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David A. Knight
Executive Vice President
General Counsel
Stephens Inc.

November 28, 2014

By Electronic Mail: pubcom@finra.org

Marcia E. Asquith
Senior Vice President and Corporate Secretary
FINRA
1735 K Street, NW
Washington DC 20006-1500

Dear Ms. Asquith:

We appreciate the opportunity to comment on the revised CARDS rule proposal, Regulatory Notice 14-37. We also join, and incorporate by reference, the comment letters submitted by SIFMA and the BDA. We share their concerns regarding the burden that would be imposed by CARDS, as well their concerns regarding data privacy and the disproportionate costs of the CARDS proposal. In addition, we submit this separate comment because we have substantial and grave concerns that the proposed wholesale collection of our customers' sensitive, financial information by FINRA would violate the fundamental Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Under the CARDS program, FINRA intends to collect, on an ongoing basis, massive amounts of data concerning our customers' account transactions and securities holdings, as well as personal investor profile information such as investment objectives, annual income and net worth. FINRA will collect this information without any particularized suspicion of impropriety, retain the data indefinitely, and then analyze that data without any prior judicial approval.

An "unreasonable search" occurs whenever "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). For these purposes, FINRA would be considered a government actor. *See Rooms v. S.E.C.*, 444 F.3d 1208, 1214 (10th Cir. 2006) (due process requirements apply to NASD); *Blount v. S.E.C.*, 61 F.3d 938, 941 (D.C. Cir. 1995) (Municipal Securities Board held a state actor). Accordingly, FINRA's "search" in mass collecting data under CARDS must pass Constitutional scrutiny.

Under the Fourth Amendment, in evaluating the reasonableness of a search, courts must weigh an individual's subjective expectation of privacy against the strength of the government's corresponding interests. Here, individual and institutional investors undoubtedly have substantial interests in the privacy of the financial and personal information contained in their brokerage accounts. In many cases, this information will be sufficient to provide a snapshot of a

customer's wealth, income, assets, and trading patterns. On the other hand, FINRA offers only vague justifications for the CARDS program, through which FINRA intends, in some unarticulated manner, to "leverage[]" "technological advancements" to "obtain, store, manage and access large quantities of data to identify and quickly respond to *potentially* fraudulent and abusive behavior that it *might* not see through its current surveillance or examination programs." Reg. Notice 14-37 at 2 (emphasis added).

In evaluating the Fourth Amendment interest, FINRA cannot rely upon the fact that customers voluntarily provide financial information to their brokers. Courts have increasingly recognized that in light of technological advances, the collection of massive amounts of data creates an issue far different from earlier cases. *See, e.g., United States v. Jones*, 132 S. Ct. 945 (2012) (GPS tracking for nearly a month violated reasonable expectation of privacy); *Klayman v. Obama*, 957 F. Supp. 2d 1, 30-37 (D.D.C. 2013) (NSA bulk phone metadata collection for five-year periods). Decades ago, the Supreme Court held that the government could collect records from a telephone company—on a brief and infrequent basis—because the telephone customer had no reasonable privacy expectation in information given to a third party. *See Smith v. Maryland*, 442 U.S. 735 (1979). The Supreme Court has recognized, however, that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." *Jones*, 132 S. Ct. at 952 n.6 (quoting *United States v. Knotts*, 460 U.S. 276 (1983)). As one district court recently recognized in evaluating the NSA's telephone metadata program, "the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979." *Klayman*, 957 F. Supp. 2d at 34. The federal courts thus have increasingly recognized that bulk data collection efforts, such as the CARDS program, trigger Fourth Amendment concerns even when the information comes from a third-party provider. *See, e.g., Jones*, 132 S. Ct. 945; *Klayman*, 957 F. Supp. 2d at 30-37; *see also United States v. Maynard*, 615 F.3d 544, 557 (D.D.C. 2010) (limited surveillance maintains reasonable expectations of privacy while unlimited surveillance does not).

Just as the extended collection of telephone metadata and location information violates individuals' reasonable expectations of privacy, so too does FINRA's proposed Orwellian CARDS data collection. It is one thing to expect brokerages occasionally to provide this data to FINRA on the basis of an articulated, specific concern or a limited audit. It is an entirely different matter to compel brokerages to conduct what is effectively a joint intelligence-gathering campaign with FINRA on an ongoing, world-without-end basis. *See Klayman*, 957 F. Supp. 2d at 33.

