Peter J.Chepucavage
3705 Corey Pl.N.W.
Washington D.C.20016
202-364-3804
iasbda@gmail.com

By email to pubcom@finra.org

Ms. Jennifer Piorko Mitchell

FINRA Office of the Corporate Secretary

1735 K Street, NW Washington, DC

Re: Special Notice on Transparency and Engagement (March 21, 2017)

Dear Ms. Piorko:

I submit the following in response to the request for comments on FINRA's 360 review of its policies.While the comments are critical of certain policies they are not intended to be critical of the staff,senior management or current Board.My comments also may go beyond transparency and engagement but each suggests a sub- committee study and disclosure of the results which are the touchstones for engagement and transparency.Without such reviews policies can become unfair over time because they are embedded without critical ongoing analysis.Therefore I applaud this effort and hope my comments are considered constructive.

I) FINRA's Form U-5 needs to be modified to include only regulatory violations and not employment disputes wherein the U-5 is weaponized against employees.At the very least the staff should be reviewing all employer comments.A sub-committee should be formed to review the entire termination process

I am a former regulator and securities attorney who has watched the U-5 process abused for many years. Initially employers were limited by the threat of a defamation case until a court gave them immunity.See Rosenberg case infra.Now the only protection is FINRA review.But there is no directive to the staff to review and correct an incomplete or inaccurate U-5 even when the employee complains. This is despite the fact that FINRA emphasizes the importance of complete and accurate U-5.s and threatens disciplinary action for U-5's that don't meet that standard. See Regulatory Notice 10-39 . See also Melanie Waddell, FINRA 's Top 5 Enforcement Issues of 2011, ADVISORONE (Mar. 12, 2012), http://www.advisorone.com/2012/03/12/finras-top-5-enforcement-issues-of-2011 (listing FINRA's top enforcement issues). Derek Linden a senior staffer states the policy as follows;" Finra reviews all terminations for cause, Mr. Linden added, and requires corrective action by firms when disclosures appear to be incomplete or inaccurate." I recommend the formation of a permanent subcommittee that would conduct a deep review of

the termination process with a view toward recommending changes.That subcommittee should have a combination of employee counsel and member HR staff and should do extensive interviews with other employees and their counsel

Long History of Abuse

Two law review articles detail the large number of instances involving U-5 abuse: http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3201&context=vlr See also http://scholarship.law.stjohns.edu/cqi/viewcontent.cqi?article=1059&context=lawreview Numerous employee counsel have noted the unfairness of the process and it's incumbent on the new committee to determine the validity of their complaints.Fn 8 of the Villanova article infra especially notes these concerns.See also:

http://www.investmentnews.com/article/20100917/FREE/100919924/finras-u-5-directive-could-put-firms-in-a-tough-spot

"Legal observers said the real issue with inadequate U-5 reporting is that Finra has done little or nothing to police it.The regulator has brought some cases against firms for failing to file U-5s on a timely basis, but not for inadequate or malicious filings, attorneys said.

"Historically, I haven't seen any cases," said Mr. Wolper, a former Finra district director. "I'm not sure it's something they

do."

"What they need to do to get accurate reporting is to do some serious enforcement actions," said Jonathan Kord Lagemann, a veteran securities attorney in Chatham, N.Y.

"This is not the first [Finra] notice on this subject," he said, "and no one will take them seriously until they do [take action]."Jeff Liddle a noted employee counsel states (describing how Form U-5s can be unfair to good brokers) Form U- 5 disclosures might protect the general public from"bad brokers" at the expense of the reputation of "good brokers." See Liddle & Brecher, supra note 8 Villanova article infra, at 675 (explaining impact of Form U-5s on all securities professionals).In another context Liddle has noted

"A problem with U-5 disclosures is that some of the alleged reasons for termination may have nothing to do with industry regulations, he added. A broker or branch manager fired for, say, fraternizing with subordinates "doesn't fall into a category of a rule [or] industry standard of conduct, Mr. Liddle said, yet the charge would now be written up in detail on the U-5 and the employee would be required to disclose it to his future employer on his U-4." Of course future employers can always ask for a reference and make a judgment if one is not forthcoming which is the case in every other industry. The amount of time and resources spent in filing and processing U-5's can and should be devoted to improving the regulatory structure in other ways.See

also https://www.onwallstreet.com/news/critics-charge-termination-forms-ripe-for-abuse .

Most recently the Wells Fargo case has highlighted the need for U-5 review.See **Firms"Weaponize"U5 Termination Filings** by Mason Braswell Advisor Hub 12/9/2016

https://advisorhub.com/firms-weaponize-u5-termination-filings/

"They're using it as a competitive tool," Sharron Ash, chief litigation counsel at MarketCounsel said of firms' growing aggressiveness in filling out U5 forms. "Depending on the boxes they check, maybe they decide you're under internal review and you don't find out that you're under internal review until you left."

