



August 7, 2017

Office of Exemption Determinations
EBSA (Attention: D - 11933)
U.S. Department of Labor, 200
Constitution Avenue, N.W., 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

Dear Secretary Acosta:

On behalf of our 2.4 million members, Thrivent Financial for Lutherans ("Thrivent")¹ offers comments to the Department of Labor (the "Department") in connection with the Department's Request for Information Regarding the Final Rule and Prohibited Transaction Exemptions ("RFI"). We understand that the Department will use the information provided in response to the RFI to better enable the Department to review its final regulation (the "Final Regulation") re-defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended ("Code"), the corresponding Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "PTE 84-24") issued by the Department on April 8, 2016 (collectively, the "Rule") pursuant to the memorandum issued by President Donald J. Trump on February 3, 2017 to the Department (the "Presidential Memorandum").²

We appreciate this opportunity to once again contribute our unique perspective as the Department proceeds with the President's order to examine the Rule "to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." Our response to the RFI should provide some insight to the Department as why the Rule will directly cause an increase in litigation. Our response will also explain why the

¹ Thrivent is a member-owned and governed fraternal benefit society authorized under Chapter 614 of the Wisconsin Statutes and exempt from taxation under section 501(c)(8) of the Internal Revenue Code of 1986, as amended.

² Memorandum of Feb. 3, 2017 to the Secretary of Labor: Fiduciary Duty Rule, 82 Fed. Reg. 9675 (Feb. 7, 2016)

Rule will limit the choices low- to middle-income Americans will have to enable themselves to adequately save for retirement.

As we stated first in our July 21, 2015 comment letter on the proposed Rule and associated prohibited transaction exemptions, we welcomed the Department's efforts to update existing regulations to ensure consumers are appropriately protected, and have sought to be an active partner throughout the rulemaking process to share our unique perspective and concerns. As a fraternal benefit society we are owned by our members, and as such Thrivent has been focused on serving members in a pro-consumer, fair, and transparent way since its origin – that's part of being a membership organization. Thrivent has actively supported proposals to create a meaningful best interest standard of care for the sale of financial products for years. In fact, in 2009, Thrivent testified before the House Financial Services Committee in support of Congressional efforts at the time to create a statutory best interest standard. We remain concerned, however, that the Rule, as enacted, will in fact create yet another barrier for middle and lower income families to access professional, individualized or specifically directed investment advice for saving and investing their assets.

I. Overview of Thrivent

Thrivent is a member-owned and governed fraternal benefit society authorized under Chapter 614 of the Wisconsin Statutes and exempt from taxation under section 501(c)(8) of the Code. Christian individuals and their families become members of Thrivent ("Members") for the purpose of enabling Thrivent and its Members to carry out Thrivent's primary mission, which is to strengthen communities by helping Members to be wise with money and to live generously. In furtherance of that aim, Members perform public service projects and other charitable works through Thrivent's lodge system. In order for Thrivent and its Members to accomplish their mission, Thrivent sells its proprietary insurance and annuity products to its Members. Such sales are a core function of tax-exempt fraternal benefit societies under the Code.

As we described in our July 21, 2015 comment letter, fraternal benefit societies, like Thrivent, differ from other financial services firms in several striking ways. Fraternal societies are required by law to offer their members insurance protection issued by the fraternal; and help them carry out religious, benevolent, social, educational and other similar activities through their grassroots lodge system. Connecting financial security with generosity and service is a hallmark of the fraternal model – we believe that the more secure our Members are, the more generous they are with their time, talents and treasures – and the fraternal model helps them achieve both.

Thrivent, like other fraternal benefit societies, focuses on helping persons of modest means. The median size of our IRAs (our primary concern, as fraternal societies cannot issue group coverages) is \$25,000. Moreover, more than half of the Members we serve with IRAs have annual household incomes of less than \$75,000. These are the people who will be most negatively affected by the Rule as enacted.

Members of a fraternal benefit society are required to share a common calling or avocation – Thrivent has a Christian common bond. Its members consist of Christians, their spouses and their minor Christian children. Fraternal societies are also required to bring their members

together in local fraternal lodges to conduct religious, benevolent, social, educational and other similar activities.

The origin of fraternal benefit societies in the United States dates back almost 150 years. Fraternal societies were created because individuals who shared a common bond and a desire to serve their neighbors in need banded together. Throughout the rich history of fraternal benefit societies, their member-led lodges and the religious and benevolent activities have been funded in large part through the sale of insurance and financial products to fraternal lodge members. Fraternal benefit societies have taken on an increasingly vital role in community service, identifying and meeting local needs that otherwise might go unmet. In fact, according to a recent study of the economic input of fraternal benefit societies in communities³, fraternal benefit societies have been estimated to provide \$3.8 billion in societal benefit annually – that is a 76-fold return on the public investment in this increasingly important model. This benefit includes the value of social capital which is generated from fraternal members serving together and building sustainable relationships to strengthen communities from the inside out, on the grassroots level.

