Bulletin 2016-01 and economically targeted investments in Interpretive Bulletin 2015-02.[46] Based on the content of the two previously mentioned bulletins, the DOL reiterated:

- its longstanding position that ERISA fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals. When competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as tie-breakers for an investment choice;
- that ERISA fiduciaries must not too readily treat environmental, social and governance ("ESG") factors as economically relevant to the particular investment choices at issue when making a decision. Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits;
- that investment policy statements are permitted to include policies concerning the use of ESG factors to evaluate investments, or on integrating ESG related tools, metrics or analyses to evaluate an investment's risk or return, but an investment policy statement is not required to contain such guidelines or tools to comply with ERISA;

[45] Available at: https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01
[46] While this guidance is not applicable to church plans exempt from ERISA, the guidance does provide useful information on the DOL's view of investing based on environmental, social and governance factors.

- that a prudently selected, well-managed and properly diversified ESG-themed investment alternative could be added to the available investment options on a 401(k) plan platform without requiring the plan to forego adding other non-ESG themed investment options to the platform;
- that in the case of a qualified default investment alternative ("QDIA"), fiduciaries should not choose QDIAs based on collateral public policy goals;
- plan fiduciaries should engage in traditional and customary proxy voting activities in discharging their fiduciary obligation to prudently manage plan investments and that in most cases, proxy voting and other shareholder engagement does not involve a significant expenditure of funds because institutional investment managers are appointed as the responsible plan fiduciary pursuant to ERISA; and
- that an investment policy that contemplates engaging in shareholder activities that are intended to monitor or influence the management of corporations in which the plan owns stock can be consistent with a fiduciary's obligations under ERISA if the responsible fiduciary concludes there is a reasonable expectation that such activities are likely to enhance the economic value of the plan's investment in that corporation after taking into account the costs involved.

4. Proposed Rule on Open MEPs

The DOL released its proposed rule on open multiple employer plans[47] ("MEPs") on October 23, 2018. The rule makes it easier for small businesses to join together to participate in defined contribution multiple employer plans. The proposed rule clarifies that employer groups and associations or professional employer organizations ("PEO") can, when satisfying certain criteria, constitute "employers" within the meaning of section 3(5) of ERISA for purposes of establishing or maintaining an individual account employee pension benefit plan under ERISA. The proposed rule's broadened definition of employer would include a broadened range of "bona fide employer groups or associations" which could be within the same trade, industry, line of business or profession, or alternatively be a geographically based group. The proposed rule would allow different businesses to join a MEP, either through a group or an association, or through a PEO. The proposed rule would also allow certain working owners without employees to participate in a MEP sponsored by a group or association.

Although this open MEP rule affects only ERISA plans, it indicates the DOL is issuing rules in response to President Trump's August 31 Executive Order requesting the DOL to consider the expansion of access to multiple employer plans and other retirement plan options (discussed in Section VI.B. of this document).

III. Patient Protection and Affordable Care Act

The ACA, which was signed into law by President Obama in March of 2010, imposed sweeping changes on the delivery of health care in this country and has had a major impact on all players in the health care market (including individuals and insurers). Since the ACA's enactment, HHS, the DOL, and the Department of the Treasury (collectively the "Agencies") have jointly issued final regulations and other

[47] 83 Fed. Reg. 53,534 (Oct. 23, 2018).

guidance relating to different provisions in the ACA. This report focuses on guidance that was issued in the last year.

A. Contraceptive Coverage

Under the ACA, all non-grandfathered plans must provide coverage for certain preventive care services and must cover such services without the imposition of any cost-sharing requirements (such as a copayment, coinsurance or deductible). These services include contraceptive coverage. Unless entitled to an exemption, non-grandfathered plans had to begin providing these services to women without cost-sharing for plan years beginning on or after August 1, 2011.

1. Regulatory Guidance

Exemption for Religious Employers

In August 2011, the Agencies granted an exemption for group health plans established or maintained by "religious employers" (and health insurance coverage provided in connection with such plans) with respect to the requirement to cover contraceptive services. As originally drafted, the term "religious employer" was very narrowly defined. Subsequently, in February 2012, as a result of concerns expressed by a number of religious organizations, the Agencies committed to rulemaking to protect additional organizations from having to provide contraceptive coverage to which they object on religious grounds.

In June 2013, the Agencies issued final regulations that significantly broadened the definition of "religious employer."[48] The revised religious employer exemption covered:

- churches;
- conventions and associations of churches; and
- integrated auxiliaries.[49]

Accommodation for Other Religious Organizations

The 2013 final regulations also provided for the "accommodation" of certain health care coverage provided by "eligible organizations." An employer eligible for the accommodation rules does not have to provide contraceptive coverage to its employees, but contraceptive coverage will be made available by either the health insurance issuer (in the case of fully-insured plans) or the third-party administrator ("TPA") (in the case of self-insured plans). For purposes of the accommodation rules, an "eligible organization" is a non-profit entity that:

- opposes coverage for some or all of the contraceptive services required to be covered;

[48] 78 Fed. Reg. 39,870 (July 2, 2013).

[49] An "integrated auxiliary" is defined in the applicable regulations as a tax-exempt (501(c)(3)) organization that is both affiliated with a church and internally supported. An organization is not "internally supported" if both of the following apply: (a) the organization offers goods, services or facilities for sale, other than on an incidental basis, to the general public; and (b) the organization normally receives more than 50% of its support from a combination of governmental sources, public solicitation of contributions, receipts from the sale of admissions or goods, the performance of services, or furnishing facilities in activities that are not unrelated trades or businesses.

- holds itself out as a religious organization; and
- maintains in its records a "self-certification" that indicates that it meets the above requirements and makes such self-certification available upon request by the first day of the first plan year for which the accommodation applies.[50]

As discussed above, an eligible organization entitled to the accommodation will not have to contract, arrange, or pay for contraceptive coverage. However, women covered under the health care plans maintained by eligible organizations will still be entitled to contraceptive coverage paid for by either the health insurance issuer (in the case of fully-insured plans) or the TPA (in the case of self-insured plans).[51]

In the case of insured group health plans sponsored by eligible organizations, the coverage would thus be provided at no cost to the participant by the employer's health insurance issuer. In the case of self-insured health plans, the TPA would assume the responsibility for arranging with a health insurance issuer to provide contraceptive coverage at no cost to participants. The Agencies state that the related costs incurred by both the issuer and the TPA would be offset by adjustments in user fees that issuers pay on the state's "affordable insurance exchange."

In August 2014, following the Supreme Court's decision in the *Hobby Lobby* case, HHS issued interim regulations that provide a new method by which eligible nonprofit religious organizations could provide notice of their religious objections to providing contraceptive coverage.[52] Under the interim rules, religious non-profits are still permitted to self-certify under the accommodation rules described above. However, in the alternative, such organizations may qualify for the accommodation by providing HHS with written notification of their objection to providing contraceptive coverage. HHS and the DOL will then notify insurers and TPAs so that enrollees may receive separate coverage for such services.[53]

In July 2015, the Agencies finalized the interim final regulations issued in August 2014.[54] The final regulations also describe the content requirements of the alternative notice and describe accommodations for closely-held for-profit entities.[55]

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[50] The guidance does not elaborate on what it means for an organization to "hold itself out as a religious organization." However, this self-certification does not need to be submitted to any of the Agencies. Thus, it appears that the Agencies do not intend to review the self-certification to make their own determination as to whether the organization does or does not hold itself out as being religious.

[51] The final regulations require the issuer or TPA to provide direct payments for the contraceptive services.

[52] 79 Fed. Reg. 51,092 (Aug. 27, 2014). On October 27, 2014, the Church Alliance filed a comment letter on the interim final regulation. In that letter, the Church Alliance expressed its concern that the interim regulations fail to protect the religious rights of religious organizations that object to providing some or all contraceptive coverage through their employee benefit plans established for their employees and their dependents. The Church Alliance noted that the latest version of the accommodation still falls short of the needs of eligible organizations because they are still required to act contrary to their beliefs by maintaining a contractual relationship with third parties that facilitate delivery of the contraceptive coverage they oppose. The letter further argued that the regulations continue to violate the Establishment Clause.

[53] HHS also issued a proposed rule soliciting comments on how it might extend the same service to closely-held for-profit entities with religious objections to contraceptive coverage. This proposed rule was in response to the Supreme Court decision in *Hobby Lobby*.

[54] 80 Fed. Reg. 41,318 (July 14, 2015).

[55] The final rules defined a "closely held for-profit entity" as an entity that is not publicly traded and that has an ownership structure under which more than 50 percent of the organization's ownership interest is owned by five or

2. U.S. Supreme Court Decision

On November 6, 2015, the U.S. Supreme Court granted review of seven cases addressing the enforcement of the contraceptive coverage mandate cases. Oral arguments before the Supreme Court in the seven cases were held in March of 2016. After hearing the oral arguments, the Supreme Court requested supplemental briefing from the parties addressing the alternative approaches that could be used to provide contraceptive coverage to the organization's employees without requiring the organization to provide notice to insurers, TPAs or HHS. The supplemental brief for the religious organizations indicated that their religious exercise is not infringed if they are required to do nothing more than contract for a plan that does not provide coverage for some or all forms of contraception, even if their employees receive such coverage from the same insurance company. The supplemental brief for the government indicated that the accommodation could be modified in this way for insured plans but notes that this approach would not work for self-insured plans.

In light of the "substantial clarification and refinement in the positions of the parties" raised in the supplemental briefs, the Court remanded the seven cases back to the appellate courts in May of 2016 and anticipated that those courts will "allow the parties sufficient time to resolve any outstanding issues between them."[56] The Court also stated that it expressed no view on the merits of the case.

In June 2016, the Court remanded six additional cases involving the religious employer accommodation back to the appellate courts. The Court stated again that it was not ruling on the merits of the cases.

Some of the cases on remand from the Supreme Court have settled, while others are still pending.

As a result of the Court's decision to remand these cases to the appellate courts, the Agencies issued a request for information in July 2016.[57] The request for information asked for comments on whether there are alternative ways to structure the accommodation for religious organizations while ensuring women enrolled in their plans receive the full range of contraceptive coverage without cost sharing. In particular, the Agencies requested information regarding alternative approaches that would work for insured plans as well as self-insured plans.[58]

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fewer individuals, or an entity with a substantially similar ownership structure. For purposes of this definition, all of the ownership interests held by members of a family are treated as being owned by a single individual. Based on available information, the Agencies believed that this definition included all of the for-profit companies that have challenged the contraceptive-coverage requirement on religious grounds. The rules finalized standards concerning documentation and disclosure of a closely held for-profit entity's decision not to provide coverage for contraceptive services.

[56] *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

[57] 81 Fed. Reg. 47,741 (July 22, 2016).

[58] The Church Alliance filed a comment letter on September 20, 2016 in response to the request for information. In the comment letter, the Church Alliance again requested that the Agencies expand the types of church-affiliated employers that are exempt from the contraceptive coverage mandate to include any objecting employer that provides health coverage through a church plan. If the Agencies decide not to expand the exemption, then the Church Alliance requested that the Agencies adjust the notification required to qualify for the accommodation.

3. 2017 Regulatory Guidance

On January 9, 2017, the Agencies issued FAQ Part 36[59] which included a statement that, after reviewing comments submitted in response to the 2016 request for information and considering various options, the Agencies could not find a way at that time to amend the accommodation to satisfy objecting eligible organizations while pursing the Agencies' policy goals.

On May 4, 2017, the President issued an "Executive Order Promoting Free Speech and Religious Liberty" that instructed the Secretaries of the Agencies to consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate regarding contraceptive coverage. The two rules discussed below are the result of that re-examination.

On October 6, 2017, the Agencies issued interim final rules[60] addressing religious and moral exemptions and accommodations for coverage of certain preventive services under the ACA. The Agencies issued final regulations on November 7, 2018, which are substantially the same as the interim final rules and include in the preamble responses to public comments on the interim final regulations.

These rules protect religious beliefs (and add exemptions for moral beliefs) and expand exemptions to certain entities and individuals whose non-grandfathered health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the ACA. The rules do not alter the discretion of the Health Resources and Services Administration to maintain the guidelines requiring contraceptive coverage where no regulatorily recognized objection exists. The rules also leave the accommodation process in place as an optional process for certain exempt entities that wish to use it voluntarily and will provide contraceptives to persons covered by the plans of entities that use it. The final rules are effective January 14, 2019.

The first rule[61] issues an expanded exemption to a broader range of entities and individuals that object to contraceptive coverage based on strongly held religious beliefs, while continuing to offer the existing accommodation as an optional alternative. The expanded exemption encompasses non-governmental, non-grandfathered health plan sponsors that also object to the provision of contraceptive coverage based on sincerely held religious beliefs, including publicly held and closely held for-profit corporations (regardless of size), religious employers, nonprofits, higher education institutions, and insurance issuers, to the extent they provide a plan to otherwise exempt entities. The exemption in this rule also allows, but does not require, issuers and employers to omit contraceptives from coverage provided to objecting individuals.

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[59] Available at: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resourcecenter/faqs/aca-part-36.pdf.

[60] The Church Alliance filed a comment letter on December 5, 2017 regarding the interim final rules. In the comment letter, the Church Alliance requests that the Agencies: (1) clarify that an employer adopting an exempt plan cannot be penalized; (2) provide guidance on how an organization can revoke its use of the accommodation; and (3) refrain from requiring a form of certification to claim or maintain the exemption. See Appendix D for a copy of the comment letter.

[61] 83 Fed. Reg. 57,536 (Nov. 15, 2018).

The second rule[62] issued by the Agencies addresses moral exemptions and accommodations for coverage of certain preventive services under the ACA. This rule incorporates conscience protections into the contraceptive mandate and expands exemptions to the mandate to protect certain entities and individuals that object to coverage of some or all contraceptives based on sincerely held moral convictions (but not religious beliefs). Employers that can claim this exemption include non-governmental, privately held for-profit employers (the exemption is not available to plan sponsors that are publicly traded), nonprofits, higher education institutions and insurers, but exempted insurance plans can only be purchased by employers or individuals having moral objections.

The rules do not define religious or moral objections. However, the HHS Fact Sheet explains the following:

> Based on case law, the preamble to the rule explains that moral convictions are protected in ways similar to religious beliefs, when the convictions are those: (1) that a person deeply and sincerely holds; (2) that are purely ethical or moral in source and content; (3) but that nevertheless impose … a duty; (4) and that certainly occupy … a place parallel to that filled by … God in traditionally religious persons, such that one could say the beliefs function as a religion.[63]

No self-certification, filing or notice to the Agencies is required under the rules for employers or individuals objecting to the provision of contraceptives on religious or moral grounds. Plans subject to ERISA must continue to follow required notice procedures for changing covered benefits, including revising summaries of benefits and coverage and issuing a summary of material modification within the required timeframe.

After the issuance of the interim final rules, two judges enjoined the enforcement of the rules.[64] Both cases have been appealed.

B. Final Regulations on Short-Term, Limited-Duration Insurance

Short-term, limited-duration insurance (“STLDI”) is a type of insurance designed to fill temporary gaps in coverage when an individual is moving to a different plan or coverage. Although STLDI is not an excepted benefit, it is exempt from the ACA market reform provisions because it is not considered individual insurance coverage. Under prior regulations, the maximum term of coverage for this type of insurance was limited to three months, including the period for which the policy may be renewed.

In August, the Agencies amended the STLDI regulations to increase the maximum term of coverage to 12 months. Specifically, the amended regulations define STLDI as health coverage provided under a contract with an insurer that has an expiration date specified in the contract that is less than 12 months after

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[62] 83 Fed. Reg. 57,592 (Nov. 15, 2018).

[63] Available at: https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html (quotations omitted).

[64] *Pennsylvania v. Trump*, 281 F.Supp.3d 553 (E.D. Penn. 2017); *California v. Health and Human Services*, 281 F.Supp.3d 806 (N.D. Cal. 2017).

the original effective date of the contract. In addition, the amended regulations permit STLDI to have a total duration of no more than a total of 36 months, taking into account renewals or extensions.[65]

The amended regulations retain the requirement that a notice must be prominently displayed in the contract and any application materials provided in connection with enrollment in at least 14-point type but revise the content that must be included in the notice. The revised notice contained in the amended regulations includes additional detail. In addition, the notice included in policies that are effective before January 1, 2019 must state that the coverage is not minimum essential coverage that satisfies the requirements of the ACA and that an individual without minimum essential coverage may owe a penalty.[66]

On April 23, 2018 the Church Alliance submitted a comment letter[67] in response to the proposed rule amending the definition of STLDI for purposes of its exclusion from the definition of individual health insurance coverage. The comment letter points out that lengthening the maximum period of STLDI may have the unintended effect of adversely impacting church health plans. Positioning STLDI as a viable alternative coverage option for church workers could challenge the financial solvency for long-standing programs such as the Church Alliance member health plans to the permanent disadvantage of many career servants of religious organizations. The Church Alliance urged the Centers for Medicare/Medicaid Services to limit STLDI coverage to filling short-term coverage gaps and refrain from lengthening the maximum period of STLDI coverage.