Even Congress has raised questions about securities firms' alleged abuse of the forms.

"[P]ublic reports indicate that Wells Fargo may have filed inaccurate or incomplete Form U-5s for fired employees and that the bank may have done so to retaliate against whistle blowers," Senators Elizabeth Warren (D-Mass.), Ron Wyden (D-Ore.) and Robert Menendez (D-N.J.) wrote in a November 3 letter to Timothy Sloan, the new president and CEO of Wells Fargo & Co. The letter was one of a growing number of corollary issues cropping up for the San Francisco-based bank company as a result of the fake-account scandal that cost it

$185 million in September.

The Board should review the entire U-5 process for fairness and efficacy. Firms will often provide a clean U-5 in order to keep an employee on their side in a regulatory or customer dispute or to distance themselves from the employee with a dirty U-5. The subjectivity and self- serving nature of the form is indisputable especially when the staff is not reviewing it and there is immunity. I therefore suggest that this study consider whether U-5's have outlived their purpose as a way of assisting a future employer. The form should only be filed with FINRA and only if there is a suspected regulatory issue. If Finra institutes an investigation the employee must disclose it on his u-4.

The current staff does not review individual employer comments but thoroughly reviews and approves employee comments. What possible regulatory purpose could be advanced for this asymmetrical distinction other than to favor the members at the expense of individual employees. Those of us with experience in filing U-5's have always known that it was never a level playing field. Most employees are employees at will and can be fired for any reason including especially objecting to illegal activity by the firm, but the firm can characterize the termination as actions inconsistent with firm policies. If the employee has strong legal counsel and the firm is worried about his story and possible lack of supervision charges he might be allowed to resign by mutual agreement.

http://dealbreaker.com/2013/04/morgan-stanley-hopes-its-clawback-people-are-better-than-

In another reported story a firm was said to be "harassing and assaulting employees, and threatening to harm their careers by improperly marking their industry records, according to a FINRA complaint.
http://www.law360.com/articles/432747/finra-savs-john-thomas-bilked-investors-bullied- reps. Both the law review articles deal with the issue of absolute vs qualified privilege in filing a U-5.The fact that such privileges exist make it all the more important for FINRA to review the filings for completeness , accuracy and fairness. As noted later they also argue for the need to eliminate the distribution of such filings to future employers until a finding of regulatory misconduct has been made or a regulatory investigation initiated. If the filings are not reviewed the employer has a de facto absolute privilege. The staff argues the burden of reviewing U-5 language "but the majority of the U-5 filings stem from a broker's voluntary decision to leave his employment and do not lead to an investigation. See dissent in the famous Rosenberg decision granting absolute immunity in New York state.866 N.E.2n at 445- 46.The question this review should address is whether it can continue to ignore these individual statements or whether the staff in reviewing such notices should also review the firm's statement for completeness and accuracy. I suggest that this

study clarify that the U-5 is not a weapon for employers.

The U-5 process can and should be improved.

The subjectivity and self- serving nature of the form is indisputable especially when the staff is not reviewing it. I therefore suggest that this study consider whether U-5's have outlived their legitimacy as a way of preventing future violations.The form should only be filed with FINRA and only if there is a suspected regulatory issue. If Finra institutes an investigation the employee would be required to disclose it to his future employer on his U-4. Of course future employers can always ask for a reference and make a judgment if one is not forthcoming which is the case in every other industry. The amount of time and resources especially legal fees spent in filing and processing U-5's can and should be devoted to improving the regulatory structure in other ways.FINRA itself is not bound by such disclosures when it terminates employees for misconduct or incompetence even though many of those employees will end up with member firms. The only legitimate purpose for disclosure is when there is a finding or investigation into a regulatory problem and that disclosure can and should be made to the regulators. A performance related disclosure has no purpose as it is purely self- serving and is never verified by FINRA. Legal and compliance personnel are often subject to performance terminations for trying to maintain a strict compliance culture.Employees who wish to report questionable

conduct are easily intimidated by the threat of a U-5 that is not reviewable except thru an expensive arbitration years after the filing. See Braswell supra.

