February 19, 2013

The Honorable Angela Williams
The Honorable Jessie Ulibarri
200 East Colfax
Denver, CO 80203

RE: HB 1046 - Social Media Legislation

Dear Representative Williams and Senator Ulibarri:

The Securities Industry and Financial Markets Association (SIFMA)[1] is writing to express its concern about HB 1046, as currently drafted. This legislation would prohibit employers from requiring that current or prospective employees provide employers with access to their personal social media accounts.

The securities industry has no interest in accessing employee accounts that are used exclusively for personal use. The problem, however, is that many people use the same account for both personal and business activity. According to a 2012 American Century Investments study, nearly nine out of ten financial services professionals have a social media profile or account. Fifty-eight percent of these professionals use social media for business at least several times per week; twenty-seven percent use it for business on a daily basis.[2] Business use includes, among other things, reading and posting commentary, monitoring and sharing relevant news, business promotion and brand building, sharing best practices, and obtaining customer feedback. A "personal" account that is used for business purposes must be treated as a business account.

While HB 1046 is well-intentioned, it would, if enacted as drafted, conflict with the duty of broker-dealers to supervise, record, and maintain business-related communications as required by both the Financial Industry Regulatory Authority ("FINRA") and by state law. FINRA is the largest independent regulator for all securities firms doing business in the United States and is considered a self-regulatory organization under federal securities laws. To protect investors, FINRA requires, among other things, that securities firms supervise, record and maintain their employees' business communications – including those disseminated on social media sites. This is spelled out in several different FINRA rules and regulatory notices, including:

- Securities firms must establish procedures for the review of registered representatives' written and electronic business correspondence. (NASD Rule 3010(d))

- "Firms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites for business purposes are appropriately supervised ….". (FINRA Regulatory Notice 10-6)

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA has offices in New York and in Washington, D.C. For more information, visit **http://www.sifma.org**.

[2]https://www.americancentury.comm/pdf/Financial_Professionals_Social_Media_Adoption_Study.2012/pdf

- "The content provisions of FINRA's communications rules apply to interactive electronic communications that the firm or its personnel send through a social media site." (FINRA Regulatory Notice 10-6)

- A firm's procedures "must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules, including the content requirements of NASD Rule 2210, such as the prohibition on misleading statements or claims and the requirement that communications be fair and balanced." (Regulatory Notice 11-39)

State securities laws and regulations similarly require broker-dealers and broker-dealer agents to maintain books and records relating to the firm's business. This can include business communications made or transmitted using social media. Denying broker-dealers access to personal social media accounts where business is being conducted would create a serious conflict with FINRA regulations and state law.

Prohibiting broker-dealers from supervising business communications on social media accounts also puts customers at risk. Without appropriate monitoring, it will be much harder for firms to detect serious problems. Such problems could include: (1) misleading claims by an employee, such as the promise of an unrealistically high rate of return on investment; (2) fraudulent activity, including insider trading and Ponzi schemes; and (3) inappropriate conduct such as the selling of investment products that are not approved by the firm.

We appreciate language in Section 4(a) which enables firms to conduct an investigation to ensure compliance with applicable securities requirements. This language is helpful in addressing situations where an employee is using his or her personal social media account for business purposes without the firm's knowledge. It, however, does not address the more common scenario where an employee alerts the firm that he or she plans to conduct business on a personal social media site and the firm is then required to satisfy ongoing monitoring and recordkeeping requirements.

SIFMA therefore respectfully requests that you consider a narrow amendment to HB 1046 so that securities firms can continue to comply with state requirements and FINRA regulations. Language from several other states is illustrative.

- For example, New Jersey has legislation (A. 2878[3]) that has passed both houses with language in Section 7 which reads, "Nothing in this act shall be construed to prevent an employer from complying with the requirements of State or federal statutes, rules or regulations, case law or rules of self-regulatory organizations." Section 1 also defines personal account to exclude accounts used for business purposes.

- Similarly, Michigan recently enacted a social media law (Public Act No. 478[4]) which states in Section 5(2), "This act does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self regulatory organization, as defined in section 3(a) (26) of the securities and exchange act of 1934, 15 USC 78c(a)(26)." This language also works, although we would suggest replacing "federal law" with "state or federal law or regulation" to recognize state requirements in this area.

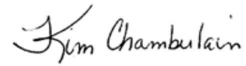
We respectfully suggest that you amend HB 1046 to include similar language.

[3] http://www.njleg.state.nj.us/2012/Bills/A3000/2878_R3.PDF

[4] http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0478.pdf

Thank you for your consideration. Please feel free to contact me at 212-313-1311 should you have any questions.

Sincerely,



Kim Chamberlain
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Cc: Members, House Appropriations Committee
Fred Joseph, Colorado Banking and Securities Commissioner
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