COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, ss. Appeals Court
No. 2022-P-1050

ROBINHOOD FINANCIAL LLC, Plaintiff-Appellee

v.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, AND THE MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH, Defendants-Appellants

Application for Direct Appellate Review

On behalf of Robinhood Financial LLC

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I. REQUEST FOR DIRECT APPELLATE REVIEW

This Court should grant direct appellate review in this case to address the validity under state and federal law of a regulation promulgated by Secretary of the Commonwealth William F. Galvin: the "Fiduciary Duty Rule," 950 C.M.R. § 12.207(1)(a). The Fiduciary Duty Rule represents a stunning power-grab by the Secretary. Without any directive from the Legislature, he purported to override this Court's precedent and unilaterally made a fundamental policy decision for the entire Commonwealth. The case thus presents broadly important questions regarding separation of powers and the bounds of the Secretary's authority.

The validity of the Fiduciary Duty Rule—which would impose a novel fiduciary duty on broker-dealers when providing investment recommendations—also presents a question of tremendous public importance on its own terms. The Rule threatens to increase the costs of broker-dealer services for Massachusetts customers (and price out entirely many less wealthy customers whom Robinhood serves). The Superior Court correctly held below that the Fiduciary Duty Rule flouts this Court's precedent and exceeds the Secretary's

statutory authority, and thus granted judgment in favor of appellee Robinhood Financial LLC. This Court should grant direct review and affirm.

This case presents two questions of law critical to the administration of law in the Commonwealth that warrant immediate final determination by this Court:

(1) Whether the Superior Court correctly held that the Secretary exceeded his authority to define terms in the Massachusetts Uniform Securities Act by imposing a novel fiduciary duty on broker-dealers not recognized by Massachusetts common law.

(2) If the Court concludes that Massachusetts law is not dispositive of the case, whether the Fiduciary Duty Rule conflicts with the U.S. Securities and Exchange Commission's "Regulation Best Interest"—which imposes a lower standard of care on broker-dealers when making securities recommendations to retail investors—and is therefore preempted by federal law.

II. STATEMENT OF PRIOR PROCEEDINGS

Robinhood Financial LLC is a registered broker-dealer that provided investment services to roughly half a million Massachusetts residents in 2020. Compl. ¶ 8. On December 16, 2020, the Massachusetts Securities Division filed an administrative complaint against Robinhood, alleging that several aspects

of Robinhood's business model are "unethical or dishonest."[1] As relevant here, that administrative complaint alleges that Robinhood has violated the Fiduciary Duty Rule, a rule the Secretary promulgated in March 2020, which attempts to override Massachusetts common law and impose fiduciary duties on all broker-dealers. Compl. ¶¶ 54, 60-61.

In April 2021, Robinhood brought this lawsuit against the Secretary and the Securities Division, seeking a declaratory judgment that the Fiduciary Duty Rule is invalid and unenforceable.[2] Robinhood asserted that the Secretary lacked authority to promulgate the Rule and that the Rule is preempted by the Securities and Exchange Commission (SEC)'s "Regulation Best Interest," which imposed a national standard of conduct on broker-dealers when making securities recommendations to retail investors. Compl. ¶¶ 66-84.

Robinhood moved to enjoin the Administrative Action while the Superior Court considered the validity of the Fiduciary Duty Rule. The Superior

[1] This Administrative Action is styled *In the Matter of: Robinhood Financial, LLC* (Docket No. E-2020-0047). The Secretary filed an amended complaint on October 21, 2021, and the action remains pending.

[2] Robinhood also sought injunctive relief under 42 U.S.C. § 1983. A copy of the Superior Court docket sheet is attached as Exhibit A.

Court denied that motion,[3] but concluded "that Robinhood may seek a declaration that the disputed regulation is unlawful without first exhausting its administrative remedies, both because it would be futile to press those claims before the Securities Division and because Robinhood's claims raised pure questions of law with broad implications." Ex. B at 1. Shortly thereafter, the Superior Court ordered the parties to submit cross-motions for partial judgment on the pleadings regarding the Fiduciary Duty Rule's validity.

On March 30, 2022, after full briefing and oral argument, the Superior Court granted Robinhood's motion and denied the Secretary's motion.[4] The court concluded that "the Secretary's promulgation of the Fiduciary Duty Rule was beyond his authority." Ex. C at 3. The court declared the Fiduciary Duty Rule unlawful but stayed its order for 30 days "to permit the Secretary time to pursue an appeal." *Id.* at 26-27.

Thirty days later, on April 29, 2022, the Secretary filed a notice of appeal and a "motion for clarification," claiming uncertainty regarding whether the

[3] A copy of the Superior Court's order denying Robinhood's motion for a preliminary injunction is attached as Exhibit B.

[4] A copy of the Superior Court's order granting Robinhood's motion for judgment on the pleadings and denying the Secretary's motion for judgment on the pleadings is attached as Exhibit C.

court's declaration that the Fiduciary Duty Rule is invalid was an interlocutory order or a final judgment. *See* Ex. A. On August 18, 2022, the Superior Court formally entered a final judgment declaring "that the regulation adopted by the Secretary on March 6, 2020, codified at 950 C.M.R. 12.207(1)(a) is invalid and those sections implementing it, 950 C.M.R. 12.204(1)(a)(4) and 12.204(1)(a)(29), are unlawful in so far as they implement 12.207(1)(a)."[5]

III. STATEMENT OF FACTS RELEVANT TO APPEAL

A. Overview of Broker-Dealers and Investment Advisers

In the United States, individuals can obtain securities investment services from brokerage firms (typically referred to as "broker-dealers") or investment advisers. Broker-dealers and investment firms have different types of relationships with retail investors and different compensation models. Broker-dealers facilitate transactions in securities (i.e., match sellers with buyers) and may, but are not required to, make investment recommendations to retail investors. Under federal law, if a broker-dealer makes investment recommendations, those recommendations must be "solely incidental" to the

[5] The order also dismissed without prejudice Count II of the Complaint on mootness grounds. A copy of the final judgment entered on August 18, 2022, is attached as Exhibit D.

broker-dealer's main business of effecting transactions. 15 U.S.C. § 80b-2(a)(11)(C).

Investment advisers, by contrast, provide investment advice to their clients. *See id.* § 80b-2(a)(11) ("'Investment adviser' means any person who, for compensation, engages in the business of advising others . . . as to [*inter alia*] the advisability of investing in, purchasing, or selling securities."). In keeping with the more limited scope of broker dealers' responsibilities, broker-dealers are typically less expensive than investment advisers. As the SEC has explained, "[b]oth investment advisers and broker-dealers play an important role in our capital markets and our economy more broadly" because, among other things, their different business models "present[] investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services." Commission Interpretation Regarding Standard of Conduct for Investment Advisors, Release No. IA-5248, 84 Fed. Reg. 33,669, 33,669 (July 12, 2019).

Consistent with their different client relationships, broker-dealers and investment advisers have long been subject to different standards of conduct under federal and state law. For decades, consistent with the general common-law standards across the country, Massachusetts has distinguished

between investment advisers, who are fiduciaries of their clients, and broker-dealers, who are not. *See Vogelaar v. H.L. Robbins & Co.*, 348 Mass. 787, 787 (1965); *Patsos v. First Albany Corp.*, 433 Mass. 323, 333-36 (2001). The Massachusetts Uniform Securities Act ("MUSA"), enacted in 1972, leaves the common-law distinction unaltered. *See* G.L. c. 110A (1972). Massachusetts law is consistent with federal law and regulation which has, since the 1940s, treated the two types of investment services and entities differently. *See* Investment Advisers Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (1940), codified at 15 U.S.C. §§ 80b *et seq.*

B. Robinhood's Business Model

Robinhood is a registered broker-dealer. Compl. ¶ 8. Unlike traditional brokerage firms, however, Robinhood does not charge its customers commissions on securities transactions or require its customers to maintain account minimums. Compl. ¶¶ 1, 20. Instead, Robinhood draws revenue from other sources, including payments for routing orders that their customers place to other market participants, known as market makers (often referred to as "payment for order flow"). Compl. ¶ 33. By offering commission-free trading for stocks, ETFs, and options, Robinhood's business model has eliminated a

significant cost of investing and provided clients of lesser financial means a cost-effective way to access the capital markets. Compl. ¶ 20.

C. The SEC's Rejection of a Fiduciary-Duty Standard in Regulation Best Interest

In the wake of the 2008-2009 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). As part of Dodd-Frank, Congress authorized the SEC to consider whether to revise its established standards of conduct for broker-dealers and, if the SEC concluded that changes were needed, to promulgate rules regarding the standard of conduct governing broker-dealers "when providing personalized investment advice about securities to a retail investor." 15 U.S.C. § 78o(k)(1); *see* 15 U.S.C. § 80b-11(g)(1) (similar).

After studying and debating that issue for nearly ten years, the SEC determined that broker-dealers and investment advisers should continue to be subject to different duties. In June 2019, the SEC promulgated Regulation Best Interest ("Reg BI"). In Reg BI, the SEC specifically *rejected* a uniform fiduciary standard for broker-dealers and investment advisers in favor of a "best interest" standard of conduct for broker-dealers when making recommendations to retail customers regarding a particular securities transaction or investment strategy. *See Regulation Best Interest: The Broker-Dealer*

Standard of Conduct, 84 Fed. Reg. 33,318, 33,322 (July 12, 2019) ("Reg BI Adopting Release") ("We have . . . declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers.").

As the SEC explained, subjecting broker-dealers "to a wholesale and complete application of the existing fiduciary standard under the Advisers Act" would fail to account for "the structure and characteristics of the broker-dealer business model." *Id.* Worse yet, a fiduciary standard would actually *harm* retail investors by "significantly reduc[ing] retail investor access to differing types of investment services and products, reduc[ing] retail investor choice in how to pay for those products and services, and increas[ing] costs for retail investors of obtaining investment recommendations." *Id.*

While the SEC stopped short of imposing a fiduciary standard, Reg BI imposed a series of disclosure, care, conflict-of-interest, compliance, and record-making and recordkeeping obligations on broker-dealers when offering securities recommendations to retail investors. *Id.* at 33,220-21. The SEC concluded that these obligations, which "[drew] from key principles underlying fiduciary obligations," would "best achieve the Commission's important

goals of enhancing retail investor protection and decision making, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products." *Id.* at 33,222-23.

Reg BI subsequently survived judicial review when the Second Circuit recognized that the SEC validly "considered and rejected a uniform fiduciary standard for investment advisers and broker-dealers," in favor of preserving customers' ability to choose a non-fiduciary option. *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 250 (2d Cir. 2020).

D. The Secretary's Adoption of a Fiduciary-Duty Standard in Response to the SEC's Regulation

The Secretary opposed the SEC's policy choice in Reg BI. In 2018, during the public comment period on Reg BI, the Secretary urged the SEC to adopt a "strong uniform fiduciary standard" that would require broker-dealers to "stand[] in a fiduciary relationship with the customer," and be subject to the same duties as investment advisers. *See* Letter from Sec. William F. Galvin to SEC Chairman Clayton (Aug. 7, 2018), https://tinyurl.com/33bpjc6s. In that letter, the Secretary accused the SEC of allowing "investor protection [to take] a back seat . . . based on a spurious claim of investor choice," and

threatened that "Massachusetts [would] be forced to adopt its own fiduciary standard" if the SEC declined to do so. *Id.*

Nine days after the SEC announced the final version of Reg BI, the Secretary followed through with that threat. On June 14, 2019, the Secretary proposed a regulation that would impose on broker-dealers the very fiduciary duty that the SEC had rejected. *See* Massachusetts Securities Division, Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (June 14, 2019), https://tinyurl.com/56fhrmk8. The Secretary's proposal explicitly criticized Reg BI because, in the Secretary's view, it "fails to establish a strong and uniform fiduciary standard." *Id.*; *see also* Melanie Waddell, *Galvin Proposes Fiduciary Duty Rule in Massachusetts*, THINKADVISOR (June 14, 2019), https://tinyurl.com/36mmxscp.

The Secretary's proposal generated numerous comments, many of which expressed concern that the proposed Fiduciary Duty Rule would create a "regulatory labyrinth" and urged the Secretary to avoid taking action that directly conflicted with Reg BI in favor of coordinating with other federal and state regulators on a single, uniform standard. One such comment came from

Governor Charles Baker. The Governor voiced concern that "[t]he draft regulation does not appear to sufficiently account for differences in the industry, inadequately defines key terms . . . , and departs from federal regulations and regulations adopted in other states," and would therefore "create more confusion rather than clarity in the industry and for investors." Letter from Gov. Charles D. Baker to Sec. William Galvin (Jan. 7, 2020) at 1, https://tinyurl.com/5y7hkwbh.

The Secretary rejected these comments and adopted the Fiduciary Duty Rule anyway. *See* Massachusetts Securities Division, Adoption of Amendments to Fiduciary Conduct Standard Regulations (Mar. 6, 2020), https://tinyurl.com/2d27ea2v. At every step of the process, the Secretary made clear that he intended the regulation as a repudiation of the SEC's Reg BI. *See, e.g.*, Massachusetts Securities Division, Solicitation of Comments on Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives at 2-3 (Dec. 13, 2019), https://tinyurl.com/3pyhwpfa. Shortly after the final Fiduciary Duty Rule was announced, the Secretary informed the press that the purpose of his new rule was to impose the precise "strict fiduciary standard" the SEC had declined to adopt after years of careful consideration. *See* Justin Baer & Jason Zweig,

After Courts Kill a Federal Fiduciary Duty Rule, Massachusetts Launches Its Own, WALL ST. J. (Feb. 21, 2020, 3:25 PM), https://tinyurl.com/4mu4jr5y.

