# CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

**Counsel:**
**K&L Gates LLP**
1601 K Street NW
Washington D.C. 20006
Tel (202) 778-9000
Fax (202) 778-9100

August 13, 2019

Electronically to http://www.regulations.gov

U.S. Department of Health and Human Services
Office for Civil Rights
Attn: 1557 NPRM (RIN 0945-AA11)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

**Re: Nondiscrimination in Health and Health Education Programs and Activities Proposed Rule**

To Whom It May Concern:

## I. Introduction

The Church Alliance is submitting this letter as a public comment to the Nondiscrimination in Health and Health Education Programs and Activities Proposed Rule ("Proposed Rule") published by the United States Department of Health and Human Services ("HHS") at 84 Fed. Reg. 27846 on June 14, 2019. The Church Alliance appreciates HHS's ongoing consideration of the section 1557 regulation 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 in many cases, 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 ("ERISA") and section 414(e) of the Internal Revenue Code of 1986, as amended ("IRC"). Despite the diverse range of its members, the members of the Church Alliance ("we") share the common view that a church or an employer associated with a church should not have to face the choice of violating its religious tenets and beliefs or violating the law in order to maintain a health plan for its workers.

## II. Executive Summary

The Church Alliance is grateful for HHS's proposed revisions to its section 1557 regulation to clarify the scope and clearly align with existing statutory protections of religious freedom. We do request one clarification, however, so insurance companies are not treated more favorably than self-funded

group health plans (including those operated by churches). Our request is described more fully in Section IV of this letter.

## III. Description of Denominational Health Plans

Church health plans offered by Church Alliance members ("Denominational Plans") are multiple employer in nature, with (in some cases) thousands of churches and other church-associated employers participating in the plans. These church-associated organizations include colleges and universities, seminaries, K-12 parochial schools, hospitals, nursing homes, children's homes, religious camps, food pantries and other social service organizations. In some cases, the Denominational Plan is provided through or by a separately incorporated church benefits board. In other cases, such plans are provided directly by or through what might be called the church itself – often this will be a separately incorporated, denominational "headquarters" organization. Denominational Plans have been in existence for over 50 years, often are self-funded and are "group health plans" as defined in section 5000(b)(1) of the IRC. Most are offered nationwide, so as church workers move, they can have seamless coverage.

## IV. Proposed "45 CFR 92.3 Scope of Application"

Proposed section 92.3 describes the scope of entities covered by 45 CFR § 92 ("Part 92"), similar to the way in which current 45 CFR § 92.2 describes the application of Part 92. However, we appreciate the more limited definition contained in proposed section 92.3(b) for the term "health program or activity", which limits the scope of the covered entities. Current 45 CFR § 92.4 defines the term "health program or activity" to include health-related insurance coverage or other health-related coverage. In contrast, proposed section 92.3(c) states that an entity engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing health care. We agree with the narrower interpretation of the term "health program or activity".

We do request an additional clarification, ideally in section 92.3 itself. The Supplementary Information to the Proposed Rule explains that self-funded group health plans under ERISA are not, by virtue of the provision of health coverage, entities covered by the Proposed Rule. We request that the exclusion be expanded to also exclude self-funded group health plans not governed by ERISA, specifically self-funded Denominational Plans. We are aware of no policy reason to exclude self-funded ERISA group health plans (and health insurers), but apply the Proposed Rule to self-funded Denominational Plans (and other self-funded group health plans that are not governed by ERISA). Instead, all of these plans should be similarly excluded under part 92.

We suggest that all self-funded group health plans should explicitly be excluded from the term "health program or activity", to the extent such plans do not receive Federal financial assistance from HHS and/or the entities operating the plans are not principally engaged in the business of providing health care. Specifically, we suggest the following modification to 45 CFR § 92.3(c):

> For purposes of this part, *a self-funded health plan or* an entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of *the* provision *of health coverage or health insurance*, be considered to be principally engaged in the business of providing health care.

## V. Proposed "45 CFR 92.6 Relationship to Other Laws"

As stated above, the members of the Church Alliance share the view that a church or an employer associated with a church should not have to face the choice between violating religious tenets and violating the law in order to maintain a health plan. We believe that no church health plan should be required to provide or refrain from providing items or services to the extent this would violate the church's religious tenets. This is true even though Denominational Plans are not aligned on whether certain health or medical services (e.g., abortion) should be provided in their health plans.

Therefore, the Church Alliance appreciates the specific reference in section 92.6(b) to specific religious freedom, conscience and nondiscrimination statutes.

## VI. Proposed "45 CFR 86.18 Amendments to Conform to Statutory Exemptions"

As stated above, the Church Alliance is aligned on the principle that no church health plan should be forced to provide or refrain from providing items or services that conflict with its religious beliefs. Therefore, we support proposed section 86.18. As described in Section III of this letter, Denominational Plans provide health coverage benefits to a variety of church-associated organizations, including some that receive HHS funding. Depending on the beliefs of the denomination, the church-associated organization may be strongly in favor of or strongly against providing or paying for abortion in their Denominational Plan. We think that this section appropriately states that neither the provision nor payment for benefits or services related to an abortion are required nor prohibited.

## VII. Conclusion

The Church Alliance is grateful for changes proposed to the section 1557 regulation, but respectfully requests that an additional clarification be made that no self-funded health plans are subject to the requirements of section 1557 unless they receive Federal financial assistance from HHS and/or the entities operating them are principally engaged in the business of providing health care.

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 S. Page
Partner
K&L Gates LLP
On behalf of the Church Alliance