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CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

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December 21, 2018

By electronic submission (Notice.Comments@irs.counsel.treas.gov)

CC:PA:LPD:PR (Notice 2018-81), Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Comments in Response to Notice 2018-81

To Whom It May Concern:

I. Introduction

The Church Alliance submits this comment in response to Notice 2018-81 (the "Notice"), on Section 336(a) of the Protecting Americans from Tax Hikes Act of 2015 (Public Law 114-113 (129 Stat. 2242 (2015))) ("PATH Act"). Church Alliance members ("we") appreciate and support the Notice's guidance.

We are writing in response to the Notice's request for comments regarding potential guidance on other issues raised by PATH Act provisions related to church plans. The Church Alliance previously submitted to the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") a letter commenting on PATH Act-related implementation issues.

In our comment letter of August 3, 2016, we identified key areas where specific guidance would be helpful. Ideally, all of the guidance requested in that 2016 letter would be issued. In this letter, however, we focus on four specific areas that are of particular importance to the Church Alliance: automatic enrollment; plan transfers and mergers; church plan investments in collective trusts; and permissive aggregation and disaggregation under the controlled group rules for church plans. (We recognize that this last area listed was addressed in the Notice, so our comments about this area relate to that guidance.)

The Church Alliance is a coalition of chief executive officers of a diverse group of 37 denominational benefit plan administrators, from mainline and evangelical Protestant, Catholic, and

Jewish faith traditions (“denominations”), which provide retirement and health benefits to over one million clergy and lay workers and their families.

II. Automatic Enrollment by Church Plans

Subsection 336(c) of the PATH Act allows church defined contribution plans to offer automatic enrollment, by preempting State laws that may otherwise impede payroll deductions not specifically requested by employees. The PATH Act automatic enrollment provision parallels the automatic contribution arrangement (“ACA”) provision added by the Pension Protection Act of 2006 (Pub. L. No. 109-280; the “PPA”) for defined contribution plans subject to ERISA. Following the enactment of the PPA, the Department of Labor, Treasury, and IRS promulgated additional guidance on the ACA provision, including with respect to implementation of the ACA, as well as notice and default investment requirements. Because the PATH Act automatic enrollment provision is modeled on the corresponding PPA provision, some church plans may look to this guidance to resolve implementation issues with respect to Subsection 336(c). We suggest that guidance permit church plans offering automatic enrollment to rely on applicable existing automatic enrollment guidance as a safe harbor in designing their own arrangements.

To further parallel the options available to ERISA plans under the PPA, we suggest that guidance clarify that a church plan (other than an electing church plan under Internal Revenue Code (“Code”) section 410(d)) offering an ACA that satisfies the requirements of Code section 414(w)(3) may elect to treat such ACA as an eligible automatic contribution arrangement (“EACA”) under the rules that currently apply to ERISA plans. In particular, the guidance should clarify that a church plan that elects to treat an ACA as an EACA may allow permissible withdrawals in accordance with section 1.414(w)-1 of the Treasury Regulations. Elective applicability of the EACA requirements and regulations will offer flexibility with respect to the number and type of notices that a church plan is obligated to provide to its beneficiaries.

In addition, we suggest that guidance indicate that a church plan that satisfies the qualified automatic contribution arrangement (“QACA”) requirements of Code section 401(k)(13) be deemed to satisfy the automatic contribution arrangement requirements of subsection 336(c) of the PATH Act, other than the default investment requirement of subsection (c)(4) (which must be satisfied independently under the facts and circumstances). The clear availability of EACA and QACA arrangements will provide church plans with the same flexibility and plan design options available to ERISA Plans.

III. Certain Plan Transfers and Mergers

Subsection 336(d) of the PATH Act created new Code section 414(z), which allows certain plan transfers and mergers. We request guidance be issued to reinforce that Code section 414(z) is self-executing and does not require the issuance of regulations to be effective. Alternatively, it could affirmatively be stated in guidance that such transactions can proceed in good faith until further guidance is issued.

