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Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506
Via E-Mail: pubcom@finra.org

Re: Comments regarding FINRA Regulatory Notice 18-13

Dear Ms. Mitchell:

FINRA has requested comments concerning RN-18-13 which proposes to eliminate the requirement of actual or de facto control over an account to determine a violation of quantitative suitability, under Rule 2111. This change is grounded on the theory that the account control element is unnecessary to ensure that culpability for trading activity rests with the appropriate party. I respectfully disagree.

The suitability rule recently underwent a substantive transformation with an effective date of July 2012. Now it is being suggested that the necessity of proving "control" when bringing a claim of "excessive trading"/"churning" should be removed. By removing the factor of control, one would be removing both the moving factors behind the transaction(s) and the ultimate responsibility for approving and or directing transactions. The consequences would be to alleviate any sense of personal responsibility of the client for investments and strategies. This is despite the fact that the client may be the driving force behind the types and timing of recommendations, and or other factors, which would demonstrate to the "trier of the facts" that the client was in control of the activity in the account, thereby negating any possibility of a finding of "churning" in the account. Yet 18-13 wants to ignore the issue of control. It appears that they no longer wish to even call it churning, but instead just call it "quantitative suitability."

According to Notice to Members 18-13, when FINRA originally attempted to codify and change the suitability rules, it apparently codified the line of cases on excessive trading (historically referred to as "churning").

In order to prevail in a churning claim, one must prove 3 elements as follows:

1. Excessive trading
2. Control
3. Scienter

Excessive trading is an element of churning; however, you can have a separate and distinct finding of excessive trading in regard to a suitability claim. Given the nature of the clients' objectives and risk parameters, you can show a violation there without control or scienter. Aren't the authors of 18-13 eliminating the claim of churning? Regardless of who controlled the account activity, the charge of excessive trading will be brought and there will be little or no defense possible of control by the client.

The regulatory notice states that it would not change the obligations to prove that the transactions were "recommended" and that the level of trading was excessive and unsuitable in light of the customer's investment profile. It would seem to this writer that the reliance upon a "recommendation" as a factor would be more reasonable if we had a Notice to Members which clearly enabled an advisor to make such a recommendation without fear of legal consequences since they were consistent with the client's profile or as a direct request from the client for a particular type or timing of a recommendation. This is at the clients' direction to the firm that the recommendations given should fall within those risks and those parameters. As long as they are consistent with and verified by the client, they should be in a "safe harbor" for the account executive whether it be conservative or speculative. This, however, would have to recognize speculative recommendations and activity are consistent with speculative objectives.

The proposed notice should be effective for clients pursuing claims against inappropriately recommended activities as well as provide the strongest of defenses for those relying upon the speculative, or other, profiles for those in

reliance upon the clients' verification of those objectives in order to make recommendations. If the control element is dropped, the recommendation element should be enhanced. For instance, a series of recommendations (that are obviously not churning) would be given a presumption of suitability if they are within the client profile. The client would have the burden of rebutting that presumption.

Imagine the person who wants to trade options and seeks out a broker to make recommendations of options of value at the time. He is making recommendations to quality and timing of the transactions in a short-term vehicle but both the impetus and control belong to the client.

Imagine the client who determines he or she desired to invest in gold and natural resources. That person regularly looks for advice and recommendations on oil gold, silver, etc. and the shifts which occur in those fields. Recommendations are being made but they are being driven by the client. Panels will continually look for the impetus, the driving force, the cause, or simply the control.

The examples wherein someone was found to be in control, regardless of age, gender or education, is a question of fact and none other. These facts are first reviewed by supervisory teams at the firms. If need be, the regulators and or legal system adjudicates based upon the facts. Control has always been one of those necessary factors and it should remain as such.

Fortunately, we have mature markets with well thought out case law generated by our legal system. These cases and their juris prudence have outlined the essential factors in these churning cases and even give guidance to the appropriate methods for determining culpability as well as damages in various types of churning cases. This history gives others trying cases of this nature a structure of fairness, legal rights, and duties in such cases. This guidance would become relatively worthless in churning cases if control is removed. The system, the structure, and the rule currently work. Integrity is the bedrock of our system. By removing control, you remove culpability. By removing culpability, you remove accountability and the integrity of the system.

Let's ask the question: Do we not trust the arbitrators and or judges to be fair? Do we think we should intervene to determine the outcome by establishing rule changes like this? I think not!

As one can easily see, this transformation of the rules of conduct to remove the act of churning because it requires an element of control is at best confusing. In reality, it is a manipulation of the appropriate language which appears to have the purpose of trying to eliminate the established procedures for the analysis and potential defense of brokers who work with speculative and aggressive accounts. These accounts may desire to take greater risks. These avenues are available to those who wish to risk their investable resources to achieve higher returns. These clients, older or younger, may very well be in control of the types and timing of recommendations and the ultimate transactions. This is, has been, and hopefully always will be part of the capitalistic systems inherent in the markets. Even if the SEC proposal on Best Interest becomes the rule, the presumption approach would be useful to protect broker dealers from unwarranted claims of unsuitability.

As indicated above, this suggested change does not help anyone. This change would be counterproductive for our system as a whole, including the investors, the advisors, the regulators, and the arbitrators or judges. In other words, it weakens the foundation and sacrifices the integrity of the system.

Respectfully submitted,

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