C. Individual Mandate Litigation

In February of 2018, several Republican state attorneys general and governors filed a lawsuit challenging the constitutionality of the individual mandate.[68] Because the U.S. Supreme Court upheld the individual mandate in 2012 as a legitimate use of Congress' taxing power, the plaintiffs argue that the reduction of the individual mandate penalty to zero under the TCJA makes it unconstitutional. The plaintiffs also argue that the individual mandate cannot be severed from the rest of the ACA and, therefore, the entire law is unconstitutional.

Democratic state attorneys general from several states and the District of Columbia intervened in the case to defend the ACA. They have argued that the individual mandate is still constitutional and, even if the court determines it is unconstitutional, it can be severed from the rest of the ACA.

On September 5, 2018, the judge heard oral arguments on plaintiffs' request to grant a preliminary injunction against enforcement of the ACA. A decision has not yet been made in the case.

D. Delay of Cadillac Tax

The cadillac tax is a 40% excise tax that will be imposed on certain high-cost employer-sponsored health care plans (so-called "cadillac" plans) to the extent that the annual cost for an employee exceeds a threshold amount. The threshold amount is $10,200 for employee-only coverage and $27,500 for coverage

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[65] 83 Fed. Reg. 38,212 (Aug. 3, 2018).

[66] The notice included in policies that are effective after January 1, 2019 are not required to include this language because the Tax Cut and Jobs Act reduced the individual shared responsibility payment to $0 for months beginning after December 2018.

[67] The Church Alliance comment letter on short-term, limited-duration insurance is attached as Appendix E.

[68] *Texas v. United States of America*, No. 4:18-cv-00167-O (N.D. Tex. filed Feb. 26, 2018).

other than employee-only and will be indexed annually. These thresholds also will be adjusted for plans that carry a higher premium cost because of age and gender demographics of an employer's employees and for qualified retirees and employees in certain high-risk professions.

The cadillac tax was originally effective in 2018, but was delayed until 2020 (i.e., tax years beginning after 2019) by the Consolidated Appropriations Act, 2016.[69] In January of 2018, the cadillac tax was further delayed to 2022 by a provision included in legislation to fund the government and end a temporary government shutdown.[70]

E. Clarification of Emergency Service Coverage Rules

The ACA requires non-grandfathered health plans to comply with certain emergency service coverage requirements. The Agencies issued interim final regulations on the emergency service coverage requirements in 2010, which were finalized in 2015 without substantive revisions. Among other requirements, the regulations provide that any copayments and coinsurances imposed on out-of-network emergency services cannot exceed the in-network copayment or coinsurance rate. In addition, plans must provide benefits for out-of-network emergency services equal to the <u>greatest of</u> the following base amounts: (1) the median of negotiated in-network rates (this amount is disregarded if the plan does not have in-network negotiated rates); (2) the amount the plan generally uses to determine payments for out-of-network services (*e.g.*, the usual, customary and reasonable amount); or (3) the amount that would be paid under Medicare Part A or Part B.

In 2017, a district court determined that the Agencies acted "arbitrarily and capriciously" in adopting the regulations by failing to respond to comments about potential problems relating to the requirement to consider the usual, customary and reasonable amount when determining how much a plan is required to pay for out-of-network emergency services.[71] As a result, the court remanded the case to the Agencies to provide additional response to these comments.

In May of 2018, the Agencies issued a notice of clarification to provide additional justification for its decision not to adopt the recommendations made in filed comments.[72] The court has not made a decision in this case.

F. Patient-Centered Outcome Research Institute Adjusted Fee

The ACA includes a provision imposing a fee on certain health insurance policies and plan sponsors of certain self-insured health plans to fund an institute to perform research on the clinical effectiveness of certain medical treatments, services, procedures, and drugs (the Patient Centered Outcome Research Institute or "PCORI"). The fee is generally imposed on health insurance issuers and plan sponsors of self-insured health plans for each plan or policy year ending after September 30, 2012, and before October 1, 2019. The fee, which initially was $1 times the average number of covered lives in the first plan year ending after September 30, 2012, and $2 for each covered life in the second plan year ending after September 30, 2012, is subject to indexing. In November, the IRS issued Notice 2018-85,[73] increasing the amount used to

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[69] Public Law 114-113 (2015).
[70] Public Law 115-120 (2018).
[71] *American College of Emergency Physicians v. Price*, 264 F.Supp.3d 89 (D.D.C. 2017).
[72] 83 Fed. Reg. 19,431 (May 3, 2018).
[73] 2018-48 I.R.B.___.

calculate the fee to $2.45 for plan and policy years ending on or after October 1, 2018, and before October 1, 2019.

G. Section 1557 Nondiscrimination Rules

On December 31, 2016, a federal district judge issued a preliminary injunction to prevent the implementation of certain provisions of the final rule issued last year under section 1557 of the ACA.[74] Section 1557 prohibits discrimination under any health program or activity that received Federal financial assistance on any grounds prohibited by Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination and Employment Act of 1975 and section 504 of the Rehabilitation Act of 1973. The prohibited grounds for discrimination under these laws include race, color, national origin, age, disability, and sex.

The scope of section 1557 is broader than the scope of the final rule. The final rule only applies to health programs and activities that receive federal financial assistance through HHS or that are administered by HHS. This would include federal and state Exchanges, the insurers participating in such Exchanges, the employee health benefit plans of employers principally engaged in health care that receive federal financial assistance (e.g., hospitals) and possibly group health plans that receive funds from HHS (e.g., the retiree drug subsidy or EGWP payments). The final rule would also apply to any services that insurers subject to the rule offer outside the Exchanges, including third party administration services.

The plaintiffs, in the district court case referenced above, sued HHS, arguing that it exceeded its authority in interpreting sex discrimination as including gender identity and termination of pregnancy. The district court agreed and issued an injunction temporarily delaying the implementation of the portion of the regulations prohibiting discrimination on the basis of gender identity and termination of pregnancy. The injunction does not delay the implementation of the remaining provisions of the final rule.

In July 2017, the court granted a stay and suspended the proceedings until HHS reviews the regulations.[75] The court stated that the injunction remains effective throughout the stay. The stay is still in effect.

IV. Equal Employment Opportunity Commission

A. Reconsideration of Wellness Rules

The Americans with Disabilities Act ("ADA") generally prohibits employers from making disability-related inquiries and medical examinations unless the inquiry or exam is "voluntary" and part of an employee health program available at the employee's worksite. Title II of the Genetic Nondiscrimination Act of 2008 ("GINA") includes an exception to the prohibition on the use of genetic information for voluntary wellness programs that do not condition inducements for employees on the provision of genetic information.

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[74] 81 Fed. Reg. 31,376 (May 18, 2016).
[75] *Franciscan Alliance, Inc. v. Price*, No. 7:16-cv-00108-O, 2017 WL 3616652 (N.D. Tex. July 10, 2017).

On May 16, 2016, the Equal Employment Opportunity Commission ("EEOC") finalized rules on employer wellness programs under both the ADA and GINA. The final rules generally allow incentives of up to 30% of the cost of self-only coverage for participation in a wellness program.

In October of 2016, the American Association of Retired Persons ("AARP") filed a lawsuit against the EEOC arguing that the 30% incentive is inconsistent with the requirement that the wellness program be "voluntary" under the ADA and GINA. AARP also argued that employees who cannot afford to pay a 30% increase in premiums would be forced to disclose protected information even if they would not otherwise choose to disclose such information.

The U.S. District Court for the District of Columbia ruled[76] in August of 2017 that the EEOC failed to adequately justify its interpretation of the term "voluntary" as permitting a 30% incentive and remanded the rules to the EEOC for reconsideration. The Court decided not to vacate the rules because of concerns that vacating the rules would have "significant disruptive consequences."

In September of 2017, the EEOC filed a status report with the Court stating that it intended to issue proposed rules by August of 2018 and final rules by October of 2019. The EEOC's report also indicated that any amended rule probably would not be applicable until the beginning of 2021 so that employers have time to bring their plans into compliance.

AARP then filed a motion requesting the court to reconsider its decision and vacate the rules. On December 20, 2017, the court vacated the 30% incentive portion of the rules as of January 1, 2019 and directed the EEOC to propose new rules by August 31, 2018, stating that the 2021 timeframe for the new rules is "unacceptable."[77]

The EEOC recently indicated that it probably will not issue proposed rules until at least January of 2019.[78]

V. Litigation

A. Challenges to Church Plan Status

Over 40 lawsuits have been filed in the last several years challenging the availability of the ERISA church plan exemption to defined benefit plans sponsored by a number of different religiously affiliated health care systems. The allegations in these lawsuits are substantially the same – plaintiffs in each lawsuit claim, among other things, that:

- the defined benefit plans maintained by the respective defendant health care systems do not comply with ERISA and have engaged in prohibited transactions;
- the defendants have purposefully ignored ERISA requirements that are meant to protect participants by improperly claiming to be church plans, exempt from ERISA; and
- the plans are underfunded.

[76] *AARP v. U.S. Equal Employment Opportunity Comm'n*, 267 F.Supp.3d 14 (D.D.C. 2017).
[77] *AARP v. U.S. Equal Employment Opportunity Comm'n*, 292 F.Supp.3d 238 (D.D.C. 2017).
[78] *See* https://www.bna.com/wellness-rules-update-n73014475059/.

Almost all of the lawsuits also allege that the ERISA church plan exemption is unconstitutional. The principal argument in each case is that the IRS, DOL and courts have misinterpreted the church plan definition for over 30 years and that only plans established by churches can be church plans. According to the plaintiffs' argument, plans established by 501(c)(3) organizations that are controlled by or associated with a church could not qualify as church plans.

The Third,[79] Seventh,[80] and Ninth[81] Circuit Courts of Appeals all ruled in favor of the plaintiffs and held that the defined benefit plans maintained by the respective health care systems were not church plans. These three health care systems filed petitions for writs of certiorari with the U.S. Supreme Court, asking the Court to determine whether their pension plans are "church plans" under ERISA.[82] The U.S. Supreme Court agreed to take the case, heard oral arguments in March and issued an order in June of 2017.

The U.S. Supreme Court unanimously decided in *Advocate Health Care Network et al. v. Stapleton et al.*,[83] that church plans can be established by church-affiliated organizations (in this case, church-affiliated hospitals) and do not have to be established by the church with which they are affiliated, as plaintiffs were claiming in this case. This Supreme Court decision reversed the three Court of Appeals decisions which held that church plans must be established by a church. Applying the rules of statutory construction, the Supreme Court disagreed with the Courts of Appeals, stating that a plan maintained by a church-affiliated organization can be a church plan, even if the church-affiliated organization established it.

The church plan status litigation is not over. Although the Supreme Court settled the question of who can establish a church plan, the trial courts in several cases, including *Rollins*, are now considering three open questions:

- whether a retirement plan committee of a church-associated hospital qualifies as a "principal purpose organization" maintaining the plan, as required by Code section 414(e);
- whether the hospitals involved remain, under the facts at hand, "controlled by or associated with" a church, as also required under §414(e); and
- whether the church plan exemption from ERISA is unconstitutional under the Establishment Clause of the United States Constitution.

On September 7, 2017, the Tenth Circuit Court of Appeals heard oral arguments related to all three of these questions in *Medina v. Catholic Health Initiatives*. (The trial court in *Medina* had ruled on all three questions left open by the U.S. Supreme Court's decision in *Advocate*.) An opinion by the Tenth Circuit Court of Appeals was issued on December 19, 2017.[84] The court held that Catholic Health Initiatives was associated with the Catholic Church, that a benefits plan administration committee can be a principal

[79] *Kaplan v. St. Peter's Healthcare System*, 2015 WL 9487719 (3rd Cir., 2015).
[80] *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir., 2016).
[81] *Rollins v. Dignity Health*, 2016 WL 3997259 (9th Cir., 2016).
[82] The Church Alliance joined GuideStone Financial Resources and the Pension Boards, United Church of Christ, Inc. in filing amicus briefs in the *Rollins* and *Medina* cases. The Church Alliance also filed an amicus brief in support of the certiorari petitions filed with the U.S. Supreme Court in *Kaplan*, *Stapleton*, and *Rollins,* along with a brief on the merits, after the certiorari petitions were granted.
[83] 137 S. Ct. 1652 (2017).
[84] *Medina v. Catholic Health Initiatives, et. al.*, 877 F.3d 1213 (10th Cir., 2017).

purpose organization and that the ERISA church plan exemption is constitutional. Similar decisions have been reached by trial courts in *Smith v. OFS Healthcare System et.al*,[85] and *Feather v. SSM Health*.[86]

B. Fee Litigation

New cases continue to be filed alleging that retirement plan sponsors and committees are breaching their ERISA fiduciary duties to the plan and plan participants by paying excessive and unreasonable fees to retirement plan recordkeepers, administrative service providers, and investment providers. In the past, most of these cases have been filed against large, for-profit companies sponsoring 401(k) plans. In 2016, a number of cases were filed against college and university 403(b) plans. Decisions have been reached in some of these cases, and for the most part, they have been favorable for the college and university plan sponsors.

Portico Benefit Services was also served with a complaint in 2015, alleging that it breached its fiduciary duty under Minnesota state law by charging plan participants excessive plan administration fees. The district court for the Fourth District of Minnesota dismissed the case due to a lack of subject matter jurisdiction. The plaintiffs appealed this decision, and the Minnesota Court of Appeals reversed the trial court's decision, determining that subject matter jurisdiction is present. Portico appealed to the Minnesota Supreme Court, and the Church Alliance filed an *amicus curiae* brief in support of Portico's appeal. Unfortunately, the Minnesota Supreme Court did not accept the appeal. Portico also filed a petition for certiorari with the U.S. Supreme Court, asking the Court to decide the subject matter jurisdiction issue. The U.S. Supreme Court did not grant the writ. The case is now proceeding at the trial court level.[87]

C. Housing Allowance Litigation Update

In *Freedom From Religion Foundation v. Lew*,[88] the Freedom from Religion Foundation ("Foundation") challenged (on Constitutional grounds) the exclusion of housing allowance from the gross income of a minister. The trial court initially ruled that the Foundation had standing to sue because the individual co-presidents of the Foundation (also plaintiffs in the case) were excluded from claiming a "housing allowance" income tax exclusion granted to clergy. The court then held that the housing allowance for ministers violated the Establishment Clause of the First Amendment of the United States Constitution, reasoning that the exemption provided a benefit only to clergy, and that the exception was not necessary to alleviate a special burden on religious exercise.

The federal government appealed the trial court's decision to the Court of Appeals for the Seventh Circuit. On April 9, 2014, the Church Alliance filed an *amicus curiae* brief in support of the government's position on appeal. On November 13, 2014, the Seventh Circuit vacated the District Court's decision in this case and remanded it back to the lower court with instructions to dismiss the complaint for lack of standing.[89] However, in its opinion, the Seventh Circuit provided a roadmap describing how the Foundation and its co-presidents could establish standing to pursue their claim. The Seventh Circuit indicated that, if

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[85] No. 3:16-cv-00467 (S.D. Il. 2018).
[86] No. 4:16-cv-01669 (E.D. Mo. 2018).
[87] *Bacon et. al. v. Board of Pensions of the Evangelical Lutheran Church in America,* No. 27-CV-15-3425 (D. Minn. 2015).
[88] 983 F. Supp. 2d 1051 (W.D. Wis. 2013). The Freedom From Religion Foundation had filed an identical lawsuit in California prior to filing the complaint in this action.
[89] 773 F.3d 815 (7th Cir., 2014).

the Foundation's employees to whom housing allowance was granted filed a tax return claiming that their housing allowance was excludible from income taxation, and the IRS denied the claimed exclusion, these employees would then have standing to pursue their claim that Code section 107 is unconstitutional.

