ONLINE TRADING LOSSES AND SUITABILITY CLAIMS AGAINST E-BROKERS

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Online securities trading is experiencing explosive growth. With such growth comes a risk that increasing numbers of investors will suffer losses in their online securities accounts. If history is any indication, many such customers will assert so-called "suitability claims" against their e-brokers. Such claims will involve allegations that the e-brokers — through their Web sites or other electronic communications — prompted such customers to purchase securities that were unsuitable given the customers' risk profiles, financial needs or fact-specific situations.

Online trading projections alone suggest an increased risk of such claims. Projected growth in the number of online securities accounts is staggering. According to a study by International Data Corporation, in 1998 approximately 8 percent of all investors maintained an online securities account. This represented 6.4 million accounts. Those 6.4 million accounts generated approximately $1.28 billion in annual revenues for e-brokers. Moreover, IDC projects that by 2002, nearly 33 percent of all investors will trade online and there will be 24 million online securities accounts that will generate approximately $5 billion in annual revenues for e-brokers.[1]

Day Trading Losses Are Likely To Grow

With the explosive growth of easy, one-click trading, it should be no surprise that so-called "day trading" is growing as well. Day traders typically are amateur or "semiprofessional" investors who buy and sell securities hoping for a quick gain. They rarely hold such securities for more than a short time, choosing to cash in their gains or cut their losses quickly as they move on to the next target. Day traders typically maintain a securities account with one or more e-brokers, work out of their homes or at local firms that cater to them especially, and rely on the Internet, television, radio and print publications for much of the information that prompts their trades.

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An entire industry has arisen in the last five years designed solely to serve day traders. There are a host of "how to" books that tutor investors in the supposed "art" of day trading[2] There are numerous Web sites that target their services to day traders[3] Day trading firms have sprung up around the country designed primarily to serve local day traders[4] And, the mainstream press has begun to focus on the growth of day trading as well as the impact it can have on individual stock prices.[5]

According to the President of the Electronic Traders Association, approximately one third of all day traders lose money.[6] The conclusion is inescapable. As more people engage in day trading, more people, in raw numbers, are likely to lose money online. There is the risk, then, that more and more claims are likely to be asserted against e-brokers. Additionally, "mistake" claims are likely to increase in frequency — for example, claims based on inadvertently typing "2000" shares when purchasing stock rather than "200" shares or inputting the wrong ticker symbol for a particular stock. Such claims usually must be pursued in an arbitration setting under the securities arbitration rules of various self regulatory organizations (SROs) and, in some instances, under the securities arbitration rules of the American Arbitration Association.

Securities regulators are not blithely unaware of the risks that day trading and overactive online trading present to average investors. For example, in a recent press release entitled "Day Trading Craze Should Give Investors Pause, State Securities Regulators Warn," the North American Securities Administrators Association, Inc. warned that "[f]or the typical retail investor, day trading isn't investing, it's gambling. If you want to gamble, go to Las Vegas; the food is better. . . . [T]he same message applies to the hundreds of thousands of investors who are actively trading from home using on-line brokerages."[7]

Suitability Claims

Trading losses suffered by litigious customers often result in so-called "suitability claims." Suitability claims arise from the obligation of broker dealers, when making recommendations to customers, to have a reasonable basis for recommending the securities transactions at issue and to recommend only those transactions believed to be suitable for the customer based upon those facts disclosed by the customer concerning his or her other securities holdings, financial situation and financial needs.[8] This requirement arises from SRO rules as well as the so-called "shingle theory." Under that theory, "it is presumed that a broker-dealer that hangs out a shingle and solicits customers makes [an] implied representation of fair dealing."[9]

Violations of the suitability doctrine can give rise to liability under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.[10] In some circumstances, violations also can give rise to liability under Section 12(2) of the Securities Act of 1933[11] and under state law theories of fraud, negligence or breach of contract.[12]

Suitability claims typically rank either first or second as the principal claim asserted by burned investors who pursue action against broker-dealers or their employees.[13] As the number of online securities accounts grows, so does the risk of suitability claims against e-brokers.[14]

Recent Arbitration Claim: A Shot Across The E-Brokers' Bow

At least one recently-filed arbitration presents the issue of precisely what duty, if any, an e-broker has to stop a customer from trading himself or herself into financial ruin. Last Fall Lael Desmond, a 27-year-old graduate student in Indianapolis, Indiana, reportedly commenced an arbitration under the securities arbitration rules of the National Association of Securities Dealers, Inc. (NASD) against Ameritrade Inc.

