



February 11, 2015

The Honorable Bernie Hunhoff
500 East Capitol Avenue
Capitol Building, 3rd Floor
Pierre, South Dakota
57501

RE: SB 123 - Social Media Legislation

Dear Representative Hunhoff:

The Securities Industry and Financial Markets Association (SIFMA)¹ is writing to express its concerns about SB 123. This legislation would, among other things, prohibit employers from requiring an employee or applicant to provide passwords to personal accounts. We respectfully suggest the following language as an amendment to SB 123:

“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.”

To date seventeen states have enacted social media legislation limiting private employers’ ability to access employees’ social media accounts: Arkansas, California, Colorado, Illinois, Louisiana, Maryland, Michigan, Nevada, New Hampshire, New Jersey, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Washington, and Wisconsin. Fourteen of these states have included language clarifying that the law does not prevent employers from satisfying their federal, state and SRO obligations. California, Colorado, and Maryland do not include this language, but do have some limited exceptions. Maine and Vermont have adopted studies on this issue and New Mexico passed a law that applies to prospective employees only.

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

¹The 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>.

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 SB 123 is well-intentioned, it would, if enacted, 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)
- “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. The North American Securities Administrators Association (NASAA), a body comprised of the state securities regulators tasked with protecting investors within their respective jurisdictions, has expressed serious concern that social media bills could conflict with state securities requirements. In a February 14, 2013 letter to NCSL Executive Director William Pound³, then NASAA President and Arkansas Securities Commissioner Heath Abshire stated,

“State laws and regulations require broker-dealers, investment advisers, broker-dealer agents and investment adviser representatives to maintain books and records relating to the firm’s business, which can include business communications made or transmitted using social media. To comply with these requirements, broker-dealers and investment advisers must be able to access social media accounts used by employees for *business* purposes. Legislation under consideration by certain states

²https://www.americancentury.com/pdf/Financial_Professionals_Social_Media_Adoption_Study.2012/pdf

³<http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-letter-to-NCSL-Regarding-Social-Media-Privacy-Legislation-FINAL-2-14-2013.pdf>

may prove problematic because, absent an appropriate carve-out, such laws would place broker dealers and investment-advisers in a precarious position where compliance with state privacy laws might cause them to run afoul of their supervisory and record-keeping responsibilities under state and federal securities laws and regulations, and vice versa.”

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.

SIFMA therefore requests that you consider the exemption to SB 123 so that securities firms can continue to comply with state requirements and FINRA regulations.

Sincerely,

A handwritten signature in black ink, reading "Nancy Lancia". The signature is written in a cursive, flowing style.

Nancy Lancia
Managing Director
State Government Affairs