CHURCH ALLIANCE
Acting on Behalf of Church Benefits Programs

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CC:PA:LPD:PR (REG-136724-17)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: REG-136724-17; Comments on Health Reimbursement Arrangements and Other Account-Based Group Health Plans Notice of Proposed Rulemaking ("HRA NPRM")

To Whom It May Concern:

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, three Jewish groups, and Catholic schools and institutions.

These church benefits organizations 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").

In this comment letter we provide comments on how the HRA NPRM may impact church benefit plans, particularly with respect to the conditions that an HRA integrated with individual health insurance coverage must satisfy to comply with the nondiscrimination provisions in Internal Revenue Code ("the Code") section 9802 and section 2705 of the Public Health Service Act ("PHS Act").

## I. Executive Summary

Church benefits organizations exist to provide comprehensive benefits for ministers and church lay employees of the numerous congregational and mission organization employers affiliated with the denomination. The U.S. Congress and the regulatory agencies responsible for the health and welfare benefits laws and regulations have acknowledged the

unique organizational polities of America's churches, which reflect each denomination's or church's underlying theological tenets and religious beliefs and have provided both church plan exemptions, state law preemption and/or regulatory flexibility, when the requirements of the law or regulations have an adverse impact on the church benefits organizations' ability to continue to deliver their programs.

These unique polities are reflected in the health coverage that may be offered, sponsored or mandated by the denomination. Denominational approaches range from mandating group health coverage to allowing each congregation to determine whether and how to offer group or individual coverage, and to whom it should be offered.

For many church workers, enrollment in the church benefits board's employer group health plan is the most suitable health care coverage alternative because it is portable from call to call and can serve as continuous career-long coverage for the worker and his or her family. In addition, such coverage is consistent with the denomination's beliefs. However, for some church employers in some markets, individual insurance plan coverage may be the best coverage alternative for their employees. This is particularly true if individuals enrolled in individual insurance plans continue to be protected by the Affordable Care Act market reforms relating to pre-existing conditions, guaranteed issue and essential benefits.

In some denominations, the minister's employment relationship may be governed by the terms of the denomination's constitution or governing documents. A denomination's constitution, handbook or other document may mandate specific group health plan coverage (often sponsored by the denomination) for its ministers. In those denominations, the HRA NPRM, as proposed, may limit the church or church-affiliated organization's ability to offer an integrated HRA plan with individual coverage to lay employees, while continuing to enroll ministers in the denominational plan. The Church Alliance suggests the agencies accommodate these unique employer-employee relationships with an acknowledgment that the employment classifications set forth in the HRA NPRM should not limit or interfere with a minister's appointment or call. This would allow church plans to achieve increased HRA usability. Since ministers are ordained or commissioned for religious reasons, there is no danger of this acknowledgment being "easily manipulated in order to transfer the risks (and perceived higher costs) from the employer's traditional group health plan to the individual market." 83 Fed. Reg. at 54431. By doing so, the agencies can avoid requiring employment classifications that would impair the "employment relationship between a religious institution and … its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 U.S. 171 (2012) (distinguishing clergy and lay employees in the context of application of employment laws).

For example, for denominations with mandated coverage for ministers, such an acknowledgment would allow churches to continue their self-funded employer group health plans for ministers in their current formation, while allowing individual church employers the option of electing to offer an integrated HRA with individual insurance coverage to all other classes of employment.

## II. Description of church benefit plans

Church benefit plans have been in existence for decades and, in some cases, pre-date the enactment of the Internal Revenue Code in 1913. Church benefit plans are typically maintained by a separately incorporated church benefits organization for eligible employees of ministries in

a denomination. Often the sponsor is the church or denomination itself, not the benefits organization. The plans are generally multiple-employer in nature and provide retirement and welfare benefits to thousands (or, in the case of large denominations, tens of thousands) of clergy and lay workers working for different religious employers throughout the country.

Most participating employers covered by church benefit plans are small, local churches with only a few employees. In many denominations, the local church's pastor may be that church's only employee. If there are other employees, they may be full or part-time workers who assist with administrative duties, although these duties are performed by volunteers in many churches.

