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September 11, 2020

The Honorable Andrew Friedson
Council Office Building
100 Maryland Avenue
Rockville, MD 20850

Email: Councilmember.Friedson@montgomerycountymd.gov

Dear Councilmember Friedson:

Summary

This letter outlines several specific actions that Montgomery County, the State of Maryland, and the United States Government could take to improve the quality of policing. These actions could begin to address some police officers' shameful targeting of African Americans. As I discuss below, these steps include:

1. Creating a national system for police departments to exchange personnel data on individual police officers to reduce the opportunity for officers with bad records to move from one police department to another;
2. Amending Maryland's recordkeeping law to allow for greater public disclosure of police abuse; and
3. Eliminating the incentives for localities to use fines to fund local governments' budgets.

Introduction

Thank you for your leadership on Black Lives Matter. Your [newsletter](#) of June 18, 2020 states that we are at an inflection point regarding racial equality. We have much to do as a county and as a society to address pervasive racism.

Like so many Americans, I have been horrified by the brutality of police officers shooting or strangling African Americans without apparent cause or justification. The attacks on Jacob Blake, George Floyd, Tony McDade, Eric Garner, and so many others demonstrate that something is profoundly wrong with how and when police use force against African American citizens.

I appreciate that most police officers perform their duties at a level that is above and beyond our expectations and that some act heroically to protect the public.¹ I believe that Montgomery County police overwhelmingly are fine public servants. Nonetheless, we cannot excuse the abuse of power of a few by citing the fine record of the majority. We cannot dismiss acts of racially motivated brutality because most of the police do the right thing most of the time. Moreover, as the national news media has reported, these acts of brutality are not nearly as rare as some people would have us believe.²

Recommendations

I respectfully seek your help in implementing the following specific reforms:

- 1. Create a national system for police departments to exchange personnel data on individual police officers.** – To my knowledge, there is no mechanism for one police department to know if an individual seeking employment as an officer has exhibited wrongful or unlawful behavior at another police department or been subject to disciplinary action. Because of the privacy of personnel records (often protected by statute) and litigation fears, it is possible for an individual who has a record of bad acts to move from department to department.

To address similar concerns, securities regulators have developed a system to prevent a securities salesperson who engages in bad behavior at one brokerage firm from moving to another firm and repeating the same bad behavior. Under the supervision of the Securities and Exchange Commission (SEC), a unique self-regulatory organization, called FINRA,³ operates this system, called the Central Registration Depository ([CRD](#)).⁴ “The CRD program covers the registration records of broker-dealer firms, branch offices and their associated individuals, including their qualification, employment and disclosure histories; it also directs the processing of form filings, fingerprint submissions, collection and disbursement of registration-related fees, qualification exams and continuing education sessions.”

In particular, when a salesperson (called a “registered representative”) joins a brokerage firm, the firm must file a [Form U4](#) with FINRA, indicating that this person is now affiliated with that firm and subject to its supervision. If that person leaves that brokerage firm, the firm must file [Form U5](#) with FINRA disclosing the reason for that registered representative’s departure (including whether the registered representative was the subject of a regulatory investigation, internal investigation, customer complaint, or other reason).⁵

¹ E.g., Montgomery County Police Officer Michael [Damskey](#) who rescued a citizen from a burning car, saving her life.

² E.g., *After video shows Wisconsin police shooting a Black man multiple times, National Guard is called to Kenosha*, police shooting of Jacob Blake, [Washington Post](#), Aug. 24, 2020

³ Financial Industry Regulatory Authority (FINRA). [FINRA](#)’s headquarters are in Washington, DC, but it has major facilities in Rockville, MD.

⁴ Federal and state securities regulators along with FINRA created the [CRD system](#).

⁵ For example, Form U5 requires the brokerage firm to answer the following questions:

If the brokerage firm does not answer these questions truthfully, it is a violation of FINRA's rule and the firm is subject to sanction.⁶

Montgomery County, Maryland cannot itself institute the equivalent of a CRD system for police officers. But it *could* develop a prototype and offer to share information about its officers with other police departments when making hiring decisions. It could seek similar information when considering hiring an officer from another jurisdiction. The county could seek to work with other Maryland counties and with the state government to seek a workable solution.

