CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

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David J. Kautter
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
And
Acting Commissioner
Internal Revenue Service

Jeremy Lamb
Lauson Green
Williams Evans
Department of the Treasury
Internal Revenue Service

Re: Comment Letter on 414(e) Church Plan regulations

Dear Sirs:

The Church Alliance ("we" or "the Alliance") submits this comment letter in response to the regulatory agenda of the Department of the Treasury ("Treasury"), which noted that Treasury is drafting proposed regulations ("Regulations") to update the existing final regulations ("existing regulations") on the definition of a church plan under section 414(e) of the Internal Revenue Code ("Code"). We are grateful for Treasury's efforts on the Regulations.

The Alliance is a coalition of the chief executive officers of 38 church benefits organizations, shown on the left side of this letterhead. The Alliance represents these 38 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, branches of Judaism, and Catholic schools and institutions. These organizations serve more than 155,000 ministries and more than one million clergy and lay workers and their families.

Our comments generally are ordered to follow the structure of Code section 414(e). We hope you will find this comment letter useful.

CODE SECTIONS

I. ***414(e)(1) "In general.***

For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501."

A. Welfare Plans May be Church Plans

The existing regulations were issued before passage of the Multiemployer Pension Plan Amendments Act of 1980[1] ("MPPAA"). MPPAA added Code section 414(e)(3)(A), which states that a church plan includes a "plan maintained by an organization . . . for the provision of ***retirement benefits or welfare benefits***, or both, for the employees of a church. . . ." (emphasis added). We recommend that, consistent with MPPAA, the Regulations confirm that welfare plans, like retirement plans, may qualify as church plans.

B. Beneficiaries

The term "beneficiaries" should go beyond the familiar concept of a named beneficiary for a death benefit (e.g. in a life insurance policy or defined contribution plan account where the participant names a party to receive proceeds upon death). The term should include joint annuitants and other survivors who are entitled to a death benefit, as may occur in retirement plans.

The term beneficiary also should include any dependent who may be entitled to benefits from a plan (child, spouse, etc.), through an employee participant. It is very common for a health plan to allow a participant to enroll family members in accordance with the rules the plan provides for this purpose. The Alliance recommends that the Regulations provide that the term beneficiary includes all individuals who benefit directly through the employee participant, such as dependents and joint annuitants.

[1] Pub. L. No. 96-364 § 407(a).

II. ***414(e)(2) "Certain plans excluded.***

The term 'church plan' does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries)."

A. Effect of Non-Church Employees in a Church Plan

The Alliance respectfully urges Treasury to reverse the approach taken in existing regulations that church plan status is destroyed by having one or more "non-church" employers or having non-church employees in a plan. Specifically, the Alliance requests Treasury to modify section 1.414(e)-1(c)(1) of the existing regulations to reflect an understanding, post-MPPAA, that a church plan be *primarily* for the benefit of "employees of the church or convention or association of churches". (Hereinafter, the term "Church" will also include a "convention or association of churches.") The Alliance also suggests that the Regulations establish a safe harbor rule with a threshold percentage of non-Church employees who may be covered in a church plan without affecting its status as a church plan. Specifically, we request that Code section 414(e)(2)(B) be considered met if at least 85% of the employees in the plan are individuals described in section 414(e)(1) or 414(e)(3)(B) (or their beneficiaries).

1. *Medina* Case

The Tenth Circuit Court of Appeals recently stated: "[w]ithout deciding the exact meaning of substantially all in 29 U.S.C. § 1002(33)(B)(ii)—for example, whether 75% would be enough—we accept [the plaintiffs'] concession that 85% would satisfy the statutory requirement."[2] The court looked to a Seventh Circuit case[3] that noted Treasury regulations always interpret "substantially all" in the Code as 85%, and interpreted "substantially all" in MPPAA the same way.

2. Private Letter Rulings

Post MPPAA, the IRS has ruled that having non-Church employees does not destroy church plan status. PLRs have been issued holding that plans still were church plans with from 2.5 percent to upwards of 50 percent of non-Church employees participating.[4]

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[2] *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1228 (10th Cir. 2017).

[3] *Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1158–60 (7th Cir. 1990).

[4] In PLR 9810034 (Mar. 6, 1998), the IRS held that the plan of a convention or association of churches would not fail to be a church plan where it covered eligible employees of for-profit entities:

3. Analogies in the Code: "Insubstantial" Non-Exempt Activities

Treasury could look to other sections of the Code for analogies. For example, an organization exempt under section 501(c)(3) must be organized and operated "exclusively" for exempt purposes, and it cannot be operated so that "more than an insubstantial part of its activities" is not in furtherance of an exempt purpose. In a Technical Advice Memorandum, the IRS addressed a number of precedents involving the determination of whether non-exempt activities were substantial. [5] In this Memorandum, the IRS discussed court decisions holding that non-exempt activities constituting approximately 45% of total activities were "substantial;"[6] where receiving 30% of revenues from unrelated business activity was "substantial;"[7] and where 22% of average annual expenditures for non-exempt purposes was "substantial."[8] Based on these precedents, the Technical Advice Memorandum makes the statement that "[g]enerally, courts

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> [S]uch employees of for-profit entities constitute approximately 2.5% of the total number of active or vested and retired participants in Plan Z. Further, it is anticipated that even with the expected increase in employees employed by the non-profit organizations, the total number of active or vested and retired participants in Plan Z of for-profit employers is 3.8%. Therefore, in accordance with section 414(e)(2) of the Code, substantially all of the individuals included in Plan Z are church employees, as described in section 414(e)(1) or section 414(e)(3)(B) of the Code.

