UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

THRIVENT FINANCIAL FOR LUTHERANS, *Plaintiff*, v. THOMAS E. PEREZ, sued in his official capacity, Secretary, United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR, *Defendants.*	Civil Action No. 16-cv-03289-SRN-HB

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In light of overwhelming evidence that then-current federal and state regulation was insufficient to protect retirement investors from being harmed by their advisers' conflicts of interests, the Department of Labor ("Department") issued the Conflict of Interest Rule and accompanying prohibited transaction exemptions in April 2016 to better protect retirement investors. Acting pursuant to its authority under the Employee Retirement Income Security Act ("ERISA"), the Department sought to ensure that advisers and firms relied on by retirement investors act in their best interest. One of the new exemptions permits certain conflicted transactions involving individual retirement accounts, which would otherwise be prohibited under ERISA, to proceed if the relevant financial institution and adviser acknowledge their status as fiduciaries and agree to certain contractually enforceable terms.

Plaintiff, Thrivent Financial for Lutherans ("Thrivent"), challenges only one aspect of one exemption, claiming that it violates the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* That statute has nothing to do with the Department regulation at issue here. The FAA ensures the enforceability of arbitration agreements, subject to a narrow savings clause. The challenged exemption complies with the FAA because it does not impair the enforceability of any arbitration agreement. And the FAA should not be applied beyond its statutory text, let alone to limit an agency's express statutory authority to issue exemptions conditioned upon adherence to terms aimed at protecting retirement investors in the case of conflicted transactions, as ERISA instructs the Department to do.

Accordingly, the Department is entitled to summary judgment, and Plaintiff's motion should be denied.

STATEMENT OF FACTS

I. REGUALTORY REGIMES GOVERNING RETIREMENT INVESTMENT ADVICE

Retirement investment advice is governed by several different (but overlapping) regulatory and supervisory regimes, including ERISA, federal securities laws, state insurance regulation, and industry self-regulatory bodies. *See* Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, AR344-45, 355.[1]

A. ERISA Statutory Framework

Congress enacted ERISA in 1974 based on its determination that employees' retirement savings were not being adequately protected to the detriment of retirement investors and the country. *See* 29 U.S.C. § 1001(a); Pub. L. No. 93-406, 88 Stat. 829, 898 (1974). To help ameliorate this problem, Congress defined as "fiduciaries" those individuals who play an integral role in shaping retirement savings and imposed upon them certain responsibilities and restrictions.

Under ERISA and parallel provisions in the Internal Revenue Code ("Code"),[2] "a person is a fiduciary with respect to a plan" if, among other things:

[1] Pursuant to the Court's October 20, 2016 order, the parties will file a joint appendix of relevant portions of the administrative record on or before Jan. 23, 2017. All citations to the administrative record use the prefix "AR."

[2] Title I of ERISA applies only to "employee benefit plans," while the parallel provisions in the Code—enacted by Title II of ERISA—cover a broader set of tax-favored retirement and savings plans. *See* 26 U.S.C. § 4975(e)(1); AR13, 44.

> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]

29 U.S.C. § 1002(21)(A); 26 U.S.C. § 4975(e)(3)(B). ERISA prohibits fiduciaries from engaging in specified transactions that Congress deemed fraught with conflicts of interest and potential for abuse. 29 U.S.C. § 1106(b); 26 U.S.C. § 4975(c)(1); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).[3] For example, a fiduciary is prohibited from self-dealing, 29 U.S.C. § 1106(b)(1); 26 U.S.C. § 4975(c)(1)(E), and from "receiv[ing] any consideration for his own personal account . . . in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3); 26 U.S.C. § 4975(c)(1)(F).

Given the breadth of the prohibited transactions, Congress enumerated statutory exemptions from some of the prohibitions. 29 U.S.C. § 1108(b); 26 U.S.C. § 4975(d). For example, one exemption permits "reasonable compensation" to be paid to conflicted entities for "services necessary for the establishment or operation of the plan." 29 U.S.C. § 1108(b)(2). Congress also delegated express authority to the Secretary of Labor ("Secretary") to grant "conditional or unconditional" administrative exemptions on a class-wide or individual basis, if the Secretary finds that the exemption is:

> (1) administratively feasible,
> (2) in the interests of the plan and of its participants and beneficiaries, and
> (3) protective of the rights of participants and beneficiaries of such plan.

29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2).[4]

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[3] Hereinafter, internal citations, quotations, and alterations are omitted unless otherwise indicated.

[4] While responsibility for the Code provisions was originally assigned to the Treasury

This prohibited transaction framework applies equally to "employee benefit plans"[5] and to individual retirement accounts ("IRAs").[6] Violations of the prohibited transaction provisions are subject to excise taxes enforced by the Internal Revenue Service ("IRS"). 26 U.S.C. § 4975(a)-(b). Congress, however, provided additional protections in Title I of ERISA for employee benefit plans—(1) fiduciaries to employee benefit plans are directly subject to standards that include duties of prudence and loyalty, 29 U.S.C. § 1104, and (2) the Secretary, fiduciaries, and plan participants and beneficiaries may sue to enforce the prohibited transaction provisions and fiduciary obligations in federal court. *Id.* § 1132(a)(2)-(3), (5). Thus, for employee benefit plans, litigation generally proceeds in federal court and most state laws are preempted, *see* 29 U.S.C. § 1144(a); *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 913-14 (8th Cir. 2005), whereas IRA customers are not provided a federal cause of action but may bring state law claims, based on theories such as breach of contract or breach of fiduciary duty. *See, e.g.*, *Abbit v. ING USA Annuity & Life Ins. Co.*, 999 F. Supp. 2d 1189, 1197-99 (S.D. Cal. 2014).

Department, in 1978, the Department was given interpretive, rulemaking, and exemptive authority for the fiduciary definition and the prohibited transactions provisions for both employer-based plans and tax-favored individual accounts. *See* Reorganization Plan No. 4 of 1978 § 102 (codified at 5 U.S.C. App. 1, as ratified by Congress in 1984).

