Before the
UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Petition for Rulemaking of: THRIVENT FINANCIAL FOR LUTHERANS AND THRIVENT INVESTMENT MANAGEMENT INC., Petitioners.	File No. 4-781

COMMENT IN SUPPORT OF PETITIONERS THRIVENT FINANCIAL FOR LUTHERANS AND THRIVENT INVESTMENT MANAGEMENT INC.'S PETITION FOR RULEMAKING

Andrew B. Kay, Esq.
P. Randolph Seybold, Esq.
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
(202) 344-4000

Richard T. Choi, Esq.
Ann B. Furman, Esq.
CARLTON FIELDS, P.A.
1025 Thomas Jefferson Street, NW
Washington, DC 20007
(202) 965-8100

Attorneys for Petitioners Thrivent Financial for Lutherans and Thrivent Investment Management Inc.

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I. INTRODUCTION

On December 29, 2021, Thrivent Financial for Lutherans ("Thrivent") and Thrivent Investment Management Inc. ("TIMI") submitted a petition for rulemaking ("Petition") pursuant to 15 U.S.C. § 78s(c) and SEC Rule of Practice 192(a). That Petition calls on the Securities and Exchange Commission ("Commission" or "SEC") to abrogate or amend FINRA Rules 2268(d), 12200, and 12204(d), which unlawfully and impermissibly prohibit FINRA members from entering or enforcing private arbitration agreements mandating individual customer arbitration in a non-FINRA forum (the "Challenged FINRA Rules"). Over seven months later, it is not apparent that the Commission has taken any meaningful steps to act on the Petition. Thrivent and TIMI therefore submit this Comment to call on the Commission to act promptly—either by granting the Petition or denying it—as due process and the Administrative Procedure Act require.

The Petition clearly established that there is no legal authority to support the Challenged FINRA Rules. The Petition further made clear that Thrivent and TIMI have a tangible and concrete interest in the invalidation of the Challenged FINRA Rules, as Thrivent and TIMI incur present and ongoing harm as a result of these unlawful Rules. All of Thrivent's insurance products, including its variable annuities and variable life insurance products (collectively, "Variable Products"), include as a matter of law Thrivent's Bylaws, which govern the rights and obligations by which all Thrivent members (who are its customers) agree to be bound. These Bylaws mandate application of the Member Dispute Resolution Program ("MDRP"), which includes individual arbitration of disputes in a non-FINRA forum. But the Challenged FINRA Rules prohibit Thrivent and TIMI from selling or offering Variable Products that include and apply the MDRP Bylaw, thereby prohibiting Thrivent from uniformly and consistently applying its Bylaws to Thrivent members. (Pet. at 31-32.)

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, obligates the Commission to act "within a reasonable time" with respect to the Petition. Federal courts have squarely held that a "reasonable time" for agency action is measured as a matter of ***weeks or months, and not years***; the Commission, therefore, cannot simply ignore or delay action on the Petition, because such inaction or delay is unreasonable and unlawfully denies Thrivent and TIMI's due process rights to adequate and meaningful administrative adjudication guaranteed by the APA. This is particularly true where—as here—Thrivent and TIMI are currently being harmed by the Challenged FINRA Rules they contend are invalid under federal law, and they have elected to petition for a change to those Rules rather than violating them and inviting an enforcement action. Federal courts have made clear that regulated parties are not required to "bet the farm" by violating rules in order to challenge them. But continued inaction by the Commission would leave Thrivent and TIMI in that very situation, since the only other procedural avenue available to challenge the Rules would be through an enforcement action after a rule violation. Thrivent and TIMI therefore submit this Comment to prompt action on the Petition, absent which Thrivent and TIMI will need to litigate in federal court the Commission's failure to act within a reasonable time.