Mr. Desmond claims that he opened an online margin account with Ameritrade last year while working for his father's business, taking graduate biology courses at a local institution and saving money for medical school. Mr. Desmond alleges that during the August 1998 market correction, he lost more than $40,000 of his savings by trading Internet stocks on margin. Among many other things, Mr. Desmond contends that Ameritrade "breached its suitability obligation" to him when it allowed him to continue trading risky stocks on margin.[15]

The Desmond Arbitration should be considered a "shot across the bow" of e-brokers. Soon, others — and their lawyers — likely will be looking to craft claims against their e-brokers in the hope that they can recoup losses resulting from overly-optimistic assessments of market sectors or individual stocks. Such claims likely will take the form of the nearly-ubiquitous "suitability" claim.

The remainder of this article will discuss suitability issues as they arise in the e-broker context and will provide recommendations for reducing the risk of liability in connection with suitability claims by online investors.

The SEC's 1984 Computer Brokerage System Release

On October 9, 1984, the United States Securities and Exchange Commission issued its Computer Brokerage System Release.[16] In that release, the Commission emphasized that broker-dealers owe their customers a high standard of care in determining the suitability of investments. As the SEC noted:

> The final concern is one of investor qualifications and suitability. Because these systems provide investors greater flexibility in trading, the Commission believes it is important that a broker-dealer use a high degree of care in making its initial determination regarding an investor's financial qualifications and his suitability for large and risky investments.[17]

The 1984 Release further stated: "[e]xisting rules [that] require a familiarity with one's customers and their trading activities, and the retention of books and records, are, if anything, *more crucial in the context of computer brokerage systems where direct contact between investors and their brokers is reduced*."[18]

Additionally, the 1984 Release emphasized the SEC's view that suitability considerations arise when a broker-dealer or associated person "provides investors [with] research and analysis amounting to recommendations of individual securities through the computer brokerage system or accompanying data bases."[19]

Finally, the 1984 Release suggests that broker-dealers that provide online research or recommendations to their customers may be subject to some degree of increased scrutiny regarding whether they have discharged their suitability obligations. Thus, "[o]nline broker-dealers should be aware that they may need to expand their suitability reviews as they provide their customers with equity research, the opportunity to participate in IPOs, direct solicitations and other financial services."[20]

The 1984 Release — though somewhat dated — suggests three important considerations for today's e-brokers. First, the SEC recognized at the time of the Release that computerized trading means that there is a likelihood of reduced personal contact between broker-dealers and their customers. Second, the SEC deemed it critical at the time of the Release, in view of such reduced personal contact, that broker-dealers should exercise a high degree of care at the outset of the account relationship to make an appropriate "initial determination" regarding each investor's "financial qualifications and . . . suitability for large and risky investments." And, third, anything that might be construed as an online "recommendation" may subject the broker-dealer to heightened scrutiny regarding its obligations under the suitability doctrine.

More Recent Guidance

Because most SRO suitability rules, like NASD Rule 2310, require that registered representatives have reasonable grounds for believing that a "recommendation" to a customer is suitable, there is an important threshold issue regarding what exactly is a "recommendation." As has recently been noted:

Concerns have arisen, however, about the application of the NASD Rule 2310 suitability standard in the use of electronic media as a result of certain SRO interpretations of its application. Rule 2310 requires a registered representative to have reasonable grounds for believing that a purchase recommendation to a customer is suitable. . . . Rule 2310 applies only when a purchase recommendation is made to the client and therefore the threshold issue in a suitability analysis is whether a recommendation has been made.[21]

