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July 21, 2015

Office of Regulations and Interpretations *via Electronic Mail*
Office of Exemptive Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re:
1. Definition of the Term "Fiduciary;" Conflict of Interest Rule-Retirement Investment Advice **[RIN 1210—AB32]**
2. Proposed Best Interest Contract Exemption **[ZRIN 1210—ZA25]**
3. Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption
(PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters **[ZRIN 1210—ZA25]**

To Whom It May Concern:

On behalf of our 2.4 million members, Thrivent Financial for Lutherans offers comments on the notice of proposed rulemaking concerning the definition of the term "Fiduciary" (the "Proposed Regulation"), the proposed Best Interest Contract Exemption, and the proposed Amendment to and Partial Revocation of Prohibited Transaction Exemption 84-24 (collectively referred to as the "Proposal") by the U.S. Department of Labor (the "Department").

This comment letter is divided into two parts. The first part provides the Department with background on Fraternal Benefit Societies and Thrivent Financial for Lutherans. We then provide the Department with specific comments and requests on a range of issues.

We appreciate this opportunity to respond to the Department's proposals. Thank you for your kind attention to our comments.

BACKGROUND ON THRIVENT FINANCIAL FOR LUTHERANS AND FRATERNAL BENEFIT SOCIETIES

As a fraternal benefit society exempt from federal income tax under section 501(c)(8) of the Internal Revenue Code, Thrivent Financial for Lutherans is a not-for-profit membership organization of Christians, primarily Lutherans. Fraternal benefit societies, like Thrivent, differ from other financial services firms in several striking ways. Fraternals 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.

Members of a fraternal benefit society are required to share a common calling or avocation – Thrivent, for example, will only accept as members Christians, their spouses and their minor Christian children. Fraternals are also required to bring their members together in local fraternal lodges to conduct religious, benevolent, social, educational and other similar activities. For example, in 2014 alone, Thrivent and its members, operating through their fraternal lodges, raised/donated $209.8 million and generated 10.7 million volunteer hours to support communities, churches and individuals in need.

The origin of fraternal benefit societies in the United States dates back almost 150 years. Fraternals 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 communities, 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.[1] 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.

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

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.

Thrivent Financial believes that financial professionals or organizations that provide financial guidance to a plan, plan participants/beneficiaries and IRA owners regarding plan and IRA assets should be subject to a best interest standard of care. We believe, however, that, as proposed, the Proposal will increase costs to consumers, 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, and generate a barrage of disclosures, many of which duplicate disclosures already required by the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). In particular for Thrivent, increased costs reduce its ability to fund its members' religious and benevolent activities. Congress appears to have understood this inverse connection between costs and benevolence when it exempted fraternal benefit societies from federal income tax.

In addition, Thrivent, like other fraternal benefit societies, focuses on helping persons of modest means. The median size of our IRAs (our primary concern, as fraternals 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 affected if we cannot find a way to make the Proposal workable. To avoid unintended consequences of the Proposal, Thrivent respectfully submits the following comments and offers alternative approaches that acknowledges and adheres to a best interest standard of care and provides meaningful disclosures to investors.

SPECIFIC COMMENTS ON THE PROPOSAL

PROPOSED REGULATION SECTION 2510.3—21 (DEFINITION OF "FIDUCIARY")

1. **Fraternal Exemption from Definition of "Fiduciary"**

We request further consideration by the Department for an additional "carve-out" to be added to the definition of "Fiduciary" that recognizes the unique nature, requirements and governance of fraternal benefit societies.

Thrivent Financial is a fraternal benefit society governed by our own members and required by the federal tax code and laws in all fifty states to not only provide insurance and other benefits to our members, but also to bring together members and coordinate those members "in work that is of a fraternal and beneficial character."[2] It is a system deeply embedded in our nation's history and laws. Congress and the states have chosen to keep it in place for more than a century—and with good reason: fraternal benefit societies provide great benefits not only to their members, but to the country as a whole.

The good work that Thrivent Financial and its members perform is supported by the sale of our proprietary products. By law, fraternal benefit societies must provide their members with their own "fraternal insurance products" (which includes annuity contracts that are commonly utilized in retirement plans and IRAs). It is the sale of these products that provide the funding that fuels the local lodges and charitable activities that fraternal benefit societies and their members carry out. As stated earlier in the fraternal background section of this letter, providing proprietary products to their members is a fundamental basis for the existence of fraternal benefit societies and necessary for the success of their contribution to the public well-being across the country. A recent academic study concluded that the tax exemption of fraternal benefit societies enabled them to provide a $3.8 billion yearly benefit to communities.[3]

We appreciated the opportunity to discuss our unique concerns as a fraternal benefit society with the Department during the comment period. This included a discussion of how fraternals differed from other financial institutions and how they might be more appropriately treated under the Proposed Rule. We were told that the Department staff did try to accommodate unique situations (like those of Thrivent) where appropriate. The example given was for organizations with over 100 employees – the justification being the employer is in a position to assure that the best interests of its employees are met.

An analogous situation exists with the unique fraternal governance structure of Thrivent. We are required to be governed by our members. Thrivent members nominate and elect our national board of directors – all of whom are members of our society who own a proprietary insurance or annuity product. In addition, our unique lodge structure provides governance by our members at a local level. The oversight provided by our member board is robust and engaged, with the board providing oversight on key issues impacting our members – from financial strength to product line up to sales practices to religious and benevolent activities.