The Secretary claimed to find authority to create a fiduciary duty for broker-dealers in MUSA, Massachusetts's version of the Uniform Securities Act. Mass. Gen. Laws ch. 110A. MUSA grants the Secretary authority to take certain administrative actions against a broker-dealer or investment adviser who "has engaged in any unethical or dishonest conduct or practices in the securities . . . business." *Id.* § 204(a)(G). It also grants the Secretary narrow authority to make "such rules, forms, and orders as are necessary to carry out the provisions of this chapter, including rules and forms . . . defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of this chapter." *Id.* § 412(a).

Any rule adopted by the Secretary must be "consistent with the purposes fairly intended by the policy and provisions of [MUSA]" and "necessary or appropriate in the public interest or for the protection of investors." *Id.* § 412(b). Section 412(b) further notes that in "prescribing rules," the Secretary may cooperate with the SEC and other state regulators to give effect to "the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever possible."

Id. Section 412 is consistent with section 415, entitled "Statutory Policy," which provides that MUSA's "general purpose" is "to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation." *Id.* § 415.

Purporting to "defin[e]" MUSA's existing term "unethical or dishonest conduct or practices," *id.* §§ 204(a)(G), 412(a), in promulgating the Fiduciary Duty Rule the Secretary added a new regulation, section 12.207, entitled "Fiduciary Duty of Broker-dealers and Agents." Relevant here is subsection (1)(a) of that regulation, which defines as an "unethical or dishonest conduct or practice[]":

> Failing to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.

950 Code Mass. Regs. § 12.207(1)(a). The Secretary also promulgated a parallel amendment to section 12.204(1)(a), making it a "dishonest or unethical practice" to "fail[] to act in accordance with the duties and standards described in 950 CMR 12.207." *Id.* § 12.204(1)(a)(29).

IV. STATEMENT OF ISSUES OF LAW RAISED ON APPEAL

(1) Whether the Superior Court correctly held that the Secretary exceeded his authority to define terms in the Massachusetts Uniform Securities

Act by imposing a novel fiduciary duty on broker-dealers not recognized by Massachusetts common law.

(2) If the Court concludes that Massachusetts law is not dispositive of the case, whether the Fiduciary Duty Rule conflicts with the U.S. Securities and Exchange Commission's "Regulation Best Interest"—which imposes a lower standard of care on broker-dealers when making securities recommendations to retail investors—and is therefore preempted by federal law.

V. BRIEF ARGUMENT

The Fiduciary Duty Rule is the product of the Secretary's defiance of both this Court's delineation of Massachusetts common law and federal law as expressed in the SEC's Reg BI. In promulgating the Rule, the Secretary substituted his judgment as to what standards should govern broker-dealers for the common law and the judgment of this Court, the Legislature, the Governor, and the federal government. The Fiduciary Duty Rule *changes* the law and thus exceeds the Secretary's authority to make rules that *effectuate* MUSA. Rather than identify any new legislative directive, the Secretary claimed that his authority to "define any terms" in MUSA allowed him unilaterally to prohibit industry-standard conduct that had been lawful in

Massachusetts for decades. It does not. Making matters worse, the Fiduciary Duty Rule directly conflicts with federal law and thus is preempted.

The Superior Court correctly invalidated the Fiduciary Duty Rule, and this Court should grant direct review and affirm.

A. The Secretary Lacked Authority to Promulgate the Fiduciary Duty Rule

1. For decades, Massachusetts law has allowed broker-dealers to offer services to customers in a non-fiduciary capacity. In *Patsos v. First Albany Corp.*, 433 Mass. 323 (2001), this Court delineated the scope of duties broker-dealers owe to their customers: ordinarily, "a 'simple' broker-customer relationship is not fiduciary in nature, even if a broker has encouraged the trust of an unsophisticated customer." *Id.* at 330. Building on prior law in the Commonwealth and surveying decisions from federal and other state courts, the Court held that fiduciary obligations apply "only to those stockbrokers who have the ability to, and in fact do, make most if not all of the investment decisions for their customer." *Id.* at 336. In the wake of this Court's decision, the Legislature did not enact any law imposing different duties or direct the Secretary to take any action. *Patsos* remains the authoritative pronouncement of broker-dealers' duties under Massachusetts law.

In promulgating the Fiduciary Duty Rule, the Secretary sought to abrogate this Court's holding in *Patsos*. As the Superior Court recognized, "the Fiduciary Duty Rule imposes a fiduciary duty on broker-dealers even where they lack the type of relationship described in *Patsos* as triggering a fiduciary duty." Ex. C at 18-19. The Rule therefore "expands the universe of broker-dealers subject to fiduciary obligations beyond those subject to such duties under *Patsos*" and therefore "changes the common law as defined by" this Court. *Id.* at 19.

The Secretary, however, lacks authority to override unilaterally this Court's pronouncement of Massachusetts law. The Legislature has not authorized him to override *Patsos*, tasked him to consider whether to impose fiduciary duties on broker-dealers (as Congress did in Dodd-Frank), or authorized him to abrogate the common law more generally. Rather, the Legislature gave the Secretary only carefully circumscribed authority under MUSA to "make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this chapter." G.L. c. 110A, § 412(a). While that limited authority includes the power to "defin[e] any terms" in the chapter, *id.*, it is not a blank check to "redefine" lawful conduct as "unethical

or dishonest" based solely on the Secretary's say-so. It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). And because "courts presume that the Legislature does not intend to displace the common law" absent a clear indication of intent, Ex. C at 20; *Commonwealth v. G.F.*, 479 Mass. 180, 191 (2018), the Superior Court rightly held that the Legislature did not clandestinely give the Secretary the authority to displace the common law in MUSA.

Under the Secretary's extreme reading of section 412, he could unilaterally ban practices that are legal under state law, legal under federal law, and consistent with industry standards, just because he alone thinks it would be a good idea. The Superior Court rightly rejected that expansive reading of the Secretary's delegated authority. Noting that language such as that in section 412 "is common in agency delegations," the Superior Court held that authority to promulgate rules "necessary to carry out the provisions of this chapter" "does not mean that the agency has been delegated unfettered authority to adopt any regulation that the agency concludes is generally consistent with the underlying statute." Ex. C at 23 (citing *Commonwealth v. Maker*, 459 Mass. 46, 49-50 (2011)). Rather, as sections 412 and 415 show, the Legislature

"directed the Secretary to maintain consistency in the securities laws among . . . Massachusetts, the federal government, and the other states which have adopted the Uniform Securities Act." *Id.* at 24. In other words, "the Legislature directed the Secretary to strive for uniformity in the securities laws, and not to create conflict in this area." *Id.*

The Fiduciary Duty Rule, however, "runs directly contrary to this direction." *Id.* Not only does the Fiduciary Duty Rule override this Court's articulation of the common law, but the Secretary knew, and intended, that it would conflict with federal law—after all, the Secretary lobbied the SEC to adopt this standard, and promulgated the Fiduciary Duty Rule only after the SEC chose not to. What is more, the Secretary knew he was departing from the nationwide consensus, writing that he hoped "other state regulators" would follow his lead in imposing stringent fiduciary duties on broker-dealers. *See id.* at 25. As the Superior Court rightly put it: "[t]he Secretary's decision to reject any effort at coordinating with federal authority and that of other states is the opposite of the direction contained in MUSA and supports the conclusion that by adopting the Fiduciary Duty Rule, the Secretary acted beyond his delegated authority." *Id.*

2. The Fiduciary Duty Rule is invalid under Massachusetts law for another reason: the Secretary's overbroad reading of his delegated authority, if accepted, would violate the Massachusetts Constitution. The Secretary claims the unilateral power to declare lawful conduct "unethical or dishonest." If MUSA conferred that power, the Legislature's delegation of authority to the Secretary would be impermissible because it would allow him to "mak[e] fundamental policy decisions," without "adequate direction," and without "safeguards such that abuses of discretion can be controlled." *See Commonwealth v. Clemmey*, 447 Mass. 121, 135 (2006) (quotation marks omitted).

The Superior Court did not reach this issue, but it noted that "the delegation claimed by the Secretary would be a final policy determination, evidently conferring on the Secretary 'unbridled power to regulate . . . [that] can be subject to no meaningful review.'" Ex. C at 23 n.18 (citing *Chelmsford Trailer Park Inc. v. Chelmsford*, 393 Mass. 186, 191 (1984)). That is because "in the Secretary's view, the Legislature delegated to him the authority to redefine the common law as reflected in *Patsos*, an issue of policy as determined by a co-equal branch of government, the judicial branch." *Id.* The result would be that "the Secretary's view of that issue would be the last word as to the

scope of fiduciary duties borne by broker-dealers, rendering any judicial review largely meaningless." *Id.*

In short, the Secretary's claim to unilateral power to overrule this Court's pronouncement of the common law usurps the roles of the Legislature and the Governor. Under the separation-of-powers principles laid out in Article 30 of the Massachusetts Declaration of Rights, the Secretary of the Commonwealth does not possess plenary lawmaking authority.

B. The SEC's Regulation Best Interest Preempts the Fiduciary Duty Rule

Independently, the Fiduciary Duty Rule is invalid because it conflicts with federal law: Regulation Best Interest.[6] The Supremacy Clause provides that the United States Constitution and other federal statutes are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Federal law's supremacy extends to federal regulations that bear "the force of law." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). A state law that conflicts with federal regulation is

[6] The Superior Court did not reach this issue, but this Court can affirm "based on reasons that are the same as or different from those of the Superior Court judge" and "may consider any ground apparent on the record that supports the result reached in the lower court." *Lynch v. Crawford*, 483 Mass. 631, 641 (2019) (quotation marks omitted).

thus preempted. Preemption may expressly be stated in federal law, or it may be implied. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

Implied preemption occurs when state law presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation marks omitted). The Fiduciary Duty Rule does so here. The SEC adopted Reg BI after nearly a decade of study, as directed by Congress in Dodd-Frank. In adopting the "best interest" standard, the SEC "considered a number of options," including "subject[ing] broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act" or "craft[ing] a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers." 84 Fed. Reg. at 33,321-22; *see id.* at 33,462, 33,467. The SEC rejected those alternatives, though, because they were not "appropriately tailored to the structure and characteristics of the broker-dealer business model" and threatened to raise costs for dealers and retail investors, while decreasing "retail investor access to differing types of investment services and products [and] retail investor choice in how to pay for those products and services." *Id.* at 33,322. The SEC thus explicitly rejected a Fiduciary Duty Rule for broker-dealers and made a deliberate decision to promote investor choice.

The Secretary disregarded the SEC's decision and imposed a standard of care on broker-dealers that the SEC specifically considered and rejected after nearly a decade of study. In doing so, the Fiduciary Duty Rule circumvents the SEC's deliberate policy judgment and eliminates choices regarding types of investment services that the SEC sought to preserve.

Such interference with the SEC's deliberate decision is the very definition of a state "obstacle" subject to preemption. In similar cases, the Supreme Court has found that state laws that adopt a standard considered but rejected by Congress or a federal agency in favor of another rule are preempted. For example, in *Geier v. American Honda Motor Co.*, the Court held that a federal regulation preempted a state common-law tort action that sought to impose on car manufacturers a duty to manufacture cars with airbags. 529 U.S. 861, 879-81 (2000). The U.S. Department of Transportation had already "*rejected* a proposed . . . 'all airbag' standard," making instead a "deliberate[]" regulatory choice to gradually require manufacturers to phase-in a "mix" of passive safety restraints, including but not limited to airbags. *Id.* The Court held that a state-law duty to install airbags would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881; *see also Arizona*,

567 U.S. at 405 (holding a state law criminalizing non-citizens engaging in unauthorized employment was preempted by federal law because "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment").

So too, here, the Fiduciary Duty Rule presents an obstacle to the SEC's deliberate choice to preserve a mix of fiduciary and non-fiduciary choices for investors.

VI. REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

This case involves questions of broad public importance concerning the ability of a single executive official to rewrite Massachusetts law. The answers to those questions affect Massachusetts's broker-dealers, residents who want to use broker-dealer services, and potentially myriad others who might be subject to future action by the Secretary under his sweeping view of his rulemaking authority. Mass. R. App. P. 11(a)(3); G.L. ch. 211A, § 10; *Commonwealth v. Landry*, 438 Mass. 206, 208 (2002) (granting direct appellate review where "the questions reported raise[d] issues of Statewide importance"). As the Superior Court concluded (and the Secretary did not

contest), the legal questions in this case "are of great public significance because their resolution will affect many broker-dealers and tens if not hundreds of thousands of their clients." Ex. B at 5.

In promulgating the Fiduciary Duty Rule, the Secretary acted without a delegation of authority from the Legislature and defied both this Court's precedent and the Governor's protestations. The Superior Court rightly saw through the Secretary's efforts to rewrite Massachusetts law as he sees fit. The Fiduciary Duty Rule makes Massachusetts an outlier among the states and pits its law against the federal government's. Direct appellate review is warranted so this Court can affirm the Superior Court's judgment and make clear that the Secretary's rulemaking authority is not unfettered.

The case also presents an important issue of federal constitutional law under the Supremacy Clause. *See* Mass. R. App. P. 11(a)(2). Congress charged the SEC with considering whether to impose fiduciary duties on broker-dealers. After nearly a decade of study and debate, the SEC adopted Reg BI and—despite the Secretary's lobbying—rejected a fiduciary duty for broker-dealers. Before the Superior Court's decision in this case, Massachusetts law thus stood in direct, and intentional, conflict with federal law. Direct appellate review is appropriate so this Court can confirm that federal law

preempts the Fiduciary Duty Rule and that broker-dealers in Massachusetts are subject to the same federal standard of conduct as everywhere else.

