

CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

Chair:
Mr. John G. Kapanke

Secretary/Treasurer:
Robert H. Rydland, Esquire

Board of Pensions
Evangelical Lutheran Church in America
800 Marquette Avenue, Suite 1050
Minneapolis, MN 55402-2892
(612) 752-4117 • Fax (612) 334-5399

Members:

Dr. K. Young Bae
Association of Unity Churches

Mr. L. Wood Bedell
Reformed Church in America

Mr. J. Paul Bell
Associate Reformed Presbyterian Church

Ms. Barbara A. Boige grain *
United Methodist Church

Mr. John H. Bolt
Christian Reformed Church in North America

Mr. David J. Brown
Community of Christ

Mr. Gary D. Campbell
Presbyterian Church in America

Mr. Elford H. Clark
International Church of the Foursquare Gospel

Mr. Michael A. Downs *
United Church of Christ

Mr. Nevin Dulabaum
Church of the Brethren

Dr. Craig A. Dunn
Wesleyan Church

Mr. Jon M. Fianagan
Wisconsin Evangelical Lutheran Synod

Dr. Sumner M. Grant *
American Baptist Churches

Mr. James P. Hamlett *
Christian Church (Disciples of Christ)

Dr. O. S. Hawkins *
Southern Baptist Convention

Mr. Dale Hill
Free Methodist Church of North America

Mr. Gerald B. Hindy
Assemblies of God

Mr. Jeffrey A. Jenness
Board of Pensions of the Church of God

Rev. Dr. Jeffrey J. Jeremiah
Evangelical Presbyterian Church

Mr. Del L. Johnson
General Conference of Seventh-Day Adventists

Mr. John G. Kapanke *
Evangelical Lutheran Church in America

Mr. Mario J. Kauffman
Mennonite Church

Mr. Robert M. Koppel *
Reform Pension Board

Mr. Ray Lewis
National Association of Free Will Baptists

Dr. Dean A. Lundgren
Evangelical Covenant Church

Mr. Robert W. Maggs Jr. *
Presbyterian Church (U.S.A.)

Rev. Ross I. Morrison
Evangelical Free Church of America

Mr. John M. Preis *
Young Men's Christian Association

Br. Michael F. Quirk, FSC *
Christian Brothers Services

Mr. Arthur D. Rhodes
Church of God Benefits Board

Mr. James F. Sanft *
Lutheran Church-Missouri Synod

Mr. Stephen Schultz
Baptist General Conference

Mr. Mitchell J. Smilowitz
Joint Retirement Board for
Conservative Judaism

Mr. Ray D. Stites
Christian Churches Pension Plan

Mr. T. Dennis Sullivan *
Episcopal Church

Mr. James P. Thomas, CPA
Churches of God, General Conference

Rev. Don L. Waller
Church of the Nazarene

Mr. Edward W. Wood
International Pentecostal Holiness Church

* Steering Committee Members

Counsel:
David A. Starr, Esquire
Williams & Jensen, P.C.
701-8th St. N.W., Suite 500
Washington, D.C. 20001
Tel (202) 659-8201
Fax (202) 496-0699
e-mail: dastarr@wms-jen.com

August 10, 2010

Department of Health and Human Services
Office of Consumer Information and Insurance Oversight
Attention: OCIIO-9991-IFC
P.O. Box 8016
Baltimore, MD 21244-1850

Re: *Comments on Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the PPACA*

Ladies and Gentlemen:

This letter is being submitted on behalf of the Church Alliance as a public comment to the *Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the PPACA* (the "Regulations") published by the Department of Health and Human Services (HHS), Department of Labor (DOL) and Department of the Treasury (IRS) (together, the "Departments") in the Federal Register on June 17, 2010. 75 F.R. 34538-70, amending 26 C.F.R. Parts 54 and 602, 29 C.F.R. Part 2590 and 45 C.F.R. Part 147.

The Church Alliance members, listed on the left of this letterhead, provide medical coverage to over one million participants (clergy and lay workers) serving over 155,000 churches, synagogues and affiliated organizations. For over 50 years, many denominational church plans, most of which offer a nationwide plan (often on a self-funded basis), have allowed often itinerant clergy families the comfort and security of career-long portable, comprehensive medical coverage, on an affordable basis through a plan that reflects their denomination's belief system. The members of the Church Alliance hope to continue to offer employment-based coverage to clergy and lay employees under the new health care reform regime.

The Church Alliance commends the Departments for speedily issuing the Regulations and other guidance under the Patient Protection and Affordable Care Act (PPACA). Although the Regulations address many employer and group health plan concerns, they leave a number of important questions unanswered, particularly as they relate to their impact on church plans.

