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June 12, 2018

Via E-Mail – rule-comments@sec.gov

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-07-18
Comment Letter re: "Regulation Best Interest"

Dear Mr. Fields:

On behalf of Keesal, Young & Logan, P.C., we submit our comments regarding the Securities and Exchange Commission's proposed "Regulation Best Interest" and specifically the language proposed at 17 C.F.R. §240.15l-1(a)(2)(ii)(C).

As drafted, the proposed language would permit the SEC to establish a violation for "excessive trading" (e.g., churning) without establishing that the broker exercised actual or *de facto* control over the trading. We urge the SEC to revise the regulation to conform to long-standing precedent governing churning claims and to expressly state that a violation of 17 C.F.R. §240.15l-1(a)(2)(ii)(C) can occur only where the broker exercises actual or *de facto* control over the trading in the customer's account. The basis of our comments is set forth in the enclosed letter to the Financial Industry Regulatory Authority ("FINRA") dated June 11, 2018, in which we commented on FINRA's proposed amendment to its parallel "quantitative suitability" rule, FINRA Rule 2111. (For reference, SEC Release No. 34-83062 regarding "Regulation Best Interest" discusses FINRA Rule 2111 at pages 149-155.)

For the reasons set forth in our comment letter to FINRA regarding its proposed amendment to FINRA Rule 2111, we respectfully urge the SEC to conform Regulation Best Interest and the language proposed at 17 C.F.R. §240.15l-1(a)(2)(ii)(C) to long-standing precedent governing churning claims and to require that a violation of the this subsection can exist only where the broker had actual or *de facto* control over the trading.

Re: File Number S7-07-18
Comment Letter re: "Regulation Best Interest"

Thank you for the opportunity to comment.

Very truly yours,

Stacey M. Garrett

Stacey M. Garrett
On behalf of Keesal, Young & Logan, P.C.
stacey.garrett@kyl.com

SMG: (KYL4821-7763-1337.1)

Enclosure: As stated

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June 11, 2018

Via E-Mail – pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: Comments regarding FINRA Regulatory Notice 18-13 (April 20, 2018)

Dear Ms. Mitchell:

On behalf of Keesal, Young & Logan, P.C.,[1] we are writing to submit our comments regarding FINRA's proposed amendments to Rule 2111, as set forth in Regulatory Notice 18-13 (April 20, 2018).

Summary of Comments

For the last 60 years, courts across the United States have held that liability for churning requires proof that the broker had actual or *de facto* control over the trading. Where the broker does not control the trading, churning does not exist. In 2010, FINRA amended Rule 2111 to codify and reflect the long-standing line of cases on excessive trading (sometimes referred to as "churning") as the rule's "quantitative suitability" obligation. (Reg. Not. 18-13, p. 2.)

[1] Since 1970, Keesal, Young & Logan has represented companies and individuals associated with the financial services industry. Our attorneys have appeared in thousands of securities arbitration proceedings conducted by the Financial Industry Regulatory Authority (FINRA), the New York Stock Exchange, Pacific Stock Exchange, American Stock Exchange, National Association of Securities Dealers, American Arbitration Association, Judicial Arbitration and Mediation Services (JAMS), National Futures Association and the Municipal Securities Rulemaking Board. We also have significant experience handling regulatory proceedings initiated by the Securities and Exchange Commission, FINRA, CFTC, CBOE and state regulators. Our attorneys frequently speak on topics related to the securities industry in general and FINRA procedures in particular. The opinions and views expressed in this letter are solely those of Keesal, Young & Logan.

Re: Comments regarding FINRA Regulatory Notice 18-13 (April 20, 2018)

