



WHITE PAPER

# BlackBerry: The FINRA Compliant Smartphone

By Jeffrey Plotkin

## Executive Summary

In the United States, broker-dealers are required by regulation to keep and archive all internal and external business communications of their employees, including electronic communications transmitted via smartphone. Broker-dealers also are required to perform supervisory reviews of their employees' communications with the public, including electronic communications transmitted via smartphone. If broker-dealers cannot capture and review all forms of communications with the public sent to or from their employees' smartphones, they must establish policies prohibiting such communications and should disable those communications functions on their employees' firm-issued smartphones.

Given these requirements, smartphones designed for the general consumer electronics market, such as the popular Apple iPhone and the various Google Android system-powered phones, have failed to significantly diminish BlackBerry's historical dominance of the smartphone market on Wall Street. Currently, the iPhone and Android are incapable of being fully compliant with broker-dealer regulations, and there are no third-party solutions available to plug all the compliance holes of these phones.

The BlackBerry, on the other hand — designed specifically for use in the highly regulated financial services industry — is the only smartphone currently capable of being fully compliant with the broker-dealer regulations. All the various electronic communications that can be transmitted to and from a BlackBerry — including secure business email; personal email; proprietary network instant messages (“proprietary IM”); SMS text messages; and browser-based webmail, instant messages, and correspondence on social network sites — can either be captured and routed to a broker-dealer's servers for archiving and review or be disabled at the corporate server level.

CTOs and CIOs of broker-dealers should consult with smartphone manufacturers concerning the compliance readiness of their devices before committing to any purchases of the devices for their employees. Broker-dealers that issue iPhones and Androids to their employees for business purposes, or allow their employees to utilize their personal iPhones and Androids for business purposes, face significant risks that business communications transmitted from those devices will be lost in cyberspace, exposing those broker-dealers to regulatory and civil liability.

## The Regulatory Landscape

The Securities and Exchange Commission (“SEC”) is the primary regulator for broker-dealers in the United States. The SEC has delegated certain regulatory duties to the Financial Industry Regulatory Authority (“FINRA”), a self-regulatory organization (“SRO”). FINRA was formed as a result of a merger between the regulatory arms of the National Association of Securities Dealers, Inc. (“NASD”), and the New York Stock Exchange, Inc. (“NYSE”). Broker-dealers are still subject to either or both of the NASD and NYSE rules and to any new FINRA consolidated rules (collectively “SRO rules”).

## Recordkeeping and Supervision Rules

SEC rules require broker-dealers to keep and preserve (i.e., archive) all hard copy and electronic communications relating to their “business as such” for a three-year period.<sup>1</sup> This rule is specifically incorporated by reference into the SRO rules.<sup>2</sup>

SRO rules generally require principals of broker-dealers to review and approve all incoming and outgoing correspondence of registered representatives with the public to ensure compliance with the securities laws.<sup>3</sup> These rules give broker-dealers the flexibility to design supervisory procedures for electronic communications that are appropriate to their structure, nature and size of business, and customer base.<sup>4</sup>

FINRA has made clear that the supervisory rules apply to all forms of electronic business communication between broker-dealers and the public, including email, instant messages, SMS text messages,<sup>5</sup> and communications through social media sites, such as Facebook, Twitter, and LinkedIn.<sup>6</sup> The SROs also have made clear that broker-dealers must prohibit their employees from engaging in electronic communications of any form with the public, including via smartphone, unless the firms are capable of preserving and monitoring the communications.<sup>7</sup>

## Smartphone Capabilities and FINRA Compliance

Smartphones such as the BlackBerry offer and accommodate a wide range of electronic communication vehicles and applications, such as secure business email,<sup>8</sup> personal email (BlackBerry Internet Service, POP/IMAP), proprietary IM (BlackBerry Messenger), SMS text messaging, and a variety of Internet browser-based communication functions such as webmail, instant messages, and the various social media sites.

And as discussed above, in order for a smartphone to be fully FINRA compliant, it must capture and route all electronic communications transmitted to and from the device to the firm’s servers for archiving and supervisory review purposes. In the alternative, to the extent certain types of electronic communications transmitted via the smartphone cannot be captured and routed to the firm, the firm must at a minimum institute policies prohibiting use of those electronic communication vehicles. The best practice to ensure compliance in such situations is for broker-dealers to disable the functionality of those types of electronic communications on their employees’ firm-issued smartphones.

While broker-dealers and their customers still communicate with each other electronically through traditional desktop computer systems (including third-party systems such as Bloomberg and Reuters), an ever-increasing share of electronic communications on Wall Street are transmitted to or from smartphones. And while broker-dealer personnel and their customers still communicate through secure business email from their handheld devices, an ever-increasing share of their electronic communications are in the form of SMS text and other nontraditional electronic communication vehicles such as Facebook. Therefore, more than ever, it is important for broker-dealers to ensure that smartphones issued to employees for business use are FINRA compliant.

## Analysis of FINRA-Compliance Readiness of the Leading Smartphones

At the request of Research In Motion Limited, the manufacturer of the BlackBerry, this author compared the FINRA-compliance readiness of the three most popular and advanced smartphones on the market: the BlackBerry, the iPhone, and the Android.

This author found that while all three devices allow for the capture and potential supervisory review of secure business email transmitted through a broker-dealer's email server, the BlackBerry is the only device that automatically can capture and route SMS text messages, proprietary IM (i.e., BlackBerry Messenger), and personal email to a broker-dealer's servers for potential supervisory review.

The BlackBerry also allows broker-dealers, at the corporate server level, to force smartphones on the network to browse the Internet through the broker-dealer's corporate proxy server, thereby enabling a broker-dealer to capture and route its employees' web-browser-based smartphone communications (webmail, social media, blogs, bulletin boards, and instant messages) to the company's servers for archiving and potential supervisory review.