Both legal issues presented by this case are critically important to the public. If allowed to stand, the Fiduciary Duty Rule will restrict access to financial services for small investors and increase their costs. Those are the same concerns that animated both the SEC's decision to reject the Secretary's preferred standard and the Governor's objection to the Fiduciary Duty Rule. The Secretary ignored those serious concerns and plunged forward with the Rule anyway, telling the press that he disagreed with the SEC, disagreed with the Governor, and would defend the Rule in court. For the sake of Massachusetts investors, this Court should decide these important issues now.

In short, direct appellate review is appropriate to reinforce the limits of the Secretary's rulemaking authority, to ensure that Massachusetts securities law does not conflict with federal law and the laws of other states, and to preserve the ability of Massachusetts consumers to choose the investment services they want at a price they can afford.

Respectfully submitted this

17th day of November, 2022

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Pursuant to Mass. R. App. P. 11(b), undersigned counsel certifies that the above document was rendered in fourteen-point Century Expanded BT typeface on Microsoft Word 2019 and that the section entitled "Brief Argument" consists of 1,876 words in proportional font.

/s/ Amy Mason Saharia

Pursuant to Mass. R. App. P. 13(d), undersigned counsel certifies that the above document will be sent, on the date of its filing, by email and first-class mail, to Adam Hornstine, Office of Attorney General Maura Healey, One Ashburton Place, Boston MA 02108, adam.hornstine@state.ma.us.

/s/ Amy Mason Saharia

EXHIBIT A

2184CV00884 Robinhood Financial LLC vs. William F Galvin Secretary of the Commonwealth et al

- Case Type:
- Contract / Business Cases
- Case Status:
- Open
- File Date
- 04/15/2021
- DCM Track:
- B - Special Track (BLS)
- Initiating Action:
- Actions Involving Business Entities and Government
- Status Date:
- 04/15/2021
- Case Judge:
-
- Next Event:
-

All Information | Party | Event | Tickler | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/15/2021	Attorney appearance On this date Timothy P Burke, Esq. added for Plaintiff Robinhood Financial LLC		
04/15/2021	Original civil complaint filed.	1	Image
04/15/2021	Civil Action Cover Sheet	2	
04/15/2021	Robinhood Financial LLC's MOTION for appointment of Special Process Server.	3	
04/16/2021	Robinhood Financial LLC's Motion for leave to Allow Ten Excess Pages on Motion for Preliminary Injunctive Relief	4	
04/16/2021	Plaintiff Robinhood Financial LLC's Motion for a Short Order of Notice on Complaint and Motion for Preliminary Injunctive Relief	5	
04/16/2021	Endorsement on Motion for Appointment of Special Process Server (#3.0): ALLOWED		Image
04/16/2021	Endorsement on Motion to Allow Ten Excess Pages on Motion for Preliminary Injunctive Relief (#4.0): ALLOWED		Image
04/16/2021	Endorsement on Motion for Short Order of Notice (#5.0): ALLOWED		Image
04/16/2021	Summons and order of notice issued on a Complaint for a Preliminary Injunction , returnable on 05/11/2021 10:00 AM Hearing on Equity Issue. Judge: Salinger, Hon. Kenneth W Applies To: Burke, Esq., Timothy P (Attorney) on behalf of Robinhood Financial LLC (Plaintiff)	6	
04/22/2021	General correspondence regarding Notice of acceptance into Business Litigation Session. This case is assigned to BLS2.	7	Image
04/26/2021	Short Order of Notice, returned SERVED To registered agent 04/16/2021 Applies To: Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant); Burke, Esq., Timothy P (Attorney) on behalf of Robinhood Financial LLC (Plaintiff)	8	Image
04/26/2021	Short Order of Notice, returned SERVED To registered agent 04/16/2021 Applies To: William F Galvin Secretary of the Commonwealth (Defendant)	9	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/26/2021	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Appearance Applies To: McDonough, Esq., Myles W (Attorney) on behalf of Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)	10	Image
04/26/2021	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's EMERGENCY Motion for Scheduling Order	11	Image
04/26/2021	Opposition to Plaintiff's Motion for Preliminary Injunctive Relief filed by William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth	12	Image
04/26/2021	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Appearance Applies To: Goetz, Esq., Victoria (Attorney) on behalf of Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)	13	Image
04/26/2021	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Appearance Applies To: Donovan, III, Esq., John A (Attorney) on behalf of Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)	14	Image
04/27/2021	Attorney appearance On this date Myles W McDonough, Esq. added for Defendant William F Galvin Secretary of the Commonwealth		
04/27/2021	Attorney appearance On this date John A Donovan, III, Esq. added for Defendant William F Galvin Secretary of the Commonwealth		
04/27/2021	Attorney appearance On this date Victoria Goetz, Esq. added for Defendant William F Galvin Secretary of the Commonwealth		
04/27/2021	Attorney appearance On this date Myles W McDonough, Esq. added for Defendant Massachusetts Securities Division of the Office of the Secretary of the Commonwealth		
04/27/2021	Attorney appearance On this date John A Donovan, III, Esq. added for Defendant Massachusetts Securities Division of the Office of the Secretary of the Commonwealth		
04/27/2021	Attorney appearance On this date Victoria Goetz, Esq. added for Defendant Massachusetts Securities Division of the Office of the Secretary of the Commonwealth		
04/27/2021	Event Result:: Hearing on Equity Issue scheduled on: 05/11/2021 10:00 AM Has been: Rescheduled For the following reason: Joint request of parties Hon. Kenneth W Salinger, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
04/27/2021	The following form was generated: Notice to Appear Sent On: 04/27/2021 10:04:48 Notice Sent To: Timothy P Burke, Esq. Morgan, Lewis and Bockius LLP One Federal St, Boston, MA 02110 Notice Sent To: John A Donovan, III, Esq. Sloane And Walsh LLP One Boston Place 201 Washington Street Suite 1600, Boston, MA 02108 Notice Sent To: Myles W McDonough, Esq. Sloane and Walsh, LLP One Boston Place 201 Washington St Suite 1600, Boston, MA 02108 Notice Sent To: Victoria Goetz, Esq. Sloane and Walsh, LLP One Boston Place Suite 1600, Boston, MA 02108		
05/04/2021	Endorsement on Motion for Scheduling Order (#11.0): ALLOWED (date 4/27/21) Notice 4/29/21		Image
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05/11/2021	Opposition to the Plaintiff's Motion for Preliminary Injunctive Relief (Opposition Memorandum) filed by Massachusetts Securities Division of the Office of the Secretary of the Commonwealth	15	Image

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05/24/2021	Attorney appearance On this date Jaime A Santos, Esq. added for Other interested party Securities Industry and Financial Markets Association		
05/24/2021	Attorney appearance On this date Edwina Clarke, Esq. added for Other interested party Securities Industry and Financial Markets Association		
05/26/2021	Event Result:: Hearing on Equity Issue scheduled on: 05/26/2021 11:00 AM Has been: Held via Video/Teleconference Hon. Kenneth W Salinger, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
05/27/2021	Endorsement on Motion to (#17.0): file Brief of Amicus Curiae ALLOWED Dated: May 26, 2021 Notice sent 5/27/21		Image
05/27/2021	Brief filed: Brief of Amicus Curiae The Securities Industry and Financial Markets Association in Support of Plaintiff's Motion for Preliminary Injunction (filed 5/26/21) Applies To: Securities Industry and Financial Markets Association (Other interested party)	18	Image
05/27/2021	Endorsement on Motion for Preliminary Injunctive Relief (#4.0): DENIED See Memorandum and Order. Dated: May 27, 2021 Notice sent 5/27/21		Image
05/27/2021	MEMORANDUM & ORDER: DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION: ORDER - Plaintiffs' motion for preliminary injunction is DENIED. The parties shall submit additional memoranda of law - to be filed by June 10, 2021, and not to exceed ten pages each - addressing whether the court should or should not stay this action until there is a final decision in pending administrative proceeding, and what case schedule would be appropriate if this matter is not stayed. If the parties are able make a joint recommendation on any of these issues they should do so. A Rule 16 scheduling conference will be held on June 14, 2021, at 2:00 p.m. Dated: May 27, 2021 Notice sent 5/27/21 (See P#19 for complete memorandum) Judge: Salinger, Hon. Kenneth W	19	Image
05/28/2021	The following form was generated: Notice to Appear - BLS Sent On: 05/28/2021 11:18:16 Notice Sent To: Timothy P Burke, Esq. Morgan, Lewis and Bockius LLP One Federal St, Boston, MA 02110 Notice Sent To: John A Donovan, III, Esq. Sloane And Walsh LLP One Boston Place 201 Washington Street Suite 1600, Boston, MA 02108 Notice Sent To: Myles W McDonough, Esq. Sloane and Walsh, LLP One Boston Place 201 Washington St Suite 1600, Boston, MA 02108 Notice Sent To: Victoria Goetz, Esq. Sloane and Walsh, LLP One Boston Place Suite 1600, Boston, MA 02108 Notice Sent To: Jaime A Santos, Esq. Goodwin Procter LLP 1900 N St NW, Washington, DC 20036 Notice Sent To: Edwina Clarke, Esq. Goodwin Procter LLP 100 Northern Ave, Boston, MA 02210		
06/10/2021	William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Memorandum in support of a Stay of this Action or Alternative Scheduling Pending Completion of the Administrative Proceedings	20	Image
06/10/2021	Attorney appearance On this date J. Radke, Esq. added for Other interested party North American Securities Administrators Association Inc		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
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06/14/2021	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 06/14/2021 02:00 PM Has been: Held via Video/Teleconference Hon. Kenneth W Salinger, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
06/16/2021	Endorsement on Motion for leave to file a brief of Amicus Curiae North American Securities Administrators Association, Inc. (#21.0): DENIED Amicus Curiae have no role to play in setting a case schedule. And the topics that NASAA seeks leave to address would not be of assistance to the court. (dated 06/14/21) notice sent on 06/15/21		Image
06/16/2021	MEMORANDUM & ORDER: ALLOWING partially dispositive motions. the parties shall confer and make a joint proposal-if poss ble by the morning of Friday, June 18, 2021-on a efficient process and reasonable schedule for addressing those issues. (dated 6/14/21) notice sent 6/6/21 Judge: Salinger, Hon. Kenneth W	25	Image
06/18/2021	Party(s) file Agreement Joint PROPOSAL for cross-motion for judgment on the pleadings and agreed to briefing schedule. Applies To: Robinhood Financial LLC (Plaintiff); William F Galvin Secretary of the Commonwealth (Defendant); Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)	26	Image
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08/18/2021	Attorney appearance On this date Charles L Solomont, Esq. added for Plaintiff Robinhood Financial LLC		
08/18/2021	Attorney appearance On this date Jason Stiles Pinney, Esq. added for Plaintiff Robinhood Financial LLC		
08/18/2021	Attorney appearance On this date Jeff Goldman, Esq. added for Plaintiff Robinhood Financial LLC		
08/18/2021	Attorney appearance On this date Bryan Michael Connor, Esq. added for Plaintiff Robinhood Financial LLC		
08/18/2021	Attorney appearance On this date Emma M Coffey, Esq. added for Plaintiff Robinhood Financial LLC		
08/19/2021	Opposition to Plaintiff's Motion to file a 40 Page "Consolidated Brief" filed by William F Galvin Secretary of the Commonwealth, William F Galvin Secretary of the Commonwealth	30	Image
08/24/2021	Endorsement on Motion for Leave to file Consolidated Brief (#29.0): ALLOWED brief to be filed within 48 hours, limited to 30 pages, defendant may file a response, limited to 10 pages, within 5 days of plaintiff's filing. (dated 8/23/21) notice sent 8/24/21		Image

