

July 28, 2023

Andrew B. Kay



Via Hand Delivery and First Class Mail

Office of the General Counsel
Attn: Megan Barbero, General Counsel
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Thrivent Financial for Lutherans' and Thrivent Investment Management Inc.'s
Petition for Rulemaking to Abrogate or Amend Financial Industry Regulatory Authority
Rules 2268(d), 12200, and 12204(d) – File No. 4-781

Dear Ms. Barbero:

This letter follows up on my previous letter, sent on February 16, 2023, on behalf of Thrivent Financial for Lutherans (“Thrivent”) and Thrivent Investment Management Inc. (“TIMI”) with respect to the above-referenced petition for rulemaking submitted to the Securities and Exchange Commission on December 29, 2021 (“Rulemaking Petition”). We received no response to that letter, and in nearly nineteen months since the Rulemaking Petition was filed we have heard nothing from the Commission or its Staff beyond a form acknowledgement of receipt.

As I noted in my prior letter, although the United States Court of Appeals for the District of Columbia Circuit denied our petition for a writ of mandamus compelling the Commission to either grant or deny the Rulemaking Petition, it did so “without prejudice to refile in the event of significant additional delay.” (January 23, 2023 Order, D.C. Cir. Case No. 22-1296). Unfortunately, the lack of response to my letter from nearly five months ago, and the Commission’s continued silence with respect to the Rulemaking Petition submitted more than a year and a half ago, suggests that significant additional delay is inevitable.

This delay cannot be justified by the substance of the Rulemaking Petition, which addresses a pure question of law that the Commission has studied for decades. Further, as explained in the Rulemaking Petition, correcting what in our view are unlawful FINRA rules does not require substantial Commission effort or resources: To address and correct the unlawful FINRA Rules, “the Commission could simply remove the Challenged FINRA Rules from FINRA’s rule book” or the Commission could “amend the Challenged FINRA Rules, consistent with the FAA and Supreme Court precedent, to clarify that private agreements between FINRA members and their customers that require individual arbitration in a non-FINRA forum are valid and enforceable under FINRA Rules, and that FINRA’s special notice requirements applicable to arbitration provisions are not enforceable.” (Rulemaking Petition, File No. 4-781 at 34).

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Our concern regarding the Commission's ongoing delay in processing the Rulemaking Petition is further informed by positions the Commission recently took in filings with the Third Circuit in connection with another mandamus petition. (*See In re Coinbase, Inc.*, 3rd Cir. Case No. 23-1779). In its Respondent Brief in *Coinbase*, the Commission stated that "[t]here are no statutory or regulatory deadlines requiring the Commission to take action on the petition on a specific timeline," and suggested that the Commission's only deadline is that which might be imposed by courts through writs of mandamus, and then only if the Commission delays action for many years. (*Id.*, ECF No. 26 at 7, 11-12, 12 n.8). The Commission repeated this position in a subsequent letter filing. (*Id.*, ECF No. 30 at 7, 9). The Commission also stated that, if Coinbase was dissatisfied with the Commission's slow progress on its rulemaking petition, Coinbase could obtain "judicial scrutiny" of the Commission's positions through filings in enforcement actions, including the one the Commission has now brought against it. (*Id.*, ECF No. 26 at 14; ECF No. 30 at 6).

As we have addressed, the law is clear that the Commission is obligated to act on the Rulemaking Petition in a timely manner. However, the Commission's apparent determination to ignore Thrivent's entreaties, along with the Commission's recent assertions in the Third Circuit regarding the general obligation to act on rulemaking petitions, suggest that the Commission has no plan to act on the Rulemaking Petition unless and until the D.C. Circuit orders it to do so. Is it the Commission's position that the only two options for parties like Thrivent and TIMI, who are presently subjected to unlawful regulations, are to: (1) wait for years after submitting a rulemaking petition before seeking a writ of mandamus to compel the Commission to act; or (2) subject themselves to an enforcement action in which they can address the unlawful regulations? Neither of those options are reasonable or appropriate. And as an organization regulated by the Commission, TIMI (and its parent Thrivent) prefer engaging in a dialogue with the Commission regarding a timetable by which the Commission will address the Rulemaking Petition, rather than continued silence and additional delay that necessitates another mandamus petition.

We remain hopeful for an opportunity to discuss whether, how, and when the Commission plans to move forward with its consideration of our Rulemaking Petition. Please let me know when a representative from your Office is available to discuss these issues with us.

Sincerely,



Andrew B. Kay