II. DISCUSSION

A. The Challenged FINRA Rules are Unlawful and Harmful to Thrivent and TIMI

The Petition explains in detail why the Challenged FINRA Rules are unlawful and invalid. In short, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), overrides the Challenged FINRA Rules. (Pet. at 2-3.) Indeed, the law is clear that agreements to arbitrate can be limited or prohibited only where Congress has, through legislation, made its intention to supersede the FAA "clear and manifest." *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1617 (2018). And with regard to the federal securities laws in particular, the Supreme Court has held that they do not provide the Commission or FINRA with clear and manifest authority to impede or supersede FINRA members and their customers' agreements to arbitrate claims individually and/or outside the FINRA arbitration forum. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* ("Exchange Act"), includes no provisions that reflect congressional intent to override the FAA and limit the enforceability of parties' agreements to arbitrate Exchange Act claims).[1]

Further, the Petition explains how these unlawful Challenged FINRA Rules are harming both Thrivent and TIMI. Thrivent's Bylaws require a mandatory dispute resolution process, the MDRP, that is incorporated into all Thrivent insurance products, including Variable Products, as a matter of state law. (Pet. at 5.) However, in contravention of federal law, the Challenged FINRA Rules would subject Thrivent's broker-dealer affiliate, TIMI, to a FINRA enforcement action if Thrivent or TIMI were to sell Variable Products mandating the MDRP or if TIMI were to seek to apply the MDRP Bylaw in Variable Product disputes. (Pet. at 20; Pet. Ex. 3 at 2, Feb. 25, 2021 Letter from FINRA to Thrivent stating "it would be a violation of FINRA rules if TIMI were to treat all disputes with Thrivent members involving Thrivent's variable insurance products as being governed solely by Thrivent's MDRP.").

B. The Petition is an Appropriate Avenue to Seek Relief from the Unlawful Challenged FINRA Rules

As discussed above, Thrivent and TIMI are being harmed by the Challenged FINRA Rules—Rules that they contend are invalid under federal law. Both the APA and the SEC Rules of Practice make clear that a Rule 192 petition is an available procedure to challenge those Rules'

[1] Under 15 U.S.C. § 78o(o), the Commission has authority to prohibit or impose conditions or limitations on some arbitration agreements, but the Commission only can do so "by rule"—meaning by following rulemaking procedural requirements under the APA. The Commission has undertaken no such rulemaking.

validity. The APA gives "an interested person the right to petition for the issuance, amendment, or repeal of a rule" and SEC Rule of Practice 192 provides that "[a]ny person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the [Commission] Secretary." 5 U.S.C. § 553(e); 17 C.F.R. § 201.192.

Moreover, the law does not require parties like Thrivent and TIMI to subject themselves to an enforcement action in order to challenge the validity of rules that they believe to be invalid. For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court rejected the argument that petitioners should "raise their claims by appealing a Board sanction" in order to challenge the authority of the PCAOB—another entity overseen by the Commission. 561 U.S. 477, 490 (2010). To the contrary, the Court reasoned that "[w]e normally do not require plaintiffs to bet the farm … by taking the violative action before testing the validity of the law." *Id*. (internal quotations and citation omitted). Accordingly, federal courts have repeatedly held that a party in the position of Thrivent and TIMI may use the rulemaking petition process to challenge the validity of SEC or FINRA rules. *See, e.g.*, *Scottsdale Capital Advisors Corp. v. Fin. Indus. Regul. Auth., Inc.*, 844 F.3d 414, 423 (4th Cir. 2016) ("Scottsdale is not required to challenge a Board rule at random or bet the farm by voluntarily incurring a sanction in order to trigger § 78y's mechanism for administrative and judicial review" but instead can "petition the SEC—apart from any disciplinary action—to amend or repeal [the] FINRA Rule."); *N. Y. Republican State Comm. v. Sec. & Exchange Comm'n*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) (holding that the APA and Rule 192 provide the right to "petition for the amendment or repeal of any Commission rule" and "[i]f the Commission denies an individual's petition, she may then petition this Court for review of the Commission's decision to deny the petition.").[2]