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08/25/2021	Endorsement on Motion for leave to File Brief Amicus Curiae (#28.0): ALLOWED (date 8/12/21) Allowed brief shall not exceed 20 pages CT. Rules 9A (a) (5) (civ) Notice 8/12/21		Image
09/03/2021	Endorsement on Motion for Seven Day Enlargement to file Response and for Procedural Clarification (#31.0): ALLOWED dated 8/27/21 (notice sent 08/31/21)		Image
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09/08/2021	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Filing and List of Documents		Image
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09/08/2021	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Certificate of Service		Image
09/08/2021	Affidavit of Compliance with Superior Court Rule 9A		Image
09/08/2021	Opposition to Defendants' Motion for Partial Judgment on the pleadings and Cross Motion for Partial Judgment on the Pleadings filed by Robinhood Financial LLC	34	Image
09/08/2021	Affidavit Declaration of Jason S. Pinney in support of Plaintiff's Cross- Motion for Partial Judgment on the Pleadings and in Opposition to Defendants' Motion for Partial Judgment on the pleadings	35.1	Image
09/08/2021	Exhibits/Appendix Addendum of Admissions from Defendants' Answer		Image
09/08/2021	Exhibits/Appendix Addendum of Sources Relied upon in Defendants' Memorandum in support of (1) Opposition to Plaintiff's Cross- Motion for Partial Judgment on the Pleadings and (2) Reply to Plaintiff's Opposition to Defendants' Motion for Partial Judgment on the pleadings		Image
09/08/2021	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Request for Hearing		Image
09/08/2021	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Certificate of Service		Image
09/08/2021	Robinhood Financial LLC's Memorandum in support of Plaintiff's Cross- Motion for Partial Judgment on the Pleadings and Opposition to Defendants' Motion for Partial Judgment on the pleadings	35	Image
09/08/2021	Reply/Sur-reply Defendants' Memorandum in support of (1) Opposition to Plaintiff's Cross- Motion for Partial Judgment on the Pleadings and (2) Reply to Plaintiff's Opposition to Defendants' Motion for Partial Judgment on the pleadings	36	Image
09/15/2021	North American Securities Administrators Association Inc's Memorandum BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS WILLIAM F. GALVIN AND THE MASSACHUSETTS SECURITIES DIVISION	37	Image
09/18/2021	Plaintiff Robinhood Financial LLC's Assented to Motion for LEAVE TO FILE A REPLY AND SUR-REPLY RELATED TO PLAINTIFF¿S CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS	38	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/18/2021	Exhibits/Appendix PLAINTIFF'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS		Image
09/24/2021	Endorsement on Motion for LEAVE TO FILE A REPLY AND SUR-REPLY RELATED TO PLAINTIFF¿S CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (#38.0): ALLOWED (date 9/22/21) Notice 9/23/21		Image
10/04/2021	Reply/Sur-reply in Support of Opposition to Plaintiffs Cross Motion for Partial Judgment on the Pleadings	39	Image
10/05/2021	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Submission of Addendum of Sources Relied Upon in Defendants' Sur-Reply in Support of Opposition to Plaintiff's Cross-Motion for Partial Judgment on the Pleadings	40	Image
10/15/2021	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's EMERGENCY Motion for seven day enlargement to file response and for procedural clarification (Date 9/3/21) Notice 10/14/21	41	Image
10/21/2021	The following form was generated: Notice to Appear Sent On: 10/21/2021 15:31:18 Notice Sent To: Timothy P Burke, Esq. Morgan, Lewis and Bockius LLP One Federal St, Boston, MA 02110 Notice Sent To: Jason Stiles Pinney, Esq. Morgan, Lewis and Bockius LLP 1 Federal St, Boston, MA 02110 Notice Sent To: Charles L Solomont, Esq. Morgan, Lewis and Bockius LLP 1 Federal St, Boston, MA 02110 Notice Sent To: Jeff Goldman, Esq. Morgan, Lewis and Bockius LLP One Federal St, Boston, MA 02110-1726 Notice Sent To: Bryan Michael Connor, Esq. Morgan, Lewis and Bockius LLP 101 Park Ave, New York, NY 10178 Notice Sent To: Emma M Coffey, Esq. Morgan Lewis and Bockius 1 Federal St, Boston, MA 02135 Notice Sent To: Myles W McDonough, Esq. Sloane and Walsh, LLP One Boston Place 201 Washington St Suite 1600, Boston, MA 02108 Notice Sent To: John A Donovan, III, Esq. Sloane And Walsh LLP One Boston Place 201 Washington Street Suite 1600, Boston, MA 02108 Notice Sent To: Victoria Goetz, Esq. Sloane and Walsh, LLP One Boston Place Suite 1600, Boston, MA 02108 Notice Sent To: Jaime A Santos, Esq. Goodwin Procter LLP 1900 N St NW, Washington, DC 20036 Notice Sent To: Edwina Clarke, Esq. Goodwin Procter LLP 100 Northern Ave, Boston, MA 02210 Notice Sent To: J. Radke, Esq. Murtha Cullina LLP 99 High St 20th Floor, Boston, MA 02110		
12/02/2021	Event Result:: Hearing for Judgment on Pleading scheduled on: 12/02/2021 02:00 PM Has been: Held as Scheduled Hon. Michael D Ricciuti, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		
03/30/2022	MEMORANDUM & ORDER: on Cross Motions for Judgment on the Pleadings Judge: Ricciuti, Hon. Michael D (see P#42 for decision and order) (dated 3/30/22	42	Image
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04/29/2022	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Appeal	43	Image
04/29/2022	Notice of appeal filed. (See p#43) Notice sent 5/2/22 Applies To: William F Galvin Secretary of the Commonwealth (Defendant); Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/09/2022	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Order of Transcript of Proceedings Transcript of 12/2/21 ordered	44	Image
05/11/2022	Transcript of 12/2/21 received from Transcriber Lisa Phipps (via email)		
05/18/2022	Defendants William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Motion for (1) Clarification of whether the Court's Decision and Order of March 30, 2022 s a Final or Interlocutory Decision, and (2) If Interlocutory for report under Mass.R.CIV.P64 and for stay of Trial Court Proceedings	45	Image
05/18/2022	Response to the Motion for Clarification filed by Robinhood Financial LLC	46	Image
05/18/2022	Reply/Sur-reply Defendant's Reply to Plaintiff's Response to the Defendants' Motion for Clarification	47	Image
05/18/2022	Affidavit of Compliance with Superior Curt rule 9A Defendants' Notice of Filing and List of Documents Certificate of Service		Image
06/10/2022	The following form was generated: Notice to Appear Sent On: 06/10/2022 11:06:11		
06/10/2022	The following form was generated: Notice to Appear Sent On: 06/10/2022 11:15:49		
08/16/2022	Event Result:: Motion Hearing scheduled on: 08/16/2022 02:30 PM Has been: Not Held For the following reason: Case Settled Comments: Judgment issued Hon. Michael D Ricciuti, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
08/18/2022	JUDGMENT DECLARED that the regulation adopted by the Secretary on March 6, 2020 codified at 950 CMR 12.207(1)(a) is invalid and those sections implementing it 950 CMR 12.204(1)(a)(4) and 12.204(1)(a) (29) are unlawful in so far as they implement 12.207(1)(a) Count II of the complaint is Dismissed without prejudice as moot Tis Final Judgment becomes effective upon entry by the Court entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Ricciuti, Hon. Michael D	48	Image
08/18/2022	Attorney appearance On this date Adam Hornstine, Esq. added for Defendant William F Galvin Secretary of the Commonwealth		
08/18/2022	Attorney appearance On this date Adam Hornstine, Esq. added for Defendant Massachusetts Securities Division of the Office of the Secretary of the Commonwealth		
09/06/2022	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Notice of Appeal	49	Image
09/08/2022	Notice of appeal filed. (See p#49) Applies To: William F Galvin Secretary of the Commonwealth (Defendant); Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (Defendant)		
09/14/2022	Defendant William F Galvin Secretary of the Commonwealth, Massachusetts Securities Division of the Office of the Secretary of the Commonwealth's Submission of Mass. R. App. P. Rule 8(b) and Rule 9(d) Certification of Ordering Transcripts	50	Image
09/23/2022	Transcript of 5/26/21,6/14/21,12/2/21 received from transcr ber Lisa Phipps (via email)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/17/2022	Notice of assembly of record sent to Counsel Applies To: Donovan, III, Esq., John A (Attorney) on behalf of William F Galvin Secretary of the Commonwealth (Defendant); Pinney, Esq., Jason Stiles (Attorney) on behalf of Robinhood Financial LLC (Plaintiff); Burke, Esq., Timothy P (Attorney) on behalf of Robinhood Financial LLC (Plaintiff); Goldman, Esq., Jeff (Attorney) on behalf of Robinhood Financial LLC (Plaintiff); McDonough, Esq., Myles W (Attorney) on behalf of William F Galvin Secretary of the Commonwealth (Defendant); Solomont, Esq., Charles L (Attorney) on behalf of Robinhood Financial LLC (Plaintiff); Hornstine, Esq., Adam (Attorney) on behalf of William F Galvin Secretary of the Commonwealth (Defendant); Radke, Esq., J. (Attorney) on behalf of North American Securities Administrators Association Inc (Other interested party); Connor, Esq., Bryan Michael (Attorney) on behalf of Robinhood Financial LLC (Plaintiff); Santos, Esq., Jaime A (Attorney) on behalf of Securities Industry and Financial Markets Association (Other interested party); Goetz, Esq., Victoria (Attorney) on behalf of William F Galvin Secretary of the Commonwealth (Defendant); Clarke, Esq., Edwina (Attorney) on behalf of Securities Industry and Financial Markets Association (Other interested party); Coffey, Esq., Emma M (Attorney) on behalf of Robinhood Financial LLC (Plaintiff)		
10/17/2022	Notice to Clerk of the Appeals Court of Assembly of Record		
10/31/2022	Notice of docket entry received from Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2022-P-1050) was entered in this Court on October 27, 2022.	51	 Image

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

2084CV00884-BLS2

ROBINHOOD FINANCIAL, LLC

v.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, IN HIS OFFICIAL CAPACITY, AND THE MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The Enforcement Section of the Securities Division of the Office of the Secretary of the Commonwealth has brought an administrative enforcement proceeding against Robinhood Financial, LLC. It claims that Robinhood violated the Massachusetts Uniform Securities Act (known as "MUSA") by: (i) breaching a fiduciary duty that it allegedly owed to customers when providing investment recommendations or advice; (ii) engaging in other unethical or dishonest conduct in connection with the purchase or sale of securities; and (iii) not reasonably ensuring that is agents comply with the requirements of MUSA.

The fiduciary duty claim is based on a regulation, adopted last year by the Secretary, that imposes a fiduciary duty on broker-dealers when they provide investment advice or recommendations to clients. Robinhood contends that the regulation is unconstitutional or otherwise unlawful.

Robinhood asks the Court to enjoin the pending adjudicatory proceeding before the Division until the Court declares whether the fiduciary duty regulation is enforceable. The Court will exercise its discretion to **deny** this motion for a preliminary injunction.

The Court concludes that Robinhood may seek a declaration that the disputed regulation is unlawful without first exhausting its administrative remedies, both because it would be futile to press those claims before the Securities Division and because Robinhood's claims raised pure questions of law with broad implications.

But it does not follow that the Court should enjoin the pending administrative action. There appears to be no basis for enjoining prosecution of the two claims that are not based on the new fiduciary duty regulation. It would not be in the

public interest to do so. And Robinhood will suffer no irreparable harm if the Division proceeds with the pending administrative action.

The Court will seek additional briefing about whether it should stay this action until there is a final decision in pending administrative proceeding and, if not, what is an appropriate schedule for deciding a dispositive motion on the merits of Robinhood's constitutional claims. It will schedule a conference to discuss those issues with the parties.

1. **Summary of Dispute**. Under MUSA, it is illegal for a broker-dealer to engage in "unethical or dishonest conduct or practices." See G.L. c. 110A, § 204(a)(2)(G). It is also illegal for a broker-dealer to fail reasonably to supervise its employees and other agents "to assure compliance with" MUSA. *Id*., § 204(a)(2)(J). If the Secretary finds that a broker-dealer has committed such a violation, he may impose a fine, suspend or revoke the broker-dealer's registration, or take any other appropriate action. *Id*., § 204(a).

The Secretary has the power to adopt rules "defining any terms" in MUSA. See G.L. c. 110A, § 412(a).

Last year the Secretary adopted a rule under which "[f]ailing to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security" shall "be deemed 'unethical or dishonest conduct or practice' " for the purposes of § 204(a)(2)(G). See 950 C.M.R. § 12.207(1)(a).

Robinhood claims that this regulation imposes a duty not recognized at common law,[1] and that the statute authorizing the Secretary to define terms used in MUSA either does not give him authority to change the common law or is an unconstitutional delegation of legislative power.[2] Robinhood also contends that the regulation violates the Federal Constitution because it is inconsistent with and thus preempted by Federal law, violates Robinhood's

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[1] See *Patsos* v. *First Albany Corp.*, 433 Mass. 323, 333–336 (2001) (broker-dealer owes fiduciary duty if they make most investment decisions for customers, but not if customer makes investment decisions and broker merely receives and executes their orders).

[2] See generally *Murphy* v. *Massachusetts Turnpike Auth*, 462 Mass. 701, 709–710 (2012) (describing separation of powers constraint on delegation of legislative authority under art. 30 of the Massachusetts Declaration of Rights).

First Amendment right to engage speech, and violates the so-called Dormant Commerce Clause.

2. **Legal Background**.

2.1. **Preliminary Injunction Standards**. "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc.* v. *Axsun Technologies, Inc.*, 469 Mass. 181, 194 (2014). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." *Student No. 9* v. *Board of Educ.*, 440 Mass. 752, 762 (2004).

Since Robinhood asks the Court to constrain government action, it must prove that: (1) it is likely to succeed on the merits of its claims; (2) it will suffer irreparable harm if injunctive relief is denied; (3) when the possible harm to each side is considered in light of Robinhood's likely chance of success, the risk of irreparable harm to Robinhood if the injunction is denied outweighs the potential harm to the Securities Division if the injunction is granted; and (4) "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." See *Garcia* v. *Department of Hous. & Cmty. Dev.*, 480 Mass. 736, 747 (2018), quoting *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984); see also *Packaging Indus. Group, Inc*. v. *Cheney*, 380 Mass. 609, 617 (1980).

Robinhood has the burden of proving all of these things in order to justify a preliminary injunction. See, e.g., *Berrios* v. *Dept. of Pub. Welfare*, 411 Mass. 587, 598 (1992) (burden of showing likelihood of success); *GTE Products Corp.* v. *Stewart*, 414 Mass. 721, 726 (1993) (burden of showing irreparable harm); *Tri-Nel Mgmt., Inc.* v. *Board of Health of Barnstable*, 433 Mass. 217, 227 (2001) (burden of showing that injunction would serve the public interest).

2.2. **Exhaustion of Administrative Remedies**. Whether Robinhood is likely to succeed on the merits turns in part on whether it may seek a declaration that the fiduciary duty rule is illegal without first pressing the issue in the pending adjudicatory proceeding before the Securities Division.

"As a general rule, where an administrative procedure is available" from a state agency, a party must "exhaust the opportunities for an administrative remedy" before seeking injunctive or declaratory relief in court. *Space Bldg. Corp.* v. *Commissioner of Revenue*, 413 Mass. 445, 448 (1992). Even where a party contends

that the agency lacks jurisdiction or power to act, the agency "should have an opportunity to ascertain the facts and decide the question for itself…." *Wilczewski* v. *Commissioner of the Dept. of Envtl. Quality Eng'g*, 404 Mass. 787, 793 (1989), quoting *Saint Luke's Hospital* v. *Labor Relations Comm'n*, 320 Mass. 467, 470 (1946).

