Article ____. NONQUALIFIED CHURCH-CONTROLLED ORGANIZATIONS

1.01 Nonqualified Church-Controlled Organizations. Notwithstanding any provisions of the Plan to the contrary, the provisions of this Article ___ shall apply to any Participating Employer that is a Nonqualified Church-Controlled Organization.

1.02 Establishment of Plan. To the extent permitted by applicable law, Treasury Regulations and other guidance, a Participating Employer described in Section 1.01 intends that any Annuity Contracts or Custodial Accounts will be investments of this Plan and will not be subject to the requirements of either Code section 403(b)(1) or 403(b)(7), and instead will be subject to the requirements of Code section 403(b)(9).

1.03 Non-Discrimination Requirements. Notwithstanding any provisions of the Plan to the contrary, contributions made on behalf of a Participant by a Participating Employer that is a Non-QCCO must meet the applicable non-discrimination rules imposed by Code section 403(b)(12)(A), including the following requirements:

(a) Salary Reduction Contributions. To the extent required by applicable law and at least once during each Plan Year, each Participating Employer that is a Non-QCCO must provide each Employee with notice of the Employee's effective opportunity to enter into a Salary Reduction Agreement with the Employer.

(b) Limitations on Matching Contributions and After Tax Contributions

(1) Current Year Testing. For each Plan Year, the ACP for Participants who are Highly Compensated Employees and the ACP for Participants who are Non-Highly Compensated Employees must satisfy one of the following tests:

(A) 1.25 Test. The ACP for a Plan Year for Participants who are Highly Compensated Employees for each Plan Year shall not exceed the ACP for Participants who are Non-Highly Compensated Employees for that Plan Year multiplied by 1.25; or

(B) 2 Percent Test. The ACP for a Plan Year for Participants who are Highly Compensated Employees for the Plan Year shall not exceed the ACP for Participants who are Non-Highly Compensated Employees for that Plan Year multiplied by 2, provided that the ACP for Participants who are Highly Compensated Employees does not exceed the ACP for Participants who are Non-Highly Compensated Employees in the Plan Year by more than two (2) percentage points.

(2) Special Rules.

(A) A Participant is a Highly Compensated Employee for a particular Plan Year if he meets the definition of Highly Compensated Employee in effect for that Plan Year. Similarly, a Participant is a Non-Highly Compensated Employee for a particular Plan Year if he does not meet the definition of a Highly Compensated Employee in effect for that

Plan Year.

(B) For purposes of this section, the Contribution Percentage for any Participant who is a Highly Compensated Employee and who is eligible to have Contribution Percentage Amounts allocated to his account under two or more plans or arrangements described in Code section 401(a) or 403(b) that are maintained by the Employer, shall be determined as if the total of such Contribution Percentage Amounts was made under each plan and arrangement. If a Highly Compensated Employee participates in two or more such plans or arrangements that have different plan years, all Contribution Percentage Amounts made during the Plan Year under all such plans and arrangements shall be aggregated. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under Code section 401(m).

(C) In the event that this Plan satisfies the requirements of Code sections 401(m), 401(a)(4) or 410(b) only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this Plan, then this section shall be applied by determining the ACP of Employees as if all such plans were a single plan.

(D) For purposes of the ACP test, After Tax Contributions are considered to have been made in the Plan Year in which contributed to the Plan. Matching Contributions and Qualified Nonelective Contributions will be considered made for a Plan Year if made no later than the end of the 12-month period beginning on the day after the close of the Plan Year.

(3) At any time during the Plan Year, the Employer may make an estimate of the amount of After-Tax Contributions or Matching Contributions that will be permitted under this Section 1.05(b) and may reduce the maximum permitted contributions for Highly Compensated Employees under Sections ____ and ____ to the extent the Employer determines in its sole discretion is necessary to satisfy at least one of the requirements of subsection (b)(1).