Because existing regulations under Code section 414(l) do not apply to church plans, it also would be helpful for guidance to specify how to determine the accrued benefit for certain mergers and transfers under Code section 414(z). Specifically, we recommend that, for

transactions under Code section 414(z) involving a transfer of all or any portion of an accrued benefit from a defined benefit plan to an individual account balance plan, the guidance provide that the amount of such accrued benefit may be determined on the basis of actuarial assumptions that are reasonable based on circumstances existing at the time the determination is being made.

IV. Investments by Church Plans in Collective Trusts

Section 336(e) of the PATH Act clarifies that the assets of a church plan or an organization described in Code section 414(e)(3)(A) that has as its principal purpose or function the administration of a church plan may be commingled and invested in a group trust described in IRS Revenue Ruling 81-100 (as modified by IRS Revenue Rulings 2004-67, 2011-1, and 2014-24), or any subsequent revenue ruling that supersedes or modifies such revenue ruling.^[1] We again respectfully request that the IRS update Revenue Ruling 2011-1 to reflect these section 336(e) provisions. Further, we request that the IRS confirm that no changes to Treas. Reg. sec. 1.403(b)-9(a)(6) are necessary to permit the commingling authorized under the section 336(e) provisions. Lastly, we request that the update to Revenue Ruling 2011-1 make clear that assets that can be permissibly commingled with church plan assets (such as assets exclusively devoted to church purposes) need not be subject to the exclusive benefit requirement that was applicable to group trusts under Revenue Ruling 2011-1.

The IRS and Treasury previously asked the Church Alliance about the timing and need for the requested update of Revenue Ruling 2011-1. After making inquiry with the church benefits organizations of Church Alliance members, we indicated to you that we were unaware of any current challenges, so the timing and need was not critical. Since then, at least one Church Alliance member's benefit organization has been challenged with respect to investments permitted by section 336(e) of the PATH Act, since Revenue Ruling 2011-1 has not been updated to reflect these changes, so we ask that Revenue Ruling 2011-1 be updated as expeditiously as possible.

V. Application of Controlled Group Rules to Church Plans – Permissive Aggregation/Disaggregation Election and Revocation Thereof

The Notice provides that the generally applicable substantiation and recordkeeping requirements of Code section 6001 apply to the revocation of an election under Code section 414(c)(2)(C) or (D), on the permissive aggregation and disaggregation of church-related organizations. It is our understanding from the Notice that an entity revoking an election to permissively aggregate or disaggregate must provide a copy of the revocation upon request by the IRS. However, if no request is made by the IRS, no such documentation must be submitted to the IRS. In addition to the foregoing provisions, which are effective on or after October 22, 2018, the Notice provides that any reasonable method of notifying the Secretary of the Treasury (“Secretary”) of a revocation is acceptable for revocations before October 22, 2018.

^[1] Section 336(e) of the PATH Act also provides that assets which are otherwise permitted to be commingled for investment purposes with the assets of church plans or Code section 414(e)(3)(A) organization assets can also be invested in an 81-100 group trust (for example, assets that are exclusively devoted to church purposes).

The Notice provides no specific guidance and imposes no requirements as to the form or submission to the IRS of the election to permissively aggregate or disaggregate. Since we believe that no specific requirements for the election are imposed by Code sections 414(c)(2) or 6001, we believe specific requirements for such an election may be imposed only by notice served on the organization(s) by the Secretary or by regulation. If that is incorrect, we suggest that this be clarified in guidance.

As stated above, we are grateful for the guidance provided by the Notice, and support it. Since the Notice contains no procedures, guidance or instructions other than as described above, we presume that no other requirements will be imposed in conjunction with any other aspects of such aggregation or disaggregation, until and unless further guidance is issued (or except as required by Code section 414(c)(2)). We appreciate that the Notice is in accordance with our comment in our August 3, 2016 letter that the revocation be as efficient and easy to administer as possible for churches and church-related organizations, and our comment in such letter that no further notice of revocation be required beyond the notice described in Code sections 414(c)(2)(C) and (D).

VI. Conclusion

Thank you for your consideration of these points as Treasury and IRS contemplate potential additional guidance to implement Section 336 of the PATH Act. We are grateful for your work on these issues of significant importance to the church benefits community. Please do not hesitate to contact the undersigned at (202) 778-9128 with any questions or if we may be of any assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karishma Shah Page', with a long horizontal flourish extending to the right.

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