And in PLR 9441040 (Oct. 14, 1994), the IRS held that where the employees of two for-profit employers (unrelated trades or businesses to the church's tax-exempt purpose), which were covered by a church plan, ranged from between 4.4% and 7.5% of the total participants covered in the church plan, the plan did not fail to be a church plan:

> [T]he percentage of Plan participants who were involved in an unrelated trade or business is insubstantial when viewed in light of the total number of employees covered by Plan X. Therefore, since the employees of [the for-profit employers] constitute an insubstantial portion of the participants of Plan X, the Plan was not established and maintained primarily for the benefit of employees or their beneficiaries of a church or a convention or association of churches who are employed in connection with one or more unrelated trades or businesses, and substantially all of the individuals included in the Plan are church employees, as described in section 414(e)(1) or section 414(e)(3)(B).

Moreover, in PLR 8734045 (May 28, 1987), the IRS appeared to indicate that perhaps upwards of 50% of the participants in a church plan could be non-church employees, i.e., employees of unrelated trades or businesses. "[A] plan is considered maintained primarily for employees of the church, for plan years after September 2, 1974, if in four of its last five plan years (1) less than 50% of the plan participants consist of, and in the same year (2) less than 50% of the total compensation paid by the employer during the plan year to plan participants is paid to, employees employed in connection with an unrelated trade or business."

[5] TAM 200203069 (June 11, 2001).
[6] *The Nationalist Movement v. Commissioner*, 37 F.3d 216 (8th Cir. 1994).
[7] *Associated Master Barbers & Beauticians of American, Inc. v. Commissioner*, 69 T.C. 53 (1977); and *Orange County Agricultural Society, Inc. v. Commissioner*, 893 F.2d 529 (2nd Cir. 1990).
[8] *Bethel Conservative Mennonite Church v. Commissioner*, 80 T.C. 352 (1983).

have denied exemption to organizations that conducted non-exempt activities which generated income in excess of approximately 25% of the organization's total annual income."[9]

Treasury regulations also address the question of what constitutes "substantially all" in other contexts. As noted above and as relied on by the Seventh Circuit Court of Appeals,[10] these regulations frequently provide that 85% constitutes "substantially all."[11] Virtually all of the regulations we could find quantify "substantially all" as 85%.[12]

4. Suggested Safe Harbor

Taking into account the *Medina* decision, the examples from the PLRs, and, more importantly, the applicable analogies in other parts of the Code and related Treasury regulations, the Alliance recommends that the Regulations include a safe harbor that provides that a plan in which 85% or more of the plan participants are individuals described in Code section 414(e)(1) or (3)(B) can qualify as a church plan.[13] If Treasury adopts this safe harbor approach, the Alliance suggests the Regulations specify that the 85% safe harbor may be met either by: 1) counting only the "individuals described in paragraph (1) or (3)(B)", in both the numerator and the denominator (i.e. count "individuals described in paragraph (1) and (3)(B)" ("employees"), but not beneficiaries, in the 85% calculation) or 2) counting employees and beneficiaries in both the numerator and the denominator.

The safe harbor should not be the only way, however, to fall outside of Code section 414(e)(2)(B), as other compelling facts and circumstances may exist that warrant church plan status even if less than 85% of the plan participants are employees (or deemed employees) of a

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[9] The TAM addressed the revocation of the exemption of an organization that received 75% of its income from non-exempt activities, so for purposes of the TAM, the Service did not need to address whether some percentage less than approximately 25% would also be considered substantial.

[10] *Cont'l Can Co.*, 916 F.2d. at 1158.

[11] For example:

- Code section 4071 imposes a tax on tires used for highway vehicles, unless the vehicles will be used "substantially all" of the time as school busses.
- Code section 4221(e) (3); Treas. Reg. section 48.4221-11(b) (3) provides that "substantially all" in Code section 4221(d)(7)(C) means 85% or more.
- Code section 4942(a) imposes a tax on a charitable foundation's undistributed income, but Code sections 4942(a)(1) and (j)(3)(A) exempt foundations that distribute "substantially all" of their income and Treas. Reg. section 53.4942(b)-1(c) defines "substantially all" as "85 percent or more".
- Code section 951(a) imposes a tax on Americans holding shares of certain foreign corporations but excludes from the corporations' income gains from the sale of commodities if "substantially all" of its business is as an active producer, Code section 954(c) (1) (C) (ii); Treas. Reg. section 1.954-2T(f) (3) (iv) defines "substantially all" as "85 percent of the taxable income of the controlled foreign corporation."