The history of fraternal benefit societies and the significant religious and benevolent activities fraternal members engage in through their local lodges help explain why Congress exempted them from federal income tax in 1909 and has maintained that exemption since then. Congress recognized then and now that fraternal benefit societies are unique.

For more than a century, Thrivent has helped our members be wise with money and live generously in support of their congregations and communities. We largely serve individuals and families of modest means who want to connect their faith and finances for good. Thrivent offers a broad range of financial products and services, including life insurance, annuities, disability insurance and long term care coverage to our members. We also distribute mutual funds through a subsidiary. These proprietary products offered to our membership through the tailored guidance of our licensed and captive financial representatives nationwide serve as the basis through which we exist as a fraternal benefit society and as the economic engine that helps us fulfill our fraternal mission of service to our members and their communities.

As a fraternal benefit society, Thrivent has a unique relationship with its Members. As the United States Supreme Court has recognized, “entry into membership of an incorporated benefit society is more than a contract; it is entering into a complex and abiding relation...”⁴ Each Member is an important piece of the Thrivent Christian community, and they perform public service projects, support their congregations and engage in other charitable works through the lodge system.

Thrivent has a number of organizational characteristics, some of which are explained in more detail below, that are inherently designed to assure that Thrivent is run exclusively in the

³ *Economic Contributions of Fraternal Benefit Societies: A Five Year Perspective*, Phillip Swagel, School of Public Policy, University of Maryland (July 2014)

⁴ *Sovereign Camp, W.O.W. v. Bolin*, 305 U.S. 66, 75 (1938).

interest of its Members: (i) Thrivent is Member-owned; (ii) Thrivent is Member-run through a representative form of government; (iii) Thrivent's revenue may only be used to pay benefits and to fund its operations, while any surplus is paid back to a substantial majority of its Members in the form of a dividend; and (iv) Thrivent relies upon a dispute resolution system that is designed to help assure Members get the benefits to which they are entitled and to resolve disputes in a manner consistent with Thrivent's fraternal character.

In addition, section 501(c)(8) of the Code provides that Thrivent must be operated for the exclusive benefit of its Members. Applicable state law further provides that Thrivent must exist solely for the benefit of its Members and for the purpose of carrying out its mission.

By design, Thrivent is operated in the interest of its Members because the sole reason for its existence is to benefit its Members. Further, by definition, Thrivent is already required by applicable federal and state law to operate in accordance with an exclusive benefit principle.

In other words, Thrivent is not the same as commercial insurance companies for purposes of certain federal and state laws. The purpose of Thrivent and other fraternal benefit societies is to advance the mission of the fraternal. The sale of Thrivent insurance and annuity products is a means to attaining this objective. As Thrivent's Articles provide, "[t]he purpose of the Society is to associate Christians and their families ... to aid themselves and others with programs of ... insurance and ... assistance to Lutheran and other Christian congregations and their institutions."⁵ Thrivent's Members understand that they choose to enter into a "complex and abiding relation" when they become fraternal Members and that they will not have the same relationship with the fraternal as they would have with a mutual or stock insurance company.

Further, in connection with that relationship, Thrivent is required to operate for the exclusive benefit of its Members. It was in this context that Thrivent's Members, through its Board of Directors, implemented the Member Dispute Resolution Program ("MDRP"), pursuant to which Thrivent's Members intend to resolve disputes individually in Thrivent's alternative dispute resolution program that culminates (if necessary) in arbitration, rather than through class litigation.

Thrivent's Bylaws provide for the MDRP to constitute the sole means for Members to resolve disputes arising in connection with insurance policies and annuity contracts sold by Thrivent. By providing a dispute resolution process, the MDRP reflects Thrivent's Christian Common Bond, helps preserve Members' fraternal relationship and avoids protracted and adversarial litigation that could undermine Thrivent's core mission.

As explained in greater detail below, the MDRP requires Thrivent also to adhere to stringent protective standards that are consistent with the intent of the BIC Exemption. The MDRP provides for an enforcement mechanism that is protective of Members' rights by providing a multi-tiered dispute resolution system.

A. Thrivent's Governance Structure

⁵ Articles, Art. IV.

Thrivent is governed by its Articles of Incorporation (“Articles”) and Bylaws (“Bylaws”), which form the fraternal contract between Thrivent and its Members. The Articles and Bylaws set the framework for all Thrivent programs, operations and policies.⁶

Thrivent is overseen by a Board of Directors (the “Board”), which represents and acts on behalf of Thrivent’s Members.⁷ The Board consists of between 10 and 12 elective directors, directors appointed by the Board, and not more than two principal officers of Thrivent.⁸ Importantly, the elective directors are elected by Thrivent’s Benefit Members⁹ and constitute at least two-thirds of the members of the Board in number.¹⁰ The elective Board members are nominated by other Benefit Members through the local lodges. In every case, all directors must be Benefit Members. Employees of Thrivent’s and Thrivent’s subsidiaries or affiliates, and Thrivent’s insurance sales representatives, generally are *not* eligible for election to the Board.¹¹ The Board makes decisions about Thrivent’s corporate objectives, policies and strategy in compliance with the Articles and Bylaws.

