CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

Counsel:
K&L Gates LLP
1601 K Street NW
Washington D.C. 20006
Tel (202) 778-9000
Fax (202) 778-9100

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Electronically to Notice.comments@irscounsel.treas.gov

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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2015-52

Comment to Notice 2015-52: Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage

To Whom It May Concern:

I. Introduction

The Church Alliance is submitting this letter as a public comment to *Notice 2015-52*: *Section 4980I – Excise Tax on High Cost Employer-Sponsored Health Coverage* (the "Notice") published by the United States Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") at 2015-35 I.R.B. 227 on July 30, 2015. To some extent this comment letter supplements a letter dated May 15, 2015, in which the Church Alliance commented on *Notice 2015-16* (the "Prior Comment"). A copy of the Prior Comment is attached.

The Church Alliance is an organization composed of the chief executives of thirty-seven church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The church health benefit plans represented by the Church Alliance ("denominational health plans") provide health plan coverage to over one million participants (clergy and lay workers) serving over 155,000 churches, synagogues and affiliated organizations ("church employers"). We hope our comments will help Treasury and the IRS apply the requirements with respect to the excise tax on high cost employer-sponsored health coverage under Internal Revenue Code (the "Code") section 4980I (the "Excise Tax") to denominational health plans and church employers.

II. Executive Summary

As explained below, the Excise Tax is to be assessed on high cost employer-sponsored health coverage, but the determination of the cost of coverage under denominational health plans is challenging. Code section 4980I provides that cost is to be determined under rules similar to the rules for determining applicable premiums under Code section 4980B ("COBRA"). However, denominational health plans are excluded from COBRA. Moreover, the contributions paid by church employers for denominational health plan coverage are unlikely to have much correlation to the cost of coverage for the employees of that particular church employer, because of adjustments often made based on religious beliefs and principles. The processes expected to be involved in calculating and allocating any excess benefit in the time period necessary to complete these processes are particularly challenging for church employers in denominational health plans. As a result of these challenges, the Church Alliance continues to request relief from the Excise Tax for denominational health plans to the greatest extent possible, as well as flexibility in its application, to the extent relief is not granted.

III. Challenges for Denominational Health Plans

A. Persons Liable for the Section 4980I Excise Tax

Section 4980I(c)(2)(C) provides that the "coverage provider" liable for any applicable Excise Tax for "other applicable coverage" is "the person that administers the plan benefits". Treasury and the IRS have requested comments on two alternative approaches for determining the identity of the person that administers the plan benefits. For the reasons set forth below, the two approaches described in the Notice do not provide the level of certainty necessary to identify the coverage provider for other applicable coverage under denominational health plans.

Under the first approach described in the Notice, the person that administers the plan benefits would be the person responsible for performing the day-to-day functions that constitute the administration of plan benefits, which will generally be a third-party administrator for benefits that are self-insured. Many self-insured denominational health plans offer one or more benefit packages providing applicable coverage, but have separate third party administrators that perform the relevant day-to-day functions for separate categories of benefits under the plans: medical, mental health and prescription drug benefits. Therefore, this approach will not provide the level of certainty necessary to identify the third party administrator that is the coverage provider for other applicable coverage.

Under the second approach described in the Notice, the person that administers the plan benefits would be the person that has ultimate authority or responsibility under the plan with respect to the administration of plan benefits (including the final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility. The relevant administrative matters over which the person that administers the plan benefits would have ultimate authority or responsibility could include eligibility determinations, claims administration and arrangements with service providers. Given the unique structure of denominational health plans, in certain cases there may be different entities that have ultimate authority or responsibility for the different administrative matters with respect to the same benefit package. For example, a parish or synagogue may have ultimate responsibility over eligibility determinations, but the denominational board may have ultimate responsibility over claims administration. In addition, in a denominational health plan, an ecclesiastical authority may have ultimate

authority or responsibility with respect to plan benefit administration in certain circumstances. Therefore, this approach also fails to provide the level of certainty necessary to identify the entity that is the coverage provider for other applicable coverage.

Therefore, the Church Alliance respectfully requests that Treasury and the IRS consider an alternate approach that will provide flexibility and certainty to denominational health plans by allowing the designation of the coverage provider in the plan document for the applicable coverage. This approach would provide flexibility to denominational health plans to identify the entity best suited to comply with the obligations placed on the coverage provider and provide certainty to such health plans with respect to the identity of the coverage provider for other applicable coverage.

