CHURCH ALLIANCE
Acting on Behalf of Church Benefits Programs

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Electronically to http://www.regulations.gov.

U.S. Department of Health and Human Services, Office for Civil Rights
Attn: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Nondiscrimination in Health 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 Programs and Activities; Proposed Rule ("Proposed Rule") published by the United States Department of Health and Human Services ("Department") at 80 Fed. Reg. 54172 on September 8, 2015.

The Church Alliance is an organization composed of the chief executives of thirty-seven church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The Church Alliance members provide employee benefit plans, including in many cases, health care coverage, to approximately one million participants (clergy and lay workers) serving over 155,000 churches, parishes, synagogues and church-associated organizations. These health care programs are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 and section 414(e) of the Internal Revenue Code of 1986, as amended. All of the members of the Church Alliance 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 care plan for its workers. This is true even though some of the health care plans associated with the members of the Church Alliance do not impose restrictions on covered health or medical services falling within the ambit of the Proposed Rule.

II. Executive Summary

The Church Alliance appreciates the Department's recognition of and sensitivity to religious conscience and liberty issues in promulgating regulations implementing the nondiscrimination requirements of section 1557 of the Affordable Care Act. For the reasons set forth below, the Church Alliance respectfully submits that church self-insured health care plans should be exempted from the Proposed Rule because the plans, other than certain retiree-only Medicare supplement plans, do not receive Federal financial assistance, nor is such assistance received by all, or substantially all, of the employers participating in the plans. At a minimum, clarification should be provided that a retiree-only church health care plan is not a

"health program or activity" within the meaning of the Proposed Rule. In addition, the Church Alliance submits that the Proposed Rule should include a religious conscience exemption that will clearly protect the rights of religious organizations that object to providing coverage for certain health or medical services otherwise required under section 1557.

III. Definitional Issues for Multiple Employer, Church Health Care Plans

The Proposed Rule utilizes several key definitions that together determine its scope and reach. These key terms are "covered entity," "health program or activity," "Federal financial assistance," and "employer health benefit program." Before explaining the issues presented by these definitions for church self-insured health care plans, it is important to understand how these plans are structured.

A. Description of Church Self-Insured Health Care Plans

Church self-insured health care plans are multiple employer in nature, with (in some cases) thousands of churches and other church-associated employers participating in the plans. In some cases, the plan is provided through or by a separately incorporated church benefits board. In other cases, the plan is provided directly by or through what might be called the church itself – in many cases this will be a separately incorporated, denominational "headquarters" organization. In almost all cases today, the typical church self-insured health care plan is administered by one or more third-party administrators ("TPAs") pursuant to administrative services contracts entered into by the TPAs and the church benefits board or church headquarters association.

As noted above, some of the larger church self-insured health care plans have literally thousands of participating employers. While most of these participating employers are churches, parishes or synagogues, church-associated organizations also participate in some of the plans. These church-associated organizations include colleges and universities, seminaries, K-12 parochial schools, Bible colleges, hospitals, nursing homes, children's homes, church camps and social service organizations. It is possible that some of these organizations could receive Federal financial assistance from HHS in connection with a health program or activity that is not an employee health benefit program—but the church plan sponsor will not know of this receipt. However, the Church Alliance believes that only a small number of participating employers in the typical church self-insured health care plan will receive such assistance--substantially all of them will not.

B. Analysis of Key Proposed Rule Definitions

The Proposed Rule, in section 92.4, defines the term "covered entity" as including any entity that operates[1] a health program or activity, any part of which receives Federal financial assistance. For purposes of this definition, "*health program or activity* means the provision or administration of health-related services or health-related insurance coverage . . . ." The Proposed Rule goes on to provide, in the definition of "health program or activity," that if the entity is "principally engaged in providing or administering health services or health insurance coverage, all of its operations are considered part of the health program or activity" except as otherwise provided in the Proposed Rule. The "health program or activity" definition states that "such entities" (presumably those that are principally engaged in providing or administering health services or health insurance coverage) include, among other entities, a group health plan.