In addition to serving local churches, church benefit plans also cover other nonprofit organizations associated with the denomination or church. For example, participating employers can include church-affiliated nursing homes, day care centers, seminaries, universities, elementary and secondary schools, hospitals, and social services organizations. All of these organizations are essential to fulfilling the mission and ministry of the church. Individuals, such as self-employed ministers and missionaries, also may participate in church plans.

Church plans capable of serving multiple church employers provide efficiency, continuity, and consistency of employee benefits for ministers and lay workers as they move throughout the United States from one church or church-related organization to another within a denomination. In some denominations, these moves occur frequently and as directed by ecclesiastical supervisors.

Denominations have been organized to reflect their own theological beliefs and church polity (the operational and governance structure of the denomination), which can give rise to unique challenges for church plans. Hierarchical structures, where the parent church organization sets policy for the entire denomination, operate in a manner similar to a large multiple employer plan. Hierarchical structures still will present unique challenges, though, because while policy may be set centrally, many decisions and processes impacting employee benefits are set and controlled locally, such as payroll, hiring, and termination. Other less hierarchical structures, including synodical or presbyterian structures (local or regional policy-making through representation from area churches) and congregational structures (voluntary cooperation among autonomous churches, or church conventions or associations) operate with less centralized policy decision-making, and can further divide various responsibilities and functions between the national plan and local employer, which can lead to greater regulatory compliance challenges.

### A. Church health plans

Many church health plans have been in existence for over 50 years. Most denominations offer a nationwide plan (most often on a self-funded basis), which provides clergy and their families the comfort and security of career-long, portable, comprehensive, and affordable medical coverage through a plan that reflects their denomination's beliefs. As workers move from one church to another, they often are able to continue coverage under the plan without impacting provider networks and existing contributions to annual deductibles and out-of-pocket maximums.

Self-insured church health plans may provide for averaging of contribution rates, so that larger, wealthier, and more-established churches effectively support smaller, poorer, or newer (i.e.,

evangelizing) churches. This averaging or community rating generally is for theologically-based reasons.

However, in many denominations the church benefits board may not actually know the level of coverage that the local ministry provides to its non-ministerial employees, because there is no centralized human resource or payroll function. Sometimes coverage rules set by the church benefits board are driven by an intermediate or local church body or unit of church government in various ways. To accommodate these practical issues, most church benefit boards have allowed the individual church employers to define the employee classifications applicable to their organization. Nonetheless, denominations have the right under the First Amendment to determine who fits within the category of minister for the denomination.

### B. Examples of the unique denominational governance issues impacted by the regulation as proposed

**Denomination #1:** Under this denomination's form of government, as set forth in its Constitution, all ordained ministers are subject to ecclesiastical jurisdiction of the mid-level councils of the denomination. Such a council must approve a minister's call to a congregation and the terms of that call. The Constitution mandates that all ministers serving churches must be enrolled for participation in the benefits plan of the denomination's church benefits board. The Constitution further provides that, with respect to its other employees, only the congregation's governing body (and not the mid-level council) has jurisdiction. Any amendment to the Constitution must be approved by the denomination's general assembly (which meets biannually), subject to ratification thereafter by an affirmative vote of approval of two-thirds of its congregations over the next two years. Thus, the amendment process, even when most effective, takes a minimum of four years. As a result of this Constitutional mandate to enroll ministers in the denominational employer group health plan, no church employer in this denomination could offer any other full time employee at the church an HRA integrated with an individual insurance plan. This result is inconsistent with the intent of the proposed regulations.

**Denomination #2:** Under this denomination's form of government, the mid-level conference is required to establish a board of pensions or similar organization, which is required to sponsor a group health plan for the employees of the conference office. The organization also has the authority to decide whether local churches are required to adopt the conference group health plan. Some conferences mandate that all of their churches participate in the group health plan sponsored by the conference. Others leave the decision up to each local church. In some cases, the coverage is limited to clergy, who may be required under the rules of the denomination to itinerate, unlike lay employees. Some local churches in conferences that permit local choice would like to offer help to their lay employees, but the conference plan may only cover clergy. Similar to Denomination #1, such churches would be prevented from offering an HRA to its lay employees, because clergy employees are covered by a group health plan in which the employer participates.

