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

July 31, 2017

By electronic submission (http://www.regulations.gov)

The Honorable Steven T. Mnuchin
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Request for Information – Review of Regulations

To Whom It May Concern:

The Church Alliance is submitting this letter as a public comment to the Request for Information, published on June 14, 2017 by the Department of the Treasury ("Treasury") at 82 Fed. Reg. 27217 ("RFI"). We welcome the opportunity to comment, and, as requested, are suggesting:

- regulations that can be eliminated, and
- regulations that can be modified.

This letter primarily addresses regulations impacting church health plans.

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations affiliated with mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The benefit programs offered by these organizations provide retirement and health benefits to more than one million clergy,[1] church lay workers, and their family members at more than 155,000 churches, parishes, synagogues, and church-associated organizations across the country.

I. Executive Summary

We understand that as regulations are drafted, Treasury receives and considers comments from a wide variety of stakeholders. As Treasury now considers eliminating or modifying regulations, we urge Treasury to consider the unique needs of church workers, the church plans through which they receive their employee benefits, and the diverse church structures surrounding them.

Regulatory requirements sometimes are unclear or particularly challenging for church benefits organizations. Specifically, as Treasury considers modifying regulations, we request: 1) flexibility in the application of regulations to account for the unique needs

[1] As used in this comment letter, the term "clergy" refers to ministers, priests, rabbis, imams, and other spiritual leaders.

and structures of churches, 2) relief from burdensome regulations and guidance that disproportionately adversely impact church benefit plans and/or the ministries and workers they serve, 3) appropriate religious exemptions when regulations directly conflict with church religious beliefs, and 4) preservation of existing church exemptions and state preemption. In addition, we suggest the elimination of several regulations.

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 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 are often 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 cover other church-related organizations. 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 the 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 (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, the church benefits board may not actually know the level of contribution that the local ministry requires of the employee (and therefore, conversely, the amount paid by the local ministry), because there is no centralized human resource or payroll function. Sometimes contributions set by the church benefits board are blended by an intermediate or local church body or unit of church government in various ways. Rates may be blended to remove any perceived barriers to appointment. This cross-subsidization reflects and serves the mission work of these denominations.

III. Reducing burdens through regulatory changes

A. Regulations that can be eliminated

The RFI stated that Executive Order 13777 requires the identification of regulations that are outdated, unnecessary, or ineffective. All of the regulations identified below for elimination are outdated and unnecessary.

1. Sections 1.89(a)-1 and 1.89(k)-1

Two proposed regulations related to repealed section 89 of the Internal Revenue Code (the "Code") should be eliminated. The two proposed regulations are Treasury Regulation sections 1.89(a)-1 and 1.89(k)-1. Since Code section 89, on which the two proposed regulations are based, was repealed completely in 1989 by section 202(a) of Pub. Law. No. 101-400, it makes sense to withdraw the two proposed regulations.

2. Section 1.511-2(a)(3)

Similarly, the Church Alliance suggests that Treasury Regulation section 1.511-2(a)(3) be eliminated. The described regulation provided an exemption from the taxes imposed by Code section 511 for taxable years beginning before January 1, 1970. The exemption described in this regulation was eliminated nearly 50 years ago, but the regulation persists.

Section 1.511-2(a)(3)(iii) provides that churches and conventions or associations of churches are subject to the taxes imposed by Code section 511 for taxable years beginning after December 31, 1969, but this regulation is unnecessary, because section 1.511-2(a)(1)(i) already provides that Code section 511(a)(1) taxes apply to any organization that is exempt from tax under section 501(a), which would include churches and conventions or associations of churches. Also, the transition rules in section 1.511-2(a)(3)(iii) no longer are effective. Therefore, section 1.511-2(a)(3) can be eliminated in its entirety.

