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# CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

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April 10, 2014

## By Electronic Submission

Internal Revenue Service  
Room 5205, POB 7604  
Ben Franklin Station  
Washington, DC 20044

Attention: **Mark Iwry**, Senior Advisor to the Secretary and Deputy Assistant Secretary (Tax Policy) for Retirement and Health Policy, U.S. Department of the Treasury  
**George H. Bostick**, Benefits Tax Counsel, U.S. Department of the Treasury  
**William J. Wilkins**, Chief Counsel, Internal Revenue Service

Copy: **Phyllis Borzi**, Assistant Secretary of Labor for the Employee Benefits Security Administration, U.S. Department of Labor  
**Acacia Bamberg Salatti**, Acting Director, Office of Faith-Based & Neighborhood Partnerships, U.S. Department of Health and Human Services

Re: *Notice 2013-54*

To Whom It May Concern:

The Church Alliance is submitting this letter as a public comment to *Notice 2013-54: Application of Market Reform and other Provisions of the Affordable Care Act to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements* (the "Notice") published by the Internal Revenue Service ("IRS") in 2013-40 I.R.B. on September 13, 2014. The Department of Labor ("DOL") and Department of Health and Human Services (collectively with the IRS, the "Departments") concurred with the Notice in *Technical Release 2013-3* and *Insurance Standards Bulletin Series: Application of Affordable Care Act Provisions to Certain Healthcare Arrangements*, respectively. The Church Alliance represents numerous church health plans and their hundreds of thousands of participating church employers across the United States and submits this comment on their behalf. The Church Alliance appreciates the opportunity to comment on the Departments' in their rulemaking process under the Patient Protection and Affordable Care Act ("ACA").

## **I. Background on the Church Alliance**

The Church Alliance is an organization composed of the chief executives of thirty-eight church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The members of the Church Alliance currently provide affordable and comprehensive health benefits to approximately one million Americans.

## **II. Background on Church Plans**

For over 100 years, many denominations have established and maintained health and pension benefit organizations or boards. Through these denominational organizations, local churches are able to offer health and pension benefits to ministers and lay church employees in a cost effective manner. Equally as important, these national denominational church plans are able to take advantage of “economies of scale,” allowing individual local churches and their ministers and lay employees to purchase health care coverage for less than it would cost to purchase similar coverage through the small group or individual insurance markets. This approach has allowed thousands of small local churches, many in rural or disadvantaged areas, to provide benefits to ministers and lay employees. Despite the availability of these plans, most of the denominations represented by the Church Alliance have numerous small churches that do not participate<sup>1</sup> in plans maintained by Church Alliance member organizations, primarily due to their limited budgets.

## **III. Employer Payment Plans**

The Church Alliance is concerned about the impact of the Notice on churches and small church-related employers that have had a longstanding practice of reimbursing employees for the cost of premiums for individually purchased medical insurance policies or plans. This practice was supported by *Revenue Ruling 61-146*, in which the IRS held that, if an employer pays an employee’s premiums for non-employer-sponsored medical insurance, the payments are excluded from the employee’s gross income. This arrangement (referred to in the Notice as an “employer payment plan”) permitted small churches and other small church-related nonprofit employers to assist clergy and lay workers in purchasing health care insurance on a simple and straight-forward basis. In fact, a few Church Alliance member denominations, and numerous smaller denominations that are not Church Alliance members but also benefit from the Church Alliance’s efforts, relied almost exclusively on employer payment plans as a strategy for providing health benefits to clergy and other employees at thousands of small churches.

In many cases, the house of worship may only have one or two employees – the pastor and perhaps one other worker who assists with secretarial or bookkeeping duties. Many of these houses of worship, because they have so few employees, do not maintain a group health plan, especially where their denomination does not maintain a group health plan. Instead, they have relied on *Revenue Ruling 61-146* and structured their compensation packages to reimburse their clergy (and lay employees, if any) for individual medical insurance coverage.

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<sup>1</sup> In some denominations each local church or synagogue (“house of worship”) has the autonomy, based on the governance structure and polity (often based in theology), to decide whether or not to adopt the denomination’s plan. In addition, even in denominations with some hierarchical ecclesiastical authority to require houses of worship to participate in the denominational plan, there are churches that nevertheless do not, for example, if the clergy covered is a licensed pastor instead of an ordained minister because that type of employee is not subject to the ecclesiastical requirement, or simply with respect to less than full-time ministers.

