



June 6, 2016

The Honorable Brian S. Dempsey
The Honorable Stephen Kulik
House Ways & Means Committee
Room 243
State House
Boston, MA 02133

RE: S. 2063 – An Act relative to social media privacy protection.

Dear Chairman Dempsey & Vice-Chairman Kulik:

The Securities Industry and Financial Markets Association (SIFMA)¹ is writing to encourage you to amend S. 2063, an Act relative to social media privacy protection. This legislation would, among other things, prohibit employers from requiring employees or applicants to provide access to their personal 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.

We appreciate that S. 2063 defines a personal social media account as one that is used “exclusively for personal communications unrelated to any business purposes of the employer.” This is certainly helpful. We, however, believe that additional language clarifying the scope of permissible employer activity is both necessary and useful in the securities context.

Currently, broker-dealers have a duty 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

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>.

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

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.³

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.

Thus, to ensure our ability to comply with existing federal, state and SRO obligations, we would encourage you to adopt the following amendment:

"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."

³ In a February 14, 2013 letter to NCSL Executive Director William Pound, 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 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."

To date, twenty-three states have enacted social media legislation limiting private employers' ability to access employees' social media account.⁴ Twenty of these states have included language clarifying that the law does not prevent employers from satisfying their federal, state and SRO obligations.⁵ The Uniform Law Commission is also finishing its model legislation, which includes this provision.

We recognize that the bill does contain language referencing self-regulatory organizations on page 11, lines 207 and 208. The language, however, is regrettably too restrictive. The language we are seeking would apply to ongoing monitoring of business communications on a social media account. The existing exemption language does not address ongoing monitoring requirements but rather is limited to investigations.

We appreciate your willingness to consider our concerns. Please do not hesitate to contact me at 212-313-1311 or SIFMA's lobbyists Roger Donoghue and Tara O'Donnell at 617-720-0590.

Sincerely,

A handwritten signature in black ink that reads "Kim Chamberlain". The signature is fluid and cursive, with the first name "Kim" and last name "Chamberlain" clearly legible.

Kimberly Chamberlain
Managing Director & Associate General Counsel
State Government Affairs

Cc: Members, House Ways & Means Committee

⁴ Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

⁵ California, Colorado, and Maryland were three of the earliest states to pass legislation and do not include this language. They do, however, some include limited exceptions.