1.04 <u>Distribution of Excess Aggregate Contributions</u>.

(a) <u>Distribution of Excess Aggregate Contributions</u>. Notwithstanding any other provisions in the Plan, Excess Aggregate Contributions, plus any income and minus any loss allocable thereto, shall be distributed no later than twelve months after a Plan Year to Participants to whose Accounts such Excess Aggregate Contributions were allocated for such Plan Year. Excess Aggregate Contributions are allocated to the Highly Compensated Employee with the largest Contribution Percentage taken into account in calculating the Actual Contribution Percentage test for the year in which the excess arose, beginning with the largest amount of such Contribution Percentage Amounts and continuing in descending order until all the Excess Aggregate Contributions have been allocated. If such Excess

Aggregate Contributions are distributed more than two and one half (2½) months after the last day of the Plan Year in which such excess amounts arose, a ten percent (10%) excise tax will be imposed on the Employer maintaining the Plan with respect to those amounts. Excess Aggregate Contributions will be treated as Annual Additions under the Plan even if distributed.

(b) Determination of Income or Loss. Excess Aggregate Contributions shall be adjusted for any income or loss. The income or loss allocable to Excess Aggregate Contributions allocated to each Participant is the income or loss allocable to the Participant's Matching Contribution account, and, if applicable, Qualified Nonelective Contribution account for the Plan Year multiplied by a fraction, the numerator of which is such Participant's Excess Aggregate Contributions for the year and the denominator is the Participant's Accumulated Benefit(s) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan Year.

(c) Accounting for Excess Aggregate Contributions. Excess Aggregate Contributions allocated to a Participant shall be distributed on a pro-rata basis from the Participant's Matching Contribution account and, if applicable, the Participant's Qualified Nonelective Contribution account.

1.05 Qualified Nonelective Contributions.

(a) The Employer may make Qualified Nonelective Contributions on behalf of Participants that are sufficient to satisfy the ACP test.

(b) Qualified Nonelective Contributions will be allocated only to Participants who are Non-Highly Compensated Employees, in the ratio which each such Participant's Compensation for the Plan Year bears to the total Compensation of all such Participants for such Plan Year.

1.06 Definitions. For purposes of this Article VIII, the following definitions shall apply:

(a) ACP or Actual Contribution Percentage means, for a specified group of Participants (either Highly Compensated Employees or Non-Highly Compensated Employees), the average of the Contribution Percentages of the Eligible Participants in that group (calculated separately for each Participant in the group).

(b) Compensation means compensation as defined in Section 4.01(b)(2). The annual compensation of each Participant taken into account in determining allocations shall not exceed $265,000, as adjusted for cost-of-living increases in accordance with Code section 401(a)(17)(B) of for periods after 2015.

(c) Contribution Percentage means the ratio (expressed as a percentage) of the Participant's Contribution Percentage Amounts to the Participant's Compensation for the Plan Year (whether or not the Employee was a Participant for the entire Plan Year).

(d) Contribution Percentage Amount means the sum of the Matching Contributions and After-Tax Contributions made under the Plan on behalf of the

Participant for the Plan Year. Pursuant to election procedures approved by the Plan Administrator, the Employer may include Qualified Nonelective Contributions in the Contribution Percentage Amounts.

(e) Eligible Participant means any Participant who is otherwise authorized under the terms of the Plan to make an After-Tax Contribution or receive a Matching Contribution during the Plan Year.

(f) Excess Aggregate Contributions with respect to any Plan Year, means the excess of:

(1) The aggregate Contribution Percentage Amounts taken into account in computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over

(2) The maximum Contribution Percentage Amounts permitted by the ACP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of their Contribution Percentages.

(g) Matching Contribution means an Employer contribution made to this Plan on behalf of a Participant on account of an After Tax Contribution made by such Participant, or on account of a Participant's Elective Deferral under a plan maintained by the Employer.