3. Sections 1.6033-1 and 301.6033-1

We also suggest the elimination of Treasury Regulation sections 1.6033-1 and 301.6033-1. Section 1.6033-1 applied to the Form 990 information returns filed by exempt organizations for taxable years beginning before January 1, 1970. Section 301.6033-1 incorrectly cites to section 1.6033-1 as the regulation relating to the requirement of returns by exempt organizations, although instead sections 1.6033-2 through 1.6033-6 and sections 301.6033-4 and 301.6033-5 currently apply. Section 1.6033-1 has not been effective for nearly 50 years, so can be eliminated, and section 301.6033-1 should be eliminated since it is misleading.

4. Section 1.170-2

Likewise, Treasury Regulation section 1.170-2 can be eliminated. This regulation addresses charitable deductions by individuals before amendments to the Code were made by the Tax Reform Act of 1969. Since this regulation no longer is effective, it can be eliminated.

Section 1.170-0 provides that "the provisions of section 1.170 and sections 1.170-1 through 1.170-3 are applicable to contributions paid in taxable years beginning before January 1, 1970, and all references therein to sections of the Code are to sections of the Internal Revenue Code of 1954 prior to the amendments made by section 201(a) of the Tax Reform Act of 1969 (83 Stat. 549)." It appears that sections 1.170, 1.170-1 and 1.170-3 have been eliminated. In the same manner, section 1.170-2 can be eliminated.

B. Regulations that can and should be modified

As described above, church benefit plans have been carefully designed over the years to reflect each church's religious beliefs and polity. However, some regulations issued under the Patient Protection and Affordable Care Act ("ACA") have created unique challenges for church health plans, so we request modification of those regulations. The Church Alliance also is requesting modifications to Treasury Regulation section 1.403(b), but that is addressed in a separate letter, also filed today.

1. Regulations under ACA sections 1557 and 2713

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 beliefs or violating the law in order to maintain a benefits plan for its workers. This is true even though some of the health plans associated with the members of the Church Alliance do not impose restrictions on covering health or medical services that would conflict with the requirements of the ACA.

Specifically, the application of the ACA section 2713 preventive services mandate with respect to contraceptive services, and certain provisions of the ACA section 1557 nondiscrimination regulations conflict directly with the religious beliefs of some Church Alliance members. These burdens rise to the level of infringing upon the rights of those Church Alliance members and the ministries they serve to freely exercise their religion.

Executive Order 13777 requires the identification of regulations that impose costs that exceed benefits. The costs to the free exercise of religion of these regulations, as currently written, exceed any marginal benefits from uniformity in rules. We therefore suggest that broad religious exemptions be created in or for the ACA section 2713 regulations (26 CFR 54.9815-2713 and 2713A and 45 CFR 147.131) and the ACA section 1557 regulations (45 CFR 92). Such exemptions would reduce the costs and burdens associated with the ACA.

2. Summary of Benefits and Coverage regulations

Regulations under the ACA relating to the Summary of Benefits and Coverage ("SBC") (26 CFR 54.9815-2715) have been burdensome to church health plans and ministries. Church benefits organizations strive to provide church workers with the clearest, most accurate picture of employee benefits, including health plan benefits and coverage, but the narrow constraints of the SBC have impeded those efforts. These regulations are ineffective, as applied to church health plans, in helping individuals to better understand their health coverage or to compare coverage options. The costs of these regulations (postage, printing, and time) greatly exceed the benefits. In addition, church benefits organizations do not have direct and immediate information about the hiring of employees, so requirements to provide new employees with the SBCs create compliance challenges.

Church benefits organizations have spent countless hours in preparing, distributing, and explaining SBCs to plan participants. Such explanations are required since SBCs are not as clear as the information that the church benefits organizations had been providing.

SBCs diminish church health plan participants' understanding of their coverage because: 1) the terminology of SBCs is inconsistent with church plan terminology (for example, the word "premium" is required to be used, whereas church health plan coverage is paid for by contributions); 2) the page and formatting limitations, as well as the many requirements for disclosures and taglines, leave little space for details about health coverage, including information on dental, adult vision, employee assistance, and health and wellness; 3) being forced to prepare and utilize coverage examples based on input that does not match the actual health coverage applicable to plan participants creates misunderstanding; and 4) the format of the SBC does not allow for a description of special coverages and rules that may be applicable due to religious beliefs or otherwise. We acknowledge that the SBCs may be supplemented, but presenting participants with multiple documents creates confusion.