[12] The only departure the Alliance found from 85% was Rev. Proc. 77-37, 1977-2 C.B. 568, section 3.01, which provides that the IRS will not issue letter rulings finding that corporate reorganizations satisfy the "substantially all" requirements in, e.g., Code sections 354(b)(1)(A) and 368(a), unless the transferred assets represent at least 90% of the fair market value of the net assets.

[13] We also suggest that if former employees are included as "individuals included in the plan", they be considered to be "described in paragraph (1) or (3)(B)" if they were so described on their last day of employment by a participating employer. Otherwise, a plan could cease to meet this requirement for church plan status simply because it includes a significant amount of retirees or other former employees.

Church. The Alliance suggests that the Regulations specify that failing to meet the safe harbor does not necessarily mean that the plan is described in Code section 414(e)(2)(B).

III. 414(e)(3)(A) "Treatment as church plan.

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches."

A. Principal Purpose Organization

An employee benefit plan that is both established and maintained by a Church is a church plan. One of the defects of the church plan definition as originally included in the Employee Retirement Income Security Act of 1974 ("ERISA") was that the definition worked for hierarchically-governed Churches (like the Roman Catholics and Seventh-day Adventists) but did not clearly cover the employee benefit plans of many Protestant denominations, particularly those that are congregationally governed. The individuals who drafted the then-proposed "new" church plan definition in the late 1970s included Code section 414(e)(3)(A) as an alternative path to church plan status for plans not themselves established and maintained by a Church.[14]

In framing the intended scope of new Code section 414(e)(3)(A), the individuals who drafted the new church plan definition on behalf of the Alliance and worked with supportive Congressional staff to ensure its passage wanted to be as inclusive as possible, in terms of the types of organizations that could be "principal purpose organizations," or "PPOs", as these organizations have come to be called.[15] It is for this reason that a PPO is described as "a civil law corporation or otherwise" whose "principal purpose or function" is the "administration or funding" of a "plan or program" "for the provision of retirement benefits or welfare benefits or both."[16]

With this historical perspective in mind, the Alliance requests that the Regulations address the following issues with respect to PPO requirements.

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[14] The Supreme Court's *Advocate* decision recognized that Code section 414(e)(3)(A) provides an alternative way for a plan to qualify as a church plan. *Advocate Health Care Network v. Stapleton*, 2017 WL2407476 (2017).

[15] The Alliance recognizes that the intent of the individuals who drafted the new church plan definition in the late 1970s does not rise to the level of legislative history – which is itself not given any weight in statutory interpretation when a court views the meaning of a statute as being "plain." However, the Alliance is providing a historical perspective in these comments because the church polity and church plans and programs structural issues that were reflected in the drafting in the late 1970s still exist today, virtually unchanged. Both then and now, the Alliance believes it is uniquely situated to comment on these issues.

[16] The Alliance drafters recognized that they did not know how every church benefit plan or program was structured, and Code section 414(e)(3)(A) was therefore drafted in the broadest possible manner. In fact, the drafters felt that breadth in drafting was a constitutional imperative, so that one form of church polity or employee benefit plan structure would not be favored over another. This was particularly true for Catholic diocesan and religious order plans, because their representatives did not participate in the Alliance drafting process.

1. PPO Not Required for Church Plan Status

The Alliance requests that the Regulations make it clear that a plan will be a church plan if it is both established and maintained by a Church, even if no PPO is used to administer or fund the plan. There appears to have been some confusion on this point in a few of the court cases that have reviewed and interpreted the church plan definition in the past few years, so clarification of this fundamental point appears to be needed.

2. Meaning of "Principal Purpose"

Webster's New Collegiate Dictionary defines the word "principal" as "first in rank, authority, importance or degree." The Tax Court cited this definition in *Dittler Bros. Inc. v. Commissioner*[17] in determining the meaning of the phrase "principal purpose" in the statute at issue in that case.[18] The Alliance requests that the Regulations provide that an organization's principal purpose or function will be the administration or funding of employee benefit plans if the majority of either the time spent or expense incurred by the organization or its members or employees relates to such administration or funding, or both.

3. Type of Organization

The statute is clear that a PPO can be an incorporated or unincorporated organization. The IRS, in numerous PLRs, has determined that a PPO can consist of an employee benefit plan administration committee. The Alliance affirms that this interpretation would be consistent with the drafters' intent to ensure that the statute would cover all benefit plans and programs sponsored by a Church (regardless of polity) and all types of PPOs in use by Churches and their affiliated organizations (in particular, those created by Catholic affiliated organizations).

4. Benefit Plan Committee Membership

The Alliance recommends that a benefit plan administration committee that otherwise qualifies as a PPO need only have one member, that the member or members of the committee need not be members of the Church by or with which the sponsoring employer is controlled or associated, and that individuals can be designated as committee members by virtue of the office or position they hold (such as, Director of Human Resources or Treasurer).

5. Control by or Association with a Church

The IRS has also made it clear in a number of PLRs that a benefit plan committee is controlled by or associated with a Church if the affiliated employer appointing the committee is itself so controlled or associated.[19] The Alliance recommends that the Regulations also make this clear.[20]

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[17] 72 T.C. 896 (1979).