Further, with the BlackBerry, broker-dealers can opt to disable, at the corporate server level, not only SMS text and proprietary IM, but also any personal email services and any web-browser-based communication vehicles that can be accessed via the smartphone.

The iPhone, on the other hand, currently does not allow broker-dealers to capture and route SMS text, proprietary IM, or personal email, or to disable electronic communication vehicles on their employees' devices at the corporate server level, other than secure business email. The iPhone currently has rudimentary support for an option to force phone users to browse the Internet through the company's proxy server, but it may be possible for employees to override this protocol from their handsets. In short, broker-dealers have no practical ability to capture or disable — and thus no ability to control — most of the forms of electronic communications transmitted via their employees' iPhones. Currently there are no commercially available third-party solutions for the iPhone to cure these shortcomings.

The Android also currently does not allow broker-dealers to capture and route or disable SMS text, proprietary IM, personal email, or web-browser-based communications. There is a commercially available third-party FINRA compliance solution for Android with respect to SMS text and web-browser-based instant messages only.<sup>9</sup> Therefore, broker-dealers only have a minimal ability to capture or disable — and thus minimal ability to control — the various forms of electronic communications transmitted via their employees' Androids.<sup>10</sup>

Broker-dealers that allow their employees to utilize the iPhone or Android for business communications therefore must rely on their employees' voluntary cooperation with the firms' policies prohibiting the use of alternative forms of electronic communications on smartphones that cannot be captured and reviewed by the firms. However, there is no meaningful way to police or audit the employees' conduct in that regard.

For ease of reference, the checklist below compares the FINRA compliance readiness and/or capabilities of the BlackBerry, iPhone, and Android in all material categories:

	BlackBerry		iPhone		Android	
	Capture/Route	Disable	Capture/Route	Disable	Capture/Route	Disable
SECURE BUSINESS EMAIL	Yes	Yes	Yes	Yes	Yes	Yes
SMS TEXT	Yes	Yes	No	No	Yes**	No
PROPRIETARY IM	Yes	Yes	No	No	No	No
PERSONAL EMAIL	Yes	Yes	No	No	No	No
WEB BROWSER (e.g., WEBMAIL, SOCIAL MEDIA, INSTANT MESSAGES)	Yes	Yes	Maybe*	No	Partial***	No

\* End users may be able to override controls.

\*\* Separate purchase of third-party solution required.

\*\*\* Instant messages only, separate purchase of third-party solution required.

## CONCLUSION

The BlackBerry currently is the only smartphone capable of being fully compliant with U.S. broker-dealer regulations concerning recordkeeping and supervisory review of electronic communications.

## About the Author

Jeffrey Plotkin is a partner of the law firm Day Pitney LLP in New York City, and is the chairman of the firm's Broker-Dealers, Investment Advisers, and Commodities Firms Practice Group. He formerly served as the chief of the Branch of Broker-Enforcement and assistant regional administrator of the SEC's New York Regional Office.

Mr. Plotkin's practice focuses on representing broker-dealers and their associated persons in investigations and enforcement actions by the SEC and FINRA, and providing consulting services to broker-dealers, investment advisers, and technology companies with respect to compliance with securities regulations. He is the author of numerous white papers and legal articles addressing broker-dealer regulatory issues surrounding electronic communications. Mr. Plotkin is an adjunct professor of law for New York Law School's LLM Program for Financial Services Law and an annual guest lecturer at the Columbia University Graduate School of Business.

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## Endnotes

1. 17 C.F.R. § 240.17a-4(b)(4); see also SEC Release No. 34-38245 (Feb. 5, 1997) (email must be retained and archived under the rule); NYSE Info. Memo 03-7 (March 5, 2003) (“instant messages ... must be maintained and retained in compliance with” the SEC’s record retention rules); NASD NTM 03-33 (July 2003) (same). SEC Rule 17a-4(f) governs the manner in which electronic communications are archived. The main requirement of the rule is that broker-dealers preserve the records exclusively in a “non-rewritable, non-erasable” electronic media format. 17 C.F.R. § 240.17a-4(f)(2)(ii)(A).
2. See NASD Rule 3110(a); NYSE Rule 440.
3. See NASD Rule 3010(d); NYSE Rule 342.16. These SRO rules do not require that broker-dealers review internal email among their employees. See SEC Release No. 34-38548 (Apr. 25, 1997).
4. See NASD Rule 3010(d)(2); NYSE Rule 342.17.
5. FINRA Regulatory Notice 07-59 (Dec. 2007).
6. FINRA Regulatory Notice 10-06 (Jan. 2010). By some estimates, social networking now accounts for approximately 50 percent of mobile Internet traffic, mainly via smartphones.
7. See NASD NTM 98-11 (Jan. 1998); NYSE Info. Memo 98-3 (Jan. 16, 1998); FINRA Regulatory Notice 07-59; FINRA Regulatory Notice 10-06.
8. Secure email allows employees to send and receive email through firm-assigned email addresses residing on the firms’ servers.
9. TextGuard offers software (that must be physically downloaded onto each individual user’s smartphone) that is capable of capturing SMS text messages and Internet-based instant messages from Androids for routing to a broker-dealer’s server. No similar software has been developed yet for the iPhone.
10. Good Technology, Inc.’s “Good for Enterprise” system (“Good”) offers a device management and security solution for both the iPhone and Android that is focused primarily on protecting data transmitted via secure business email. Good, however, does not provide a FINRA-compliance solution with respect to SMS text, proprietary IM, or personal email. Further, iPhone and Android users on the Good system can browse the web outside of Good’s secure “container” application and thereby are able to keep browser-based communications secret from their employer.