The Foundation followed the roadmap provided by the Seventh Circuit on the standing issue, and on April 6, 2016, filed another complaint in the Western District of Wisconsin.[90] The government conceded that the plaintiffs now have standing to pursue the claim that Code section 107 is unconstitutional in the case of a housing allowance exclusion, but argued that the plaintiffs did not have standing to pursue a claim of unconstitutionality with respect to "in kind" housing provided to clergy. The re-filed case was heard by the same judge, Judge Barbara Crabb, who held that Code section 107 was unconstitutional in 2013, before the Seventh Circuit vacated her decision. On October 24, 2016, Judge Crabb dismissed for lack of standing the portion of the Foundation's complaint that Code section 107(1) housing (the in-kind housing exclusion) is unconstitutional but granted standing with respect to clergy housing allowance excludable under Code section 107(2). On October 5, 2017, Judge Crabb once again found the housing allowance provision of Code section 107(2) to be unconstitutional.[91]

The case was appealed to the Seventh Circuit Court of Appeals.[92] Oral arguments were heard before a three-judge panel on October 24, 2018 and a decision from the Seventh Circuit is expected early in 2019. Based on the oral argument, practitioners with experience in Constitutional law are more optimistic that the clergy housing allowance exclusion will be upheld than they were before oral argument.

VI. Other

A. State-Run Retirement Programs

Over the past several years, ten states[93] have enacted state-run IRAs, MEPs or other retirement programs, and many other states are considering these types of savings vehicles. The state IRA legislation generally requires certain employers that do not provide employer-sponsored retirement plans to offer payroll deduction IRAs to their employees, and in some cases, requires employers to automatically enroll employees in the IRA unless employees have elected to opt out of participation. The definition of which employers are subject to the law varies from state to state.

B. Executive Order on Retirement Plans

President Trump issued an executive order on strengthening retirement security in America[94] on August 31, 2018. The order states that it will be the policy of the Federal Government to expand access to workplace retirement plans for American workers so they will be financially prepared to retire. The President directed federal agencies to revise or eliminate rules and regulations that impose unnecessary costs and burdens on businesses, especially small businesses, and that hinder formation of workplace retirement plans. The order directed the Secretary of Labor to examine policies that would expand access

[90] *Gaylor v. Lew*, No. 3:16-cv-00215 (W.D. Wis. 2016).
[91] *Gaylor v. Mnuchin,* No. 3:16-cv-00215 bbc (W.D. Wis. 2017).
[92] *Gaylor v. Mnuchin*, No. 3:16-cv-00215 (7th Cir. 2018).
[93] California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont and Washington have enacted state-run retirement plan legislation.
[94] Available at: https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/.

to multiple employer plans and other retirement plan options, improve the effectiveness of and reduce the cost of furnishing required employee benefit plan notices and disclosures, and update life expectancy and distribution period tables for purposes of required minimum distribution rules.

C. Prescription Drug Clawbacks

In certain cases, the cost of a prescription drug is less than the copay amount charged a to participant under the terms of a health care plan. Often insurers and pharmacy benefit managers ("PBMs") keep the spread between the cash price and plan copay amount – this amount is called a "clawback." A University of Southern California White Paper[95] indicated nearly ¼ of prescriptions filled may involve a clawback. Gag clauses have prohibited many pharmacists from informing customers that they could purchase a prescription for less by paying cash and not processing it through their benefit plan.

In the past several years these clawback practices have gained the attention of state and federal lawmakers. Many states have enacted laws related to clawbacks[96] and gag clauses[97] and on September 18, 2018, the United States Senate passed a bipartisan bill that would ban gag clauses.

Plaintiffs' attorneys have also taken notice of this controversial practice. A clawback suit against United Health Care was dismissed in favor of United Health Care on December 19, 2017.[98] In a proposed class action clawback suit against CIGNA, fiduciary claims were allowed to proceed, surviving a motion to dismiss.[99] The judge stated that CIGNA may be liable under ERISA and racketeering laws for the alleged clawback scheme because CIGNA may have acted as a fiduciary because it allegedly exercised unauthorized, discretionary control over the insurance plans and contracts in order to receive the excess clawback payments.

D. Mental Health Proposed FAQs Part 39

On April 23, 2018, the DOL, HHS and the IRS issued proposed FAQs[100] on the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"). The Agencies also released a self-compliance tool to help health plans, administrators and sponsors assess their compliance with the MHPAEA.

FAQs Part 39 were issued in response to the 21st Century Cures Act, which required the Agencies to solicit feedback and issue clarifying information and examples regarding MHPAEA provisions on Non-Quantitative Treatment Limitations ("NQTLs") and on ERISA disclosure. Health plans and insurers cannot impose NQTLs on mental health and substance use disorder benefits unless any methods, processes, strategies, evidentiary standards and other factors in applying the NQTLs are comparable to, and are applied

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[95] https://healthpolicy.usc.edu/wp-content/uploads/2018/03/2018.03_Overpaying20for20Prescription20Drugs _White20Paper_v.1-2.pdf.

[96] Arkansas, Connecticut, Delaware, Georgia, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wyoming have enacted clawback legislation.

[97] Arkansas, Connecticut, Georgia, Louisiana, Maine, Mississippi, Nevada, and North Dakota are among the states with laws that prohibit or restrict gag clauses.

[98] *In re: UnitedHealth Group PBM Litigation*, 2017 WL 6512222 (D. Minn. Dec. 19, 2017).

[99] *Negron v. Cigna Health and Life Insurance Co*. 2018 WL 1258837 (D. Conn. March 12, 2018).

[100] Available at: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-39-proposed.pdf.

no more stringently than, those used in applying the NQTL to medical and surgical benefits in the same classification.

The FAQs clarify that health plans cannot:

- apply a medical management standard limiting or excluding benefits based on whether a treatment is experimental or investigative that is applied more stringently to mental health or substance abuse disorder benefits as compared to medical or surgical benefits;
- apply more stringent guidelines when setting dosage limits for prescription drugs to treat mental health or substance abuse disorder;
- reduce reimbursement rates for non-physician practitioners providing mental health or substance abuse disorder services without using a comparable process with respect to reimbursement of non-physician providers of medical or surgical services; and
- exclude coverage for inpatient, out-of-network treatment outside of a hospital for eating disorders when the plan covers such treatments for medical or surgical conditions following physician authorization and a determination that the treatment is medically appropriate based on clinical standards of care.

The proposed FAQs also address specific ERISA disclosure requirements for mental health and substance abuse disorder benefits.

E. SEC Proposes Fiduciary Rule

On April 18, 2018, the Securities and Exchange Commission ("SEC") released three fiduciary rules[101] designed to fill any gap between reasonable investor expectations and legal standards: (i) Regulation Best Interest; (ii) Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, and (iii) Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles.

Under the proposed Regulation Best Interest, a broker-dealer would be required to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities to the customer. Regulation Best Interest is designed to make it clear that a broker-dealer may not put its financial interests ahead of the interests of a retail customer in making recommendations. In addition to the proposed enhancements to the standard of conduct for broker-dealers in Regulation Best Interest, the SEC proposed an interpretation to reaffirm and, in some cases, clarify the SEC's views of the fiduciary duty that investment advisers owe to their clients. By highlighting principles relevant to that fiduciary duty, investment advisers and their clients would have greater clarity about advisers' legal obligations.

Next, the SEC proposed to help address investor confusion about the nature of their relationships with investment professionals through a new short-form disclosure document — a customer or client relationship summary. Form CRS would provide retail investors with simple, easy-to-understand information about the nature of their relationship with their investment professional and would supplement

[101] Available at: https://www.sec.gov/rules/proposed/2018/34-83062.pdf, https://www.sec.gov/rules/proposed/2018/ia-4889.pdf, https://www.sec.gov/rules/proposed/2018/34-83063.pdf.

other more detailed disclosures. For advisers, additional information can be found in Form ADV. For broker-dealers, disclosures of the material facts relating to the scope and terms of the relationship would be required under Regulation Best Interest.

Finally, the SEC proposed to restrict certain broker-dealers and their financial professionals from using the terms "adviser" or "advisor" as part of their name or title with retail investors. Investment advisers and broker-dealers would also need to disclose their registration status with the SEC in certain retail investor communications.

Taken as a whole, the proposed rules and interpretations apply consistent principles to investment advisers and broker-dealers by providing clear disclosures, exercising due care, and addressing conflicts of interest. The specific obligations of investment advisers and broker-dealers would be tailored to the differences in the types of advice relationships that they offer.

F. SEC Regulations on Business Conduct Standards

On June 26, 2018, the Church Alliance submitted a comment letter[102] regarding the possible revision of regulations promulgated by the SEC on business conduct standards for security-based swap dealers and major security-based swap participants. The comment letter was prepared after a meeting with the SEC to follow up on the process by which a church plan is deemed to be a "Special Entity" for purposes of the regulations. The Church Alliance urged the SEC to consider harmonizing its regulations with those of the Commodity Futures Trading Commission ("CFTC") which allow church plans to "opt-in" to Special Entity status

G. Request for Information Regarding Faith-Based Organizations

On November 22, 2017, the Church Alliance filed a comment letter[103] responding to a request for information published by HHS on October 25, 2017. It urged HHS, as it considers new regulations and guidance and modifies or rescinds other regulation or guidance, to consider faith-based organizations and specifically to include, expand or preserve religious exemptions and flexibility in the application of regulations and guidance to accommodate the religious beliefs and structures that church benefit plans embody. It also recommended modifying certain provisions of the nondiscrimination regulations of ACA section 1557 that conflict directly with the religious beliefs of some Church Alliance members, and rules and regulations under section 2713 of the ACA dealing with religious exemptions and accommodations for coverage of certain preventive services under the ACA that violate religious beliefs in the provision of health benefits.

H. Form 990 Litigation

On October 11, 2018, Nonbelief Relief, the charitable arm of the Freedom from Religion Foundation, filed a complaint[104] in the U.S. District Court for the District of Columbia, after its tax-exempt status was automatically revoked. The IRS revocation notice said the relief organization failed to file a

[102] The Church Alliance comment letter on the revision of swap dealer and participant regulations is attached as Appendix F.
[103] The Church Alliance comment letter on the request for information regarding faith-based organizations is attached as Appendix G.
[104] *Nonbelief Relief, Inc. v. Kautter*, No. 18-cv-2347 (D. D.C. 2018).

Form 990 information return for three consecutive years. In its complaint, Nonbelief Relief said it objects to having to file Form 990 while churches and church-related organizations do not. This lawsuit was not a surprise because Nonbelief Relief informed the IRS when it sought tax-exempt status in 2015 that it would not be filing the Form 990 annual report that many charities submit.

I. State Fiduciary Legislation

In 2017, the Nevada legislature passed legislation that imposes fiduciary responsibility on broker-dealers, registered investment advisers and some financial services sales representatives. These individuals were previously excluded from Nevada state law covering the fiduciary duties imposed on "financial planners." Some practitioners have questioned the Nevada law's applicability to financial planners who provide services to an employee benefit plan covered by ERISA. Church plans are not subject to ERISA, so "ERISA preemption" is not available to such plans.

In 2017, Connecticut passed a law requiring administrators of state-run retirement plans to disclose certain investment fees and fees paid to investment advisors. Legislators in Maryland, Illinois, New York and New Jersey have issued proposed regulations imposing greater fiduciary responsibility on various parties. The Church Alliance is following these state legislative developments to assess their possible impact on church plans.

J. General Data Protection Regulation

The General Data Protection Regulation ("GDPR") went into effect in the European Union on May 25, 2018. This regulation was designed to harmonize data privacy laws across Europe as well as give greater protection and rights to individuals that are residents of the European Union. Individuals, organizations, and companies that are either 'controllers' or 'processors' of personal data will be covered by the GDPR. Organizations that use a resident's personal data have specific security and notice requirements under the GDPR. Covered individuals are granted rights under the GDPR, including rights to access personal data and have incorrect information corrected. Plan sponsors that provide services to residents of the European Union should check with counsel to determine what policies, procedures and notices need to be in place to comply with GDPR requirements.

K. California Consumer Privacy Act of 2018

On June 28, 2018, the California legislature passed Assembly Bill 375, [105] the most comprehensive privacy bill in the United States to date. The California Consumer Privacy Act ("Act") will go into effect on January 1, 2020, and applies to any organization that conducts business in California that has annual gross revenue in excess of $25,000,000; annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes the personal information of 50,000 or more consumers, households, or devices, alone or in combination; or derives 50 percent or more of its annual revenue from selling consumers' personal information. It appears that nonprofits are not subject to this law because the Act defines affected businesses as those organized or operated for the profit or financial benefit of shareholders or other owners. The Act:

[105] Available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375.

- grants a consumer (a California resident) the right to request a business to disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for collecting or selling the information, and the categories of third parties with which the information is shared;
- grants a consumer the right to request deletion of personal information and requires the business to delete upon receipt of a verified request;
- grants a consumer a right to request that a business that sells the consumer's personal information, or discloses it for a business purpose, disclose the categories of information that it collects and categories of information and the identity of third parties to which the information was sold or disclosed and requires a business to provide this information in response to a verifiable consumer request;
- authorizes a consumer to opt out of the sale of personal information by a business and prohibits the business from discriminating against the consumer for exercising this right, including by charging the consumer who opts out a different price or providing the consumer a different quality of goods or services, except if the difference is reasonably related to value provided by the consumer's data;
- requires a business to make disclosures about the information and the purposes for which it is used;
- authorizes businesses to offer financial incentives for collection of personal information;
- prohibits a business from selling the personal information of a consumer under 16 years of age, unless affirmatively authorized;
- prescribes various definitions for its purposes and defines "personal information" with reference to a broad list of characteristics and behaviors, personal and commercial, as well as inferences drawn from this information; and
- prohibits the provisions described above from restricting the ability of the business to comply with federal, state, or local laws.

The Act also provides a private right of action in connection with certain unauthorized access and exfiltration, theft, or disclosure of a consumer's nonencrypted or nonredacted personal information.

L. HSA Limits

1. On May 4, 2017, the IRS issued Revenue Procedure 2017-37 which contained HSA limits for 2018. Subsequently, the TCJA changed the method of indexing HSA contribution limits, and Revenue Procedure 2018-18[106] was issued on March 5, 2018 and lowered the 2018 maximum HSA contribution amount for family coverage by $50 to $6,850. On April 26, 2018, the IRS issued Revenue Procedure 2018-27[107] which allows taxpayers to treat $6,900 as the maximum HSA contribution amount for family coverage for 2018. The Revenue Procedure also provides guidance for individuals who received a distribution of an excess HSA contribution based on the March 5 guidance.

[106] 2018-10 I.R.B. 392.
[107] 2018-20 I.R.B. 591

2. 2019 Limits. The IRS has announced the maximum contribution levels for HSAs and out-of-pocket spending limits for high deductible health plans ("HDHPs") that must be used in conjunction with HSAs for 2019.[108] The relevant amounts for 2019 are as follows:

Annual HSA contribution limit	**$3,500** – individual coverage *($50 increase)* **$7,000** – family coverage *($100 increase)*
Catch-up contribution limit over age 55	**$1,000** *(no change)*
Maximum HDHP out-of-pocket limit	**$6,750** – individual coverage *($100 increase)* **$13,500** – family coverage *($200 increase)*
HDHP minimum deductible	**$1,350** – individual coverage *(no increase)* **$2,700** – family coverage *(no increase)*

M. Social Security Cost of Living Adjustments

On October 11, 2018, the Social Security Administration announced the cost-of-living adjustments for 2019.[109] The cost-of-living adjustments for 2019 are as follows:

Increase in monthly benefits	2.8%
Maximum earnings subject to Social Security taxes	$132,900 (*$4,500 increase*)
Maximum earnings subject to Medicare taxes	Unlimited
Exempted earnings amount:[110] • In year prior to year during which retiree reaches full retirement age • In year during which retiree reaches full retirement age	 $17,640 *($600 increase)* $46,920 *($1,560 increase)*

[108] Rev. Proc. 2018-30, 2018-21 I.R.B. 622.
[109] Social Security Press Release, October 11, 2018, https://www.ssa.gov/news/press/releases/2018/#10-2018-1.
[110] The "exempted earnings amount" is the amount of annual earnings a retiree who is under full retirement age can earn without a reduction in Social Security benefits. There is no reduction for a retiree who has attained full retirement age.

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Acting on Behalf of Church Benefits Programs

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June 26, 2018

David J. Kautter
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
And
Acting Commissioner
Internal Revenue Service

William M. Paul
Acting Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service

Re: Request for Transition Relief Under 26 U.S.C. Sections 512(a)(6) and (7)

Dear Sirs:

The Church Alliance is a coalition of the chief executive officers of 38 church benefits organizations which are affiliated with mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions.

Church Alliance members provide employee benefits, including in many cases, health and pension coverage, to approximately one million participants (clergy and lay workers, hereinafter "church workers") serving over 155,000 churches, synagogues, and affiliated organizations such as schools, colleges and universities, nursing homes, children's homes, homeless shelters, food banks, and other ministries.