In considering a proposed rule similar to Rule 2310, the SEC has indicated that suitability considerations arise when a broker-dealer "recommends to an investor the purchase of a specific [security]" and do not arise when the broker-dealer serves "solely as an order taker" or is simply placing "general advertisements."[22]

Additionally, the NASD has provided further guidance regarding what constitutes a "recommendation" for purposes of determining suitability obligations. After emphasizing that Rule 2310 does not apply where a broker-dealer "acts solely as an order-taker for persons who, on their own initiative, effect transactions without a recommendation from" the broker-dealer, the NASD defined a recommendation to include any instance in which a broker-dealer:

> brings a specific security to the attention of the customer through any means, including, but not limited to, direct telephone communication, the delivery of promotional material through the mail, or the transmission of electronic messages.[23]

Also, the NASD has not sought "to suggest that every statement that includes mention of a security would be considered a recommendation;" instead, the determination of whether or not a recommendation has been made "depends on an analysis of all the relevant facts and circumstances . . . ."[24]

Admittedly, however, information provided electronically by an e-broker (via its Web site or otherwise) might constitute a recommendation even if it is not intended as such by the e-broker. Indeed, in 1996, the NASD emphasized that:

Special care should be taken where a member or associated person transmits via email, television, radio, or other electronic medium messages concerning a particular security to a broad universe of investors of varying financial sophistication, experience, and resources. In such circumstances, the suitability of the security should be determined with respect to each customer who responds to the message before effecting a transaction. Further, consideration should be given to the desirability of including a notice in the electronic tranmission alerting the recipients of the message to the need to assess the security in the context of each customer's individual circumstances.[25]

E-Brokers Seek Guidance On the Suitability Issue

Such pronouncements, of course, do little to clarify precisely how e-brokers might run afoul of suitability requirements. Indeed, they raise more questions than they answer.

If an e-broker offers financial planning tools on its site that permit customers to specify certain criteria and then, based on those criteria, presents customers with investment alternatives, does this constitute a "recommendation?" If the e-broker site offers research dealing with particular companies and their securities, does this constitute a "recommendation?" Do links from an e-broker's Web site to external sites that reference or address particular securities constitute a "recommendation?"

Is it enough to perform a single suitability determination at the time an online account is created or must there be some continuing obligation in this regard? What are the implications of permitting online account owners to have e-mail subscriptions (or other electronic subscriptions using push technology) to online research reports about particular companies and their securities? Is there any obligation on the part of an e-broker to intercede when a trade appears completely out of character based upon previous trades conducted through the same account (where, for example, the account owner has never made a purchase of a particular form of risky securities worth more than $1,000 but suddenly seeks to make such a purchase in excess of $100,000)?

Such questions appear to have prompted the industry to begin the arduous process of seeking regulatory guidance. Indeed, a committee of the Securities Industry Association reportedly "wants securities regulators to clarify whether discount and online firms can be held liable in what are known as 'suitability' complaints, normally brought against stockbrokers."[26] Indeed, in the last few months the issue reportedly has arisen at two meetings of a new industry association of discount brokerage firms according to Michael Anderson (of Ameritrade Inc.) who co-chairs the association.[27]

Regulatory guidance in this context would be appropriate. Investors looking for recompense easily forget that the online accounts in which they suffered their losses are self-managed accounts over which the e-broker has no discretion. Indeed, typically there is not even an individual broker assigned to oversee an investor's online account.

Clearer guidelines regarding precisely those circumstances in which an online broker-dealer can be found to have made some form of "unsuitable" recommendation to an online investor who manages his or her own securities account would seem appropriate ***before*** the number of online investors grows to the extent forecast by International Data Corporation.[28]

The self-managed nature of most such accounts, combined with the scienter and loss causation requirements that apply to suitability claims based on alleged violations of Rule 10b-5, likely will doom most such claims against e-brokers to failure. But, before massive resources are expended by customers to pursue such claims (and by e-brokers to defend them), e-brokerage customers, and their online brokers, deserve more clearly-defined boundaries of precisely how the "suitability doctrine" applies in the e-broker context.

