



We wish to address one serious deficiency of this proposal , its failure to address how it would enable FINRA to enhance its ability to understand abusive short selling. There is but one reference to short selling in the notice at p8 where fails to deliver are noted as part of the stock record allocation category. Since the information is provided on a monthly basis it will not address the key to abusive short selling which is to monitor how long fails are left open and why? The current Reg SHO list for NYSE ARCA below shows more then 50 etf's on the list with significant fails for 10 days or more. Moreover these include only those trades clearing and settling thru DTC. But we know that a large number of trades more then 40% are internalized either on dark pools , elsewhere or ex-cleared. See CFA Institute's study at:

[dark\\_pools\\_internalization\\_and\\_equity\\_market\\_quality\\_final\\_issue\\_brief.pdf](#)

If CARDS is to address these problems more is needed in terms of either information or explanation. Recent cases involving Wedbush Securities and Penson, Merrill Lynch and Overstock indicate that after 10 years of Reg SHO the abuse continues unabated and without the information noted herein that abuse will continue. An automated system that picks up the length of all fails and reasons for them can address this issue but its not apparent in CARDS. We understand that Cards may pick up internalized trades and hopeful it will also include ex-clearing trades. But as noted in the following questions much activity may not be accounted for:

Since the 1930's, the financial industry has claimed the markets are complex for outside regulators to understand (i.e. the SEC) and argued for the necessity of SROs. Because Congress accepted this proposal, SROs and FINRA are congressionally authorized to be the first line of defense for the protection of investors in the securities industry. FINRA has an obligation as an SRO to aid the SEC's goals of investor protection and the maintenance of fair and orderly markets. Moreover, historically exchange SROs operated their own regulatory functions, but more recently FINRA has been contracted to provide regulatory services to most U.S. stock and option exchanges. FINRA states it is currently reviewing 90% of trading in U.S. equity markets (14 to 20 billion transactions each day) through the use of 'innovative

technology' and surveillance algorithms/patterns to detect market manipulation and other violations.<sup>1[1]</sup> FINRA has not satisfactorily explained the CARDS system enforcement benefits. There are two basic monthly CARDS data collection elements; a) purchase and sale information for each transaction, and b) a one-day snapshot of the FINRA members' stock record. With the data provided, the CARDS system will not be able to follow a transaction from order and execution through settlement.

## **Purchase and Sale Data**

As regulator, FINRA should currently have complete access to the purchase and sale data. What data will CARDS provide that FINRA does not have through its regulatory authority?

In the CARDS Rule Proposal Regulatory Notice, the 'Purchases and Sales' Data Category requires firms to produce; "A chronological listing of the member firm's cleared securities transactions reported on a trade date basis."

- What is the definition of a cleared securities transaction? Is this intended to include firms' ex-cleared trades outside of the NSCC system?
  - Will the purchase and sale data include all transactions of the reporting firm's affiliates/subsidiaries both foreign and domestic? Would this include all divisions of the reporting firms, such as prime brokerage, wealth management and market making?
  - Will the CARDS system allow FINRA to monitor transactions executed by sponsored market access clients and determine the true identity of those clients, even if they are not registered FINRA members? (see FINRA Letter of Acceptance Waiver and Consent No. 20080150845-01 regarding Wedbush Securities dated November 21, 2012) and most recent Wedbush case.
  - Will high frequency trading transactions that are usually pre-netted/compressed be reported on a trade-by-trade basis in the purchase and sale data?
  - Recently announced actions against clearing firms and their clients indicate that a decade after Regulation SHO's implementation, abusive short selling of U.S. securities continues and Regulation SHO protections have not been operating as intended. How will the CARDS system address these important SRO enforcement deficiencies?
  - FINRA has produced or had access to daily short sale data from the exchanges that has shown excessive short selling in top U.S. securities for at least the past 4 years, but FINRA has taken no significant public action stemming from the
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short sale data. Will CARDS enhance or provide new information that will allow FINRA to better enforce short sale regulations?

- FINRA is the regulator of BATS Markets, on which there are consistently 10 to 15% more short sales than other markets in significant securities. Will CARDS enable FINRA to more effectively oversee exchange activity for which it is responsible?
- Through request of the SEC, all SROs produce short sale data except the big board NYSE, of which FINRA is the assigned regulator. If FINRA members refuse to produce data, what recourse will FINRA have and implement?
- Given the history of firms repeated improper reporting to OATS, blue sheets and other required regulatory data, is there a mechanism in the CARDS system for it to catch a firm's inaccurate reporting? For example, will the data be compared to exchange and other market venue data to verify its accuracy? Or, does CARDS have another way to verify firms are reporting properly?

