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Submitted to FINRA May 30, 2017

On March 21, 2017, the Financial Industry Regulatory Authority ("FINRA") published "*Special Notice*: Engagement Initiative / FINRA Requests Comment on Potential Enhancement to Certain Engagement Programs / Comment Period Expires May 5, 2017." As set forth, in part, in the "Executive Summary" of the *Special Notice*:

> FINRA's status as a self-regulatory organization (SRO) requires that, in pursuing its mission of investor protection and market integrity, FINRA engage effectively with its member firms, as well as investors and other stakeholders. FINRA currently expends significant resources on its engagement programs, and many individuals from its member firms and the public also devote time to these programs. This Notice provides an overview of these engagement programs, with particular focus on FINRA's committees, rulemaking process and member relations and related programs. FINRA requests comment regarding how it can enhance these programs to promote its mission and its effectiveness as an SRO.

For an organization that "expends significant resources on its engagement programs," FINRA didn't craft an engaging *Special Notice* because within 45-days-deadline of May 5th, only ten comments dated March 22 to May 5, 2017 were posted. Among the comments was one dated April 10, 2017, from the Securities Industry and Financial Markets Association ("SIFMA"), which, in pertinent part, stated that:

> [S]IFMA requests that the comment period for the Notice be extended by 45 days.
>
> SIFMA and its members appreciate that FINRA is engaging in this initiative to solicit comments on its engagement and transparency. The Notice is wide-ranging and includes more than 100 questions for consideration. . .

In its April 10th request for more time, SIFMA described itself in *Footnote 1*:

> SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

If SIFMA, the industry's largest trade group, needed an additional 45 days (double the initial time provided in the March release) to comment on FINRA's *Special Notice*, what did FINRA imagine would be the reaction from its smaller member firms and so-called stakeholders? To make matters worse, as of May 30, 2017, FINRA had posted five notices requesting comment:

> *1. Special Notice* 3/21/17: FINRA Requests Comment on Potential Enhancements to Certain Engagement Programs COMMENT PERIOD EXPIRES: JUNE 19, 2017
>
> 2. *Regulatory Notice 17-14*: FINRA Requests Comment on FINRA Rules Impacting Capital Formation COMMENT PERIOD EXPIRES: MAY 30, 2017
>
> *3. Regulatory Notice 17-15*: FINRA Requests Comment on Proposed Amendments to the FINRA Corporate Financing Rule COMMENT PERIOD EXPIRES: MAY 30, 2017
>
> 4. *Regulatory Notice 17-16*: FINRA Requests Comment on Proposed Limited Safe Harbor From FINRA Equity and Debt Research Rules for Desk Commentary COMMENT PERIOD EXPIRES: MAY 30, 2017
>
> 5. *Regulatory Notice 17*-20: FINRA Requests Comment on the Effectiveness and Efficiency of Its Rules on Outside Business Activities and Private Securities Transactions COMMENT PERIOD EXPIRES: JUNE 29, 2017

Five pending FINRA notices with three seeking comment by the same date. Clearly, FINRA's engagement process is disengaged from an understanding of its audience's resources.

Extension to June 19, 2017

Rather than acknowledge the meaning of the tepid response and withdraw the *Special Notice*, FINRA extended the comment deadline from May 5th to June 19, 2017. Why bother? What's the point? As of May 30, 2017, FINRA posted only six additional comments to the *Special Notice* (including a second from SIFMA) dated between May 6 and May 11, 2017. In total, a mere 16 responses from 15 parties – and that from an organization of nearly 4,000 member firms employing over 600,000 registered representatives! FINRA needs to learn two lessons:

> 1. the *Special Notice* sought answers to questions no one was asking; and,
>
> 2. FINRA remains out of touch with what constitutes issues of interest to its members, its members' associated persons, and the investing public.

30 Page Behemoth

The 30-page size and scope of *the Special Notice* rendered it inappropriate for its self-professed task of seeking "comment from all interested parties." Smaller member firms and the industry's hard-working associated persons lack the time to read such a Behemoth, much less

respond to the facts, topics, subtopics, queries, and multi-part follow-ons. Which makes me wonder whether the *Special Notice* was truly intended to elicit responses from all interested parties or was it rigged to cater to those with the funding and staffing necessary to process the material and draft a comment. If SIFMA, the self-professed "voice of the U.S. securities industry," stumbles under the burden of commenting on a FINRA notice, who else has the resources to carry that same load?