Although the law on churning has not changed over the last six decades, FINRA now proposes to amend Rule 2111 to *eliminate* the requirement that FINRA prove the broker "controlled" the trading in order to establish that the broker violated his or her "quantitative suitability obligation" under Rule 2111. FINRA now concludes that the original basis for requiring the "control element" under Rule 2111 is "unnecessary." (Reg. Not. 18-13, p. 3.) FINRA does not identify what has led it to take the unprecedented step of enacting a rule that is contrary to settled law, nor does it identify what has changed in the customer-broker relationship to justify its conclusion that the "control element" is no longer a necessary element of churning. Rather, FINRA now takes the perplexing position that it need only establish that a broker *recommended* a transaction to establish that a broker violated his or her quantitative suitability obligation, if the trading is excessive in light of the customer's investment profile. This position flatly ignores the customer's vital role in exercising the final say as to whether or not to buy or sell securities that have been recommended. Equally troubling, the elimination of the "control element" is a radical and unwarranted departure from more than 60 years of settled American jurisprudence on the issue of churning. All of the United States Courts of Appeals that have addressed the issue have uniformly held that the broker's actual or *de facto* "control" over the trading is an essential element of churning.[2] The federal securities regulations and FINRA Rules should be in harmony with prevailing law, not contrary to it.

FINRA also suggests that the proposed amendment to Rule 2111 is necessary to align Rule 2111 with the Securities and Exchange Commission's recently proposed "Regulation Best Interest." (Reg. Not. 18-13, n. 4.) Notably, Regulation Best Interest has not been finalized or adopted; indeed, the comment period for Regulation Best Interest remains open until August 7, 2018. (*See* SEC Release No. 34-83062, p. 42 (April 18, 2018).) It is premature for FINRA to amend its rules to conform to a *proposed* regulation. Additionally, to the extent that Regulation Best Interest (and specifically the "Care Obligation") proposes to permit regulators to establish a violation of the "quantitative suitability obligation" without establishing that the broker exercised actual or *de facto* control over the trading, it too should be revised to expressly state that the quantitative suitability rule proposed at 17 C.F.R. §240.15l-1(a)(2)(ii)(C) applies only where the broker exercises actual or *de facto* control over the trading.[3]

Finally, FINRA states that that the proposed amendment to Rule 2111 is necessary because establishing that the broker controlled the trading in an account places a "heavy and unnecessary burden on customers by, in effect, asking them to admit that they lack

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[2] See the decisions cited in the Appendix hereto.

[3] For the reasons set forth herein, we similarly urge the SEC to conform Regulation Best Interest and the "Care Obligation" proposed at 17 C.F.R. §240.15*l*-1(a)(2)(ii)(C) to long-standing precedent governing churning claims and to require that a violation of the Care Obligation can exist only where the broker had actual or *de facto* control over the trading.

sophistication or the ability to evaluate a broker's recommendation." (Reg. Not. 18-13, p. 2.) For that reason, FINRA is concerned that the control element serves as an "impediment" to investor protection. As defense lawyers in securities cases for more than 45 years, we have yet to encounter customers who were reluctant to allege lack of sophistication or the inability to evaluate a broker's recommendation, even when confronted with facts establishing precisely the opposite. Even so, removing the "control element" from Rule 2111 will not ease any perceived "burden" on customers because Rule 2111 will not establish a new legal standard for churning cases. There is no private right of action for an alleged violation of industry rules. Indeed, the Securities and Exchange Commission admits that proposed Regulation Best Interest will not create any new private right of action or right of rescission, nor does the SEC intend such a result. (SEC Release No. 34-83062, p. 42.) In other words, establishing *civil* liability for churning will still require a customer to prove the broker controlled the trading in the account, the trading was excessive given the customer's investment objectives, and the broker acted with fraudulent intent.

We support FINRA's mission of investor protection. Of course, that mission must exist in tandem with the equally important goal of providing a fair regulatory framework for brokers. For the reasons set forth in this letter, we urge FINRA's Board of Governors to reject the proposed change to Rule 2111 and to retain FINRA's obligation to establish that a broker "controlled" the trading in an account in order to prove a violation of Rule 2111's quantitative suitability obligation.

