



Conference Forum—April 2019



**Wespath**

BENEFITS | INVESTMENTS

**Legal Update**

# Agenda

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- Church Alliance Changes
- Litigation Matters 2018-2019
- Tax and Retirement Matters 2018-2019
- Health Care 2018-2019
- Financial Services 2018-2019

**CHURCH ALLIANCE**  
Acting on Behalf of Church Benefits Programs

# Church Alliance Leadership—2019

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**Jim Sanft**  
Chair  
*Lutheran Church—  
Missouri Synod*



**Reverend  
Jeff Thiemann**  
Vice Chair  
*Evangelical Lutheran  
Church in America*



**Ann Stillman**  
Secretary  
*Lutheran Church—  
Missouri Synod*



**Andy Hendren**  
Treasurer  
*The United  
Methodist Church*

# Church Alliance Steering Committee

## “Standing Members”

**Barbara A. Boigegrain**

The United Methodist Church

**Dr. O.S. Hawkins**

The Southern Baptist Convention

**John M. Preis\***

Young Men’s Christian Association

**Rev. Frank Spencer**

Presbyterian Church U.S.A.

**Rev. Jeffrey Thiemann**

Evangelical Lutheran Church in America

**Mary Kate Wold**

The Episcopal Church

## Elected Members

**Louis Barbarin**

American Baptist Churches

**Brian Bodager**

United Church of Christ

**Jeffrey Jenness**

The Church of God

**Brother Michael Quirk**

Christian Brothers Services

**James Sanft**

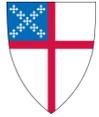
Lutheran Church—Missouri Synod

**Mitchell Smilowitz**

Conservative Judaism

\* Retiring Summer 2019

# Church Alliance Members—37



# Church Alliance Priorities

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**Tax**



**Health Care**



**Litigation**



**Financial Services**



**Employee Benefits**



**Religious Liberty**



# Litigation Matters 2019



# Legal Challenge—Section 107

- Clergy receive cash housing allowance exempt from income tax under Code §107(2)
- First Amendment, U.S. Constitution:  
“Congress shall make no law **respecting an establishment of religion**, or prohibiting the free exercise thereof ...”
- Annie Gaylor [officer of the Freedom From Religion Foundation (“FFRF”)] and others filed case against U.S.
  - **Asked court to declare §107(2) unconstitutional**

**Judge Barbara Crabb held §107(2) unconstitutional—October 2017**



# Backstory

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- **2002:** Clergy Housing Allowance Clarification Act
- **2010:** FFRF files suit in Eastern District Court, California
  - **Dismissed** for lack of standing
- **2011:** Gaylor and FFRF file in Western District Court, Wisconsin (Judge Crabb)
- **2013:** Crabb ruling: 107(2) violates establishment clause
- **2014:** Seventh Circuit Court of Appeals
  - **Dismissed** for lack of standing because Gaylor did not ask for tax refund
- **2015:** Gaylor files claim with IRS for tax paid on housing (denied)
- **2016:** Gaylor refiles case



# Housing Allowance Litigation

- **Defendants appealed to Seventh Circuit Court of Appeals in Chicago**
- Church Alliance amicus brief had additional amici:





# Housing Allowance Oral Arguments

- Court of Appeals heard argument
  - **October 24, 2018**
- **Panel**
  - Judge Bauer (Ford)
  - Judge Brennan (Trump)
  - Judge Manion (Reagan)
- **Advocates**
  - Pannucci (government)
  - Goodrich (intervenors)
  - Chodorow (tax professor, amici)
  - Bolton (FFRF)

## Key Question Considered

**Through what lens should we view Section 107?**

1. On its own as a tax break only available to ministers?
2. As part of a broader tax scheme about housing that covers other non-religious groups?