The FINRA Camel

The overwhelming majority of industry participants don't give a damn about FINRA's advisory, ad hoc, and district committees; panels; councils; boards; rulemaking process; member relations, education, and compliance resources; operational reporting; and other information resources. Most industry participants are busy paying bills and trying to keep pace with the daily demands of compliance and regulation. Large publicly-traded companies send their executives to all sorts of industry meetings (many of which are pejoratively referred to as "junkets") because the expense is fobbed off onto their shareholders. For a smaller FINRA firm or an associated individual, service on a FINRA committee involves a likely out-of-pocket payment for such dedication and valuable time away from the office. Even if FINRA pays for the travel, room, and board for such service, that reimbursement does not necessarily off-set the time away from a small firm by its owner or a key person. As such, service on FINRA's committees is a luxury few smaller firms and individuals can afford, which may explain why we tend to see the same faces, year after year, rotating among the various committees.

I acknowledge that many who serve do so out of a sincere desire to better the FINRA community, but there is no evidence that such service has moved the needle of reform in a meaningful direction. Further, the resort to the same gene pool of talent produces a predictable byproduct of proposals that never quite rock the boat and never quite transform FINRA into a more effective and fairer regulator. There is much truth in the old saying that a camel is a horse created by a committee. FINRA has a stable full of camels.

Unappetizing Bait

Respectfully, I decline to bite on the dangling bait of questions posed in the *Special Notice* and will provide commentary that I feel better addresses some of the larger and more fundamental issues. I will, however, confine my comments to addressing specific language in the *Special Notice*'s "Background and the Importance of Engagement" section:

> FINRA is an SRO for the broker-dealer industry and is dedicated to investor protection and market integrity through effective and efficient regulation that facilitates vibrant capital markets. There are many stakeholders with strong interests in how FINRA pursues this mission, including FINRA's member firms, investors and other regulators and policymakers.

The *Special Notice* references "many stakeholders with strong interests" in FINRA's mission. In reality, the majority of so-called stakeholders have virtually no role of consequence at the SRO. The vote on FINRA elective office and on FINRA rule proposals is the exclusive franchise of FINRA member firms. In limiting voting to member firms, FINRA perpetuates a gerrymandered Board that furthers the disproportionate influence of its larger member firms.

Board Beyond Belief

The *Special Notice* seems a familiar effort to manicure the hand of FINRA, which remains within a metal gauntlet. In the face of years of regulatory failure, the *Special Notice* implores us to believe that FINRA is dedicated to reform and involving its so-called stakeholders. That same notice, however, admonishes us to not suggest anything meaningful like reconstituting the Board. At present, FINRA's Board of Governors consists of the following 23 members:

Chief Executive Officer of FINRA;

12 Public Governors;

1 Floor Member Governor;

1 Independent Dealer/Insurance Affiliate Governor;

1 Investment Company Affiliate Governor;

3 Small Firm Governors;

1 Mid-Size Firm Governor; and

3 Large Firm Governors

The three FINRA member firm sizes are determined by this formula:

Small Firm: 1 to 150 registered representative

Mid-Size Firm: 151 to 499 registered representatives

Large Firm: 500 or more registered representative

When FINRA's Board was purportedly rebalanced along the lines of the numbers of registered persons employed by each member firm rather than the previous one-firm-one-vote standard, the professed rationale was that such a restructuring better reflected the membership. I never accepted that explanation and still refuse to drink the *Kool-Aid*. Registered reps are counted when it comes to allocating seats on the Board; however, those same reps are denied any vote on any matter at the SRO. The message sent by such a duplicitous policy is that those who

serve in Wall Street's trenches cannot be trusted to further self-regulation but those who sit in the C-Suites can. Really? Since when? Or, more aptly: How's that worked out for you? Should I mention Madoff? Should I raise the painful history of the *Great Recession*? Do you want to talk about Lehman Brothers and Bear Stearns? When would you like to discuss FINRA's granting of a requalification waiver to Jon Corzine? When should we tackle Muni-Bond and LIBOR rigging? That all went on while NASD's and FINRA's Large member firms pretty much ran the shop.

