thrivent®

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April 30, 2026

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

Re: FINRA Regulatory Notice 26-06 – Request for Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes

Dear Ms. Piorko Mitchell:

Thrivent Investment Management Inc. ("TIMI")[1] appreciates this opportunity to respond to FINRA Regulatory Notice 26-06 (the "Notice").[2]

Introduction and Summary

TIMI agrees with FINRA's recognition in the Notice that arbitration is an area warranting further focus within the broader FINRA Forward initiative and welcomes FINRA's willingness to reassess its arbitration rules and practices. However, TIMI believes that FINRA's discussion of arbitration in the Notice does not fully acknowledge the legal overlay, and restraints on FINRA authority, imposed by the Federal Arbitration Act ("FAA").[3]

The Notice acknowledges that "[o]verlaying FINRA's arbitration forum and rules is the FAA," which "establishes a liberal federal policy favoring arbitration agreements," and "requests that commenters be mindful of how any suggested changes may implicate the FAA and the related

[1] TIMI is a registered broker-dealer, FINRA and SIPC member, organized under the laws of the State of Delaware, that is wholly owned by Thrivent Financial for Lutherans ("Thrivent"), a fraternal benefit society organized and existing under the laws of the state of Wisconsin. Among other activities, TIMI sells to its customers, who are Thrivent members, Thrivent variable insurance products regulated as securities by the Securities and Exchange Commission ("SEC").

[2] FINRA Requests Comment on Modernizing FINRA Arbitration Rules, Guidance and Processes, FINRA Reg. Not. 26-06 (Mar. 2, 2026). https://www.finra.org/sites/default/files/2026-03/Regulatory-Notice-26-06.pdf

[3] On December 29, 2021, Thrivent and TIMI petitioned the SEC to abrogate or amend FINRA Rules 2268, 12200, and 12204 because these rules unlawfully restrain FINRA members from entering into or enforcing predispute arbitration agreements requiring individual arbitration in a non-FINRA forum. (SEC Rulemaking Petition File No. 4-781). The SEC denied the rulemaking petition on December 18, 2024, Thrivent and TIMI appealed that denial to the U.S. Court of Appeals for the District of Columbia Circuit, and that appeal is presently pending (D.C. Cir. Case No. 25-1047). In this letter, TIMI is responding to the Notice according to its terms; nothing herein is intended to be inconsistent with, or should otherwise be construed against, any position Thrivent or TIMI have taken in the SEC rulemaking petition proceedings.

judicial precedent."[4] But the way the Notice frames the discussion fails to take into account both the present legal landscape with respect to arbitration agreements and the implications of the SEC's recently-issued analysis of FAA jurisprudence.[5]

The discussion and questions in the Notice assume that the current FINRA arbitration rules are consistent with the FAA, and that modifications to those rules that might further limit parties' freedom to enter into binding predispute agreements to resolve disputes in arbitration would also be consistent with the FAA. But this premise is incorrect. As the SEC itself has now expressly acknowledged, the federal securities laws do not override the protections afforded under the FAA.[6] FINRA ***does not*** have regulatory authority to prohibit its members and their customers from entering into or enforcing predispute agreements to resolve their disputes on an individual basis in a non-FINRA arbitration forum. Yet that is exactly what FINRA Rules 2268, 12200, and 12204 prohibit.

For this reason, the following specific requests for comment in the Notice are flawed:

- Request for Comment A(i).3. requests comment on whether FINRA "[s]hould…allow parties to contractually agree in advance to opt out of FINRA arbitration and arbitrate disputes in alternative fora for certain categories of claims [] or customer dispute types?"[7] This question presumes FINRA has the authority *not to allow* parties to do so. But that is contrary to the FAA.

- Request for Comment A(i).(4). requests comment on whether customers "[s]hould…be allowed to unilaterally choose, post dispute, between arbitration and litigation even if they signed a customer agreement with an alternative forum selection clause?"[8] This question presumes FINRA has the authority to determine whether a FINRA member's predispute arbitration agreement with a customer is enforceable. But that is also contrary to the FAA.

