



March 14, 2013

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Executive Secretary  
Federal Financial Institutions Examination Council  
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**Re: SIFMA Comment on “Social Media: Consumer Compliance Risk Management Guidance” (Docket Number FFIEC-2013-0001)**

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> respectfully submits the following comments to the Federal Financial Institutions Examination Council (the “Council”) in response to the Council’s request for comment on the proposed guidance titled “Social Media: Consumer Compliance Risk Management Guidance” (the “Guidance”). SIFMA appreciates the opportunity to comment on the Council’s proposed Guidance.

SIFMA’s members include securities brokers and dealers, investment advisers, and investment companies that are registered with and regulated by the U.S. Securities and Exchange Commission (the “SEC”). Many of these entities also are subject to the rules and guidance of the Financial Industry Regulatory Authority (“FINRA”), an independent regulator of securities firms in the United States. SIFMA members also include futures commission merchants that are regulated by the Commodity Futures Trading Commission (“CFTC”). Each of these types of entities (“Securities Firms”) may be affiliated with financial institutions, such as banks or savings associations, within a holding company structure. As part of a holding company structure, Securities Firms also may be subject to oversight of the Board of Governors of the Federal Reserve System (“Board”).

It is from this unique regulatory perspective that SIFMA, on behalf of its members, responds to the following question specifically asked by the Council:

“Are there other consumer protection laws, regulations, policies or concerns that may be implicated by financial institutions’ use of social media that are not discussed in the proposed guidance but that should be discussed?”

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

FINRA and the SEC's Office of Compliance and Inspections and Examinations have already published guidance on the use of social media.<sup>2</sup> The social media guidance published by FINRA and the SEC is tailored to the specific regulated activities applicable to the covered entities. SIFMA is concerned that those of its members that are subject to Board oversight also may be subject to the Council's Guidance resulting in duplicative and potentially conflicting regulatory guidance. To avoid unnecessary duplication, confusion and conflict, SIFMA encourages the Council to expressly exclude Securities Firms from the entities subject to the final Guidance adopted by the Council.<sup>3</sup>

This exclusion is consistent with the stated purpose of the Guidance, which is to "address the applicability of existing federal consumer protection and compliance laws, regulations, and policies to activities conducted via social media *by banks, savings associations, and credit unions, as well as by nonbank entities supervised by the [Consumer Financial Protection Bureau ("CFPB")]* (collectively, financial institutions)."<sup>4</sup> (Emphasis added.) In addition, Securities Firms are not subject to the enforcement of the CFPB under the Consumer Financial Protection Act.<sup>5</sup> On these bases, SIFMA would interpret the Guidance to not apply to subject savings and loan holding companies, bank holding companies or nonbank financial companies nor to non-Financial Institution entities within a holding company structure, such as Securities Firms.

Including Securities Firms within the scope of the Council's Guidance would be inconsistent with the Council's statement that the "[G]uidance does not impose additional obligations on financial institutions...." Many of the requirements included in the Guidance appear to be more onerous than the requirements currently imposed by the Securities Firms' primary regulators. As such, the Guidance would, in fact, impose additional obligations on Securities Firms if they are covered by the Guidance. By way of example, but not exclusion, the following aspects of the Guidance impose different, and arguably more burdensome, requirements than those required under SEC and FINRA social media guidance: firm governance, monitoring and third party content, customer complaints and supervision of employee use of social media.

## **A. Governance Structure**

The Council's proposed Guidance appears to contemplate a more centralized management and oversight structure for social media activities than is required of Securities Firms under SEC and FINRA social media guidance. Specifically the Guidance appears to contemplate more direct management by, and reporting to, the board of directors or senior management with regard to social media strategy and controls and ongoing assessment of social media risks. This level of involvement by a firm's board of directors or senior management exceeds that currently required by Securities Firms pursuant to SEC and FINRA social media guidance. Rather, social media activities and related risks are generally overseen by those business and control function managers and staff with day-to-day involvement in and responsibility for the firm's social media activities. There may be unique circumstances where social media activity and related risks should be brought to the attention of the board of directors or senior management for review and/or consideration, but these

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<sup>2</sup> See, SEC, Office of Compliance Inspections and Examinations, Vol. II, Issue 1 (Jan. 4, 2012); FINRA Regulatory Notice 11-39 (Aug. 2011); FINRA Regulatory Notice 10-106 (Jan. 2010).