Through their service on the Board as elective directors and through their election of other Benefit Members to serve on the Board, Thrivent Benefit Members participate in a representative form of government, by shaping Thrivent’s mission and determining the rules by which Thrivent is governed. It is through this elective process that Benefit Members can influence the governance of Thrivent, including the implementation and use of the MDRP. Notably, state law requires a representative form of governance.¹²

The members of the Board are active in ensuring that Thrivent is operated in accordance with its Christian purposes and for the benefit of its Members. For example, the Board receives and reviews quarterly updates on the details of MDRP operations.

B. Thrivent’s Insurance Operations

In order for Thrivent and its Members to accomplish their mission, Thrivent offers certain types of proprietary insurance and financial products to fraternal lodge Members through Thrivent’s licensed financial representatives. Offering such insurance provides an important source of financial protection for Members and is not only permitted, but required by federal

⁶ Articles of Incorporation and Bylaws, Preface.

⁷ Articles, Preface and Art. V.

⁸ Articles, Art. V.

⁹ A “Benefit Member” is a person of age 16 or older who is a benefit under a contract issued by Thrivent. Benefit Members may participate in the affairs of the local lodges and may hold office therein. They also have the right to vote in the corporate and insurance affairs of Thrivent. Articles, Art. VI. Benefit Members are currently 86% of the total Members. The remainder of the membership consists of Associate Members and Youth Members. *Id.*

¹⁰ Articles, Art. V.

¹¹ Bylaws, § 18.

¹² Wis. Stat. § 614.42.

law.¹³ Furthermore, federal and state laws require that Thrivent conduct its activities for the exclusive benefit of its Members.¹⁴

Thrivent is subject to strict prohibitions on the use of its assets and the conduct of its operations. Revenue may only be used to further the purpose of Thrivent, which is to provide insurance benefits to Members and to fund Member-led lodges and Thrivent's religious and benevolent activities. In every instance, Thrivent must consider whether the use of its assets is in the "best interest" of its Members and whether such use prohibits Thrivent from reaching "the conclusion that it is operated for the exclusive benefit of its members."¹⁵ For example, Thrivent may not pay excessive compensation to its executives.

Additionally, Member contracts are participatory in nature. In the most basic sense, Thrivent is required by law to collect premiums from Members, determine the projected experience of its assets and compare the experience to its projected obligations, set aside sufficient funds to meet those obligations and anticipated growth, and set aside funds that may be used to further Thrivent's Christian mission (generally, the amount set aside reflects what Thrivent would pay in taxes but for its tax exemption). All remaining surplus is distributed to Members who own Thrivent contracts in the form of a dividend. The most recent dividend was \$312 million. This system ensures that Thrivent does not have an incentive to charge unreasonably high fees to its Members or to sell higher cost products, because the additional revenue is not retained by Thrivent or paid to outside shareholders. Rather, any revenue not used for the purposes of the fraternal is returned to the Members.

C. Thrivent's Mandatory Member Dispute Resolution Program (MDRP)

A core component of the Member protections enshrined in the Articles and Bylaws is the MDRP. The MDRP is an alternative dispute resolution mechanism that is the sole means for presenting and resolving grievances, complaints or disputes between Members, insureds, certificate owners or beneficiaries and Thrivent or Thrivent's directors, officers, agents and employees.¹⁶ The MDRP was designed to reflect Christian beliefs and to preserve Members' fraternal relationship. The MDRP includes the following three dispute resolution mechanisms:

- 1) Appeal, whereby the Member can appeal a dispute to a panel of reviewers who are senior level Thrivent employees who are not involved with the original decision at issue and who do not supervise the employee who made the decision at issue;
- 2) Mediation, whereby the Member may elect to have a dispute mediated by a mediator selected by the Member through a third party agency that recommends reviewers in any state of the country and in accordance with the American

¹³ Code § 501(c)(8). *Id.*; Wis. Stat. § 614.01(a).

¹⁴ *Id.*; Wis. Stat. § 614.01(a).

¹⁵ Rev. Rul. 78-87.

¹⁶ Bylaws, §11(a), (b).

Arbitration Association's mediation rules (or in accordance with applicable rules of another agreed-upon neutral organization); and

- 3) Arbitration, whereby the matter will be resolved by binding arbitration in accordance with the American Arbitration Association's arbitration rules (or in accordance with applicable rules of another agreed-upon neutral organization), administered by a neutral organization agreed upon by the parties, if the above mediation process does not satisfactorily resolve the dispute.¹⁷

Prior to utilizing the MDRP Appeal, however, Members with concerns or disputes about Thrivent, from their insurance contracts to fraternal or corporate governance issues, interact with our home office Member Relations Department. This staff is a dedicated group of employees that work to resolve those matters in an attempt to preserve the fraternal relationship between Thrivent and its Members by avoiding adversarial litigation that could threaten to undermine the organization's core mission. As a result of the Member Relations staff efforts, most of the issues our Members have with Thrivent are promptly resolved to the Members' satisfaction before even potentially reaching the first stage of the MDRP.