Lies, Damn Lies, and Statistics

According to FINRA's online "Statistics" page, five years ago in 2012, FINRA had 4,289 firms with 630,391 reps. As of April 2017, the SRO had 3,813 member firms employing 633,822 registered representatives. As such, 476 firms (about 11%) have vanished from the ranks in half a decade. According to FINRA's "Upcoming FINRA Board of Governors Election" (FINRA Election Notice, May 23, 2017) at

> As of close of business on Monday, May 22, 2017, the number of FINRA small firms was 3,455, and the number of large firms was 180.

Using the *May 2017 Election Notice* numbers and roughly backing them into FINRA's current statistics, about 91% of FINRA's member firms fall within the "Small" category and only about 5% fall under the "Large" (by extrapolation, about 4% fall under the "Mid-Sized" category). Notwithstanding that lop-sided distribution in favor of Small Member Firms:

- *91% of FINRA's Small firms are allocated only 3 seats or 13% on its Board; and*
- *5% of FINRA's Large firms are allocated 3 seats or 13% on its Board.*

It doesn't look right because it isn't right. FINRA is run by a gerrymandered Board that was engineered in order to entrench powerful industry participants and to slowly strangle the influence of smaller firms and other industry stakeholders.

Getting Mean (When We Need Median)

I have seen studies that place the average height for an American male at 5' 10," with 25% of the population at 5'8" or shorter and another 25% of the population at 6' or taller. Let's call males 5'8" and shorter "Short;" those taller than 5'8" but shorter than 6' "Mid-sized;" and those taller than 6' "Tall." Let's guesstimate that 91% of males are 6'2" or shorter. Although such labels as short or tall may be somewhat arbitrarily assigned, they should not change simply when a member of one group is compared to that of another. For example, if you are 6'10" and I am 6'1," I am not "short" simply because I am compared to someone who is taller. Short is not the same as shorter; larger is not the same as larger. There is a difference between absolute and relative terms.

Simply comparing a business with 100 employees to another business of 2,000 employees, does not allow us to determine whether the 100-employee firm is "small" or the 2,000-employee firm is "large" because those definitions are derived from the population being measured. If there are 10,000 firms in an industry and 9,000 have no more than 20 employees, then a firm with 100 employees and a firm with 2,000 employees are likely "Large" firms. Similarly, if in another industry with 10,000 firms, 9,000 have 4,000 or more employees, then a firm with 100 employees and a firm with 2,000 employees are likely "Small" firms.

Dividing FINRA's April 2017 tally of 633,822 registered representatives by 3,813 member firms shows that FINRA's average firm employs 166 registered representatives. This version of "average" is calculated by the mathematical "mean" formula. FINRA's By-Laws artificially define a "Small" member as one having no more than 150 reps. When you consider that FINRA's *average sized* firm employs only 16 more reps than what is characterized as a "Small" firm, you begin to understand why the labels are more political than accurate.

Consider an array of nine firms with 1, 2, 8, 15, 20, 60, 75, 500, and 1,000 reps:

- **the "mean"** would be 1681/9 = 186.78; and
- **the "median"** (the fifth firm) would be "20."

In an effort to revise FINRA's arbitrary member firm classifications and instill some apolitical methodology into the process, FINRA should calculate its "average" member size pursuant to the mathematical "median," which is the actual size of its mid-point member firm (the 1,907th member firm). In addition to publishing its "median" firm size on its *Statistics* page, FINRA should provide us with similar breakpoints for the bottom 25% and the higher 25% of its membership range. I would then amend the By-Laws so as to classify the bottom 25% of FINRA's membership as "Small;" the upper 25% as "Large;" and the 50% of the firms between the two extremes as "Mid-sized."

Basing FINRA's three membership classes on the median metrics would better frame the nature of the organization's constituent parts. FINRA Board membership should be revised to seat twice as many Governors from the "Mid-size" membership versus either of the "Small" or "Large;" and the voting of the "Mid-sized" Firm Governors should equal the combined vote of the "Small" and "Large" Firm Governors.