[18] The Tax Court in *Dittler Bros.* also noted the U.S. Supreme Court's subscription to this definition in *Malat v. Riddell*, 383 U.S. 569 (1966).

[19] *See, e.g.*, PLR 200338019 (Sept. 19, 2003).

[20] Control is addressed in more detail in Section IV.C herein. Association is addressed in more detail in Section VI.

IV. ***414(e)(3)(B) "Employee defined.***

The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E)."

A. Employees

1. Definition of "Minister"

The Alliance recommends that the term "minister" be broadly defined in the church plan Regulations to include rabbis, swamis, lamas, abbots, monks, priests, deacons, bishops, imams, pastors, reverends, dastoors, cantors, members of religious orders and other religious leaders with similar stature within a Church.

2. Definition of "Exercise of His Ministry"

The Alliance recommends that the term "exercise of his ministry" be broadly defined in the Regulations. Specifically, the Alliance believes that 20 C.F.R. section 404.1023(c), which defines when work is in the exercise of ministry for Social Security purposes, should, for consistency and uniformity purposes, also be referenced or utilized in the church plan Regulations for guidance as to what is meant by "exercise of ministry" for a minister under Code section 414(e)(3)(B)(i).

B. Exempt Organization Requirement in 414(e)(3)(B)(ii)

We suggest that, to satisfy this requirement of tax exemption, the Church or PPO may verify an organization's exempt status by one of the methods described below. (If the PPO or Church maintains multiple church plans, this verification need only be performed when an organization adopts the first of such multiple plans.) The suggested verification methods are:

1. Obtaining a copy of the organization's IRS determination of tax-exempt status;

2. Confirming that the organization is listed in the group exemption ruling of the applicable Church, received from the IRS;

3. Confirming that the organization is recognized or otherwise designated by the Church under a process that includes confirmation that the organization is exempt from federal income tax;

4. Verifying the organization is tax-exempt on the IRS website by a review of the IRS Business Master File or Tax Exempt Organization Search;

5. Obtaining a copy of the organization's application for an IRS determination of tax-exempt status (if the organization appears to meet all of the requirements for such status); or

6. For Churches, integrated auxiliaries, public charities whose annual gross receipts are normally not more than $5,000, and other entities that are not required to file an application for recognition of exemption from federal income tax, verifying tax-exempt status by any other reasonable method. For an individual church, any reasonable method would include, but not be limited to, verifying that the church is on an official list of churches maintained by the related convention or association of churches or receiving a certification by a church officer that the entity is a church.

C. Control Requirement in Code Section 414(e)(3)(B)(ii)

We recommend that the Regulations allow the control requirement in Code section 414(e)(3)(B)(ii) to be met by canonical, ecclesiastical or similar control. For example, if employees of the organization are subject to ecclesiastical supervision by a Church or its leaders, the organization should be deemed to be controlled by the Church. Another example of such control is when an organization is bound by canon law, a Church book of discipline, or other similar set of Church rules.

The Alliance recommends that the Regulations recognize these safe harbors for establishing requisite control by a Church:

1. Safe Harbor One

The first safe harbor we propose would be met where the members, governing board or an officer or officers of the Church have the right to appoint, elect, approve, ratify or remove a majority of the organization's governing board or officers.

2. Safe Harbor Two

The second safe harbor would be met if the Church has reserved to itself the responsibility for approving certain significant corporate events involving the subordinate organization, such as merging with another organization or dissolving. Such reservations are often referred to as "reserved powers."

3. Safe Harbor Three

This safe harbor would be met when the organization's budget must be approved by the Church.

V. *414(e)(3)(C) "Church treated as employer. A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B)."*

A. Deemed Employer - Multiple Churches

An employee of an organization controlled by or associated with two or more Churches may be considered to be an employee of each Church, thus permitting the employee to be treated as a Church employee for purposes of participating in a plan sponsored by either Church or by the organization itself. This is because when Code sections 414(e)(3)(B) and (C) are read together, an employee of the organization is deemed to be an employee of each Church.

The IRS has recognized this in a number of PLRs.[21] The Regulations should affirmatively state the logical conclusions of these paired statutory provisions.

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[21] In PLR 200207027 (Nov. 19, 2001), employees of an organization formed by two Churches were deemed to be employed by each Church. Each member Church elected an equal number of the organization's trustees and, upon dissolution, the organization's remaining assets would be distributed between the two member Churches equally. PLR 200207027 concluded that the organization (referred to as the "Employer" in the ruling) was associated with both Churches for purposes of section 414(e)(3) and therefore the organization's employees could be considered to be employees of either of the Churches for purposes of the church plan rules.

