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February 15, 2013

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Proposed FINRA Rule 2267;
File No. SR-FINRA-2013-002

Dear Ms. Murphy:

The Investment Company Institute¹ appreciates being provided the opportunity to comment on FINRA's proposed revisions to FINRA Rule 2267 relating to investor education and protection.² The Institute has long supported investors being provided meaningful information regarding their investment professionals, and we support FINRA's efforts to make investors more aware of the information available to them through BrokerCheck. We strongly oppose, however, doing so by requiring disclosure about BrokerCheck on "websites, social media pages and any comparable Internet presence" of FINRA's members and their associated persons,³ as is currently proposed. Our opposition is based on:

- ❖ The vague and ambiguous nature of the Proposal, which precludes the opportunity to fully assess it and its impact on FINRA members; and
- ❖ The very strong likelihood that the Proposal will adversely impact FINRA members' continued use of social media to the detriment of them and their customers.

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$14.2 trillion and serve over 90 million shareholders.

² See *Notice of Filing of Proposed Rule Change to Amend FINRA Rule 2267 (Investor Education and Protection)*, SEC Release No. 34-68700, 78 Fed. Regis. 5542 (Jan. 25, 2013) (the "Proposal").

³ As used in this letter when describing the Proposal or its impact, the term "FINRA member" includes associated persons of the member who would be subject to the new requirements.

Each of these issues is discussed in more detail below.

THE PROPOSAL IS TOO VAGUE AND AMBIGUOUS TO FULLY ASSESS ITS IMPACT

FINRA's BrokerCheck provides the public with information on the professional background, business practices, and conduct of FINRA member firms and their associated persons. FINRA has proposed to revise Rule 2267, *Investor Education and Protection*, to help to ensure that investors are made aware of the information available to them through BrokerCheck. In particular, the rule would be revised to require each FINRA member to "include a prominent description of and link to BrokerCheck, *as prescribed by FINRA*," on any "websites, social media pages and any comparable Internet presence" that relate "to the member's investment banking or securities business" or that relate to the FINRA member's business and are "maintained by or on behalf of any person associated with a member."⁴ [Emphasis added.] In order to fully understand and assess the impact of the Proposal, the terms "social media pages"⁵ and "comparable Internet presence," as used in this rule, must be defined. In addition, FINRA must provide the details of the "prominent description of and link to BrokerCheck" that will be required to be displayed by the revised rule. Further, the scope of what information is considered to "relate to the member's investment banking or securities business" must be clarified.⁶ Without this crucial information, it is impossible to fully assess the Proposal's impact.⁷

For example, with respect to the issue of "social media pages," in an electronic or virtual world, what constitutes a "page"?⁸ According to a recent Nielsen report, "[f]orty-six percent of social media users say they use their smartphone to access social media."⁹ Does the term "social media page"

⁴ See FINRA's proposed Rule 2267(c).

⁵ Neither the term "social media" nor "social media pages" is defined in the proposed rule or other FINRA rules. As such, we are uncertain as to their scope – *e.g.*, Do they include texting or instant messaging used by members? Do they include both static and interactive postings on social media sites?

⁶ *Cf.* Rule 17a-4(b)(4) under the Securities Exchange Act of 1934, which requires brokers and dealers to maintain a record of communications "relating to [the broker's or dealer's] *business as such*." [Emphasis added.]

⁷ The website disclosure that would be required by the Proposal also raises a variety of implementation issues on which FINRA should seek public comment prior finalizing any new BrokerCheck disclosure requirements. For example, it is unclear where such disclosure should appear for a member that has a global presence or a variety of affiliates that are not FINRA members that utilize the same brand.

⁸ Without knowing what a "page" is, it is impossible to understand what disclosure would be required, particularly in the context of interactive social media – *e.g.*, would the disclosure be required in each posting by a member on an interactive social media site?

