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DOL Announces that it is Proposing an 18-Month Extension of the Transition Period

On August 9, 2017, the Department of Labor ("DOL") announced that it is submitting for interagency review a proposed 18-month extension, to July 1, 2019, of the Transition Period and Delay of Applicability Dates for the Best Interest Contract Exemption, the Principal Transactions Exemption, and PTE 84-24. It did this in a notice of administrative action in *Thrivent Financial for Lutherans v. Acosta*, Case No. 16-cv-03289-SRN-DTS ("*Thrivent*"). While not certain, the filing means that the 18-month extension of the Transition Period is likely.

As background, Thrivent has asked the District Court for the District of Minnesota to strike down the Best Interest Class Exemption's anti-arbitration provision. Until recently, DOL had opposed Thrivent's claim that the anti-arbitration provision illegally violated the Federal Arbitration Act. On July 3, in a separate piece of Fiduciary Rule litigation, *Chamber of Commerce v. Acosta*, DOL submitted a filing announcing that it would no longer defend the anti-arbitration provision of the Best Interest Class Exemption on the basis that the Department of Justice had taken a closer look at the Federal Arbitration Act and had submitted a brief in the currently pending Supreme Court case *NLRB v. Murphy Oil* that could not be reconciled with any defense of the anti-arbitration provision. On July 5, 2017, DOL filed a notice with the district court that it would no longer defend the anti-arbitration provision in *Thrivent.*

Since then, Thrivent and DOL have continued to contest how the district court should resolve the case. Thrivent has argued that the district court should enter a nationwide injunction blocking the anti-arbitration provision. DOL has argued that the district court should stay the case indefinitely so that DOL can make the changes to the Best Interest Contract Exemption's anti-arbitration provision that it deems appropriate, or, if the court is unwilling to grant a stay, the district court should grant an injunction blocking DOL from requiring that Thrivent comply with the anti-arbitration provision. On August 10, 2017 the district court will hear arguments about the appropriate resolution.

Today's filing previews some of the arguments that DOL is likely to make tomorrow, for example that judicial efficiency is best served by staying the resolution of *Thrivent*. However, the notice does not by itself have any legal effect or guarantee that the Transition Period will be extended.

In the notice of administrative action, DOL states that it has submitted "proposed amendments" extending the Transition Period to the Office of Management and Budget ("OMB"). The words "proposed amendments" could mean that DOL is only at the "proposed rule" stage with a delay. If that is the case, then there is a probability that the length of the delay or other specifics of the delay could change; there is also some risk that the delay may not become finalized. Alternatively, the language could mean that DOL has "proposed" to OMB an interim final rule extending the Transition Period. If that is the case, then OMB's

cost benefit analysis would be the final review prior to the delay taking effect. However, OMB could determine that the delay fails to comply with the requirements of the Administrative Procedure Act and could reject the delay, make changes to its length, or make other substantive changes.

While today's filing is significant and signals that it is extremely likely that the Transition Period will be extended, it is not the final step. As of now, there is no delay. We will continue to monitor developments and provide updates as DOL, OMB, and possibly the courts take additional steps to delay and or revise parts of the Fiduciary Rule and its exemptions.

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