> Based on the foregoing, it is concluded that the Employer is an organization that shares common religious bonds and convictions with both Church A and Church B. The Employer is, therefore, an organization that is associated with a church or convention or association of churches within the meaning of Code § 414(e)(3)(D), for purposes of the church plan rules. It is further concluded, therefore, that the Employer's employees are deemed to be employees of a church or convention or association of churches under the rules of Code § 414(e)(3)(B), and conversely, that either Church A or Church B may be considered the employer of these employees under the rules of Code § 414(e)(3)(C). (emphasis added)

Similarly, in PLR 199938049 (July 1, 1999) employees of an eldercare facility formed by two churches (the eldercare organization referred to as "Corporation O" in the ruling) were deemed to be employees of both churches:

> In this case, Churches A and B formed an association of churches under section 414(e) the Code in providing for the housing and medical needs of the elderly through the establishment, support and oversight of Corporation O. Furthermore, Corporation O was an organization described in Code section 501(c)(3) and was exempt from Federal income tax under section 501(a). Corporation O is affiliated with Churches A and B because its Board of Trustees was selected by Corporations M and N. Corporation M was controlled by Diocese D because the Council of Diocese D nominated its trustees, and the Bishop of Diocese D was an ex officio trustee. Corporation N was controlled by Synod Y because Church B in Synod Y elected its trustees. Diocese D was associated with Church A, and Church B in Synod Y was an intermediate governmental unit responsible for the mission of Church B throughout a certain region. Corporation O was associated with Churches A and B because it addressed the ecclesiastical tasks of Churches A and B concerning the aged.
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> Accordingly, pursuant to sections 414(e)(3)(B) and (C) of the Code, employees of Corporation O are deemed to be employees of Churches A and B, and Churches A and B are deemed to be employers of such employees for purposes of the church plan rules. (emphasis added)

Stating this in the Regulations also would be consistent with at least one Department of Labor Advisory Opinion[22], which ruled that under section 3(33) of ERISA (ERISA's counterpart to Code section 414(e)), employees of an organization formed by three churches, Morningside Ministries, were deemed to be employees of each of the three churches:

> Further, Morningside is "associated with" the Churches, within the meaning of section 3(33)(C)(iv) of Title I of ERISA, because Morningside's adherence to the tenets and teachings of the Churches is assured by the Churches' joint control of Morningside (as described above); by the presence as directors on the Morningside Board of the Episcopal bishop, the Methodist bishop, and the Presbyterian senior pastor; and by the presence of one or more clergy who have been elected as directors to represent one of the Churches on the Morningside Board. Because these factors assure Morningside's adherence to the tenets and teaching of the Church (sic), they also assure that Morningside shares common religious bonds and convictions with the Churches and, thus, that Morningside is "associated with" the Churches within the meaning of section 3(33)(C)(iv) of Title I of ERISA.
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> Accordingly, it is the view of the Department of Labor (hereinafter, the Department) that individuals whose employment is with Morningside are considered employees of an organization that is a civil law corporation and that is controlled by, or associated with, a church or convention or association of churches within the meaning of section 3(33)(C)(ii)(II) of Title I of ERISA. In accordance with section 3(33)(C)(iii) of Title I of ERISA, the Churches are therefore deemed the employer of those individuals for purposes of the church plan definition in section 3(33). (emphasis added)

VI. ***414(e)(3)(D) "Association with church.***

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches."

Finally in PLR 9322032 (Mar. 9, 1993) the IRS recognized that employees of an eldercare facility formed by three churches (referred to as "Organization A" in the ruling) were deemed to be employees of a church or association of churches pursuant to Code sections 414(e)(3)(B) and (C):

> Organization A is an association of churches and is an exempt organization controlled by Churches A, B and C through a Board of Directors consisting of representatives of all three Churches, including the highest official of each Church. Organization A, therefore, is controlled by and shares common religious bonds and convictions with Churches A, B and C. Accordingly, pursuant to sections 414(e)(3)(B) and (C) of the Code, employees of Organization A are deemed to be employees of a church or convention or association of churches for purposes of the church plan rules. (emphasis added)

The organization that was the subject of PLR 9322032 was apparently Morningside Ministries, a Texas organization.

[22] Advisory Opinion 94-12A (Dep't Labor, Apr. 4, 1994).

A. Associated with a Church – Common Religious Bonds and Convictions

Neither ERISA nor the Code statutorily defines what "common religious bonds and convictions" means. The IRS and court cases have, over the years, developed a body of guidance as to what types of relationships, affiliations, connections, or other factors will constitute such common religious bonds and convictions. Most recently, the Tenth Circuit in *Medina*,[23] opined that the factors that could meet the common religious bonds and convictions test should not be construed narrowly, because the statutory language is written broadly. We agree with the Tenth Circuit's interpretation of common religious bonds and convictions.

Association with a Church may need to be determined for either or both of the following: (i) to authenticate the status of an organization as a PPO under Code section 414(e)(3)(A), and (ii) to identify whose employees may participate in a church plan under 414(e)(3)(C)(ii). Clarification of "associated with a Church" is the highest priority item to the Alliance in the Regulations.

We recommend that Treasury, in the Regulations, provide five safe harbor tests (set out below) to allow entities (including PPOs) to determine whether or not they are "associated with" a Church within the meaning of Code section 414(e)(3)(D).

