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CHURCH ALLIANCE

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August 3, 2016

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Dear Mr. Neis and Mr. Tackney:

We are writing in regard to the Church Plan Clarification Act, which was enacted at the end of 2015 (Section 336 of Division P of the Consolidated Appropriations Act, 2016; Pub. L. No. 114-113; the "CPCA"). The CPCA addresses a number of urgent issues facing church retirement plans. After several years of advocating for the CPCA, members of the church benefits community are eager to move forward expeditiously under this new legislation.

The Church Alliance is a coalition of the chief executive officers of 37 church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. Our member benefit programs provide retirement and health benefits to more than 1 million clergy, lay workers, and their family members. These church benefit boards, and the individuals covered by their programs, are directly impacted by the CPCA. The Church Alliance and its members have a keen interest in the timely implementation of the CPCA to help our member benefit programs continue to meet the needs of their beneficiaries.

As the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") consider the implementation of the CPCA, the issuance of a notice or other similar guidance could be helpful as church

benefit programs seek to move forward under the new law. If the Treasury and IRS pursue such guidance, we respectfully request consideration of the following points:

I. Application of Controlled Group Rules to Church Plans – In General

As background, subject to certain exceptions, new Internal Revenue Code ("IRC") section 414(c)(2)(A) provides that an organization that is otherwise eligible to participate in a church plan shall not be aggregated with another organization unless (1) one such organization provides (directly or indirectly) at least 80 percent of the operating funds for the other organization during the preceding taxable year of the recipient organization, and (2) there is a degree of common management or supervision between the organizations so that the organization providing the operating funds is directly involved in the day-to-day operations of the other organization. For a nonqualified church-controlled organization ("non-QCCO"), IRC section 414(c)(2)(B) requires aggregation with other non-QCCOs or organizations that are not tax-exempt if at least 80 percent of the directors or trustees of such other organization or organizations are either representatives of, or directly or indirectly controlled by, the first non-QCCO.

We suggest that, for purposes of the rules described in IRC sections 414(c)(2)(A) and (B), the presence of the requisite common management or supervision (IRC section 414(c)(2)(A)) or direct or indirect control (IRC section 414(c)(2)(B)) should be determined based upon objective indications of *actual* participation in the management, supervision, or control of an organization. The mere *right* to participate in an organization's management, supervision, or control should not be sufficient for purposes of the aggregation rules provided by these sections. As an illustration, if the governing documents of an organization (the "first organization") that is otherwise eligible to participate in a church plan grants another organization (the "second organization") a right to appoint a member to the first organization's governing board, and the second organization provides at least 80 percent of the operating funds of the first organization, the two organizations will not be aggregated under the rule provided in IRC section 414(c)(2)(A) unless the second organization actually appoints an individual to serve on the first organization's governing board, and that individual does in fact participate in board meetings and other proceedings so as to influence the management and supervision of the first organization. If the second organization does not exercise its right to appoint a representative, the aggregation rule would not apply.

II. Application of Controlled Group Rules to Church Plans – Notice of Revocation of Permissive Aggregation/Disaggregation Election

For purposes of providing notice to the Treasury Secretary of a revocation of an election to permissively aggregate under new IRC section 414(c)(2)(C) or to permissively disaggregate

under new IRC section 414(c)(2)(D), we request that any guidance set forth the appropriate procedure for submitting such a notice.

As background, IRC section 414(c)(2)(C) provides that a church or convention or association of churches (or its designee) may elect to treat church-related organizations that are eligible to participate in a church plan as a single employer. IRC section 414(c)(2)(D) provides that an employer may elect to treat churches and entities that are not churches as separate employers. Both elections, once made, apply to all succeeding plan years unless revoked with notice provided to the Treasury Secretary.

We suggest that guidance clarify that such an election may be made in any reasonable manner, such as by executing a corporate resolution. Further, we suggest that guidance indicate that the revocation of such an election may be made by submitting a notice to that effect to the Treasury Secretary by mail to a designated physical address or by email to a designated email address. Such notice should include the date such revocation is intended to take effect.

To ensure that the filing of a revocation of election under IRC section 414(c)(2) is as efficient and easy to administer as possible, we suggest that the guidance not require any further notice of revocation beyond the notice to the Treasury Secretary.

III. Application of Contribution and Funding Limitations to 403(b) Grandfathered Defined Benefit Plans

As background, subsection (b) of the CPCA amends the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248) ("TEFRA") to provide that defined benefit plans established under IRC section 403(b) are subject to the limitation on benefits applicable to defined benefit plans.[1] Previously under TEFRA, certain defined benefit arrangements established by church-related organizations and in effect on September 3, 1982 were subject to both the limitation on benefits applicable to defined benefit plans and the limitation on contributions applicable to defined contribution plans.[2] The amendment made by subsection (b) of the CPCA applies retroactively to IRC section 403(b) defined benefit plans established and in existence as of the date of enactment of the CPCA.

We request that, in the future, Treasury and IRS update the regulations under IRC section 415 and any other affected regulations or other guidance to reflect the amendment made by subsection (b) of the CPCA. In the meantime, we suggest that any guidance on the CPCA clarify that taxpayers should disregard any provision of the regulations under IRC section 415, or other regulations or guidance that indicates that IRC section 403(b) defined benefit plans are subject to the limitation on contributions applicable to defined contribution plans.