[5] An "employee benefit plan" under ERISA encompasses both plans providing retirement income to employees (such as pension plans and 401(k) plans) and "employee welfare benefit plans" providing other benefits, such as payments for medical care, disability, and death. 29 U.S.C. § 1002(3).

[6] While the Code provisions apply to several types of tax-favored individual accounts, 26 U.S.C. § 4975(e)(1)(B)-(F), this brief addresses the individual retirement accounts that are primarily relevant to Plaintiff's investment advice.

B. Securities Regulation

While ERISA, including the Code provisions, applies to fiduciary investment advice on all forms of assets a plan or IRA may hold, AR344, federal securities laws apply only to securities—*e.g.*, stocks, bonds, and mutual funds—but encompass all investments in these products, not just retirement investments. AR345. The Securities and Exchange Commission ("SEC") administers the securities laws, and supervises industry self-regulating organizations. AR345, 347-50.

Regulation differs for the two types of professionals permitted to provide advice regarding securities: registered investment advisers and broker-dealers. *See* AR416. A registered investment adviser (as defined in the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*) has fiduciary duties similar to, but not coextensive with, ERISA duties of loyalty and prudence. AR348-49. Conflicts of interest are generally addressed under the securities laws by disclosure and consumer consent for conflicted transactions, unlike ERISA's categorical prohibitions on such transactions. AR349.

Broker-dealers trade securities on others' behalf and are generally governed by the Securities Exchange Act of 1934 and SEC rules. *See* 15 U.S.C. § 78c(a)(4); AR347. While they, and the representatives working under them, must register to sell securities, they are not required to comply with the fiduciary duties under the Advisers Act if their advice is "solely incidental" to the conduct of their business as a broker-dealer and they receive no "special compensation" for advisory services. 15 U.S.C. § 80b-2(a)(11)(C); AR348. In giving investment advice, broker-dealers are generally subject only to a "suitability" standard set by securities laws and the Financial Industry Regulatory Authority

("FINRA"),[7] which requires a broker-dealer to have a reasonable basis to believe that a recommended transaction or investment strategy involving securities is suitable for the customer, based on the customer's investment profile. *See* AR348-49, AR427.

Arbitration is commonly used to resolve disputes regarding broker-dealer transactions. AR349-50. Among its regulations for broker-dealers, FINRA adopted Arbitration Rule 12204, which was approved by the SEC in 1992. *See* AR98-99; FINRA Arbitration Rule 12204 (Newton Decl. Ex. A). Rule 12204 specifically bars class actions from FINRA's arbitration process and requires that pre-dispute arbitration agreements between broker-dealers and customers contain a notice that class action matters may not be arbitrated. *See id.*; *see also Dep't of Enforcement v. Charles Schwab*, Complaint No. 2011029760201 (FINRA Bd. of Governors, April 24, 2014) (Newton Decl. Ex. B) (upholding Rule 12204 in the face of FAA challenge).

C. Insurance Regulation

Insurance products are subject to different regulations, although some are also subject to the securities laws. The insurance industry is primarily regulated by state law, which is influenced by non-binding model standards from the National Association of Insurance Commissioners ("NAIC").[8] AR352, 355. Insurance companies sell deferred annuity contracts as a retirement investment option. AR356-57. Deferred annuities

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[7] FINRA is a self-regulatory organization of the broker-dealer industry. It is registered with, and operates under the oversight of, the SEC. *See* AR349-50.

[8] The NAIC is the standard-setting and regulatory support organization created and governed by chief insurance regulators from all 50 states, DC, and U.S. territories. AR352.

involve the investor making a lump-sum payment or series of payments to the insurer in exchange for an agreement to make periodic payments to the investor at a future date. AR355-56. The NAIC's model suitability regulation for annuities ("2010 Model Regulation"), to the extent adopted by states, sets suitability standards for insurers similar in many respects to the standard for broker-dealers. AR357; AR27896. Some insurance products—*e.g.*, "variable" annuities, for which the entire investment risk is borne by the investor—are regulated as securities and thus must be sold in compliance with both insurance and securities regulations. AR356-58. Thus, most insurance agents also register to sell securities. AR419. Other insurance products—*e.g.*, declared rate annuities and fixed indexed annuities[9]—are not regulated as securities and can be sold by "insurance only" agents. AR427-28, 438-42 (comparison chart), AR447 (annuity distribution chart).

Many states, in regulating insurance, prohibit arbitration of insurance claims. *See* Susan Randall, Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act, 11 Conn. Ins. L.J. 253, 265-80 (2005) (collecting statutes and regulations).[10] But these state law prohibitions often do not apply to fraternal

[9] Indexed annuities are a "hybrid" product with some investment risk borne by the investor because gains depend on the performance of a specified index or other external reference. AR439-40, 484. They are conditionally exempted from securities regulation. Congress provided a safe harbor, directing the SEC not to regulate indexed annuities as securities if they satisfy the standards set forth in the Dodd-Frank Act, including the NAIC suitability standards. *See* Pub. L. No. 111-203, § 989J, 124 Stat. 1376, 1949 (July 21, 2010).

[10] The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, prevents the application of federal laws of general applicability—including the FAA—to the extent such general laws conflict with state insurance laws. *See, e.g.*, *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001).

organizations. *See, e.g.*, *Thrivent Financial for Lutherans v. Lakin*, 322 F. Supp. 2d 1017, 1023-24 (W.D. Mo. 2004).

