Luxor Financial Group
Business Development & Compliance Consultants for Brokerage Firms & RIA's
29 Frost Lane, Lawrence, New York 11559
Tel: 347-247-9977 email: Ken@luxorbd.com

June 27th 2019

Via email: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA Inc
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 19-17
Proposed FINRA Rule 4111

Dear Ms. Mitchell:

I write this comment today on behalf of Luxor Financial Group, Inc and numerous small firms that we represent regarding Proposed Rule 4111 (the "Proposed Rule"). The spirit and substance of the Proposed Rule are a cause of deep concern, and are strikingly intrusive even to an industry accustomed to the intense scrutiny necessary to safeguard the public. In short, the Proposed Rule should not be adopted.

In Regulatory Notice 19-17, which requests comment on the Proposed Rule, several considerations are set forth to justify implementation of Rule 4111. The impetus at the heart of the matter is the desire to strengthen the controls FINRA has which previously prevented enforcement and sanction of misconduct until *after* such harm has occurred. While misconduct and sanction usually occur in that order, and represents the sort of causal relationship inherent in any regulatory schema, Regulatory Notice 19-17 describes it as an undue constraint on the enforcement process. Regulatory Notice 19-17 concedes that market forces will cause bad actors to "eventually be forced out of the industry" regardless Rule 4111 is necessary as a prophylactic measures. The logic here is perplexing and un-American. The Notice cites certain research that suggests that past behavior can be an indicator of future misconduct, but sociology is hardly the province of financial regulators; the tone is Orwellian.

FINRA provides no evidence, argument, or data to prove that the Proposed Rule will cure the problem that it has been invented to solve. FINRA provides no evidence, argument, or data to support the proposition that the Proposed Rule is what is minimally necessary to address the unknown degree of harm posed by the small group of repeat offenders, or why these offenders seemingly can't be reached under FINRA's current powers. There is no publicly available data to suggest whether public opinion aligns with the Proposed Rule. There is no consideration of how public opinion and trust may be affected by the Proposed Rule. FINRA concludes the background and discussion portion of the Notice by alluding to Consolidated Rule 9208 promulgated by the Investment Industry Regulatory Organization of Canada, which targets problematic firms. Perhaps a targeted solution would alleviate many of the concerns currently circulating among member firms about this rule, but FINRA only notes that are "not proposing it at this time".

Indeed, what is perhaps inadvertently conveyed as impetus for the rule is frustration with the rights currently exercised by member firms. FINRA reductively and summarily addresses these rights, and yet member firms are *entitled* to reasonable constraints on regulation, as well as the expectation that the regulatory system will not seek to impose rules that are overly broad and arbitrary. While it is in the best interest of FINRA, the investing public, and most member firms to remove bad actors- this escalation in enforcement compounds the frustration of small firms already cornered by a complex and layered web of rules. The Proposed Rule affects broker-dealers both preemptively and retroactively in a manner that the standard court system would surely limit. While surely the public trust is eroded when there is customer harm, public trust is also eroded when they are given cause to wonder why the current system of rules and regulations protecting them is inadequate as is.

Although unpaid arbitration awards and recidivist brokers may be inconsistent with FINRA's mission, this does not automatically warrant the imposition of a complicated series of thresholds and calculations that will, with virtual certainty, chill the rights of member firms to do business and to freely associate with brokers. Regulatory Notice 19-17 sends the clear message that the primary concern of FINRA is the "particular challenge" that it faces in examining and disciplining individual firms with a history of misconduct. It is a frankly astonishing admission that FINRA has begun to see the due-process rights of its member firms as an inconvenience that is superseded when member firms "take advantage of the limits" of legal constraints on enforcement activity. Regulatory Notice 19-17 explicitly states:

> **Enforcement actions in turn can only be brought after a rule has been violated-and any resulting consumer harm has already occurred.** In addition, these proceedings can take significant time to develop, prosecute, and conclude, during which time the individual or firm is able to continue misconduct.

The right of the individual or firm to forestall the imposition of disciplinary sanctions by exercising their right to a legal defense is not an inconvenience that can be circumvented as dictated by FINRA standing in the shoes of the investing public. There is some transparent frustration here with the legal constraints on their enforcement and the time it takes to pursue them to a conclusion and remedy, but this Proposed Rule would preemptively enforce economic sanctions and undermine the appeals process. This initiative is ill advised, and unfair to many of those doing business in the industry. Many FINRA member firms, especially smaller firms, will feel an outsized impact under this new proposed rule. Free access to cash-on-hand or qualified securities is critical to the now shrinking field of small firms. A restricted deposit requirement compromises a firm's ability to transact business that may be necessary to both maintain operations and cover payment of any pending arbitration claims. With access to both a smaller pool of potential employees marked with the "scarlet letter" of prior misconduct and with restricted access to funds, smaller firms will struggle to exist, while larger firms will view it as the cost of doing business.

Small firms budget carefully, and allot their dollars into acquisitions, technology, personnel and compliance. Under the Proposed Rule, some will be forced to tie up their funds in a restricted deposit account, or terminate employees who would trigger this requirement. These terminated employees would not simply exit the financial services industry; they have always migrated to "advice" based positions or to un-registered firms, where there is even less oversight. The proposed waiver to compensate for financial hardship is a perfunctory consideration; anyone with knowledge of the industry knows that to avail oneself of this waiver would deter recruitment and lead to brokers leaving the firm. The ripple effects of the Proposed Rule seem to have been deemed unworthy of consideration or description. When small to mid-sized firms are inadvertently crippled it gives the investing public less choice. Large firms will consolidate more of the market. These are the same firms that caused the 2008 financial crisis and who will far more easily absorb the impact of the Proposed Rule.

A cursory review of the BrokerCheck system reveals thousands of regulatory actions as well as client arbitrations against larger broker dealers, who often have thousands of disclosed incidents for their representatives. Yet due to the size and resources of larger firms, the numeric thresholds imposed would result in absorbable losses, while smaller firms would be faced with an existential crisis.

To mitigate the impact on smaller firms, we recommend that:

1. The threshold be raised on reportable settlements to the $50,000 - $100,00 range as the current amounts for reporting are extremely low and create a large amount of reportable events from settlements which are simply settled to avoid the high costs of litigation;
2. Association with a disciplined firm should be held against the actual ownership persons, rather than brokers who were simply affiliated as this makes brokers guilty by association as opposed to actual misconduct by the broker and consequently unfairly punishes the firm that hires that broker;
3. Nuisance arbitrations that are settled without admission of guilt be addressed;
4. Remove the requirement of placing funds on hold during proceedings as this is devastating to small Firms with limited resources. Moreover, this issue is resolved for Firms that have an E&O policy which should certainly eliminate the requirement for a cash reserve for firms who have a policy in place;
5. Pending actions should have no bearing as everyone is entitled to have issues adjudicated prior to being penalized;
6. Additional considerations need to be addressed as to the disproportionate impact the Proposed Rule will have on small firms.

Sincerely,

Ken Norensberg

Ken Norensberg,
Managing Director, Luxor Financial Group
& Former FINRA Governor