



July 21, 2017

Office of Exemption
Determinations
EBSA (Attention: D- 11933)
U.S. Department of Labor
200 Constitution Avenue NW.
Suite 400
Washington, DC 20210

Email: EBSA.FiduciaryRuleExamination@dol.gov

**Re: Department of Labor Request for Information Regarding the Fiduciary Rule
and Prohibited Transaction Exemptions – Extension of January 1, 2018
Applicability Date**

Dear Secretary Acosta:

Thrivent Financial for Lutherans ("Thrivent") welcomes the opportunity to respond to the Department of Labor Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI") as it relates to the extension of the January 1, 2018 applicability date of the provisions of the Best Interest Contract Exemption ("BIC Exemption"), the Class Exemption for Principal Transactions ("Principal Trading Exemption"), and Prohibited Transaction Exemption 84-24 ("PTE 84-24") that did not become effective on June 9, 2017.

We believe an extension of the January 1, 2018 applicability date should be provided until such time the Department completes the review and analysis required by the President's Memorandum dated February 3, 2017 ("Presidential Memorandum"), the review and analysis of the comments received in response to the Department's March 2, 2017 request for comments on issues raised in the Presidential Memorandum, and responses to the RFI due on or before August 7, 2017. We believe an extension of at least eighteen months is appropriate. Further, the application of any new exemptions or material changes to the BIC Exemption, Principal Trading Exemption, or PTE 84-24 should not be effective for at least twelve months from the date a final exemption or substantial change is published in the Federal Register even if such period extends past the aforementioned eighteen months.

During the time any extension is in place, the Department should only require that a fiduciary who intends to rely upon the BIC Exemption, Principal Trading Exemption or PTE 84-24 comply with the Impartial Conduct Standards as set forth in the Final Rule and Extension of Applicability Date promulgated by the Department on April 7, 2017. 82 Fed. Reg. 16902. The Department also should extend its non-enforcement policy as established in Field Assistance Bulletin No. 2017-02 during the time any such extensions are in place.

Our understanding is that the Department is reviewing its final rule defining who is a "fiduciary" of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 ("Code") as a result of

giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (“Fiduciary Rule”), the BIC Exemption, the Principal Trading Exemption and PTE 84-24 pursuant to the Presidential Memorandum. The President directed the Department “to examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.” Further, the President directed the Department to prepare an updated economic and legal analysis. In so doing, if the Department determines, among other things, that investors will be harmed by a reduced access to financial products and services and advice provided in connection therewith or the Fiduciary Rule or exemptions are likely to cause an increase in litigation and corresponding increase in the costs of retirement services products, the Department should submit for public notice and comment a proposed rule to rescind or revise the Fiduciary Rule and exemptions.

Based upon the foregoing, substantial revisions to the Fiduciary Rule, Principal Trading Exemption, BIC Exemption, and PTE 84-24 are possible. Indeed, the Department of Justice in the case captioned *Thrivent Financial for Lutherans v. R. Alexander Acosta, Secretary of Labor and U.S. Department of Labor*, Court File No. 0:16-cv-03289-SRN-DTS (D. Minn.), notified the court that it no longer intends to defend the validity of the one regulatory provision challenged in that case - the application of section II(f)(2) of the BIC Exemption to arbitration agreements. Yet the January 1, 2018 applicability date remains in place, and the Department has not taken steps to effectuate this claimed intention.

This puts Thrivent and other financial institutions in the difficult position of investing a large amount of human and financial capital to comply with a rule and exemptions by January 1, 2018 that may change. Further, Thrivent must in the very near future begin the process of implementation in order to be ready on that date. For example, Thrivent must make substantial changes to our technology in order to implement the initial transaction disclosure, “upon request” transaction disclosure, and web disclosure as required under the BIC Exemption, to implement the disclosure requirements under PTE 84-24, and to further automate procedures required to comply with the Impartial Conduct Standards effective on January 1, 2018. We estimate that such implementation will cost Thrivent at least \$4.5 million dollars.

As a result of the tumultuous procedural history of this rulemaking, Thrivent, like most other financial services companies, has found it difficult to complete the full operationalization of all of the requirements of the BIC Exemption, Principal Trading Exemption, and PTE 84-24 as they stand today. Thrivent understood that changes to the applicability date of April 10, 2017 and substantive changes to the Fiduciary Rule, BIC Exemption, Principal Trading Exemption and PTE 84-24 may occur as a result of the 2016 presidential election. Indeed, such extensions did occur and substantive changes appear to be forthcoming. However, given that the extension to January 1, 2018 will end shortly and the substantial investment that Thrivent must make to be in full compliance with the BIC Exemption and PTE 84-24 by that date, Thrivent must know as soon as possible whether the applicability date will be further extended and, if not, what substantive provisions will apply on January 1, 2018 and thereafter in order to avoid needlessly spending resources on operational changes that may again change.

The incurrence of needless costs by Thrivent and financial institutions will hurt investors as they, at least in part, will bear such costs. Further, because Thrivent is a not-for-profit fraternal benefit society that exists solely for the purpose of benefiting its members and

furthering its Christian mission, any expenditure needlessly made by Thrivent to comply with the Fiduciary Rule, BIC Exemption, and PTE 84-24 will prevent the use of those amounts for these purposes. Therefore, we believe the extension of the applicability date of January 1, 2018 by at least eighteen months is necessary.

Additionally, as the Department recognizes in its RFI, the development of new products that may, by design, address the conflicts of interest about which the Department is concerned will take many months or even years to implement. The Department should recognize that product manufacturers may not be willing to create such products until the Department finalizes its review process and the Department makes clear to such manufacturers and their distributors at what point a person acts as a fiduciary and, in the event of fiduciary status, how to comply with an exemption. Therefore, we believe that any new exemptions or any substantial changes to the BIC Exemption, Principal Trading Exemption or PTE 84-24 resulting from the Department's review should not be effective until at least twelve months after such exemptions or substantial changes are published in the Federal Register.

The Department asks in its RFI whether a delay of the January 1, 2018 applicability date poses risks to retirement investors and whether any benefits of a delay would outweigh those risks. The application of substantial federal and state regulation to the financial services industry and due to the possibility that potentially large excise taxes under section 4975 of the Code could be imposed on fiduciaries who do not act in accordance with the prohibited transaction provisions of ERISA and the Code are designed to protect investors. Furthermore, as we stated earlier in this letter, we propose that the Department continue to require that fiduciaries as defined in the Final Rule comply with the Impartial Conduct Standards during any extension period to the extent they rely on the BIC Exemption, Principal Trading Exemption, or PTE 84-24. Financial institutions that fail to work diligently and in good faith to comply with the Final Rule and exemptions as required by FAB 2017-2 will face the aforementioned excise taxes. Therefore, retirement investors will have substantial protection until such time the Department is able to complete its review and make any changes as required by the Presidential Memorandum and in accordance with the information the Department gathers through the RFI.

We are happy to further discuss with you why the Department should extend the January 1, 2018 applicability date. We also look forward to responding to your RFI in greater detail by the August 7, 2017 deadline.

Sincerely,



Paul R. Johnston
General Counsel & Corporate Secretary
paul.johnston@thrivent.com