II. ADVISERS' WIDESPREAD CONFLICTS OF INTEREST HARM RETIREMENT INVESTORS

Trends in retirement savings since Congress passed ERISA in 1974 have resulted in a shift away from defined-benefit pension plans, in which *employers* bear the risk, to defined-contribution plans, where the *employees* bear the risk, and concomitantly, from plans where employers make most decisions to those where the individual investor makes significant decisions (*e.g.*, 401(k) plans) or all decisions (*e.g.*, IRAs). AR319, 430-31, 504, 507-13, 517-20. Most IRA assets derive from rollovers from 401(k) plans and other employee benefit plans effected upon an employee's retirement or another life event that causes the employee to move his or her assets out of an employer-administered plan. AR319, 416. Most IRA investors consult a financial professional in some capacity regarding their rollover decisions. *Id.*

While individual investors today are more responsible for their investment decisions and more likely to rely on financial professionals for assistance in making those decisions, compensation arrangements in the retirement investment industry have created incentives for advisers to recommend products that pay themselves or their firms more money than they would earn upon the sale of products that are in their clients' best interests. *See* AR337, 444-50. The conflicts posed by these compensation practices have been well-documented by regulators and outside groups and acknowledged by the financial services industry. *See* AR449-50.

For example, broker-dealers and their representatives often have a financial stake in the investment decisions that IRA investors make pursuant to the representatives' advice and often stand to gain if IRA investors trade more, buy or hold certain mutual funds or other products. AR444. The attendant conflicts often play out at two levels: variation in the revenue received by the broker-dealer, and variable compensation paid by the broker-dealer to its representatives who render IRA advice. *Id.* Similar and often greater conflicts of interest arise in the context of annuities. Commissions for annuities are generally much higher and less transparent than those for mutual funds. *See* AR447, 661, 60668. These problems are compounded by the bonuses provided by insurers for meeting certain sales goals. AR447-48; *see, e.g.*, AR5316-22, Zeke Faux and Margaret Collins, "Indexed Annuities Obscure Fees as Sellers Earn Trip to Disney," *Bloomberg Business* (Jan. 20, 2011). As a result, agents and broker-dealers have financial incentives to steer investors toward particular annuity products regardless of whether those products best serve investors. AR447-48.

Confronted with myriad and complex choices of financial products, consumers today often lack the requisite expertise and depend on advisers for guidance. *See* AR4, 319. Yet, consumers are frequently unaware of the nature and extent of their advisers' conflicts of interest. AR325, 421, 443, 447-48, 458-59, 498 n.412. Under these circumstances, the Department found that the predictable result is that conflicts bias advisers to the detriment of retirement investors. The Department quantified certain harms in the IRA market for broker-sold mutual funds, finding the impact of conflicts of interest on investment outcomes in that market to be large and negative. *See* AR474-76, Fig. 3-17.

This underperformance—in one segment of the market alone—could cost IRA investors between $95 billion and $189 billion over the next 10 years. *Id.* Based on a wide body of evidence, the Department also concluded that such harms are not limited to mutual funds but are widespread throughout the market, including for variable and indexed annuities. *Id.*; AR359, 437-39, 447-48, 463-65, 474.[11]

III. PLAINTIFF & ITS MEMBER DISPUTE RESOLUTION PROGRAM

Thrivent is, according to Plaintiff's papers,[12] a fraternal benefit society incorporated in Wisconsin. Johnson Decl. ¶ 3, ECF No. 18. In 2013, it extended its "common bond" for purposes of its fraternal designation beyond the Lutheran denomination to all Christians; the only requirements are that each applicant (or the applicant's spouse) affirms "I am a Christian, seeking to live out my faith," and supports Thrivent's purpose "to be wise with money and live generously." *Id.* ¶ 5 & Ex. A; *see also id.* Ex. B (bylaws amended June 5, 2013). Thrivent is currently ranked 318 on the Fortune 500 list. *See* https://www.thrivent.com/about-us/financial-strength-and-reputation/. In 2015, its total revenue exceeded $9 billion, and after all expenses, including over $1 billion for commissions and operating costs, its net income was $770 million. *See* Newton Decl. Ex. C, 2015 Annual Report to Members at 3. It paid more than $200 million in commissions to agents selling its proprietary individual annuities. *See* Newton Decl. Ex. D, 2015

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[11] Several commenters on the rulemaking expressed specific concerns about annuities. *See, e.g.*, AR39243-46 (Cmt. 596, Ron A. Rhoades), AR45965-67 (Cmt. 3034, Committee for the Fiduciary Standard), AR46846-53 (Cmt. 3090, Fund Democracy).

[12] For purposes of this motion, the Department does not dispute the factual assertions in Plaintiff's declarations that are recited herein.

Statutory Statement at 6 line 19. Its agents are paid commissions and additional incentives for meeting certain benchmarks, and given "opportunit[ies] to qualify to attend conferences at top-notch destinations—domestic and international." Newton Decl. Ex. E, Career Brochure at 8; *see also* Kinney Decl. ¶ 8.

Thrivent sells, either directly or through a subsidiary, numerous types of products, including but not limited to:

- life insurance,
- disability income insurance,
- immediate and deferred annuities,
- mutual funds,
- credit union products,
- money management services,
- retirement planning.

See Kinney Decl. ¶ 3; Thrivent Financial Products, https://www.thrivent.com/products/. Some of its advisers serve only as insurance agents, while others work through a broker-dealer or are registered investment advisers. *See* Newton Decl. Ex. F, Answer Guide for New Members at 10-13.

Thrivent's Member Dispute Resolution Program ("MDRP"), which was adopted in 1999, requires many disputes to be resolved through individual mediation or arbitration and prohibits representative or class claims. Johnson Decl. ¶ 8 & Ex. B § 11(e). However, the MDRP is mandatory only for two types of disputes: 1) those regarding membership in Thrivent and 2) those regarding "insurance and/or annuity products issued and sold by [Thrivent] and its precedessors." Newton Decl. Ex. G, Member Dispute Resolution Program at 2. The MDRP further clarifies that the program is "optional" for disputes regarding Thrivent's variable products, including variable annuities. *Id.* It does not apply to insurance products "brokered by, but not issued by," Thrivent. *Id.* Nor does it apply to disputes involving mutual funds, Thrivent Financial Credit Union, or any other non-insurance product or service. *Id.*