However, a judge has the discretion to let a civil action proceed in court before a pending administrative action if completed if the "administrative remedy is 'seriously inadequate.' " *Luchini* v. *Commissioner of Revenue*, 436 Mass. 403, 405 (2002), quoting *Space Bldg. Corp*., *supra*. "Only in extraordinary cases may a court take jurisdiction of a matter that is pending before an administrative agency." *Temple Emmanuel of Newton* v. *Massachusetts Comm'n Against Discrim*., 463 Mass. 472, 479 (2012).

The Supreme Judicial Court has identified four circumstances in which a court may grant relief before an administrative agency has made a final decision in an adjudicatory proceeding pending before it. *Id*. at 479–483. First, "[i]n cases where resort to an administrative agency obviously would be futile, and there is no fact-finding function for the agency to perform, a court may exercise jurisdiction despite a plaintiff's failure to exhaust administrative remedies." *Norfolk Elec., Inc.* v. *Fall River Housing Auth*. 417 Mass. 207, 210 (1994). Second, exhaustion may be waived if a case "presents a purely legal question of wide public significance." *Kelleher* v. *Personnel Adm'r of Dept. of Personnel Admin*., 421 Mass. 382, 385 (1995); accord *Space Bldg*, 413 Mass. at 448. Third, a court may exercise jurisdiction without requiring exhaustion where "pursuing the administrative remedy will result in irreparable harm to either party." *Temple Emmanuel*, 472 Mass. at 480. Finally, exhaustion is not required before a court may decide "a question of law 'peculiarly within judicial competence.' " *Id*., quoting *Everett* v. *Local 1656, Int'l Ass'n of Firefighters*, 411 Mass. 361, 368 (1991).

If any of these four factors applies in a particular case, a judge may—but is not required to—entertain a claim for declaratory relief without requiring the plaintiff first to exhaust their administrative remedies. Whether to do so is a matter of discretion; it is rarely required. See *Luchini*, 436 Mass. at 405 (exceptions to exhaustion "may be made in the judge's discretion"); but see *Space Bldg*, 413 Mass. at 448–449 (judge abused discretion in requiring plaintiff to exhaust remedies before appellate tax board, because claim that Commissioner failed to comply with procedural requirements of G.L. c. 30A, § 11(7), raised pure question of law that board lacked jurisdiction to decide).

3. **Analysis**.

3.1. **Likelihood of Success as to Exhaustion of Remedies**. The Court concludes that Robinhood is likely to succeed in showing that it need not exhaust its administrative remedies before challenging the fiduciary duty rule because the "futility" and "wide public significance" exceptions both apply.

It would be futile to ask the Securities Division to vacate the fiduciary duty rule, because it has no power "to strike down a regulation or declare it void on constitutional grounds." See *Doe* v. *Sex Offender Registry Bd.*, 82 Mass. App. Ct. 152, 155 (2012); but see *Duarte* v. *Commissioner of Revenue*, 451 Mass. 399, 413–414 (2008) (agency nonetheless has authority to decide whether regulation validly applies in particular case).

In addition, Robinhood has shown that its challenges to the legal validity of the regulation turn on pure questions of law that do not require any fact-finding, and are of great public significance because their resolution will affect many broker-dealers and tens if not hundreds of thousands of their clients. Defendants do not appear to disagree.

The Court therefore concludes that Robinhood is likely to succeed in showing that it should not have to exhaust its administrative remedies in the pending enforcement action before seeking and obtaining declaratory relief on whether the fiduciary duty regulation is lawful. See *Norfolk Elec.*, 417 Mass. at 210 (futility); *Kelleher*, 421 Mass. at 385 (legal question of wide public significance).

3.2. **Public Interest—Irreparable Harm**. Nonetheless, the Court concludes that it would not be appropriate to enjoin the pending administrative action by the Securities Division against Robinhood, even assuming that Robinhood was likely to succeed on the merits of its constitutional claims.

Robinhood wrongly conflates the factors for deciding whether a party must exhaust its administrative remedies with the distinct standards that govern whether a should issue a preliminary injunction staying an adjudicatory proceeding that is pending before an administrative agency.

If a plaintiff can show that a case falls within any of the four categories of cases discussed in *Temple Emanuel*, then a court may be justified in suspending the exhausting requirement. See 463 Mass. at 480. But these tests are **not** substitutes for the standards that determine whether to issue a preliminary injunction. None of the decisions cited by Robinhood involved the issuance or affirmance

of an injunction staying a pending administrative proceeding until a court resolves a relevant legal question.[3]

As noted above, the Security Division asserts three claims against Robinhood, only one of which is based on an alleged violation of the fiduciary duty rule. If the Court were to strike down the challenged regulation, the Division would still be entitled to press its separate claims that Robinhood's alleged conduct was nonetheless unethical or dishonest, and that Robinhood failed adequately to supervise its employees and other agents to prevent them from engaging in unethical or dishonest conduct.

The Legislature has given the Secretary full authority to enforce MUSA, subject to judicial review of any final decision made by the Secretary in an adjudicatory proceeding. See G.L. c. 110A, §§ 406–408, 411. There is a strong public interest in the Secretary engage in fair and prompt enforcement of MUSA. Enjoining the Securities Division from adjudicating the two claims unrelated to the fiduciary duty rule would therefore not be in the public interest.

And if the enforcement action is to move forward in any case, Robinhood will not suffer any irreparable harm from having to address the fiduciary duty claim at the same time. Though Robinhood may suffer additional "expense and disruption of defending itself" before the Division, that will not constitute irreparable harm. See *Federal Trade Comm'n* v. *Standard Oil Co. of California*, 449 U.S. 232, 244 (1980).

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[3] Robinhood represented at oral argument that the *Temple Emanuel* trial court had stayed the MCAD's adjudicatory proceeding before deciding whether the ministerial exception to antidiscrimination laws that is required by the First Amendment to the United States Constitution applied, and that the SJC approved of doing so. That is incorrect. The Superior Court docket for that case, civil action no. 0984CV01950-H, shows that the plaintiff had moved to stay the administrative proceeding, the Commission responded a few days later by moving to dismiss, and within a few weeks the court entered judgment on the merits in Temple Emanuel's favor without ever acting on the motion to stay. Cf. *Dwight* v. *Dwight*, 371 Mass. 424, 426 (1976) (court may take judicial notice of its own records). The SJC never said the case had been stayed or should have been stayed. See 463 Mass. at 475. To the contrary, the SJC concluded that "the judge should have abstained from deciding whether the ministerial exception barred [the] discrimination claim until the commission entered a final decision." *Id*. at 483.

Robinhood has therefore not shown that it is entitled to preliminary injunctive relief. Since the public interest weighs against enjoining the entire administrative proceeding, and Robinhood will suffer no irreparable if the Court declines to enjoin the proceeding solely with respect to the fiduciary duty claim, there is no need for the Court to determine whether Robinhood is likely to succeed on the merits of its constitutional claims.

4. **Further Briefing Requested**. Having concluded that Robinhood may challenge the fiduciary duty rule without waiting to exhaust any administrative remedies, but also that it would be inappropriate to enjoin the Securities Division from proceeding with the pending enforcement action, the Court must decide whether this case should move forward to a declaration as to whether the fiduciary duty regulation is valid, or whether it should be stayed until the Division's pending action is concluded.

To say the least, it would be unusual to stay a civil action to wait for resolution of an administrative adjudicatory proceeding if the court determines that the plaintiff is not required to exhaust their administrative remedies. The "futility" and "wide public significance" exceptions to the general exhaustion requirement would have no practical effect in this case if the Court were to stay this action until the Security Division finishes its adjudicatory proceeding.

But "[t]here is a measure of discretion in deciding whether a case is appropriate for declaratory relief." *City of Boston* v. *Keene Corp*., 406 Mass. 301, 305 (1989). Under G.L. c. 231A, § 3, "a judge has discretion to decline to grant declaratory relief if persuaded that it will not serve a useful purpose." *Everett*, 411 Mass. at 369 (court did not abuse discretion in refusing to enter declaratory judgment as to whether city could deduct portion of health insurance premium from pay of union employees without violating collective bargaining agreement, and leave decision to Labor Relations Commission).

And since courts should avoid deciding constitutional questions "unnecessarily or prematurely," *Massachusetts Gen'l Hosp.* v. *C.R.*, 484 Mass. 472, 489 (2020), there is some logic to staying this action until the Securities Division can complete its proceeding and decide these questions. The Division could make findings and reach conclusions that would effectively moot Robinhood's legal challenge in this case. If the Division were to find or conclude that Robinhood's conduct did not constitute the providing of investment advice or recommendations, then the fiduciary duty rule would not be implicated. That is not a pure question of law, because it turns at least in

part on the exact nature of Robinhood's communications and interactions with its clients. Alternatively if the Division were to find or conclude that Robinhood engaged in unethical or dishonest conduct even assuming that it owed no fiduciary duty to its customers, then whether Robinhood also violated the fiduciary duty rule may be beside the point.

The Court invites the parties to submit short additional briefing on whether this case should be stayed or, alternatively, whether the Court should set a schedule providing for prompt resolution of Robinhood's legal challenge to the Secretary's fiduciary duty rule.

ORDER

Plaintiffs' motion for preliminary injunction is **denied**. The parties shall submit additional memoranda of law—to be filed by June 10, 2021, and not to exceed ten pages each—addressing whether the court should or should not stay this action until there is a final decision in pending administrative proceeding, and what case schedule would be appropriate if this matter is not stayed. If the parties are able make a joint recommendation on any of these issues they should do so. A Rule 16 scheduling conference will be held on June 14, 2021, at 2:00 p.m.

Kenneth W. Salinger
Justice of the Superior Court

May 27, 2021

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV00884

ROBINHOOD FINANCIAL, LLC

vs.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, and the MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

This is an action for injunctive and declaratory relief brought by plaintiff Robinhood Financial, LLC ("Robinhood") against William F. Galvin, in his role as the Secretary of the Commonwealth, and his office, including the Enforcement Section of the Securities Division (collectively, "Secretary"). The Secretary has brought an administrative enforcement proceeding against Robinhood (the "Administrative Action") in which the Secretary alleges that Robinhood violated the Massachusetts Uniform Securities Act ("MUSA"), G. L. c. 110A, by, among other things, breaching a fiduciary duty that it allegedly owed to its customers when providing investment recommendations or advice. The fiduciary duty allegation in the Administrative Action is grounded upon a regulation adopted by the Secretary on March 6, 2020, codified at 950 C.M.R. § 12.207 (1) (a) ("the Fiduciary Duty Rule"). Section 12.207 (1) (a) deems it an "unethical or dishonest conduct or practice" for purposes of an enforcement action under G. L. c. 110A, § 204 (a) (2) (G) for a broker-dealer like Robinhood to "fail[] to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or

exchange of any security." The Secretary claims to have promulgated the Fiduciary Duty Rule pursuant to G. L. c. 110A, § 412 ("the Statute"), which permits the Secretary to "defin[e] any terms," including the term "unethical or dishonest conduct or practice" found in G. L. c. 110A, § 204 (a) (2) (G).[1]

At the time the Fiduciary Duty Rule was adopted, the Secretary amended 950 CMR § 12.204 (1) (a) (4) and added Section 12.204 (1) (a) (29) to implement the new rule. Section 12.204 (1) (a) (4) made it a dishonest or unethical practice, except as provided in 950 CMR § 12.207, to "recommend[] to a customer an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer." Section 12.204 (1) (a) (29) added violation of Section 12.207 to the list of dishonest or unethical practices.

Robinhood sued to challenge the validity of the Fiduciary Duty Rule, claiming that it was invalid on its face and as applied to Robinhood.[2] Robinhood contended in its complaint, and argues now, that the Fiduciary Duty Rule unlawfully overrides Massachusetts common law, that the Secretary lacked the authority to adopt the Fiduciary Duty Rule, and that it is preempted by a regulation previously promulgated by the Securities and Exchange Commission ("SEC") that imposed a national "best interest" standard of conduct, rather than a fiduciary standard of conduct, for brokerage firms that provide investment recommendations to customers.

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[1] Section 204 (a) (2) (G) permits the Secretary to impose sanctions against a broker-dealer for "engag[ing] in any unethical or dishonest conduct or practices in the securities, commodities or insurance business."

[2] Robinhood seeks invalidation of only Section 12.207 (1) (a) and the sections of Title 950 that refer to it, and not the entirety of Section 12.207.

Initially, Robinhood sought an injunction against application of the Fiduciary Duty Rule in the Administrative Action, which this Court (Salinger, J.) denied. See Docket No. 19. However, the Court (Salinger, J.) subsequently permitted the parties to file partially dispositive, cross-motions for judgment on the pleadings on three questions, asking whether any part of 950 C.M.R. § 12.207 (1) exceeds the authority that the Legislature delegated to the Secretary; (2) is an exercise of legislative authority in violation of art. 30 of the Massachusetts Declaration of Rights; or (3) is preempted by Federal law. See Docket No. 25.

The Secretary moved for partial judgment on the pleadings, arguing that, first, he was within his delegated authority in promulgating the Fiduciary Duty Rule; second, that the legislative delegation of authority to him complied with Article 30; and third, that Fiduciary Duty Rule Section is not preempted by federal law. Robinhood opposed and cross-moved for partial judgment on the pleadings, asserting that Fiduciary Duty Rule exceeded the Secretary's authority under the statute and the Massachusetts Constitution; and that it conflicted with and therefore was preempted by federal law.

In consideration of the relevant facts, the parties' memoranda of law and oral arguments, and for the reasons that follow, the Court concludes that on the first issue, the Secretary's promulgation of the Fiduciary Duty Rule was beyond his authority. Because it reaches this conclusion, the Court need not reach the constitutional issue posed by the second question. See, e.g., Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 616 (2021) ("We do not decide constitutional questions unless they must necessarily be reached," quoting Manor v. Superintendent, Mass. Correctional Inst., Cedar Junction, 416 Mass. 820, 824 (1994)). Nor does the Court reach the preemption question.