To compound the difficulties, the new SBC template requires more disclosures and taglines and an additional coverage example, which will force the omission of some information currently in the SBC. Requiring utilization of a new

template unnecessarily imposes upon the scarce resources of church benefits organizations, and the calculator for the new coverage example is proving particularly challenging because it is not producing the results expected. The Church Alliance requests that section 54.9815-2715 be modified to provide flexibility and at least a reasonable amount of leniency in the application of the SBC requirements to church health plans (or to all health plans), including the flexibility to utilize either the current or new SBC template.

3. Regulations on the cost of coverage

ACA regulatory requirements that presume knowledge of health coverage costs or premiums also have been challenging for self-insured church health plans and church benefits organizations. As explained above, church benefits organizations will not always know the "premium" or contribution paid by an individual employee or employer for health coverage because of subsidization or shifting that may occur at an intermediate or local church level. Additionally, the contributions received by church benefits organizations and church health plans may be driven by factors other than costs, and "cost" allocation often is driven by religious beliefs. Conversely, the local ministries also only will have limited information about the expenses of health coverage.

As a result, self-insured church health plans have found particularly challenging the regulatory burdens imposed by the requirements for Form W-2 reporting because often neither the church benefits organization nor the employer know the total cost of coverage. Similarly, if the Code section 4980I excise tax becomes effective, its requirements will be challenging for many reasons, including because of the difficulty of ascertaining costs or "premiums."

Temporary relief was granted to church plans with respect to Form W-2 reporting of the cost of employer-sponsored group health coverage by Internal Revenue Service ("IRS") Notice 2012-9. The Church Alliance requests permanent relief from the described reporting requirement and, if effective, the Section 4980I excise tax, consistent with the temporary relief accorded in Notice 2012-9. If such relief cannot be granted, the Church Alliance requests flexibility to help church benefits organizations and ministries participating in church health plans meet their requirements given the unique challenges with respect to knowing "costs."

4. Treasury Regulation sections 1.6055-1 and 301.6056-1

The application of the requirements of Treasury Regulation sections 1.6055-1 and 301.6056-1 to church health plans and the ministries whose employees participate in these plans is not entirely clear. It has been challenging to apply these regulations because church benefits organizations have some of the information necessary to meet these regulatory requirements, while the participating ministries have other information that is necessary to meet the requirements. For example, the church benefits organization may know that an employee had health coverage under the church health plan, but generally would not have information on the amount, if any, the employee paid for the coverage, to be able to determine affordability. Unlike a large, multi-location employer that has centralized control of information on hiring, termination, and payroll, church benefits organizations do not have access to this information about plan participants.

In addition, church structures do not align clearly with these reporting requirements. For example, many church plans are self-insured, but sponsored by the church (denomination), not the individual employers. This results in a lack of clarity about whether an employer in a self-insured church plan should report information about months of coverage, or the plan administrator should. The lack of clarity invariably could lead to discrepancies, for example, as workers terminate employment with a large employer and move to a small employer but continue in a church health plan. Special rules are contained in these regulations for governmental employers and units to accommodate their unique needs and structures. In the absence of special rules for church employers and units, the Church Alliance requests flexibility and a reasonable amount of leniency in the application of these regulations.