Summaries of Member complaints are reported to the Thrivent Board on a quarterly basis, offering management's observations on trends and areas of emphasis where we think improvements should be considered. There have been instances where Thrivent, through its Member governance process, has made changes to its practices or to its insurance contracts after identifying trends arising during the complaint process, which have been identified through either discussions with our Member Relations Department or periodic evaluations of the MDRP. These evaluations are conducted by cross-functional teams including legal, compliance, and supervisory personnel.

Such changes have been made even though the practices or contract terms being evaluated were justified under applicable law. We believe that evaluating Member complaints in this manner is unique to Thrivent and reflective of the requirement that Thrivent operates through a representative form of governance and for the exclusive benefit of its Members.¹⁸

We believe this process is fair, reasonable and cost effective to the individual Member as well as the Membership as a whole. The MDRP is designed to efficiently determine whether a Member is entitled to benefits under the terms of the contract and whether the sale of the product to the Member was in his or her best interest. Class litigation is considerably less efficient, and if Thrivent and its Members were forced to resolve disputes in class litigation, it may impair Thrivent's ability to resolve disputes efficiently and to evaluate trends and practices in a manner that further all Members' best interests.

The MDRP is hard-wired to be incredibly protective of Thrivent's Members. In particular, the MDRP includes the following important protections:

¹⁷ Bylaws, §11(c).

¹⁸ We are concerned that the threat of class action litigation will inhibit Thrivent's ability to take such remedial actions.

- Thrivent must take reasonable measures to assure that the MDRP process proceeds promptly;¹⁹
- Thrivent (not the Member pursuing the mediation and/or arbitration) pays the administrative costs of the mediation and/or arbitration, including the fees and expenses of mediators or arbitrators, filing fees and reasonable and necessary court reporting fees;²⁰
- Thrivent accommodates its Members' preferences with respect to the location of mediation and arbitration; and
- Members may be awarded any and all damages or other relief allowed for the claim in dispute by applicable federal or state law, including exemplary or punitive damages, attorney's fees and expenses.²¹

Importantly, Thrivent pays the costs of mediation and arbitration in order to encourage Members to take advantage of the MDRP. Thrivent believes this is particularly advantageous to Members who have modest household incomes, which is the case for a large percentage of Members. Such Members may otherwise be dissuaded from resolving disputes due to lack of necessary funds.

A key benefit of the MDRP is that it preserves the fraternal relationship between Thrivent and its Members by avoiding class action litigation that could threaten Thrivent's ability to fairly and efficiently resolve member disputes and thus undermine the organization's core mission. The Bylaws provide that no lawsuits or other actions are permitted for claims or disputes covered by the MDRP.²² The Bylaws also only allow disputes brought in a representative group or on behalf of or against any class of persons and the joinder of disputes of multiple Members with the express written consent of all affected Members and Thrivent.²³

The MDRP is consistent with Thrivent's fraternal nature, consistent with the Christian beliefs of its Members, and reflects a careful balancing between Thrivent's and its Members' desire for a prompt, fair and efficient resolution of disputes, on the one hand, and the protection of the interests of all Members on the other. Experience has shown that the MDRP not only provides a fair and efficient process for dispute resolution, but is also in the best interest of Members.²⁴ In addition, Thrivent is not motivated to make determinations that are not otherwise

¹⁹ Bylaws, §11(c).

²⁰ Bylaws, §11(d).

²¹ Bylaws, §11(f).

²² Bylaws, §11(c).

²³ Bylaws, §11(e).

²⁴ The average cycle time for an appeal is 15 days, for a mediation is 88 days, and for an arbitration is 287 days. Of 5,604 complaints raised by Members from 2011 to 2015, 5,430 (96.9%) were resolved through a Member Relations process and thus were not addressed in the MDRP. During that period, there were 174 appeals, 70 mediations, and 16 arbitrations.

for the benefit of its Members (*e.g.*, increase of stock price for outside shareholders) because it is constrained in the use of its assets. Rather, Thrivent acts for the exclusive benefit of its Members. Thrivent believes that the use of litigation to resolve disputes within Thrivent is inconsistent with the concept of a Member-owned organization that is run by its Members.

II. Executive Summary

We believe that the BIC Exemption as drafted unfairly and unnecessarily discriminates against Thrivent’s unique organizational structure and dispute resolution process by requiring Thrivent to abandon its longstanding commitment to individual arbitration of disputes with Members in order to have exemptive relief. We also believe that the conditions in sections II(f)(2) and II(g)(5) of the BIC Exemption are contrary to a preference under federal law to resolve disputes by arbitration rather than through litigation and that these conditions will result in increased litigation. Therefore, the BIC Exemption should not include these conditions.

We also believe that several improvements should be made to the BIC Exemption and PTE 84-24 in order to make them more workable and to reduce unnecessary compliance costs while still protecting the interests of investors. We provide our suggestions below.