Coalition members and the steeples and church-related institutions that participate in our plans are generally structured as tax-exempt organizations. For that reason, we respectfully add our voice to those of organizations, including the American Institute of CPAs and the National Council of Nonprofits, among others, that have requested a delay in implementation of changes relating to Sections 512(a)(6) and (7) of the Internal Revenue Code that were enacted as part of the recent Tax Cuts and Jobs Act ("TCJA"; Public Law No. 115-97).

Treasury and the Internal Revenue Service ("Service") granted similar transition relief from new information reporting requirements in

Notice 2013-45[1], stating: "[t]his transition relief will provide additional time for dialogue with stakeholders in an effort to simplify the reporting requirements consistent with effective implementation of the law. It will also provide … reporting entities additional time to develop their systems for assembling and reporting the needed data." The same justification clearly calls for transition relief in the case of Sections 512(a)(6) and (7), and we respectfully urge you to provide an appropriate delay in the implementation of these sections.

Section 512(a)(6)

Section 512 of the Internal Revenue Code, as amended by the TCJA, contains a new paragraph (6), which changes the method of calculation to be used by tax-exempt organizations for tax reporting and payment for income earned through certain unrelated trades or businesses. This change impacts our member organizations, as well as the church-related institutions we serve.

The church benefit boards that make up the Church Alliance invest billions of dollars of retirement, welfare plan, and religious institutional assets on behalf of their beneficiaries. For the efficiency and certainty of these investments, the most critical need for clarification with respect to Section 512(a)(6) relates to the definition of a "trade or business" and whether an activity, such as investing or "alternative investing", constitutes "more than 1 unrelated trade or business." As sophisticated investment fiduciaries, many of the Church Alliance's church benefit boards invest in partnerships and other alternative investment vehicles.

As such we agree with and reiterate the AICPA's observation: "Absent specific guidance, it is not possible to determine whether a tax-exempt organization that receives, for example, one hundred Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., is required to track and report each Schedule K-1, or each line of income on each Schedule K-1, as a separate trade or business. A narrow definition of a trade or business for purposes of the computation of UBTI could potentially lead to hundreds or thousands of trades or businesses, which is burdensome to taxpayers, tax practitioners and the IRS to record, report, and audit. Tax-exempt organizations would need, at a minimum, upgraded general ledger software to track each trade or business, to maintain the appropriate records for tax preparation at the end of the tax year. Guidance is necessary for the development of such software."

As other organizations have noted, there is an acute need for guidance about how Treasury and the Service will interpret Section 512(a)(6). Among other aspects requiring

[1] In addition to this example, which is similar in that it created a new reporting requirement with financial ramifications for non-reporting, many others exist, including some which provided transition relief for significant periods of time. *See e.g.*, Notice 2011-1 (delaying compliance with Section 2716 of the Public Health Service Act, including any sanctions for failure to comply, until after regulations or other administrative guidance of general applicability has been issued under Section 2716). Although Section 2716 contained a provision for rules "similar" to rules appearing in Code Section 105(h), the fact that compliance remains delayed (from an original effective date of plan years beginning on or after September 23, 2010) indicates that Treasury and the Service may have significant discretion with respect to commencement of implementation.

clarification, tax-exempt organizations need guidance on how to assemble and report the necessary information. This need is compounded by the fact that the organizations we serve have never been required to report and pay tax in this way before, which underscores the need for regulatory direction. Treasury and the Service also would benefit from input from stakeholders in developing this guidance.

We note that issuance of regulations for Section 512(a)(6) is one of the top 10 items in your Priority Guidance Plan, published on May 9, 2018. We urge you to delay the implementation of the provision until these regulations have been issued in final form. Without them, our member organizations and the institutions they serve will not be able to ascertain whether they are in compliance, or otherwise carrying out the intent of the provision. This will only create confusion and hardship for affected organizations, many of which are small, mission-focused, community organizations with limited resources.

Section 512(a)(7)

The TCJA also added a new paragraph (7) to Section 512, declaring as taxable income certain amounts paid by tax-exempt organizations (e.g., for a qualified transportation fringe benefit, parking facility used in connection with qualified parking, etc.).

This paragraph also requires tax exempt organizations to pay tax differently for periods after December 31, 2017, calling for payment of tax on amounts that are not income, but expenditures, thus requiring additional time for organizations to adapt their systems for compliance. For example, of the 155,000 churches, synagogues, and affiliated organizations represented in the Church Alliance, a great number provide a parking lot but have never been required to ascertain an amount related to such parking for employees, nor have they ever had to file a Form 990-T in order to pay a tax on amounts "spent" by the church to provide parking. Thus, absent relief, thousands of small churches, with volunteer treasurers, will potentially be tasked with filing a Form 990-T for the first time, and determining how much tax to pay for their church parking lot. Despite the deduction reflected in Section 512(b)(12), with respect to thousands of local churches and many conventions or associations of churches, there is no exception to the burdensome Form 990-T filing requirement related to these UBTI amounts.

Again, the stakeholder community, Treasury, and the Service would benefit from transition relief to allow adequate time to consider stakeholder input, and provide time for affected taxpayers to adapt their systems for reporting and payment as may be necessary.

Conclusion

In conclusion, the Church Alliance respectfully requests that the Treasury and the Internal Revenue Service provide transitional relief from the implementation of Section 512(a)(6) and (7) of the Internal Revenue Code until tax years beginning after final regulations are issued, so that stakeholders have had a reasonable time to develop systems to comply with the regulations. This relief is important to providing compliance certainty to our member organizations and the institutions they serve, to ensure that the resources of America's religious communities are properly directed and focused on their mission work.

Sincerely,

Karishma Shah Page
Partner, K&L Gates LLP
On Behalf of the Church Alliance

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August 7, 2018

David J. Kautter
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
And
Acting Commissioner
Internal Revenue Service

William M. Paul
Acting Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service

Re: Comment Under 26 U.S.C. Section 512(a)(7)

Dear Sirs:

I. Introduction

The Church Alliance is a coalition of the chief executive officers of 38 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, three Jewish groups, and Catholic schools and institutions.

Church Alliance members provide employee benefits, including in many cases health and pension coverage, to approximately one million participants (clergy and lay workers, hereinafter "church workers") serving over 155,000 churches and synagogues (hereinafter "churches") and church-affiliated organizations such as schools, colleges and universities, nursing homes, children's homes, homeless shelters, food banks, and other ministries (hereinafter "ministries"). Church Alliance members and the churches and ministries that participate in our plans are tax-exempt organizations.

In our letter to you of June 26, 2018, we requested a delay in implementation of changes relating to Sections 512(a)(6) and (7) of the Internal Revenue Code ("Code") that were enacted as part of the recent Tax Cuts and Jobs Act ("TCJA," Pub. L. No. 115-97). In this comment letter we again request such a delay, but ask for other relief specifically related to Code Section 512(a)(7), as further described in this letter.

II. Code Section 512(a)(7)

The TCJA added a new paragraph (7) to Code Section 512(a), increasing unrelated business taxable income ("UBTI") for certain disallowed fringe benefits paid by tax-exempt organizations (e.g., for a qualified transportation fringe benefit, parking facility used in connection with qualified parking, etc.). The Church Alliance requests a reasonable interpretation of this new paragraph as it applies to parking at churches and ministries.

Of the 155,000 churches and ministries represented by the Church Alliance, a great number have parking lots; however, they have never been required to determine the cost of providing such parking for their employees, nor have they had to file a Form 990-T in order to pay a tax on amounts "spent" by the church to provide parking. Thus, absent relief, thousands of small churches, most with volunteer treasurers, will potentially be tasked with filing a Form 990-T for the first time and determining how much tax to pay for their church parking lot.

We respectfully request that Treasury and the Internal Revenue Service (the "Service") consider the following substantive suggestions with respect to guidance on this Section.

A. Parking at Churches and Ministries is Not a Fringe Benefit

As described above, Code Section 512(a)(7) increases UBTI by certain fringe benefits for which no deduction is allowed, per Code Section 274. We believe that for the vast majority of churches and ministries, parking should not be considered a fringe benefit.

"[G]ross income includes compensation for services, including . . . fringe benefits."[1] With virtually all of the churches and ministries served by the Church Alliance, the parking lot or other parking facility is provided for congregants and visitors, not as compensation for services, and should not be considered a "parking facility used in connection with qualified parking" under Code Section 512(a)(7). Such parking is provided free of charge for visitors (e.g., church members, other worshippers, members of the community, volunteers, any person who wants to see or take refuge in a church, students, and those seeking comfort, services or other aid from the ministry) and only incidentally is used by employees. Oftentimes, a parking lot is used as an extension of the church or ministry -- as a site for events such as tent revivals, mission fairs, and youth basketball. The parking lot is used to support the work of the church or ministry, not as a fringe benefit for employees.

Should Treasury and the Service decline to follow the above reasoning, we believe the rules for valuing the fringe benefit of "qualified parking" that are set forth in Notice 94-3 should be extended to the treatment of qualified parking under the TCJA. As described above, parking at most churches and ministries primarily is available to visitors and other "customers" of the churches and ministries. In such situations, this rule found in Notice 94-3 is instructive:

> Employer-provided parking that is available primarily to customers of the employer, free of charge, will be deemed to have a fair market value of $0. This rule does not apply, however, if an employer maintains "preferential"

[1] Treas. Reg. Sec. 1.61-21(a)(1)

> reserved spaces for employees. A reserved space is “preferential” if it is more favorably located than the spaces available to the employer’s customers.

For any situations in which the above rule would not apply to a church or ministry, under Notice 94-3, parking at churches and ministries should be able to be viewed by looking at the cost “that an individual would incur in an arms-length transaction to obtain parking at the same site. If that cost is not ascertainable, then the value of parking is based on the cost that an individual would incur in an arm’s-length transaction for a space in the same lot or a comparable lot in the same general location under the same or similar circumstances.”

Such parking could be similar to the following example in Notice 94-3:

> Employer Z operates an industrial plant in a rural area in which no commercial parking is available. Z furnishes ample parking for its employees on the business premises, free of charge. The parking provided by Z has a fair market value of $0 because an individual other than an employee ordinarily would not pay to park there.

If under either of these rules in Notice 94-3 the value of the parking is $0, then there is no compensation for services from the parking and therefore such parking is not a “fringe benefit,” and is not within the scope of Section 512(a)(7).

Extending these rules of Notice 94-3 to qualified parking under the TCJA also would help equalize the treatment between for-profit and tax-exempt organizations. In the above situations with for-profit organizations, as with tax-exempt organizations, the qualified parking would have a fair market value of $0 (except when there is preferential parking). However, post-TCJA the for-profit organizations still should be able to deduct the costs of acquiring and maintaining such parking (through depreciation deductions and/or as property-related ordinary and necessary business expenses, and not as employee compensation). Additionally, the TCJA created more favorable rules and limitations for depreciation and expensing that can apply to certain property costs of for-profit organizations. It would be inequitable to liberalize deductions that may be available for the costs of parking at for-profit organizations, while taxing tax-exempt organizations for the costs of parking with no fair market value. We do not think it was Congress’ intent to do so in the TCJA.

Extending these rules of Notice 94-3 also would avoid what we believe is an unintended consequence for for-profit organizations. If these rules are not extended to employee parking under the TCJA, for-profit organizations theoretically could, in situations in which employee parking has $0 value, be forced to reduce their deductions for the costs of acquiring and maintaining parking (e.g. for depreciation and property-related ordinary and necessary business expenses) by the amount of such costs allocable to employee parking. In other words, if employee parking with a $0 value still is considered a fringe benefit (qualified transportation fringe), Code Section 274(a)(4) could be interpreted as disallowing *any* deduction for the expenses of such parking, including depreciation deductions and other property-related business expense deductions. To avoid this result, the above rules of Notice 94-3 should be extended to qualified parking under the TCJA.[2]

B. Clarification of Language in Section 512(a)(7)

Alternatively, if Treasury and the Service decline to apply Notice 94-3, we suggest that guidance be issued to clarify that the phrase "amounts paid or incurred" in Section 512(a)(7) refers to actual payments or amounts due, and that "for . . . any parking facility used in connection with qualified parking" indicates that the amount in question is an additional amount paid specifically for such parking, which would not otherwise be paid, i.e. the marginal cost of providing spaces in the lot for employees. Thus, under this interpretation, a church that maintains a parking lot for its members and the community, and which incurs no additional marginal cost to allow its employees to also park in the same parking lot, would not have paid or incurred any "amount" to provide qualified parking within the meaning of Section 512(a)(7).

Additionally, churches frequently allow other tax-exempt organizations and/or employees of such organizations to use church meeting rooms or other facilities without charge (e.g. Alcoholics Anonymous support groups, Boy Scout and Girl Scout troops, teachers from nearby schools, ministers from neighboring churches, and sometimes congregations from other denominations). Free parking also is provided to the employees of the other tax-exempt organizations. Disallowing the interpretation described in the preceding paragraph would require churches to engage in complex allocation calculations, taking into account the varied use of such parking, which would be further complicated because employees of other tax-exempt organizations are also frequently allowed to park on such lots.

The Church Alliance also notes that Section 512(a)(7) states: "unrelated business taxable income of an organization shall be ***increased***" (emphasis added) by disallowed fringes. However, if the organization does not have any unrelated trades or businesses generating UBTI in the first place, there would be no UBTI to increase and the provision should be interpreted to exclude such organizations from its impact[3].

C. Section 512(b)(12) Approach

For any church or ministry that does not fall within any of the foregoing interpretations, we suggest that UBTI under Section 512(a)(7) be computed with the following modification set forth in Section 512(b)(12):

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[2] Deborah Walker, CPA, and Sarah McGregor, CPA, *Coping with the new entertainment expense and transportation fringe benefit rules*, Tax Insider, July 12, 2018, available at https://www.thetaxadviser.com/newsletters/2018/jul/new-entertainment-expense-transportation-fringe-benefit-rules.html

[3] This potential interpretation was also acknowledged in the April 23, 2018 edition of Tax Notes: "Perhaps those organizations [that have no 'gross income' from the conduct of a traditional unrelated trade or business] are not required to file [a Form 990-T] because filing is required only if gross income is recognized, and section 512(a)7) does not state or imply the recognition of any gross income that is to be included in computing UBTI. Similarly, perhaps section 512(a)(7) can be read to increase UBTI only when UBTI first exists, thus avoiding the effect of section 512(a)(7) for organizations that have no traditional UBTI."

> Except for purposes of computing the net operating loss under section 172 and paragraph (6), there shall be allowed a specific deduction of $1,000. In the case of a diocese, province of a religious order, or a convention or association of churches, there shall also be allowed, with respect to each parish, individual church, district, or other local unit, a specific deduction equal to the lower of –
>
> (A) $1,000, or
> (B) The gross income derived from any unrelated trade or business regularly carried on by such local unit.

For purposes of this modification, UBTI under Section 512(a)(7) should be included in "gross income derived from any unrelated trade or business regularly carried on by such local unit" (as described in Section 512(b)(12)(B)). In other words, if Treasury and the Service believe that costs incurred by a church should be considered income (despite the arguments made in A and the first paragraph of B above) for purposes of UBTI as defined in Section 512, then it should also be clear that the deduction for the church in 512(b)(12) is also fully applicable to such costs (as income).

D. Administrative Burden Relief

Treasury and the Service might also consider allowing relief for tax-exempt organizations for whom the costs of compliance (e.g., costs associated with determining whether or not they will need to file Form 990-T, calculating the amount of the tax, and filing the Form 990-T) greatly exceeds the tax revenue that would be generated as a result of this new provision. This is particularly burdensome for small churches that otherwise would not have filed a Form 990-T but for new Section 512(a)(7) and now, absent relief, will likely incur significant and disproportionate costs to comply with this provision. See Revenue Ruling 2018-27 (pp.2- 3) (relief provided where the cost of compliance is greater than the tax difference).

Such relief, particularly for churches, also is likely to be in the Service's best interest. Otherwise, the Service will be receiving Forms 990-T from tens of thousands of churches that are unfamiliar with filing any sort of Form 990, and consequently are likely to have errors. The Church Alliance believes that the Service likely would be required in any inquiries about such returns or possible tax liability to follow Code Section 7611, which restricts church tax inquiries and examinations, including inquiries about whether a church is carrying on an unrelated trade or business or otherwise engaged in activities which may be subject to taxation. These additional burdens on the Service are likely to be far in excess of any revenue received.

The Church Alliance requests that Treasury and the Service may consider it appropriate to grant those entities that are exempt from filing Forms 990 an exemption from section 512(a)(7), or at least an interim non-enforcement period.