# Victory!



## Seventh Circuit Opinion

### Section 107(2) constitutional under two Supreme Court tests:

1. *Lemon*\* test
  - A. Has a secular purpose
  - B. Does not support or hinder religion
  - C. Avoids excessive entanglement
2. *Town of Greece*\*\* historical test
  - A. Lengthy tradition of tax exemptions for religion, particularly for church-owned properties

\* *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

\*\* *Town of Greece v. Galloway*, 572 U.S. 565 (2014)

## Next

- Decision **March 15, 2019**
- Plaintiff (FFRF) options
  1. Seek *en banc* rehearing 7<sup>th</sup> Circuit
  2. Appeal to Supreme Court
  3. Pursue similar case in trial court in another Circuit
  4. Pursue legislative changes to Section 107(2)
    - Dollar limits, etc.



# Other Litigation Issues



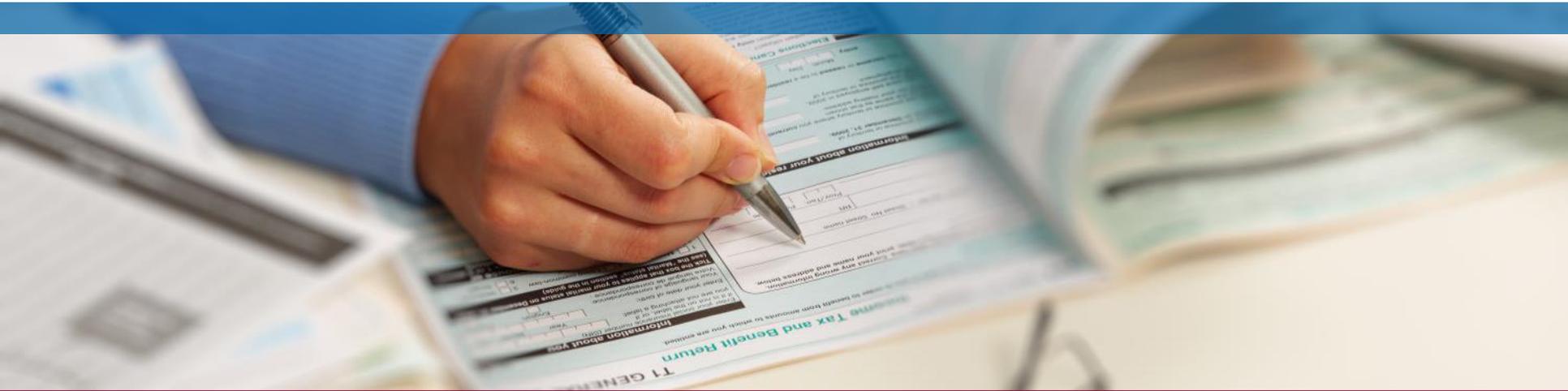
## Church Plan (Hospital) Litigation

- SCOTUS decided *Advocate Health Care v. Stapleton* case **June 5, 2017**
  - **Three open questions** for lower courts
- Several favorable cases since
  - *Medina v. Catholic Health Initiative* (10th Circuit—**December 2017**)
  - *Sanzone v. Mercy Health* (E. District, MO—**August 2018**)
  - *Rollins v. Dignity Health* (N. District, CA—**September 2018**)



## Form 990 Church Exemption Case

- FFRF sues IRS claiming that exemption for churches from Form 990 filing requirement is **unconstitutional**
  - *Nonbelief Relief, Inc. v. Kautter* (D.C. District Court—**October 2018**)



# Tax and Retirement Matters 2019

# 403(b)(9) Issue

## IRS: 2016 Novel Interpretation

A **retirement income account** is a defined contribution program established or maintained ... to provide benefits under Section 403(b) for employees of **the church-related organization that established the plan. Non-QCCOs\* are erroneously excluded from the regulatory definition of a “church-related organization.”**



Includes “steeples”



Includes QCCOs, except in context of pre-approved plan program because IRS has taken the position that QCCOs can become non-QCCOs



DOES NOT include non-QCCOs, like denominationally-affiliated universities and hospitals, which were erroneously omitted

As a result, certain church-affiliated organizations lose the valuable benefits of §403(b)(9) retirement income accounts, face uncertainty, and may bear administrative costs.