Given the unique relationship of a fraternal benefit society to its members, as well as the differences in our structure and governance, **we would appreciate additional consideration of a possible exception under which the sale of a fraternal insurance product will not result in either the financial professional or the financial institution being considered to be a fiduciary.** The basic idea would be the same as that for large employers – the fraternal organization would be in a position to be able to assure that the best interests of its members were served. Of course, we would be open to considering additional structures, processes or

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[2] *Nat'l Union v. Marlow*, 74 F. 775, 778-79 (8th Cir. 1896) (*cited in*, *inter alia*, I.R.S. P.L.R. 201320023 (May 17, 2013)).
[3] See Footnote 1, above.

disclosures that might help the Department or other regulators define how this is best accomplished.

2. **Modification to the Seller's Carve-Out**

We are concerned that the Department's proposed definition of a "fiduciary" is over-reaching, particularly where it redefines the scope of activities that constitute rendering "investment advice." The Proposal appears to arbitrarily and inappropriately exclude small investors and the use of asset allocation models accompanied by required disclosures from the list of available "carve-outs."

Subsection (b)(1)(i)(B)(1)[4] provides a "carve-out" for transactions with plan fiduciaries with financial expertise. This "seller's carve-out" is not available, however, to retail investors – small plans, plan participants/beneficiaries and IRA owners.

We ask the Department to modify the rule so that the seller's carve-out can apply with respect to transactions with any retail customers that satisfy the accredited investor criteria used by the federal securities laws to measure financial sophistication (annual income of more than $200,000 ($300,000 with a spouse) or who have a net worth of more than $1,000,000).

The Proposal appears to inappropriately exclude small investors and the use of asset allocation models accompanied by required disclosures from the list of available "carve-outs." We believe the definition of "small plan" suggested in the DOL's request for comments[5] is arbitrary and inconsistent with other, long-standing definitions in securities law.

3. **Modification of Investment Education Carve-Out**

Subsection (b)(6) provides a "carve-out" for Investment Education.[6] While this carve-out incorporates most of the relevant text of Interpretive Bulletin 96-1, there are some significant changes. One such change is not incorporating the language in IB 96-1 that permitted the use of asset allocation models that refer to specific products available under the plan or IRA, as long as those references are accompanied by a statement that other investment alternatives having similar risk and return characteristics may be available.

We ask the Department to restore the provisions in subsections (d)(3)(iii) and (4)(iv) of IB 96-1 to the Investment Education carve-out.

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[4] Fiduciary Rule Notice, 80 Fed. Reg. 21957.

[5] "Comments on the scope of the seller's carve-out and whether the plan size limitation of 100 plan participants and 100 million dollar asset requirement in the proposal are appropriate conditions or whether other conditions would be more appropriate proxies for identifying persons with sufficient investment related expertise to be included in a seller's carve-out."

[6] Fiduciary Rule Notice, 80 Fed. Reg. 21958.

The inability to utilize asset allocation models that identify specific investments makes the Investment Education carve-out less effective (when compared to IB 96-1), at best, and counterproductive, at worst. Investors expect that the education provided by their advisers will leave them with enough information to make informed investment decisions on their own. The inability to identify specific investments will prevent this from happening.

4. **Clarify that Routine Statements are not "Investment Advice"**

We ask the Department to clarify and expressly state that providing routine statements falls under the carve-out provided in Subsection (b)(5)(iii) and is not an activity deemed to be investment advice.

Subsection (a)(1)(iii) enumerates the types of activities that would be considered rendering investment advice.[7] However, subsection (b)(5)(iii)[8] provides a "carve-out" from the definition of "investment advice" for statements of value that are used to comply with regulatory reporting and disclosure requirements. As written, it is unclear whether a routine statement containing account valuation information to a plan participant/beneficiary or IRA owner would be considered "investment advice" and trigger onerous hurdles for a Retirement Investor to cross in order to receive necessary, educational retirement information prior to investing her assets. It would be helpful to distinguish between a "routine statement" and the enumerated items listed in subsection (b)(5)(iii).

COMMENTS AND REQUESTS ON THE PROPOSED BEST INTEREST CONTRACT EXEMPTION

We fully appreciate that the Department sought to create an avenue for financial institutions and financial professionals to continue to receive compensation for providing quality investment advice to retirement investors. However, the ambiguity within the Best Interest Contract Exemption, as it is currently proposed, falls short of being able to "flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice."[9] We offer several comments on this proposed exemption and recommend alternative approaches that honor a best interest standard of care and provides meaningful disclosures to retirement investors.

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[7] Subsection (a)(1)(iii) provides that the following type of advice is considered to be investment advice: "An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA."

[8] Subsection (b)(5)(iii) provides: "A plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation."

[9] Fiduciary Rule Notice, 80 Fed. Reg. 21961.

Section I – Best Interest Contract Exemption

1. Applicability of Best Interest Contract Exemption to constituent parts of rollover and conversion process

Subsection (b) of the Best Interest Contract Exemption describes the applicability of the Exemption to certain transactions.[10] Section I(b)(1) limits covered advice to: "[a] participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution[.]"

We ask the Department to clarify that all parts of the rollover and conversion process are covered under the Best Interest Contract Exemption.