1. **The proposed amendment to Rule 2111 will not promote investor protection because there is no private right of action for an alleged violation of FINRA rules.**

FINRA is concerned that the control element is an "impediment" to investor protection, but the proposed amendment to Rule 2111 would not address that concern. Customers who claim that their account was excessively traded (churned) still will be required to establish all of the elements of churning required by law (including that the broker exercised actual or *de facto* control over the trading in the account, and acted with fraudulent intent). It has been settled for many years that investors cannot state a claim for civil liability based on an alleged violation of an industry rule. *See Brady v. Calyon Sec. (USA) Inc*., 406 F. Supp. 2d 307, 312 (S.D.N.Y. 2005) (defendant's motion to dismiss granted because rules of NYSE and NASD do not create a private right of action); *SSH Co. v. Shearson Lehman Bros.*, 678 F. Supp. 1055, 1058 (S.D.N.Y. 1987) ("[T]he [NYSE and NASD] rules contain no express provisions for civil liability and the courts in this circuit have refused to imply a private right of action to enforce these rules."); *Halkin v. VeriFone Inc.* (*In re VeriFone Sec. Litig.*), 11 F.3d 865, 870 (9th Cir. 1993) ("It is well established that violation of an exchange rule will not support a private claim"); *Carrott v. Shearson Hayden Stone, Inc.*, 724 F.2d 821, 823 (9th Cir. 1984) (summary judgment properly granted to defendant because there is no private right of action under NYSE rules); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 680–81 (9th Cir. 1980) (Securities Exchange Act does not provide a private cause of action for violation of stock exchange rules or NASD rules). Therefore, even if FINRA Rule 2111 is modified, and even if proposed Regulation Best Interest is adopted, neither rule will create any new private right of action or right of rescission. The SEC is explicit about this. (SEC Release No. 34-83062, p. 42) ("Furthermore, we do not believe that Regulation Best Interest would create any new private right of action or right of rescission, nor do we intend such a result.")

Having differing standards for "quantitative suitability" under FINRA Rule 2111 and for "churning" under federal law will not aid investor protection; it will only promote investor (and possibly arbitrator) confusion. Moreover, if arbitrators errantly base an award in favor of a public customer on the more lenient standard of proposed amendment to Rule 2111 in disregard of the prevailing and controlling law on churning (including the required element of "control"), the resulting award could be subject to vacatur in several circuits as a result of the arbitrators' manifest disregard of the law. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 91–92 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (the "manifest disregard" doctrine allows a reviewing court to vacate an arbitral award only in "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent."); *Wachovia Sec., L.L.C. v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (manifest disregard is "a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.'"); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008) (citing *Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70* F.3d 418, 421 (6th Cir. 1995)) ("Thus, an arbitrator acts with manifest disregard if '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'"); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th Cir. 2011) (although the words "manifest disregard for law" do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4).)

True investor protection demands reliability and consistency. In that regard, FINRA Rules should be consistent with, not contrary to, established law. The proposed amendment to Rule 2111 should be rejected. Like established federal law, Rule 2111 should continue to require FINRA to establish that a broker "controlled" the trading in an account in order to prove a violation of Rule 2111.

Re: Comments regarding FINRA Regulatory Notice 18-13 (April 20, 2018)

2. <u>The customer's control over the trading should continue to be a defense to regulatory actions alleging excessive trading</u>.

The proposed amendment to Rule 2111 would enable FINRA to establish that a broker had violated his or her "quantitative suitability" obligation even where the broker did not control the trading; in other words, in a situation where the broker did not control the trading, a broker would have a complete defense to a civil claim for churning but could still face regulatory exposure for a potential violation of Rule 2111. There is no justification for creating this disparate standard. Establishing that a broker "controlled" the trading in an account has been an essential element of churning for more than 60 years. *Every* United States Circuit Court of Appeals that has addressed churning has concluded that the broker's actual or *de facto* control of the trading is an essential element of churning.[4] The element of "control" serves an important purpose in churning cases, and it should be no different simply because the complaining party is a regulator.

a. <u>Recommendations do not equal control.</u>

FINRA states that, because it must show that the broker recommended the transactions in order to prove a Rule 2111 violation, culpability for excessive trading will still rest with the appropriate party even absent the control element. (Reg. Not. 18-13, p. 3.) But it is well-settled that recommendations do not equal control. *Sheldon Co. Profit Sharing Plan & Tr. v. Smith, 82*8 F. Supp. 1262, 1273 (W.D. Mich. 1993). If a customer is fully able to evaluate his broker's advice and agrees with the broker's suggestions, the customer retains control of the account. *Newburger, Loeb & Co. v. Gross, 56*3 F.2d 1057, 1070 (2d Cir. 1977) (citing *Carras v. Burns, 51*6 F.2d 251, 258–59 (4th Cir. 1975)). "As long as the customer has the capacity to exercise the final right to say 'yes' or 'no,' the customer controls the account." *Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 635 F. Supp. 1391, 1394 (D. Md. 1986) (citing *Follansbee v. Davis, Skaggs & Co., 68*1 F.2d 673, 677 (9th Cir. 1982)).