B. Church Structures and Denominational Health Plans

Even after resolving the above question on the coverage provider, the application of the Excise Tax requirements to denominational health plans remains challenging. This is in part because each denomination has a unique governance structure that reflects its theological beliefs, which adds complexity to the application of the requirements. That governance structure often determines how direct the relationship between each church employer, clergy member and the denominational plan is, and may affect the way employer and employee contributions for coverage are established or allocated, which in turn impacts the determination of the "cost of coverage". The structure of the denomination also typically informs the identity of the plan sponsor and the control that it can exert on plan design and contribution limits. As a result, the true "cost of coverage" under a self-insured denominational health plan is not always readily evident. The organization responsible for the health plan design and administration may not actually know the level of contribution that the local unit requires of the employee, because there is no centralized human resource or payroll function for any of the denominations.

Sometimes contributions set by the denominational health plan, e.g., single coverage rates and family rates, are blended by an intermediate church body or unit of church government in various ways. Rates may be blended to remove any perceived barriers to appointment at a particular church employer due to a clergyperson's family size.

Some denominations and intermediate church bodies may cross-subsidize church employers through contribution structures. They may charge higher contribution rates to churches with larger memberships, greater revenue (giving), or more assets, and in turn charge a reduced contribution rate to smaller or rural churches or to churches serving economically poorer populations. This cross-subsidization reflects and serves the mission work of these denominations.

Some denominational health plans require a contribution for coverage that is simply a fixed percentage of a clergyperson's, or an employee's, compensation. This percentage charge may not directly reflect the actual cost of coverage provided for its employees, but rather an amount that the denomination has determined is that church employer's fair share of the overall cost of coverage for all church workers in the plan. In other cases, the contribution under the health plan may be combined with the contribution to the church pension plan, to set one benefits coverage contribution for participating church employers. These unique contribution arrangements based on church beliefs and structure present challenges for application of the Excise Tax requirements to denominational health plans.

C. Employer Aggregation

1. Identification of the applicable coverage taken into account as made available by an employer (Code § 4980I(d)(1)(A))

To lend some certainty to the challenging process of applying the Excise Tax requirements to denominational health plans, the Church Alliance recommends that each individual church employer generally be held responsible for determining the applicable coverage provided to its employees. An individual church employer may be the only entity to know all the coverage provided to its employees. In addition, individual church employers typically will be in a position to identify which coverage is excludable from each employee's gross income under Code section 106, as the individual church employer will be responsible for determining that in connection with the preparation of the Form W-2s. We suggest, though, due to the unique structures of denominations and church employers, flexibility in the application of this rule, which would allow individual church employers to rely on another party, perhaps another member of its controlled group under Code section 414(b) or (c) or the applicable denominational plan, for determining the applicable coverage, with the responsibility for the determination of applicable coverage to remain with the individual church employer, unless another responsible party is clearly designated.

2. Identification of the employees taken into account for the age and gender adjustment (Code § 4980I(b)(3)(C)(iii))

We suggest that the identification of the employees taken into account for the age and gender adjustment be permitted to be done on a plan-wide basis in the case of a denominational health plan. As noted in our Prior Comment, a plan-based approach will reflect the basis on which many denominational health plans actually allocate costs. As described above, many denominations and intermediate church bodies cross-subsidize participating religious employers through their contribution structures. Alternatively, some denominational health plans charge contributions for coverage that are a fixed percentage of the clergyperson's or employee's compensation, thus effectively subsidizing coverage for employers with lower compensated participants.

A plan-wide approach will have the added advantage of saving plans the expense of calculating the age and gender adjustments on an employer-by-employer basis. As noted in our Prior Comment, few denominational plans calculate their costs on an employer-by-employer basis. Also, a denominational health plan may not know exactly which entities employ each of its participants. A diocese, for example, may contribute to a denominational benefit plan on behalf of all the employees employed by the parishes and other organizations within the diocese, without identifying exactly who is the common law employer of each participant.