As the legal analysis in the SEC Policy Statement confirms, the federal securities laws ***do not*** provide FINRA with the authority that is the premise for these two questions. Accordingly, additional changes to FINRA's arbitration rules are warranted, beyond what is contemplated by the questions posed in the Notice.

To be clear, TIMI is not suggesting that FINRA's arbitration forum must, or should be, abandoned. FINRA arbitration should remain an option for FINRA members and their customers who choose it as the means to resolve their disputes. Further, FINRA has an obligation to

[4] Notice at 7.

[5] SEC, Final rule; Policy statement, *Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions* (Sept. 17, 2025) https://www.sec.gov/files/rules/policy/33-11389.pdf (the "SEC Policy Statement"). Citations to the SEC Policy Statement herein refer to the pages of the PDF of the Policy Statement available at the foregoing link.

[6] SEC Policy Statement, *supra* n. 4, at 7-8.

[7] Notice at 10.

[8] Id.

promulgate rules that, among other things, "protect investors and the public interest."[9] Thus, if FINRA members and their customers agree to use alternative arbitration fora and rules rather than FINRA's—as the FAA gives them a right to do—FINRA has ongoing authority to issue rules ensuring that customers' rights are protected, as long as such rules are consistent with federal law.

But federal law does not allow FINRA to prohibit its members from entering into or enforcing predispute agreements to arbitrate on an individual basis in a non-FINRA forum. The rulemaking process furthered by the Notice is an excellent opportunity for FINRA to conform its rules to federal law and ensure that FINRA members and their customers have the FAA-guaranteed freedom to choose the means of resolving their disputes.[10]

In the remainder of this letter TIMI: (1) briefly explains why FINRA's current customer arbitration rules are inconsistent with federal law and should be amended; (2) addresses the policy benefit of such amendments, which promote the freedom of choice guaranteed by the FAA; and (3) offers proposed revisions to conform FINRA Rules 2268, 12200, and 12204 to federal law.

FINRA's Arbitration Rules Are Contrary to Federal Law and Must Be Corrected

The FAA guarantees that parties' arbitration agreements "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. The SEC Policy Statement thoroughly explains the history of the Supreme Court's FAA jurisprudence, including with respect to the arbitrability of securities customer claims against broker-dealers under the federal securities laws.[11] The SEC Policy Statement accurately conveys the present state of federal law as it relates to the interplay between the federal securities laws and the FAA as follows: "Nothing in the text of the anti-waiver provisions or any other provisions of the Federal securities statutes could be construed as a clearly expressed congressional intention that the [FAA] would not apply to Federal securities laws claims."[12]

Notwithstanding this legal landscape, FINRA Rules 2268, 12200, and 12204 prohibit parties from entering into or enforcing predispute agreements to arbitrate on an individual basis in a non-FINRA forum, as FINRA has made clear in its own regulatory notices.[13] These FINRA rules

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[9] 15 U.S.C. § 78o-3(b)(6).

[10] In a speech addressing the SEC Policy Statement, SEC Chairman Paul Atkins stated that the Commission's public articulation of its position on FAA jurisprudence was long overdue: "While I am pleased that the Commission is voting today on whether to issue the Policy Statement, I must note that **the agency is, unfortunately, at least a decade too late in taking this action … the law in this area has been clear since *at least* 2013.**" https://www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431 (emphasis added).

[11] *See* SEC Policy Statement, *supra* n. 4, at 7-15.

[12] SEC Policy Statement, *supra* n.4, at 8. As the SEC also notes in the SEC Policy Statement, in the 2010 Dodd-Frank Act, Congress expressly granted the SEC rulemaking authority to limit, condition, or prohibit arbitration agreements between broker-dealers and their customers. 15 U.S.C. § 78o(o); *see also*, SEC Policy Statement at 12. However, the SEC has never undertaken any rulemaking under this authority, nor was any such authority granted to FINRA.