We are concerned that some of the component parts of a rollover recommendation might not be covered under the Best Interest Contract Exemption. While it is clear that the Best Interest Contract Exemption covers the recommendation of how to invest the assets in the rollover IRA, it is not clear that it covers recommendations to take distributions and/or recommendations to rollover distributions. Similarly, when dealing with IRA conversions, it is also not clear if the Best Interest Contract Exemption covers recommendations to take distributions and/or recommendations to convert distributions.

The Preamble to the final rule includes the following:

> The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions.[11]

As the availability of guaranteed retirement income through employer-sponsored plans has declined, individuals have turned to individual annuity products through the IRA rollover market to secure a source of guaranteed income past retirement. A broad selection of annuity products are available, including relatively simple single premium deferred annuities. Consumers benefit

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[10] Subsection (b) provides: "*Covered transactions.* This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and Financial Institution's advice to any of the following 'Retirement Investors:'

> (1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;
> (2) The beneficial owner of an IRA acting on behalf of the IRA; or
> (3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a non-participant-directed Plan subject to Title I of ERISA with fewer than 100 participants, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan."

[11] Fiduciary Rule Notice, 80 Fed. Reg. 21932.

from being able to use the rollover process to access these types of retirement products. Because, as the Preamble points out, individuals are becoming increasingly responsible for managing their investments, and because defined benefit pensions are increasingly unavailable to employees, Thrivent believes that now, more than ever, it's important for consumers to have the ability to have guidance and help through the entire rollover and conversion process. Clarifying that the Best Interest Contract Exemption covers the entire rollover and conversion process will help preserve this ability for consumers.

2. Availability of Best Interest Contract Exemption to Small Plans

Section I(b)(3) limits covered advice to plan sponsors of "non-participant-directed Plans...with fewer than 100 participants..."[12] We are concerned that this limitation will stifle the growth of plans, especially within the small-plan market.

We ask the Department to expand the coverage under the Best Interest Contract Exemption to include investment advice provided to plan sponsors of small participant-directed plans.

Many of our members are owners of small businesses. They often look to our financial professionals for guidance on how to provide employer-provided benefits for their employees. Based on their experience, we know that establishing a participant-directed plan, especially a small plan, is a multi-step process. First, the employer makes the decision to adopt the plan. Then the employer/plan fiduciary determines the investment menu. Finally, the participants make their investment decisions from the available products on the investment menu.

All of these steps have to happen, in chronological order. Participants cannot make investment decisions until the employer (i) adopts the plan and (ii) determines the investment menu. To make the administration of a small participant-directed plan efficient and cost-effective for participants, there will almost always be a limited investment menu. The participants will have 10 or 20 or 30 choices, rather than hundreds or thousands of options.

We are concerned that if the recommendations a financial professional provides to the employer/plan fiduciaries to set the investment menu is not covered by the Best Interest Contract Exemption, financial professionals will not able to provide quality educational information and recommendations with respect to setting the plan's investment menu and be compensated for their financial expertise and professional guidance. An unintended consequence, and an avoidable one, is that employer/plan fiduciaries who do not receive advice for setting the investment options, will be, in all likelihood, reluctant to adopt the plan or ill-equipped to do so absent such professional financial guidance.

[12] Fiduciary Rule Notice, 80 Fed. Reg. 21984.

The Best Interest Contract Exemption should be available for investment advice that is provided to an employer/plan fiduciary of a non-participant directed plan and an employer/plan fiduciary of a participant-directed plan alike. There is no compelling reason to disadvantage plan sponsors of small participant-directed plans by prohibiting financial professionals from using the Best Interest Contract Exemption when providing investment advice. Both groups value the advice provided by financial professionals and need that advice to prudently invest plan assets held on behalf of plan participants and/or to determine an investment menu.

Section II – Contract, Conduct, and Other Requirements

As a not-for-profit membership organization, Thrivent values its relationship with its members. We understand the importance of the initial interactions and discussions with prospective clients and know that the relationship will evolve over time as the needs of the client evolve. With this focus, we seek clarification on a number of provisions and offer several enhancements to the Section II provisions.

1. **Entry into Best Interest Contract**

Subsection II(a) requires that prior to recommending the purchase, holding or sale of an asset, the financial institution and the financial professional enter into a written contract with the retirement investor.[13] We offer four comments on this subsection.

First, we ask the Department to require the Best Interest Contract to be entered into prior to the time a transaction occurs rather than prior to making any recommendation.

At the beginning of any financial professional-investor relationship, initial conversations allow the parties to engage in fact-finding, provide financial education, and discuss the products and services the financial professional has to offer and whether they meet the objectives of the investor. It is not unusual for a recommendation to be made at the end of such an initial conversation. The requirement to have a Best Interest Contract entered into prior to making a recommendation inhibits the normal sales advice process and will further deter some individuals from seeking out any financial advice as getting people to initiate any action to better their financial futures is already difficult. Signing the Best Interest Contract prior to executing a transaction still serves the best interests of the client while ensuring that the financial professional and prospective client have the initial conversations to understand the prospective client's needs, goals, and objectives prior to formulating any investment recommendations.

Second, we ask the Department to allow for "negative consent" approaches and electronic signatures in lieu of a physical signature.