III. Conclusion

In conclusion, the Church Alliance respectfully requests that the Treasury and the Internal Revenue Service consider the suggestions in this letter to provide compliance certainty to our member organizations and the institutions they serve, thus helping to ensure that the resources of

America's religious communities are properly directed and focused on their mission work. Thank you.

Sincerely,

Karishma Shah Page
Partner, K&L Gates LLP
On Behalf of the Church Alliance

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Assistant Secretary for Tax Policy
U.S. Department of the Treasury
And
Acting Commissioner
Internal Revenue Service

Jeremy Lamb
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Department of the Treasury
Internal Revenue Service

Re: Comment Letter on 414(e) Church Plan regulations

Dear Sirs:

The Church Alliance ("we" or "the Alliance") submits this comment letter in response to the regulatory agenda of the Department of the Treasury ("Treasury"), which noted that Treasury is drafting proposed regulations ("Regulations") to update the existing final regulations ("existing regulations") on the definition of a church plan under section 414(e) of the Internal Revenue Code ("Code"). We are grateful for Treasury's efforts on the Regulations.

The Alliance is a coalition of the chief executive officers of 38 church benefits organizations, shown on the left side of this letterhead. The Alliance represents these 38 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, branches of Judaism, and Catholic schools and institutions. These organizations serve more than 155,000 ministries and more than one million clergy and lay workers and their families.

Our comments generally are ordered to follow the structure of Code section 414(e). We hope you will find this comment letter useful.

CODE SECTIONS

I. ***414(e)(1) "In general.***

> ***For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501."***

A. Welfare Plans May be Church Plans

The existing regulations were issued before passage of the Multiemployer Pension Plan Amendments Act of 1980[1] ("MPPAA"). MPPAA added Code section 414(e)(3)(A), which states that a church plan includes a "plan maintained by an organization . . . for the provision of ***retirement benefits or welfare benefits***, or both, for the employees of a church. . . ." (emphasis added). We recommend that, consistent with MPPAA, the Regulations confirm that welfare plans, like retirement plans, may qualify as church plans.

B. Beneficiaries

The term "beneficiaries" should go beyond the familiar concept of a named beneficiary for a death benefit (e.g. in a life insurance policy or defined contribution plan account where the participant names a party to receive proceeds upon death). The term should include joint annuitants and other survivors who are entitled to a death benefit, as may occur in retirement plans.

The term beneficiary also should include any dependent who may be entitled to benefits from a plan (child, spouse, etc.), through an employee participant. It is very common for a health plan to allow a participant to enroll family members in accordance with the rules the plan provides for this purpose. The Alliance recommends that the Regulations provide that the term beneficiary includes all individuals who benefit directly through the employee participant, such as dependents and joint annuitants.

[1] Pub. L. No. 96-364 § 407(a).

II. ***414(e)(2) "Certain plans excluded.***

The term 'church plan' does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries)."

A. Effect of Non-Church Employees in a Church Plan

The Alliance respectfully urges Treasury to reverse the approach taken in existing regulations that church plan status is destroyed by having one or more "non-church" employers or having non-church employees in a plan. Specifically, the Alliance requests Treasury to modify section 1.414(e)-1(c)(1) of the existing regulations to reflect an understanding, post-MPPAA, that a church plan be *primarily* for the benefit of "employees of the church or convention or association of churches". (Hereinafter, the term "Church" will also include a "convention or association of churches.") The Alliance also suggests that the Regulations establish a safe harbor rule with a threshold percentage of non-Church employees who may be covered in a church plan without affecting its status as a church plan. Specifically, we request that Code section 414(e)(2)(B) be considered met if at least 85% of the employees in the plan are individuals described in section 414(e)(1) or 414(e)(3)(B) (or their beneficiaries).

1. *Medina* Case

The Tenth Circuit Court of Appeals recently stated: "[w]ithout deciding the exact meaning of substantially all in 29 U.S.C. § 1002(33)(B)(ii)—for example, whether 75% would be enough—we accept [the plaintiffs'] concession that 85% would satisfy the statutory requirement."[2] The court looked to a Seventh Circuit case[3] that noted Treasury regulations always interpret "substantially all" in the Code as 85%, and interpreted "substantially all" in MPPAA the same way.

2. Private Letter Rulings

Post MPPAA, the IRS has ruled that having non-Church employees does not destroy church plan status. PLRs have been issued holding that plans still were church plans with from 2.5 percent to upwards of 50 percent of non-Church employees participating.[4]

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[2] *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1228 (10th Cir. 2017).

[3] *Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1158–60 (7th Cir. 1990).

[4] In PLR 9810034 (Mar. 6, 1998), the IRS held that the plan of a convention or association of churches would not fail to be a church plan where it covered eligible employees of for-profit entities:

3. Analogies in the Code: "Insubstantial" Non-Exempt Activities

Treasury could look to other sections of the Code for analogies. For example, an organization exempt under section 501(c)(3) must be organized and operated "exclusively" for exempt purposes, and it cannot be operated so that "more than an insubstantial part of its activities" is not in furtherance of an exempt purpose. In a Technical Advice Memorandum, the IRS addressed a number of precedents involving the determination of whether non-exempt activities were substantial. [5] In this Memorandum, the IRS discussed court decisions holding that non-exempt activities constituting approximately 45% of total activities were "substantial;"[6] where receiving 30% of revenues from unrelated business activity was "substantial;"[7] and where 22% of average annual expenditures for non-exempt purposes was "substantial."[8] Based on these precedents, the Technical Advice Memorandum makes the statement that "[g]enerally, courts

> [S]uch employees of for-profit entities constitute approximately 2.5% of the total number of active or vested and retired participants in Plan Z. Further, it is anticipated that even with the expected increase in employees employed by the non-profit organizations, the total number of active or vested and retired participants in Plan Z of for-profit employers is 3.8%. Therefore, in accordance with section 414(e)(2) of the Code, substantially all of the individuals included in Plan Z are church employees, as described in section 414(e)(1) or section 414(e)(3)(B) of the Code.

And in PLR 9441040 (Oct. 14, 1994), the IRS held that where the employees of two for-profit employers (unrelated trades or businesses to the church's tax-exempt purpose), which were covered by a church plan, ranged from between 4.4% and 7.5% of the total participants covered in the church plan, the plan did not fail to be a church plan:

> [T]he percentage of Plan participants who were involved in an unrelated trade or business is insubstantial when viewed in light of the total number of employees covered by Plan X. Therefore, since the employees of [the for-profit employers] constitute an insubstantial portion of the participants of Plan X, the Plan was not established and maintained primarily for the benefit of employees or their beneficiaries of a church or a convention or association of churches who are employed in connection with one or more unrelated trades or businesses, and substantially all of the individuals included in the Plan are church employees, as described in section 414(e)(1) or section 414(e)(3)(B).

Moreover, in PLR 8734045 (May 28, 1987), the IRS appeared to indicate that perhaps upwards of 50% of the participants in a church plan could be non-church employees, i.e., employees of unrelated trades or businesses. "[A] plan is considered maintained primarily for employees of the church, for plan years after September 2, 1974, if in four of its last five plan years (1) less than 50% of the plan participants consist of, and in the same year (2) less than 50% of the total compensation paid by the employer during the plan year to plan participants is paid to, employees employed in connection with an unrelated trade or business."

[5] TAM 200203069 (June 11, 2001).
[6] *The Nationalist Movement v. Commissioner*, 37 F.3d 216 (8th Cir. 1994).
[7] *Associated Master Barbers & Beauticians of American, Inc. v. Commissioner*, 69 T.C. 53 (1977); and *Orange County Agricultural Society, Inc. v. Commissioner*, 893 F.2d 529 (2nd Cir. 1990).
[8] *Bethel Conservative Mennonite Church v. Commissioner*, 80 T.C. 352 (1983).

have denied exemption to organizations that conducted non-exempt activities which generated income in excess of approximately 25% of the organization's total annual income."[9]

Treasury regulations also address the question of what constitutes "substantially all" in other contexts. As noted above and as relied on by the Seventh Circuit Court of Appeals,[10] these regulations frequently provide that 85% constitutes "substantially all."[11] Virtually all of the regulations we could find quantify "substantially all" as 85%.[12]

4. Suggested Safe Harbor

Taking into account the *Medina* decision, the examples from the PLRs, and, more importantly, the applicable analogies in other parts of the Code and related Treasury regulations, the Alliance recommends that the Regulations include a safe harbor that provides that a plan in which 85% or more of the plan participants are individuals described in Code section 414(e)(1) or (3)(B) can qualify as a church plan.[13] If Treasury adopts this safe harbor approach, the Alliance suggests the Regulations specify that the 85% safe harbor may be met either by: 1) counting only the "individuals described in paragraph (1) or (3)(B)", in both the numerator and the denominator (i.e. count "individuals described in paragraph (1) and (3)(B)" ("employees"), but not beneficiaries, in the 85% calculation) or 2) counting employees and beneficiaries in both the numerator and the denominator.

The safe harbor should not be the only way, however, to fall outside of Code section 414(e)(2)(B), as other compelling facts and circumstances may exist that warrant church plan status even if less than 85% of the plan participants are employees (or deemed employees) of a

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[9] The TAM addressed the revocation of the exemption of an organization that received 75% of its income from non-exempt activities, so for purposes of the TAM, the Service did not need to address whether some percentage less than approximately 25% would also be considered substantial.
[10] *Cont'l Can Co.*, 916 F.2d. at 1158.
[11] For example:

- Code section 4071 imposes a tax on tires used for highway vehicles, unless the vehicles will be used "substantially all" of the time as school busses.
- Code section 4221(e) (3); Treas. Reg. section 48.4221-11(b) (3) provides that "substantially all" in Code section 4221(d)(7)(C) means 85% or more.
- Code section 4942(a) imposes a tax on a charitable foundation's undistributed income, but Code sections 4942(a)(1) and (j)(3)(A) exempt foundations that distribute "substantially all" of their income and Treas. Reg. section 53.4942(b)-1(c) defines "substantially all" as "85 percent or more".
- Code section 951(a) imposes a tax on Americans holding shares of certain foreign corporations but excludes from the corporations' income gains from the sale of commodities if "substantially all" of its business is as an active producer, Code section 954(c) (1) (C) (ii); Treas. Reg. section 1.954-2T(f) (3) (iv) defines "substantially all" as "85 percent of the taxable income of the controlled foreign corporation."

[12] The only departure the Alliance found from 85% was Rev. Proc. 77-37, 1977-2 C.B. 568, section 3.01, which provides that the IRS will not issue letter rulings finding that corporate reorganizations satisfy the "substantially all" requirements in, e.g., Code sections 354(b)(1)(A) and 368(a), unless the transferred assets represent at least 90% of the fair market value of the net assets.
[13] We also suggest that if former employees are included as "individuals included in the plan", they be considered to be "described in paragraph (1) or (3)(B)" if they were so described on their last day of employment by a participating employer. Otherwise, a plan could cease to meet this requirement for church plan status simply because it includes a significant amount of retirees or other former employees.

Church. The Alliance suggests that the Regulations specify that failing to meet the safe harbor does not necessarily mean that the plan is described in Code section 414(e)(2)(B).

III. 414(e)(3)(A) "Treatment as church plan.

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches."

A. <u>Principal Purpose Organization</u>

An employee benefit plan that is both established and maintained by a Church is a church plan. One of the defects of the church plan definition as originally included in the Employee Retirement Income Security Act of 1974 ("ERISA") was that the definition worked for hierarchically-governed Churches (like the Roman Catholics and Seventh-day Adventists) but did not clearly cover the employee benefit plans of many Protestant denominations, particularly those that are congregationally governed. The individuals who drafted the then-proposed "new" church plan definition in the late 1970s included Code section 414(e)(3)(A) as an alternative path to church plan status for plans not themselves established and maintained by a Church.[14]

In framing the intended scope of new Code section 414(e)(3)(A), the individuals who drafted the new church plan definition on behalf of the Alliance and worked with supportive Congressional staff to ensure its passage wanted to be as inclusive as possible, in terms of the types of organizations that could be "principal purpose organizations," or "PPOs", as these organizations have come to be called.[15] It is for this reason that a PPO is described as "a civil law corporation <u>or</u> otherwise" whose "principal purpose <u>or</u> function" is the "administration <u>or</u> funding" of a "plan <u>or</u> program" "for the provision of retirement benefits <u>or</u> welfare benefits <u>or</u> both."[16]

With this historical perspective in mind, the Alliance requests that the Regulations address the following issues with respect to PPO requirements.

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[14] The Supreme Court's *Advocate* decision recognized that Code section 414(e)(3)(A) provides an alternative way for a plan to qualify as a church plan. *Advocate Health Care Network v. Stapleton*, 2017 WL2407476 (2017).

[15] The Alliance recognizes that the intent of the individuals who drafted the new church plan definition in the late 1970s does not rise to the level of legislative history – which is itself not given any weight in statutory interpretation when a court views the meaning of a statute as being "plain." However, the Alliance is providing a historical perspective in these comments because the church polity and church plans and programs structural issues that were reflected in the drafting in the late 1970s still exist today, virtually unchanged. Both then and now, the Alliance believes it is uniquely situated to comment on these issues.

[16] The Alliance drafters recognized that they did not know how every church benefit plan or program was structured, and Code section 414(e)(3)(A) was therefore drafted in the broadest possible manner. In fact, the drafters felt that breadth in drafting was a constitutional imperative, so that one form of church polity or employee benefit plan structure would not be favored over another. This was particularly true for Catholic diocesan and religious order plans, because their representatives did not participate in the Alliance drafting process.

1. PPO Not Required for Church Plan Status

The Alliance requests that the Regulations make it clear that a plan will be a church plan if it is both established and maintained by a Church, even if no PPO is used to administer or fund the plan. There appears to have been some confusion on this point in a few of the court cases that have reviewed and interpreted the church plan definition in the past few years, so clarification of this fundamental point appears to be needed.

2. Meaning of "Principal Purpose"

Webster's New Collegiate Dictionary defines the word "principal" as "first in rank, authority, importance or degree." The Tax Court cited this definition in *Dittler Bros. Inc. v. Commissioner*[17] in determining the meaning of the phrase "principal purpose" in the statute at issue in that case.[18] The Alliance requests that the Regulations provide that an organization's principal purpose or function will be the administration or funding of employee benefit plans if the majority of either the time spent or expense incurred by the organization or its members or employees relates to such administration or funding, or both.

3. Type of Organization

The statute is clear that a PPO can be an incorporated or unincorporated organization. The IRS, in numerous PLRs, has determined that a PPO can consist of an employee benefit plan administration committee. The Alliance affirms that this interpretation would be consistent with the drafters' intent to ensure that the statute would cover all benefit plans and programs sponsored by a Church (regardless of polity) and all types of PPOs in use by Churches and their affiliated organizations (in particular, those created by Catholic affiliated organizations).

4. Benefit Plan Committee Membership

The Alliance recommends that a benefit plan administration committee that otherwise qualifies as a PPO need only have one member, that the member or members of the committee need not be members of the Church by or with which the sponsoring employer is controlled or associated, and that individuals can be designated as committee members by virtue of the office or position they hold (such as, Director of Human Resources or Treasurer).

5. Control by or Association with a Church

The IRS has also made it clear in a number of PLRs that a benefit plan committee is controlled by or associated with a Church if the affiliated employer appointing the committee is itself so controlled or associated.[19] The Alliance recommends that the Regulations also make this clear.[20]

[17] 72 T.C. 896 (1979).
[18] The Tax Court in *Dittler Bros.* also noted the U.S. Supreme Court's subscription to this definition in *Malat v. Riddell*, 383 U.S. 569 (1966).
[19] *See, e.g.*, PLR 200338019 (Sept. 19, 2003).
[20] Control is addressed in more detail in Section IV.C herein. Association is addressed in more detail in Section VI.

IV. 414(e)(3)(B) "Employee defined.

The term employee of a church or a convention or association of churches shall include—

(i) ***a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;***

(ii) ***an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and***

(iii) ***an individual described in subparagraph (E)."***

A. Employees

1. Definition of "Minister"

The Alliance recommends that the term "minister" be broadly defined in the church plan Regulations to include rabbis, swamis, lamas, abbots, monks, priests, deacons, bishops, imams, pastors, reverends, dastoors, cantors, members of religious orders and other religious leaders with similar stature within a Church.

2. Definition of "Exercise of His Ministry"

The Alliance recommends that the term "exercise of his ministry" be broadly defined in the Regulations. Specifically, the Alliance believes that 20 C.F.R. section 404.1023(c), which defines when work is in the exercise of ministry for Social Security purposes, should, for consistency and uniformity purposes, also be referenced or utilized in the church plan Regulations for guidance as to what is meant by "exercise of ministry" for a minister under Code section 414(e)(3)(B)(i).