The control element serves an important purpose that would be eviscerated by the proposed amendment to Rule 2111. Requiring proof that the broker exercised actual or *de facto* control over the trading — not that he or she merely *recommended* it — ensures that responsibility for the transaction rests with the appropriate party. Evidence that a customer followed his broker's recommendations does not determine who controlled the account. The customer's sophistication in securities transactions and independent evaluation about the handling of the account are at least equally important. *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 3 (1st Cir. 1983). To hold otherwise would prevent imputing control to the highly sophisticated investor who actively monitors his account but typically does not disagree with his

[4] See Appendix hereto.

broker's recommendations. *Id.* As the United States Court of Appeals for the Ninth Circuit recognized more than 35 years ago, "[i]t simply cannot be construed to mean that the sophisticated investor is not in control of his account simply because he usually follows the recommendations of his broker. As long as the customer has the capacity to exercise the final right to say 'yes' or 'no,' the customer controls the account." *Follansbee*, 681 F.2d at 677.

By allowing a broker's mere "recommendation" instead of "control" to form the basis of a regulatory violation of proposed amended Rule 2111, FINRA will effectively eliminate the significance of the customer's participation in the trading. This is exactly the outcome the United States Court of Appeals for the First Circuit found was improper in *Tiernan*, *supra*. By removing consideration of the customer's involvement in the strategy and trading, proposed amended Rule 2111 would give FINRA the ability to penalize brokers for trading decisions made by sophisticated customers who actively participate in —and who at times direct — the activity in their accounts but typically do not disagree with their brokers' recommendations. FINRA's role as a self-regulatory organization should be to oversee a *fair* regulatory framework, not one that penalizes brokers for the informed, involved decisions of their customers.

b. "Solicited" transactions do not equal control.

By its terms, the quantitative suitability component of Rule 2111 applies only where the broker recommends a series of transactions to a customer. The parallel component of the SEC's proposed Regulation Best Interest (the "Care Obligation" at 17 C.F.R. §240.15l-1(a)(2)(ii)) likewise applies only where the broker recommends transactions to a customer. Where a customer directs a trade, a strategy or a series of transactions, the quantitative suitability component of Rule 2111 and Regulation Best Interest would not apply. (SEC Rel. 34-83062, p. 80.) Although we agree that Rule 2111 and the related "Care Obligation" of Regulation Best Interest should not apply to unsolicited transactions, whether a trade ticket is marked "solicited" or "unsolicited" does not always reflect who recommended a transaction and certainly does not reflect who controlled the trading. For those reasons, retention of the "control" element is critical and cannot be satisfied by merely reviewing a trade ticket to determine whether it was marked "solicited" or "unsolicited." Brokers often consider an order "solicited" if they discuss the security with the customer before the trade is executed and the broker agrees with the customer's suggestion, even if the broker does not believe that the trade is in the "best interests" of the customer, and even if the broker did not recommend the transaction. Consider these three scenarios:

<u>Scenario one</u>: A wealthy, experienced customer has a concentrated position in stock with a very low cost basis. Although the broker recommends selling some stock and diversifying into a laddered bond portfolio, the customer rejects the advice, goes on margin and intends to use the margin proceeds to buy more equities in the same industry because the customer knows that industry best. The customer discusses his intended stock purchases with

the broker. The broker gives the customer information about the securities the customer proposes to buy, and the customer decides which stocks to buy. In this scenario, the broker may mark the trade ticket "solicited" because he had provided the customer with information about the securities (an approach that comports with the policies of many member firms), but the trading strategy and the security selection originated with the customer, and — under long-standing principles governing churning claims — the customer controlled the trade. In this scenario, removing consideration of the customer's role and simply ascertaining whether the trade ticket was marked "solicited" or "unsolicited" would fail to present an accurate picture of the transaction and the broker-client relationship. Moreover, investor protection would not be served by finding the broker in violation of proposed amended Rule 2111 in this scenario, although that is certainly a risk in the absence of the "control" element of quantitative suitability.