[13] Subsection (a) provides: "*Contract*. Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset, the Adviser and Financial Institution enter into a written contract with the Retirement Investor that incorporates the terms required by Section II(b)–(e)."

The requirement for a "written contract" creates a very difficult operational issue. Throughout the financial services industry, firms will be attempting to get Best Interest Contracts into place for millions of IRA owners. Getting physical signatures from all existing IRA owners is an impractical solution given the extremely short timeline the Department anticipates for making the proposed rules effective. This requirement also presents challenges for investors who have provided representatives and family members with durable powers of attorney to manage the affairs of their retirement accounts. The authority provided in these circumstances are often limited to existing rights under accounts and do not contemplate the requirement to provide a physical signature on a new contract. It is unclear how advisors and financial institutions would meet the requirement for a physical signature in these cases.

Third, we ask the Department to eliminate the requirement that the financial professional be a party to the Best Interest Contract.

As long as the contract specifically acknowledges that the financial professional and the financial institutions are fiduciaries acting in the best interest of the investors, having the financial institution be a party to the contract should be sufficient. The Proposal already requires the financial institution to implement policies and procedures designed to ensure that it and its financial professionals act in the best interest of the investor when providing advice to retirement investors. Requiring the financial professional to separately sign the contract does not add more protection for the investor.

Additionally, there are practical considerations to consider with requiring financial professionals to sign the contract. Financial professionals may work with customers either individually in a face-to-face relationship, or in a call-center with a virtual or telephone-based relationship, or they may work in partnership with other financial professionals as a team. Instead of focusing on providing sound, quality investment advice to clients, firms would be diverting resources to obtain signatures from every financial professional servicing every client, while managing turnover and client reassignment requests. Including an acknowledgement of fiduciary status of both the financial institution and the financial professional in an upfront contract is sufficient.

Finally, we ask the Department to address the problem the Best Interest Contract Exemption poses for tax related deadlines.

The Best Interest Contract Exemption does not sufficiently address a practical and recurring situation that many financial institutions and financial professionals face – an investor who has good intentions to contribute to his or her IRA prior to a tax filing deadline, but waits until the last minute to initiate the transaction. Obtaining signatures from the financial professionals prior to making a recommendation (along with the other significant requirements and limitations of the Best Interest Contract Exemption) would create another barrier for the investor who (i) does not have a Best Interest Contract in place and (ii) meets with a financial professional to receive advice related to an IRA investment for a prior year IRA contribution. In these instances, the best interests of the investor would be negatively impacted by the timing requirements of the exemption.

2. **Subordination of Financial Interests to that of Investor**

As previously stated, we generally support the Best Interest Standard contained in Subsection II(c)(1).[14] We are concerned, however, that the language seems to require the complete disregard of any financial interest of the financial professional, financial institution, etc. It appears to require that any advice that is provided must totally ignore the business and economic reality that an enterprise that is reliant on commissions and/or third party compensation to cover its costs and/or generate a profit – cannot completely turn a blind eye to its own business needs and hope to remain in business. If the Best Interest Standard is meant to require financial professionals, financial institutions, etc. to have absolutely no interest in the transaction, we do not believe that any person or entity that receives any compensation can truly comply. We think a more appropriate standard is that financial professionals and financial institutions should subordinate their own interests to that of their client, but not totally disregard them.

We ask the Department to remove the phrase "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party" and replace it with the phrase "and that subordinates the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party to those of the Retirement Investor."

3. **ERISA Preemption Clarification**

Subsection II(d)(1) provides: "The Adviser, Financial Institution, and Affiliates will comply with all applicable federal **and state laws** regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset" (emphasis added).[15]

We are concerned over the application of state law to ERISA transactions, which already fall under federal jurisdiction. **We ask the Department to clarify that the ERISA preemption applies for ERISA plans.**

[14] Subsection (c)(1) provides: "When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party)."

[15] Fiduciary Rule Notice, 80 Fed. Reg. 21984.

4. **Additional Examples of Acceptable Compensation Structures**

Subsection II(d)(4) proposes rules regarding compensation structures but expressly permits "differential compensation based on […] neutral factors."[16] The Preamble provides five examples of "broad approaches to compensation structures that could help satisfy the contractual warranty."[17] One of them (Example 4) illustrates Differential Payments Based on Neutral Factors.

Pursuant to the Department's request for comments on this issue, we ask the Department to provide more detailed examples of acceptable compensation structures, particularly those illustrating Differential Payments Based on Neutral Factors.

The lack of clarity around this subsection will create significant uncertainty and new roadblocks for consumers seeking basic financial security products. Without knowing what is considered "reasonable compensation" to ensure compliance with the Proposal, some financial representatives may hesitate to offer certain products that may be ideal for a member's particular needs.

5. **Discretionary v. Non-Discretionary Accounts**

Subsection I(c)(4) excludes an Adviser who "exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of the assets, or has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA."[18]

We ask the Department treat discretionary and non-discretionary investment accounts similarly.

Thrivent offers both discretionary and non-discretionary investment accounts, primarily in its investment advisory managed account program. Both types of accounts (discretionary and non-discretionary) offer our members access to a broad range of investment vehicles, including mutual funds, exchange traded funds, and general equities, as well as access to professional portfolio managers. Under the Best Interest Contract Exemption, the financial professional and the financial institution would acknowledge a fiduciary status and contractually commit to provide advice that is in the best interest of the investor, irrespective of whether the financial professional or the financial institution has discretion over the assets in the account. Under these circumstances, our members with assets in both discretionary and non-discretionary accounts would already be protected by the terms of a Best Interest Contract.