However, under the Notice, employer payment plans are treated as group health plans and, effective January 1, 2014, cannot be “integrated” with an insurance policy purchased in the individual (non-group) market (individual policy). As a result, employer payment plans cannot meet two of the ACA market reform requirements applicable to group health plans (*viz.*, the prohibition on annual limits and the requirement that preventive services be covered without any cost-sharing). Therefore, it appears that there is no longer a way for an employer to reimburse employees for individual policy coverage on a nontaxable or pre-tax basis as an employee benefit.

This change has taken many employers by surprise. This is particularly true of church employers, most of which are small, financially unsophisticated and often reliant upon volunteers for accounting and legal advice. The Notice was issued in September 2013, very shortly before the roll-out of the ACA’s health insurance marketplaces (ACA Marketplaces). The media focus on the substantial difficulties and problems associated with that roll-out obscured virtually all other guidance relating to the ACA that was issued last fall. This media attention included focus on the Departments’ announcement that certain individual policies could be maintained for an additional year (through 2014) despite not fully complying with the ACA’s market reforms. Even the most sophisticated employers were not immediately aware of the significant implications of the Notice with respect to providing non-taxable health care benefits to employees through an employer payment plan.

Many small churches that utilize these types of informal reimbursement arrangements do not have legal staff or the financial resources to regularly monitor sub-regulatory guidance issued by the Departments. They often obtain their information on regulatory changes at the conferences and meetings within their denominations, which often occur only infrequently during the year. Moreover, even church business media sources, the other source of regulatory information for church employers, were late to “catch on” to this very impactful guidance, only starting to cover it in recent weeks. As a result, a few of these small churches only became aware of the changes at the very end of 2013, and most are only just now learning of them.

In addition, most churches set their annual budgets in the fall for the following calendar year, sometimes even earlier due to church calendars. Many of these churches were therefore unaware of the change in the law until well after they had finalized their budgets and compensation packages for 2014.

#### **IV. Transition Relief**

In light of the above, the Church Alliance requests that the IRS postpone the effective date for the changes with respect to the treatment of employer payment plans until January 1, 2015. Such a postponement would provide time to ensure that the affected employers learn about the new requirements so that they can revise and restructure their compensation packages accordingly.<sup>2</sup> In addition, such relief would mirror that given by the Departments to issuers of individual policies that did not fully-comply with the ACA’s market reforms; *i.e.*, an additional year (recently increased to several years) to comply.

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<sup>2</sup> Note: This postponement should apply only with respect to payments to employees who are not eligible for a premium assistance tax credit under section 36B of the Code. We recognize that those employees who purchase insurance coverage on the ACA Marketplaces and who receive a premium tax credit for that coverage should not also be allowed to exclude from income any employer reimbursement for the cost of that coverage.

## V. Additional Questions

The Notice, though lengthy and detailed, left many open questions for employers who for many years have maintained employer payment plans, stand-alone health reimbursement arrangements (HRAs) and premium-only (cafeteria) plans under Code Section 125 (POP). Churches and other small nonprofit employers need more clarity and certainty about the application of the Notice and the ACA market reforms to these arrangements, particularly in light of the \$100 per day per affected participant penalty for noncompliance under Code Section 4980D<sup>3</sup>. Specifically, the Church Alliance respectfully seeks answers to the following questions on behalf of thousands of small church employers.

### Employer Payment Plans

***1. Can an employer payment plan be “integrated” with the group plan of another employer, e.g., the plan of an employee’s spouse’s employer or the plan of an employee’s former employer? Can an employer reimburse the premium/contribution or marginal premium/contribution that its employee pays for such coverage on a nontaxable basis under Revenue Ruling 61-146 and comply with the ACA market reforms?***

Such practices have been common among church employers for many years, and as such, the Church Alliance urges the Departments to allow employer payment plans to be “integrated” with the group health plan of another employer. The Notice permits employer-provided HRAs to be “integrated” with the group plan of an employer other than that sponsoring the HRA, e.g., the employer of an employee’s spouse. Though there are requirements for “integration” of an HRA with a group health plan, e.g., regarding “minimum value”; such requirements could be analogously applied to an employer payment plan.

***2. Can an employer payment plan reimburse cost-sharing amounts, e.g., deductibles, co-payments, and coinsurance amounts, incurred under either an individual policies or a group health plan (of the employer sponsoring the employer payment plan or that of another employer) on a nontaxable basis?***

### Premium-only Plans (POP)

The text of the ACA and the Notice make clear that individual policies purchased in the ACA Marketplace cannot be paid through a POP (Section 125 Plan) on a pre-tax basis. However, the Notice left open the question of whether premiums for individual policies purchased on the private market for non-group coverage (off-Marketplace) can be paid by an employee through a POP.

