CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

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By electronic submission (http://www.regulations.gov)

Internal Revenue Service
Attn: CC:PA:LPD:PR (REG-121508-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: IRS Reg. 121508-18; Multiple Employer Plans

To Whom It May Concern:

I. Introduction

The Church Alliance is submitting this letter as a public comment to the Multiple Employer Plans Notice of Proposed Rulemaking ("Proposed Regulations") published by the Internal Revenue Service ("IRS") on July 3, 2019 at 84 FR 31777. The Church Alliance appreciates the IRS's ongoing consideration of issues faced by multiple employer plans and the opportunity to comment.

The Church Alliance is an organization composed of the chief executives 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 ("ERISA"), and section 414(e) of the Internal Revenue Code of 1986, as amended ("IRC").

II. Executive Summary

The Church Alliance members believe that there is uncertainty over whether IRC Section 413(c) and regulations thereunder apply to 403(b) plans. Moreover, we do not think that Section 413(c) should be applied to 403(b) plans. We share in the observations made by the American

Benefits Council ("ABC") about that uncertainty in its comment recently filed in response to the Proposed Regulations (the "ABC Comment"). Rather than lengthen this comment, we adopt the views and put forth the position outlined in the uncertainty discussion in section I.B. of the ABC Comment.

While the Church Alliance welcomes the concept of an exception to the unified plan rule in the proposed regulations, the condition of implementing a plan spinoff is inconsistent with the main goal of the Strengthening Retirement Security in America Executive Order (the "Executive Order") in the church plan context. In addition, for church plans it may infringe upon ecclesiastical requirements, erode the portability features that are critically important to church plans and is likely to be unworkable. We propose an alternative strategy for addressing this situation below.

III. Requiring a spinoff/termination is inconsistent with the Executive Order in the church plan context.

Implementing a plan spinoff in the church plan context after an unresponsive participating employer fails to take appropriate remedial action would, through no fault of plan participants, deny such participants access to a workplace retirement plan and potentially harm their ability to be financially prepared for retirement. As stated in the Executive Order, it is the policy of the Federal Government to expand access to workplace retirement plans for American workers and that enhancing workplace retirement plan coverage is critical to ensuring that American workers will be financially prepared to retire. Imposing a spinoff requirement as a condition of application of the exception to the unified plan rule would in some cases result in the exact opposite of what is intended by the Executive Order.

IV. Requiring a spinoff/termination infringes upon ecclesiastical polity requirements.

The ecclesiastical polity requirements of some denominations require the denominational retirement plan to be open to all employers in the denomination and prohibit the exclusion of any denominational employers. The proposed regulations' requirements related to an unresponsive or non-compliant employer would place the church benefits board in the untenable position of having to choose between violating ecclesiastical polity requirements or violating the law. One denomination represented through the Church Alliance has indicated that they would not even have that choice—they would have to serve a non-compliant employer and attempt, working through the denominational leadership structure, to force the employer to resolve whatever the compliance problem may be.

V. Requiring a spinoff/termination is inconsistent with portability and continuity needs of church plans and other multiple employer plans.

Multiple employer plans are required to recognize an employee's service rendered to all participating employers for purposes of eligibility and vesting. Church plans, as the quintessential non-union multiple employer plan model, count heavily on this feature because of the itinerancy of their workers. Some clergy are required to move on a regular basis as part of their denomination's religious tradition and beliefs; for example, being appointed by a bishop to different churches year over year. Illustrative of this impact, approximately one-third of ministers

in The United Methodist Church ***are moved every year***. These church plan members count heavily on the seamlessness of their retirement plan. No matter where they move, their church plan is available to them and their retirement contributions and investment strategies can continue uninterrupted.

Many religious organizations are facing financial pressures, and several are combining. In some synagogues where there were two rabbis and two cantors serving two congregations previously, only one of each clergy will be retained. The "released" ministers then will have to seek a new synagogue to lead. Separate periods of employment are a hallmark of church plans. Teachers are another example. It is common for a lay or commissioned teacher to move from one school to another school of the same religious tradition. Not only do these teachers count on continuity in their savings plans, but also in their pension, health and other welfare benefit plans. In the non-compliant employer scenario, the teacher still is employed and no distributable event has occurred.

We are also concerned about the catch-up rules under IRC Section 402(g)(7) for employees who have 15 years of service with a denomination. If one of the employers for whom a church worker was employed is eliminated from the plan, would that affect the employee's ability to qualify for the special catch-up election? The spinoff/termination concept for unresponsive participating employers could frustrate the ability to utilize this catch-up election. Many newly employed ministers and church workers may be hired at very low salaries and may not be able to contribute to a 403(b) plan at first. However, after serving for 15 years, their financial situation may have improved to the point where they now want to "catch-up" for the years in which they could not afford to contribute.