IV. THE DEPARTMENT'S RULEMAKING

In its April 8, 2016 rulemaking, the Department took two related actions. First, pursuant to its authority to define statutory terms, 29 U.S.C. § 1135, the Department revised its 1975 regulation interpreting when a person "renders investment advice for a fee or other compensation," thus meeting the definition of a "fiduciary" in ERISA. *See* Final Rule, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016), AR1. The 1975 regulation, which was promulgated before 401(k) plans existed and before IRAs were commonplace, had set forth a five-part test under which an adviser became a fiduciary only if (among other things) the advice was provided on a regular basis and the parties had a "mutual agreement" that the advice would serve as a primary basis for investment decisions. *See* 40 Fed. Reg. 50842 (Oct. 31, 1975). The Department determined that the five-part test was not compelled by the statutory text and, given the changes in the market for retirement investment advice, was no longer the most effective way to identify those meant to be held accountable as fiduciaries under ERISA. Notice of Proposed Rulemaking, 80 Fed. Reg. 21928, 21933-35 (Apr. 20, 2015), AR704-06. Instead, the Department proposed and ultimately adopted a definition that better reflects the statutory language, defining "investment advice" in terms of specified "recommendations" to a particular advisee regarding "securities or other investment property," including how the property should be invested after it is rolled over, transferred or distributed from a plan. 29 C.F.R. § 2510.3–21(a)(1); *see Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-1035, 2016 WL 6573480, at *18 (D.D.C. Nov. 4, 2016) (concluding that "the new interpretation better comports with the text of the statute"). The definition of a "recommendation" is based on FINRA's approach to regulating investment advice in the broker-dealer context and also tracks SEC guidance. AR26-27. The Rule, like ERISA, thus broadly applies fiduciary status to those who give investment advice regarding employee benefit plans and IRAs for compensation.

Second, the Department exercised its express statutory authority to grant a number of administrative "prohibited transaction exemptions" ("PTEs"). Exemptions are not required if a firm amends its practices to avoid conflicts of interest, such as ensuring that its agents' compensation does not vary based on what they recommend. AR42. The Department issued new PTEs and amended existing ones to ensure that if fiduciaries engage in a conflicted transaction, the action is still "in the interests of" and sufficiently "protective of" the rights of retirement investors. 29 U.S.C. § 1108(a); 26 U.S.C. 4975(c)(2). Of greatest significance here is the new Best Interest Contract ("BIC") Exemption, which is designed to flexibly handle a wide variety of investment transactions involving the "retail market"—*i.e.*, consumers and small employer plans. *See* Final BIC Exemption, 81 Fed. Reg. 21002 (Apr. 8, 2016), AR58.[13] The exemption provides broad

[13] On July 11, 2016, the Department republished the BIC Exemption with technical corrections. *See* AR146.

prohibited transaction relief for a range of compensation practices that ERISA and the Code would otherwise prohibit, so long as advisers and financial institutions adhere to basic fiduciary standards and take certain specified steps to mitigate the impact of conflicts of interest. AR59. In particular, to rely on the exemption, financial institutions must:

- acknowledge fiduciary status with respect to investment advice to the investors;
- adhere to "impartial conduct standards" requiring them to:
  - give advice in the retirement investor's best interest (i.e., prudent advice based on the investment objectives, risk tolerance, financial circumstances, and needs of the investor, without regard to financial or other interests of the adviser or financial institution);
  - charge no more than reasonable compensation; and
  - make no misleading statements about investment transactions, compensation, and conflicts of interest;
- implement policies and procedures reasonably and prudently designed to prevent violations of the impartial conduct standards;
- refrain from giving or using incentives for advisers to act contrary to the customer's best interest; and
- fairly disclose the fees, compensation, and material conflicts of interest associated with their recommendations.

AR63. The Department's intent in the BIC Exemption is to hold financial institutions and their advisers responsible for adhering to fundamental fiduciary standards, while leaving them the flexibility and discretion to determine how best to satisfy these basic standards in light of the unique attributes of their businesses. AR63.

In the case of fiduciary advice to IRA investors, the BIC Exemption provides that these requirements must be contained in a contract between the financial institution and the retirement investor. AR78. The contract provision is designed to "align[] the interests" of financial institution and its advisers to those of the retirement investor. AR78. It does this by "eliminating ambiguity about the fiduciary nature of the relationship" and by providing "enforceable rights and remedies" that give financial institutions "a powerful incentive to comply with the exemption's standards, implement effective anti-conflict policies and procedures, and carefully police conflicts of interest." *Id.* The contract provision thus helps ensure that the exemption is "in the interests of" and "protective of the rights of [IRA] participants and beneficiaries," 26 U.S.C. § 4975(c)(2), as required under ERISA in order for the Department to grant an exemption at all.

The contractual commitment also provides "an administrable means of ensuring fiduciary conduct" for IRA transactions, AR78, helping to satisfy the statutory condition that any exemption be "administratively feasible." 26 U.S.C. § 4975(c)(2). Without a contract, the primary incentive for compliance would be "the possible imposition of an excise tax." AR78; *see* 26 U.S.C. § 4975(a)-(b). This "provides an additional, but inadequate, incentive to ensure compliance with the exemption's standards-based approach," especially because the excise tax "critically depends on fiduciaries' self-reporting of violations, rather than independent investigations and litigation by the IRS." AR78. By contrast, the contract approach adopted by the Department avoids "requir[ing] the creation and expansion of a government enforcement apparatus." *Id.*

The conditions of the BIC Exemption allow individual arbitration agreements. AR98-99. Its preamble "recognizes that for many claims, arbitration can be more cost-effective than litigation in court." AR99. And "permitting individual matters to be resolved through arbitration tempers the litigation risk and expense for Financial Institutions." AR99. The exemption, however, is not available for contracts that waive or qualify an investor's right to a judicial class action:

> (f) *Ineligible Contractual Provisions*. Relief is not available under the exemption if a Financial Institution's contract contains . . . (2) . . . a provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution[.]