Ultimately, either Congress will need to create a legislative framework for a CRD system for police officers, or states will have to establish a system themselves. Such a system must include a mechanism to ensure that police departments report accurately and completely on the behavior of their former officers. If police departments fail to disclose the reasons for an officer's departure, the system will be worthless at best, and a whitewash at worst.

It would not be practical or proper to create an oversight organization with the authority to sanction individual police departments for disclosure failures.⁷ But, by establishing a CRD-type information collection agency, that agency could establish a system to report disclosure failures publicly to the governor of the state in which the failure occurred. It would be up to elected officials to address the disclosure failure.

Ultimately, the goal would be to institute a personnel reporting system that would reduce the likelihood that an officer who has engaged in wrongful behavior can move from one police department to another, regardless if interstate or intrastate. It also would reduce the chance that a police department could participate in the cover up, allowing another police department to hire an officer without knowing his or her background.

It would cost money to create and operate such a reporting system. It also would impose indirect costs on police departments that would need to assemble and comply with the reporting requirements. Federal, state, and local governments would need to identify a funding mechanism for the system. But the *status quo* imposes significant costs on communities, in addition to the social costs of wrongful police behavior. Currently taxpayers bear the burden of paying millions of dollars to resolve claims against police for

Did the individual voluntarily resign from your firm, or was the individual discharged or permitted to resign from your firm, after allegations were made that accused the individual of:

1. violating investment-related statutes, regulations, rules or industry standards of conduct?
2. fraud or the wrongful taking of property?
3. failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?

⁶ E.g., FINRA settled an action against [Merrill Lynch](#) for, among other things, its alleged multiple failures to submit timely Forms U5.

⁷ FINRA is not a trade association; it operates under authority that Congress has granted under the federal securities laws. As a self-regulatory organization, FINRA may bring proceedings against its members or their associated persons for violations of its rules. It makes public final disciplinary actions. [FINRA Rule 8313](#). To be clear, I am not suggesting that the record-keeping organization for police should have the same authority as FINRA.

misconduct. According to one estimate, taxpayers spent \$300 million on such cases in one year.⁸ As a country we should reduce the number of wrongful police actions because it is the right thing to do; but it also would save taxpayers' money.

If a system exists to protect people's money from unscrupulous securities salespeople, should we not have a system to protect people's lives?

2. **Reform Maryland recordkeeping laws** – Maryland must reform its recordkeeping laws to allow greater public disclosure of wrongful police activity. Maryland Code General Provisions Title 4 Public Information Act creates a system that requires disclosure of some information about public officials and protects the privacy of others. Of course, privacy is a complex issue and confidentiality may be appropriate in some circumstances, but not in others. It is my view that Maryland needs to reconsider its current legal framework.

Section 4-103(a) establishes a general right of the public “to have access to information about the affairs of government and the official acts of public officials and employees.” Unfortunately, the statute includes exceptions that are overly broad. For example, § 4-311 protects the confidentiality of a “personnel record of an individual, including an application, a performance rating, or scholastic achievement information.”

Maryland law should protect every police officer's privacy to some extent. The public does not need to know if a police officer has diabetes or is in remission from cancer. It is also important to protect the identity of a “whistleblower” who provides information to law enforcement. But, the public should know if a police department has a history of abusing minorities. The public should know if a department repeatedly has sanctioned an officer for outrageous or wrongful behavior. The burden should be on the police department or the police officer, not the public, to demonstrate why it is appropriate to keep disciplinary records confidential.

Again, the securities laws could be instructive. FINRA operates a system called [BrokerCheck](#). This online system allows anyone to obtain information about brokers and brokerage firms. Indeed, some state laws require more disclosure than FINRA may provide. If investors may obtain such information about stockbrokers, why shouldn't the public have information about police officers?

I recognize that it would not be sensible to release sensitive information about police departments and officers on a wholesale basis. But, in the absence of greater public access to information about the wrongdoing of police departments and officers, it is very unlikely that the behavior of police departments and police officers will change.