In light of the above, the Court concludes that the Fiduciary Duty Rule is invalid. Accordingly, the Secretary's motion is **DENIED** and Robinhood's motion is **ALLOWED**. The Court further **DECLARES** that 950 C.M.R. § 12.207 (1) (A), and those sections implementing to it, Section 12.204 (1) (a) (4) and Section 12.204 (1) (a) (29), are unlawful. However, in light of the significant public policy concerns at issue in this case, the Court **STAYS** this Order for thirty days to permit the Secretary time to pursue an appeal.

APPLICABLE LEGAL STANDARD

In deciding a Rule 12 (c) motion, all facts pleaded by the nonmoving party must be accepted as true. Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984). For plaintiff to prevail, it must demonstrate that there are no disputed material facts and that it is entitled to judgment as a matter of law. See, e.g., Federated Mut. Ins. Co. v. Coyle Mech. Supply Inc., 983 F.3d 307, 313 (7th Cir. 2020) ("When a plaintiff moves for judgment on the pleadings, the motion should not be granted unless it appears beyond doubt that the nonmovant cannot prove facts sufficient to support its position, and that the plaintiff is entitled to relief. Thus to succeed, the moving party must demonstrate that there are no material issues of fact to be resolved … view[ing] all facts and inferences in the light most favorable to the non-moving party.") (citations, internal quotation marks omitted). "A defendant's rule 12(c) motion is 'actually a motion to dismiss ... [that] argues that the complaint fails to state a claim upon which relief can be granted.'" Jarosz v. Palmer, 436 Mass. 526, 529–530 (2002) (citation omitted). To prevail on a motion to dismiss, the defendant must show that the facts alleged in the complaint, taken as true, and drawing all reasonable inferences in plaintiff's favor, would not "plausibly suggest[] … an entitlement to relief." Lopez v. Commonwealth, 463 Mass. 696, 701 (2012), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008); see also Golchin v.

Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011) (in deciding defendants' Rule 12(b)(6) motion, the court assumes the truth of the facts alleged in the complaint and any reasonable inference that may be drawn in plaintiff's favor from those allegations).

FACTS

A. Overview of the Relevant Securities Business

In the United States, individuals can obtain investment services from brokerage firms (technically called "broker-dealers") or from investment advisers. As the SEC has summarized, "[b]oth investment advisers and broker-dealers play an important role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services." Commission Interpretation Regarding Standard of Conduct for Investment Advisors, Release No. IA-5248, 84 Fed. Reg. 33669, 33669 (July 12, 2019).

Insofar as their relationships involve retail customers, broker-dealers typically earn transaction-based compensation by charging commissions from client transactions and/or receiving payments for the orders that clients place with other market participants (often referred to as "payment for order flow"). Investment advisers, on the other hand, usually charge a monthly or quarterly fee calculated as a percentage of customer assets under the adviser's management. Brokerage firms are typically less expensive.

Certain customers of broker-dealers neither seek nor receive any advice or recommendations about securities transactions but instead make their own investment decisions and then direct their broker-dealer to effect the transactions that they have selected. These

customers are often termed "self-directed" investors because they make their own investment decisions and their trades are not recommended or solicited by the broker-dealer who executes them. Self-directed broker dealers are not supposed to make recommendations to self-directed investors about what securities to buy or sell or when to buy or sell.

B. The SEC's Regulation Best Interest

In Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Congress authorized the SEC to

> promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment adviser[s] under sections 206(1) and (2) of this Act when providing personalized investment advice about securities ...

Public Law 111-203, July 21, 2010, 124 Stat 1376, codified at 15 U.S.C.A. § 80b-11 (g) (1).

After conducting a study and engaging in a public rulemaking debate, the SEC promulgated Regulation Best Interest ("Reg BI") in 2019. Reg BI establishes a "best interest" standard of conduct for broker-dealers and associated persons when making a recommendation to a retail customer regarding a securities transaction or investment strategy involving securities.

In adopting Reg BI, the SEC "declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers ... Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail

investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations." Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33322 (footnotes omitted).

> In summary, Reg BI requires broker-dealers to do the following:
>
> When making such a recommendation to a retail customer, you must act in the best interest of the retail customer at the time the recommendation is made, without placing your financial or other interest ahead of the retail customer's interests.
>
> This ***general obligation*** is satisfied only if you comply with four specified ***component obligations***:
>
> - ***Disclosure Obligation*:** provide certain required disclosure before or at the time of the recommendation, about the recommendation and the relationship between you and your retail customer;
> - ***Care Obligation*:** exercise reasonable diligence, care, and skill in making the recommendation;
> - ***Conflict of Interest Obligation*:** establish, maintain, and enforce written policies and procedures reasonably designed to address conflicts of interest; and
> - ***Compliance Obligation*:** establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest.
>
> **Record-making and Recordkeeping:** You must also comply with new record-making and recordkeeping requirements.

See Regulation Best Interest, A Small Entity Compliance Guide (emphasis in original).[3]

During the debate on Reg BI, the Secretary was a proponent of a "uniform fiduciary standard" for broker-dealers. When Reg BI was initially proposed in 2018, the Secretary objected because it did not subject broker-dealers to a uniform fiduciary standard. In August 2018, the Secretary wrote a letter to the SEC Commissioners. In part, the letter stated:

[3] Available at https://www.sec.gov/info/smallbus/secg/regulation-best-interest.

> The Proposals address the most fundamental of investor protection issues: the duties that providers of investment advice owe their customers and clients. As a regulator, I have seen the grievous harm suffered by Main Street investors who mistakenly trusted and relied on conflicted investment advice. The Commission now has the opportunity of a generation to protect them. Unfortunately, the Proposals are inadequate to provide this protection. I urge the Commission to replace the current Proposals with a strong uniform fiduciary standard, comparable to the standard applicable under the Investment Advisers Act of 1940, that will apply to advice provided to retail investors by both investment advisers and broker-dealers. If the Commission does not adopt a strong and uniform fiduciary standard, Massachusetts will be forced to adopt its own fiduciary standard to protect our citizens from conflicted advice by broker-dealers. ...
>
> [I]t is evident that the Commission has abandoned a fiduciary standard in the name of choice and the preservation of the broker-dealer advice model. The Commission should not move away from a true fiduciary standard based on a spurious claim of investor choice. We urge the Commission to reject the status quo and to upgrade the Proposals to a true fiduciary investor protection standard. The Commission has shaped its "best interest" regulation to preserve the traditional broker-dealer advice model, with investor protection taking a back seat....

Letter from Sec. William Galvin to SEC Chairman Clayton (Aug. 7, 2018), at 1, 4.[4]

On June 5, 2019, the SEC announced the final version of Reg BI, which, in effect, rejected the Secretary's suggestion.

C. <u>The Fiduciary Duty Rule</u>

Nine days after the SEC announced the final version of Reg BI, on June 14, 2019, the Secretary proposed an initial version of the Fiduciary Duty Rule. <u>See</u> Massachusetts Securities Division, Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (June 14, 2019).[5] The Secretary's proposal criticized Reg BI because, in the Secretary's view, it "fails to establish a strong and uniform fiduciary standard." <u>Id</u>.

On December 13, 2019, the Secretary solicited comments on a revised version of the Fiduciary Duty Rule. <u>See</u> Massachusetts Securities Division, Solicitation of Comments on

[4] Available at https://www.sec.state.ma.us/sct/sctpdf/SECCommissioners.pdf.
[5] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (Dec. 13, 2019).[6] In his Request for Comment, the Secretary noted that despite Congressional direction in Section 913 of Dodd-Frank that the SEC establish a fiduciary duty for broker-dealers and their agents, the SEC did not do so in Reg BI. Request for Comment, at 2.[7] In the Secretary's view,

> Reg BI sets ambiguous requirements for how longstanding and harmful conflicts in the securities industry must be addressed. Further, Reg BI is overly focused on complicated disclosures, and permits the continuation of harmful practices such as sales quotas and broad-based sales contests. In many instances, it appears that the mitigation of conflicts required under Reg BI can be accomplished through disclosure alone.
>
> This approach contradicts years of data and will not protect investors from harmful conflicts. ... While disclosure can be helpful to some investors, it cannot replace a clear fiduciary standard.

Id. at 2-3 (footnote omitted).

The Secretary rejected preliminary comments objecting to the Fiduciary Duty Rule, and specifically rejected deferring to the standard articulated in Reg BI because,

> Reg BI fails to provide investors the protection they need from harmful conflicts of interest. The critical term 'best interest' is not defined in Reg BI, and the rule focuses far too heavily on disclosure through Form CRS. In many cases, it appears that compliance with Reg BI may be accomplished primarily or exclusively via disclosure ... [which is] the second-best option relative to eliminating the impact of conflicts. A fiduciary standard is necessary to ensure that financial advice be based on what is best for investors.

Id. at 3. The Secretary further dismissed concerns that imposing the Fiduciary Duty Rule would create a "regulatory labyrinth," and turned away suggestions that he postpone taking action and wait to coordinate with other federal and state regulators, explaining:

> The Division's primary responsibility is to investors in Massachusetts. The SEC's Reg BI is insufficient to protect those investors from harmful conflicts of interest. **The Division hopes that other state regulators, and potentially the SEC, will eventually establish a**

[6] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconduct standard/ fiduciaryruleidx.htm.
[7] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Request-for-Public-Comment.pdf.

true fiduciary standard for all investment advice. Until then, the Division has a duty to take the necessary steps to protect Massachusetts investors.

Several commenters wrote that the establishment of *any* state fiduciary standard conflicts with Reg BI and that the Division should not proceed with a formal regulation. The Division disagrees. Reg BI "sets a federal floor, not a ceiling, for investor protection."[8] If the purpose and objective of Reg BI is truly to enhance the standard for investment advice and improve investor outcomes, the more rigorous fiduciary standard does not prevent or frustrate that purpose. ...

[O]thers wrote that the Division should wait to coordinate with other federal and state regulators. The Division believes that it is both necessary and appropriate to impose a true, uniform fiduciary standard now.

The Division has been careful and deliberate in its approach to the Proposal. The Division did not propose its own fiduciary standard until after the SEC declined to adequately enhance Reg BI. Despite Secretary William Galvin's comments on August 7, 2018, and comments from several others urging the SEC to adopt a strong, fiduciary standard, the SEC's final version of Reg BI is too weak to truly protect investors from harmful conflicts of interest.

Id. at 4 (footnote omitted, emphasis added)

The Secretary's proposal generated more than 600 comment letters. One comment came from the Governor, who wrote:

> Based on feedback provided in public comments and directly to my Administration, we are concerned the draft regulation may create confusion. The draft regulation does not appear to sufficiently account for differences in the industry, inadequately defines key terms and how regulated entities can resolve potential conflicts of interest, and departs from federal regulations and regulations adopted in other states. In short, we fear the draft regulation may create more confusion rather than more clarity in the industry and for investors.
>
> Specifically, we are concerned the current draft of the regulation could ... [h]arm the business models of broker-dealers, which are legal, and who are significant employers in Massachusetts and put such employers here at a competitive disadvantage with other states ....

[8] For this point, the Secretary cited Commissioner Robert J. Jackson Jr., Statement on Final Rules Governing Investment Advice (Jun. 5, 2019), available at https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd. Commissioner Jackson' Statement was issued in dissenting from the SEC's adoption of Reg BI.

Letter from Gov. Charles D. Baker to Sec. William Galvin (Jan. 7, 2020) at 1.[9]

On March 6, 2020, following consideration of commentary submitted by the securities industry and other market participants and after making certain revisions, the Secretary announced the adoption of the Fiduciary Duty Rule, which has been codified at 950 C.M.R. § 12.207. In it, the Secretary adopted a fiduciary standard under which broker-dealers have fiduciary obligations when providing investment advice or recommendations to their customers. See Massachusetts Securities Division, Adoption of Amendments to Fiduciary Conduct Standard Regulations (Mar. 6, 2020).[10] In his Adopting Release, the Secretary explained that "Section 12.207 of the Final Regulations will hold broker-dealers and agents to a fiduciary standard of conduct when making recommendations and providing investment advice to customers." Adopting Release (Feb. 21, 2020), at 2.[11]

In part, Section 12.207 provides:

> (l) The following practices are a non-exclusive list of practices by a broker-dealer or agent which shall be deemed "unethical or dishonest conduct or practices" for purposes of M.G.L. c. 110A, § 204(a)(2)(G):[12]
>
> > (a) Failing to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.
> >
> > (b) Failing to act in accordance with a fiduciary duty to a customer during any period in which the broker-dealer or agent:
> >
> > > 1. Has or exercises discretion in a customer's account, unless the discretion relates solely to the time and/or price for the execution of the order;
> > >
> > > 2. Has a contractual fiduciary duty; or

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[9] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/comments/2020-01-07-Governor-Charles-D.-Baker.pdf.
[10] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryrule-adoption.htm.
[11] Available at https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf.
[12] Section 204(a)(2)(G) permits the Secretary to impose sanctions against a broker-dealer for "engag[ing] in any unethical or dishonest conduct or practices in the securities, commodities or insurance business"

3. Has a contractual obligation to monitor a customer's account on a regular or periodic basis, as such regular or periodic basis is determined by agreement with the customer.

(2) To meet the fiduciary duty, each broker-dealer or agent shall adhere to duties of utmost care and loyalty to the customer.