BIC Exemption § II(f)(2), AR134. The Department determined that, for several reasons, the effectiveness of the exemption would be limited if class actions were not available. AR99. First, "[e]xposure to class claims creates a powerful incentive for Financial Institutions to carefully supervise individual Advisers, and ensure adherence to the Impartial Conduct Standards," in part because class proceedings and judicial opinions have a "transparent and public nature" in contrast with "arbitration decisions, which are less visible and pose less reputational risk to firms or Advisers found to have violated their obligations." *Id.* Second, the "results and reasoning of court decisions serve as a guide for the consistent application of that law in future cases involving other Retirement Investors and Financial Institutions." *Id.* Third, the judicial system is suited to address "systemic violations affecting many different investors," including instances where "the monetary effect on a particular investor is too small to justify pursuit of an individual claim." AR99. The judicial system also provides "a well-established framework characterized by impartiality, transparency, and adherence to precedent." AR99. Fourth, and finally, the Department purposefully adopted an approach consistent with the approach for broker-dealers in FINRA Arbitration Rule 12204 and approved by the SEC in 1992, which specifically bars class actions from FINRA's arbitration process. *See id.*; *see also* FINRA Arbitration Rule 12204. Accordingly, after careful consideration of commenters' concerns and objections, the Department adopted the BIC Exemption with its contract condition for

IRAs and its conclusion that the exemption would be unavailable for contracts with class action waivers.[14]

V. PROCEDURAL HISTORY

Plaintiff filed suit on September 29, 2016, *see* Compl., ECF No. 1, and the parties agreed to proceed immediately to summary judgment briefing. *See* Scheduling Order, Oct. 20, 2016, ECF No. 20. Five other pending cases challenge aspects of the Conflict of Interest Rule and/or the BIC Exemption. *See Chamber of Commerce v. Perez*, No. 3:16-01476-M (N.D. Tex.) (consolidated with *American Council of Life Insurers v. Dep't of Labor*, No. 3:16-01530-C (N.D. Tex.), and *Indexed Annuity Leadership Council v. Perez*, No. 3:16-1537-N (N.D. Tex.)); *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-1035 (D.D.C.); *Market Synergy Group, Inc. v. U.S. Dep't of Labor*, No. 5:16-4083 (D. Kan.). The Department prevailed on summary judgment in *Nat'l Ass'n for Fixed Annuities*, and that plaintiff has noticed an appeal. *See* Mem. Opinion, No. 16-1035 (D.D.C.), Nov. 4, 2016, ECF No. 46. In *Market Synergy Group*, the court also ruled in the Department's favor, denying plaintiff's motion for a preliminary injunction and concluding that plaintiff was not likely to succeed on the merits. *See* Mem. & Order, No. 5:16-4083 (D. Kan.) Nov. 28, 206, ECF No. 59. The consolidated Texas cases are *sub judice* after summary judgment

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[14] The Department did, however, make clear that the regulatory structure could remain in place in the event a court—provisionally or otherwise—rules the class action waiver provision of the exemption invalid. *See* BIC Exemption § II(f)(4), AR134-35 ("In the event that the provision . . . is ruled invalid by a court of competent jurisdiction, this provision shall not be a condition of this exemption with respect to contracts subject to the court's jurisdiction unless and until the court's decision is reversed, but all other terms of the exemption shall remain in effect.").

briefing and oral argument. *See* Minute Entry, *Chamber of Commerce*, No. 3:16-01476-M (N.D. Tex. Nov. 22, 2016). One of those cases includes an FAA challenge to the BIC Exemption similar to Plaintiff's. *See* Compl. ¶¶ 177-180, *Chamber of Commerce*, No. 3:16-01476-M (N.D. Tex.), ECF No. 1. Just as in that case the Department explained in its briefing and at oral argument that the FAA claim is without merit, the Department now asks this Court to reject that claim here as well.

ARGUMENT

I. THE BIC EXEMPTION'S CLASS ACTION CONDITION DOES NOT VIOLATE THE FEDERAL ARBITRATION ACT.

Plaintiff brings its challenge under the Administrative Procedure Act ("APA"), which permits courts to "hold unlawful and set aside agency action . . . [as] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). "This subsection of the APA authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority." *Iowa League of Cities v. EPA*, 711 F.3d 844, 876 (8th Cir. 2013). "Agency rules will survive ultra vires allegations so long as [the court] can reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance." *Id.* Here, Plaintiff does not dispute that the Department's statutory authority "contemplate[s] the issuance" of conditional exemptions from the prohibited transaction provisions. *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). Such exemption authority is entitled to broad deference. *See AFL-CIO v. Donovan*, 757 F.2d 330, 343 (D.C. Cir. 1985) (where agency "is expressly delegated the authority to grant [an] exemption and is required to make certain other determinations in order to do so," agency's "grant and those determinations . . . are thus entitled to great deference"). And Plaintiff identifies no limitations implicit to the ERISA scheme that would prevent adoption of the condition.

Instead, Plaintiff argues that another statute, the FAA, limits what conditions the Department may require for ERISA exemptions it issues. For the reasons described below, the FAA is not implicated by the conditions the Department adopted here. Accordingly, the Department is entitled to summary judgment on Plaintiff's sole claim.

A. The Federal Arbitration Act Should Be Read to Provide What its Text Says and No More.

The Federal Arbitration Act ("FAA"), enacted in 1925 and reenacted and codified in 1947, *see EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002), provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Thus, § 2 of the Act (the "enforceability provision") requires parties that have entered into a pre-dispute arbitration agreement to comply with its terms unless it is unenforceable under the Act. Other provisions permit a contracting party to seek a stay of litigation until the enforceability of the agreement is decided, *id.* § 3, and to compel the other party to resolve the dispute through arbitration, *id.* § 4. The Act also sets criteria for courts to confirm or vacate arbitration awards, *id.* §§ 9-11, and for procedural matters

related to such motions, *id.* §§ 12-13. Finally, the Act addresses other procedural matters such as selection of arbitrator, calling of witnesses, and appeals. *Id.* §§ 5-8, 15.