(h) Plan Administrator means the Board or its designee. However, if the Participating Employer has elected to offer Funding Arrangements in addition to the ARP Retirement Income Account, the Participating Employer or its designee shall be the Plan Administrator with complying with the provisions of this Section ___.

(i) Qualified Nonelective Contributions means contributions (other than Matching Contributions) made by the Participating Employer and allocated to Participants' Accounts that the Participants may not elect to receive in cash until distributed from the Plan, that are nonforfeitable when made, and that are distributable only in accordance with the distribution provisions (other than for hardships) applicable to Elective Deferrals.

1.07 Non-Qualified Church-Controlled Organization. The term "Non-Qualified Church Controlled Organization" or "Non-QCCO" shall mean a church-controlled tax-exempt organization described in Code section 501(c)(3) that is that is neither a "church" within the meaning of Code section 3121(w)(3)(A) nor a "qualified church-controlled organization" within the meaning of Code section 3121(w)(3)(B).

1.08 Qualified Church-Controlled Organization. The term "Qualified Church-Controlled Organization" or "QCCO" means an organization described in Code section 3121(w)(3)(B) and the Treasury Regulations thereunder, and generally refers to any church controlled, tax-exempt organization described in Code section 501(c)(3), other than an organization which:

(a) Offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal

charge which is substantially less than the cost of providing such goods, services, or facilities; and

(b) Normally receives more than 25% of its support from either: (1) governmental sources, or (2) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

CHURCH ALLIANCE
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June 26, 2020

By e-mail

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Dear Commissioner Rettig:

On behalf of the Church Alliance, I am writing to request that the Treasury Department and Internal Revenue Service ("IRS") expedite guidance to ensure that church benefits plans that participated in the IRS's 403(b) pre-approved plan program and obtained pre-approval of their 403(b)(9) plans be permitted to amend those plans to allow certain types of church-affiliated organizations to participate, in accordance with the recent enactment of the SECURE Act.

The Church Alliance

The Church Alliance is an organization composed of thirty-seven church benefit boards, covering mainline and evangelical Protestant denominations, three Jewish entities, and Catholic schools and institutions. The boards provide employee benefit plans, including retirement and/or health coverage, to approximately one million participants (clergy and lay workers) serving over 155,000 churches, parishes, synagogues and church-associated organizations. These plans are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974, as amended, and section 414(e) of the Internal Revenue Code of 1986 ("Code"), as amended.

The SECURE Act and Background on 403(b)(9) Non-Qualified Church Controlled Organizations Issue

The SECURE Act provisions that were included in the 2019 year-end funding agreement reached by Congress and signed by the President (P.L. 116-94) included a clarification provision for which the Church Alliance has been actively advocating for several years. This provision clarified that church-affiliated organizations that are "non-qualified church-controlled organizations," or "non-QCCOs," are eligible to participate in church retirement income account programs described in Code section 403(b)(9). This legislative clarification is

retroactively effective back to 1982, when section 403(b)(9) was first added to the Code.

The "non-QCCO" problem first came to our attention when the IRS was reviewing 403(b) "volume submitter" plan documents that had been submitted under the IRS's pre-approved 403(b) plan program. IRS representatives in Cincinnati who were involved in this review informed representatives of several organizations that filed plan documents for pre-approval that both non-QCCOs and organizations that qualified as "QCCOs" (qualified church-controlled organizations) were ineligible to participate in a volume submitter plan described in Code section 403(b)(9). Church benefit program representatives subsequently learned that IRS Chief Counsel in Washington, D.C. advised the Cincinnati IRS office that their view was that non-QCCOs are not eligible to participate in a 403(b)(9) plan and, further, that the IRS had decided not to allow QCCOs to participate in a pre-approved volume submitter 403(b)(9) plan either, because QCCOs might turn into non-QCCOs at some point. This surprising and disappointing news necessitated a legislative effort that eventually resulted in the SECURE Act provision amending Code section 403(b)(9) to clarify that both types of organizations are indeed eligible to participate in 403(b)(9) plans – and always have been.