(a) The duty of care requires a broker-dealer or agent to use the care, skill, prudence, and diligence that a person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances. For purposes of 950 CMR 12.207(2), a broker-dealer or agent shall make reasonable inquiry, including:

1. The risks, costs, and conflicts of interest related to all recommendations made and investment advice given;

2. The customer's investment objectives, risk tolerance, financial situation, and needs; and

3. Any other relevant information.

(b) The duty of loyalty requires a broker-dealer or agent to:

1. Disclose all material conflicts of interest;

2. Make all reasonably practicable efforts to avoid conflicts of interest, eliminate conflicts that cannot reasonably be avoided, and mitigate conflicts that cannot reasonably be avoided or eliminated; and

3. Make recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.

(c) Disclosing conflicts alone does not meet or demonstrate the duty of loyalty.

(d) It shall be presumed to constitute a breach of the duty of loyalty for a broker-dealer or agent to recommend any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, if the recommendation is made in connection with any sales contest.

950 C.M.R. § 12.207.

As noted above, the Secretary promulgated § 12.207 pursuant to G. L. c. 110A, § 412. Section 412 permits the Secretary to adopt rules "defining any terms," including the term "unethical or dishonest conduct or practice" found G. L. c. 110A, § 204 (a) (2) (G).

Section 12.207, as revised, became effective on March 6, 2020, and enforcement began on September l, 2020.

D. Robinhood

Robinhood is registered as a broker-dealer (and not an investment adviser) with the Secretary, the SEC and the Financial Industry Regulatory Authority. As of December 8, 2020, Robinhood had approximately 500,000 accounts with Massachusetts customers.

Robinhood offers commission-free trading for stocks and options, does not require account minimums, and interacts with its customers through its website and mobile application. In lieu of commissions, Robinhood draws revenue from other sources, including payments for order flow. By eliminating commissions, Robinhood has eliminated a cost of investing. Until recently, many brokerage firms required customers to pay commissions to trade securities while also receiving payment for order flow. For example, historically a broker-dealer might charge a client a brokerage commission (sometimes termed a "mark-up") of one-percent of the purchase price, or $0.25 per share, or $10.00 per trade. That same broker-dealer would also receive payments for order flow from a market maker. By not charging commissions, Robinhood has attracted clients of relatively lesser financial means.

Robinhood is subject to MUSA. Under MUSA, it is illegal for a broker-dealer to engage in "unethical or dishonest conduct or practices." See G. L. c. 110A § 204 (a) (2) (G). It is also unlawful for a broker-dealer to fail reasonably to supervise its employees and other agents "to assure compliance with" MUSA. Id. at § 204 (a) (2) (J). If the Secretary finds that a broker-dealer has committed such violations, he may through administrative action impose a fine, suspend or revoke the broker-dealer's registration, or take any other appropriate action. Id. at § 204 (a).

E. The Administrative Complaint

On December 16, 2020, the Secretary filed an Administrative Complaint ("Admin. Compl.") against Robinhood, In the Matter of: Robinhood Financial LLC (Docket No. E-2020-0047), alleging that several aspects of Robinhood's business model are "dishonest and unethical." The Secretary alleges in the Administrative Complaint that Robinhood violated the new Fiduciary Duty Rule (Count II)[13] and had failed to supervise its employees (Count III). Based on the same alleged facts, the Secretary also charges Robinhood with having engaged in unethical or dishonest conduct (Count I). Specifically, the Secretary alleges that Robinhood, among other things, encouraged trading by its customers by providing lists of securities, including the most popular or most traded securities by its customers, which was tantamount to "ma[king] ... recommendations to the customer." Id. at 5. Additionally, it alleged that Robinhood "encourage[ed] constant engagement [of its customers] with its platform ... [and] failed to properly screen customer profiles and allowed thousands of inexperienced investors to engage is very risky trading activity." Id. at 5. The Secretary further alleged that:

> [Robinhood's] business model and lack of adequate procedures has put both customers and their assets at risk. By doing so, Robinhood has failed to comply with [the Fiduciary Duty Rule]. ... For years, Robinhood has unscrupulously engaged in conduct that exposes Massachusetts investors to potential harm. Specifically, Robinhood has: targeted young individuals with little or no investment experience; lacked adequate infrastructure and, as a result, experienced repeated outages and disruptions on its trading platform; used gamification strategies to manipulate customers into continuous interaction and constant engagement with its application; encouraged inexperienced investors to execute trades frequently; and failed to follow its own written supervisory procedures when approving customers for options trading. This behavior continued unabatedly ever since adoption of the [Fiduciary Duty Rule] in Massachusetts. These actions do not represent the behavior of a fiduciary and are inconsistent with the duty Robinhood owes Massachusetts investors.

[13] The Administrative Action was the first enforcement action taken by the Secretary against a brokerage firm under the new the Fiduciary Duty Rule.

Id. at 6-7. The Administrative Complaint also alleged that, after the adoption of the Fiduciary Duty Rule, Robinhood failed to consider its customer's investment experience or objectives when "providing lists [of securities being purchased through its website] to encourage customers to purchase securities without any consideration of suitability"; employed strategies to facilitate unsuitable trading; and failed to act in the best interests of its customers. Id. at 19-20.[14]

DISCUSSION

DOES THE SECRETARY HAVE THE AUTHORITY TO PROMULGATE SECTION 12.207 UNDER G. L. c. 110A, § 412?

Robinhood claims that the Fiduciary Duty Rule imposes a duty not recognized at common law as outlined by the Supreme Judicial Court in Patsos v. First Albany Corp., 433 Mass. 323, 333-336 (2001). Robinhood also claims that the Statute, G. L. c. 110A, § 412, does not give the Secretary authority to change the common law.

The parties agree that under current common law, Patsos defines the scope of a broker-dealer's fiduciary responsibility, if any, to its customer. In that case, the Supreme Judicial Court determined that whether a broker-dealer bore fiduciary obligations was based on the measure of discretion it exercised on behalf of a customer:

> In determining the scope of the broker's fiduciary obligations, courts typically look to the degree of discretion a customer entrusts to his broker. Where the account is "non-discretionary," meaning that the customer makes the investment decisions and the stockbroker merely receives and executes a customer's orders, the relationship generally does not give rise to general fiduciary duties. See, e.g., Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc., 157 F.3d 933, 940–941 (2d Cir.1998) ("Under New York law, as generally, there is no general fiduciary duty inherent in an ordinary broker-customer relationship.... [A general fiduciary] duty can arise only where the customer has

[14] The parties dispute whether Robinhood provides advice or is a "self-directed broker-dealer." Contrary to the Secretary's contention (see Defendants' Opposition, Docket No. 36, at 1-2), this dispute, while central to the Administrative Action, is not material to either motion here. The Secretary alleges in the Administrative Action that the Fiduciary Duty Rule applies to Robinhood, in part because the Secretary contends that Robinhood effectively gave advice to its customers and thereby became subject to fiduciary obligations under the Fiduciary Duty Rule. Because that is so, it does not matter for purposes of this action whether the Secretary's factual allegations are correct; what matters is that the Fiduciary Duty Rule is alleged in the Administrative Action as a basis for the Secretary's claims against Robinhood, making the validity of the Fiduciary Duty Rule a live issue for this Court.

delegated discretionary trading authority to the broker"). See also Carr v. CIGNA Secs., Inc., 95 F.3d 544, 547 (7th Cir.1996); Greenwood v. Dittmer, 776 F.2d 785, 788 (8th Cir.1985). For nondiscretionary accounts, each transaction is viewed singly, the broker is bound to act in the customer's interest when transacting business for the account, but all duties to the customer cease "when the transaction is closed." Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 952–953 (E.D.Mich.1978), aff'd, 647 F.2d 165 (6th Cir.1981). See Hill v. Bache Halsey Stuart Shields, Inc., [790 F.2d 817] at 824 [(10th Cir.1986)] (in nondiscretionary accounts broker owes only a narrow duty not to make unauthorized trades).

Conversely, where the account is "discretionary," meaning that the customer entrusts the broker to select and execute most if not all of the transactions without necessarily obtaining prior approval for each transaction, the broker assumes broad fiduciary obligations that extend beyond individual transactions. See, e.g., Carr v. CIGNA Secs., Inc., supra at 547 ("The general rule ... is that a broker is not the fiduciary of his customer unless the customer entrusts him with discretion to select the customer's investments"); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 953. But see Romano v. Merrill Lynch, Pierce, Fenner & Smith, [834 F.2d 523] at 530 [(5th Cir.1987), cert. denied, 487 U.S. 1205 (1988)] (there is no "bright-line" distinction between the fiduciary duty owed customers in discretionary as opposed to nondiscretionary accounts). Trading by the broker without the customer's prior approval suggests that an account is discretionary, while frequent communications between the parties about the prudence of various transactions may support a finding that a customer has retained control of his account. Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 954. If a broker has acted as an investment advisor, and particularly if the customer has almost invariably followed the broker's advice, the fact finder may consider this as evidence that the relationship is discretionary. Leboce, S.A. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 709 F.2d 605, 607–608 (9th Cir.1983). Courts have looked to both the documentation of the customer's account, as well as to the execution of particular account transactions, to determine whether the customer has entrusted a broker to manage his investments for his benefit. Paine, Webber, Jackson & Curtis, Inc. v. Adams, [718 P.2d 508] at 516 [(Colo.1986)].

Other factors may also support a finding that a stockbroker has assumed general fiduciary obligations to a customer. A customer's lack of investment acumen may be an important consideration, where other factors are present. See, e.g., Broomfield v. Kosow, 349 Mass. 749, 755 (1965); Birch v. Arnold & Sears, Inc., 288 Mass. 125, 129, 136 (1934); Romano v. Merrill Lynch, Pierce, Fenner & Smith, supra at 530, citing Clayton Brokerage Co. v. Commodity Futures Trading Comm'n, 794 F.2d 573, 582 (11th Cir.1986) (trier of fact must consider "the degree of trust placed in the broker and the intelligence and personality of the customer"); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 953, 954 (where customer is particularly young, old, or naive with regard to financial matters, courts are "likely" to find that broker assumed control over account). An inexperienced or naive investor is likely to repose special trust in his stockbroker because he lacks the sophistication to question or criticize the broker's advice or judgment. Paine, Webber, Jackson & Curtis, Inc. v. Adams, supra at 517. This may be particularly true

> where the broker holds himself out as an expert in a field in which the customer is unsophisticated. See, e.g., Burdett v. Miller, 957 F.2d 1375 (7th Cir.1992); Paine, Webber, Jackson & Curtis, Inc. v. Adams, supra at 517, citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck, 127 Wis.2d 127, 145–146 (1985) (Abrahamson, J., concurring) ("[B]y gaining the trust of a relatively uninformed customer and purporting to advise that person and to act on that person's behalf, a broker accepts greater responsibility to that customer"). Social or personal ties between a stockbroker and customer may also be a consideration because the relationship may be based on a special level of trust and confidence. Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 954.
>
> We have considered these and similar facts relevant to determining the scope of duty that extends to a customer. Broomfield v. Kosow, supra at 755 ("review such factors as the relation of the parties prior to the incidents complained of," as well as "the readiness of the plaintiff to follow the defendant's guidance in complicated transactions wherein the defendant has specialized knowledge"). But we have also held that a business relationship between a broker and customer does not become a general fiduciary relationship merely because an uninformed customer reposes trust in a broker who is aware of the customer's lack of sophistication. See Snow v. Merchants Nat'l Bank, 309 Mass. 354, 360–361 (1941) (bank that conducted hundreds of securities transactions for elderly widow uninformed in financial matters could not reasonably have been considered to have acted as fiduciary because customer's mere trust or reliance not enough to establish a fiduciary relationship). Cf. Broomfield v. Kosow, supra at 755 (catalyst in transformation of business relationship into fiduciary relationship is defendant's knowledge of plaintiff's reliance upon him). In this respect, as others, our law is consistent with other States. See, e.g., Hill v. Bache Halsey Stuart Shields, Inc., supra at 824 ("A fiduciary duty ... cannot be defined by asking the jury to determine simply whether the principal reposed 'trust and confidence' in the agent").

Patsos, 433 Mass. at 333–336 (footnotes omitted). For the Court, a broker-dealer's fiduciary obligations only arose in limited circumstances because the Court

> recognize[d] ... two potentially competing considerations: the need to protect customers who relinquish control of their brokerage accounts, and the need to ensure that securities brokers—particularly those who merely execute purchase and sell orders for customers—not become insurers of their customers' investments. Assigning general fiduciary duties only to those stockbrokers who have the ability to, and in fact do, make most if not all of the investment decisions for their customers properly provides appropriate protection only for those customers who are particularly vulnerable to a broker's wrongful activities.

Id. at 336.

At argument, the Secretary suggested that there was no conflict between the Fiduciary Duty Rule and Patsos, asserting that the Fiduciary Duty Rule was "consistent" with Patsos

because "the Secretary was very careful and very precise in adopting a very narrow regulation that says the triggering event ... is if you provide advice and recommendations." Transcript, Dec. 2, 2021, Hearing ("Tr."), at 1-11; see also 1-38 -1-39, 1-68 (Robinhood arguing that a broker-dealer who makes recommendations to a client is subject to fiduciary obligations imposed pursuant to the Fiduciary Duty Rule, which was not the case under Patsos). But this is not the line drawn in Patsos. There, the distinction between broker-dealers who bore fiduciary obligations and those that did not turn on the broker-dealer's relationship with the customer and focused on the broker-dealer's level of discretion;[15] accordingly, Patsos held that it was appropriate to assign those broker-dealer fiduciary obligations because they could and did make investment decisions for their customers and were thus in position to wrongfully exercise that discretion to the detriment of the investor, whereas "under Massachusetts law, a simple broker-customer relationship is not fiduciary in nature, even if the broker has encouraged the trust of an unsophisticated customer." Patsos, 433 Mass. at 330.