However, we propose that Treasury make clear that to the extent an organization is unable to meet one of the proposed safe harbors (described below), such organization may still be able to demonstrate that it is "associated with" a Church (i.e., shares common religious bonds and convictions) on a case-by-case basis under a facts and circumstances inquiry.

1. Safe Harbor One

The first safe harbor we propose is based on the existence of requirements imposed by or pertaining to the Church, or connections existing between an organization and a Church. Many of these factors have been historically recognized by the IRS (e.g., in PLRs issued on church plan status) and by courts as sufficient to meet the "common religious bonds and convictions" test under Code section 414(e)(3)(D).

In light of the numerous religions practiced in the United States, and the vast number of denominations within each religion, many of which have different worship practices, beliefs, and organizational structures, we believe that the list of factors for this safe harbor should be expansive enough to account for these differences in order to avoid favoring certain denominations over others. This safe harbor requires that the organization share common religious bonds and convictions with a Church by demonstrating one or more of the following factors.[24]

For readability, these factors have been grouped into two categories, although some factors could fall within both categories: a) requirements imposed by or pertaining to the Church, and b) connections between the organization and the Church:

[23] *Medina*, 877 F.3d at 1224.

[24] We note that many of these factors demonstrating the sharing of common religious bonds and convictions were enumerated in prior PLRs issued by the IRS. See e.g., PLR 9835028.

a. Requirements

i. A Church, or the members, governing board, or one or more officers thereof, has the authority to appoint or remove, or to control the appointment or removal of, at least one of the organization's officers or directors;

ii. In the event of dissolution, the organization's assets are required to be distributed to the Church, or to an affiliate thereof;

iii. The organization is required to follow the policies and/or moral or religious teachings of the Church;

iv. The Church requires the organization's articles, bylaws, constitution, mission statement, public documents or the deeds to the organization's real property to contain certain provisions and/or such documents must be approved by the Church;

v. A majority of voting membership of the organization is held by, or a majority of the Board members or officers are required to be, members or delegates of congregations or other units of the Church;

vi. The organization is required by the Church to report to the Church at least annually on the organization's financial and/or general operations and/or to make payments to the Church, with no corresponding consideration;

vii. The organization requires its officers, employees and/or students and/or members of its governing board to subscribe to a statement including the stated beliefs of the Church;

viii. The organization requires ministers of the Church to be officers or members of its governing board or otherwise employs ministers of the Church;

b. Connections

i. An institutional relationship exists between the organization and the Church (which may include such relationship being reflected in the corporate name of the organization or the presence of voting or non-voting members of the Church or a designee thereof on the governing board of the organization);

ii. The organization has been officially recognized or otherwise designated by the Church in a manner that indicates an affiliation (which may include listing the organization in the directory of affiliated organizations of the Church);

iii. The Church provides financial support representing ten percent (10%) or more of the organization's annual operating revenue and/or other non-financial assistance to the organization;

iv. Voting membership of the organization is limited to entities that are recognized by the Church, or share common convictions with the Church;

v. The Church owns real property in which the organization conducts a significant portion of its activities, or the organization is housed in the building or otherwise on property of the Church;

vi. The articles, bylaws, constitution, mission statement, or a similar document of the Church, the organization or the denominational benefits board affirms that the organization and the Church share common or similar religious doctrines, beliefs, principles, disciplines or practices and/or are otherwise affiliated or associated with each other;

vii. The organization or its delegate has voting or advisory rights in the Church;

viii. The organization is considered an arm of or was formed by the Church, carries out functions of the Church, has a mission parallel to the Church, sponsors activities designed to support the religious mission of the Church, and/or has as its primary purpose aiding or providing services or resources to the Church;

ix. The organization is included in the activities or services provided by the Church that are limited to members of the Church, and/or to organizations associated with the Church;

x. The organization educates students for the ministry of the Church, or requires or offers religious instruction or a religious curriculum of the Church;

xi. The organization follows basic teachings, tenets, and core beliefs like those of the Church, or has adopted a statement that includes the stated beliefs of the Church as found in published writing (although the language need not be exact), provided the stated beliefs are important and significant parts of the teachings and tenets of the Church, and if the statement is in one of the following documents: 1) its enabling instrument (corporate charter, trust instrument, articles of association or incorporation, constitution or similar document), 2) bylaws (or a document equivalent to bylaws), 3) resolution of its governing board, or 4) a published position or mission statement;

xii. The organization maintains a chapel where services and/or sacraments of the Church are conducted and/or prayers and worship of the Church occur at the organization; or

xiii. The organization grants preferential admission status or practices preferential hiring of members of the Church.

The next two safe harbors that we propose borrow from the concept of an organization being "affiliated with" a Church under Code section 6033 and the regulations thereunder.

2. Safe Harbor Two

An organization should be deemed to be "associated with" a Church if it is covered by a group exemption letter issued to the Church under applicable administrative procedures, within the meaning of Treasury regulations section 1.6033-2(h)(2)(i).

3. Safe Harbor Three

An organization should be deemed to be "associated with" a Church if it is operated, supervised, or controlled by or in connection with a Church within the meaning of Treasury regulations section 1.6033-2(h)(2)(ii).