B. Exempt Organization Requirement in 414(e)(3)(B)(ii)

We suggest that, to satisfy this requirement of tax exemption, the Church or PPO may verify an organization's exempt status by one of the methods described below. (If the PPO or Church maintains multiple church plans, this verification need only be performed when an organization adopts the first of such multiple plans.) The suggested verification methods are:

1. Obtaining a copy of the organization's IRS determination of tax-exempt status;

2. Confirming that the organization is listed in the group exemption ruling of the applicable Church, received from the IRS;

3. Confirming that the organization is recognized or otherwise designated by the Church under a process that includes confirmation that the organization is exempt from federal income tax;

4. Verifying the organization is tax-exempt on the IRS website by a review of the IRS Business Master File or Tax Exempt Organization Search;

5. Obtaining a copy of the organization's application for an IRS determination of tax-exempt status (if the organization appears to meet all of the requirements for such status); or

6. For Churches, integrated auxiliaries, public charities whose annual gross receipts are normally not more than $5,000, and other entities that are not required to file an application for recognition of exemption from federal income tax, verifying tax-exempt status by any other reasonable method. For an individual church, any reasonable method would include, but not be limited to, verifying that the church is on an official list of churches maintained by the related convention or association of churches or receiving a certification by a church officer that the entity is a church.

C. Control Requirement in Code Section 414(e)(3)(B)(ii)

We recommend that the Regulations allow the control requirement in Code section 414(e)(3)(B)(ii) to be met by canonical, ecclesiastical or similar control. For example, if employees of the organization are subject to ecclesiastical supervision by a Church or its leaders, the organization should be deemed to be controlled by the Church. Another example of such control is when an organization is bound by canon law, a Church book of discipline, or other similar set of Church rules.

The Alliance recommends that the Regulations recognize these safe harbors for establishing requisite control by a Church:

1. Safe Harbor One

The first safe harbor we propose would be met where the members, governing board or an officer or officers of the Church have the right to appoint, elect, approve, ratify or remove a majority of the organization's governing board or officers.

2. Safe Harbor Two

The second safe harbor would be met if the Church has reserved to itself the responsibility for approving certain significant corporate events involving the subordinate organization, such as merging with another organization or dissolving. Such reservations are often referred to as "reserved powers."

3. Safe Harbor Three

This safe harbor would be met when the organization's budget must be approved by the Church.

V. *414(e)(3)(C) "Church treated as employer.*
A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B)."

A. <u>Deemed Employer - Multiple Churches</u>

An employee of an organization controlled by or associated with two or more Churches may be considered to be an employee of each Church, thus permitting the employee to be treated as a Church employee for purposes of participating in a plan sponsored by either Church or by the organization itself. This is because when Code sections 414(e)(3)(B) and (C) are read together, an employee of the organization is deemed to be an employee of each Church.

The IRS has recognized this in a number of PLRs.[21] The Regulations should affirmatively state the logical conclusions of these paired statutory provisions.

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[21] In PLR 200207027 (Nov. 19, 2001), employees of an organization formed by two Churches were deemed to be employed by each Church. Each member Church elected an equal number of the organization's trustees and, upon dissolution, the organization's remaining assets would be distributed between the two member Churches equally. PLR 200207027 concluded that the organization (referred to as the "Employer" in the ruling) was associated with both Churches for purposes of section 414(e)(3) and therefore the organization's employees could be considered to be employees of either of the Churches for purposes of the church plan rules.

> Based on the foregoing, it is concluded that the Employer is an organization that shares common religious bonds and convictions with both Church A and Church B. The Employer is, therefore, an organization that is associated with a church or convention or association of churches within the meaning of Code § 414(e)(3)(D), for purposes of the church plan rules. It is further concluded, therefore, that the Employer's employees are deemed to be employees of a church or convention or association of churches under the rules of Code § 414(e)(3)(B), and conversely, that <u>either Church A or Church B may be considered the employer of these employees under the rules of Code § 414(e)(3)(C)</u>. (emphasis added)

Similarly, in PLR 199938049 (July 1, 1999) employees of an eldercare facility formed by two churches (the eldercare organization referred to as "Corporation O" in the ruling) were deemed to be employees of both churches:

> In this case, Churches A and B formed an association of churches under section 414(e) the Code in providing for the housing and medical needs of the elderly through the establishment, support and oversight of Corporation O. Furthermore, Corporation O was an organization described in Code section 501(c)(3) and was exempt from Federal income tax under section 501(a). Corporation O is affiliated with Churches A and B because its Board of Trustees was selected by Corporations M and N. Corporation M was controlled by Diocese D because the Council of Diocese D nominated its trustees, and the Bishop of Diocese D was an ex officio trustee. Corporation N was controlled by Synod Y because Church B in Synod Y elected its trustees. Diocese D was associated with Church A, and Church B in Synod Y was an intermediate governmental unit responsible for the mission of Church B throughout a certain region. Corporation O was associated with Churches A and B because it addressed the ecclesiastical tasks of Churches A and B concerning the aged.
>
> <u>Accordingly, pursuant to sections 414(e)(3)(B) and (C) of the Code, employees of Corporation O are deemed to be employees of Churches A and B, and Churches A and B are deemed to be employers of such employees for purposes of the church plan rules</u>. (emphasis added)

Stating this in the Regulations also would be consistent with at least one Department of Labor Advisory Opinion[22], which ruled that under section 3(33) of ERISA (ERISA's counterpart to Code section 414(e)), employees of an organization formed by three churches, Morningside Ministries, were deemed to be employees of each of the three churches:

> Further, Morningside is "associated with" the Churches, within the meaning of section 3(33)(C)(iv) of Title I of ERISA, because Morningside's adherence to the tenets and teachings of the Churches is assured by the Churches' joint control of Morningside (as described above); by the presence as directors on the Morningside Board of the Episcopal bishop, the Methodist bishop, and the Presbyterian senior pastor; and by the presence of one or more clergy who have been elected as directors to represent one of the Churches on the Morningside Board. Because these factors assure Morningside's adherence to the tenets and teaching of the Church (sic), they also assure that Morningside shares common religious bonds and convictions with the Churches and, thus, that Morningside is "associated with" the Churches within the meaning of section 3(33)(C)(iv) of Title I of ERISA.
>
> Accordingly, it is the view of the Department of Labor (hereinafter, the Department) that individuals whose employment is with Morningside are considered employees of an organization that is a civil law corporation and that is controlled by, or associated with, a church or convention or association of churches within the meaning of section 3(33)(C)(ii)(II) of Title I of ERISA. <u>In accordance with section 3(33)(C)(iii) of Title I of ERISA, the Churches are therefore deemed the employer of those individuals for purposes of the church plan definition in section 3(33)</u>. (emphasis added)

VI. 414(e)(3)(D) "Association with church.

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches."

Finally in PLR 9322032 (Mar. 9, 1993) the IRS recognized that employees of an eldercare facility formed by three churches (referred to as "Organization A" in the ruling) were deemed to be employees of a church or association of churches pursuant to Code sections 414(e)(3)(B) and (C):

> Organization A is an association of churches and is an exempt organization controlled by Churches A, B and C through a Board of Directors consisting of representatives of all three Churches, including the highest official of each Church. Organization A, therefore, is controlled by and shares common religious bonds and convictions with Churches A, B and C. <u>Accordingly, pursuant to sections 414(e)(3)(B) and (C) of the Code, employees of Organization A are deemed to be employees of a church or convention or association of churches for purposes of the church plan rules</u>. (emphasis added)

The organization that was the subject of PLR 9322032 was apparently Morningside Ministries, a Texas organization.

[22] Advisory Opinion 94-12A (Dep't Labor, Apr. 4, 1994).

A. Associated with a Church – Common Religious Bonds and Convictions

Neither ERISA nor the Code statutorily defines what "common religious bonds and convictions" means. The IRS and court cases have, over the years, developed a body of guidance as to what types of relationships, affiliations, connections, or other factors will constitute such common religious bonds and convictions. Most recently, the Tenth Circuit in *Medina*,[23] opined that the factors that could meet the common religious bonds and convictions test should not be construed narrowly, because the statutory language is written broadly. We agree with the Tenth Circuit's interpretation of common religious bonds and convictions.

Association with a Church may need to be determined for either or both of the following: (i) to authenticate the status of an organization as a PPO under Code section 414(e)(3)(A), and (ii) to identify whose employees may participate in a church plan under 414(e)(3)(C)(ii). Clarification of "associated with a Church" is the highest priority item to the Alliance in the Regulations.

We recommend that Treasury, in the Regulations, provide five safe harbor tests (set out below) to allow entities (including PPOs) to determine whether or not they are "associated with" a Church within the meaning of Code section 414(e)(3)(D).

However, we propose that Treasury make clear that to the extent an organization is unable to meet one of the proposed safe harbors (described below), such organization may still be able to demonstrate that it is "associated with" a Church (i.e., shares common religious bonds and convictions) on a case-by-case basis under a facts and circumstances inquiry.

1. Safe Harbor One

The first safe harbor we propose is based on the existence of requirements imposed by or pertaining to the Church, or connections existing between an organization and a Church. Many of these factors have been historically recognized by the IRS (e.g., in PLRs issued on church plan status) and by courts as sufficient to meet the "common religious bonds and convictions" test under Code section 414(e)(3)(D).

In light of the numerous religions practiced in the United States, and the vast number of denominations within each religion, many of which have different worship practices, beliefs, and organizational structures, we believe that the list of factors for this safe harbor should be expansive enough to account for these differences in order to avoid favoring certain denominations over others. This safe harbor requires that the organization share common religious bonds and convictions with a Church by demonstrating one or more of the following factors.[24]

For readability, these factors have been grouped into two categories, although some factors could fall within both categories: a) requirements imposed by or pertaining to the Church, and b) connections between the organization and the Church:

[23] *Medina*, 877 F.3d at 1224.

[24] We note that many of these factors demonstrating the sharing of common religious bonds and convictions were enumerated in prior PLRs issued by the IRS. See e.g., PLR 9835028.

a. Requirements

i. A Church, or the members, governing board, or one or more officers thereof, has the authority to appoint or remove, or to control the appointment or removal of, at least one of the organization's officers or directors;

ii. In the event of dissolution, the organization's assets are required to be distributed to the Church, or to an affiliate thereof;

iii. The organization is required to follow the policies and/or moral or religious teachings of the Church;

iv. The Church requires the organization’s articles, bylaws, constitution, mission statement, public documents or the deeds to the organization’s real property to contain certain provisions and/or such documents must be approved by the Church;

v. A majority of voting membership of the organization is held by, or a majority of the Board members or officers are required to be, members or delegates of congregations or other units of the Church;

vi. The organization is required by the Church to report to the Church at least annually on the organization’s financial and/or general operations and/or to make payments to the Church, with no corresponding consideration;

vii. The organization requires its officers, employees and/or students and/or members of its governing board to subscribe to a statement including the stated beliefs of the Church;

viii. The organization requires ministers of the Church to be officers or members of its governing board or otherwise employs ministers of the Church;

b. Connections

i. An institutional relationship exists between the organization and the Church (which may include such relationship being reflected in the corporate name of the organization or the presence of voting or non-voting members of the Church or a designee thereof on the governing board of the organization);

ii. The organization has been officially recognized or otherwise designated by the Church in a manner that indicates an affiliation (which may include listing the organization in the directory of affiliated organizations of the Church);

iii. The Church provides financial support representing ten percent (10%) or more of the organization's annual operating revenue and/or other non-financial assistance to the organization;

iv. Voting membership of the organization is limited to entities that are recognized by the Church, or share common convictions with the Church;

v. The Church owns real property in which the organization conducts a significant portion of its activities, or the organization is housed in the building or otherwise on property of the Church;

vi. The articles, bylaws, constitution, mission statement, or a similar document of the Church, the organization or the denominational benefits board affirms that the organization and the Church share common or similar religious doctrines, beliefs, principles, disciplines or practices and/or are otherwise affiliated or associated with each other;

vii. The organization or its delegate has voting or advisory rights in the Church;

viii. The organization is considered an arm of or was formed by the Church, carries out functions of the Church, has a mission parallel to the Church, sponsors activities designed to support the religious mission of the Church, and/or has as its primary purpose aiding or providing services or resources to the Church;

ix. The organization is included in the activities or services provided by the Church that are limited to members of the Church, and/or to organizations associated with the Church;

x. The organization educates students for the ministry of the Church, or requires or offers religious instruction or a religious curriculum of the Church;

xi. The organization follows basic teachings, tenets, and core beliefs like those of the Church, or has adopted a statement that includes the stated beliefs of the Church as found in published writing (although the language need not be exact), provided the stated beliefs are important and significant parts of the teachings and tenets of the Church, and if the statement is in one of the following documents: 1) its enabling instrument (corporate charter, trust instrument, articles of association or incorporation, constitution or similar document), 2) bylaws (or a document equivalent to bylaws), 3) resolution of its governing board, or 4) a published position or mission statement;

xii. The organization maintains a chapel where services and/or sacraments of the Church are conducted and/or prayers and worship of the Church occur at the organization; or

xiii. The organization grants preferential admission status or practices preferential hiring of members of the Church.

The next two safe harbors that we propose borrow from the concept of an organization being "affiliated with" a Church under Code section 6033 and the regulations thereunder.

2. Safe Harbor Two

An organization should be deemed to be "associated with" a Church if it is covered by a group exemption letter issued to the Church under applicable administrative procedures, within the meaning of Treasury regulations section 1.6033-2(h)(2)(i).

3. Safe Harbor Three

An organization should be deemed to be "associated with" a Church if it is operated, supervised, or controlled by or in connection with a Church within the meaning of Treasury regulations section 1.6033-2(h)(2)(ii).

As to the question of whether "affiliated with" (within the meaning of Code section 6033) should equate to being "associated with" (within the meaning of Code section 414(e)(3)(D)), we believe that it should. The former "affiliated with" test appears to be a stricter test, demanding a closer relationship (i.e., a group exemption letter or operational control by the Church) than the latter "associated with" test, which merely requires common religious bonds and convictions. Since meeting the criteria under Treasury regulations section 1.6033-2(h)(2)(i) and (ii) is dispositive of being "affiliated with" a Church for Code section 6033 purposes, it should follow that meeting such criteria should also be dispositive of being "associated with" a Church for Code section 414(e)(3)(D) purposes.

4. Safe Harbor Four

An organization should be deemed to be "associated with" a Church if the organization's employee benefit plan or a multiple employer plan in which the organization participates:

(i) is administered or funded by a denominational benefits board;

(ii) the denominational benefits board has established connectional criteria and spiritual convictions that an organization must meet in order to participate in a multiple employer plan maintained by such board, or to have its plan administered or funded by such benefits board;

(iii) such criteria must be consistent with the mission statement of the denominational benefits board approved by the denomination; and

(iv) the denominational benefits board makes a reasonable, good faith determination that an organization satisfies such criteria.

For purposes of this safe harbor, a denominational benefits board is a board, committee or program established or created by a Church denomination and recognized by it as the official benefits plan administrator for such Church denomination.

5. Safe Harbor Five

Some seminaries are non-denominational but hold to a particular theological point of view and prepare students to enter into ministry in a broad range of Churches that share common religious convictions and often common religious bonds with the seminary. Often times, these seminaries or bible colleges–seek to protect their independence from any one denominational affiliation because they seek to serve many denominations that share common core convictions. Other religious educational institutions, while independent, are established to prepare students to engage in society from a particular theological viewpoint, regardless of whether their students will enter into vocational ministry.

Employee benefit plans established by these educational institutions should be able to qualify for church plan status because the institutions are often associated not with one Church, but with many. The Alliance therefore urges Treasury to specifically address this circumstance by adopting an express safe harbor indicating that the employee benefit plans established by such institutions are church plans.

B. Clarification of Church Plans Maintained by Multiple Churches

In addition, the Alliance requests that the Regulations clarify that multiple Churches maintaining a church plan together are not required to demonstrate common religious bonds and convictions between them. In other words, an "association of Churches" is not itself required to be "associated with" a Church.

As described above, an organization *that is not itself a Church* must demonstrate control by, or common religious bonds and convictions with, a Church, in order to qualify as an organization eligible to establish and maintain a church plan. However, this is not the case for multiple Churches maintaining a church plan together. Multiple Churches, each of which could establish and maintain a church plan under section 414(e), may establish and maintain a church plan together without demonstrating common religious bonds and convictions. The common bonds and convictions criteria referred to above are specifically required to establish a link between a non-Church (which would not be permitted to establish or maintain a church plan individually) and a Church (which would be so permitted).[25]

[25] Although the use of the related words "association" and "associated" can create the impression that an association of churches is also subject to the requirement of sharing common bonds and convictions between its members, parsing the statutory language illustrates that this was not the drafters' intent. The phrase "convention or association of churches" is used concurrently with "church" throughout section 414(e).