Disenfranchisement

Unquestionably, FINRA's 180 Large firms employ the bulk of the 633,822 registered representatives. As I have long noted in the press and my published works, it is unconscionable that there is no seat on FINRA's Board specifically set aside for a Registered Representative

Governor and that there is no voting afforded to registered men and women. It all smacks of the constitutionally discredited practice of deeming certain human beings as 3/5ths of a person for purposes of allocating a state's voting power but a non-person for all else. In response to legitimate calls to democratize its Board, FINRA thinks it is cleverly deflecting the criticism by cynically offering to adjust its committee structures and so-called engagement programs:

> Because they are established by statute, regulation and FINRA's By-Laws, the checks and balances described above—FINRA's Board composition, the comprehensive SEC oversight of FINRA and the limitations on FINRA's powers—operate as effective constraints on FINRA's Board and management and cannot be changed by them. However, FINRA's Board and management can adjust many aspects of FINRA's committee structure and other elements of its engagement programs described below. In reviewing comments on these engagement programs, FINRA intends to evaluate any potential changes in light of this framework of checks and balances governing FINRA, the policy objectives it reflects and the extent to which such changes would enable FINRA to more effectively protect investors and promote market integrity while helping to support vibrant capital markets.

Page 4 of the Special Notice

The above concluding paragraph from the "Background and Importance of Engagement" section of the *Special Notice* is nothing more than calculated disinformation designed to maintain the failed status quo at FINRA. FINRA altered the composition of its Board so as to dilute the voting role of its smaller member firms and diminish their influence. That reallocation of power was accomplished via SEC-approved rulemaking, and it can be reformed via that same route. In 2017, FINRA pretends that its Board composition "cannot be changed." We are indeed in the age of alternative facts. As if proposing a By-Law amendment to restructure the Board so as to make it fairer and more representative is illegal?

Table Stakes

The public trust in the ability of the broker-dealer industry to self-regulate itself has been violated over and over again. Moreover, FINRA has turned its back on the needs of its smaller members and has pandered to the needs of its *Too-Big-To-Fail* member firms. Absent the power of the ballot and the termination of larger member firms' disproportionate influence, all other market participants are shooting blanks. The *Special Notice* references FINRA's "stakeholders" but what stake does any market participant have at FINRA without a vote? If I can't get a seat at the poker table, what does it matter what the table stakes are?

> Effective engagement with these stakeholders is vital to FINRA for several reasons. First, as is the case for any regulator, FINRA must understand what it regulates. Active and continuous engagement with its stakeholders helps provide FINRA with expertise

> regarding the various business models of its member firms, the complex and rapidly evolving securities markets in which they operate and the wide range of retail and institutional investors those firms serve. FINRA can use what it learns from this engagement to enrich its regulatory programs and identify ways to protect investors and promote market integrity that are more practical, tailored and effective. For example, by engaging with member firms and investors, FINRA often learns about emerging issues or concerns, which helps it stay ahead of potential risks to investors and the markets. In addition, through such engagement, FINRA can also receive constructive feedback about the extent to which its rules or programs are achieving their goals and about potential changes that would better serve investors and promote strong capital markets.

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There has never been and there is not now an "active and continuous engagement" by FINRA with its stakeholders. Stakeholders have no meaningful role in FINRA and are not inclined to provide "constructive feedback." There is no partnership or trust between the regulator and the regulated. There is no sense of community for public investors, their advocates, and the industry's hundreds of thousands of disenfranchised registered representatives. FINRA's years of interest in harvesting "expertise" from among its stakeholders was little more than doling out patronage and sinecures. Too many of those who served on too many of FINRA's committees, subcommittees, and advisory boards performed no service of value. It all comes off as certificates of participation. Unquestionably, there are those who serve with honor and distinction, and their efforts have yielded recommendations of value and merit; but there is also far too much redundancy and window dressing. The metastatic growth of FINRA's committees/boards is of no value. There is a saying that a camel is a horse created by committee; and FINRA has a stable full of camels.