⁹ See *State of the Media: The Social Media Report* (2012), Nielsen ("Nielsen Report"). Regarding Internet usage more generally, Institute research indicates the 84% of households with Internet access that own mutual funds use the Internet for financial purposes; 63% of households with Internet access that do not own mutual funds use the Internet for financial

encompass a mobile social media page? Would the disclosure required for mobile devices differ from that required on tablets, personal computers, and desk tops in light of the different nature and capabilities of mobile devices?¹⁰ How is the disclosure to be made if the social media page utilizes video rather than written text? How are members to comply with the rule if the social media platform, which is outside the member's control, precludes use of such disclosure or URLs? The Proposal does not address these and related issues.¹¹

It appears from the Proposal that the crucial details necessary to implement the revised rule – including whether the disclosure will vary depending upon the social media platform, social media page, mobile social media page, and the device used by an investor to access such media – will be determined by FINRA without the opportunity for public comment. Indeed, according to FINRA, it “would provide members with the text description and web address format for the link to BrokerCheck” in order to ensure “consistency” in the rule’s implementation once the Commission approves the amendments to Rule 2267.¹² This approach seems contrary to the requirements of Section 19(b) under the Securities Exchange Act of 1934 and related rule and form requirements, as well as to the fairness of the rulemaking process, which are intended to provide members of the public, including those impacted by a rule, the ability to analyze a proposal and provide meaningful input into the rulemaking process prior to being subject to new regulatory requirements.¹³

purposes. See *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet 2011*, ICI Research Perspective (Oct. 2011) at p. 24.

¹⁰ It is because of these differences that mobile applications have been developed to facilitate website access by users of mobile devices in a user-friendly format. According to the PewResearch Center:

An ‘app’ is an end-user software application designed for a mobile device operating system, which extends that device’s capabilities. Apps were first introduced in early 2007 with the Apple iPhone. Since then, they have become increasingly popular as other smartphone platforms and now tablet computers have embraced this form of accessing content. Indeed, app use has been a core feature in the broader move away from desktop computers toward mobile computing on handheld devices.

Half of adult cell phone owners have apps on their phones, Kristin Purcell, Associate Director for Research, Pew Internet Project, Pew Research Center (Nov. 2, 2011).

¹¹ It is also unclear from the Proposal whether FINRA has considered issues such as how a user’s experience may differ when linking to FINRA’s BrokerCheck website from mobile social media.

¹¹ The Proposal at p. 5543.

¹³ Section 19(b) of the 1934 Act requires each self-regulatory organization to file with the Commission proposed rule changes “accompanied by a concise general statement of the basis and purpose of such proposed rule change.” In addition, Form 19b-4 expressly requires that a self-regulatory organization proposing a rule or rule amendment “provide *all* required information . . . in a clear and comprehensive manner, *to enable the public to provide meaningful comment on the proposal . . .*” [Emphasis required.] To the extent FINRA has determined that the detail required to implement the rule will be accomplished by FINRA as an interpretation of Rule 2267, it appears that Rule 19b-4 would require that any such

To address these concerns, we strongly urge that the Commission not approve the Proposal until such time as FINRA adequately explains its proposed requirements, including how they will be implemented on websites, social media, mobile social media, and “any comparable Internet presence,” and provides members and interested persons an opportunity to comment on a more fulsome proposal.

THE PROPOSAL WILL ADVERSELY IMPACT FINRA MEMBERS AND INVESTORS

While we are unable to fully analyze the Proposal for the reasons discussed above, even in its current form it can be expected to adversely impact the use of social media by FINRA members and their customers. We are concerned that, in the interest of “consistency,” FINRA intends to take a “one-size-fits-all” approach to any required disclosure.¹⁴ Particularly in the context of social media, this approach would be unworkable. For example, a static “text description and web address format” will not be capable of being applied to the variety of social media and mobile social media (including interactive and video social media) that exists today and that will be developed in the future. Today there are over 200 social media websites in existence,¹⁵ each of which is unique, and this number can only be expected to increase over time. To be workable and not impede investors’ access to financial information through social media, FINRA’s rule must be adaptable to the variety of available social media platforms and the manner in which these platforms are used or accessed by FINRA’s members and their customers.