\*QCCO: qualified church-controlled organization

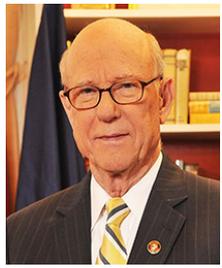


# 403(b)(9) Legislation—115<sup>th</sup> Congress

- Senators Ben Cardin, Pat Roberts and Mike Crapo introduced stand-alone 403(b)(9) bill: **S. 674**
  - **March 21, 2017**
- Congressmen Peter Roskam and Ron Kind introduced House companion: **H.R. 2341 (SERVE Act)**
  - **May 3, 2017**
- Larger retirement packages: **RESA** and **FSA**
  - Retirement Enhancement and Savings Act; Family Savings Act



Ben Cardin (D-MD)



Pat Roberts (R-KS)



Mike Crapo (R-ID)



Peter Roskam (R-IL)



Ron Kind (D-WI)

## Other Co-Sponsors

Senator	House Representatives									
Amy Klobuchar (D-MN)	Mike Kelly (R-PA)	Don Bacon (R-NE)	Lloyd Smucker (R-PA)	Gregory Meeks (D-NY)	Robert Pittenger (R-NC)	Tim Walberg (R-MI)	Mark Meadows (R-NC)	Andy Barr (R-KY)	Barbara Comstock (R-VA)	Ann Wagner (R-MO)

**Were not enacted in 115<sup>th</sup> Congress**

# 403(b)(9)—116<sup>th</sup> Congress



## Senate:

- **Stand-alone 403(b)(9) non-QCCO fix—S. 836**
  - Roberts (R-KS), Cardin (D-MD), Crapo (R-ID), Klobuchar(D-MN), Perdue (R-GA)
- **Retirement Enhancement and Savings Act of 2018 (RESA)—S. 972**
  - Bipartisan support (Grassley and Wyden)
  - Draft text includes 403(b)(9) clarification legislative text



Grassley (R-IA)



Wyden (D-OR)



Kelly (R-PA)



Kind (D-WI)

Ways and Means



Neal (D-MA)



Brady (R-TX)

## House:

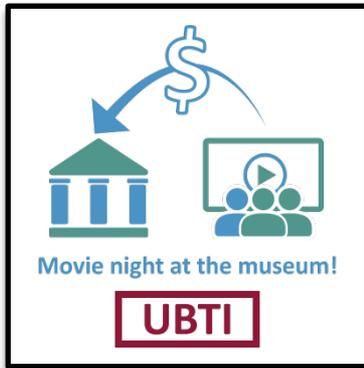
- **SECURE Act:** new retirement security package—**H.R. 1994**
  - Includes 403(b)(9) non-QCCO fix
  - Ways and Means Chairman Neal's priority

**Reasonable bipartisan prospects in 116<sup>th</sup> Congress**



# Tax Cuts and Jobs Act (TCJA, H.R. 1)

## Code §512(a)(6)—“Siloing”



- **Unrelated trade or business—computed separately for tax purposes**
- **Previously:** If tax-exempt organization had two or more unrelated businesses, UBTI was calculated by **aggregating** gross income from the activities and subtracting the aggregate allowable deduction
- **37% individual tax** rate for trusts may apply



## Code §512(a)(7)—UBIT

- **Unrelated Business Income Tax (UBIT)**
- Tax on qualified transit fringe benefits for employees (**parking**, public transit)
- Paid or **incurred costs**
- **21% corporate tax rate** applies
- Churches don't file **Form 990**



# Transportation Fringe UBIT

## A qualified transportation fringe is:

- **Qualified parking** (i.e., parking employer provides for its employees)
- **Transit pass** (paid by employer or through salary-reduction)
- **Qualified bicycle commuting reimbursement**
- **Commuter highway vehicle transportation**

**Employer must add to UBIT: 1) amount paid for the above and 2) amount for any on-premises athletic facility**



# Tax on Parking Expenses

- For churches paying a **garage for employee parking**
  - **Total paid is UBTI** (if not over \$260 per employee)
- For churches **maintaining their own lots**
  - **UBTI =**
    - **Spots reserved for employees** (as a %) x annual cost of lot, **plus either:**
    - **\$0** (if primary use of other spots is for public), **or**
    - **Percentage of remaining spots used by employees x remaining cost**  
(after excluding spots reserved for non-employees)



# Form 990-T

- Form to report UBTI
- **Not required if UBTI is \$1,000 or less**
- New line 34: Amounts paid for disallowed fringes
- File and pay tax by due date
  - **May 15** for most exempt organizations

OMB No. 1545-0047  
**2018**

Form **990-T** Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e))  
For calendar year 2018 or other tax year beginning \_\_\_\_\_, 2018, and ending \_\_\_\_\_, 20\_\_\_\_  
Go to www.irs.gov/form990 for instructions and the latest information.  
Do not enter SSN numbers on this form as it may be made public if your organization is a 501(c)(3).