III. Removal of Anti-Arbitration Conditions to the BIC Exemption

The conditions in sections II(f)(2) and II(g)(5) of the BIC Exemption provide that the contract between the Financial Institution²⁵ and a Retirement Investor may not require the investor to waive or qualify his or her right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution. We believe that such requirement should be removed from the BIC Exemption for the following reasons: (i) the condition is discriminatory towards Thrivent; (ii) the condition is contrary to the preference under federal law for arbitration over litigation as a means of resolving disputes, and (iii) the condition will cause an increase in litigation. Therefore, Thrivent requests that the conditions set forth in sections II(f)(2) and II(g)(5) be removed.

A. Sections II(f)(2) and II(g)(5) are Discriminatory Towards Thrivent

Thrivent offers a broad range of financial products and services to Thrivent’s Members, which are primarily individuals and families of modest means. Thrivent recommends these products to its members in various circumstances, including in connection with ERISA plan-to-IRA rollovers, IRA-to-IRA transfers, and distributions from existing IRAs for which Thrivent or its affiliates serve as an investment adviser. Consequently, Thrivent is a “fiduciary” by reason of providing investment advice pursuant to the Final Regulation effective June 9, 2017.

Because Thrivent receives commissions and other transaction-based compensation in connection with the sale of these products, which include proprietary products, Thrivent will need to rely on an exemption to avoid engaging in a non-exempt prohibited transaction under ERISA and/or the Code. Additionally, Thrivent cannot stop selling proprietary insurance

²⁵ Capitalized terms not defined in this letter have the same meaning as in the Rule.

products. As a fraternal benefit society, Wisconsin law *requires* Thrivent to sell proprietary insurance products to its members. *See* Wis. Stat. §§ 614.01(1)(a)5, 632.62(1)(b). Thrivent cannot simply exit the insurance industry entirely or stop issuing proprietary life insurance products. By the DOL’s rationale, however, Thrivent “benefits” from the sale of proprietary products, meaning that the sale of such products in connection with certain retirement-related accounts could constitute prohibited self-dealing under DOL’s Fiduciary Rule.²⁶ Therefore, in order to continue to function as a fraternal benefit society that sells proprietary life insurance products to its members, Thrivent has no choice but to avail itself of the BIC Exemption.

However, if the Department is unwilling to remove the conditions in sections II(f)(2) and II(g)(5) of the BIC Exemption, no prohibited transaction class exemption is available to Thrivent for many of its activities unless Thrivent is willing to forgo the MDRP. Thrivent is not able to utilize the BIC Exemption because the MDRP is not consistent with the conditions of the BIC Exemption, which prohibit waivers of plan and IRA investors’ (and certain fiduciaries’) rights to bring or participate in class actions or other representative actions in court in disputes with financial institutions or advisers. Thrivent also cannot rely upon PTE 84-24 in many instances because PTE 84-24 has been amended to exclude many types of insurance products from its scope.

We do not believe that Thrivent should be required to abandon its longstanding commitment to individual arbitration of disputes with Members related to such products. Sections II(f)(2) and II(g)(5) of the BIC Exemption are unnecessary in light of the protections afforded through requirements of already applicable federal and state law. Further, a requirement that Member disputes be resolved through class litigation substantially threatens Thrivent’s ability to accomplish its mission. Simply put, the time and expense of class action litigation would convert the fairness, promptness and efficiency that are the hallmarks of the MDRP into an expensive, lengthy and adversarial process.

B. Federal Law Favors the Use of Arbitration to Resolve Disputes

The anti-arbitration provisions of the BIC Exemption do not only discriminate against Thrivent, but fly directly in the face of a federal law that favors the resolution of disputes through arbitration rather than litigation. The Federal Arbitration Act (“FAA”)²⁷ embodies a primary federal policy to promote and protect arbitration agreements from discrimination or invalidation.²⁸ Section 2 of the FAA provides that “[a] written provision in any ... contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid,

²⁶ Section IV of the BIC Exemption specifically requires Financial Institutions to meet additional requirements under the BIC Exemption if the Financial Institution limits Advisers’ investment recommendations, in whole or part, based on whether the investments are Proprietary Products.

²⁷ 9 U.S.C. § 1 et seq.,

²⁸ “[Supreme Court precedent] ha[s] repeatedly described the [FAA] as ‘embod[ying] [a] national policy favoring arbitration.’ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (alteration in original) (internal quotation marks omitted); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (same); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing that the FAA evinces a “liberal federal policy favoring arbitration agreements”); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (same).

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁹

The federal government recently appeared to express its agreement with this premise in a case before the Supreme Court, *NLRB v. Murphy Oil USA, Inc.* (“Murphy Oil”), Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017). In an amicus brief filed with the Court on June 16, 2017, the Solicitor General argued that courts “must enforce agreements to arbitrate federal claims unless the FAA’s mandate has been overridden by a contrary congressional command or unless enforcing the parties’ agreement would deprive the plaintiff of a substantive federal right.”³⁰ Subsequently, the Department of Justice (“DOJ”) filed a brief in the matter of *Chamber of Commerce v. United States Department of Labor*, No. 17-10238 (5th Cir. 2017) in which it stated that it would not seek to enforce section II(f)(2) of the BIC Exemption in light of the Solicitor General’s position in the *Murphy Oil* case.³¹ More recently, on July 27, 2017, DOJ withdrew its cross-motion for summary judgment 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.) and informed 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.