In contrast, the requirement of shared common religious bonds and convictions appears only in section 414(e)(3)(D), in the definition of "associated with a church". The concept of "association with a church" appears in section 414(e)(3)(A) in the description of a principal purpose organization (where such organization must be "controlled by or associated with a church or a convention or association of churches") and in section 414(e)(3)(B)(ii) (where it broadens the definition of "employee" of a church or convention or association of churches to include employees of certain organizations "controlled by or associated with a church or a convention or association of churches"). Note

VII.	***414(e)(3)(E) "Special rule in case of separation from plan.*** ***If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B) , the church plan shall not fail to meet the requirements of this subsection merely because the plan—*** ***(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or*** ***(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service."***

A. Separated Employees

Code section 414(e)(3)(E) expands the definition of "employee" under Code section 414(e)(3)(B) to include certain individuals who have separated from service with an organization maintaining a church plan. Subsection (i) of 414(e)(3)(E) provides that the plan will still be a church plan even though it retains a separated employee's accrued benefit or account for later distribution under the plan. This provision is critical to retirement plans as there must be a distributable event under a retirement plan before it can distribute an accrued benefit or account. In many situations, a separation from service will not be a distributable event.

Subsection (ii) allows the church plan to remain a church plan even if it receives a contribution for a separated employee for up to five years after the separation. If the employee is disabled upon separation from service, the contributions may continue for an indefinite period. One of the reasons for this extension of participation may have been to accommodate separation from service arrangements in which the employer agrees to continue retirement benefit accrual for some period of time after termination.[26] Also, this accommodates the payment of disability benefits from a welfare plan, which can easily extend beyond five years.

that if the drafters' intent was to require a group of churches to meet the common bonds and convictions standard, a definition of "convention or association of churches" could have been included, defining a convention or association of churches as multiple churches sharing common religious bonds and convictions. Furthermore, it would be inconsistent to require the common religious bonds and convictions standard for an "association of churches", but not for a "convention of churches"; however, it is impossible to read the current statutory language to require the common religious bonds and convictions standard to apply to a convention of churches, as the statute consistently reads "convention *or* association of churches".

[26] Retirement plan contributions may continue to be made to a retirement plan described in section 403(b) for up to five years following an employee's termination of employment.

Code section 414(e)(3)(E) does not specifically contemplate welfare benefits other than disability benefits, while section 414(e)(3)(A) includes any type of welfare plan. By their very nature, welfare plans often provide benefits to separated employees. Examples include employees on COBRA and COBRA-like extensions of health care, retirees receiving health care, retiree death benefits and severance benefits.

The Alliance requests that the lack of specificity in the Code be remedied by the Regulations. Code section 414(e)(3)(E) does not preclude other types of post-separation benefits. The payment of welfare benefits designed to be paid after separation, such as death and severance pay benefits, should not disqualify a church welfare benefit plan, as long as the benefits were accrued during the active Church employment period.

The IRS so held in PLR 201323043,[27] in which it found that a church welfare plan that accepted contributions for a retired employee beyond five years of retirement was a church plan. The ruling reasoned that, even though contributions continued to be made to provide the retiree benefits, all the retiree's benefits were "fully accrued while the retiree was an active employee and no contributions are made with respect to any periods after the employee's separation from service".

In a typical health plan, a retired employee may be allowed to continue in a Medicare supplement by paying the required premium. The benefit to the employee is the ability to remain enrolled in the familiar health plan, perhaps for life, which is significant even if the employee is paying for current costs. Health plans may provide retiree coverage for life after satisfaction of a requisite number of years of service with the employer. Consistent with PLR 201323043, the Alliance believes that this type of benefit is accrued during the working career for the time when the employee reaches the status of being retired.

If a welfare plan provides a death benefit for a retiree, that benefit is clearly designed to be paid potentially more than five years after the employment relationship has ended. However, the Alliance submits that the death benefit is "accrued" during the years of active service.

In some situations the employer will pay for the post-severance benefit, and in other situations the retiree will pay. It should not matter who pays or what the benefit arrangement is – the question should be whether the benefit is *on account of the prior service* as opposed to current service.

[27] June 7, 2013.

VIII. | ***414(e)(4) "Correction of failure to meet church plan requirements.***

(A) In general. If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years."

A. What is correctable?

Code section 414(e)(4) sets forth specific requirements allowing correction of a failure to meet one or more requirements of section 414(e) (for "church plan" status), if the correction is made within the correction period specified in section 414(e)(4)(3). This provision is broad and would allow correction for any type of failure to meet the requirements of section 414(e).[28]

Additionally, section 414(e)(4) permits correction by a "plan" and does not limit its application to a specific type of plan. Therefore, we believe that correction under section 414(e)(4) is available for a plan providing welfare benefits, retirement benefits, or both.

Finally, correction should be available to any church plan, whether maintained by a Church or by a PPO.

EXISTING TREASURY REGULATIONS

IX. | ***1.414(e)-1(e) "Religious Orders and Religious Organizations. For purposes of this section the term "church" includes a religious order or a religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the function of a church whether as a civil law corporation or otherwise."***

We think this provision should be retained in the Regulations. The "integral part" test remains good law,[29] so should not be eliminated from the Regulations. If the Regulations omit this provision, courts may conclude that organizations described in this regulation no longer may be included within the term "Church".

[28] We note that, under Code section 410(d), a "church plan" under section 414(e) may make an affirmative election (a "section 410(d) election") to become subject to the provisions of Title I of ERISA and certain provisions of the Code as if it were not a church plan. A specific procedure is set forth in Treas. Reg. section 1.410(d)-1 to make such an election for a church plan, and the election, once made, is irrevocable with respect to such plan. Because there is a specific procedure to make the section 410(d) election, the election cannot be inadvertently made (*e.g.*, by publishing plan materials indicating the plan is subject to ERISA or by filing Form 5500). Consequently, we believe that a properly made section 410(d) election would, therefore, not be a "failure" to meet the requirements of section 414(e), which is subject to correction under section 414(e)(3)(A).

[29] See, e.g., PLR 201537025 (Sept. 11, 2015).

X. ***1.414(e)-1(f) "Separately incorporated fiduciaries. A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated fiduciary such as a pension board or a bank."***

We recommend that this regulation be expanded to read as follows: "A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated *plan administrator* such as a pension board, bank *or a separately incorporated third party administrator such as a medical claims administrator*." We recommend this clarification since this arrangement is commonly utilized by church welfare plans to gain access to provider discounts and networks, and does not detract from the relationship of the plan to a Church.

CONCLUSION

We are grateful for the opportunity to comment on the Regulations, which are of critical importance to the Alliance. Please do not hesitate to contact the undersigned at (202) 778-9128 with any questions, or if we may be of any assistance.

Sincerely,

Karishma Shah Page
Partner, K&L Gates LLP
On Behalf of the Church Alliance

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December 5, 2017

By electronic submission (http://www.regulations.gov)

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS–9940–IFC
P.O. Box 8016
Baltimore, MD 21244–8016

Re: Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA

To Whom It May Concern:

The Church Alliance submits this comment in response to the interim final rules (the "Rules") regarding religious exemptions and accommodations for coverage of certain preventive services under the Patient Protection and Affordable Care Act ("ACA") issued jointly by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (together, the "Departments") and published at 82 Fed. Reg. 47,792 (Oct. 13, 2017).

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations, shown on the left side of this letterhead. As discussed in more detail below, the Church Alliance supports the religious liberty principle that no church plan should be forced to violate its religious beliefs in the provision of health benefits. Therefore, even though many Church Alliance members have no religious objection to providing the wide range of preventive services required by section 2713 of the ACA, the Church Alliance applauds the expansion of the religious exemption in the Rules, consistent with that religious liberty principle.

By way of background, the Church Alliance has submitted comments on five separate occasions regarding the ACA's preventive services coverage requirement (the "Coverage Requirement"):

- on September 28, 2011, on the interim final rules published at 76 Fed. Reg. 46,621 (Aug. 3, 2011);[1]
- on June 19, 2012, on the advance notice of proposed rulemaking published at 77 Fed. Reg. 16,501 (Mar. 21, 2012);[2]

[1] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Sept. 28, 2011), *available at* http://church-alliance.org/sites/default/files/images/u2/Comment_Letter_Contraceptive_Religious_Employer_09_28_11.pdf.
[2] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Jun. 19, 2012), *available at* http://church-alliance.org/sites/default/files/images/u2/Church_Alliance_Comment_on_ANPRM_on_Preventive_Services_June_2012.pdf.

- on April 8, 2013, on the notice of proposed rulemaking published at 78 Fed. Reg. 84,566 (Feb. 6, 2013);[3]
- on October 27, 2014, on the notice of proposed rulemaking published at 79 Fed. Reg. 51,092 (Aug. 27, 2014);[4] and
- on September 20, 2016, in response to the request for information on coverage for contraceptive services published at 81 Fed. Reg. 47,741 (Jul. 22, 2016).[5]

We appreciate this opportunity to build on our previous comments as the Departments consider religious exemptions and accommodations for coverage of certain preventive services under the ACA.

I. BACKGROUND ON THE CHURCH ALLIANCE

The Church Alliance represents 37 church benefits boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The Church Alliance members provide employee benefit plans, including in many cases, medical coverage, to approximately one million participants (clergy and lay workers) serving over 155,000 churches, synagogues, and affiliated organizations. These medical programs are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 414(e) of the Internal Revenue Code (the "Code").

The contraceptive services requirement of section 2713 of the ACA has created challenges for some Church Alliance members. The plans of a few Church Alliance members, reflecting the religious beliefs of the churches with which they are associated, exclude coverage for all contraceptives. Other programs whose associated churches do not object to contraception, but hold fundamental convictions against abortion, exclude coverage for contraceptives that are or could be abortifacients, such as so-called "morning-after pills" or "emergency contraceptives." Many of the health care plans associated with the members of the Church Alliance do not impose any specific restrictions on contraceptive coverage. However, the Church Alliance agrees that its members should not have to risk significant penalties in order to follow the religious beliefs of the churches with which they are associated.

II. INTERIM FINAL RULES

The Church Alliance is very grateful that the Departments have expanded the religious exemption in the Rules. As contrasted with earlier versions of regulations on the Coverage Requirement, the Rules no longer require a church or an employer associated with the church to choose between violating its religious beliefs and violating the law. The preamble to the Rules states that the exemption was expanded "among other reasons, to provide for participation in the health insurance market by certain entities or individuals free from penalties for violating sincerely held religious beliefs opposed to providing or receiving coverage of contraceptive services . . . ."[6] The Church Alliance supports that reasoning. We also commend the Departments for moving to a plan-based exemption, which the Church Alliance recommended in its prior comments.

As the Departments continue to work on the Rules, we would like to raise a few questions and technical suggestions for consideration.

[3] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Apr. 8, 2013), *available at* http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf.
[4] Letter from Church Alliance to Employee Benefits Security Admin. (Oct. 27, 2014), *available at* http://church-alliance.org/sites/default/files/images/u2/Comment-Letter-ACA-Preventive-Services-IFR-10-27-14.pdf.
[5] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Sept. 20, 2016), *available at* http://church-alliance.org/sites/default/files/images/u2/CA-Response-RFI-09-20-16.pdf.
[6] 82 Fed. Reg. 47,792, 47,815 (Oct. 13, 2017).

A. Clarify that an Employer Adopting an Exempt Plan Cannot Be Penalized

The preamble to the Rules makes clear that if a plan is exempt under 45 C.F.R. § 147.132, neither the plan sponsor, the plan, nor an issuer providing coverage in connection with the plan will be penalized as a result of the plan not providing contraceptive coverage:

> Section 147.132(a)(1) introductory text and (a)(1)(i), by specifying that ''[a] group health plan and health insurance coverage provided in connection with a group health plan'' is exempt ''to the extent the plan sponsor objects as specified in paragraph (a)(2),'' exempt the group health plans the sponsors of which object, and exempt their health insurance issuers from providing the coverage in those plans (whether or not the issuers have their own objections).[7]

While the Rules recognize that exempt plans may cover multiple employers, the Rules do not recognize that employers adopting such plans that are not themselves "plan sponsors" can be penalized $100 per day for each employee not provided contraceptive coverage.[8] Employers that are "so closely associated" with an exempt plan sponsor that they are permitted to participate in the sponsor's health plan should not be penalized.[9] Perhaps such employers avoid a penalty on account of Section 54.9815-2713T, which is added to 26 C.F.R. Part 54, but this is not clear. We suggest this be recognized (or clarified) in guidance.

B. Revocation of Accommodation

The preamble to the Rules states:

> If an eligible organization wishes to revoke its use of the accommodation, it can do so under these interim final rules and operate under its exempt status.[10]

However, it is unclear how such a revocation is to be accomplished, and whether the objecting organization must notify the applicable issuer and third party administrator in a particular way. The Church Alliance would appreciate the Departments' guidance on this question.

C. Certification or Documentation of Exemption

The preamble to the Rules states:

> The Departments invite public comment on whether exempt entities, or others, would find value either in being able to maintain or submit a specific form of certification to claim their exemption, or in otherwise receiving guidance on a way to document their exemption.[11]

The Church Alliance respectfully requests that the Departments refrain from specifying forms of certification to claim or maintain an exemption. It is our understanding, as stated in the preamble to the Rules, that "exempt entities will not be required to comply with a self-certification process."[12] Moreover, the Rules state that "the exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section [45 C.F.R. § 147.132] objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its

[7] *Id.* at 47,808.
[8] *See* 26 U.S.C. §§ 4980D(b) and (e)(1) (imposing the $100 per day tax for any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements) on the employer).
[9] 82 Fed. Reg. at 47,810.
[10] *Id.* at 47,813.
[11] *Id.* at 47,809.
[12] *Id.* at 47,808.

sincerely held religious beliefs."[13] We urge the Departments to refrain from issuing guidance on "a specific form of certification," because this guidance could be interpreted as setting a rigid standard or requirement, which may create Religious Freedom Restoration Act[14] concerns for some exempt entities. Such guidance would appear to us to be contrary to both the preamble to the Rules and the Rules themselves, which appear to condition exemption only on meeting the description in paragraph (a)(1) and objecting to certain coverage or payments based on religious beliefs, and do not include a certification.

However, the Church Alliance would find value in receiving guidance that is flexible on ways to document the religious exemption.

The Church Alliance is grateful for the expanded religious exemption in the Rules, but would welcome additional guidance on the issues we have described above. Should you have any questions or wish to discuss these issues further, please contact the undersigned at (202) 778-9000.

Sincerely,

Karishma S. Page
Partner,
K&L Gates LLP
On Behalf of the Church Alliance

[13] *Id.* at 47,835.
[14] 42 U.S.C. § 2000BB-1.

Chair:
Ms. Barbara A. Boigegrain

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CHURCH ALLIANCE
Acting on Behalf of Church Benefits Programs

Counsel:
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April 23, 2018

By electronic submission (http://www.regulations.gov)

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–9924-P
P.O. Box 8010
Baltimore, MD 21244–8010

Re: Short-Term, Limited-Duration Insurance

To Whom It May Concern:

The Church Alliance submits this comment in response to the proposed rule (the "Rule") amending the definition of short-term, limited-duration insurance ("STLDI") for purposes of its exclusion from the definition of individual health insurance coverage. As you know, the Rule was issued jointly by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (together, the "Departments") and published at 83 Fed. Reg. 7437 (Feb. 21, 2018).

The Church Alliance is a coalition of the chief executive officers of 38 church benefits organizations, shown on the left side of this letterhead. The Church Alliance represents these church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions.

I. BACKGROUND ON CHURCH ALLIANCE MEMBERS' HEALTH PLANS

Church Alliance members provide employee benefits, including in many cases, health coverage, to approximately one million participants (clergy and lay workers, hereinafter "church workers") serving over 155,000 churches, synagogues and affiliated organizations. The health plans are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 414(e) of the Internal Revenue Code (the "Code"). These plans ("church health plans") typically are sponsored by religious denominations or separate entities established by a denomination to sponsor retirement and health and welfare benefits to the church workers serving the denomination's churches and associated employers. Members of the Church Alliance provide centrally-administered, portable, comprehensive benefits coverage to thousands of small church employers and their workers.