Department of the Treasury Internal Revenue Service

**A** Check box if address changed  
 1501  1  410(a)  22(e)  405A  53(b)  529(a)

**B** Exempt under section  
 501(c)  1  410(a)  22(e)  405A  53(b)  529(a)

**C** Book value of all assets at end of year

**D** Employer identification number (Employee's trust, see instructions)

**E** Unrelated business activity code (See instructions)

**F** Group exemption number (See instructions) **G** Check organization type:  501(c) corporation  501(c) trust  401(a) trust  Other trust

**H** Enter the number of the organization's unrelated trades or businesses. Describe the only (or first) unrelated trade or business here. If only one, complete Parts I–V. If more than one, describe the first in the blank space at the end of the previous sentence, complete Parts I and II, complete a Schedule M for each additional trade or business, then complete Parts III–V.

**I** During the tax year, was the corporation a subsidiary in an affiliated group or a parent–subsidiary controlled group?  Yes  No If "Yes," enter the name and identifying number of the parent corporation.

**J** The books are in care of **Telephone number**

<b>Part II Unrelated Trade or Business Income</b>			(A) Income	(B) Expenses	(C) Net
<b>1a</b> Gross receipts or sales	<b>1c</b> Balance				
<b>2</b> Less returns and allowances					
<b>3</b> Cost of goods sold (Schedule A, line 7)					
<b>4a</b> Capital gain net income (attach Schedule D)					
<b>4b</b> Net gain (loss) (Form 4797, Part II, line 17) (attach Form 4797)					
<b>5</b> Income (loss) from a partnership or an S corporation (attach statement)					
<b>6</b> Rent income (Schedule C)					
<b>7</b> Unrelated debt-financed income (Schedule E)					
<b>8</b> Interest, annuities, royalties, and rents from a controlled organization (Schedule F)					
<b>9</b> Investment income of a section 501(c)(7), (8), or (17) organization (Schedule G)					
<b>10</b> Exploited exempt activity income (Schedule I)					
<b>11</b> Advertising income (Schedule J)					
<b>12</b> Other income (See instructions; attach schedule)					
<b>13</b> Total. Combine lines 3 through 12					

**Part III Deductions Not Taken Elsewhere** (See instructions for limitations on deductions.) (Except for contributions, deductions must be directly connected with the unrelated business income.)

<b>14</b> Compensation of officers, directors, and trustees (Schedule K)		<b>14</b>
<b>15</b> Salaries and wages		<b>15</b>
<b>16</b> Repairs and maintenance		<b>16</b>
<b>17</b> Bad debts		<b>17</b>
<b>18</b> Interest (attach schedule) (see instructions)		<b>18</b>
<b>19</b> Taxes and licenses		<b>19</b>
<b>20</b> Charitable contributions (See instructions for limitation rules)		<b>20</b>
<b>21</b> Depreciation (attach Form 4562)		<b>21</b>
<b>22</b> Less depreciation claimed on Schedule A and elsewhere on return	<b>22a</b>	<b>22b</b>
<b>23</b> Depletion		<b>23</b>
<b>24</b> Contributions to deferred compensation plans		<b>24</b>
<b>25</b> Employee benefit programs		<b>25</b>
<b>26</b> Excess exempt expenses (Schedule I)		<b>26</b>
<b>27</b> Excess membership costs (Schedule J)		<b>27</b>
<b>28</b> Other deductions (attach schedule)		<b>28</b>
<b>29</b> Total deductions. Add lines 14 through 28		<b>29</b>
<b>30</b> Unrelated business taxable income before net operating loss deduction. Subtract line 29 from line 13		<b>30</b>
<b>31</b> Deduction for net operating loss arising in tax years beginning on or after January 1, 2018 (see instructions)		<b>31</b>
<b>32</b> Unrelated business taxable income. Subtract line 31 from line 30		<b>32</b>