"The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate[.]" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985). The FAA was designed "to overcome judicial hostility to arbitration agreements." *Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009) (quoting *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 272 (1995)); *see, e.g., Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 806 (8th Cir. 1986) (noting that, prior the FAA, many states treated arbitration agreements as "revocable at will any time before issuance of an award"). Accordingly, under the FAA, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

The FAA's savings clause, however, "permits arbitration agreements to be declared unenforceable" under certain circumstances. *Concepcion*, 563 U.S. at 339. Focusing on "grounds . . . for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added), courts apply the FAA to permit invalidation of agreements "by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration." *Concepcion*, 563 U.S. at 339. State laws that conflict with the FAA, *i.e.*, those that limit enforcement of arbitration agreements more than the savings clause does, are preempted. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (state law is "pre-empted to the extent that it actually conflicts with [the FAA]—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The FAA's enforceability provision also applies to agreements to arbitrate claims arising under federal statutes, "unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013). But the FAA does not require arbitration where the parties have not agreed to it. *See Waffle House*, 534 U.S. at 289 ("[N]othing in the statute authorizes a court to compel arbitration of an issue, or by any parties, that are not already covered in the agreement."); *AT&T Techs, Inc. v. CWA*, 475 U.S. 643, 648 (1986) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

"The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *In re Kolich*, 328 F.3d 406, 409 (8th Cir. 2003) (same). The text of the FAA requires only that arbitration provisions in contracts be enforced. Nor would reading the statute to mean what it says and no more yield a result at odds with its purpose here, for the reasons discussed below. Therefore, the FAA cannot, and should not, be read to have any bearing on the legitimacy of a federal exemption adopted pursuant to the Department's express authority that does not interfere with the enforceability of any contract.

B. The Condition Does Not Affect the Enforceability of Arbitration Agreements.

By its terms, the FAA only makes "valid, irrevocable, and enforceable" a "written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. "The Act . . . does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements." *Dean Witter Reynold*, 470 U.S. at 219-20. Indeed, the Supreme Court has described the import of this core FAA provision as simply that "Congress has thus mandated the enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). Thus, the Supreme Court[15] and the Court of Appeals for this Circuit[16] have uniformly addressed the enforceability of arbitration agreements

[15] Every Supreme Court case cited by Plaintiff involved enforcement of an arbitration agreement, *see Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013) ("whether the [FAA] permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim"); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (finding preemption by the FAA where "state court held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes"); *CompuCredit*, 132 S. Ct. at 668 ("whether the Credit Repair Organizations Act . . . precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act"); *Concepcion*, 563 U.S. at 336 ("whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (finding preemption where state "notice requirement would invalidate the [arbitration] clause" in the contract); *see also Preston v. Ferrer*, 552 U.S. 346, 358-63 (2008) (harmonizing contract provisions to avoid an "apparent conflict" between the arbitration provision and state law setting additional arbitration procedures); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (addressing procedural issues in case where "basic issue presented . . . was the arbitrability of the dispute between [the parties]").

[16] Every Eighth Circuit case cited by Plaintiff also addressed enforceability. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016) (reversing in part National

already entered into.

The Department, in exercising its statutory exemption authority, took care not to conflict with the FAA. *See* AR100 ("The exemption does not purport to render an arbitration provision in a contract between a Financial Institution and a Retirement Investor invalid, revocable, or unenforceable."). The BIC Exemption does not implicate the enforceability of arbitration agreements; indeed, it has no effect on existing contracts. *See* AR121-22. And even when an existing contract is modified or a new contract is entered into and comes under the terms of the exemption, the BIC Exemption does not limit the enforceability of any arbitration agreement the parties choose to enter into—the only effect is that certain arbitration agreements would make the transaction ineligible for the exemption. *See* AR100. As such, the exemption does not conflict with the plain text of the FAA, which mandates that such agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Accordingly, the BIC Exemption does not impair the FAA's primary purpose. *See Concepcion*, 563 U.S. at 344 ("The principal purpose of the FAA is to ensure that private

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Labor Relations Board decision requiring party to "either rescind the arbitration agreement or revise it"); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1051 (8th Cir. 2013) (reversing order denying motion to compel arbitration); *Green v. Supershuttle Int'l., Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (addressing "Minnesota-state-law-based challenge to the enforceability of the class action waivers"); *Southeastern Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 965 (8th Cir. 2009) (addressing motion to compel arbitration pursuant to contract); *Cicle v. Chase Bank USA*, 583 F.3d 549, 551 (8th Cir. 2009) (same); *Franke v. Poly-America Med. & Dental Benefits Plan*, 555 F.3d 656, 657 (8th Cir. 2009) (same); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d 475, 476-77 (8th Cir. 1988) (same).

arbitration agreements are enforced according to their terms."); *Dean Witter Reynolds*, 470 U.S. at 220 ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered[.]"). The Department's adoption of the BIC Exemption has nothing to do with the judicial hostility to enforcement of arbitration agreements that led to Congress' effort to put these agreements "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339; *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999). The Department's action leaves arbitration clauses on "equal footing" with other provisions found in contracts between investors and the people trying to sell them investment products—the enforceability of both are unaffected, and both are subject to exemption conditions designed to ensure that investors are protected and their interests served in transactions that would otherwise be prohibited. *See* AR99-100.[17]

C. The FAA Does Not Prohibit Incentives Not to Enter into Certain Arbitration Agreements.

Because the BIC Exemption does not conflict with the plain text of the FAA, Thrivent seeks an unprecedented expansion of FAA jurisprudence. It claims that the FAA