As to the question of whether "affiliated with" (within the meaning of Code section 6033) should equate to being "associated with" (within the meaning of Code section 414(e)(3)(D)), we believe that it should. The former "affiliated with" test appears to be a stricter test, demanding a closer relationship (i.e., a group exemption letter or operational control by the Church) than the latter "associated with" test, which merely requires common religious bonds and convictions. Since meeting the criteria under Treasury regulations section 1.6033-2(h)(2)(i) and (ii) is dispositive of being "affiliated with" a Church for Code section 6033 purposes, it should follow that meeting such criteria should also be dispositive of being "associated with" a Church for Code section 414(e)(3)(D) purposes.

4. Safe Harbor Four

An organization should be deemed to be "associated with" a Church if the organization's employee benefit plan or a multiple employer plan in which the organization participates:

(i) is administered or funded by a denominational benefits board;

(ii) the denominational benefits board has established connectional criteria and spiritual convictions that an organization must meet in order to participate in a multiple employer plan maintained by such board, or to have its plan administered or funded by such benefits board;

(iii) such criteria must be consistent with the mission statement of the denominational benefits board approved by the denomination; and

(iv) the denominational benefits board makes a reasonable, good faith determination that an organization satisfies such criteria.

For purposes of this safe harbor, a denominational benefits board is a board, committee or program established or created by a Church denomination and recognized by it as the official benefits plan administrator for such Church denomination.

5. Safe Harbor Five

Some seminaries are non-denominational but hold to a particular theological point of view and prepare students to enter into ministry in a broad range of Churches that share common religious convictions and often common religious bonds with the seminary. Often times, these seminaries or bible colleges–seek to protect their independence from any one denominational affiliation because they seek to serve many denominations that share common core convictions. Other religious educational institutions, while independent, are established to prepare students to engage in society from a particular theological viewpoint, regardless of whether their students will enter into vocational ministry.

Employee benefit plans established by these educational institutions should be able to qualify for church plan status because the institutions are often associated not with one Church, but with many. The Alliance therefore urges Treasury to specifically address this circumstance by adopting an express safe harbor indicating that the employee benefit plans established by such institutions are church plans.

B. Clarification of Church Plans Maintained by Multiple Churches

In addition, the Alliance requests that the Regulations clarify that multiple Churches maintaining a church plan together are not required to demonstrate common religious bonds and convictions between them. In other words, an "association of Churches" is not itself required to be "associated with" a Church.

As described above, an organization *that is not itself a Church* must demonstrate control by, or common religious bonds and convictions with, a Church, in order to qualify as an organization eligible to establish and maintain a church plan. However, this is not the case for multiple Churches maintaining a church plan together. Multiple Churches, each of which could establish and maintain a church plan under section 414(e), may establish and maintain a church plan together without demonstrating common religious bonds and convictions. The common bonds and convictions criteria referred to above are specifically required to establish a link between a non-Church (which would not be permitted to establish or maintain a church plan individually) and a Church (which would be so permitted).[25]

[25] Although the use of the related words "association" and "associated" can create the impression that an association of churches is also subject to the requirement of sharing common bonds and convictions between its members, parsing the statutory language illustrates that this was not the drafters' intent. The phrase "convention or association of churches" is used concurrently with "church" throughout section 414(e).

In contrast, the requirement of shared common religious bonds and convictions appears only in section 414(e)(3)(D), in the definition of "associated with a church". The concept of "association with a church" appears in section 414(e)(3)(A) in the description of a principal purpose organization (where such organization must be "controlled by or associated with a church or a convention or association of churches") and in section 414(e)(3)(B)(ii) (where it broadens the definition of "employee" of a church or convention or association of churches to include employees of certain organizations "controlled by or associated with a church or a convention or association of churches"). Note

VII. ***414(e)(3)(E) "Special rule in case of separation from plan.***

If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B) , the church plan shall not fail to meet the requirements of this subsection merely because the plan—

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service."

A. Separated Employees

Code section 414(e)(3)(E) expands the definition of "employee" under Code section 414(e)(3)(B) to include certain individuals who have separated from service with an organization maintaining a church plan. Subsection (i) of 414(e)(3)(E) provides that the plan will still be a church plan even though it retains a separated employee's accrued benefit or account for later distribution under the plan. This provision is critical to retirement plans as there must be a distributable event under a retirement plan before it can distribute an accrued benefit or account. In many situations, a separation from service will not be a distributable event.

Subsection (ii) allows the church plan to remain a church plan even if it receives a contribution for a separated employee for up to five years after the separation. If the employee is disabled upon separation from service, the contributions may continue for an indefinite period. One of the reasons for this extension of participation may have been to accommodate separation from service arrangements in which the employer agrees to continue retirement benefit accrual for some period of time after termination.[26] Also, this accommodates the payment of disability benefits from a welfare plan, which can easily extend beyond five years.