Indeed, the Proposal can be expected to preclude the use of certain social media that is popular today. For example, some of the popular social media used by FINRA’s members and investors today (*e.g.*, Twitter and Blogger¹⁶) have express limits on the size of social media postings. Twitter, for

interpretation be published for public comment prior to its adoption. This is because Rule 19b-4(c) provides that an interpretation of a self-regulatory organization shall be deemed a proposed rule change that must be submitted to the SEC under Rule 19b-4 and subject to notice and comment unless it is: (i) implied by an existing rule; or (ii) concerns solely with the administration of the self-regulatory organization. FINRA’s plans to prescribe the specific disclosure that would be required by an amended Rule 2267 does not appear to meet either of the Rule 19b-4 exceptions.

¹⁴ The Proposal at p. 5543.

¹⁵ For a visual representation of these sites, *see* the Conversation Prism at <http://www.briansolis.com/2012/07/please-help-us-update-the-conversation-prism-v4-0/>.

¹⁶ According to the Nielsen Report, Twitter and Blogger are two of the top ten most-visited social media sites. The remaining eight are: Facebook, Pinterest, Wordpress, LinkedIn, Tumblr, Wikia, Google+, and MySpace. Also, Twitter use is up via mobile applications from 2011 to 2012 by 134% and via mobile web by 140%. Nielsen Report at pp. 7-8. According to the Huffington Post, there were: 175 million tweets sent from Twitter every day in 2012; 32% of all Internet users are using Twitter; and 1 million accounts are added to Twitter every day. *See 100 Fascinating Social Media Statistics and Figures from 2012*, which is available at: http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me_b_2185281.html.

example, limits social media postings (*i.e.*, “tweets”) to 140 characters.¹⁷ We note that the link on FINRA’s website to BrokerCheck consists of approximately 60 characters¹⁸ (*i.e.*, <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/>). If a member’s tweets are required to include the proposed disclosure, approximately 80 characters would remain for a FINRA member or its associated person to (1) communicate their message via twitter **and** (2) describe and provide some context for the tweet’s link to BrokerCheck. As this seems impossible, we believe that the Proposal will impede the continued ability of FINRA’s members to communicate with investors via Twitter and any other social media with similar limits. This result seems contrary to consumers’ increasing use of social media and mobile social media and their interest in interacting with their financial professionals through such media or mobile applications.¹⁹

It does not appear that FINRA has considered these and other potentially adverse effects of the Proposal. Indeed, the *only* discussion of the rule’s intended impact relates to members’ websites and this discussion, too, does not address a variety of issues relating to the disclosure’s content, format, and placement on websites and related costs.²⁰ Consistent with Rule 19b-4, such issues deserve serious consideration and a public vetting prior to the Commission approving the Proposal.

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¹⁷ Twitter’s new video streaming social media, Vine, is limited to six second videos. Further, Twitter only permits one link, which would be problematic for those FINRA members that use that one link to link to the member’s website.

¹⁸ If it includes the CRD number of the FINRA registrant, it may likely be longer than 60 characters.

¹⁹ *See, e.g.*, Nielson Report, which documents consumers’ increasing use of social media. The opportunity and reputational costs to FINRA’s members that can be expected to result from their no longer being able to interact with investors through social media should also be considered.

²⁰ According to FINRA’s limited discussion of the costs to members associated with the Proposal, while FINRA “has not found an independent estimate relating to the cost of adding a link to a website,” it “anticipates that the costs to comply . . . will be limited . . . In addition, FINRA will provide firms with the specific links (in a user-friendly URL format) to be added to their websites, thereby helping to contain the costs associated with the proposal.” The Proposal at p. 5543.

Elizabeth M. Murphy

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We appreciate being afforded the opportunity to provide these comments. If you have any questions, please do not hesitate to contact the undersigned at 202-326-5825.

Sincerely,

/s/

Tamara K. Salmon

Senior Associate Counsel

cc: David Grim, Deputy Director
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