Steps To Minimize The Risks Of E-Broker Suitability Claims

Until securities regulators and SROs adequately clarify the situation, there are some things that e-brokers can do to minimize the risk of suitability claims by the owners of online securities accounts. What follows is a brief list of such considerations.

- Of course, e-brokers should always require prospective customers to complete appropriate new account documentation (including a click-wrap agreement) when opening an account.[29] Those agreements should require the customer to provide basic suitability data such as background and educational experience, investment experience, other securities holdings, current financial situation, financial needs, investment objectives and the like. The agreement further should clarify, explicitly, that the account is self-managed, that the account owner trades at his or her own risk, that the account owner is solely responsible for determining the suitability of individual investments, that the account owner will not rely on the e-broker to determine the suitability of any particular investment and that the account owner acknowledges that all information and services delivered via the e-broker's site, including the delivery of research reports and the like, is solely informational in nature and does not constitute a recommendation of any particular security or security transaction.

- E-Brokers should require customers to meet more stringent requirements to trade on margin, to trade stock options, or to trade in exotic securities. E-brokers should utilize click-wrap agreements through which the customer acknowledges an understanding of the explicit nature of such trading mechanisms, the risks involved and the fact that the account owner is solely responsible for determining the suitability of any individual investments.

- E-brokers should use an electronic or printed form of "negative consent letter" confirming all the account and suitability information. Such a letter has been described as follows: "[a] negative consent letter contains all the client's pertinent account information and is sent to the address listed on the account. It requests the customer to review the information and, if appropriate, to send any corrections to the firm by a return e-mail or letter and pre-paid envelope provided in the mailing."[30]

- E-brokers should require that participation in any special programs (delivery of research, availability of IPOs, providing lists of possible investments geared to financial or retirement goals, etc.) is conditioned on a recognition that the programs do not constitute recommendations and that the determination of suitability lies within the sole responsibility of the customer. They further should structure such programs so that, upon delivery of information, the same points are made to the customer.

- E-brokers should use state of the art technology to monitor accounts for unusual trading activity. As for what constitutes "unusual" trading activity in any particular account, e-brokers should permit the customer to define its scope. During the account opening process, it is possible to tell the customer that the account will be monitored for unusual activity and to present the customer with a "pick list" of activities that will be monitored, such as: purchases or sales that exceed a certain amount of money, frequency of trading, efforts to liquidate more than a specified percentage of account assets, etc. By providing the customer with an opportunity to define what he or she believes will be "unusual" for the account, the online broker mitigates any future argument that it failed to identify "unusual" activity that might give rise to an obligation to conduct a suitability determination.

- Be certain to reconsider suitability issues with each rollout of added features at the e-broker site (*e.g.*, a decision to provide online customers with equity research, providing customers with an opportunity to participate in IPOs, use of e-mails or push technology to solicit investments in particular securities, etc.).[31]

- If any portion of the e-broker's Web site is devoted to news items, clearly label it as such so as to distinguish such items from research or anything else that might be construed as a recommendation.[32]

- When investments are addressed on the e-broker's Web site or through any other electronic media that originates from the e-broker, "the level of risk involved should be clearly stated."[33]

Above all, until more regulatory guidance is available, it would seem prudent for e-brokers to make clear that any form of information that they provide to online account owners — via their Web site, via e-mail or otherwise — is provided solely for informational purposes, and does not constitute a recommendation of any particular security or security transaction.

ENDNOTES

1 Paul Johnson, *Online Brokerage Forecast, 1997-2002: Redefining the Brokerage Landscape*, Nov. 1998 (Int'l Data Corp. Rep. #W17465). *See also Study Sees Strong Growth of Online Trading*, CMPnet TechWeb, Nov. 10, 1998 <http://www.techweb.com/wire/story/TWB19981110S0016>.