3. Identification of the taxpayer responsible for calculating and reporting the excess benefit (Code § 4980I(c)(4)(A))

Individual church employers generally should be responsible for calculating and reporting any excess benefit. As with the determination of applicable coverage, we suggest, though, flexibility in the application of this rule, which would allow individual church employers to rely on another party, perhaps another member of its controlled group under Code section 414(b) or (c) or the applicable denominational plan, to calculate and report excess benefits. This reliance may be necessary because the church employer

may not have the information necessary for it to ascertain the cost of coverage, or may not have the expertise to perform such calculation and reporting. However, any such delegation should not affect the individual employer's responsibility, unless another responsible party is clearly designated. This is similar to the way in which the calculation and reporting requirements are handled under Code section 6055 with respect to minimum essential coverage. The preamble to the final regulations under Code section 6055 provides:

> As stated in the preamble to the proposed regulations, one member of a controlled group may assist the other members by filing returns and furnishing statements on behalf of all members, thus providing administrative flexibility. However, each employer is treated as a plan sponsor separately liable for timely and correct reporting. Employers in controlled groups that are not applicable large employer members (determined after applying the aggregation rules under § 54.4980H–1(a)(16)), and reporting entities (such as issuers) that are not reporting as employers, may report under section 6055 as separate entities, or one entity may report for the group.

79 Fed. Reg. 13220, 13221 (Mar. 10, 2014).

The IRS and Treasury take a similar approach with respect to the information reporting by large employers under Code section 6056. *See* the preamble to the final regulations under Code section 6056, 79 Fed. Reg. 13231, 13246 (Mar. 10, 2014).

4. Identification of the employer liable for any penalty for failure to properly calculate the tax imposed under § 4980I (Code § 4980I(e)(1)(B))

Code section 4980I(e)(1)(B) provides that the penalty for failure to properly calculate the excess benefit under Code section 4980I(c)(4) shall be imposed on the "employer or plan sponsor." Presumably, the penalty is imposed on the "plan sponsor" only in the case of a multiemployer plan. (See the last paragraph of Code section 4980I(c)(4).) That leaves the penalty to be imposed on the "employer" in all other cases. We suggest that individual church employers be responsible for any penalties for failure to properly calculate the tax under Code section 4980I. Church employers that rely on another party for calculations and reporting may be able to receive indemnity or other financial recompense from the other party for any such penalties, but this risk-shifting is best accomplished by agreement, rather than by regulation.

D. Cost of Coverage

The Notice provides that "[t]o to calculate the amount of any excise tax that a coverage provider may owe under Section 4980I for a taxable period, an employer must determine the extent, if any, to which the cost of applicable coverage provided to an employee during any month of the taxable period exceeds the dollar limit" and that "[t]he the employer then must notify both the IRS and the coverage provider of the amount of the excess benefit...." These requirements are particularly challenging with respect to church employers in denominational health plans, many of which have volunteer treasurers, who do not have the knowledge, information or resources to make this determination, much less to make it soon after the end of the taxable year. The Notice cites to Section 4980(d)(2)(A) of the Code, which provides that the cost of coverage under Code section 4980I is to be determined under rules similar to the rules of COBRA for

determining "applicable premiums." However, as previously noted, denominational health plans are not subject to COBRA and thus do not calculate "applicable premiums" under COBRA. Instead of charging premiums, denominational health plans obtain contributions to cover the aggregate amount needed to pay for the health coverage for all plan members.

1. General

In the Notice, Treasury and the IRS stated that they "anticipate that the potential timing issues are likely to be different for insured plans and self-insured plans", and will also be different for Health Savings Accounts (HSAs), Archer Medical Savings Accounts (Archer MSAs), Health Flexible Spending Arrangements (FSAs), and Health Reimbursement Arrangements (HRAs). The Church Alliance agrees that such differences likely generally exist.

a. Self-Insured Plans

The Notice continues by stating that with self-insured plans, the information necessary to calculate and allocate any excess benefit "should be available to the employer relatively soon after the applicable calendar year ends." This will often not be the case for employers participating in a self-insured denominational health plan. The necessary information for this calculation likely will not be available to the church employer relatively soon after the close of the year, and may not be available at all, since the church employers may be separated from cost data by at least a couple of decision layers, based on church structure, mandates and guidance.