In light of the FAA, and DOJ’s statements regarding the anti-arbitration provisions of the BIC Exemption, the Department should no longer condition the availability of the BIC Exemption on an Adviser’s and Financial Institution’s willingness to forgo the opportunity to arbitrate claims that arise in connection with the provision of investment advice under the Final Regulation.

C. Sections II(f)(2) and II(g)(5) will Likely Result in Increased Litigation

In the Presidential Memorandum, President Trump asked that the Department determine “...whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services” and, if so, the Department should “publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law.” If the Department retains the prohibition against pre-dispute agreements to arbitrate class claims, the likelihood of increased litigation is a certainty. Any costs related thereto will at least in part be borne by investors.

Indeed, the Department recognized in the preamble to the BIC Exemption that “for many claims, arbitration can be more cost-effective than litigation in court” and that “permitting individual matters to be resolved through arbitration tempers the litigation risk and expense for Financial Institutions, without sacrificing Retirement Investors’ ability to secure judicial relief for systemic violations that affect numerous investors through class actions.” However, the

²⁹ 9 U.S.C. § 2.

³⁰ Brief for the United States as *Amicus Curiae* Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307, p. 9, *NLRB v. Murphy Oil* (U.S. June 16, 2017).

³¹ Brief for Appellees, R. Alexander Acosta, Secretary, U.S. Department of Labor and U.S. Department of Labor, *Chamber of Commerce v. United States Department of Labor*, pp. 59, No. 17-10238 (5th Cir. 2017).

Department chose to prohibit pre-dispute agreements to arbitrate class claims as a condition of the BIC Exemption because “the option to pursue class actions in court is an important enforcement mechanism for Retirement Investors. Class actions address systemic violations affecting many different investors. Often the monetary effect on a particular investor is too small to justify pursuit of an individual claim, even in arbitration. Exposure to class claims creates a powerful incentive for Financial Institutions to” comply with the BIC Exemption. In essence, the Department acknowledges the litigation risk and the costs attendant thereto.

Thrivent believes that a robust conflict resolution program like the MDRP is protective of investors. Further, financial institutions are required to comply with the fiduciary duty and prohibited transaction provisions of ERISA when they provide investment advice to a participant in an ERISA plan and are required to comply with the Code’s prohibited transaction provisions when providing investment advice to an IRA owner. Failure to comply with ERISA can result in liability under ERISA’s remedial provisions and failure to comply with the Code can result in the imposition of substantial excise taxes by the Internal Revenue Service. Finally, financial institutions are subject to a panoply of regulatory requirements of other federal regulators and state regulators. Therefore, even if the Department removes the anti-arbitration provisions from the BIC Exemption, investors will be protected.

IV. Changes to the Neutral Factors Requirement

The requirement under the BIC Exemption that differential compensation may be paid only on the basis of neutral factors as described in the BIC Exemption has proven very difficult to apply in practice and is contrary to the “principles based approach” intended to be achieved by the Department.³² Further, compliance with this requirement as currently set forth in the BIC Exemption will result in companies like Thrivent being unable to provide as many products and services to retirement investors.

Section II(d)(3) of the BIC Exemption requires that a Financial Institution “warrant” that its policies and procedures –

...require that neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, this Section II(d)(3) does not prevent the Financial Institution, its Affiliates or Related Entities from providing Advisers with differential compensation (whether in type or amount, and including, but not limited to, commissions) based on investment decisions by Plans, participant or beneficiary accounts, or IRAs, to the extent that the Financial Institution’s policies and procedures and incentive practices, when viewed as a whole, are reasonably and prudently designed to avoid a misalignment of the interests of Advisers with the interests of the Retirement Investors they serve as fiduciaries (such compensation practices can include differential

³² 81 Fed. Reg. at 21007.

compensation based on neutral factors tied to the differences in the services delivered to the Retirement Investor with respect to the different types of investments, as opposed to the differences in the amounts of Third Party Payments the Financial Institution receives in connection with particular investment recommendations).

Section II(d)(3) effectively requires the elimination of differential compensation unless any differentiation can be addressed through a “neutral factors” analysis. The neutral factors must be “tied to the differences in the services delivered.” The Department further explains in the preamble to the BIC Exemption that “neutral factors” are based on the “time and complexity of the advisory work.” If the Financial Institution pays differential compensation based upon neutral factors, the Department states that the Financial Institution should take particular care in defining “categories of investments” across which differential compensation is paid and developing policies and procedures to supervise and monitor Adviser recommendations.³³