Like telephony metadata, continuous analysis of near real-time, mass account data provides much more information than would any single data point or lone transaction. Courts have described this phenomenon as the "mosaic effect," in which records that previously would have only provided a "tile" of information about an individual now reveal a detailed, and constantly updating, picture of the individual's activities. *See Maynard*, 615 F.3d at 562-63. Indeed, in FINRA's own words, this is the very reason it wants to implement CARDS. *See Reg. Notice 14-37* at 3-4 (describing the detailed, updating pattern of information that FINRA hopes will be revealed). FINRA's access to these "mosaics" of investors' personal, financial and trading activity—revealing, *inter alia*, financial and personal goals, proprietary strategies, personal and

corporate affiliations and associations—is not only unwarranted, it violates fundamental Constitutional rights.

FINRA’s exclusion of selected personally identifiable information (“PII”), such as customer names and addresses, does not alter the analysis. FINRA would collect other information that, taken together, might well be used to ascertain customer identity if obtained through unauthorized access, including account number, annual income, net worth, securities holdings, trading activity, brokerage firm branch location and the name of the broker handling the customer’s account. The NSA’s collection of telephony metadata includes even less PII than CARDS. Yet many Americans and members of Congress have expressed strong objections to the program, and one federal court recently held it to be unconstitutional. *See Klayman*, 957 F. Supp. 2d at 15, 43-44 (no collection of call content or the names, addresses or financial information of any call party).

In the face of this proposed unreasonable search, CARDS may only be salvaged if the privacy interests at stake are *minimal* and FINRA has an *important* interest in the collection that would be jeopardized by requiring pre-collection, individualized suspicion. *See Nat’l Fed’n of Fed. Emps.-IAM v. Vilsack*, 681 F.3d 483, 489 (D.C. Cir. 2012). Here, investors clearly have a significant expectation of privacy in their financial and personal information. On the other hand, FINRA has a minimal interest in the potential, and as yet unspecified, benefits of the CARDS program, especially in light of the comprehensive compliance and supervisory policies and procedures adopted by brokerage firms on an industry-wide basis, that are routinely examined by FINRA and other regulators to ensure they adequately protect customer interests. FINRA has failed to describe in any meaningful fashion the details of its collection and analysis procedures. FINRA has also failed to adduce any evidence that CARDS will actually achieve its stated goals. The most FINRA offers is aspirational, nebulous statements that the data will allow it to “identify and quickly respond” to risk, “enhanc[ing]” FINRA’s ability to “understand . . . business profile[s],” “understand, on an ongoing basis, where firms consistently sell products that present higher risks,” and “identify patterns of transactions that indicate bad behavior.” FINRA’s explanation raises more questions than it answers, and there is no explanation as to why the present system results in an unacceptable degree of risk.

In light of the substantial privacy interests at risk, FINRA must do more. It is highly likely that, regardless of FINRA’s yet-to-be presented justifications, CARDS will never pass Constitutional scrutiny. But certainly at this juncture, FINRA has utterly failed to establish a legitimate governmental interest that would outweigh the citizenry’s right to be free from unreasonable invasion. On strikingly analogous grounds, where the government asserted a justification of more quickly identifying and responding to terrorist threats but failed to present evidence of the efficacy of its program, the court found a substantial likelihood that individuals’ privacy interests prevailed such that the program was unconstitutional. *See Klayman*, 957 F. Supp. 2d at 39-41. If the government’s interest in identifying and responding to terrorism does not outweigh the privacy interests noted above, then how could FINRA’s interest in running a suspicionless bulk data collection program such as CARDS come close?

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Again, we appreciate the opportunity to comment on the CARDS proposal, and we urge FINRA to abandon the CARDS program in favor of the brokerage industry's established, self-regulatory safeguards and FINRA's current investigatory tools.

Sincerely,

A handwritten signature in black ink that reads "David Knight". The signature is written in a cursive style with a prominent loop at the end of the last name.

David Knight

cc: Steven Engel, Esq.
Dechert LLP