Ineffective Engagement

> A differentiating feature of FINRA's SRO model is that it can (and should) actively engage with its member firms—and those member firms can participate where appropriate in developing FINRA's rules and programs—in ways not available to the government, such as through the committee structure described below. The benefits this model offers, including providing FINRA unique access to information and expertise that facilitates efficient regulation of a highly complex industry, cannot be fully achieved if FINRA is not effectively engaged with its member firms, as well as other stakeholders.

Page 3 of the Special Notice

Disingenuously, FINRA suggests that its regulatory structure and effectiveness is the byproduct of "ways not available to the government." I would argue that FINRA is a bloated, non-responsive, quasi-governmental mess of too many executives, too many departments, and too

many committees and advisory groups. As with most entrenched bureaucracies, FINRA has been brutal in rebuffing its critics and marginalizing those who dare to disagree. It is time for FINRA to embrace dissent and involve those of us in the dissident and reform communities. We are, however, an impatient constituency, having been relegated to the wasteland by FINRA for too long. The price of our involvement is a focus on results. We seek reform. We want competency and effectiveness on an expedited basis.

Inappropriate Member Influence

> In considering FINRA's current engagement with its member firms as part of these programs—as well as any potential changes—it is useful to note the balance that must be struck between achieving the benefits of such engagement and ensuring that FINRA remains an effective regulator. Insufficient member engagement may result in FINRA failing to fully achieve the benefits of its SRO model. For example, it may not be as informed about market practices or may not respond as quickly to market developments that require attention. On the other hand, inappropriate member influence on regulatory programs could result in the failure to adequately proscribe, sanction and deter behavior that may harm investors and markets or undermine public confidence in the regulation of the broker-dealer industry.

Page 3 of the Special Notice

I challenge the *Special Notice*'s premise that FINRA "remains an effective regulator." I do not believe that goal has been met for nearly three decades. Similarly, it is not merely a proposition that "insufficient member engagement" may cause FINRA to fail as an SRO; insufficient member engagement has caused FINRA to fail as an SRO. FINRA and its predecessor NASD pursued a hostile agenda to alienate smaller member firms while advancing the needs of larger firms. After fragmenting its membership and fracturing the partnership between the regulator and regulated, FINRA learned nothing from such discredited organizational politics. Nothing better illustrates that point than this insulting quote from the *Special Notice*:

> "On the other hand, inappropriate member influence on regulatory programs could result in the failure to adequately proscribe, sanction and deter behavior that may harm investors and markets or undermine public confidence in the regulation of the broker-dealer industry."

FINRA, a member organization, fears "inappropriate" member influence. One question: ***Who gets to decide when member influence crosses over from appropriate to inappropriate?*** Ay, there's the rub! As long as those in power at FINRA remain in power, then the members' influence seems to be deemed appropriate. When the winds shift, however, and members desire reform and seek to enhance the composition of the Board so as to widen the stakeholders' base, that behavior is characterized as "inappropriate influence."

Past as Prologue

On August 1, 2002, *On Wall Street* magazine published "Attorney Seeks Broker Voice on NASD Board," which discussed several proposals I had made, among which were that:

1. NASD consider allowing some 700,000 registered persons the right to vote on rule proposals involving their careers because I believed that their ongoing disenfranchisement favored employer over employee and management over labor. I believed that registered persons would feel more involved in the regulatory process if they had a voice. It was the idea of giving someone a stake in self-regulation and transforming them into stakeholders.

2. Forms U-4 should be filed directly by registered reps with CRD (with full copies to the employing BD). I called for an end to filing only through the employer member firm. I did not propose any change in any supervisory rules and regulations. I believed that RRs should have the ability to directly access their registration and that this is an important step to ensure that such individuals are viewed as professionals rather than mere salespersons. It is the same process required of lawyers and doctors, who do not maintain their licenses or registrations solely through the grace of an employer. Put another way, imagine if you could only submit an application for a driver's license through your employer; and then imagine that your license automatically expired when you quit or were fired from a job – and the only way to renew your license was through another employer. As silly as that make-believe licensing process seems, that's about how it works for the industry's registered representatives.

On Wall Street noted this reaction to my thoughts from NASD:

> In response to a request for comment, Tom Holloman, a spokesman for NASD Regulation Inc., said: "Mr. Singer's agenda is clearly out of step with the times, pandering to those who would seek less, not more oversight and accountability. For example, Mr. Singer's proposal that registered representatives vote on all regulatory changes governing their behavior would almost certainly block or delay any effort to enact meaningful reforms. We will resist proposals that would water down industry oversight."