Guidance Needed to Conform 403(b) Pre-Approved Plan Program

As noted above, Code section 403(b)(9) has now been clarified to provide the requested relief. However, the pre-approved volume submitter 403(b)(9) plan documents, as approved by the IRS, do not permit QCCOs and non-QCCOs to participate in them. The IRS created the 403(b) pre-approved plan program so that tax-exempt employers eligible to participate in 403(b) plans could adopt a pre-approved plan and thereby insure that their retirement plans meet the written plan document requirement imposed on 403(b) plans by the IRS effective in 2010.[1] The Church Alliance members who sought and obtained approval of their 403(b)(9) volume submitter plan documents would like to be able to permit QCCOs and non-QCCOs to participate in their pre-approved plans now, but they cannot do that without amending their pre-approved plan documents to permit such participation. These Church Alliance members are concerned that making such an amendment and allowing such participation would invalidate the pre-approved status of their plans.

The Church Alliance strongly supports the IRS's goal of having as many eligible nonprofit employers as possible adopt a 403(b) pre-approved plan. With this shared goal in mind, we respectively request that the Treasury Department and IRS expedite guidance to allow current sponsors of pre-approved 403(b)(9) plans to amend those plans to permit adoption by QCCOs and non-QCCOs. We also request that the special remedial amendment period available to employers participating in 403(b) pre-approved plans be made available to adopting QCCOs and non-QCCOs even if such adoption occurs after June 30, 2020 (the date on which this special remedial amendment period will expire).

Proposed Snap On Amendment

We believe that the volume submitter plan amendments required to allow QCCOs and non-QCCOs to participate in such plans would be straightforward – in part, because the coverage

[1] Church 403(b)(9) plans were not eligible to participate in the 403(b) pre-approved plan program as initially proposed by the IRS, but, upon request, the IRS agreed to open up the pre-approved program to church 403(b)(9) retirement plans when the Revenue Procedure describing the program was finalized.

and nondiscrimination provisions that apply to non-QCCOs are already contained in the pre-approved plan documents.[2] The necessary plan document changes could be made by implementation of a "snap on" amendment, along the lines of the attached document.

Additional SECURE Act Implementation Issue

Finally, we wanted to call your attention to an issue that has arisen with respect to the section 401 "stretch IRA" provision that was included in the SECURE Act. Section 401 essentially modifies the distribution rules, except for certain "designated beneficiaries," and also includes an exception for existing annuity contracts on the date of the enactment. That exception is for a "qualified annuity" which is defined as a commercial annuity and must also meet the requirements of Code section 401(a)(9). Although church retirement income accounts that self-annuitize meet the Code section 40l(a)(9) requirements under the section 403(b) regulations, which allow the rules to be met "without the purchase of a commercial annuity" (26 CFR § 1.403(b)-6), the reference to commercial annuity, as defined in Code section 3405(e)(6), creates a lack of clarity. In this regard, we request that the IRS allow church 403(b)(9) retirement income accounts, consistent with the Code section 401(a)(9) requirements, to be treated as commercial annuities for purposes of the grandfathering exception under section 401(b)(4) of the SECURE Act. We are happy to provide additional information if it would be helpful.

Thank you for your time and consideration of this request. The Church Alliance is happy to serve as a resource on this and other issues impacting church benefits plans. If you have any questions, please contact Karishma Page at (202) 778-9051.

Sincerely,

Karishma Shah Page
Partner
K&L Gates LLP
On behalf of the Church Alliance

[2] The IRS insisted that these provisions be included in pre-approved 403(b)(9) plan documents due to participation in such plans by self-employed ministers and other ministers working outside the church in the exercise of their ministry. The required language is thus for the most part already contained in the pre-approved 403(b)(9) plan documents.