[1] For the limitation on benefits applicable to defined benefit plans, *see* Treas. Reg. secs. 1.403(b)-10(f) and 1.415-1(b)(2) and (3).
[2] *See* Sec. 251(e)(5) of Pub. L. No. 97-248.

IV. Automatic Enrollment by Church Plans

Subsection (c) of the CPCA authorizes church plans to offer automatic enrollment to their beneficiaries, by preempting State law to the contrary. The CPCA auto-enrollment provision is largely based on the auto-enrollment provision for ERISA plans added by the Pension Protection Act of 2006 (Pub. L. No. 109-280; the "PPA"). Following the enactment of the PPA, the Department of Labor, Treasury, and IRS promulgated a significant amount of guidance on the auto-enrollment provision, particularly with respect to notice and default investment requirements. Because the CPCA auto-enrollment provision is modeled on the corresponding PPA provision, church plans would benefit from sub-regulatory guidance to bridge the gaps and resolve important implementation issues with respect to the legislation. Consequently, we suggest that any guidance permit church plans offering auto-enrollment to apply existing auto-enrollment guidance to their arrangements on a reasonable, good faith basis.

To further parallel the options available to benefit plans under the PPA, we suggest that guidance clarify that a church plan that offers an automatic contribution arrangement ("ACA") which satisfies the requirements of IRC section 414(w)(3) may elect to treat such ACA as an eligible automatic contribution arrangement ("EACA") under the rules that currently apply to ERISA plans – provided, however, that an electing church plan (under IRC section 410(d)) must comply with the regulations that are generally applicable to EACAs. In particular, the guidance should clarify that a church plan that elects to treat an ACA as an EACA may allow permissible withdrawals in accordance with section 1.414(w)-1 of the Treasury Regulations. Elective applicability of the EACA requirements and regulations will offer flexibility with respect to the number and type of notices that a church plan is obligated to provide to its beneficiaries.

In addition, we suggest that guidance indicate that a church plan that satisfies the qualified automatic contribution arrangement ("QACA") requirements of IRC Section 401(k)(13) be deemed to satisfy the automatic contribution arrangement requirements of subsection (c) of the CPCA, other than the default investment requirement of subsection (c)(4) (which must be satisfied independently under the facts and circumstances).

Lastly, we suggest that guidance indicate that any failures to satisfy the notice requirements of subsection (c)(3) of the CPCA, including failure to provide the notice on a timely basis, will not result in a loss of preemption provided that the failure is corrected within a reasonable amount of time after discovery.

V. Certain Plan Transfers and Mergers

Subsection (d) of the CPCA creates new IRC section 414(z), which allows for certain plan transfers and mergers. We suggest that any interim guidance clarify that section 414(z) does not require the issuance of regulations under IRC section 414(z) to be effective.

Additionally, it would be helpful for guidance to specify how to determine the accrued benefit for certain mergers and transfers under section 414(z). Specifically, we recommend that, for transactions under section 414(z) involving a transfer of all or any portion of an accrued benefit from a defined benefit plan to an individual account balance plan, the amount of such accrued benefit be determined in accordance with section 1.414(l)-1(b)(9) of the Treasury regulations, which provides that the present value of an accrued benefit must be determined on the basis of reasonable actuarial assumptions. Further, we recommend that, for this purpose, plan sponsors be permitted (but not required) to adopt the present value assumptions used by the Pension Benefit Guaranty Corporation (PBGC) as of the date of the merger or spinoff, and that such PBGC assumptions are deemed to be reasonable.

VI. Investments by Church Plans in Collective Trusts

Subsection (e) of the CPCA clarifies that the assets of a church plan or an organization described in section 414(e)(3)(A) that has as its principal purpose or function the administration of a church plan may be commingled and invested in a group trust described in IRS Revenue Ruling 81-100 (as modified by IRS Revenue Rulings 2004-67, 2011-1, and 2014-24), or any subsequent revenue ruling that supersedes or modifies such revenue ruling.[3] We request that the IRS update Revenue Ruling 2011-1 to reflect these section 336(e) provisions. Further, we request that the IRS confirm that no changes to Treas. Reg. sec. 1.403(b)-9(a)(6) are necessary to permit the commingling authorized under the CPCA section 336(e) provisions. Lastly, we request that the update to Revenue Ruling 2011-1 make clear that assets that can be permissibly commingled with church plan assets (such as assets exclusively devoted to church purposes) need not be subject to the exclusive benefit requirement that was applicable to group trusts under Revenue Ruling 2011-1. As to the timing for the requested update of Revenue Ruling 2011-1, we note that many providers of group trust investment funds may not allow investments permitted by section 336(e) of the CPCA until Revenue Ruling 2011-1 is updated to reflect these changes, so we ask that Revenue Ruling 2011-1 be updated as expeditiously as possible.

[3] Section 336(e) of the CPCA also provides that assets which are otherwise permitted to be commingled for investment purposes with the assets of church plans or section 414(e)(3)(A) organization assets can also be invested in an 81-100 group trust (for example, assets that are exclusively devoted to church purposes).

* * *

Thank you for your consideration of these points as Treasury and IRS contemplate potential guidance to implement the CPCA. Please do not hesitate to contact us if you have questions or we can be helpful in any way. We are grateful for your work on these issues of significant importance to the church benefits community.

Sincerely,

Karishma S. Page
Partner
K&L Gates LLP

On behalf of the Church Alliance