5. Treasury Regulation sections 54.4980H-2 and 54.4980H-3

The application of the employer shared responsibility requirements of the ACA to church employers has been difficult, particularly with respect to the application of Treasury Regulation section 54.4980H-3, in determining full-time employees. It has been very challenging for church benefits organizations to educate employers about the complicated

and detailed rules for determining full-time employees under that regulation. As an example, ministers do not always fit neatly into the traditional common law employer-employee relationship. Indeed, they may serve multiple ministries and provide services for which the hours may be difficult to gauge. Therefore, the Church Alliance requests modification of Treasury Regulation section 54.4980H-2(b)(4) "Special Rules for Government Entities, Churches, and Conventions and Associations of Churches," which currently is reserved, to provide flexibility and leniency in the application of regulations under Code section 4980H.

6. Regulations related to Code section 45R

On May 15, 2017, the Centers for Medicare and Medicaid Services ("CMS") announced that it intends to propose rulemaking to make it easier for small employers to offer Small Business Health Options Program ("SHOP") plans to their employees, while maintaining access to the Small Business Health Care Tax Credit available under Code section 45R.

While the proposed rules and details have not yet been established, CMS noted that participation in federally facilitated SHOP exchanges has been much lower than anticipated. Thus, it explained that, in the future, small employers would enroll directly with an insurance company approved to offer SHOP plans. The employer would simply go online and demonstrate its eligibility, select an issuer that has been approved by HealthCare.gov, and contract directly with the issuer for the coverage it will provide. By demonstrating its eligibility through HealthCare.gov, the employer thus participates in the federally facilitated exchange, as modified by the regulations the Department of Health and Human Services ("HHS") will issue, and can qualify for the tax credit under Code section 45R.

For this modified program, it would be appropriate to apply the determinations of IRS Notice 2010-82. The goal of the modified program, as articulated by CMS, is for "small employers [to] access coverage through … an issuer of their choice." IRS Notice 2010-82 recognized that church health plans should be treated as the equivalent of an issuer. Thus, assuming the church plan satisfies the other requirements for an issuer to be approved to offer a plan under the SHOP or equivalent requirements, small church employers should be allowed to access coverage through a church plan and receive the tax credit under Code section 45R.

Specifically, it is anticipated that HHS will be amending its regulation defining the term "Exchange," currently at 45 CFR 155.20 *et seq*. When it does so, or in coordination with those modifications, Treasury or the IRS might modify, as necessary, its definition of Exchange for purposes of administering the Small Business Health Care Tax Credit. Form 8941 and its instructions may also require modification.

To enable this would require some coordination between HHS and Treasury or the IRS, but the Church Alliance respectfully requests that the Treasury or the IRS allow for such coordination so that church employers may offer coverage to clergy and other church employees under the modified SHOP and enable these small churches to receive the tax credit under Code section 45R. Providing for such tax credits would certainly enhance the affordability of coverage for these small church employers.

7. Treasury Regulation section 1.105-11

a. General

This regulation was promulgated in 1981 as guidance concerning the requirement in Code section 105(h) that a self-insured medical plan be nondiscriminatory. ACA section 10101(d) effectively expanded the nondiscrimination requirement of Code section 105(h) to insured plans through the addition of section 2716 to the Public Health Service Act ("PHSA"). This new requirement applies to insured plans through Code section 4980D, which imposes a $100 per day penalty with respect to each individual to whom the failure to comply relates. This penalty is imposed on the "employer."

Although the ACA called for insured plans to comply with this new requirement for plan years beginning on or after September 23, 2010, the IRS announced that compliance would not be required until after issuance of regulations or other guidance. *See* IRS Notice 2011-1.

The continued existence and potential enforcement of the section 105(h) regulations for self-insured plans creates a serious inconsistency with the lack of any such regulations or enforcement under section 2716 for insured plans.

Recognizing that the development of regulations under PHSA section 2716 may take considerable time, the first step in eliminating the serious inconsistency between the regulation of insured versus self-insured plans would be to repeal or waive enforcement Treasury Regulation section 1.105-11 pending issuance of regulations for insured plans under PHSA section 2716. Treasury and HHS will then be able to issue proposed regulations under Code 105(h) and PHSA section 2716 at the same time, thus ensuring consistent treatment of group health plans.

b. Section 1.105-11 and church health plans

Section 1.105-11 uniquely impacts church health plans that provide health benefits to clergy that may not be provided to lay employees. Such benefits are provided in recognition of the relationship between clergy and their church and the burdens placed on clergy.

