



August 21, 2017

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VIA ELECTRONIC FILING

The Honorable Susan Richard Nelson
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101
Nelson_chambers@mnd.uscourts.gov

Re: *Thrivent Financial for Lutherans v. R. Alexander Acosta and U.S. Department of Labor*
Court File No. 0:16-cv-03289-SRN-HB

Dear Judge Nelson:

As ordered at the August 11, 2017 hearing, Thrivent submits this letter to update the Court as to the parties' efforts to resolve Thrivent's concerns about the anti-arbitration condition that remains part of the BIC Exemption to DOL's Fiduciary Rule. This condition is set to take effect on January 1, 2018, notwithstanding that DOL's litigation position now concedes that it violates the Federal Arbitration Act.

To definitively resolve Thrivent's concerns and provide Thrivent with certainty as to its compliance obligations, Thrivent proposed that DOL commit to addressing the anti-arbitration condition in standalone rulemaking on a fast track, separate from the rest of DOL's revisions to the Fiduciary Rule. Eliminating the challenged condition through rulemaking, and doing so expeditiously, would certainly address Thrivent's concerns. DOL's counsel responded that DOL would not commit resources to such an effort.

Thrivent also inquired whether DOL would stipulate to a preliminary injunction, barring any agency of the federal government from enforcing the anti-arbitration condition of the BIC Exemption and clarifying that Thrivent has no obligation to permit judicial class actions in order to obtain relief under that exemption. DOL's counsel stated that DOL is unwilling to stipulate to any injunction under any circumstances, no matter how narrow and how temporary.

The only action DOL indicated it would consider is the issuance of a public statement that it does not intend to enforce the anti-arbitration condition of the BIC Exemption. This would not address Thrivent's concerns for several reasons:

First, a statement of non-enforcement would not change the fact that the regulation remains on the books, making it impossible for Thrivent to make required certifications of its regulatory compliance, including required certifications to state regulators that Thrivent complies with all federal laws.

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Second, the Fiduciary Rule and related exemptions are to be enforced in part through excise taxes collected by the Department of Treasury. DOL does not have any enforcement authority. Unlike eliminating the rule or enjoining its enforcement, DOL's statement of non-enforcement provides no guarantee that the Department of Treasury (a separate federal agency) would refrain from enforcing the rule once in effect.

Third, under the existing structure, it is private litigants—not federal agencies—who would primarily enforce the Fiduciary Rule. DOL's proposed statement of non-enforcement would not guarantee that private litigants would refrain from pursuing putative class actions and citing existing provisions of the BIC Exemption, which were duly promulgated under the Administrative Procedures Act, in support of that effort.

In light of DOL's unwillingness to address these concerns, Thrivent intends to file soon a motion for preliminary injunction. Under the circumstances, Thrivent would be willing to have its motion for a preliminary injunction considered based on the papers and without a hearing, and Thrivent would request a briefing schedule that would allow briefing to be completed by the third week in September. If the Court wishes to hold a hearing, Thrivent would request to be heard on its motion sometime during late September or early October. As part of the briefing, Thrivent will provide authority and argument to address the mootness concerns raised by the Court during the August 11, 2017 hearing, unless the Court would prefer separate briefing on that issue.

Sincerely,

/s/ Andrew B. Kay

By: Andrew B. Kay

ABK

cc: Counsel of Record (via ECF)