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[17] This exercise of authority is not unique. The Department and other agencies include contract requirements and specific terms in a number of regulations. *See Nat'l Ass'n for Fixed Annuities*, 2016 WL 6573480, at *26 ("[R]ules requiring that regulated entities include particular terms in written contracts are far from novel."); *see, e.g.*, PTE 84-14, 75 Fed. Reg. 38837, 38843 (July 6, 2010) (Department conditioning exemption on "acknowledge[ment] in a written management agreement that [the independent fiduciary] is a fiduciary with respect to each plans that has retained [it]"); 7 C.F.R. § 1493.20 (USDA's Export Credit Guarantee Program requiring that the "written evidence of sale . . . must, at a minimum, document the following information" constituting nine mandatory terms and one optional one); 14 C.F.R. § 212.3(c), (e) (Department of Transportation requiring charter flight contracts and specifying that each must be signed both by the carrier and the charterer, that payment must be made in advance, and that the surety is released if a claim is not filed within 60 days of cancellation).

prohibits a federal agency from exercising its statutory authority to "adopt a regulation that is hostile to arbitration" unless "Congress expressly enabled it to do so." Pl.'s Mem. at 17, ECF No. 16. But this notion that arbitration provisions "may not lawfully be discouraged," *id.* at 19, depends on a fundamental misreading of the FAA and the caselaw interpreting it. And it does not take account of the Court's obligation to reconcile the FAA with the expansive ERISA requirements and the protective goals of that statutory regime.

To interpret the FAA to prohibit disincentives for certain new arbitration provisions in as-yet unconsummated contracts, Plaintiff quotes *Concepcion* out of context. *See* Pl.'s Mem. at 18-19, 21. *Concepcion* addressed whether a California judicial rule permitting a party to an arbitration agreement to demand class arbitration *ex post* qualified under the FAA's savings clause. 563 U.S. at 346. Because the state rule would have rendered an agreement to individual arbitration unenforceable and thus would have interfered with arbitration, the Court concluded that the savings clause did not apply and the FAA, accordingly, preempted state law. 563 U.S. at 346-52.[18]

In the process of reaching its conclusion, the Court observed that "the FAA was designed to promote arbitration," 563 U.S. at 345, but the Court did not—as Thrivent would have it—turn this FAA purpose into an overarching principle that extends the FAA beyond its text. Instead, *Concepcion*, following other cases interpreting the FAA's savings

[18] The rest of the cases from which Plaintiff draws its "anti-discrimination" principle also interpret the savings clause. *See, e.g., Casarotto,* 517 U.S. at 687; *Tompkins v. 23andMe, Inc.*, No. 4-16405, __ F.3d. __, 2016 WL 6072192, at *4 (9th Cir. Oct. 13, 2016); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-60 (5th Cir. 2013); *Southeastern Stud*, 588 F.3d at 967. They go no further than *Concepcion*.

clause, employed this FAA purpose in assessing whether the state rule at issue constituted "grounds . . . at law or in equity for the revocation of any contract." 563 U.S. at 339 (quoting 9 U.S.C. § 2). This involves distinguishing "generally applicable contract defenses" that satisfy the savings clause from those that do not, such as "defenses that apply only to arbitration." 563 U.S. at 339. *Concepcion* observed that the issue is "more complex when a doctrine normally thought to be generally applicable . . . is alleged to have been applied in a fashion that disfavors arbitration," 563 U.S. at 341, and ultimately concluded that the savings clause does not preserve:

- "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," *id.* at 343, or
- a provision that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Thus, *Concepcion* ultimately rested on conflict-preemption principles that apply where state laws cannot be reconciled with federal law. *See* 563 U.S. at 352 (concluding by quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), a conflict preemption case); *see also id.* at 343 ("federal statute's savings clause" must be interpreted so that "the act cannot be held to destroy itself"). It does not broaden the scope of the FAA.[19]

Indeed, Plaintiff's theory that the FAA's policy goals trump an agency's statutory authority was directly rejected by the Supreme Court in *EEOC v. Waffle House, Inc.*, 534

[19] Similarly, the oft-quoted observation that the FAA's provisions manifest a "liberal federal policy favoring arbitration agreements." *Concepcion*, 563 U.S. at 346, in no way empowers this policy goal to extend beyond those provisions themselves.

U.S. 279 (2002). In examining the EEOC's authority to enforce employment non-discrimination laws in federal court despite an arbitration agreement entered into by the employee, the Court concluded that the "proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority." *Id.* at 294. The Court rejected the Fourth Circuit's attempt at "balanc[ing] the policy goals of the FAA against the clear language of Title VII." *Id.* at 293. The Court concluded that "[t]he text of the relevant statutes . . . . do not authorize the courts to balance the competing policies of the ADA and the FAA." *Id.* at 297. It was the dissent that made Plaintiff's argument, unsuccessfully asserting that a result that "discourages the use of arbitration agreements . . . is thus completely inconsistent with the policies underlying the FAA." 534 U.S. at 310 (Thomas, J., dissenting).

Like the EEOC, the Department acted pursuant to an express grant of broad authority from Congress—here, authority to grant conditional exemptions to allow transactions that would otherwise be prohibited, so long as such exemptions are protective of the interests of retirement investors. *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). In order to protect these interests, the Department tailored the exemption conditions to meet the statutory goals—providing for individual arbitration, but concluding under the relevant circumstances that allowing for waiver of class actions would not best serve those goals. *See* AR100, 596-97. *Cf. Concepcion*, 563 U.S. at 350 (observing that "[a]rbitration is poorly suited to the higher stakes of class litigation."). Nothing in the FAA purports to limit the Department's ability to create conditions in this way for conduct that would otherwise be illegal or to harmonize the exemption's conditions to the FINRA rule commonly governing agreements under the securities laws. *See* AR100. Indeed, Plaintiff's reading of the FAA would conflict with the longstanding observation that the Act "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).[20]

Thrivent asks that its own interpretation of the policy goals of the FAA be imposed at the expense of ERISA's text, let alone that statute's goals to protect retirement investors. But "courts are not at liberty to pick and choose" among sources of federal law, and where, as here, they are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *In re Am. River Transp. Co.*, 800 F.3d 428, 433 (8th Cir. 2015). Because the FAA and the Department's exercise of its statutory exemption authority reasonably coexist, the Court is obliged to give full effect to the Department's ERISA authority. For the same reason, the "contrary congressional command" standard that applies to limit the FAA in certain contexts is not implicated. *See CompuCredit Corp.*, 132 S. Ct. at 669; *Owen*, 702 F.3d at 1052. The Department does not—and need not—rest