Church health plans administered by Church Alliance members provide health coverage for church workers located in multiple states, with many of these church health plans providing coverage to church workers in all fifty (50) states. Participation in these church health plans often is optional for ministries, either for some or all of their church workers. Whether participation is optional, and the extent to which it is optional, often is based on religious belief, expressed through resolution, decree or other statements of the denomination.

Once a ministry has decided to participate in a church health plan (or adopts the plan per a denominational mandate), the scope of the church workers who must be covered by the church health plan also often is specified or guided by the denomination, generally based on religious beliefs or principles of justice based on religious beliefs. Since these plans generally are sponsored by the denomination, the denomination typically controls the requirements of each plan.

Church workers often move from state to state, sometimes pursuant to a denominational mandate. This is particularly true in the case of ministers, teachers and others in leadership positions for the ministries. This means that the church worker’s health coverage may change due to the move, based on the coverage provided by each ministry.

Church health plan coverage satisfies the Affordable Care Act (ACA) coverage requirements, which makes it more costly than STLDI. Church health plans often are designed to provide financial and welfare security to a workforce that works for lower than market compensation consistent with religious beliefs or denominational mandates or statements. In addition, church health plans generally cover an older and sicker population, due to the aging of clergy in most denominations and to religious beliefs on caring for the sick. The affordability of these programs is also a challenge for the sponsors. The proposed modification of the STLDI Rule may position those plans as a viable alternative coverage option for church workers. This uneven regulatory environment could challenge the financial solvency for long-standing programs such as the Church Alliance member health plans to the permanent disadvantage of many career servants of this country's religious organizations.

II. INTEREST OF THE CHURCH ALLIANCE

The Church Alliance is concerned that lengthening the maximum period of STLDI may have the unintended effect of adversely impacting church health plans. Ministries often struggle with financial challenges. Typically, the largest expenses of a ministry are wages and benefits. Therefore, with denominations that do not mandate church health plan coverage for all church workers of all ministries, ministries may be tempted to cease providing church health plan coverage in order to cut costs. Church workers, who often are lowly paid and do not have expertise in employee benefits, may be tempted to purchase health care coverage at the lowest cost. This is likely to lead to a scenario where more church workers opt for STLDI if the maximum period of such insurance is lengthened.

This could have a potential negative impact on church health plans. As church workers age and/or become sick, often they still will be able to enroll in church health plan coverage. Church health plans often must accept these church workers due to denominational mandates, frequent moves by church workers (particularly from a ministry that is not in the church health plan to a ministry that is in that plan) and ACA requirements, including guaranteed issue and the prohibitions of pre-existing conditions exclusions and denials. These ACA consumer protections are not required for STLDI plans, providing those plans with a pricing competitive advantage.

As a result, church health plan coverage may be subjected to the costs of covering sicker workers, while insurance carriers provide STLDI coverage at a low cost to healthy individuals. As the costs for church health plans continue to escalate, the contributions paid by ministries for such coverage will need to increase, which will increasingly strain ministries' budgets and will lead some ministries with healthier church workers to cease providing church health plan coverage. This may result in a death spiral for some church health plans, as the pool of church workers covered shrinks to only sicker church workers.

To prevent this result, the Church Alliance respectfully requests that STLDI coverage be limited to filling short-term coverage gaps and that the Rule refrain from lengthening the maximum period of STLDI coverage or, if that is not possible, only lengthen the maximum period to no longer than six months.

Thank you for providing us with the opportunity to comment. Should you have any questions or wish to discuss these issues further, please contact the undersigned at (202) 778-9128.

Sincerely,

Karishma Shah Page
Partner,
K&L Gates LLP
On Behalf of the Church Alliance

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Ms. Barbara A. Boigegrain

Secretary/Treasurer:
Mr. Andrew Q. Hendren, Esquire

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June 26, 2018

Mr. Brett Redfearn
Director, Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street NW
Washington, DC 20549

RE: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants

Dear Director Redfearn:

We are pleased to submit this letter, on behalf of the Church Alliance, regarding the possible revision of regulations promulgated by the Securities and Exchange Commission ("SEC") on business conduct standards for security-based swap dealers and major security-based swap participants (collectively, "SBS Entities").[1] This letter is in follow up to recent discussions held at the SEC regarding business conduct standards and, in particular, the process by which a church plan is deemed to be a "Special Entity" for the purposes of the regulations. As discussed in more detail below, we urge the SEC to consider harmonizing its regulations with those of the Commodity Futures Trading Commission ("CFTC"), which allow church plans to "opt-in" to Special Entity status.

The Church Alliance and Church Plans

The Church Alliance is a coalition of thirty-eight (38) denominational benefit programs that provide pension and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs are defined as "employee benefit plans" and "church plans" under Sections 3(3) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), respectively, and therefore, come within the definition of a "Special Entity" under Section 764(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which enacted a new Section 15F of the Securities Exchange Act of 1934 (Exchange Act) to govern the registration and regulation of SBS Entities.

Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of

[1] SEC Release No. 34-77617, Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants.

churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i).[2] A church benefits board is also (i) typically an organization described in Code Section 501(c)(3), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act of 1940. Our references throughout this letter to "church plans" should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, some have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, swaps, security-based swaps, structured notes, and options. Accordingly, the denominational benefits boards represented through the Church Alliance have an interest in the regulation of the security-based swap market.

CFTC and SEC Special Entity Rules

In 2012, the CFTC issued a final rule on Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties.[3] The CFTC's final rule contained the following within the definition of a Special Entity:

> *Under the new prong in § 23.401(c)(6), any employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a Special Entity, **may elect to be defined as a Special Entity** by notifying its swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant. Therefore, for example, under § 23.401(c)(6), **any church plan defined in Section 3(33) of ERISA, including any plan described in Section 3(33)(C)(i), such as a church benefit board, could elect to be defined as a Special Entity.***

In 2016, the SEC released its final rule on business conduct standards.[4] The SEC's rule took a different approach to defining a Special Entity:

> *Specifically, Rule 15Fh–2(d)(4), as adopted, defines a special entity to **include** "[a]ny employee benefit plan defined in Section 3 of [ERISA] and not otherwise defined as a special entity, **unless such employee benefit plan elects not to be a special entity** by notifying a security-based swap dealer or major security-based swap participant of its election prior to entering into a security-based swap with the particular security-based swap dealer or major security-based swap participant."*

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[2] Section 414(e)(3)(A) of the Internal Revenue Code of 1986, as amended (Code), is identical to ERISA section 3(33)(C)(i), and church pension boards are sometimes referred to as Section 414(e)(3)(A) organizations or "principal purpose organizations."
[3] 77 FR 9734 (Feb. 17, 2012).
[4] 81 FR 29960 (May 13, 2016).

It is important to note that, unlike the CFTC rules that provide for an opt-in feature, the SEC rules provide for an opt-out feature. Acknowledging the deviation from the CFTC rule, the SEC made a utilitarian argument. The SEC determined that the opt-out model "afford[ed] the maximum protections to the broadest categories of special entities, while still allowing them the flexibility to elect not to be special entities when they do not wish to avail themselves of those protections."

Church Alliance Views

The Church Alliance previously submitted comment letters to the CFTC and the SEC regarding the proposed rules on business conduct standards in 2011. Additionally, in October 2011, the Church Alliance provided a supplemental memorandum addressing issues and feedback raised by the CFTC. When addressing the possible definition for Special Entity in the CFTC's proposed rule, the Church Alliance noted its concern that potential counterparties would be confused and possibly refuse to deal with church plans altogether.

As noted in the supplemental memorandum, the opt-in approach for Special Entity status mitigated these concerns; the Church Alliance suggested possible revisions to the rule to include such an election. However, the issue was revived when the SEC finalized a rule that contained an opt-out approach.

In the years since the rules were finalized, experience has demonstrated that church plans most often choose not to be special entities. Church plans have found that they have the internal resources necessary to transact with counterparties; special protections tend not to be necessary and, in certain instances, would become burdensome. Given that most church plans do not opt in, the SEC's rules are incongruous with industry practice. In effect, the SEC places an additional burden on these plans.

Thus, the Church Alliance requests that the SEC review the actual costs associated with having inconsistent rules and consider revising the 2016 rule to adopt an opt-in approach to Special Entity status in harmony with the CFTC rules.

Conclusion

The Church Alliance appreciates the opportunity to comment on the business conduct standards put forth by the CFTC and SEC. We welcome the opportunity to discuss our recommendation in detail with the SEC at your convenience. Please feel free to contact me if you have any questions or wish to discuss this matter further.

Sincerely,

Karishma Shah Page
Partner, K&L Gates LLP
On Behalf of the Church Alliance

CC: Lourdes Gonzalez, Carol McGee, Joanne Rutkowski, Heather Seidel

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Acting on Behalf of Church Benefits Programs

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November 22, 2017

By electronic submission (http://www.regulations.gov)

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
Attention: RFI Regarding Faith-Based Organizations
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, D.C. 20201

Re: Request for Information Regarding Faith-Based Organizations

To Whom It May Concern:

The Church Alliance is submitting this letter as a public comment to the Request for Information published on October 25, 2017 by the Department of Health and Human Services ("HHS") at 82 Fed. Reg. 49,300 ("RFI"). We welcome the opportunity to comment.

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations affiliated with mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The benefit programs offered by these organizations provide retirement and health benefits to more than one million clergy,[1] church lay workers, and their family members at more than 155,000 churches, parishes, synagogues, and church-associated organizations across the country, including organizations that receive HHS funding or otherwise partner with HHS.

The members of the Church Alliance support the principle that a church or church-associated organization should not have to violate its religious tenets in order to comply with the law as it maintains or participates in a church employee benefits plan ("church benefits plan") for its workers, including in cases where the organization may maintain HHS funding. The Church Alliance welcomes the guidance provided by the U.S. Attorney General and cited by HHS in its RFI that, "[i]n formulating rules, regulations, and policies, administrative agencies should also proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens."[2]

[1] As used in this comment letter, the term "clergy" refers to ministers, priests, rabbis, imams, and other spiritual leaders.
[2] Memorandum from Attorney Gen. Jeff Sessions for All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty" at 1 (Oct. 6, 2017), *available at* https://www.justice.gov/opa/press-release/file/1001891/download.

I. Executive Summary

The Church Alliance commends HHS for seeking input to ensure that faith-based organizations have the freedom to act in accordance with their religious beliefs, those beliefs are accommodated, and such organizations are not otherwise restricted, excluded, substantially burdened, discriminated against, or disproportionately disadvantaged in HHS-conducted or funded programs or activities because of their religious character, identity, or beliefs. As HHS considers new regulations and guidance and modifies or rescinds other regulations or guidance, we urge HHS to consider faith-based organizations and specifically to include, expand, or preserve religious exemptions and flexibility in the application of regulations and guidance to accommodate the religious beliefs and structures that church benefits plans embody.

II. Description of church benefits plans and participating employers

Church benefits plans have been in existence for decades and, in some cases, pre-date the enactment of the Internal Revenue Code in 1913. Church benefits plans are typically maintained by a separately incorporated church benefits board for eligible employees of churches, synagogues, and other ministries in a denomination. Often the sponsor is the church or denomination. The plans are generally multiple-employer in nature and provide retirement and welfare benefits to thousands (or, in the case of large denominations, tens of thousands) of clergy and lay workers working for different employers throughout the country that participate in such plans.

In addition to serving local churches, church benefits plans cover church-related organizations. For example, participating employers can include church-affiliated nursing homes, day care centers, seminaries, colleges and universities, elementary and secondary schools, hospitals, and social services organizations. All of these organizations are essential to fulfilling the mission and ministry of the church. Some of these organizations receive HHS funding, partner with HHS, or are regulated by HHS.

Denominations have been organized to reflect their own theological beliefs and church polity (the operational and governance structure of the denomination). It is important to note that church structures are themselves based on religious beliefs. Church benefits plans, likewise, often reflect the theological beliefs and polity of the churches that sponsor or are otherwise associated with them. These beliefs and structures can give rise to unique challenges for church benefits plans. Hierarchical structures, where the parent church organization sets policy for the entire denomination, may still present unique regulatory compliance challenges for church benefits plans because, while policy may be set centrally, many decisions and processes are set and controlled locally. Other, less hierarchical structures (e.g., congregational structures) operate with less centralized policy decision-making, which can further divide plan administrative responsibilities and functions and complicate regulatory compliance efforts.

III. Removing barriers for religious and faith-based organizations

A. Regulations that can and should be modified

As described above, church benefits plans have been carefully designed over the years to reflect each church's religious beliefs and polity. However, two sets of regulations issued under the Patient Protection and Affordable Care Act ("ACA") have created unique challenges for some church benefits plans. We describe those challenges and our requests for regulatory relief in greater detail below.

1. Regulations under ACA section 1557

Certain provisions of the nondiscrimination regulations promulgated pursuant to section 1557 of the ACA[3] conflict directly with the religious beliefs of some Church Alliance members. Even though some of the members of the Church Alliance have plans that cover these services, the burdens imposed by these regulations rise to the level of

[3] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. Part 92).

infringing upon the rights of other Church Alliance members and the ministries they serve to freely exercise their religion. Some ministries served by Church Alliance members were faced with a choice between either following their religious beliefs and risking HHS funding, or violating their religious beliefs to preserve HHS funding so they could continue to serve persons in need.

A nationwide preliminary injunction has paused enforcement of these regulations, allowing ministries to follow their religious beliefs without undue legal risk. Nevertheless, until these regulations are modified to include an appropriately broad religious exemption, the threat of losing HHS funding persists for some ministries. The Church Alliance urges HHS to consider amending the section 1557 regulations to include a religious exemption, as requested in our November 9, 2015 comment letter to HHS.[4] Such a modification to the regulations would further HHS's objective, as stated in the RFI, of ensuring that the religious exercise of faith-based organizations interacting with HHS and HHS-funded entities is adequately accommodated and respected.

2. Rules and Regulations under ACA section 2713

The Church Alliance is encouraged by the interim final rules and temporary regulations issued jointly by the Internal Revenue Service, the Department of Labor, and HHS concerning religious exemptions and accommodations for coverage of certain preventive services under the ACA.[5] Even though many of the health plans associated with members of the Church Alliance do not have provisions that would conflict with the requirements of section 2713 of the ACA, the Church Alliance supports the religious liberty principle that no church plan or employer in a church plan should be forced to violate its religious beliefs in the provision of health benefits. We therefore applaud HHS for expanding the religious exemption in the interim final rules in a manner that comports with earlier Church Alliance comments. We will echo that commendation of HHS in our comment letter on the interim final rules, to be filed on behalf of the Church Alliance. The expansion of this religious exemption supports the HHS objective described in the RFI of accommodating and respecting the religious exercise of faith-based organizations interacting with HHS.

B. Accommodating the religious beliefs of faith-based organizations

As HHS considers further regulatory actions, the Church Alliance respectfully requests that HHS continue to accommodate the religious beliefs of faith-based organizations and the church and benefits plan structures based on those religious beliefs. The Church Alliance requests appropriate exemptions and a reasonable amount of flexibility to adjust for those beliefs and structures. The Church Alliance advocates on behalf of a broad spectrum of denominations with varied religious beliefs and polities that inform the structures of their benefits plans. When HHS requirements (current or future) conflict with religious beliefs or the free exercise thereof, the Church Alliance would urge HHS to consider including necessary exemptions.

As indicated above, church benefits plans reflect denominations' religious beliefs, which can often create unique regulatory compliance challenges for plans, individual employers, and covered clergy and church lay workers. In these instances, the Church Alliance requests that HHS ensure church benefits plans are afforded a reasonable amount of flexibility in complying with various regulatory requirements. For example, compliance with certain reporting requirements has proven more difficult for churches with congregational structures, while other structures, such as connectional ones, require input from a variety of sources in order to meet such requirements. These difficulties may impact the timeliness of reporting or the accuracy of information obtained. The Church Alliance urges HHS to account for these unique compliance challenges as part of its rulemaking.

In conclusion, the Church Alliance appreciates this opportunity to comment and hopes HHS finds our comments helpful. We are happy to meet or provide further clarification. The Church Alliance welcomes the opportunity to

[4] Letter from Church Alliance to U.S. Dep't. of Health and Human Servs. (Nov. 9, 2015), *available at* http://church-alliance.org/sites/default/files/images/u2/Church-Alliance-Comments-on-Nondiscrimination-Proposed-Rule-0945-AA02.pdf.
[5] 82 Fed. Reg. 47,792 (Oct. 13, 2017).

play a constructive role in ensuring future rulemakings appropriately address church benefits plans and other faith-based organizations.

Please contact the undersigned at (202) 778-9000 if you have any questions or wish to discuss any of this information further.

Sincerely,

Karishma S. Page
Partner,
K&L Gates LLP
On behalf of the Church Alliance