2 *See*, *e.g.*, David Nasser, How To Get Started in Electronic Day Trading (Mcgraw -Hill 1999); Jake Bernstein, The Complete Day Trader II (McGraw-Hill 1998); Harvey L. Houtkin & David Waldman, Secrets of the Soes Bandit: Original Electronic Trader Reveals His Battle-Tested Trading Techniques (McGraw-Hill 1998); Marc Friedfertig, George West & George Piecznik, The Electronic Day Trader (McGraw-Hill 1998); Howard Abell, The Day Trader's Advantage: How To Move From One Winning Position to the Next (Dearborn Trade 1996); Robert M. Barnes, High-Impact Day Trading: Powerful Techniques for Exploiting Short-Term Market Trends (Irwin Professional Pub. 196); Jake Bernstein & Jacob I. Bernstein, The Compleat Day Trader: Trading Systems, Strategies, Timing Indicators, and Analytical Methods (McGraw-Hill 1996); William F. Eng, The Day Trader's Manual: Theory, Art, and Science of Profitable Short-Term Investing (Wiley Finance Editions) (John Wiley & Sons 1993).

3 *See*, *e.g.*, Day Traders Network (visited Dec. 14, 1998) <http://www.daytrades.com/>; Day Trading Stocks.com (visited Dec. 14, 1998) <http://www.daytradingstocks.com>; Mtrader's Learn Daytrading (visited Dec. 14, 1998) <http://www.mtrader.com>; RML Trading (visited Dec. 14, 1998) <http://www.rmltrading.com/home.htm> (claims to be "the first

online electronic day trading firm to offer interactive real time support and education"); Investors Street (visited Dec. 14, 1998) <http://www.istreet.net/>; TEACHDAQ School of Stock Market Training (visited Dec. 14, 1998) <http://www.teachdaq.com/main.asp>.

4 News reports place the number of day trading firms in the United States at somewhere between 60 and 100. *Compare* Daisy Whitney, *Day Traders Place Risk, Reward Above Job* Security, The Denver Post Online, Oct. 19, 1998 <http://www.denverpost.com/enduser/trade1019.htm> ("about 60 facilities nationwide") *with* Cindy Krischer Goodman, *Hate Long-Term Commitments? Be a Day Trader*, Miami Herald, Sept. 13, 1998 <http://www.herald.com/business/pfinan/digdocs/075434.htm> ("about 100 trading locations in this country"). *See also* Helen Huntley, *The Day Traders*, St. Peterburg Times, Aug. 2, 1998 <http://www.sptimes.com/Business/80298/The_day_traders.html>; Ian Karleff, *Day Trading in Wonderland: Surrounded by Images of Alice, Beginners Enter SwiftTrade's World of Share Dealing*, The Financial Post, July 30, 1998 <http://www.cmtcanada.com/MoneyEntre/archive_daytrading.html>.

5 *See* Rebecca Buckman, *Day Traders Blamed for Net Stock Frenzy*, Hotcoco Business News, Dec. 4, 1998 (reprinted from Wall Street Journal) <http://www.hotcoco.com/news/business/businessstories/jfm08522.htm>; Denise Caruso, *The Online Day-Trader Phenomenon*, N.Y. Times on the Web, Dec. 14, 1998 <http://www.nytimes.com/library/tech/98/12/biztech/articles/14digi.html>; *see also* Matthew Schifrin & Scott McCormack, *Free Enterprise Comes to Wall Street*, Forbes Magazine, Apr. 6, 1998 <http://www.forbes.com/Forbes/98/0406/6107114a.htm>; Christopher Byron, *Money: Picking Up Nickles in Front of a Bulldozer [Part I]*, Thirdage (visited Dec. 13, 1998) <http://www.thirdage.com/insider/money/byron/>;Christopher Byron, *Money: Picking Up Nickles in Front of a Bulldozer [Part II]*, Thirdage (visited Dec. 13, 1998) <http://www.thirdage.com/insider/money/byron/911414908-1.html>; Associated Press, *Day Traders Profit from Quick Tactics*, Aug. 29, 1998 <http://augustachronicle.com/stories/083098/bus_LF0209.001.shtml; Karen Testa, *Day Traders Take Wall Street by Storm with Guerrilla Tactics*, Philadelphia Online, Aug. 28, 1998 <http://interactive.phillynews.com/98/Aug/28/traders28.htm>; Amey Stone, *"For 'Day-Traders,' The Turmoil Is Terrific,"* Business Week, Aug. 17, 1998 <http://www.businessweek.com/1998/33/b3591011.htm>; Charlotte W. Craig, *Looking for the Quick Fix*, Detroit Free Press, Oct. 22, 1997 http://www.freep.com/business/qpolar22.htm.