Once an employee elects to reduce his or her salary through a POP to pay premiums for health coverage, those dollars reduced from salary are treated as employer contributions. Would this cause such pre-tax salary reduction amounts to be treated as an employer payment plan, which, under the terms of the Notice, could not be integrated with an individual policy without violating the ACA market reforms?

***3. In other words, can an off-Marketplace individual policy be paid through a POP?*** The Church Alliance urges the Departments to allow such practices, or, at the least, allow such practices to continue for the 2014 calendar year.

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<sup>3</sup> Annualized for one participant, such a penalty for noncompliance with the ACA market reforms could exceed \$36,000. This amount would represent a very high percentage of an annual budget for a small church.

### **Retiree-only Plans**

The Notice explains that “retiree-only” plans are exempt from the ACA market reforms. The Notice describes a “retiree-only” plan as one that covers fewer than two current employees. The Notice explains that as a result, stand-alone HRAs that are “retiree-only” plans will not violate the ACA market reforms and are viable. However, with respect to “retiree-only” plans, the Notice left open a few questions important to church employers given many longstanding practices.

**4. Can an employer payment plan be a “retiree-only” plan?** The Church Alliance urges the Departments to permit “retiree-only” employer payment plans that are exempt from the ACA market reforms. The Departments could subject such plans to rules similar those that apply to “retiree-only” HRAs. For any month in which a participant is covered by an employer payment plan, i.e., eligible for nontaxable premium reimbursement through the employer payment plan, he or she would be considered to have minimum essential coverage (an eligible employer-sponsored plan under Code Section 5000(f)(2)) and therefore not be eligible for a premium tax credit under Code Section 36B.

**5. Can an employer payment plan reimburse premiums for Medicare Part B, Medicare Part D, Medicare supplement plans, or Medigap plans on a pre-tax basis, i.e., can an employer payment plan or HRA be “integrated” with Medicare, which is neither an individual policy nor a group health plan, for purposes of the ACA Market Reforms rules in the case of a plan that is not a “retiree-only” plan?**

**6. Can the plan of a small employer that has only one employee, i.e., it has fewer than two current employees, qualify as a “retiree-only” plan even if it has no retired former employees?** Many small churches have only one employee, i.e., the minister, and many others have only one employee who would be eligible (i.e., only one employee is full-time) for an employer health plan such as an employer payment plan or HRA. The Church Alliance urges the Departments to provide additional guidance and safe harbors regarding whether the exemption from the market reforms for “retiree-only” plans would apply to an employer payment plan or HRA that covers fewer than two current employees but no retired former employees. Many small churches and other small employers could benefit from additional clarification, as many have only one current employee in an employer group health plan such as an employer payment plan or HRA.

**7. If a small employer participating in a retiree health plan is exempt from the Medicare secondary payer rules (MSP Rules) by nature of the small employer exception (SEE), even though one or more of its employees are “working aged” or have returned to service after retiring, can the plan still be considered a “retiree-only” plan with fewer than two current employees?** Many small churches have fewer than 19 employees and qualify for the SEE under the MSP Rules. The SEE allows the health plans of these small employers to pay secondary to Medicare even for the working aged. These churches often cover working aged or rehired retired ministers through their denomination’s multiple employer health plan; usually the plan for retirees (a plan that pays secondary to Medicare). Can these working aged employees participating in a plan that is exempt from the usual MSP Rules by the SEE be covered through a plan for retirees without causing the plan to fail to be a “retiree-only” plan for purposes of applicability of the ACA market reforms?

Churches have relied on the SEE under the MSP Rules for decades, and some certainty that covering these employees through a retiree plan will not have adverse consequences under the ACA is very important to church employers and the Church Alliance. As such the Church Alliance urges the

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Departments to permit "retiree-only" plans to cover working aged employees who are eligible for SEE treatment under the MSP Rules.

## **VI. Conclusion**

For the reasons explained herein, the Church Alliance recommends that the Departments delay enforcement of certain aspects of *Notice 2013-54* until January 1, 2015. The Church Alliance also recommends that the Departments consider publishing additional guidance soon about the questions raised herein. Thousands of churches and other small church employers have long-relied on many of the practices severely curtailed by the Notice, and without additional guidance and relief, run the risk of incongruent penalties under Code Section 4980D for inadvertent noncompliance with the ACA market reforms.

We would welcome the opportunity to discuss our recommendations and questions with the IRS and the other Departments at your convenience. Please feel free to contact the undersigned at 202-661-3882 if you have any questions or wish to discuss this matter further.

Sincerely,



Stephen H. Cooper  
Government Affairs Counselor, K&L Gates  
On Behalf of the Church Alliance