### **Stock Records**

The member firms are required to produce information in certain categories "for all the firm's securities accounts to the extent the data is part of a firm's books and records", including stock records, account balances and allocation summaries.

- Is the intent of CARDS to capture all stock records and positions at all of the divisions of the reporting firm, including prime brokerage, wealth management and market making?
- Will the long, short, borrowed and failed positions at the firm reported to CARDS include all positions in customer, proprietary and market making accounts and the length of the fails?
- Will non-FINRA member subsidiaries of the parent company that are trading or holding positions in U.S. securities be required to produce stock record data to CARDS? The leading prime brokers all maintain overseas stock loan operations that may not be subject to CARDS if positions are moved overseas.
- If a position is moved before the end of the month off the main stock record of the member firm to another stock record of the firm's non-FINRA member subsidiary/affiliate, will that securities position be included in the CARDS data?
- Will CARDS obtain data regarding re-hypothecated positions at member firms subsidiaries/affiliates? Will CARDS capture the source of the securities borrowed in order for FINRA to differentiate between legitimate borrows of long shares versus those that may be re-hypothecated positions, such as those

found in the FINRA action against Deutsche Bank announced December 19, 2013?<sup>2</sup>[2]

- Will CARDS include all short/failed positions from non-member subsidiaries/affiliates of the member firm?
- Will the CARDS system include all short/failed positions from non-FINRA member sponsored market access clients of the FINRA member firm?

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3[1] FINRA Technology <http://www.finra.org/AboutFINRA/technology/>

4[2] FINRA Fines Deutsche Bank Securities, Inc. \$6.5 Million for Serious Financial and Operational Deficiencies, December 19, 2013

<http://www.finra.org/Newsroom/NewsReleases/2013/P411637>

In summary, it appears that many securities transactions are not being sent through the NSCC and that some firms,are allowing high frequency trades to be compressed and not reported on a trade-by-trade basis through NSCC. The reliance on NSCC data appears to be a flawed regulatory theory. In the original Regulation SHO rule, the SEC stated that it believed ex-cleared trades were rare and if it found that to be incorrect, the SEC would re-visit the ruling regarding Regulation SHO applying to only transactions cleared and settled through a national clearing agency. We believe the time to re-visit this application of Regulation SHO has passed and question how the CARDS system will add to the information available to dispel/rectify this long-held belief in a flawed theory. We would draw FINRA'S attention in particular to the NYSE ARCA Reg SHO list below that includes over 50 etf's at a time when failed trades are required to be closed out on the 4th and 6th days(for market makers).ETF'S are leveraged products per se but the bull and bear etf's are steroid leveraged. How will the CARDS system address the mystery of so many highly leveraged fails unless it gets very specific and timely data such as that suggested by Dodd Frank but rejected by the SEC staff in its report on *Short Sale Position and Transaction Reporting.DERA Report dated June 5 ,2014*. Nothing stops FINRA from including this recommendation in CARDS as opposed to the snapshot found in CARDS.Without this regular reporting of those failing, the system cannot catch what led to the cases

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noted above. We also believe that many U.S. short sales are shifted [offshore for circumvention of regulations and it is important that CARDS captures these shifting transactions](#). Finally the market access issues identified in the Wedbush case could rise to become economic warfare issues as note by Kevin Freeman in a defense department paper.

<http://www.scribd.com/doc/49755779/Economic-Warfare-Risks-and-Responses-by-Kevin-D-Freeman>

While our clients seek to address one set of issues here, we also note industry complaints that this idea may be a burden on competition that needs further justification. This information is 40 days after the fact and would seem to duplicate information that is more timely available especially with more examiners. Therefore the question here is not whether CARDS is viable but whether its burdens might be justified in support of other alternatives and whether FINRA is getting info it already has and missing info it needs i.e. the worst of all worlds.