The requirement that the Financial Institution identify different categories of investments and then apply the neutral factors analysis between and among categories will require Thrivent and other financial services companies to eliminate certain securities or products from its “shelf” in order to meet this requirement. For example, compensation in connection with mutual fund sales varies among mutual fund families and share classes. For this reason, many firms like Thrivent are considering, if they have not already, reducing the variety of mutual fund families and share classes that will be available for purchase by their clients. Further, the neutral factors requirement is not flexible enough to accommodate all investors’ needs and in some cases complying with the requirement will cause conflicts. For example, the commission paid to an adviser on a 10-year Treasury Note typically is proportionately higher than the commission on a 5-year Treasury Note. A strict reading of the neutral factors requirement would require that the commission on both securities be the same because the securities fall within the same category, i.e., fixed income securities, and the time and effort it takes the adviser to recommend the security does not vary between the two securities. However, in so doing, an adviser may be incented to recommend the 5-Year Treasury Note with the intent to make a subsequent recommendation to purchase a second 5-Year Treasury Note when the first note matures in order to receive a second commission, rather than recommend a 10-Year Treasury Note that would otherwise be in the best interest of the investor. These examples illustrate that the neutral factors requirement will result in what is described in the Presidential Memorandum as “...a reduction of Americans’ access to certain retirement savings offerings [and] retirement product structures...” and “dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.”

On the other hand, during the Transition Period, the Financial Institution need only apply the Impartial Conduct Standards. The Financial Institution has the option to either address conflicts of interest through its compensation practices, its compliance policies and procedures, or a combination of both. In our view, this type of approach is more in line with the Department’s stated intent that the BIC Exemption be “principles based.” In these circumstances, Financial Institutions will have the flexibility to offer securities, products, and services that meet a variety of retirement investors’ needs and to price them appropriately, while

³³ 81 Fed. Reg. at 21037.

at the same time addressing any conflicts the investment adviser or financial services company may have when recommending such securities, products, and services.

V. Grandfathering or Similar Transition Relief

Grandfathering relief or similar transition relief is necessary to address situations in which financial services companies complied with the BIC Exemption or PTE 84-24 during the Transition Period as prescribed by the Department in its announcement published in the Federal Register on April 7, 2017.³⁴ During that time, a fiduciary is required to act pursuant to the Impartial Conduct Standards when relying upon either exemption and need not comply with the other requirements included in the final exemptions published in the Federal Register on April 8, 2016. Further, fiduciaries who provide investment advice in connection with insurance contracts are permitted to comply with PTE 84-24 even if the insurance contract is not a “Fixed Rate Annuity” or “insurance contract” as defined in the final PTE 84-24 published in April 8, 2016.³⁵ However, the BIC Exemption and PTE 84-24 as published on April 6, 2016 will become fully applicable on January 1, 2018.

We are concerned that requiring financial services firms to comply with all of the requirements of the BIC Exemption and PTE 84-24 as we know them, any revisions to these exemptions, or any newly available exemptions at the end of the Transition Period after requiring compliance as described above during the Transition Period will be unnecessarily disruptive to the operations of financial services firms and their clients. This would be the case, for example, if the firm made a recommendation during the Transition Period in accordance with the Impartial Conduct Standards under the BIC Exemption or PTE 84-24 and in light of the Department’s non-enforcement guidance in Field Assistance Bulletin 2017-02. However, such recommendation may not otherwise comply with the version of the BIC Exemption or PTE 84-24 that is effective at the conclusion of the Transition Period or any newly available exemptions that may be available at that time. In those circumstances, the financial services firm may be required to override its own recommendations made during the Transition Period notwithstanding the fact they were made in accordance with an existing prohibited transaction exemption.

Based upon the foregoing, we urge the Department to provide grandfathering or similar transitional relief that will allow financial services firms that relied upon the BIC Exemption and PTE 84-24 during the Transition Period to continue to rely upon those exemptions pursuant to their terms as they existed effective on June 9, 2017. Such relief should apply to any follow up recommendations (including a recommendation to purchase mutual fund shares through an automatic purchase program) made after the Transition Period in connection with a recommendation first made during the Transition Period. Such relief is adequately protective of investors because financial institutions are required to act in accordance with the Impartial Conduct Standards during the Transition Period and will face substantial excise taxes if they fail to meet these standards and cannot demonstrate that they worked diligently and in good faith to comply with the Rule as required by FAB 2017-02.

³⁴ 82 Fed. Reg. 16902 (Apr. 7, 2017).

³⁵ 81 Fed. Reg. 21147 (Apr. 8, 2016).

VI. Changes to the Disclosure Requirements of the BIC Exemption and PTE 84-24

In our view, the disclosure requirements of the BIC Exemption and PTE 84-24 are unnecessarily burdensome for fiduciaries to produce. Further, we believe there is little chance that investors will read or comprehend the disclosure required by these exemptions particularly when you consider the large amounts of disclosure already required to be provided under other applicable law. Therefore, we make the following recommendations:

A. The BIC Exemption and PTE 84-24 should be amended to provide that a fiduciary may meet any disclosure requirements of the BIC Exemption or PTE 84-24 by providing disclosures required under other applicable law. Section III(b)(2) provides that for purposes of meeting the website disclosure requirements, a Financial Institution may make available on the website “other disclosures which are made public, including those required by the SEC and/or the Department such as a Form ADV, Part II...” so long as the website includes “an explanation that the information can be found in the disclosures and a link to precisely where it can be found...” We believe this is a sensible approach to providing disclosures to investors because it reduces the need for duplicative disclosures. However, the Department should also make clear that for purposes of meeting the other disclosure requirements of the BIC Exemption and the disclosure requirements of PTE 84-24 that a fiduciary can provide other disclosures that are otherwise required by applicable law including state insurance law, federal and state securities laws, ERISA and the Code.