Some 15 years ago, I commented in a constructive manner and NASD's petulant response was conveyed to me in the press. NASD spokesman Hollomon (who I had never spoken to or communicated with) pejoratively dismissed my opinions as *out of step with the times, pandering,* and *watering down industry oversight*. Is that what is meant by engagement?

<u>Private Sector Regulatory Organization ("PSRO")</u>

All of those in the FINRA community must accept the symbiotic need to police the industry, to root out the bad actors, to empower regulatory staff with the prerogatives and tools to fairly

investigate and prosecute misconduct, and, in the end, to persuade the public for whom the industry exists that, yes, the private sector is a more nimble and effective regulator than big government. If you re-read the *Special Notice,* you will not find a single reference to the appropriate influence of associated persons, public customers, issuers, and other market participants. Who stands for those stakeholders? Who speaks out on their behalf? When do those market participants get to raise concerns about the inappropriate influence of FINRA's larger firms and of FINRA itself?

I urge FINRA to reinvent itself as a "private sector regulatory organization" ("PSRO") and to expand and enhance its mission from one for the broker-dealer industry towards one for the larger private sector served by the financial services community. In furtherance of that change, the PSRO would serve in a holding-company role that oversees each of three regulatory divisions dedicated to Small member firms (smallest 25% of broker-dealers), Mid-sized member firms (50% of broker-dealers measured from midpoint), and Large member firms (largest 25% of broker-dealers). Pursuant to that restructuring, each division would draft a rulebook responsive to the unique needs of its constituency. The PSRO would fully enfranchise associated persons, and provide for the proportionate representation for such stakeholders as public customers, issuers, and regulators. Without question, a PSRO Board seat should be set aside for an investors' advocacy group such as PIABA.

As part of reimagining the SRO into a more expansive PSRO, all industry registration and continuing education should be undertaken directly by an applicant through the PSRO holding company and not through the member firms. FINRA should establish an *Anti-Fraud Fund* whereby all defrauded public customers would obtain restitution in the event that member firms or associated persons fail to timely honor any awards for compensatory damages, costs, and fees. Finally, I would abolish mandatory arbitration for customers and associated persons.

Conclusion

From my perspective, FINRA is often little more than an inept and frequently ineffective regulator. Unabashedly and without any hesitation, I have long characterized FINRA as the lap dog of its larger member firms and little more than a hijacked trade group intent on eliminating its smaller members and promoting financial superstores and regional brokerages. Harsh words? Absolutely. Off the mark and unfair? I think not.

As a former Series 7 and 63 registered representative; in-house brokerage, mutual fund, and investment company lawyer; American Stock Exchange lawyer and NASD attorney; as one of the founders of the NASD and then the FINRA Dissident Movement; as one of the four 1998 original petition candidates who first contested NASD's nominated Board candidates; and as a long-time advocate for industry reform, I remain disappointed with FINRA's persistent failure to embrace disparate views and to constructively reach out to dissidents. I have a big mouth. I have bellowed from the wilderness since the 1990s; but there is a difference, after all, between hearing and listening. I'm not questioning whether FINRA hears me; I'm questioning whether FINRA listens.

During my 35 years on the *Street*, I have submitted only a couple of comments in response to various NASD/FINRA notices. Frankly, I view the effort as a waste of my time because the SRO only seems interested in confirmation of whatever initiative it is proposing. Why then did I publish this long-winded and expansive comment? Maybe it's old age catching up with me and a sense that this may be the last opportunity to lay it all out on the line.

We have become a nation that ponders everything and resolves nothing. In that regard, dithering has become the hallmark of FINRA. At some point, FINRA's management must shoot the stars, pick a direction, and navigate towards the future. The time for notices, proposals, comment and debate is long past. We can't keep sailing around in circles. I believe that new FINRA CEO Cook has the skills to set course, but I also know that in doing so, he will need to turn a battleship. Notwithstanding, it's time to weigh anchor.

In the immortal words of that great Wall Street regulator Yoda: "Do or do not, there is no try."