<sup>3</sup> Notwithstanding this recommended exclusion, SIFMA encourages the Council to harmonize its Guidance with that of FINRA and the SEC to avoid unnecessary divergence among financial regulators.

<sup>4</sup> For purposes of this comment letter, SIFMA will refer hereinafter to the financial institutions defined in the proposed Guidance as "Financial Institutions".

<sup>5</sup> 12 U.S.C. §§ 5517(i)(1) and 5517(j)(1).

circumstances can be identified by responsible staff for elevation rather than universally escalating social media to a board-level or senior management responsibility.

## **B. Monitoring and Third Party Content**

Various portions of the proposed Guidance, including the discussion of fraud and brand identity and third party concerns, appear to impose potentially expansive obligations on covered entities to monitor all social media outlets and potentially, the Internet in its entirety, to mitigate reputation risks. It appears that, without clarification as to the extra-territorial implication of the Guidance, the Guidance could be interpreted to require such monitoring on a global basis. Such an expansive requirement exceeds the level of monitoring required to be undertaken by Securities Firms under existing FINRA and SEC guidance. Under FINRA guidance, Securities Firms are generally responsible for communications by or attributable to the Securities Firm (including communications in which the Securities Firm or its personnel participated in the preparation or adopted the content). Securities Firms, are not, however, responsible for other third-party social media content (including so-called “user-generated content” on non-firm-related sites). Although some Securities Firms may utilize various brand monitoring tools to understand how their brands are being used on the Internet and to protect their brands and reputation, neither SEC nor FINRA guidance requires firms to police the Internet generally.

## **C. Customer Complaints**

The proposed Guidance contemplates the possibility of expansive monitoring to enable the covered entity to identify and respond to consumer questions or complaints. Under SEC and FINRA guidance, Securities Firms are not required to undertake such expansive efforts to identify all customer complaints posted through all social media outlets. Although, as discussed above, Securities Firms may utilize brand monitoring services for a variety of reasons, under FINRA and SEC guidance, Security Firms are responsible for monitoring a limited scope of social media. Specifically, Securities Firms are responsible for monitoring social media created or operated by or on behalf of the firm. This practical approach acknowledges that customers who express complaints or questions that are not specifically communicated to a firm or expressed on a firm-operated site should not have a reasonable expectation that such complaints or questions have been received by a firm.

## **D. Employee Activity**

The Council’s proposed Guidance suggests that covered entities may be required to police employees’ personal social media accounts. Under the FINRA guidance, Securities Firms are not required to police individual firm employees’ personal social media uses, but rather must have policies in place that are designed to ensure that associated persons are appropriately supervised and trained to avoid undue risks to investors. Such policies may prohibit business communications through unsupervised social media and disciplinary action if such a policy is found to be violated. SIFMA does not believe, however, that FINRA requires firms to monitor the personal social media activity of their employees. Such a requirement would be impractical and potentially require monitoring that may not be permissible under other applicable laws. While the Council states that the Guidance is not intended “to address any employment law principles that may be relevant to employee use of social media,” employer restrictions on employee personal use of social media is a sensitive issue and has been addressed in a number of National Labor Relations Board (NLRB)

decisions. At a minimum, SIFMA believes that the Guidance should affirmatively state that the Guidance is not intended to conflict with employment laws or judicial or government agency interpretations of employment laws, or with the First Amendment rights of employees.

Conflicts such as those identified above would be most easily avoided if the finally adopted Guidance expressly excludes Securities Firms. In any event, the Council should also seek to harmonize its guidance with that of other financial regulators to avoid or minimize unnecessary divergence.

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SIFMA greatly appreciates the Council's consideration of the issues raised above in connection with the Guidance. SIFMA would be pleased to discuss these comments in greater detail with the Council. If you have any questions, please call me at [mmacgregor@sifma.org](mailto:mmacgregor@sifma.org) or 202-962-7385.

Sincerely,

/Melissa MacGregor/

Melissa MacGregor

cc: Joseph Price, FINRA  
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