[13] *See, e.g.*, Forum Selection Provisions Involving Customers, Associated Persons and Member Firms, FINRA Reg. Not. 16-25 (Jul. 22, 2016); FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts, FINRA Reg. Not. 21-16 (Apr. 21, 2021).

stand contrary to the FAA's protection of parties' rights to choose their own method of dispute resolution, in several respects. Stated briefly:

- FINRA rules prohibit members from entering into or enforcing agreements to resolve disputes in arbitration on an individual basis and waive class actions.[14]

- FINRA rules prohibit members from entering into or enforcing agreements to use a non-FINRA arbitral forum, requiring instead that a customer always be able to elect FINRA arbitration under FINRA rules after a dispute arises.[15]

- FINRA rules require notice and disclaimer requirements for arbitration clauses that are inconsistent with federal law.[16]

As an SRO overseen by the SEC, the law has been clear for decades that, at least since the Maloney Act amended the Exchange Act in 1975, FINRA's authority "ultimately belongs to the SEC" and that FINRA has "no authority to regulate independently of the SEC's control" or beyond the authority conferred by the Exchange Act.[17] And to that end, FINRA has long asserted that its rules have the force of federal law.[18] Moreover, because broker-dealers "must be members of FINRA to conduct their business," they have no choice but to comply with FINRA's rules.[19] Thus, just as with the MSRB, as addressed in *Blount v. SEC*, membership in FINRA is "a government-enforced condition to any participation in" a securities broker career.[20] FINRA's arbitration rules,

[14] FINRA Reg. Not. 21-16, *supra* n. 10, at 1: "FINRA rules prohibit member firms from incorporating provisions that would prevent customers from bringing or participating in judicial class actions by adding waiver language into customer agreements (class action waivers) and prohibit member firms from enforcing arbitration agreements against members of a certified or putative class action."

[15] FINRA Reg. Not. 16-25, *supra* n. 10, at 1: "FINRA reminds member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time and do not forfeit that right under FINRA rules by signing any agreement with a forum selection provision specifying another dispute resolution process or an arbitration venue other than the FINRA arbitration forum. In addition … FINRA rules do not permit member firms to require associated persons to waive their right to arbitration under FINRA's rules in a predispute agreement."

[16] FINRA Rule 2268 expressly requires that predispute arbitration agreements be highlighted and include specific notification language, and requires specific notification processes with respect to such agreements. Rule 2268(a), (b), (c), (f). However, the FAA disallows such requirements because they "condition[] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally" and thus target arbitration agreements for disfavored treatment. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

[17] *NASD* v. *SEC,* 431 F3d 803, 806-807 (D.C. Cir. 2005).

[18] FINRA Reg. Not. 16-25, *supra* n. 10, at 3 ("FINRA's rules are approved by the Securities and Exchange Commission (SEC), binding on FINRA member firms and associated persons, and have the force of federal law. FINRA rules are not mere contracts that member firms and associated persons can modify."). *See also, Birkelbach v. SEC*, 751 F.3d 472, 475 n.2 (7th Cir. 2014) ("The SEC must approve FINRA's rules which, once adopted by the SEC, have the force of law."); *Credit Suisse First Boston v. Grunwald,* 400 F.3d 1119, 1128-32 (9th Cir. 2005) (holding that FINRA's rules have the force of law in preempting conflicting state laws).

[19] *Alpine Secs. Corp. v. FINRA*, 121 F.4th 1314, 1321 (D.C. Cir. 2024).

[20] *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995).

just like MSRB Rule G-37, are "government action of the purest sort"—and must be evaluated for consistency with federal law.[21]

In its Policy Statement, the SEC took the opportunity to address decades of precedent on the FAA, which makes clear that FINRA's arbitration rules do not comply with federal law because "the Federal securities statutes do not override the [FAA's] policy favoring the enforcement of arbitration agreements."[22] FINRA likewise should take the opportunity presented by the FINRA Forward initiative and the Notice to address the threshold issue of ensuring that its arbitration rules are lawful.

The FAA Protects Freedom of Choice

The principle underlying the FAA is that parties should be free to decide for themselves how they want to resolve their disputes, and thus be allowed to enter into enforceable contracts to govern that decision. The FAA protects freedom of choice, freedom of contract, and predictability of process, all of which should be of paramount importance to FINRA. Giving parties the freedom to utilize alternative dispute resolution processes if they so choose (or to continue to use FINRA arbitration if they choose that instead) will provide greater options and flexibility within the marketplace, ultimately inuring to the benefit of FINRA members and their customers alike.