[16] Fiduciary Rule Notice, 80 Fed. Reg. 21984.
[17] Fiduciary Rule Notice, 80 Fed. Reg. 21971.
[18] Fiduciary Rule Notice, 80 Fed. Reg. 21984.

<u>Section III – Disclosure Requirements</u>

As we discuss below in detail, we believe that the proposed disclosure requirements should be better aligned with existing disclosure regimes to promote efficiency and address duplication. We believe that much of the information requested by the Department does not exist in the formats requested, or would need to be provided from third parties. We further believe it would be inappropriate for financial institutions and financial professionals to rely on third-party data without any ability to confirm that the data provided is accurate.

1. **<u>Transaction Disclosure</u>**

Subsection III(a)(1) proposes a disclosure of Total Cost prior to purchase of an Asset.[19] Subsections (2)(A)-(D) define the term "Total Cost."

We ask the Department to allow the Transaction Disclosure requirement for registered securities products to be met by providing prospectuses that meet the current SEC requirements.

We believe this requirement is particularly problematic for annuity contracts, where such a disclosure would require the financial institution/financial professional to develop and provide a unique disclosure specific to each investment amount for annuity products, which have costs and expenses that are inconsistent with mutual fund costs. In addition, the SEC has already defined the costs and fee disclosures that must be made to investors by prospectus for registered securities products. The advantage of relying on prospectuses to provide these disclosures is that their standards are well known across the securities industry and the systems necessary to produce them are already in place.

2. **<u>Annual Disclosure</u>**

Subsection III(b) provides: "*Annual Disclosure.* The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a succinct single disclosure."[20] Subsections (b)(1)-(3) set forth out the specific information that must be included, and subsection (b)(1) requires: "[a] list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold."[21]

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[19] Subsection (a)(1) provides: "*Disclosure*. Prior to the execution of a purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA of investing in the Asset for 1-, 5-, and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed."
[20] Fiduciary Rule Notice, 80 Fed. Reg. 21985.
[21] *Id.*

We believe this information is already provided to investors, via periodic customer account statements which are required disclosures pursuant to SEC and FINRA rules.

We ask the Department to recognize the existing disclosure regimes and eliminate or modify the Best Interest Contract Exemption disclosure requirements to avoid unnecessary duplication.

3. **Web Page Disclosure**

Subsection III(c)(1) proposes certain information that must be included on a Web page maintained by a Financial Institution.[22]

We ask the Department to examine the disclosure regime required in the Best Interest Contract Exemption in the context of existing state and federal laws. Information proposed by subsections (c)(1)(A) and (B) that is already provided to retirement investors by the prospectus and periodic customer account statements is highly duplicative and should be removed from the requirements.

We are concerned that the requirements under the proposed rule would conflict with previously established standards of product disclosures. These standards include a recently developed National Association of Insurance Commissioners (NAIC) Model Regulation that addresses annuity disclosures.[23]

It is likely that state insurance regulators could interpret the webpage disclosure as advertising material for annuity products prompting the requirement for filing with several states' insurance departments. It is also possible that the required disclosures for variable annuity products would be considered a prospectus under federal securities law and would be required to be filed with the SEC and FINRA. The cumulative amount of information required to be disclosed on the webpage presents a significant amount of information about all available investments an individual retirement investors *may* purchase from the Financial Institution as if each of these investments are similar in construction, the way in which they may be purchased, serviced and invested.

Compiling the information in this manner on the Financial Institution's webpage would not only be confusing to an investor taken out of context from the investment's prospectus and other point of sale disclosure documents and presented as if these investments are an apples-to-apples comparison when they in fact are not. That is misleading and violates existing securities laws and regulation. Disclosures regarding the construction of an investment, how it is serviced, any fees and compensation are already disclosed in product prospectuses, the SEC Form ADV brochures, transaction confirmations and customer account statements.

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[22] Fiduciary Rule Notice, 80 Fed. Reg. 21985.

[23] *See, e.g.,* The National Association of Insurance Commissioners, Annuity Disclosure Model Regulation 245-1.

These existing required disclosures provide important material conflict-related information to retirement investors in the appropriate context of the investment for the investor. In lieu of the webpage disclosure requirement, we ask the Department to recommend enhancements to existing, disclosures required by current securities regulations and rules to provide a more meaningful disclosure to retirement investors in the context that is familiar and appropriate.

Section IV – Range of Investment Options

1. **Not All Limitations on Assets Preclude a Broad Range of Options**

According to Section IV(a),[24] in order to meet the eligibility requirements of the Best Interest Contract Exemption, a Plan must offer a sufficiently broad range of assets to meet the best interests of the Retirement Investor. Section IV(b) goes on to state that the Best Interest Contract Exemption is available to Financial Institutions that limit assets available for purchase through the plan to proprietary products provided certain additional criteria are met.[25]

We ask that any requirement to satisfy additional conditions be limited to Financial Institutions that do not offer a broad range of investment options reasonably necessary to serve the Best Interests of the investor.