C. The Commission Must Act on the Petition Without Further Delay

While Rule 192 gives parties the ability to challenge a FINRA rule, it is not sufficient for the Commission to make such a procedure theoretically "available" but, in reality, a meaningless one due to the Commission's inaction. Under the APA, the Commission is obligated to act—whether by granting or denying the requested relief—"within a reasonable time." 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."); *Whale & Dolphin Conservation v. Nat'l Marine Fisheries Ser.*, No. 21-cv-00112, 2021 WL 5231938, at *2 (D.D.C. Nov. 10, 2021) ("An agency must 'proceed to conclude a matter presented to it,' including a petition requesting rulemaking, 'within a reasonable time.'" (quoting 5 U.S.C. § 555(b)). Courts addressing this requirement have held that a "reasonable time" in which a federal agency must respond to a rulemaking petition by either granting or denying relief "is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004); *see also In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020) ("Repeatedly, courts in this and other circuits have concluded that a reasonable time for

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[2] *See also Ass'n of Inv. Brokers v. Sec. & Exchange Comm'n*, 676 F.2d 857, 864 (D.C. Cir. 1982) ("As the SEC points out, however, both the Administrative Procedure Act and the Securities Exchange Act indicate an avenue petitioners might pursue to raise before the Commission their contentions concerning the alleged illegality of NYSE-style arbitration.… Petitioners may invite an SEC rulemaking directed to the arbitration requirements of the self-regulatory organizations."); *Charles Schwab & Co. Inc. v. Fin. Indus. Regul. Auth., Inc.*, 861 F. Supp. 2d 1063, 1076, n.1 (N.D. Cal. 2012) (explaining that "Plaintiff could also petition the SEC to change the FINRA Rule at issue in light of the recent Supreme Court decisions construing the FAA, which the SEC has the power to do"); *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., Inc.*, No. 20-cv-00794, 2021 WL 4060943, at *5 (D. Utah Sept. 7, 2021) ("Alpine also has the additional avenue of petitioning the SEC to repeal the Amendment outside of the disciplinary proceeding.")

agency action is typically counted in weeks or months, not years" (internal quotations and citation omitted)).

The statutory requirement for the Commission to act within a reasonable time on Rule 192 petitions is further commanded by principles of due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). And Rule 192 must provide parties with "a meaningful avenue of relief" and not a hollow one. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 490-91. If a federal agency, like the Commission, could simply refuse to act on a rulemaking petition presented to it, the rulemaking petition administrative remedy prescribed by the APA would be meaningless. *See, e.g.*, *MCI Telecomms. Corp. v. Fed. Commc'ns Comm'n*, 627 F.2d 322, 344 (D.C. Cir. 1980) ("There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all and the result is a denial of justice."). If the Commission refuses to act on Rule 192 petitions when they are presented, parties like Thrivent and TIMI would have to intentionally violate federal rules and regulations in order to challenge them—a circumstance that would be inconsistent with due process and that the Supreme Court expressly has held that parties should not be forced to endure. *Free Enter. Fund*, 561 U.S. at 490. Accordingly, the Commission must make a determination with respect to a Rule 192 petition after it is filed, and it cannot sit on the Petition without taking action. 5 U.S.C. § 555(b) ("[E]ach agency shall proceed to conclude a matter presented to it."); *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540-41 (S.D.N.Y. 2009) (stating "it is clear that [a federal agency] is required to at least definitively respond to plaintiffs' petition—that is, to either deny or grant the petition" and ordering the Department of Homeland Security "to respond to plaintiffs' petition within thirty days"); *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 794 F. Supp. 2d 39, 44 (D.D.C. 2011) ("Therefore, an agency is required to at least definitively respond to…[a] petition—that is, to either deny or grant the petition." (internal quotations and citation omitted)).

In this matter, the issues presented in the Petition further emphasize the need for prompt action by the Commission. The Petition identifies specific FINRA Rules that are *unlawful* and that cause *immediate and ongoing harm* to Thrivent and TIMI. Thrivent and TIMI's rights are violated every day that they are subject to the unlawful Challenged FINRA Rules preventing uniform and consistent application of Thrivent's Bylaws. Any further delay by the Commission in acting upon the Petition exacerbates this violation.