### [Historical NYSE Arca Threshold List](#)

Pipe-delimited data is available for [download](#)

### **Data processed on 11/24/2014**

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<b>Symbol</b>	<b>Security Description</b>
<a href="#">AFK</a>	Market Vectors Africa Index ETF
<a href="#">ASEA</a>	Global X Asean 40 ETF
<a href="#">ASHR</a>	db X-trackers Harvest CSI 300 China A-Shares Fund
<a href="#">BABS</a>	SPDR Nuveen Barclays Capital Build America Bond ETF
<a href="#">BIZD</a>	Market Vectors BDC Income ETF
<a href="#">BNO</a>	United States Brent Oil Fund LP
<a href="#">DBEU</a>	db X-Trackers MSCI Europe Hedged Equity Fund
<a href="#">DIV</a>	Global X SuperDividend U.S. ETF
<a href="#">DRV</a>	Direxion Daily Real Estate Bear 3x Shares
<a href="#">DUG</a>	ProShares UltraShort Oil & Gas
<a href="#">DVYA</a>	iShares Asia/ Pacific Dividend 30 Index Fund
<a href="#">DXJR</a>	WisdomTree Japan Hedged Real Estate Fund
<a href="#">EBND</a>	SPDR Barclays Capital Emerging Markets Local Bond ETF

[EDZ](#) Direxion Daily Emerging Markets Bear 3X Shares

[ERUS](#) iShares MSCI Russia Capped Index Fund

[ERX](#) Direxion Daily Energy Bull 3X Shares

[EWQ](#) iShares MSCI France Index Fund

[FAZ](#) Direxion Daily Financial Bear 3X Shares

[FCA](#) First Trust China AlphaDEX Fund

[FEMS](#) First Trust Emerging Markets Small Cap AlphaDEX Fund

[FNDE](#) Schwab Fundamental Emerging Markets Large Company Index ETF

[FNI](#) First Trust ISE Chindia Index Fund

[FNY](#) First Trust Mid Cap Growth AlphaDEX

[FXY](#) CurrencyShares Japanese Yen Trust

[FYC](#) First Trust Small Cap Growth AlphaDEX Fund

[GQRE](#) FlexShares Global Quality Real Estate Index Fund

[INCO](#) EGShares India Consumer ETF

[INDL](#) Direxion Daily India Bull 3x Shares

[IRY](#) SPDR S&P International Health Care Sector ETF

[IXG](#) iShares S&P Global Financials Sector Index Fund

[JDST](#) Direxion Daily Junior Gold Miners Index Bear 3X Shares

[KBWY](#) PowerShares KBW Premium Yield Equity REIT Portfolio ETF

[LWC](#) SPDR Barclays Capital Long Term Corporate BondETF

[NGE](#) Global X Nigeria Index ETF

[PFIG](#) PowerShares Fundamental Investment Grade Corporate Bond Portfolio ETF

[PTH](#) PowerShares Dynamic Healthcare Sector Portfolio

[RDIV](#) RevenueShares Ultra Dividend Fund

[RSXJ](#) Market Vectors Russia Small-Cap ETF

[RYF](#) Guggenheim S&P 500 Equal Weight Financials ETF

[SCHR](#) Schwab Intermediate-Term U.S. Treasury ETF

[SGDM](#) Sprott Gold Miners ETF

[SMH](#) Market Vectors Semiconductor ETF

[SPFF](#) Global X SuperIncome Preferred ETF

[SPHB](#) PowerShares S&P 500 High Beta Portfolio  
[SPYV](#) SPDR S&P 500 Value ETF  
[TECS](#) Direxion Daily Technology Bear 3X Shares  
[TLT](#) iShares Barclays 20+ Year Treasury Bond Fund  
[USDU](#) WisdomTree Bloomberg U.S. Dollar Bullish Fund  
[USO](#) United States Oil  
[VRP](#) PowerShares Variable Rate Preferred Portfolio  
[XLU](#) Utilities Select Sector SPDR Fund  
[XME](#) SPDR S&P Metals & Mining ETF  
[XMLV](#) PowerShares S&P MidCap Low Volatility Portfolio  
[XOP](#) SPDR S&P Oil & Gas Exploration & Production ETF  
[XOVR](#) SPDR BofA Merrill Lynch Crossover Corporate Bond ETF  
[XSD](#) SPDR S&P Semiconductor ETF  
[XTN](#) SPDR S&P Transportation ETF  
[YINN](#) Direxion Daily China 3X Bull Shares

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