6 Daisy Whitney, *Day Traders Place Risk, Reward Above Job Security*, The Denver Post Online, Oct. 19, 1998 <http://www.denverpost.com/enduser/trade1019.htm>.

7 NASAA Press Release, Nov. 25, 1998 <http://www.nasaa.org/whoweare/media/Day%20trading%20press%20release.html>.

The release further notes that last October, regulators in Massachusetts brought actions against two day trading firms alleging, among other things, the use of deceptive advertising that overstated possible profits and that downplayed risks. *Id. See also* Dan Gallagher, *Securities Regulators Discourage Day Trading: Practice Likened To Gambling, Not Investing*, San Diego Daily Transcript, Nov. 25, 1998 <http://sddt.com/files/library/98/11/25/tbb.html>.

8 *See* NASD Conduct Rules, NASD Manual (CCH) Rule 2310, at 4261 (May 2, 1990) (Rule 2310 is the successor to Article III, Section 2(a) of the NASD Rules of Fair Practice); IM-2310-2 and IM-2310-3. *See also* New York Stock Exchange (NYSE) Rule 405(1)-(3), 2 N.Y.S.E. Guide (CCH) ¶ 2405, at 3696-97 (March 26, 1970) (requiring broker-dealers involved with opening a securities account for a customer to exercise "due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried" and to stay "informed as to essential facts relative to the customer and to the nature of the proposed account"). While much of this article focuses on the standards of conduct that have arisen as part of the law that surrounds NASD Rule 2310 and other similar SRO rules, other pertinent regulatory schemes have arisen in both the Federal and State contexts. *See, e.g.*, Rule 15g-9, 17 C.F.R. § 240.15g-9 promulgated under the Penny Stock Reform Act of 1990, 15 U.S.C. § 78o(g) (mandating a specialized suitability determination in the so-called "penny stock" context); Ohio Rule 1301:6-3-18, Blue Sky L. Rep. (CCH) ¶ 45,540, at 40,519 (requiring suitability determination "based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, *and any other relevant information known to the dealer or salesman*"; emphasis added).

9 Roberta S. Karmel, *Securities Regulation: The Suitability Doctrine*, N.Y.L.J., June 15, 1995, at 3 (citing Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 879 (3d ed. 1995)).

10 15 U.S.C. § 78(j) (1998); 17 C.F.R. § 240.10b-5 (1998). Rule 10b-5 liability, of course, requires proof of scienter, affirmative misrepresentations or a duty to speak and reliance and causation. *See generally Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

11 15 U.S.C. § 77(l)(2) (1998).

12 Dan Brecher & Jeffrey S. Rosen, *Securities Arbitration of Customer Claims Alleging Unsuitability, Improper Markups/Markdowns or Breach of Fiduciary Duties*, PLI Corp. Law & Prac. Course Handbook Series: Securities Arbitration 1996, 950 PLI/Corp 469, 474 (Westlaw July-Aug. 1996).

13 *See* 2 Securities Arbitration Commentator, "Award Reporter," Nos. 6-8 (1992); *see also* Robert N. Rapp, *Rethinking Risky Investments for that Little Old Lady: A Realistic Role for Modern Portfolio Theory in Assessing Suitability Obligations of Stockbrokers*, 24 Ohio N.U.L. Rev. 189, 191 n.6 (1998).

[14] As one industry expert affiliated with Ameritrade Inc. reportedly stated in a recent interview, "'there's a concern of mine that we're going to continue to see more' [suitability] complaints, particularly as Ameritrade's main Internet unit adds tens of thousands of new customers a quarter." Rebecca Buckman, *Cyber Investing: Discount and Online Brokers Worry About Investor Suits*, Wall St. J. Interactive Ed., available in Westlaw, 1998 WL-WSJ 18993484 (Nov. 25, 1998).