In many self-insured denominational health plans participating employers have no responsibility beyond the payment of their contributions. Such employers should be able to elect to use their contributions as their "cost", which would be available to each employer relatively soon after the applicable calendar year ends. However, since all church employers do not have such a contribution structure, the use of contributions as the measure of cost should not be mandatory for all church employers, and such employers should be allowed flexibility and additional time to obtain the information necessary to determine cost, to calculate a reasonable good faith estimate or to determine the cost of similar coverage available elsewhere (as a substitute for the calculation of cost).

b. HSAs, Archer MSAs, FSAs, and HRAs

In contrast to the difficulties described immediately above, church employers in denominational health plans should readily be able to determine the cost of applicable coverage for HSAs, Archer MSAs, FSAs, and HRAs, about which they should be able to obtain information soon after the close of the taxable period, if cost is based on amounts contributed. If, instead, cost would be based on amounts used from HSAs, Archer MSAs, FSAs, or HRAs, it would be much more difficult for church employers to determine cost soon after the close of the taxable year. In our Prior Comment the Church Alliance asked that HRAs be excluded from the cost of coverage under Code section 4980I. The Church Alliance continues to request such an exclusion, which would be consistent with the exclusion of HRAs from the aggregate reportable cost of coverage reported on Form W-2 (under *Notice 2012-09*). However, if that request cannot be granted, the Church Alliance would support the approach that the Treasury and IRS are considering under which contributions to account-based plans would be allocated on a pro-rata basis over the period to which the contribution relates, regardless of the timing of the contributions during the period.

A possible solution to the challenges of determining the cost of applicable coverage for church employers in denominational health plans would be to require those employers only to calculate, report and pay Excise Tax based on the cost of coverage under the plans about which they have knowledge: account-based plans. This also would be consistent with Section 4980I of the Code because, as described above and in the Notice, the cost of coverage under Code section 4980I is to be determined under rules similar to the rules of COBRA for determining "applicable premiums", but those rules are inapplicable to denominational health plans, so employers in such plans do not calculate such premiums. In addition, this would be consistent with the relief accorded for W-2 reporting of health care cost under *Notice 2012-9*.

Finally, the Church Alliance requests Treasury and the IRS to grant church employers providing coverage through a denominational health plan a lengthy transition period before the Excise Tax becomes applicable to them. Church employers and denominational health plans are making their best efforts to implement all the requirements of the Affordable Care Act (ACA), but given the atypical employment and structures of churches and denominations, longer time periods to implement these changes are necessary. This is especially so with respect to the Excise Tax, where the processes expected to be involved in calculating and allocating any excess benefit and the time period necessary to complete these processes is expected to be particularly lengthy and difficult, given the challenges described in this letter and in the attached Prior Comment.

2. Exclusion from Cost of Applicable Coverage of Amounts Attributable to the Excise Tax

The Notice indicates on the basis of Code section 4980(d)(2)(A) that any Excise Tax reimbursement to the coverage provider should be excluded from the cost of applicable coverage. We request that the IRS and Treasury make clear that in the case of a tax-exempt coverage provider that any Excise Tax reimbursements are not unrelated business income to the coverage provider. This is hinted at in footnote 5 of the Notice, but should be clarified.

The Notice indicates that the IRS and Treasury are considering whether some or all of the income tax reimbursement to the service provider be excluded from the cost of applicable coverage. We suggest that any income tax reimbursement be excluded from the cost of applicable coverage.

E. Age and Gender Adjustment

The Church Alliance supports the potential adjustment to the baseline per employee dollar limits based on age and gender, as proposed in the Notice. It is critical to the Church Alliance that the calculation supporting the adjustment reflects the structure of denominational health plans, which is unique to each denomination and does not necessarily follow an employer/employee relationship, as described herein in Section III.B. Accordingly, the Current Population Survey as summarized in Table A-8a, as referenced in the Notice, provides an adequate basis on which to compare employed populations, but only if the population of those covered by the denominational health plans, excluding spousal and dependent coverage, are treated as one employee population (rather than being compared employer by employer). To do otherwise would result in potentially thousands of calculations per denominational health plan, sometimes with only one or two individuals per employer receiving health benefits.

The Church Alliance supports flexibility as to the timing of the date of measurement. From an administrative perspective, the first day of the plan year is often a time of the most benefit changes, following autumn annual enrollment. Providing the opportunity to select a day in the plan year, then consistently apply that date going forward, recognizes the transition of this time period, while preventing possible abuse.