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that if the drafters' intent was to require a group of churches to meet the common bonds and convictions standard, a definition of "convention or association of churches" could have been included, defining a convention or association of churches as multiple churches sharing common religious bonds and convictions. Furthermore, it would be inconsistent to require the common religious bonds and convictions standard for an "association of churches", but not for a "convention of churches"; however, it is impossible to read the current statutory language to require the common religious bonds and convictions standard to apply to a convention of churches, as the statute consistently reads "convention *or* association of churches".

[26] Retirement plan contributions may continue to be made to a retirement plan described in section 403(b) for up to five years following an employee's termination of employment.

Code section 414(e)(3)(E) does not specifically contemplate welfare benefits other than disability benefits, while section 414(e)(3)(A) includes any type of welfare plan. By their very nature, welfare plans often provide benefits to separated employees. Examples include employees on COBRA and COBRA-like extensions of health care, retirees receiving health care, retiree death benefits and severance benefits.

The Alliance requests that the lack of specificity in the Code be remedied by the Regulations. Code section 414(e)(3)(E) does not preclude other types of post-separation benefits. The payment of welfare benefits designed to be paid after separation, such as death and severance pay benefits, should not disqualify a church welfare benefit plan, as long as the benefits were accrued during the active Church employment period.

The IRS so held in PLR 201323043,[27] in which it found that a church welfare plan that accepted contributions for a retired employee beyond five years of retirement was a church plan. The ruling reasoned that, even though contributions continued to be made to provide the retiree benefits, all the retiree's benefits were "fully accrued while the retiree was an active employee and no contributions are made with respect to any periods after the employee's separation from service".

In a typical health plan, a retired employee may be allowed to continue in a Medicare supplement by paying the required premium. The benefit to the employee is the ability to remain enrolled in the familiar health plan, perhaps for life, which is significant even if the employee is paying for current costs. Health plans may provide retiree coverage for life after satisfaction of a requisite number of years of service with the employer. Consistent with PLR 201323043, the Alliance believes that this type of benefit is accrued during the working career for the time when the employee reaches the status of being retired.

If a welfare plan provides a death benefit for a retiree, that benefit is clearly designed to be paid potentially more than five years after the employment relationship has ended. However, the Alliance submits that the death benefit is "accrued" during the years of active service.

In some situations the employer will pay for the post-severance benefit, and in other situations the retiree will pay. It should not matter who pays or what the benefit arrangement is – the question should be whether the benefit is *on account of the prior service* as opposed to current service.

[27] June 7, 2013.

VIII. ***414(e)(4) "Correction of failure to meet church plan requirements.***

> ***(A) In general. If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years."***

A. What is correctable?

Code section 414(e)(4) sets forth specific requirements allowing correction of a failure to meet one or more requirements of section 414(e) (for "church plan" status), if the correction is made within the correction period specified in section 414(e)(4)(3). This provision is broad and would allow correction for any type of failure to meet the requirements of section 414(e).[28]

Additionally, section 414(e)(4) permits correction by a "plan" and does not limit its application to a specific type of plan. Therefore, we believe that correction under section 414(e)(4) is available for a plan providing welfare benefits, retirement benefits, or both.

Finally, correction should be available to any church plan, whether maintained by a Church or by a PPO.

EXISTING TREASURY REGULATIONS

IX. ***1.414(e)-1(e) "Religious Orders and Religious Organizations. For purposes of this section the term "church" includes a religious order or a religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the function of a church whether as a civil law corporation or otherwise."***

We think this provision should be retained in the Regulations. The "integral part" test remains good law,[29] so should not be eliminated from the Regulations. If the Regulations omit this provision, courts may conclude that organizations described in this regulation no longer may be included within the term "Church".

[28] We note that, under Code section 410(d), a "church plan" under section 414(e) may make an affirmative election (a "section 410(d) election") to become subject to the provisions of Title I of ERISA and certain provisions of the Code as if it were not a church plan. A specific procedure is set forth in Treas. Reg. section 1.410(d)-1 to make such an election for a church plan, and the election, once made, is irrevocable with respect to such plan. Because there is a specific procedure to make the section 410(d) election, the election cannot be inadvertently made (*e.g.*, by publishing plan materials indicating the plan is subject to ERISA or by filing Form 5500). Consequently, we believe that a properly made section 410(d) election would, therefore, not be a "failure" to meet the requirements of section 414(e), which is subject to correction under section 414(e)(3)(A).

[29] See, e.g., PLR 201537025 (Sept. 11, 2015).

X. ***1.414(e)-1(f) "Separately incorporated fiduciaries. A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated fiduciary such as a pension board or a bank."***

We recommend that this regulation be expanded to read as follows: "A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated *plan administrator* such as a pension board, bank *or a separately incorporated third party administrator such as a medical claims administrator*." We recommend this clarification since this arrangement is commonly utilized by church welfare plans to gain access to provider discounts and networks, and does not detract from the relationship of the plan to a Church.

CONCLUSION

We are grateful for the opportunity to comment on the Regulations, which are of critical importance to the Alliance. Please do not hesitate to contact the undersigned at (202) 778-9128 with any questions, or if we may be of any assistance.

Sincerely,

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