A Financial Institution that only has Proprietary Products is not precluded from having a sufficiently large number of Proprietary Products that would enable it to offer a broad range of investment options reasonably necessary to serve the Best Interests of the investor. There should be no presumption in any part of the proposed rule that a Financial Institution that imposes limits on the products it offers (whether it be Proprietary Products, products that generate Third Party payments, or any other limitation) is not able to offer a broad range of investment options reasonably necessary to serve the Best Interests of the investor.

2. **Additional Requirements Imposed by Section IV(b)**

We are also concerned about the four additional conditions that must be satisfied under section IV(b) by a Financial Institution that limits assets available for purchase under the plan. We comment on each of those requirements individually below.

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[24] Section IV(a) provides: "*General.* The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances."

[25] Section IV(b) states: "*Limited Range of Investment Options.* Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that…"

Subsection IV(b)(1)

Subsection IV(b)(1) would require a Financial Institution to make a written finding that any limitations it imposes on assets available through the plan do not affect the best interest of the customer.[26]

The Best Interest Contract Exemption already requires the Financial Institution to affirmatively agree to, and comply with, the Impartial Conduct Standards, including only providing investment advice that is in the Best Interest of the investor. Consequently, the requirement proposed in Subsection IV(b)(1) seems to be duplicative of the overarching Impartial Conduct Standards, specifically Section II(c)(1). We do not believe that such a duplicative requirement affords investors any additional protections.

We ask the Department to eliminate this requirement.

Subsection IV(b)(2)

Subsection IV(b)(2) would require that any compensation received to be reasonable.[27]

Again, this requirement seems to duplicate provisions of the Impartial Conduct Standards. Section II(c)(2) of the proposed Exemption already requires the Financial Institution to affirmatively agree to not recommend an asset if the anticipated compensation received would exceed reasonable compensation.

We ask the Department to eliminate this requirement.

In addition, the Department requires that any compensation received must be reasonable relative to the value of the specific services provided to the Retirement Investor and not in excess of the services' fair market value. Compensation that is linked only to the "services provided to the Investor" does not appropriately contemplate other important factors of assessing compensation, such as the features and benefits of the product that the Investor purchases.

We ask the Department to eliminate duplicative requirements and to eliminate services-linked compensation requirements.

Subsection IV(b)(3)

Subsection IV(b)(3) requires disclosure of any limitations placed on Assets offered through the Plan.[28]

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[26] Fiduciary Rule Notice, 80 Fed. Reg. 21985, 21986.
[27] Fiduciary Rule Notice, 80 Fed. Reg. 21986.
[28] *Id.*

As with subsection (b)(1) and (2), subsection (b)(3) seems to repeat a requirement previously established in section II of the proposed Exemption, section II(e)(3). We believe that the disclosure intended by section IV(b)(3) is already addressed by section II(e)(3), and that duplicative disclosures may actually harm consumers by distracting them with redundant paperwork.

We ask the Department to eliminate this requirement.

Subsection IV(b)(4)
Subsection IV(b)(4) provides: "[t]he Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs." [29]

We are very concerned about this condition and request that the Department eliminate it.

We believe that this requirement is unnecessary in light of section II(c)(1), which requires institutions and advisers to affirmatively agree to and comply with the requirement that advice be in the best interest of the Retirement Investor. Advice that is in the best interest of the Retirement Investor inherently meets the Retirement Investor's needs. Furthermore, advice in the Retirement Investor's best interest should consider the Retirement Investor's total portfolio of assets, and consequently could result in a recommendation to purchase a narrow subset of assets, if that is what is required to complete the portfolio.

3. **Fraternal Proprietary Products**

As a fraternal benefit society, we are very concerned about the additional requirements imposed under Section IV(b) of the Best Interest Contract Exemption for financial institutions that limit assets available for purchase to proprietary products. As stated above, Thrivent is required by the federal tax code and laws in all fifty states to not only provide insurance and other benefits to our members, but also bring together members to make a broader impact in their communities. The good work that Thrivent Financial and its members perform is supported by the sale of our proprietary products and through our tax-exempt status under Section 501(c)(8) of the Internal Revenue Code.

For Thrivent and other fraternal benefit societies there are critical differences between proprietary (which fraternals are required to offer by law) and non-proprietary products. In the broadest terms, an individual applies to become a member of a fraternal benefit society and of a local fraternal lodge and then may buy a fraternal benefit society's proprietary products, if the individual so chooses. That individual, once admitted as a member, can then engage in a wide variety of religious, benevolent, and other similar fraternal activities through the lodge system. Importantly, because fraternal benefit societies are exempt from federal income tax under Section 501(c)(8) of the Internal Revenue Code, the sale of proprietary products generates

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[29] Fiduciary Rule Notice, 80 Fed. Reg. 21986.

the support needed to provide for a lodge system and carry on fraternal activities. The sale of non-proprietary products does not generate the same level of support for our members' benevolent work.