F. Notice and Payment

1. Notice of calculation of applicable share of excess benefit and payment of tax

Many church employers participate in more than one group health plan. The church board that sponsors and administers a self-insured denominational health plan may not be aware of this other coverage (e.g., FSAs, HSAs and HRAs) provided by each of the thousands of church employers participating in the denominational health plan. If the church board doesn't know that multiple coverage providers exist or is unaware of all the coverage providers for each church employer, and is the entity designated to perform the excess benefit calculation, the amount of excess benefit will be incorrect, as will be the applicable share of the excess benefit assigned to each coverage provider. Church employers that offer insured group health plans will need to calculate the amount of excess benefit subject to the Excise Tax taking into account all other health coverage offered (e.g., FSAs, HSAs and HRAs). Church employers offering self-insured health plans also will need to perform this excess benefit calculation, if this duty is not delegated to another entity, such as the church board. The employer must also calculate and notify each coverage provider of its applicable share of the excess benefit. Many church employers rely on volunteers to carry out administrative duties and these individuals will not have in-depth knowledge of the Excise Tax, how it is calculated and how parties are notified.

Because of the complexity of a self-insured denominational health plan that does not have knowledge of individual church employers' other health plans, and the lack of sophistication of volunteer church workers required to calculate and notify parties of the Excise Tax, the Church Alliance expects many errors in these excess benefit calculations. The Church Alliance asks for a reasonable period of time for the church employer and/or church board to calculate the amount of the excess benefit subject to the tax and to notify the coverage providers of their applicable share. The process needs to allow time for coverage providers to review the calculation of their applicable share of the amount of the excess benefit subject to the tax, to question the applicable share if they think it is incorrect, and to resolve disputes before the IRS is notified. The Church Alliance believes a period of at least six months after the end of the plan year is required to calculate the Excise Tax and notify coverage providers and the IRS. After the coverage providers agree with their applicable share, they should be allowed an additional 60 days to remit the payment to the IRS.

2. Correction of Errors

Because calculation errors can impact multiple coverage providers and multiple plan/coverage years, the Church Alliance also asks for flexibility in the method used for correction of errors. If the church employer and coverage providers do not detect and resolve a calculation error until after the IRS has been notified and the Excise Tax has been paid, any reallocation is bound to be complex and could cause years of angst for the IRS, employers and coverage providers alike. Coverage providers will need specific plan information from the church employers to substantiate the excess benefit calculation and to resolve the

error. If the amount of the Excise Tax is correct but the allocation of the applicable share among coverage providers is incorrect, the Church Alliance proposes that coverage providers that paid more than their applicable share obtain reimbursement directly from those coverage providers that paid less than their applicable share. The IRS can be notified of the reallocation, but would not be required to issue refunds or invoices for additional amounts due.

G. Other Issues under Section 4980I

The Notice also invited comments on circumstances in which the interaction between the provisions of Code sections 4980H and 4980I may raise concerns and how these provisions might be coordinated, consistent with the statutory requirements of these provisions and in a manner that is administrable for employers and the IRS. The Church Alliance echoes the concerns raised in other comment letters submitted in response to *Notice 2015-16*, that health coverage that complies with the lowest possible minimum value requirement may soon exceed the applicable dollar limit under Code section 4980I, thereby exposing applicable large employers to 4980H assessable payments by merely complying with the law. Medical inflation has consistently outpaced increases in the consumer price index, which will make it increasingly more difficult, if not impossible, for employers to meet the minimum value standard to avoid the assessable payment under Code section 4980H, without exceeding the applicable dollar limits under Code section 4980I. Therefore, the Church Alliance requests flexibility or a delay in the application of Excise Tax and urges Treasury and the IRS to promulgate rules that would carry out the intention of the ACA to impose an excise tax on only excessively rich group health plans, not plans that meet the minimum requirements.

IV. Conclusion

Based on the foregoing, the Church Alliance respectfully requests relief again from the Excise Tax, including transition relief and relief with respect to the cost of coverage provided under a self-insured group health plan that is not subject to federal continuation coverage requirements, such as denominational health plans. In addition, we request flexibility in the application of the Excise Tax, as above detailed.

Thank you for your consideration of our views on this important issue to church employers and employees. If you have questions or wish to discuss this matter further, please feel free to contact the undersigned at (202) 661-3882 or stephen.cooper@klgates.com.

Sincerely,

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