The preamble to the Proposed Regulations appears to make it clear (on p. 54191) that the Office of Civil Rights of the Department of Health and Human Services ("OCR") intends to apply the employer liability rules under Section 1557 of the Affordable Care Act "whether the employee health benefit program is self-insured or fully-insured by the employer." This portion of the preamble goes on to state that, if an employer "creates a separate legal entity to administer its employee health benefit plan, the employer continues to be liable for the nondiscriminatory provision

[1] The use of the word "operates" is itself unclear in the case of group health plans, where terms like "established or sponsored by," "administered by," or "maintained by" are commonly used to describe the relationship of a plan sponsor, plan administrator or employer to a particular health care plan.

of employee health benefits to its employees; the employer, as a recipient, may not, through contractual or other arrangements, discriminate on a prohibited basis against its employees."

The term "Federal financial assistance" is broadly defined to include the receipt of funds from the Federal government by grant, loan, credit, subsidy, contract… or any other arrangement." Footnote 94 on page 54191 of the preamble to the Proposed Regulations suggests that a self-insured health care plan's receipt of Medicare Part D payments (such as, in connection with an employer group waiver, or "EGWP," plan) could mean that section 1557 applies to a self-insured church Medicare supplemental plan, generally available only to retired clergy and church workers, and their spouses.

Finally, the Proposed Rule defines an "employee health benefit program" (a key definition for assessing employer liability under section 92.208 of the Proposed Regulations) as, among other things, "health benefits coverage or health insurance provided to employees and/or their dependents established, operated, sponsored, or administered by, or on behalf of one or more employers, whether provided or administered by entities including but not limited to an employer, group health plan (as defined in the Employee Retirement Security Act of 1974 (ERISA, at 29 U.S.C. 1191(a)), third party administrator or health insurance issuer."

Section 92.2 of the Proposed Rule sets out its scope, and the preamble explaining this section indicates that it applies to any "health program or activity" (which appears to include a group health plan) any part of which receives Federal financial assistance from any Federal agency.[2] The Proposed Rule therefore appears to be very broad in application and, with its focus on the term "health program or activity" would seem to reach an employer's group health plan.

However, when assessing an employer's[3] liability for a Section 1557 violation, the focus of the Proposed Rule shifts to determining what is a "covered entity" because section 92.208 of the Proposed Rule appears to impose this liability only on a "covered entity" that provides an "employee health benefit program" to <u>its employees</u> and/or their dependents, and then only if one of the following three conditions is met:

1. The covered entity is principally engaged in providing or administering health services or health insurance coverage (Section 92.208(a));

2. The covered entity receives Federal financial assistance, a primary objective of which is to fund the covered entity's employee health benefit program (Section 92.208(b)); or

3. The entity is <u>not</u> principally engaged in providing or administering health services or health insurance coverage <u>but</u> operates a health program or activity, which is not an employee health benefit program, that receives Federal financial assistance; except that the covered entity is liable under this part with regard to the provision or administration of employee health benefits only to the employees in that health program or activity. (Section 92.208(d) (emphasis supplied))

A church self-insured health care plan would not itself appear to be a covered entity for purposes of section 92.208 liability because it is the "employee health benefit program" a church or church benefits board provides. A church or church benefits board would not appear to satisfy any of the three conditions (described above) for section 92.208 liability to be imposed on it.[4]

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[2] The Proposed Rule later makes it clear that it only covers Federal financial assistance from HHS, although it encourages other agencies to adopt its standards for purposes of their enforcement of section 1557. <u>See</u> footnote 2 in the preamble of the Proposed Rule, on page 54173.

[3] We say "employer's liability" here because the title of section 92.208 is "<u>Employer</u> liability for discrimination in employer health benefit programs." (emphasis supplied)

[4] The church or typical church benefit board would not satisfy the "principal engagement" requirement under section 92.208(a), would not itself receive Federal financial assistance to fund the employee health benefit program it provides (92.208(b), and would not operate a health program or activity other than an employee health benefit program (92.208(c)).

As noted above, however, it is possible for an employer participating in a church self-insured health care plan to receive Federal financial assistance for a health program or activity that is not an employee health benefit program, and the employer therefore would appear to be a covered entity described in section 92.208(c). The Church Alliance believes that there would only be a small number of participating employers (if any) fitting this description in a church self-insured health care plan—but the sponsor of the plan (the church or church benefit board) will not know whether any participating employers are covered entities. As a practical matter, in order to avoid an inadvertent section 1557 violation, the plan sponsor will be faced with the Hobson's choice of complying with the section 1557 requirements for all participating employers (the vast majority of which are not covered entities subject to the Proposed Rule) or exclude employers described in section 92.208(c) from plan participation—and the latter option would not be an administratively viable or realistic one. The first option would impose a requirement that otherwise would not apply to most employers in the plan, and could create First Amendment issues—for example, if the church has established an existing dispute resolution process that conflicts with the grievance procedures required by section 1557.