In October, NPR reported that some Wells Fargo Bank employees said they were fired for trying to blow the whistle on the fake bank accounts scandal. The interviewed employees said they were fired or pushed to resign after resisting pressure to sell unwanted products to customers and for reporting unethical practices. The employees said that after they blew the whistle and refused to sell unwanted products, Wells Fargo Bank wrote false and defamatory information on their FINRA Form U-5s. As a result, they were not able to find new jobs in the securities industry. According to the New York Times, Wells Fargo Bank allegedly wielded the FINRA Form U-5 as a weapon *"with little regard for the damage that inaccurate or imprecise allegations could inflict on people's careers.*

Brokers who succeed in challenging allegedly misleading filings grab occasional headlines (see this JPMorgan case and this Morgan Stanley case), but the financial and psychological costs of arbitration dissuade most brokers from filing defamation and expungement claims, lawyers said. By the time such claims wend their way through the months- and sometimes years-long arbitration process, reputational damage may have been done.

"Something that's false can be out there a long time," said Jeffrey Riffer, a lawyer at Elkins Kalt Weintraub Reuben

Gartside LLP in Los Angeles, who represents brokers. "It costs money to expunge and some people are like, 'It's not worth it.."https://www.kilgorelaw.com/law/wells-fargo-bank/ A recent arbitration reversal shows the bizarre context in which a firm may retaliate: https://www.bankinvestmentconsultant.com/news/pnc-investments-challenges-former-reps-18m-finra-arbitration-award

Data and Review are needed.

The U-5 issues are well known within the industry and the incentive not to be complete and accurate is indisputable as is the harm to the employee. The Villanova article notes the reputation dangers at FN 8 as follows:

See Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 708 (7th Cir. 1994) (noting negative statements in Form U- 5s can bar professionals from industry); cf. Dawson v. N.Y. Life Ins. Co., 135 F.3d 1158, 1164 (7th Cir. 1998) ("Any embellishment or exaggeration can only damage the agent's professional reputation and make the job hunt more difficult."); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 138 (6th Cir. 1996) (observing difficulties experienced by professionals after being defamed in Form U-5s); Rosenberg v. MetLife, Inc., 866 N.E.2d 439, 446 (N.Y. 2007) (Pigott, J., dissenting) ("When a defamatory statement is made on such a Form, there is the danger of substantial harm to the individual about whom the statement is made."); see also Jeffrey L. Liddle & Ethan A.

Brecher, Form U-5 Defamation Claims: The End of the Line? Not So Fast, in SECURITIES ARBITRATION 2007 673, 690 (2007) ("A defamatory Form U-5 can ruin an individual's career In the financial services industry."); Vivek G. Bhatt, The Amended Form U-5: Two Proposals for Solving the Privilege Dilemma, 21 WHITTIER L. REV. 963, 964 (2000) (explaining how negative statements in Form U-5s can serve as scarlet letters in individual's reputation and inhibit job searches).The above Villanova article notes that the expungement process is not adequate and the board should not be turning over its regulatory duty to arbitrators. 159. See id. at 446 n.3 ("Indeed, a costly expungement action is often the only means by which an employee may challenge defamatory statements made on a Form U- 5."); see also Tann, supra note 6, at 1042^-3 (arguing that expungement proceedings do not provide adequate protection to employees). "The majority in Rosenberg attempted to console defamed individuals by reminding them that they may bring an expungement action to remove defamatory statements from their Form U-5; yet, the court failed to recognize the expense and delay of bringing such action. Expungement is an expensive process, and it is not certain whether brokers will have the financial wherewithal to bring such an action. Moreover, by the time the broker initiates the expungement proceeding, it might be too late. At this point, the broker may have already lost all his clients. Furthermore, the victim cannot obtain money damages, which, in most situations, is the only way to redress the broker's

injury. Expungement is, therefore, a "pyrrhic remedy: If a broker is in fact successful in getting a statement expunged, he may be out of work for years until the expungement actually occurs, and the harm at that point may be irreparable. Moreover, the broker's initiation of a "suit against the company may itself have future detrimental effects [because a] person who brings suit against a former employer is likely to be a less attractive employment candidate to prospective employers"." (footnotes omitted).See Bill Singer's recent discussion of an arbitration expungement at;

http://www.brokeandbroker.com/3461/pnc-arbitration-expungement/

This study should adhere to Derek Linden's statement supra: Finra reviews all terminations for cause, Mr. Linden added, and requires corrective action by firms when disclosures appear to be incomplete or inaccurate.It should also eliminate employment disputes from required disclosures.Anecdotal evidence is always questionable but that's why a sub-committee needs to survey this issue and recommend changes if needed.

II) A Committee should be established to review the enforcement of abusive short selling especially for ETFS.

