
MEMORANDUM

To CFTC

From K&L Gates LLP, on behalf of the Church Alliance

Date October 4, 2011

Re Church Plans – Definitions and Legislative History

This memorandum is in follow up to the meeting on September 9, 2011 between representatives of the Church Alliance and the Commodity Futures Trading Commission (“CFTC”). Per your request, this memorandum: (1) proposes draft language providing clarification on the status of church plans and church benefits boards; (2) discusses the status of church plans and church benefits boards; and (3) history of and legal authority for church benefits boards to commingle assets for investment purposes.

We hope that this information is helpful. Please contact us if we can further assist you or if you have any additional questions regarding this matter. Thank you for your time and consideration of the position of the Church Alliance.

(1) Draft language providing clarification on the status of church plans and church benefits boards.

We recommend that the Commodity Futures Trading Commission (“CFTC”) in its rulemaking under the Dodd-Frank Act use the following language in defining a church plan:

An employee benefit plan, as defined in section 3 of ERISA, shall include a church plan as defined in section 3(33) of ERISA or section 414(e) of the Code, including 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, or any company or account that is

(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of the Code and

(B) substantially all of the activities of which consist of

- a. managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under the Internal Revenue Code of 1986 or

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- b. administering or providing benefits pursuant to church plans.

This language reflects two unique characteristics of church plans. First, it provides clarification on the status of church plans and church benefits boards. Second, it recognizes the ability of church benefits boards to commingle assets for investment purposes.

(2) Status of church plans and church benefits boards.

The Church Alliance was formed in 1975 as the “Church Alliance for Clarification of ERISA” to address the issues presented for established church plans by the Employee Retirement Income Security Act of 1974 (“ERISA”). ERISA, when enacted in 1974, threatened the ability of church plans to continue to be structured as they had been, in some cases, for over 200 years.

The original definition of “church plan” in both ERISA and the Internal Revenue Code (“Code”) did not reflect actual church plan operations. The first part of the original church plan definition was satisfactory. Under it, a church plan was “a plan established and maintained for its employees by a church or by an association or convention of churches which is exempt from tax under Code section 501”.

However, the original church plan definition was problematic in its treatment of church agencies, whose employees, in many cases, had historically received pension and welfare benefits from church plans. More specifically, the original church plan definition provided, in effect, that only the employees of church agencies for which the plan was maintained on January 1, 1974 could participate in the plan – no new church agencies could be admitted to the plan. In addition, the original definition provided that, after December 31, 1982, the plan would not be a church plan if it covered the employees of any church agency, i.e., church-controlled employers (non-steeple) like schools, charities, etc.

Congress revised the definition of “church plan” when it passed the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”) to address this issue and to ensure that employees of a church-related nursing home, inner-city agency, children’s home, college or hospital could continue to receive pension and welfare benefits from a church plan. Under the revised definition, a church plan could continue to provide retirement and welfare benefits for the employees of all church agencies.

The revised definition in ERISA and the Code made clear that a “church plan” 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.” As a result, church benefit boards essentially are synonymous with church plans under the Code (and ERISA). Section 414(e)(3)(A) of the Code is identical to ERISA section 3(33)(C)(i), and church pension boards are also sometimes referred to as Section 414(e)(3)(A) organizations.

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We recommend that the CFTC in its rulemaking under the Dodd-Frank Act use the same language in defining church plans as “employee benefit plans as defined in section 3 of ERISA” to provide certainty on the status of church plans and to ensure consistency with ERISA and the Code.

(3) Ability of church benefits boards to commingle assets for investment purposes.

Church denominations have organized themselves so that church pension boards are typically the entities that handle investments for the denomination’s benefit plans and for other church assets, including some church endowments. The use of church benefits boards is more administratively efficient, and such boards have greater resources, investment skills, and market clout than the individual churches and other denominationally affiliated organizations that contribute to the boards.

By way of background, in 1982, the IRS held (in Rev. Rul. 82-102) that only insurance companies could provide section 403(b) annuities. Because many church pension boards maintained 403(b) plans but not through insurance companies, Congress enacted a legislative clarification allowing church 403(b) plans and programs to continue to operate. A provision included in the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) created section 403(b)(9) of the Code.

The legislative history under TEFRA expressly recognized the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of church plans with other general church assets. **“The conferees intend that the assets of a church plan (sec. 414(e)) may be commingled in a common fund with other amounts devoted exclusively to church purposes (for example, a fund maintained by a church pension board) if that part of the fund which equitably belongs to the plan is separately accounted for and cannot be used for or diverted to purposes other than for the exclusive benefit of employees and their beneficiaries”.** (TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5).

IRS regulations under Code Section 403(b) also expressly recognized the right and authority of church benefits boards to hold, on a commingled basis for investment purposes, the assets of Code Section 401(a) qualified plans, Code Section 403(b) plans, and other non-plan church-related assets. Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6); also see Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002).

The National Securities Markets Improvement Act of 1996 (NSMIA) included provisions clarifying that church plans and their investment pools are not subject to the Investment Company Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Advisors Act of 1940. The NSMIA also preempted state “blue sky” laws, with respect to church plans, that require registration or qualification of securities, as well as state laws applicable to investment companies or brokers, dealers, investment advisors or agents.

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Specifically, section 3(c)(14) of the Investment Company Act exempts:

(14) **Any church plan** described in section 414(e) of the Internal Revenue Code of 1986 [26 USCS § 414(e)], if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, **or any company or account that is--**

(A) **established by a person that is eligible to establish and maintain such a plan under section 414(e)** of the Internal Revenue Code of 1986 [26 USCS § 414(e)]; and

(B) substantially all of the activities of which consist of--

(i) **managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans** under the Internal Revenue Code of 1986 [26 USCS § 1 et seq.]; or

(ii) administering or providing benefits pursuant to church plans.

Section 3(a)(13) of the Securities Act, section 3(a)(12)(A)(vi) and section 3(g) of the Securities Exchange Act, and section 203(b)(5) of the Investment Advisors Act contain corresponding exemptions which refer to section 3(c)(14) of the Investment Company Act.

Taken together, these acts make clear that church plans maintained by church benefit boards may commingle Section 403(b)(9) and Section 401(a) retirement plan assets with other church-related assets for investment purposes. The language of section 3(c)(14) of the Investment Company Act can serve as model language for the CFTC in its rulemaking under the Dodd-Frank Act when determining that church plans (and the benefit boards that maintain them) are “employee benefit plans as defined in section 3 of ERISA.”

We recommend that the CFTC, for purposes of its rule-making under Dodd-Frank, define church plans in a manner that includes their related church benefits boards, which are fund accounts that are permitted to commingle church plan and other church-related assets for investment purposes.