Allowing FINRA members to exercise this freedom, which the FAA "protect[s] pretty absolutely,"[23] does not mean that FINRA's arbitration forum should cease to exist or that FINRA has no oversight authority with respect to FINRA members' arbitration in alternative fora. The Exchange Act provides that FINRA can promulgate rules designed to accomplish a number of objectives, including "in general, to protect investors and the public interest."[24] Under the authority granted by this provision, FINRA has promulgated rules respecting varied aspects of broker-dealer activities, and could likewise promulgate rules to protect customers rights in the context of their private arbitration agreements with broker-dealers—as long as such rules are consistent with the constraints imposed by federal law, including the FAA. But what federal law does *not* allow FINRA to do is categorically prohibit enforcement of predispute agreements to arbitrate in a non-FINRA forum and to waive class actions.

Proposed Amendments to FINRA Rules 2268, 12200, and 12204

To assist FINRA in conforming its rules to federal law without otherwise disturbing FINRA arbitration, TIMI includes as **Attachment 1** proposed amendments to FINRA Rules 2268, 12200, and 12204, reflected in redline.

[21] *See, e.g.*, *Blount*, *supra* n. 17, 61 F.3d at 939-41.

[22] SEC Policy Statement, *supra n*. 4, at 6-7.

[23] *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018).

[24] 15 U.S.C. § 78o-3(b)(6).

Conclusion

FINRA is undertaking an important and warranted review of its arbitration rules. FINRA Rules 2268, 12200, and 12204 are presently unlawful because they limit FINRA members' rights to enter into and enforce predispute agreements to arbitrate their disputes on an individual basis in a non-FINRA forum. For the reasons described above, and as elaborated further in the SEC Policy Statement, FINRA does not have authority under federal law to impose such restrictions on its members. Accordingly, FINRA must revise its arbitration rules to conform with federal law.

TIMI welcomes an opportunity to meet with and collaborate further with FINRA to conform FINRA's customer arbitration rules with federal law, while maintaining the FINRA arbitration forum and rules as an option for members who prefer that means of resolving disputes with their customers.

Respectfully submitted,

Nicole James Gilchrist
Chief Legal Officer, Thrivent Investment Management Inc.

Attachment 1: Proposed Amendments to FINRA Rules 2268, 12200, and 12204

Rule 2268: Requirements When Using Predispute Agreements to Arbitrate Under the Code of Arbitration Procedure for Customer Disputes ~~Arbitration Agreements for Customer Accounts~~

(a) Any predispute arbitration agreement requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes shall be highlighted and shall be immediately preceded by the following language in outline form.

This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:

(1) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(2) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(3) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(4) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(5) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.

(6) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(7) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.

(b)(1) In any agreement containing a predispute arbitration clause requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes ~~predispute arbitration agreement~~, there shall be a highlighted statement immediately preceding any signature line or other place for indicating agreement that states that the agreement contains a predispute arbitration clause requiring arbitration under the Code of Arbitration Procedure for Customer Disputes. The statement shall also indicate at what page and paragraph the arbitration clause is located.

(2) Within thirty days of signing, a copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(c)(1) With respect to any agreement containing a predispute arbitration clause requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes, ~~A~~a member shall provide a customer with a copy of any ~~predispute arbitration~~ such clause or customer agreement executed between the customer and the member, or inform the customer that the member does not have a copy thereof, within ten business days of receipt of the customer's request.

If a customer requests such a copy before the member has provided the customer with a copy pursuant to paragraph (b)(2) above, the member must provide a copy to the customer by the earlier date required by this paragraph (c)(1) or by paragraph (b)(2).

(2) Upon request by a customer, a member shall provide the customer with the names of, and information on how to contact or obtain the ~~rules of, all arbitration forums in which a claim may be filed under the agreement~~ Code of Arbitration Procedure for Customer Disputes.