Moreover, the legal issues presented in the Petition are not new to the Commission, and there is no reason for the Commission to delay ruling on the Petition. The Commission has long considered whether the federal securities laws provide the statutory authority to override the Federal Arbitration Act. Indeed, in an official statement in February 2019, then-Commission Chairman Clayton confirmed that on "various occasions" he received inquiries as to whether mandatory arbitration clauses in the governing documents of entities regulated by the Commission would prevent registration statements from being declared effective.[3] Chairman Clayton further confirmed that Commission Staff have been reviewing this issue since at least 2012, yet Chairman Clayton "agree[d] with the approach taken by the staff to not address the legality of mandatory shareholder arbitration in the context of federal securities laws." Ex. A. Thus, while this issue has been raised with the Commission and its Staff over the course of many years, the Commission has

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[3] U.S. Sec. & Exch. Comm'n, *Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions*, (Feb. 11, 2019), https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions [hereinafter Ex. A and included herewith].

deferred addressing it. However, with respect to the issues raised in the Petition, deferral is no longer an option. Because Thrivent and TIMI are subjected to present and ongoing harm from the unlawful Challenged FINRA Rules, the APA and due process require the Commission to act without further delay to cure the Rules' legal deficiencies.

In pursuing the Petition, Thrivent and TIMI have endeavored to have their legal claims adjudicated by pursuing the least adversarial process available: *i.e.*, avoiding an enforcement action and instead filing a Petition under Rule 192. But this does not change that Thrivent and TIMI are being harmed by the ongoing enforcement of the Challenged FINRA Rules, and it does not change Thrivent and TIMI's interest in securing resolution of the Petition's claims without further delay. Accordingly, if the Commission chooses not to act on the Petition within a reasonable time, Thrivent and TIMI will need to pursue a writ of mandamus compelling the Commission to act—one way or the other—with respect to the relief requested by the Petition. 5U.S.C. § 706(1); *see also In re Am. Rivers*, 372 F.3d at 418-19 (holding that "a reviewing court may 'compel agency action unlawfully withheld or unreasonably delayed'" (quoting 5U.S.C. § 706(1)); *Nat'l Parks Conservation Ass'n*, 794 F. Supp. 2d at 44 ("If the agency does not respond to a petition, a reviewing court may compel agency action unlawfully withheld or unreasonably delayed."); *Whale & Dolphin Conservation*, 2021 WL 5231938, at *2 (holding, with respect to a federal agency's failure to respond to a rulemaking petition, that "a court may 'compel agency action unlawfully withheld or unreasonably delayed'" (quoting 5 U.S.C. § 706(1)).

III. CONCLUSION

Thrivent and TIMI exercised their right under the APA and SEC Rules of Practice by submitting the Petition more than seven months ago asking the Commission to abrogate or amend Challenged FINRA Rules that violate federal law and are causing current and ongoing harm to Thrivent and TIMI. The Commission must definitively respond to the Petition within a reasonable time, which is measured in "weeks or months, not years." It is Thrivent and TIMI's hope that the Commission will comply with its obligations under the APA, rather than force them to seek relief in federal court.

Date: August 4, 2022

Respectfully submitted,

Andrew B. Kay, Esq.
P. Randolph Seybold, Esq.
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
(202) 344-4000

Richard T. Choi, Esq.
Ann B. Furman, Esq.
CARLTON FIELDS, P.A.
1025 Thomas Jefferson Street, NW
Washington, DC 20007
(202) 965-8100

Counsel for Petitioners Thrivent Financial for Lutherans and Thrivent Investment Management Inc.

COMMENT IN SUPPORT OF PETITIONERS

THRIVENT FINANCIAL FOR LUTHERANS AND

THRIVENT INVESTMENT MANAGEMENT INC.'S

PETITION FOR RULEMAKING

EXHIBIT A

Statement

Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions

Chairman Jay Clayton

Feb. 11, 2019

The issue of mandatory arbitration provisions in the bylaws of U.S. publicly-listed companies has garnered a great deal of attention. As I have previously stated, the ability of domestic, publicly-listed companies to require shareholders to arbitrate claims against them arising under the federal securities laws is a complex matter that requires careful consideration.[1]

On various occasions, I have been asked about this issue in the hypothetical context of whether the staff of the Division of Corporation Finance would declare effective the registration statement of a domestic company seeking to include mandatory arbitration provisions in its governing documents at the time of its initial public offering. In response to these inquiries, I stated that, if the issue were to arise in an actual initial public offering of a domestic company, it would not be appropriate for resolution at the staff level but would rather be best addressed in a measured and deliberative manner by the Commission.