Scenario two: In the same example described above, the market declines a short time later and a margin call requires the customer to sell securities to meet the call. The customer, after discussion with his broker about all of his securities, chooses to sell the newly-purchased securities because their sale will not result in capital gains tax consequences. Again, the broker may mark the trade ticket "solicited" because he had discussed the securities with the customer. On the face of this paperwork, the trading would appear to be solicited, short-term trading, possibly in violation of proposed amended Rule 2111, even though the broker did not recommend the strategy or the security transactions, and even though the customer clearly controlled the trading. Investor protection would not be furthered by finding the broker in violation of Rule 2111 in this scenario, although the language of the proposed amendment presents that possibility.

Scenario three: In the same example described above, the customer decides to take less than 5% of his substantial liquid net worth and engage in short term trading, including some day-trading and Initial Public Offerings. The broker recommends against short term trading. The customer insists because he likes the "action" of day-trading and IPOs. The customer asks the broker to help him select securities for the purpose of short term trading, and the broker does so. Again, the broker may mark the trade tickets "solicited" because he had discussed the specific securities with the customer, even though the entire strategy was *contrary to* the broker's recommendation. And yet again, investor protection would not be furthered by finding the broker in violation of Rule 2111 in this scenario, although the language of the proposed amendment presents that possibility.

The decision in *Nunes*, 635 F. Supp. at 1394, demonstrates that the customer's actions are far more important than whether a trade is marked "solicited." Mr. Nunes claimed that his account had been churned and that most of the trades were solicited by his broker. *Id.* at 1396. Mr. Nunes had experience in the securities markets, was in telephone contact with his broker on a regular basis and continued similar trading with another brokerage firm after he left Merrill Lynch. *Id.* at 1395. The court concluded that the number of trades that were solicited was immaterial in light of Mr. Nunes's involvement in the account, as shown by the almost daily telephone calls between Mr. Nunes and his broker and their frequent meetings. *Id.* at 1394. The court granted summary judgment to Merrill Lynch, concluding that, "even assuming that many trades were solicited, this would not amount to control since Mr. Nunes clearly possessed 'sufficient intelligence and understanding to evaluate the broker's recommendations and to reject one when he thinks it unsuitable.'" *Id.* (citing *Follansbee v. Davis, Skaggs & Co., 681* F.2d 673, 677 (9th Cir. 1982)) (citation omitted). The *Nunes* decision illustrates why the element of control should not be removed from a determination of whether churning occurred. If control is removed as an element of churning (aka "quantitative suitability"), the fact finder may look solely to whether a trade was marked "solicited" or "unsolicited," without examining the facts behind the paperwork.

Courts overwhelmingly find that a broker's actual or *de facto* control over the trading in a customer's accounts— not simply his or her "recommendations" — is required to establish churning. A finding of potential regulatory liability under Rule 2111 should also require FINRA to establish that the broker exercised actual or *de facto* control over the trading.

Conclusion

As securities attorneys, we share FINRA's desire to protect the public from unscrupulous brokers. However, the rights of member firms and associated persons must not be trampled in the process. To reiterate, we agree that churning — where *all* of its elements (including control) have been established — is a serious transgression. But, the customer's role in the transactions is an important factor that cannot be minimized or worse, eliminated. The legal standard for a potential regulatory violation of Rule 2111 should continue to require proof that the broker controlled the trading.

For the reasons set forth above, we respectfully urge FINRA's Board of Governors to reject the proposed amendment to Rule 2111.

Very truly yours,

Stacey Garrett

Stacey M. Garrett
[redacted]
On behalf of Keesal, Young & Logan, PC

Attachment: Appendix of decisions

APPENDIX

Every United States Circuit Court of Appeal that has addressed churning has concluded that the broker's actual or *de facto* control of the trading is an essential element of churning, as the following decisions demonstrate:

1st Circuit: "Churning is commonly said to have three elements: (1) control of the customer's account by the broker, either explicit or *de facto*; (2) excessive trading in light of the customer's investment objectives; and (3) scienter -- the required state of mind for liability under Section 10(b) and Rule 10b-5." *Rizek v. SEC*, 215 F.3d 157, 162 (1st Cir. 2000).