[15] For a news article about the filing of the arbitration, *see* Rebecca Buckman, *Cyber Investing: Discount and Online Brokers Worry About Investor Suits*, Wall St. J. Interactive Ed., available in Westlaw, 1998 WL-WSJ 18993484 (Nov. 25, 1998).

[16] Computer Brokerage Systems, Securities Exchange Act Release No. 34-21383, 1984 WL 52312 (S.E.C.) (Oct. 9, 1984), 49 Fed. Reg. 40,159 (Oct. 15, 1984) (the "1984 Release").

[17] *Id.* at *3.

[18] *Id.* (emphasis added; footnotes omitted).

[19] *Id.* (footnote omitted). *See also* Charles Schwab & Co., SEC No-Action Letter, SEC No-Act, 1996 WL 762999 at *10 n.1 (Nov. 27, 1996).

[20] Charles Szurgot, *The Rise of Online Broker-Dealers: Business and Regulatory Issues*, 1(6) Wallstreetlawyer.com 6, 9 (Nov. 1997).

[21] John R. Hewitt & James B. Carlson, Securities Practice and Electronic Technology § 5.03[4], at 5-23 (Law Journal Seminars-Press 1998) (hereinafter "Hewitt & Carlson).

[22] *Sales Practice Requirements for Certain Low-Priced Securities*, Exchange Act Release No. 34-27160, 1989 WL 257805 (S.E.C.) at *21 (Aug. 22, 1989). *See, generally* Hewitt & Carlson, *supra* n.21, § 5.03[4], at 5-24.

[23] *Clarification of Members' Suitability Responsibilities Under NASD Rules With Special Emphasis on Member Activities in Speculative and Low-Priced Securities*, NASD Notice To Members 96-60, 1996 NASD LEXIS 76 at *3 (Sept. 1996). *See, generally* Hewitt & Carlson, *supra* n.21, § 5.03[4], at 5-24.

[24] *See* Letter from John M. Ramsey, NASD Deputy General Counsel, to Stuart J. Kaswell, Senior Vice President and General Counsel, NASD, Re: NASD Notice to Members 96-86 (Jan. 23, 1997) (quoted in Hewitt & Carlson, *supra* n.21, § 5.03[4], at 5-25.

[25] *Supervisory and Other Obligations Related To Use of Electronic Media*, NASD Notice To Members No. 96-50, 1996 NASD LEXIS 60 at *4 (July 1996). As one noted commentator has

emphasized, however, this NASD Notice assumes that an employee of the broker-dealer will interact with the customer before an order is placed. It does not, at least on its face, deal with the situation where a customer learns of information from the e-broker's Web site (or via e-mail from the e-broker) and then executes a trade through an online securities account without any further human interaction. *See* Howard M. Friedman, Securities Regulation in Cyberspace § 16.04[b], at 16-15 through 16-16 (2d ed. 1998).

26 Rebecca Buckman, *Cyber Investing: Discount and Online Brokers Worry About Investor Suits*, Wall St. J. Interactive Ed., available in Westlaw, 1998 WL-WSJ 18993484 (Nov. 25, 1998).

27 *Id.*

28 *See supra* n.1.

29 *See* Howard M. Friedman, Securities Regulation in Cyberspace § 16.04[b], at 16-17 (2d ed. 1998).

30 Hewitt & Carlson, *supra* n.21, § 5.03[4], at 5-25 n.25.

31 Charles Szurgot, *The Rise of Online Broker-Dealers: Business and Regulatory Issues*, 1(6) Wallstreetlawyer.com 6, 9 (Nov. 1997).

32 *See* Howard M. Friedman, Securities Regulation in Cyberspace § 16.04[b], at 16-17 (2d ed. 1998).

33 *See id.* (citing "a message on the Internet Fedsec List, dated Feb. 14, 1998, and posted by Joseph E. Floren of Steefel Levitt & Weiss, San Francisco, CA").