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CHURCH ALLIANCE

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

¹As used in this comment letter, the term “clergy” refers to ministers, priests, rabbis, imams, and other spiritual leaders.

²Memorandum 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 ACA³ 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).

November 22, 2017

Page 4

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,

A handwritten signature in black ink, appearing to be 'KS' followed by a long, sweeping horizontal line.

Karishma S. Page

Partner,

K&L Gates LLP

On behalf of the Church Alliance