The PPACA amends provisions of the Public Health Service Act (PHSA) relating to group health plans. The PPACA adds §9815(a)(1) to the Internal Revenue Code of 1986 (Code), which makes certain provisions of the PHSA applicable to insured and self-insured group health plans, including church plans. Section 1251 of the PPACA specifies that certain plans existing on March 23, 2010 (i.e., “Grandfathered Plans”) are subject to only select provisions of the PPACA and PHSA.

The application of Federal and State benefit laws to denominational church plans presents different challenges than it would to a typical single or multi-employer group health plan. Each denomination has a unique polity (governance structure) established to reflect its theological beliefs. The governance structures of the Church Alliance members range from purely hierarchical churches to independent churches or denominations that are congregational in nature. Each denomination has a different level of authority and control over its individual churches as employers. As a result, in some denominations the church plan sponsor has the ability to mandate employer coverage decisions; in other denominations, the national plan can only control the plan design and administration but not the eligibility and participation rules or employer contributions toward employees’ cost of coverage. A very high percentage of the churches and other employers participating in denominational church plans are small employers under the Act.

The Church Alliance has particular concerns with a few provisions of the Regulations and asks that the Departments consider the following suggestions:

Adding New Employers to a Church Plan

Denominational church plans, which function in much the same manner as multiple employer plans, offer benefits to thousands of employers affiliated with the church plan’s denomination. If one or more of these affiliated churches, conferences or agencies, not currently participating in the denominational plan, elects to cover its employees under the denominational plan after March 23, 2010, it is unclear whether the denominational church plan would forfeit its Grandfathered Plan status.

The general description in the preamble that “changes other than the changes [prohibited in the Regulations] will not cause a plan or coverage to cease to be a grandfathered health plan” suggests that new employers joining a church plan would not cause the church plan to lose its Grandfathered Plan status. Given the unique nature of church plans, we ask that the Departments clearly indicate in the Regulations that new employers are allowed to join grandfathered church plans without causing the plans to forfeit their Grandfathered Plan status to the extent that the number of new employers is not abusive relative to the number of employers participating as of March 23, 2010.

Employers in Church Plans Changing Benefit Options

In many church plans, participating employers are given a choice among several benefit packages, e.g., a PPO, HMO or high deductible plan option. While the denominational benefit board may control the design and premium cost of these benefit packages, generally each participating employer has the discretion to choose among them to best tailor its coverage to the needs of its employees and budget. Many denominations lack the authority to mandate the benefits practices of local churches and other affiliated employers.

The Church Alliance asks that the Departments allow church plans to retain this practice for participating employers, which existed before March 23, 2010. We suggest that the Regulations permit an employer in a church plan to move its employees among the various grandfathered benefit packages as permitted before March 23, 2010, provided that no employer does so more often than annually, and provided that the church plan does not alter the benefit packages in such a way that the packages would no longer be grandfathered. This rule could be subject to an anti-abuse and materiality rule, so that changes among packages would be permitted even if the resulting change for covered employees might exceed maximum cost-sharing change limits described in the Regulations, as long as changes within the plan's benefit package itself do not exceed such limits. Church plans would monitor these changes and advise participating employers when such changes might be considered abusive.

Cost-sharing at the Employer Level in Church Plans

In many church plans, the denominational benefit board has no control over the employer's (or other governing entity's) decisions with respect to the employees' share of the premiums (or contributions or dues). The Church Alliance is concerned that, under the Regulations, if an individual employer increases its employees' share of the premium, without the knowledge of or even against the instruction of the denominational benefit board administering the church plan, the entire plan will lose its Grandfathered Plan status. Such a result would not only cause hardship to the church plan and the benefits board, but also, unfairly, to many other participating employers, who do not reduce their contributions toward employees' coverage. The Church Alliance suggests that the Departments incorporate a rule into the Regulations to permit church plans to retain Grandfathered Plan status if participating employers reduce their contributions toward the cost of employees' coverage.

Specifically, we ask that the Regulations allow church plans to retain their practices with respect to employer contributions that existed before March 23, 2010. If a church plan had no control over or knowledge of participating employers' contribution rates before March 23, 2010, changes to such contribution rates after March 23, 2010 should not cause a church plan to lose its status as a Grandfathered Plan. Therefore, the Regulations should allow church health care plans to continue to maintain their existing employer contribution rate practices that were in place on March 23, 2010 and remain a Grandfathered Plan.