In contrast to lay employees, who are free to choose employers based on factors like health coverage, clergy in many cases are ordained for life and, in many denominations, are subject to requirements to move when and where they are directed by their ecclesiastical supervisors. Clergy may be moved from an appointment in one part of the country to another, and from one health plan to another. Because church plans are not covered by Title I of ERISA, and COBRA does not apply, there is no guarantee that continuous coverage will be available from the first plan. Thus, for clergy, it may be important that there be no waiting period, for example, for reasons that do not apply to lay employees.

If Treasury chooses not to repeal or waive enforcement of this regulation generally with respect to self-insured plans, the Church Alliance requests that the regulation be modified to exempt church health plans. If Treasury chooses not to create such an exemption, we request that the IRS adopt a non-enforcement policy with respect to section 105(h) and church plans. Church health plans should be exempted because the application of this regulation to church health plans, which may provide different health benefits for clergy and lay workers based on religious beliefs or demands on clergy, could otherwise interfere with a church's treatment of its ministers, and may well implicate First Amendment rights and concerns under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. However, even if Treasury does not exempt church health plans, Treasury should adopt a non-enforcement policy in order to avoid the government becoming entangled in decisions about ecclesiastical doctrine or burdening the exercise of religion with potential violations of the First Amendment or the RFRA.

If Treasury neither exempts church plans nor adopts a non-enforcement policy, it should at least determine that clergy are a reasonable nondiscriminatory classification for purposes of the eligibility test and that a church plan will be deemed to have a separate plan for clergy from other employees for purposes of the benefits test under section 1.105-11.

C. In implementing regulatory changes, refrain from making changes that interfere with church exemptions or create state insurance issues

In modifying any existing regulations, we urge Treasury to keep in mind the unique nature of church plans and continue to preserve the current exemptions for churches and church plans.

Additionally, if any modifications to or streamlining of regulations could affect the authority of states to regulate the business of health insurance, we ask that Treasury consider the possible impact on church plans. These plans often cover clergy and employees of affiliated religious employers throughout the United States. Church plans are deemed under the Church Plan Parity and Entanglement Prevention Act of 1999, Pub. Law No. 106-244, 114 Stat. 499 (codified as amended at 29 U.S.C. § 1144a) (the "Parity Act") to be single employer plans, notwithstanding the number of individual employers participating in the plan.

Moreover, church plans are not in the "business" of providing health insurance. Unlike commercial insurance companies, church plans are not operated to make a profit and do not offer coverage to the general public. Depending on the

denomination, the funding of the plans may involve cross-subsidization of the cost of coverage among the participating employers other than on a traditional underwriting basis.

With the enactment of the Parity Act, Congress recognized the unique nature of self-funded church plans and the risks associated with multi-state insurance regulation. The Parity Act preempted church plans from state licensing and other laws that threatened the continued operation of "church plan" welfare plans.

Church plans should not be exposed to the laws of each state in which a plan participant resides. Unlike large national insurance companies, self-funded church plans do not select the states in which they provide coverage and are not equipped to comply with various requirements that could apply to an insurance company offering coverage in 50 states. A self-funded church plan should also be able to determine the coverage it offers based on the affiliated church's needs and religious convictions.

Some church plans, particularly those of smaller denominations or independent churches, are fully insured. In the case of a fully insured church plan, the church plan should be permitted to elect a primary state and only the insurance laws of such state should apply.

In conclusion, the Church Alliance appreciates this opportunity to comment and hopes Treasury finds our comments helpful. We are happy to meet or provide further clarification. The Church Alliance welcomes the opportunity to play a constructive role in ensuring future rulemakings appropriately address church plans.

Please contact the undersigned at (202) 778-9000 if you have any questions or wish to discuss any of this information further.

Sincerely,

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