[20] While *Concepcion* does state that "[w]hen state law prohibits outright the arbitration of a particular type of claim . . . . [t]he conflicting rule is displaced by the FAA," 563 U.S. at 341, context suggests that the statement addresses only laws prohibiting the *enforcement* of agreements. *Concepcion* relied on *Preston v. Ferrer*, 552 U.S. at 353, which merely held that the FAA "forecloses state legislative attempts to undercut the enforceability of arbitration agreements" and that the "FAA's displacement of conflicting state law is now well established and has been repeatedly reaffirmed." *See also Marmet Health*, 132 S. Ct. at 1203-04 (applying the "prohibits outright" language to state public policy making certain arbitration agreements unenforceable). Regardless, as discussed above, the BIC Exemption does not prohibit arbitration, and it is not a state law for which the broader sweep of preemption principles apply.

on that standard here, but instead on the FAA's textual limits and the breadth of its own authority under ERISA and the Code.[21]

D. Thrivent May Not Have to Amend its Bylaws to Comply with the Condition; Regardless the BIC Exemption Is Not Coercive.

Thrivent also argues that the BIC Exemption "effectively ban[s] and invalidate[s] Thrivent's MDRP." Pl.'s Mem. at 25. This is incorrect for the reasons previously discussed, but three additional points demonstrate how Plaintiff's attempt to make a pragmatic argument is mistaken.

First, its claimed "longstanding commitment to individual arbitration," *id.* at 26—which it admits began only in 1999—is much more limited than Plaintiff portrays. As described above in the background section, the MDRP is already littered with exceptions, none of which is listed in Thrivent's Bylaws. This suggests that complying with the BIC Exemption might be as simple as adding indexed annuities to the list of exceptions. For example, a handout explains that the MDRP is "optional," not mandatory, for variable life insurance and variable annuities.[22] *See* Newton Decl. Ex. G, Member Dispute Resolution Program at 2. This exception means that the 300,000 investors in these accounts, with their

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[21] Plaintiff errs to the extent it suggests that the "contrary congressional command" standard is the only way for another federal statute to permit limits on arbitration. Instead, this doctrine simply applies basic principles of statutory construction: that if there is an irreconcilable conflict between federal statutes, a specific statutory provision may trump a general statutory standard like the FAA. *Cf. United States v. Sutton*, 625 F.3d 526, 529 (8th Cir. 2010) ("[T]he ordinary rule is that where tension exists between a specific statute and a more general statute, the specific statute governs.").

[22] Thrivent presumably made this exception because variable products are regulated as securities and are subject to FINRA Rule 12204, which, like the BIC Exemption, permits individual arbitration but prohibits class action waivers. *See supra* Stmt. of Facts § I(B).

$19 billion in assets, are not required to use the MDRP to resolve any disputes that arise regarding these products. *See* Newton Decl. Ex. H, Thrivent Series Fund, Inc., Semiannual Report at 2, 154-59 (June 30, 2016). Indeed, in its reports for these products, Thrivent accounts for class action awards. *See id.* at 187 ("(S) Litigation — Awards from class action litigation are recorded as realized gains on payment date."). For many other products, the MDRP simply does not apply: Thrivent's sale of mutual funds, credit union products, or any non-proprietary product. *Id.* Accordingly, it cannot be entirely contrary to "The Thrivent Way" for Thrivent to make an exception from its class action prohibition for indexed annuities in order to avail itself of the BIC Exemption.

Second, the BIC Exemption invalidates no contracts and is not coercive. As discussed above, there is a significant difference between rendering a contract invalid and giving a contracting party that seeks an exemption from a statutory provision that otherwise makes their conduct illegal an incentive to draft the contract differently in the first instance. Here, the BIC Exemption does not invalidate either existing contracts or new ones that seek to satisfy its terms. *See supra* Arg. § I(B). Plaintiff merely argues that it has an overwhelming incentive to seek an exemption, making its actions no longer voluntary. Pl.'s Mem. at 25-27. But it is not the rulemaking that exerts this pressure; instead, ERISA itself prohibits transactions that trigger compensation for Thrivent and its agents, making excise taxes due if the sales do not comply with an exemption. *See* 29 U.S.C. § 1106(b); 26 U.S.C. § 4975(c)(1). And, as the Department observed, the FAA does not "entitle[] parties that enter into arbitration agreements to a pass from the prohibited transaction rules." AR100. Because Plaintiff does not challenge Congress' authority to prohibit the transactions, as ERISA does, all that is at stake is the exemption the Department has provided—*i.e.*, a benefit, not a penalty. *Cf. College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87 (1999) (treating the gift of federal funds as "fundamentally different" from penalties for purposes of analyzing coercion of states).

Third, and finally, Plaintiff cites no authority for the proposition that regulatory coercion is a relevant consideration under the FAA. Indeed, coercion plays no role in the analysis. *Concepcion* certainly does not stand for the proposition that adverse incentives overwhelm choice and thus violate the FAA. *See* Pl.'s Mem. at 23. The issue in *Concepcion* had nothing to do with incentives associated with the decision to enter an arbitration agreement (or not), but instead analyzed—under the FAA savings clause—the incentives created by a state law that permitted the consumer to demand class arbitration that was not provided for in the agreement. *See* 563 U.S. at 347. As discussed above, Conception addressed only whether a state rule was "general applicable" for purposes of the savings clause. *See supra* Arg. § I(C). The FAA does not mandate that contracting parties have limitless choices available when entering into agreements. And regulatory bodies routinely incentivize conduct, as the Department has done here, pursuant to its express statutory authority.

For all of these reasons, the BIC Exemption's class action condition does not violate the Federal Arbitration Act.

CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment, and the Court should deny Thrivent's motion for summary judgment.

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Respectfully submitted,

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