**Denomination #3:** In this denomination, each congregation is self-governing, and is not subject to denominational mandates. Each congregation may choose among at least the following options for its employees: a) participate in a group health plan offered by the denomination, covering the classes of employees determined by the employer, b) offer no group health coverage, but offer an HRA that may be integrated with individual insurance coverage outside

of the denominational plan, or c) offer no health coverage to its employees. Congregations that wish to structure their benefits similarly to Denominations #1 and #2 would be prevented from offering an HRA to one class of employees while enrolling a different class of employees in the denominational health plan. As such, these congregations would not be permitted the same flexibility as congregations in other denominations that benefit from the HRA NPRM.

## III. Medicare-Eligible Disabled Employees

A different type of problem arises in regard to disabled employees, posing a similar challenge for church employers. While lay employees may lose their status as employees after a period of time, clergy may be ordained for life. In general, a disabled person will receive disability benefits from the Social Security Administration, assuming they have accumulated sufficient work credits. After 24 months of such benefits, the disabled person becomes eligible for Medicare. Some conferences and local churches would like to provide HRAs to help these disabled individuals pay Medicare premiums and medical expenses. Guidance was issued in November 2015 permitting an HRA to be integrated with Medicare for employers that are not required to offer their non-HRA group health plan coverage to employees who are Medicare beneficiaries. 26 C.F.R. § 54.9815-2711(d)(5). *See also* 80 Fed. Reg. 72192, 72202, 72244. The preamble makes it clear that this applies to employers eligible for the Medicare Small Employer exception to the Medicare Secondary Payer law. *Id. at* 72202. The Medicare Secondary Payer law also provides that even large employers are generally not required to offer their non-HRA group health plan to employees who have been disabled this long. See 42 C.F.R. 411.104 (definition of "current employment status"). It would be helpful if guidance could be issued making it clear that such long-term disabled individuals, even if they technically may still be considered common law employees, can be offered HRAs integrated with Medicare, even if the employer offers a group health plan to other employees. (For members of the clergy, they would also need to not be receiving cash remuneration for services rendered. *See* 42 C.F.R. 411.014(e).)

In the alternative, it would be helpful if guidance could be issued confirming that Q/A-2 of the Affordable Care Act FAQ Part III is still in effect. (*See* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-ii.pdf) (in the absence of formal guidance, regulators will treat plans that cover only retirees and individuals on long-term disability as plans within the exception of Code Section 9831(a)(2) for plans with less than 2 participants who are current employees).

## IV. Proposed Relief

The Church Alliance consistently advocates for laws and regulations that respect and support the multitude of forms of governance that exist in America's religious organizations. We encourage the agencies to adopt provisions that will make a proposed law or regulation neutral in its application to these different polities. To that end, we recommend acknowledgment that the employment classifications set forth in the HRA NPRM should not limit or interfere with a minister's appointment or call, so if a church entity determines, for example, that clergy must have certain group major medical plan benefits aligned with denominational beliefs, but permits lay employees to select individual policies with HRAs, that this is not prevented by the rule. As an alternative, a "good faith" standard that permitted an employer to adopt employment

classifications that are based on religious requirements and are not discriminatory overall, would be beneficial. Under such a standard, a denomination's mandated health care coverage from its denominational employer group health plan would be considered a reasonable good faith basis for establishing ministers as a separate classification of employees and all other full time employees as another separate class of employees. If there is no such mandate or other religious basis for an employment classification other than as set forth in the HRA NPRM, no other employment classifications would be considered reasonable.

In addition, in order to accommodate the fact that most clergy are appointed for life, we ask on behalf of disabled employees generally either a clarification applying to Medicare-eligible disabled the special rule allowing HRAs to be integrated with Medicare, or an affirmation confirming that Q/A-2 of the ACA FAQ Part III is still in effect.

**V. Conclusion**

The Church Alliance respectfully requests that the three agencies consider the suggestions in this letter to provide flexibility for our member organizations and the employers and employees that they serve, thus helping to ensure access to affordable, quality health care coverage for the dedicated ministers and lay employees serving America's religious communities while they continue their mission work. Thank you.

Sincerely,

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