C. Medicare Supplemental Plans

As noted above, it appears that a Medicare supplemental plan available only to retired clergy and church workers, and their spouses, may be a health program or activity for purposes of the Proposed Rule. It also appears that such a plan's receipt of Federal financial assistance in the form of Medicare Part D subsidies could be considered as not having been received for the purpose of funding an employee health benefit program, depending on the manner in which the retiree-only plan is structured.[5]

The Affordable Care Act and the Health Insurance Portability and Accountability Act both contain broad exemptions for retiree-only health care plans. The Church Alliance submits that a retiree-only church Medicare supplemental plan, like that described above, should be exempt from the Proposed Rule, if an exemption for church self-insured health care plans is not provided in the final regulations.

In light of the above analysis, the Church Alliance requests that the final regulations either:

1. Provide an exemption from the Proposed Rule for a church self-insured health care plan, or
2. Clarify that a retiree-only church Medicare supplemental plan is not a "health program or activity" for purposes of the Proposed Rule.

IV. Religious Conscience Exemption

The Church Alliance also wants to respond to the Department's request for comment on whether the final section 1557 regulations should include a specific exemption for health care plans or other covered entities with respect the proposed requirements of the rule related to sex discrimination, including the requirements that are discussed in the proposed rule. In the preamble, OCR states: "For example, HHS wants to ensure that the rule has the proper scope and adequately protects sincerely held religious beliefs to the extent those beliefs conflict with the provisions of the regulations."

If the final regulations will not provide an exemption for church self-insured health care plans, the Church Alliance submits that a religious conscience exemption like that mentioned in the preamble is vital, and hereby requests that the final regulations provide such an exemption. The Proposed Rule, if finalized in its current form, appears to prohibit excluding transgender-focused health care benefits from coverage under a self-insured group health plan. Some church health care plans represented through the Church Alliance do not have a religious or theological objection to providing such benefits. Some do, however, and it is in part for this reason that the Church Alliance

[5] For example, if the Medicare supplemental plan is sponsored by the church or church benefit board for retired clergy and church workers but paid for by the retirees themselves who decide to enroll in it, with no employer involvement or funding, the retiree-only plan may not be an employee health benefit program within the meaning of the Proposed Rule.

requests a religious conscience exemption be included in the final regulations. We say "in part" because the Church Alliance's concern goes beyond the transgender benefits issue and extends to other types of health care benefits that could, in the future, be mandated under section 1557, but to the provision of which, a church health care plan sponsor has religious objections. For both of the reasons noted above, the Church Alliance believes a religious conscience objection provision should be included in the final Section 1557 regulations.[6]

A possible exception for church self-insured health care plans could read as follows:

> A church health care plan described in section 414(e) of the Internal Revenue Code of 1986, as amended, shall not be required to include or arrange for coverage for any health care benefit required under section 1557 if the provision of such benefit would violate the religious beliefs of a church or a convention or association of churches that maintains, sponsors or participates in such a plan.

V. Conclusion

For the reasons given above, the Church Alliance requests that church self-insured health care plans be exempted from the Proposed Rule because all or substantially all of their participating employers do not receive Federal financial assistance, or, at a minimum, that it be clarified that retiree-only church health care plans receiving Medicare Part D subsidies are not "health programs or activities" for purposes of the Proposed Rule. If an exemption for church self-insured health care plans is not provided, the Church Alliance requests that a religious conscience exemption like that described above be included in the final regulations. If HHS representatives would like to discuss the Church Alliance's concerns about the Proposed Rule before the final regulations are issued, Church Alliance representatives will be glad to meet and discuss them.

Please contact the undersigned at 202-661-3882 if you have any questions or wish to discuss this matter further.

Sincerely,

Stephen H. Cooper
Government Affairs Counselor, K&L Gates
On Behalf of the Church Alliance

[6] The preamble to the Proposed Rule also requested comments on whether "certain protections" that already exist would mean that an explicit religious conscience exemption is not needed in the final regulations. The Church Alliance is concerned that, without an explicit exemption, it will be necessary to litigate with private litigants over whether coverage for certain health care plan benefits is required under Section 1557, despite strongly and sincerely held religious beliefs objecting to the provision of these benefits. An explicit exemption will avoid the necessity of this litigation.