The List of Required Modifications applicable to 403(b) volume submitter plans incorporates the concept of "denominational service" into required plan provisions. Portability of service is broadly recognized as a critical feature in industry-related multiple employer plans. To remove a period of service from the whole spoils the continuity.

If employee plan accounts of a non-compliant employer are spun off and termination distributions are made, "leakage" of retirement assets is certain to occur. Consider a career teacher who has a recent work period with an employer who is not compliant. A portion of the teacher's retirement assets will be permanently separated from the bulk of his or her retirement assets, complicating investment allocations and defeating all the purposes for which multiple employer plans are formed. In addition, these spun-off assets will no longer be invested in accordance with denominational faith and belief. Even if these assets end up in an IRA, leakage is a concern.[1]

Particularly in a situation where a financially troubled employer is reluctant to make an EPCRS correction, there is the potential for eventual job loss. This is not a good time to distribute retirement assets, if retirement security is a goal.

[1] U.S. Government Accountability Office report GAO-19-179, "*Additional Data and Analysis Could Provide Insight into Early Withdrawals*" (2019) retrieved from https://www.gao.gov/products/GAO-19-179; EBRI Issue Brief, "*The Impact of Auto Portability on Preserving Retirement Savings Currently Lost to 401(k) Cashout Leakage*" (2019) retrieved from https://www.ebri.org/content.

Many 403(b) church plans annuitize the employee's account at a favorable rate upon retirement. Separating assets through a spinoff will cause a loss of this important benefit. This punishes the participant for the sins of the employer.

VI. It may not be possible to identify assets accumulated during a period of employment with a particular employer in a church plan.

The proposed regulations require that the assets attributable to employment with the non-compliant employer be segregated and spun off. However, employee contribution records in multiple employer plans may not be kept according to the employer at which a participant worked when the assets were contributed. This type of history may not be available, particularly after a change of record keepers. If a pastor has a 403(b) account accumulated over many years as he/she moves from church to church, and then is employed by a non-compliant employer, the correct amount attributable to that period of employment may not be ascertainable. Computing earnings attributable to a time-defined portion of account assets would be extremely burdensome, at best.

Also consider a situation where an individual has more than one period of employment with an eventually non-compliant employer. We do not believe it will be universally possible to go back and determine all of the contributions, earnings and losses, etc. that are attributable to that employer.

This requirement in the proposed regulations will not work as a practical matter because the required records are not likely to exist.

VII. Other strategies for church plans better align with the Executive Order

Other measures could be required in order to encourage unresponsive participating employers in church plans to take appropriate remedial action. For example, instead of requiring a spinoff after a participating employer in a church plan fails to respond to notices, the receipt of contributions made by the participating employer, including participant elective deferrals, could be suspended until remedial action is taken. Such a suspension would likely cause employees to complain to the plan sponsor, pressuring it to do what is required for the suspension to be lifted. This would accomplish the goals of remedial action being taken, without removing participants' access to a retirement plan.

We note that at least one Church Alliance member has submitted a Volume Submitter 403(b) plan and received an IRS Advisory Letter of approval. On the subject of involuntary withdrawal by a non-compliant employer, the document says:

> *"Withdrawal Due to Non-compliance. If [Plan Sponsor] determines that an Employer is not administering the Plan in accordance with the Plan's provisions, such Employer's participation in the [plan] and the participation of its [employees] shall be terminated."*

This approved language requires a cessation of contributions without further action. It does not require or contemplate a mandatory spinoff of assets.

The Church Alliance endorses Section II.C. of the ABC Comment wherein the various administrative tasks needed to undertake a spinoff/termination are discussed. The expense, awkwardness and uncertainty associated with these transactions are not warranted. We depart from the ABC's views, however, in that we do not seek a mere simplification of the process. We seek an alternate process altogether for church plans.

The Church Alliance strongly urges the adoption of a rule for church plans that requires only that the offending employer cease participation in the plan. This would keep the participant accounts intact, invested, and growing for retirement and provide the advantage of the economies of scale of being in a multiple employer plan. Upon retirement, annuitization could be a distinct advantage.[2]

VIII. Conclusion

The Church Alliance is grateful for the focus on multiple employer plan issues but respectfully requests, in the alternative, that (1) it be clarified that Section 413(c) does not apply to 403(b) plans, or (2) if it does so apply, that relief be granted to 403(b) multiple employer church plans in a manner that does not require the spinoff of assets related to a noncompliant employer.

The Church Alliance appreciates this opportunity to comment and hopes that you have found our comments helpful. We are happy to meet or provide further clarification. Please contact the undersigned at (202) 778-9128 if you have any questions or wish to discuss any of the information in this letter further.

Sincerely,

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

[2] The notice requirements in the proposed regulation include a notice to the Department of Labor. As many church plans are not governed by ERISA, this requirement should be eliminated for non-ERISA church plans.