For Paperwork Reduction Act Notice, see instructions. Cat. No. 11291J Form **990-T** (2018)

# Legislative Efforts



- Steering Committee meeting with House Ways and Means Committee

## Supportive of repeal efforts in Congress

- Several bills to repeal §512(a)(7) or both §512(a)(6) and §512(a)(7)



Steering Committee at U.S. House of Representatives—September 25, 2018

### Representatives



Clyburn (D-SC)



Conaway (R-TX)



Maloney (D-NY)



Suozzi (D-NY)



Walker (R-NC)

### Senators



Brown (D-OH)



Coons (D-DE)



Lankford (R-OK)

# UBIT Repeal Bills

Bill Information	Description	Original Co-Sponsors	Notes
<b>Nonprofits Support Act (HR 513)</b>	Repeals 512(a)(6) and (7)	Rep. Mike Conaway (R-TX)	
<b>LIFT for Charities Act (S. 632)</b>	Repeals 512(a)(7)	Sen. James Lankford (R-OK), Sen. Chris Coons (D-DE)	
<b>LIFT for Charities Act (HR 1545)</b>	Repeals 512(a)(7)	Rep. Mark Walker (R-NC), Rep. Tom Suozzi (D-NY)	6 original co-sponsors (5 R, 1 D)
<b>Stop the Tax Hike on Charities and Places of Worship Act (HR 1223)</b>	Repeals 512(a)(7)	Rep. Jim Clyburn (D-SC)	30 Democratic original co-sponsors
<b>Stop the Tax Hike on Charities and Places of Worship Act (S. 501)</b>	Repeals 512(a)(7)	Sen. Sherrod Brown (D-OH)	
<b>Nonprofit Relief Act of 2019</b>	Repeals 512(a)(6)	Rep. Carolyn Maloney (D-NY)	Paid leave tax credit to non-profits

# Regulatory Efforts



- **Comment Letter submitted June 26, 2018**
  - Seeking delay of §512(a)(6) and §512(a)(7)
- **Comment Letter submitted August 7, 2018**
  - Offering helpful interpretations of §512(a)(7)
- **Comment Letter submitted December 28, 2018 on §512(a)(6)**
  - Response to *Notice 2018-67*
- **Comment Letter submitted February 22, 2019**
  - Responding to *Notice 2018-99*
- **Meetings with** Department of Treasury, IRS, House Ways and Means Committee



# UMC Outreach—Thank You!

## UMC Engagement—Urging 403(b)(9) fix and UBIT repeal

### Wespath Board Members' Letters

- Sen. Christopher Coons (D-DE)
- Sen. David Perdue (R-GA)
- Sen. Debbie Stabenow (D-MI)
- Sen. Johnny Isakson (R-GA)
- Sen. Claire McCaskill (D-MO)
- Sen. Patrick Toomey (R-PA)
- Sen. Richard Burr (R-NC)
- Sen. Rob Portman (R-OH)
- Sen. Robert Casey (D-PA)

### CBOs' Letters

- Sen. Sherrod Brown (D-OH)
- Sen. Mark Warner (D-VA)





# Health Care/Financial Services 2019



# Health Care Issues



## Legislation

- Cadillac Plan Tax repeal
- ACA repeal/replace/amend
- Medicare for all/more
- Other (e.g., HSA expansion)



## Regulatory

- Cadillac Plan Tax implementation
- Religious and church plan exemptions (e.g., preventive services, nondiscrimination, reporting)
- Stand-alone HRAs for purchase of individual insurance





# Financial Services Issues



## Legislation

- Commodities law fix (Commodity Pool Operator [CPO] Issue)
  - CFTC reauthorization
  - Stand-alone bill: S. 552 (Klobuchar D-MN, Perdue R-GA)



## Regulatory

- CFTC rules
- SEC Dodd-Frank rules



# Questions

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