Adding New Participants Other Than Employees

The Regulations indicate that new employees and their families may be added to a plan without losing Grandfathered Plan status. However, the Regulations appear to be silent about whether a plan can remain a Grandfathered Plan if it adds a new category of other eligible participants. For instance, some denominational plans cover seminary students; and others may at some point add such coverage, or expand such coverage to new entities that cover seminarians. Some denominations cover domestic partners; and some denominations have actions pending before their national assemblies or conventions to add such coverage in the future. It is unclear whether the addition of formerly uncovered seminarians or the addition of domestic partner coverage to the eligible family members allowed in a church plan would cause a plan to lose its Grandfathered Plan status.

The preamble to the Regulations states that “changes other than the changes described in 26 CFR 54.9815-1251T(g)(1), 29 CFR 2590.715-1251(g)(1), and 45 CFR 147.140(g)(1) will not cause a plan or coverage to cease to be a grandfathered health plan. Examples include changes to premiums, changes to comply with Federal or State legal requirements, changes to voluntarily comply with provisions of the Affordable Care Act, and changing third party administrators, provided these changes are made without exceeding the standards established by paragraph (g)(1).” 75 F.R. 34544.

It would seem contrary to the general purpose of the PPACA if the rules governing Grandfathered Plan status would prohibit expansion of employer-based coverage or hinder innovation. Nonetheless, the Church Alliance suggests that the Regulations expressly state, or describe additional examples that make clear, that the expansion of benefits to more eligible groups would not obviate Grandfathered Plan status.

Self-insured Plans as Minimum Essential Coverage

Finally, the Church Alliance has a concern that is not unique to church plans. As a result of the Regulations, many employers, including church plans and their employers, are considering the consequences of losing Grandfathered Plan status. It appears that the PPACA is unclear with respect to whether employers sponsoring or participating in non-grandfathered self-insured plans would be subject to the excise tax in 2014 and later for failing to provide the required minimum essential coverage.

Section 1513 of the PPACA, through the addition of §4980H of the Code, imposes an excise tax for employers that fail to offer their full-time employees minimum essential coverage through an “eligible employer-sponsored plan” as defined in §5000A(f)(2) of the Code, which was added by §1501 of the PPACA. An eligible employer-sponsored plan for purposes of the employer excise tax is defined in §5000A(f)(2) to “include a group health plan or group health insurance coverage offered by an employer to the employee which is a governmental plan or *any other plan or coverage offered in the small or large group market within a State.*” It also includes a Grandfathered Plan.

The reference to “the small or large group market,” if read to modify the term group health plan, would suggest that the coverage must be provided through a policy of insurance, and that a self-insured plan would not satisfy the definition of minimum essential coverage. Sections 2791(e)(2) and 2791(e)(5) of the PHS Act define the small and large group markets, respectively, as relating to health insurance; they do not appear to include self-insured plans. An interpretation of this provision that precluded non-grandfathered self-insured plans from qualifying as minimum essential coverage would subject many employers, whose self-insured plans lose Grandfathered Plan status over time (or employers that forgo the record-keeping and design constraint requirements of the Regulations and treat their plans as non-grandfathered), to the excise penalty tax for failing to offer minimum essential coverage.

“Minimum essential coverage” under §5000A(f)(1), which relates to the individual mandate, is defined more broadly, and includes (i) governmental coverage, e.g., Medicare or Medicaid, (ii) individual health plan coverage, (iii) coverage in a Grandfathered Plan, (iv) coverage in an “eligible

employer-sponsored plan”, and (v) other coverage recognized by the Secretary of HHS. We believe it is essential that the Departments exercise their discretion under §5000A(f)(1)(E)(v) of the Code to expressly recognize non-grandfathered self-insured group health plans, including church plans, as minimum essential coverage under the PPACA. We believe that failing to do so may unnecessarily subject many employees covered in non-grandfathered self-insured plans, including some church plans, to penalties for not having minimum essential coverage.

Equally importantly, we believe it is also necessary and urgent for the Departments to recognize non-grandfathered self-insured group health plans as “eligible employer-sponsored plans” under §5000A(f)(2) for purposes of the employer excise tax. Without such recognition, employers who provide long-standing, secure and comprehensive coverage to their employees through self-insured group health plans, including church plans, which are not or cease to be Grandfathered Plans, could be subject to excise tax penalties.

Thank you for your consideration of our views on this important issue to church employers and employees. If you have questions, please feel free to contact our representative, David Starr of Williams & Jensen, P.C., at (202) 659-8201 or dastarr@wms-jen.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "John G. Kapanke".

John G. Kapanke, Chair