

Co-Chairs:
Mr. John G. Kapanke
Ms. Barbara A. Boigegrain

Co-Secretary/Treasurer:
Robert H. Rydland, Esquire
Sarah S. Hirszen, 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. J. Paul Bell
Associate Reformed Presbyterian Church

Ms. Barbara A. Boigegrain *
United Methodist Church

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

Rev. Kenneth Bradsell
Reformed Church in America

Mr. David J. Brown
Community of Christ

Mr. Gary D. Campbell
Presbyterian Church in America

Mr. Eiford 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. Flanagan
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. Slices
Christian Churches Pension Plan

Mr. T. Dennis Sullivan *
Episcopal Church

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

Rev. Don L. Walter
Church of the Nazarene

* Steering Committee Members

CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

22
Counsel:
K&L Gates LLP
1601 K Street NW
Washington D.C. 20006
Tel (202) 778-9000
Fax (202) 778-9100

August 29, 2011

By Hand Delivery

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090



Re: Proposed Regulations on Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, File Number S7-25-11

Dear Ms. Murphy:

INTRODUCTION

We are pleased to submit this comment letter, on behalf of the Church Alliance, regarding the regulations proposed by the Securities and Exchange Commission (SEC or Commission) on business conduct standards for security-based swap dealers and major security-based swap participants (collectively, SBS Entities).¹ Our comments are directed toward clarifying that "church plans" and the pension boards that maintain them are included within the definition of the term "Special Entity" for purposes of these regulations.²

¹ 76 Fed. Reg. 42395 (July 18, 2011) (Proposing Release).

² A similar letter was filed on behalf of the Church Alliance in response to the proposed regulations of the Commodity Futures Trading Commission (CFTC) regarding business conduct standards for swap dealers and major swap participants with counterparties. The SEC indicated that it has taken into account the comments filed with the CFTC in developing its proposals and cites the Church Alliance letter. 76 Fed. Reg. 42395, at 42422 & n.182.

The Church Alliance is a coalition of thirty-seven (37) denominational benefit programs that provide pension and health benefits to more than one million clergy, lay workers, and their family members. These benefit programs are defined as “employee benefit plans” and “church plans” under Sections 3(3) and 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA), respectively, and therefore, come within the definition of a “Special Entity” under Section 764(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which enacted a new Section 15F of the Securities Exchange Act of 1934 (Exchange Act) to govern the registration and regulation of SBS Entities. A church plan is thus an employee benefit plan as defined in Section 3(3) of ERISA.³ Under ERISA Section 3(33)(C)(i), a church plan includes a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program to provide retirement or welfare benefits for employees of a church or a convention or association of churches, if the organization is controlled by, or associated with, a church or a convention or association of churches. Church benefits boards, like those represented by the Church Alliance, are organizations described in ERISA Section 3(33)(C)(i).⁴ A church benefits board is also (i) typically an organization described in Code Section 501(c)(3), (ii) an organization described in Code Section 414(e)(3)(A), which describes organizations that are permitted to administer or fund church plans, and (iii) exempt from treatment as an investment company pursuant to Section 3(c)(14) of the Investment Company Act of 1940. Our references throughout this letter to “church plans” should accordingly also be read to include church benefits boards.

To fulfill obligations to their beneficiaries, church plans invest in a wide variety of asset classes, and as part of their investment and risk management policies, they have authorized the use of certain derivatives. The authorized derivatives include futures, forwards, swaps, security-based swaps, structured notes, and options. Accordingly, the denominational benefits boards represented through the Church Alliance have an interest in the regulation of the security-based swap market.

³ ERISA Section 3(3) defines the term “employee benefit plan” to mean “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” An employee welfare benefit plan provides medical or other welfare benefits to participants and beneficiaries and an employee pension benefit plan provides retirement income to employees. *See* ERISA Sections 3(1)(A) and 3(2)(A)(i), respectively.

⁴ Section 414(e)(3)(A) of the Internal Revenue Code of 1986, as amended (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.

DEFINITION OF SPECIAL ENTITY

Proposed Definition

New Exchange Act Section 15F(h) authorizes the SEC to adopt rules or regulations establishing general business conduct standards for SBS Entities. In addition, that section authorizes the SEC to adopt rules or regulations mandating enhanced duties for SBS Entities when acting as advisors or counterparties to “Special Entities.” The term Special Entity is defined to include, among others, “any employee benefit plan, as defined in Section 3 of [ERISA].”⁵ As noted by the SEC in the Proposing Release, the term Special Entity refers to any employee benefit plan as defined in Section 3 of ERISA, including employee benefit plans that are not subject to regulation under ERISA, such as church plans.⁶

Nevertheless, the SEC notes that comments submitted during the pre-proposal stage raised issues concerning possible ambiguities in the statutory definition of Special Entity. The SEC did not propose to clarify the Special Entity definition in the Proposing Release and the definition of that term in proposed Regulation § 240.15Fh-2 simply repeats the statutory language. However, in the Proposing Release, the SEC requests comments on the definition in general and on several specific issues, including:

- “Should the Commission interpret ‘employee benefit plan, as defined in section 3’ of ERISA to mean a plan that is subject to regulation under ERISA?”⁷; and
- “Should the Commission interpret ‘special entity’ to include a master trust holding the assets of one or more funded plans of a single employer and its affiliates?”⁸

Clarifications to Proposal

Treatment of Church Plans

In response to the specific question posed by the SEC, the Church Alliance recommends that the SEC revise the proposed definition of Special Entity to include a separate paragraph stating, “A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement In-

⁵ New Exchange Act Section 15F(h)(2)(C).