Related to these differences between proprietary products and non-proprietary products is an important nuance regarding a financial institution's use of a captive salesforce. Thrivent, as a fraternal benefit society, needs a salesforce knowledgeable about the special religious and benevolent activities conducted by its members. Moreover, Thrivent believes its salesforce should be actively engaged in and part of its fraternal lodge system. In addition to these fraternal requirements, Thrivent seeks to assure our field force is able to live out the Thrivent mission of being wise with money and living generously and therefore provides valuable employee benefits to our salesforce that would otherwise be deemed purely independent contractors. As detailed in the footnote below, this status requires Thrivent's field force to sell proprietary products.[30] The Department's proposed changes to the definition of fiduciary and the additional burdens placed on the sale of proprietary products may cause insurers, including Thrivent, to restructure their salesforces in a manner that would strip away benefits from these salespeople. The Department should encourage captive salesforces such as this and the protections afforded by the employee benefits available to them.

Thus, while we agree that investors (in this case our members) should be provided a sufficient range of investments, we do not believe the fact that a fraternal benefit society that encourages the sale of its proprietary products should be subject to the additional conditions set out in the proposed rule. Moreover, we believe that special burdens placed on the sale of proprietary products will create a strong disincentive to Thrivent, as a fraternal, to maintain a captive salesforce, for which Thrivent currently provides retirement and medical benefits.

We propose as an alternative to Section IV(b), that a fraternal benefit society that offer a wide-range of investment options be required to disclose to its members (investors) how the sale of its proprietary products enable the fraternal and its members to strengthen their communities.

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[30] The Federal Insurance Contributions Act (FICA) section of the Internal Revenue Code defines "employee" for purposes of FICA. The definition of "employee" includes common law employees and some other categories of workers who would not be considered common law employees, these workers are commonly known as "statutory employees." One of these categories is "full-time life insurance salesm[e]n." 26 U.S.C. 3121(d)(3)(B). The regulations further describe the requirements to be considered a "full-time life insurance salesman." Treas. Reg. 31.3121(d)-1(d)(3)(ii). Specifically, "[a]n individual who entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman."

A different section of the Code allows companies to provide select employee benefits to "full-time life insurance salesmen" as defined for purposes of FICA. 26 U.S.C. 7701(a)(20). Specifically, companies may treat full-time life insurance salesmen as employees for purposes of group term life insurance, medical and other health benefits, qualified retirement plans.

COMMENTS AND REQUESTS ON PROHIBITED TRANSACTION EXEMPTION 84-24

1. Applicability of Prohibited Transaction Exemption 84-24 ("PTE 84-24") to Variable Annuities

Section I(a)(1)-(6) of PTE 84-24 identifies what transactions can be covered under PTE 84-24 and Section I(b) imposes limitations regarding the use of PTE 84-24 relative to IRAs.[31] Section I(b) provides: "*Scope of these Exemptions.* The exemptions set forth in Section I(a) do not apply to the purchase by an Individual Retirement Account as defined in Section VI, of (1) a variable annuity contract or other annuity contract that is a security under federal securities laws, or (2) mutual fund shares."[32]

We ask the Department to reconsider the current distinction between fixed and variable annuities under the amended PTE 84-24, and revise it to cover the sale of all annuity contracts to IRAs.

To summarize, the rationale, provided in the Preamble,[33] for not permitting the sale of a variable annuity in an IRA to be covered under PTE 84-24 seems to be based on the following criteria:

- The Department believes that insurance products and security products warrant different treatment;
- The Department believes that security products require that investors have protections that are provided under the Best Interest Contract Exemption and are not provided under PTE 84-24; and
- The Department believes that variable annuities should be treated as a security product.

The Department's assessment that variable annuities should be treated as a security product ignores certain critical risk characteristics of variable annuity contracts that align these contracts more closely with insurance products than securities products. We believe the Department's failure to include variable annuity contracts under the amended PTE 84-24 is unwarranted and does not contribute to investor protections. Whether an annuity contract is fixed or variable, the insurance company still bears the risk of the investor outliving capital. Given that, in practice, both fixed and variable annuity contracts require the company to bear longevity risk, these arrangements are far more similar to each other than to securities investments in any regard.

An annuity contract does not convert from an insurance product to a securities product with the addition of a variable investment feature. Variable annuity contracts are not simply securities products; they are first insurance contracts. A variable annuity combines traditional insurance concepts with certain mutual fund principles to solve two increasingly important problems in retirement planning – increased life expectancy and inflation. Variable annuity contracts share

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[31] Fiduciary Rule Notice, 80 Fed. Reg. 22018.
[32] *Id.*
[33] Fiduciary Rule Notice, 80 Fed. Reg. 22014, 22015.

many of the features of a fixed annuity contract, including a fixed (general account) option with interest guarantees, mortality-based investment guarantees, retirement income guarantees, and the availability of additional life-contingent withdrawal options. These features are not available in a securities investment. Also unlike an investment in securities, both fixed and variable annuities provide for the liquidation of principal and income actuarially over a lifetime, with the insurance company assuming the risk of miscalculating mortality predictions in computing benefit payments.

2. **Harmonize Consent Requirement for Annuities and Mutual Funds**

The basic conditions required to satisfy PTE 84-24 are different for annuities and mutual funds. Sections IV(b)(1) (for annuities) and IV(c)(1) (for mutual funds) of PTE 84-24 both require that prior to the execution of the transaction, a disclosure must be provided to the plan fiduciary. The required disclosure for annuities and mutual funds is virtually identical, but the post-disclosure requirements differ significantly.

We ask the Department to allow the "negative consent" approach that is currently available to mutual fund transactions to be available for annuity transactions.