3. **Eliminate the incentive for localities to use fines to fund local government** – Local jurisdictions should not receive fine and penalty revenues to use for general expenses. Such a system creates inherent conflicts of interest and perverse incentives to impose monetary penalties to fund local government.

⁸ *Millions in lawsuit settlements are another hidden cost of police misconduct, legal experts say*, [ABC News](#), June 16, 2020.

Perhaps the most egregious example of this conflict of interest is Ferguson, Missouri. According to the U.S. Department of Justice's report: "the City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved. City officials routinely urge Chief [of Police Thomas] Jackson to generate more revenue through enforcement."⁹

Apparently, Montgomery County has a similar law that creates the same conflict of interest, even if it does not use exhortation to bolster those revenues as the City of Ferguson allegedly did. According to the Montgomery County's operating budget:

Fines & Forfeitures	Actual FY19	Budget FY20	Est FY 20	Rec FY 21	% Chg BudRec
Library Fines	443,189	500,000	500,000	300,000	-40.0%
Other Fines & Forfeitures	160,262	0	0	0	---
Other Fines/Forfeitures	11,604,553	8,957,150	18,957,150	18,960,300	111.7%
Parking Fines	1,339,822	2,410,500	2,310,500	2,310,500	-4.1%
Photo Red Light Citations	3,833,395	4,600,000	4,600,000	4,600,000	----
Speed Camera Citations	14,114,096	18,985,000	18,985,000	18,985,000	----
TOTAL FINES & FORFEITURES	31,495,317	35,452,650	45,352,650	45,155,800	27.4%

In US dollars, FY 21 Operating Budget Recommendation, at 78-8.

The County Council has recommended an operating budget for FY20201 of \$5,925,909,313, of which \$5,133,112,691 is from tax revenue.¹⁰ Even with library fines, the County's Fines & Forfeitures do not constitute anything close to a majority of the budget. Nonetheless, this arrangement creates a conflict of interest, especially since some Maryland counties may rely more heavily on these fines than others.

Again, the federal securities laws may be instructive. When the SEC collects a fine or penalty in a civil proceeding, it either places the funds in a special account to compensate harmed investors or it pays the funds into the U.S. Treasury. Thus, there is no conflict of interest because there is no financial incentive for the SEC, its commissioners, or staff to collect penalties.¹¹

⁹ U.S. Department of Justice, Civil Rights Division, [Investigation of the Ferguson Police Department](#), March 4, 2015, at 5.

¹⁰ [Memorandum](#) from Marc Elrich, County Executive, to Sidney Katz, Montgomery County Council, March 16, 2020.

¹¹ SEC Agency Financial [Report](#) (2019), at 24.

In my view, all Maryland Counties and the State should deposit fee and forfeiture receipts into a single fund. It would be up to the Legislature and the Governor to allocate the revenues, thereby removing the direct conflict of interest.

* * * *

Solving racial injustice in the United States will require all of us to reconsider our views and attitudes about race. I realize that a few adjustments to state and local law will not solve all of our problems. I appreciate that examples from the federal securities law framework will not fit neatly into these contexts.

Nonetheless, these suggestions with appropriate adjustments and refinements could help make a difference in Montgomery County and in Maryland. Justice Brandeis famously said with respect to financial regulation that “[s]unlight is said to be the best disinfectant, electric light the most efficient policeman.”¹² Perhaps, sunlight would be one effective measure to help address police malfeasance. These and other incremental changes could help our country, our county, and our community to get on a better course to achieve the goals that we share.

I recognize that the Montgomery County Council is not in a position to implement these changes on its own; however, I believe that support at the local level is essential if we are to change police practices that are uniquely local.

Thank you for considering my views. I would be pleased to discuss these suggestions with you or your staff.

Respectfully submitted,

/s/

Stuart J. Kaswell, Esq.

Copy:

The Honorable Larry Hogan, Governor of Maryland
The Honorable David Trone
Robert L.D. Colby, Esq., Chief Legal Officer, FINRA

¹² Brandeis, Other People’s Money and How the Bankers Use it, 1913 and 1914, at 92.