2nd Circuit: "In order to recover, the customer must show that the dealer effectively exercised control over trading in the account and manipulated the account to his benefit." *Newburger, Loeb & Co., 56*3 F.2d at 1069.

3rd Circuit: "The Commodity Futures Trading Commission, the federal regulatory agency responsible for the administration and enforcement of the Commodities Exchange Act, 7 U.S.C. § 1 et seq. (1982), defines churning as "the excessive trading of an account *by a broker with control of the account*, for the purpose of generating commissions, without regard for the investment or trading objectives of the customer." *Bowley v. Stotler & Co., 75*1 F.2d 641, 644 (3d Cir. 1985) (emphasis added).

4th Circuit: "Churning occurs when a broker, exercising control over the volume and frequency of trading, abuses his customer's confidence for personal gain by initiating transactions that are excessive in view of the character of the account." *Carras v. Burns*, 516 F.2d 251, 258 (4th Cir. 1975).

5th Circuit: "Churning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of the client's interests . . . . Once an investor proves that: (1) the trading in his account was excessive in light of his investment objectives; (2) the broker in question exercised control over the trading in the account; and (3) the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interests . . . . the broker may be held liable for a violation of the federal securities laws under section 10(b) of the Securities Exchange Act of 1934 . . . . and SEC Rule 10b(5)." *Laird v. Integrated Res.*, 897 F.2d 826, 838 (5th Cir. 1990)

6th Circuit: "Churning consists of three elements, *all of which must be present*: (1) the trading must be excessive in light of the customer's investment objectives; (2) the *broker must exercise control over the account*; (3) the broker must act with intent to defraud or with willful and reckless disregard of the customer's interests." *Craighead v. E.F. Hutton & Co., 89*9 F.2d 485, 489 (6th Cir. 1990) (citing M & *B Contracting Corp. v. Dale, 795 F.*2d 531, 533 (6th Cir. 1986)) (emphasis added).

<u>7th Circuit</u>: "There is no single test or formula for proving that churning has occurred, but it is generally said that a plaintiff must show (1) that the broker exercised control over the transactions in the account and (2) that the amount of trading was excessive." *Costello v. Oppenheimer & Co., 71*1 F.2d 1361, 1368 (7th Cir. 1983).

<u>8th Circuit</u>: "To establish churning, it is necessary to prove that the dealer has control of the account and that there has been excessive trading in it." *Booth v. Peavey Co. Commodity Servs.*, 430 F.2d 132, 133 (8th Cir. 1970)

<u>9th Circuit</u>: "It is settled that when a broker, unfaithful to the trust of his customer, churns an account *in the broker's control* for the purpose of enhancing the broker's commission income and in disregard of the client's interest, there is a violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and Securities and Exchange Commission Rule 10b-5. There must be a concurrence of all three elements . . ." *Follansbee*, 681 F.2d at 676 (emphasis added); *see also Mihara v. Dean Witter & Co., 61*9 F.2d 814, 821 (9th Cir. 1980).

<u>10th Circuit</u>: "Under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and SEC Rule 10b-5, a broker may be held liable for violation of federal securities laws once an investor proves that: (1) the trading in his account was excessive in the light of his investment objectives; (2) the *broker in question exercised control over the trading in the account*; and (3) the broker acted with an intent to defraud or with willful and reckless disregard for the investor's interests." *Hotmar*, 808 F.2d at 1385 (emphasis added).

<u>11th Circuit</u>: "The plaintiff must prove three elements in order to establish a cause of action for churning: '(1) the trading in his account was excessive in light of his investment objectives; (2) the broker in question exercised control over the trading in the account; and (3) the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interest.'" *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, 76*7 F.2d 1498, 1501 (11th Cir. 1985) (citing Thom*pson v. Smith Barney, Harris Upham & Co., 709 F.*2d 1413, 1416–17 (11th Cir. 1983)).