CHURCH ALLIANCE
Acting on Behalf of Church Benefits Programs

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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
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On Behalf of the Church Alliance