(d) No agreement containing a predispute arbitration clause requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes ~~predispute arbitration agreement~~ shall include any condition that:

(1) limits or contradicts the rules of any self-regulatory organization;

(2) limits the ability of a party to file any claim in arbitration;

(3) limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement;

(4) limits the ability of arbitrators to make any award.

(e) If a customer files a complaint in court against a member that contains claims that are subject to arbitration pursuant to a predispute agreement between the member and the customer requiring the parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes ~~predispute arbitration agreement between the member and the customer~~, the member may seek to compel arbitration of the claims that are subject to arbitration. If the member seeks to compel arbitration of such claims, the member must agree to arbitrate all of the claims contained in the complaint if the customer so requests.

(f) All agreements containing a predispute arbitration clause requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes shall include a statement that "No person shall bring a putative or certified class action to arbitration under the Code of Arbitration Procedure for Customer Disputes, nor seek to enforce any predispute arbitration agreement requiring parties to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate disputes under the Code of Arbitration Procedure for Customer Disputes shall not constitute a waiver of any rights under this agreement except to the extent stated herein."

(g) The provisions of this Rule shall become effective on May 1, 2005. The provisions of paragraph (c) shall apply to all members as of the effective date of this Rule regardless of when the customer agreement in question was executed. Otherwise, agreements signed by a customer before May 1, 2005 are subject to the provisions of this Rule in effect at the time the agreement was signed.

(h)(1) No provision of this Rule or of the Code of Arbitration Procedure for Customer Disputes shall apply to, or limit any member or other person's ability to enter into or enforce, any predispute arbitration agreement that: (i) requires parties to arbitrate disputes under rules and/or procedures other than the Code of Arbitration Procedure for Customer Disputes; or (ii) requires arbitration in any forum other than the arbitration forum established and governed by the Code of Arbitration Procedure for Customer Disputes.

(2) Rule 2268A, rather than this Rule, shall apply to any member or other person who has entered into a predispute arbitration agreement that falls within the categories set forth in (h)(1)(i) and/or (h)(1)(ii) of this Rule, and such member or other person shall be able to enter into and enforce such an agreement to the full extent provided under the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.).

Rule 2268A: Using Predispute Agreements to Arbitrate Under Rules Other Than The Code Of Arbitration Procedure For Customer Disputes

(a) Any member or other person may enter into a predispute arbitration agreement that:

(1) requires arbitration in any forum other than the arbitration forum established and governed by the Code of Arbitration Procedure for Customer Disputes; and/or

(2) requires arbitration under rules and/or procedures other than the Code of Arbitration Procedure for Customer Disputes.

(b) Any member or other person who has entered into a predispute arbitration agreement that falls within paragraph (a) of this Rule shall be able to enter into and enforce such an agreement to the full extent provided under the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.).

Rule 12200: Arbitration Under an ~~Arbitration~~ Agreement to Arbitrate Under the Code of Arbitration Procedure for Customer Disputes ~~or the Rules of FINRA~~

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or
  - (2) Requested by the customer, and not contrary to a predispute arbitration agreement that:
    - (i) requires parties to arbitrate disputes under rules and/or procedures other than the Code; or
    - (ii) requires arbitration in any forum other than the arbitration forum established and governed by the Code.
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

Rule 12204: Class Action Claims

(a) Class action claims may not be arbitrated under the Code.

(b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement requiring parties to arbitrate disputes under the Code against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

This paragraph does not otherwise affect the enforceability of any rights under this Code or any other agreement.

(e)(1) No provision of this Rule, or any other provision of the Code, shall apply to, or limit any member or other person's ability to enter into or enforce, any predispute arbitration agreement that: (i) requires parties to arbitrate disputes under rules and/or procedures other than the Code; or (ii) requires arbitration in any forum other than the arbitration forum established and governed by the Code.

(2) Any member or other person who has entered into a predispute arbitration agreement that falls within the categories set forth in (e)(1)(i) and/or (e)(1)(ii) of this Rule shall be able to enter into and enforce such an agreement to the full extent provided under the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.).