The issue has risen again, but it is being presented in a different context. A domestic, publicly-listed company has received a shareholder proposal that would require the company to take steps to adopt mandatory arbitration provisions. The company has asked the staff of the Division of Corporation Finance for informal guidance on whether the company may exclude the proposal from its proxy statement. Specifically, the request seeks the staff's view on whether, under Rule 14a-8(i)(2), the company may omit from its proxy statement a shareholder proposal relating to mandatory arbitration of shareholder claims arising under the federal securities laws. Rule 14a-8(i)(2) permits exclusion of a proposal that, if implemented, would cause the company to violate any state, federal or foreign law to which it is subject. The company has argued that the proposal, if implemented, would result in a violation of both federal and state law.

This is a complex matter under both federal and state law, and it has been interpreted differently by the company (arguing that such a clause would violate both state and federal law) and the proponent (arguing that such a clause would not violate state or federal law). The staff considered in its analysis the arguments made by the company, the proponent and the Attorney General of New Jersey, the state's chief law enforcement officer and legal advisor. The staff issued a response stating that it would not recommend enforcement action should the company decide to exclude the proposal on the grounds that it would violate New Jersey state law. In the context of Rule 14a-8, the staff does not independently adjudicate the legality of any provision of state law, and it is not doing so in this matter. Here, the parties have each asserted different interpretations of state law, neither party has identified New Jersey case law precedent directly on point, and the Attorney General has provided an opinion that implementation of the proposal would violate state law. In light of the submissions, and in particular the letter of the Attorney General of New Jersey, I believe the approach taken by the staff—to not recommend enforcement action in this complex matter of state law—is appropriate.

The staff of the Division of Corporation Finance explicitly noted that it was not expressing a view as to whether the proposal, if implemented, would cause the company to violate federal law. Since 2012, when this issue was last presented to staff in the Division of Corporation Finance in the context of a shareholder proposal, federal case law regarding mandatory arbitration has continued to evolve. Further, I am not aware of any circumstances where the Commission has weighed in on the legality of mandatory shareholder arbitration in the context of federal securities law. In light of the unsettled and complex nature of this issue, as well as its importance, I agree with the approach taken by the staff to not address the legality of mandatory shareholder arbitration in the context of federal securities laws in this matter, and would expect our staff to take a similar approach if the issue were to arise again. I continue to believe that any SEC policy decision on this subject should be made by the Commission in a measured and deliberative manner.

More generally, it is important to note that the staff's Rule 14a-8 no-action responses reflect only informal views of the staff regarding whether it is appropriate for the Commission to take enforcement action.[2] The views expressed in these responses are not binding on the Commission or other parties, and do not and cannot definitively adjudicate the merits of a company's position with respect to the legality of a shareholder proposal. A court is a more appropriate venue to seek a binding determination of whether a shareholder proposal can be excluded.

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[1] For background, see (1) letter to the Honorable Carolyn B. Maloney dated April 28, 2018, available at https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf; (2) S. Hrg. 115-176, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, Feb. 6, 2018, available at

https://www.govinfo.gov/content/pkg/CHRG-115shrg28854/pdf/CHRG-115shrg28854.pdf at 146-151; (3) Remarks before the SEC Investor Advisory Committee (March 8, 2018), available at https://www.sec.gov/news/public-statement/statement-clayton-2018-3-8.

[2] Chairman Jay Clayton, Statement Regarding SEC Staff Views (Sept. 13, 2018), available at https://www.sec.gov/news/public-statement/statement-clayton-091318. See also, Division of Corporation Finance, Informal Procedures Regarding Shareholder Proposals, available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm.

Related Materials

- Staff No-Action Letter