⁶ 76 Fed. Reg. 42395, at 42421 & n. 178.

⁷ *Id.* at 42422. In connection with the SEC’s request for comments on this interpretive issue, there is a citation to the Church Alliance’s comment letter to the CFTC requesting clarification that church plans and church benefits boards be included in the definition of Special Entity. *Id.* at 42422 & n.182.

⁸ *Id.* at 42422.

come Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d).” Such a revision to the definition of Special Entity in proposed Regulation § 240.15Fh-2 would make clear what Congress intended to provide in Dodd-Frank, that church plans are Special Entities deserving of enhanced conduct by SBS Entities advising or entering into security-based swaps with them.

Accordingly, the answer to the question cited above is clearly *no*, the definition “employee benefit plan, as defined in Section 3 of ERISA” should *not* be limited to plans subject to regulation under ERISA. Because new Exchange Act Section 15F(h)(2)(C) uses the quoted language and the phrase “defined in” rather than the more limited phrase “subject to,” the plain meaning of the statute is that any employee benefit plan defined in ERISA, including a church plan, should be treated as a Special Entity.⁹ The Church Alliance submits that, as a matter of policy, church plans should not be treated differently than ERISA-covered plans and governmental plans when entering into security-based swaps with SBS Entities that would not be traded on registered national securities exchanges or registered swap execution facilities.¹⁰

Security-based swaps have not previously been subject to regulation in the United States and, therefore, there is a lack of precedent for parties and their counsel to rely upon in deciding whether it is lawful to enter into particular transactions. Moreover, some of the relevant terms in Dodd-Frank are ambiguous and could be interpreted in multiple ways. Consequently, the SEC should take this opportunity to exercise its authority under Dodd-Frank Section 764(a) so that the definition of the term Special Entity includes a paragraph stating “A plan defined as a church plan in Section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d).” Such a clarification will help to ensure that individuals who dedicate their lives to working for religious institutions are not disadvantaged in terms of the treatment of their pensions or health benefits compared to other workers.

Treatment of Church Benefits Boards

The SEC also needs to clarify that the definition of a Special Entity includes church benefits boards that hold the assets of church plans, so that such organizations receive the protections afforded to Special Entities with respect to security-based swaps under the Exchange Act and the implementing regulations.

⁹ The only comment cited from the pre-proposal stage as specifically opposing treating church plans as Special Entities, the SIFMA/ISDA 2010 Letter, provides no explanation why the plain language of Dodd-Frank should not be followed in this regard.

¹⁰ Proposed Regulation § 240.15Fh-5, pursuant to paragraph (c) thereof, would not apply to a security-based swap that is initiated on a registered national securities exchange or a registered security-based swap execution facility where the SBS Entity does not know the identity of the Special Entity.

The SEC should adopt a definition of the term Special Entity that makes clear that it includes a church benefits board that holds the assets of one or more church plans, church endowments, and other church-related funds on a commingled basis. Such a definition would be reflective of the close and unique relationship between church benefits boards and their constituent church plans, a relationship recognized in ERISA, the Code, and various federal securities laws.

Dodd-Frank provides that commercial end users should be able to conduct swap and security-based swap transactions largely as they have been accustomed to. We believe that religious organizations are deserving of similar treatment. 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 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.

The functions of a church benefits board are similar to those of a tax-exempt trust that is commonly used as the funding vehicle for a qualified private sector pension plan. Church benefits boards may also be likened to a master trust that is established by several multiple-employer pension plans. In the Proposing Release, the SEC requested comment on whether the interpretation of Special Entity should include a master trust holding the assets of one or more funded plans of a single employer and its affiliates, a parallel to the church benefits board context. The SEC, by making clear that a church benefits board is to be treated like a church plan and given Special Entity status, will provide guidance to fulfill the purposes of the regulation, while at the same time not attempting to dictate or micromanage how the religious denominations of the United States have chosen to structure themselves.

We note also that the ERISA plan asset rules themselves often "look through" commingled investment vehicles and, in such cases, subject such commingled investment vehicles to the same ERISA requirements that apply to the underlying plans. In addition, the legislative history under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and the Internal Revenue Service regulations under Code Section 403(b) expressly recognize 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.¹¹ Further, the investment company exemption provided in Section 3(c)(14) of the Investment Company Act of 1940 to church benefits boards, as well as to church plans, supports treating a church benefits board similarly to a church plan, and both as Special Entities under Dodd-Frank.

¹¹ TEFRA Conf. Rept. Pub. L. 97-248, 1982-2 C.B. 462, 524-5; Internal Revenue Service Pvt. Ltr. Rul. 200229050 (July 19, 2002); Internal Revenue Service Reg. Sec. 1.403(b)-9(a)(6).

Elizabeth M. Murphy
August 29, 2011
Page 6

CONCLUSION

The Church Alliance appreciates the opportunity to comment on the proposed regulations that would establish business conduct standards for SBS Entities. We believe that the definition of the term "Special Entity" in these regulations should refer specifically to church plans and should include church benefits boards.

We would welcome the opportunity to discuss our recommendations for revisions to the proposals in greater detail with Commissioners and staff at your convenience. Please feel free to contact me at 202-778-9447 if you have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Crowley". The signature is fluid and cursive, with a large initial "D" and "C".

Daniel F. C. Crowley
Partner, K&L Gates
On Behalf of the Church Alliance