A recent article by a former SEC enforcement staffer explains the need for review of this area.SEC Crackdown on "Fake News" is Itself Fake News (Perspective) Bloomberg Law 2017 https://bol.bna.com/sec-crackdown-on-fake-news-is-itself-fake-news-perspective/ A recent example of potential abuse was noted

by a company who belives it is subject to such abuse.http://www.digitaljournal.com/pr/3360834

My personal experience and research suggests significant abuse of the short selling and market manipulation laws and the huge amount of fails in the ETF area suggests it is continuing.

https://ftalphaville.ft.com/2010/10/14/370616/whats-the-etf-settlement-fail-issue/ See also

http://www.etf.com/sections/features/9403-delayed-etf-settlementswhats-the-problem.html?nopaging=1

ETF's currently account for over 90% of the Reg Sho Threshold list and that does not include fails that are internalized or ex-cleared.These fails should be closed out under Rule 204 but are not being closed out.Both FINRA and the SEC have included ETF fails as exam priorities but have not explained what they found. The recent enhanced data programs CARDS and CAT do not include settlement data and I have reason to believe there are huge amounts of trading not settling pursuant to Reg SHO requirements.The SEC staff has acknowledged they will only do serious cases of fraud in this area but FINRA should be doing much more.In times of crisis deliberate failures to settle will cause untold damage to confidence in the capital markets.The CEO of NASDAQ recently stated that short sales need more disclosure.

https://www.bloomberg.com/news/videos/2017-05-01/nasdaq-ce

o-on-short-selling-investor-protection-video

III) **FINRA needs to study the imposition of sanctions on supervisors especially in the large firms with a view to understanding what happened to the "failure to supervise charge."**

In a non-public meeting the week before the settlement was announced, the SEC's newest commissioner, Michael Piwowar, a Republican, voiced concerns that the SEC was fining the company, as opposed to considering ways to levy penalties against top-level executives at the bank, according to people familiar with the situation
http://www.reuters.com/article/us-sec-white-idUSBRE98P0NE20130926

See also former commissioners Atkins and Gallagher:
http://www.radicalcompliance.com/2016/11/15/compliance-trump-era-sec/

The board and staff are well aware of the age old complaint that the big firms escape the supervisory scrutiny applied to the small firms.But this dichotomy has become more visible since the financial crisis that primarily involved the big firms which are a small percentage of the membership but an overwhelming percent of business done.Judge Rakoff has been outspoken on this problem: https://www.ft.com/content/db1923d0-4bd2-11e3-8203-00144feabdc0 To my knowledge FINRA has never published the data needed to refute this criticism and should do so now.Two recent books argue forcefully for supervisors having skin in the game.*Why Wall Street Matters By William Cohan and Better Bankers Better Banks by Professors Hill and Painter*.Regulatory

fines should not be laid on the shareholders but instead on the management that failed to prevent them.Former Commissioner Grundfest has made this point in a recent NY Times article involving a small IA SEC case-Why are so few senior executives prosecuted and meanwhile Eric Wanger's career is destroyed.https://www.nytimes.com/2017/05/04/business/sec-internal-court.html?_r=0 .This could be done by not stigmatizing management but assessing them for the costs of any sanctions.It could be done absolutely or on an individual case basis.There would be no disciplinary finding against the management unless there is a deliberate or intentional failure but an assessment of costs related to the fine would be ever present focussing management's attention on their supervisory duties.At the very least each decision could address why supervision charges were not warranted.

IV) FINRA Should take on all BD cases from the SEC except those requiring subpoenas to make up for increasing SEC funding limitations.

I see no reason why the SEC should be doing bd cases when FINRA is capable and the SEC is stretched. FINRA has the expertise to do these cases and leave the SEC to supervise its efforts.In the cases of finance and operations FINRA is far more experienced and indeed is staffed by many forme SEC lawyers.I can reasonably predict that if this change is made more SEC lawyers would join FINRA.This is a crucial time for FINRA and

the self-regulatory regime and therefore FINRA should aggressively pursue taking more responsibility for bd cases including IA cases with joint registrants.A subcommittee should meet with the SEC to consider this.

V) FINRA's arbitration program has become too expensive for claims under $100,000 or for expungement claims

It has been my experience that investors are unable to find counsel for arbitration claims of less than $100,000 and as previously noted expungement cases do not provide for damages

When there are no or little damages there can be no contingency arrangements and the firms have the advantage over individual investors and registered reps.A member recently wrote on the draconian effects that occur when counsel is not affordable.http://www.brokeandbroker.com/3478/sec-alj-kohn/FI FINRA can cure this by hiring independent hearing officers to hear these claims as is done in small claims courts across the U.S.Simplified procedures will allow the individual investors and reps to present their case without incurring unnecessary expenses.Experienced hearing officers may well be more knowledgeable and more fair than arbitration volunteers and able to insure a fair and economic hearing process.

Conclusion

Too often FINRA cites its disciplinary cases and fines as evidence of its success.But fairness is also an important measure of a successful self regulator.FINRA needs to take criticism

seriously and rebut it with transparency including data.That will be the best form of engagement with members.