Thus, the fiduciary should be able to meet the disclosure requirements in Section II(e) of the BIC Exemption and the initial transaction disclosure and “upon request” transaction disclosure requirements of Section III(a) of the BIC Exemption by providing a separate written disclosure document, one or more disclosures that are otherwise required by applicable law, or a combination thereof so long as the disclosures in total allow the investor to understand the compensation paid in connection with the recommendation and to evaluate any Material Conflicts of Interest that may exist. Similarly, for purposes of complying with Section IV of PTE 84-24, the Department should clarify that the disclosure requirements therein can be provided in the same manner.

B. The Department should simplify the disclosure requirements of the BIC Exemption and PTE 84-24. The BIC Exemption requires disclosures under Section II(e), initial and “upon request” disclosure requirements under Section III(a), and web site disclosure requirements under Section III(b). In our view, any disclosure required to be provided under the BIC Exemption should be for the purpose of allowing the investor to understand costs, fees and other compensation regarding recommended transactions and understand the significance and severity of any material conflicts of interest. In order to accomplish this, we do not believe it is necessary to require the amount of disclosure currently found in the BIC Exemption. Further, we do not believe it is necessary to prescribe in the BIC Exemption how financial institutions should provide such disclosure. Rather, financial institutions should be allowed the flexibility to determine when and how disclosures should be provided to investors so they may have an understanding of costs, fees and other compensation and any material conflicts of interest.

For example, in Thrivent's case, we believe that we can convey sufficient information to our members through a combination of our member contract, account agreements, disclosures provided in accordance with other applicable law, and a single disclosure document that is provided at or before the time a recommendation is made. However, due to the requirements of the BIC Exemption, we are required to develop technology that will generate disclosures required by the BIC Exemption. Compliance with the BIC Exemption will also require substantial changes to our web site. 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. Because Thrivent is a not-for-profit fraternal benefit society that exists solely for the purpose of benefitting its members and furthering its Christian mission, Thrivent is concerned about any expenditures that are not necessary to protect our Members' interests, yet required by the BIC Exemption, because the expenditure of those resources will prevent the use of those amounts for these purposes. Therefore, we believe the Department should change the disclosure requirements under the BIC Exemption in order to allow sufficient flexibility to accommodate our approach to disclosure.

Importantly, we do not suggest that Thrivent's proposed approach to disclosure is right for every other financial institution. Rather, we believe that the Department should give each financial institution the flexibility to provide disclosures in the manner it sees fit so long as such disclosures are sufficient to allow an investor to understand the costs of a recommended transaction and the significance and severity of any material conflicts of interest. We believe this approach is more in keeping with the "principles-based approach" intended by the Department when it issued the BIC Exemption.³⁶

VII. Conclusion

As we stated in our July 21, 2015 comment letter on the proposed Rule, we commend the Department for its efforts to ensure consumers are appropriately protected. As a fraternal benefit society owned by our members, Thrivent has been focused on serving members in a pro-consumer, fair, and transparent way since its origin – that's part of being a membership organization. Thrivent has actively supported a best interest standard of care for the sale of financial products for years. Unfortunately, the practical application of the Rule will not allow us to achieve that goal, and instead will increase costs to our members, reduce access to financial advice primarily for middle and lower income families, and potentially force us to stop serving a large portion of our members of modest means as well as prohibit us from fulfilling our mission of service in communities.

The Department has asserted that current regulatory protections are inadequate to address its concerns about advice to retirement plan participants. We respectfully disagree with that blanket assertion, as we at Thrivent have been successfully serving our members, mostly individuals and families of modest means, in their best interest for more than a century. A broad

³⁶ 81 Fed. Reg. at 21007.

array of regulation and detailed systems of retirement investor protections are already in place and working, administered by the Department, the Internal Revenue Service, the Securities and Exchange Commission, the Financial Industry Regulatory Authority, state insurance departments and state securities departments.

The Rule seems to be founded on a premise that commissioned proprietary products influence advisers to provide conflicted advice to the detriment of retirement investors. Therefore, the Rule elevates automated robo-advice and fee-based advice as preferable alternatives because they are cheaper or better aligned with the interests of retirement investors. This assumption is often incorrect. Recommendations under the final Rule may generate the least expensive product, but the least expensive product may not be in the investor's best interest.

As a fraternal benefit society, Thrivent is particularly concerned that the Rule will stifle the ability of Thrivent's Members to engage in fraternal activities through the lodge system that benefit their communities and society as a whole. We urge you, therefore, to take Thrivent's unique nature, member governance and our requests into account and modify the Rule into a workable Rule that will protect retirement investors while still leaving them access to meaningful education and advice as well as access to financial products and services, the purchase of which would not only be in their best interest, but will also continue to allow Thrivent and our members to make a significant positive impact in U.S. communities.

Respectfully submitted,



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