We believe that there are disparate post-disclosure requirements between the sales of annuities and mutual funds, and that this asymmetry gives mutual funds a competitive advantage over annuities. For an annuity transaction, after providing the disclosure, the plan fiduciary must (i) acknowledge, in writing, receipt of the disclosure, and (ii) approve the transaction before the transaction can be executed.[34] Mutual fund transactions, on the other hand, are able to utilize a "negative consent" approach to obtaining approval: after providing the disclosure, the transaction can be executed without having to wait to get anything back from the plan fiduciary - unless facts or circumstances indicate otherwise, approval by the plan fiduciary may be presumed if the fiduciary allows the transaction to proceed after receiving the disclosure.[35] The Preamble to the Proposed Amendment to and Proposed Partial Revocation of PTE 84-24 discusses *Disclosures and Consent Forms*[36] but does not provide any explanation or rationale for the disparate requirements.

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[34] The Preamble provides "In order to receive commissions in conjunction with the purchase of insurance or annuity contracts, section IV(b) of PTE 84–24 as amended **requires the insurance agent or broker or pension consultant to obtain advance written authorization** from a plan fiduciary or IRA holder independent of the insurance company (the independent fiduciary) following certain disclosures..." (emphasis added).

[35] The Preamble provides "In order to receive commissions in conjunction with the purchase of securities issued by an investment company, section IV(c) of PTE 84–24 as amended **requires the investment company Principal Underwriter to obtain approval** from an independent plan fiduciary following certain disclosures...**Unless facts or circumstances would indicate the contrary, the approval required under section IV(c) may be presumed if the independent plan fiduciary permits the transaction to proceed after receipt of the written disclosure**" (emphasis added).

[36] Fiduciary Rule Notice, 80 Fed. Reg. 22016.

3. **Clarify Rollovers and Conversions are covered by the Proposed Amended PTE 84-24**

Section I of the Proposed Amended Exemption 84-24 describes covered transactions. It is unclear if all of the component parts of a rollover recommendation would be covered under PTE 84-24. Similarly, when dealing with IRA conversions, it is also not clear whether PTE 84-24 would cover all of the component parts of a conversion recommendation.

We ask the Department to clarify that all parts of the rollover and conversion process are covered under the Proposed Amended Exemption 84-24.

As the availability of guaranteed retirement income through employer-sponsored plans has declined, individuals have turned to individual annuity products through the IRA rollover market to secure a source of guaranteed income past retirement. A broad selection of annuity products are available, including relatively simple single premium deferred annuities. Consumers benefit from being able to use the rollover process to access these types of retirement products. Because, as the Preamble points out, individuals are becoming increasingly responsible for managing their investments, and because defined benefit pensions are increasingly unavailable to employees, Thrivent believes that now, more than ever, it's important for consumers to have the ability to have guidance and help through the entire rollover and conversion process. Clarifying that PTE 84-24 covers the entire rollover and conversion process will help preserve this ability for consumers.

PERIOD BETWEEN EFFECTIVE DATE AND APPLICABLE DATE

Since the availability of the exemptions is dependent upon the applicability date of the final regulation, we ask that the final regulation's eight month time-frame be extended to a more reasonable 24 to 36 month time-frame.

The Proposal makes the Best Interest Contract Exemption and PTE 84-24 available at the same time the final regulation becomes applicable (eight months following the publication of the final regulation in the Federal Register). We are primarily concerned about an eight month time period from the date of publication to satisfy all of the requirements (such as the data collection requirements) of the Best Interest Contract Exemption and PTE 84-24.[37] We believe having between 24 and 36 months to comply with the regulation will allow us a reasonable time frame in which to coordinate with intermediaries and design, test and implement necessary technological and other structural changes.

We believe the Department has significantly underestimated the amount of time – and the cost thereof – that will be required to fully comply with the Proposal, particularly within eight months of the final regulation being published. In fact, the Department acknowledged in the Preamble

[37] Fiduciary Rule Notice, 80 Fed. Reg. 21950.

that "compliance with certain requirements of the new exemption may be difficult within the eight-month timeframe."[38]

Moreover, it is unclear how investment advice that is provided during the period between the effective date (60 days after publication) and the applicable date (eight months after publication) will be treated. **We ask the Department to provide specific guidance as to the status of investment advice provided during that time frame.**

CONCLUSION

We commend the Department for its efforts to ensure consumers are appropriately protected as they consider making financial decisions. As a fraternal benefit society owned by our members, Thrivent Financial for Lutherans 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. In fact, in 2009, Thrivent testified before the House Financial Services Committee in support of such a standard.[39] Unfortunately, the practical application of the Proposal as currently drafted 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.

In its justification for the Proposal, the Department asserts 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 array of regulation and detailed systems of retirement investor protections is 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 Proposal 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 Proposal 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 Proposal may

[38] Fiduciary Rule Notice, 80 Fed. Reg. 21950.

[39] On behalf of the American Council of Life Insurers, Bruce Maisel from Thrivent testified at the October 6, 2009 hearing entitled: CAPITAL MARKETS REGULATORY REFORM: STRENGTHENING INVESTOR PROTECTION, ENHANCING OVERSIGHT OF PRIVATE POOLS OF CAPITAL, CREATING A NATIONAL INSURANCE OFFICE

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 Proposal will stifle the ability of Thrivent's members to engage in religious and benevolent 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 Proposal 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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