The Fiduciary Duty Rule does not track Patsos. Under the Fiduciary Duty Rule, a broker-dealer is subject to fiduciary duties when it "provid[es] investment advice or recommend[s] an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security." The Adopting Release draws this line, too, making the key criterion for the application of the fiduciary standard the broker-dealer's making recommendations or providing investment advice to a customer. In short, broker-dealers who are not subject to fiduciary obligations under Patsos may be subject to them under the Fiduciary Duty Rule. Because the Fiduciary Duty Rule imposes a fiduciary duty on broker-dealers even where they lack the type of relationship described in Patsos as triggering a

[15] The broker-dealer's discretion is addressed in Section 12.207 (a) (2), a part of the regulation not in dispute here.

fiduciary duty, it expands the universe of broker-dealers subject to fiduciary obligations beyond those subject to such duties under Patsos. The Fiduciary Duty Rule thus changes the common law as defined by the Supreme Judicial Court in Patsos and provides grounds for the Secretary's claims against Robinhood.[16]

Robinhood does not contest that the Secretary generally has been delegated the authority to define what are dishonest and unethical practices in the securities business, and acknowledges that he has done so in 950 C.M.R. § 12.204 (1) (a) (1) - (28), nor contests, preemption arguments aside, that the Legislature could have amended MUSA to adopt, or to permit the Secretary to adopt, the Fiduciary Duty Rule. Tr. at 1-45 - 1-46. Its claim is that the Secretary cannot re-define as an unethical and dishonest practice non-fiduciary activities of a broker-dealer that are lawful under Patsos. See Tr. at 1-39 - 1-40. The question, then, is whether the Secretary can impose otherwise inapplicable fiduciary duties on broker-dealers duties by regulation and, in doing so, override the common law as expressed in Patsos.

At argument, the Secretary was unable to cite a case holding that an executive agency could by regulation override the common law as defined by the Supreme Judicial Court. The contrary appears to be the case. The Secretary concedes that the "common law ... is of 'equal and binding force' to laws enacted by the Legislature," Commonwealth v. Adams, 482 Mass. 514, 517-518 (2019), and no case suggests an agency is free to disregard such law. Cf. Telles v. Commissioner of Insurance, 410 Mass. 560, 564 (1991) (citation omitted) ("[i]t is settled that a "an administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes ...").

[16] In the Administrative Action, the Secretary does not contend that Robinhood's customers have relinquished control of their brokerage accounts to Robinhood, or that Robinhood has the ability to, and in fact does, make most if not all of the investment decisions for its customers, as the Patsos Court emphasized.

The Secretary argued that the Court had to weave his authority to promulgate the Fiduciary Duty Rule and override Patsos from three legal threads: first, that under Adams, 482 Mass. at 517-518, the common law is of equal status to laws enacted by the Legislature; second, that under Chelmsford Trailer Park Inc. v. Chelmsford, 393 Mass. 186, 190 (1984), the Legislature can delegate "the implementation of legislatively determined policy" to an agency; and third, that under Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 723 (1983) (and other cases), "a properly promulgated regulation has the force of law." Defendants' Memo (Docket No. 33) at 4; Defendants' Opposition (Docket No. 36), at 4; Tr. at 1-12 - 1-14. In sum, the Secretary contends that "[o]ne of the ways the Legislature can alter the common law is through delegation of rulemaking authority to administrative agencies, which rules, once promulgated, have the 'force of law'... and are the equivalent of a statute." See Defendant's Memo (Docket No. 33) at 4.

Even assuming this accurately states the law, the Secretary's argument still fails. Leaving the constitutional validity of any delegation aside, the question is whether the Legislature delegated authority to the Secretary to interpret MUSA contrary to the Supreme Judicial Court's interpretation. Nothing in the statute expressly confers such a delegation; indeed, the statutory provisions on which the Secretary relies are the same ones that existed at the time Patsos was decided, evidencing that no specific delegation was made.

The Secretary's argument that such a delegation can be implied from the statute is unconvincing. Generally, courts presume that the Legislature does not intend to displace the common law. That is, had the Legislature taken direct action that created an apparent conflict with the common law, the Court would "assume that the Legislature d[id] not depart from settled law without clearly indicating its intent to do so," Commonwealth v. G.F., 479 Mass. 180

(2018), and would not construe any statute "as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." Suffolk Const. Co. v. Div. of Cap. Asset Mgmt., 449 Mass. 444, 454 (2007), quoting Riley v. Davison Constr. Co., 381 Mass. 432, 438 (1980). MUSA does not reflect a clear Legislative intent to override Patsos directly, much less to empower the Secretary to do so indirectly through delegated rulemaking. Indeed, with respect to Reg BI, the SEC acted upon the express direction of Congress, an express legislative direction that is absent here.[17]

Moreover, the language of MUSA cannot fairly be read to implicitly confer on the Secretary the authority to promulgate the Fiduciary Duty Rule under these facts. When assessing the validity of a regulation like the Fiduciary Duty Rule, the Court

> look[s] first to the language of the statute and, where it speaks clearly on the topic in the regulation, [the Court] determine[s] whether the regulation is consistent with or contrary to the statute's plain language. Where the statute relevant to the regulation is ambiguous or where there is a gap in the statutory guidance, [the Court] determine[s] whether the regulation may "be reconciled with the governing legislation." In doing so, "[the Court] accord[s] 'substantial deference' to the agency charged with interpreting and administering the statute in question, and do not invalidate regulations unless 'their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" "But deference does not suggest abdication; '[a]n incorrect interpretation of a statute ... is not entitled to deference.'"

Buckman v. Commissioner of Corr., 484 Mass. 14, 23–24 (2020) (citations omitted); see also Massachusetts Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd., 466 Mass. 292, 301 (2013)

[17]Albeit in a different context, Chamber of Com. of United States of Am. v. United States Dep't of Lab. concluded that a federal agency was not empowered to re-define the scope of fiduciary duty in the absence of express legislative direction. See 885 F.3d 360, 381–82 (5th Cir. 2018), judgment entered sub nom. Chamber of Com. of Am. v. United States Dep't of Lab., No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018). Its reasoning is helpful here. In that case, business groups sued the United States Department of Labor ("DOL") which, under a revised regulation sought to re-define the scope of fiduciary duties imposed on financial services providers and insurance companies that had up to then not been subject to fiduciary obligations under the Employment Retirement Investment Security Act. The Fifth Circuit concluded that DOL did not have statutory authority to make such a change, reasoning, in part, that Congress intended to codify the concept as one based on a "relationship of trust and confidence" and that permeated the financial industry, and had it intended to abrogate that "cornerstone" understanding, "one would reasonably expect Congress to say so." 885 F.3d at 368-376.

("Only an agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts.") (internal quotations omitted). The Court looks to all of the language of a statute, "not just a single sentence, and attempt[s] to interpret all of its terms harmoniously to effectuate the intent of the Legislature." Cuticchia v. Town of Andover, 95 Mass. App. Ct. 121, 125 (2019) (internal quotations omitted). "Beyond plain language, '[c]ourts must look to the statutory scheme as a whole,' so as 'to produce an internal consistency' within the statute ... Even clear statutory language is not read in isolation." Plymouth Ret. Bd. v. Contributory Ret. Appeals Bd., 483 Mass. 600, 605 (2019) (citations omitted). See also 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 113 (2008), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934) ("A statute must be construed 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'"). Here, the precise question is whether the Statute, G. L. c. 110A, § 412, coupled with the other provisions of and statutory scheme reflected in MUSA, implicitly authorizes the Secretary to promulgate the Fiduciary Duty Rule.

The Statute, G. L. c. 110A, § 412, states as follows:

> (a) The secretary may ... make ... rules ...as are **necessary to carry out the provisions of this chapter, including ... defining any terms ... insofar as the definitions are not inconsistent with the provisions of this chapter.** ...
>
> (b) No rule ... may be made ... unless the secretary finds that the action is **necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this chapter**. In prescribing rules ... the secretary may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

G. L. c. 110A, § 412 (emphasis added). Reading these provisions in harmony, the Secretary is authorized to define terms when doing so is necessary, appropriate, and consistent with the purpose, policy, and provisions of Chapter 110A.

The Secretary's argument that this section of MUSA confers upon him the power to promulgate rules "as are necessary to carry out the provisions of this chapter ... for the protection of investors," and therefore has the authority to promulgate the Fiduciary Duty Rule, is an excessive reading of the delegation contained in the statute. It is true that "[w]hen the Legislature vests an agency with broad authority to effectuate the purposes of an act, the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." Ciampi v. Commissioner of Correction, 452 Mass. 162, 168 (2008) (internal quotations, citation omitted). But such language, which is common in agency delegations, does not mean that the agency has been delegated unfettered authority to adopt any regulation that the agency concludes is generally consistent with the underlaying statute. See, e.g., Commonwealth v. Maker, 459 Mass. 46, 49–50 (2011) (concluding that a regulation adopted by the Sex Offender Registry Board (SORB) pursuant to a statutory delegation to "promulgate rules and regulations to implement the provisions of" the statute that imposed requirements on sex offenders not found in the statute exceeded SORB's authority).[18] The touchstone remains the Legislature's intent in conferring rulemaking authority to the agency.

[18] Although the Court does not reach the constitutionality of the delegation that the Secretary claims, the Court nonetheless notes that the Legislature cannot constitutionally delegate the making of fundamental policy decisions, but only the implementation of legislatively determined policy. See Chelmsford, 393 Mass. at 190. Here, in the Secretary's view, the Legislature delegated to him the authority to re-define the common law as reflected in Patsos, an issue of policy as determined by a co-equal branch of government, the judicial branch. Moreover, the Secretary's view of that issue would be the last word as to the scope of fiduciary duties borne by broker-dealers, rendering any judicial review largely meaningless. In short, the delegation claimed by the Secretary would be a final policy determination, evidently conferring on the Secretary "unbridled power to regulate ...[that] can be subject to no meaningful review." Chelmsford, 393 Mass. at 191.

Here, the Legislature, in three parts of MUSA, directed the Secretary to maintain consistency in the securities laws among with Massachusetts, the federal government, and the other states which have adopted the Uniform Securities Act that was the foundation for MUSA. Specifically, Section 412 (a) authorized the Secretary to define terms "insofar as the definitions are not inconsistent with the provisions of this chapter." Section 412 (b) requires that any regulation be "consistent with the purposes fairly intended by the policy and provisions of this chapter" and encourages the Secretary to "cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity" on administrative matters. Section 415 requires that MUSA "be so construed to effectuate its general purpose to make uniform the law of those states which enact it and coordinate the interpretation and administration of this chapter with the related federal regulation." Taken together, these provisions make clear that the Legislature directed the Secretary to strive for uniformity in the securities laws, and not to create conflict in this area. See Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 50–51 (2004) ("The Legislature has directed that we interpret [MUSA] in coordination with the Securities Act of 1933," citing G. L. c. 110A, § 415 and Adams v. Hyannis Harborview, Inc., 838 F. Supp. 676, 684 n. 9 (D. Mass.1993) (Massachusetts securities laws 'are substantially similar to the Federal securities laws")).

The Fiduciary Duty Rule runs directly contrary to this direction. It overrides the common law, as interpreted in Patsos, which recognized "general agreement [within the law] that the scope of a stockbroker's fiduciary duties in a particular case is a factual issue that turns on the manner in which investment decisions have been reached and transactions executed for the account." Patsos, 433 Mass. at 332. Further, the Secretary chose to promulgate the Fiduciary

Duty Rule, aware that it would create conflict with Reg BI -- and since the record supports a conclusion that the Secretary was alone in imposing the Fiduciary Duty Rule around the country, his interpretation likely conflicts with other states' laws, as well. Indeed, in his December 2019 Request for Comments, the Secretary embraced the conflict, writing that he hoped that "other state regulators, and potentially the SEC" would follow his lead, and elected not to wait to achieve "coordinat[ion] with other federal and state regulators," noting that it had proposed the Fiduciary Duty Rule only after the SEC rejected that approach in Reg BI. The Secretary's decision to reject any effort at coordinating with federal authority and that of other states is the opposite of the direction contained in MUSA and supports the conclusion that by adopting the Fiduciary Duty Rule, the Secretary acted beyond his delegated authority. See Buckman, 484 Mass. at 25 (regulation requiring submission of a medical parole plan and a written diagnosis to be submitted with petition for release on medical parole invalid as inconsistent with the legislative purpose of the statute to ensure an expeditious administrative process); see also Duarte v. Comm'r of Revenue, 451 Mass. 399, 411 (2008) (internal quotations, citations omitted) ("An agency has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes under which the agency operates.").[19]

The Secretary further cites City Council of Agawam v. Energy Facilities Siting Bd., 437 Mass. 821, 828 (2002) for the proposition that the Court is required to give "agencies broad discretion to interpret statutes that they enforce, lending 'substantial deference' to their interpretations[, which] ... include[s] approving agency regulations that, while technically

[19] The Secretary's argument that he followed Congress' guidance given in the National Securities Markets Improvement Act of 1996, which preserved state power "to investigate and bring enforcement actions ... with respect to fraud or deceit, or unlawful conduct by a broker dealer," when he exercised his discretion in implementing the Fiduciary Duty Rule, and that he therefore complied with Section 415's "direction" to "coordinate[]" with federal law (Defendant's Memo, Docket No. 33, at 9), ignores the facts. The purpose of Section 415 was to harmonize state and federal law. Adoption of the Fiduciary Duty Rule as a counterweight to Reg BI creates disharmony.

enlarging the meaning of a statute, are consistent with its intent." See also Tr. at 1-67. But that concept is inapplicable here because the Fiduciary Duty Rule is not a technical enlargement of the meaning of MUSA, but rather signals a departure from the direction contained in MUSA that Massachusetts law be coordinated with federal and state law elsewhere. See Buckman, 484 Mass. at 24 ("deference does not suggest abdication; '[a]n incorrect interpretation of a statute ... is not entitled to deference.'").

Nothing in Section 412, or in MUSA generally, suggests that the Legislature intended to give the Secretary authority to override existing Supreme Judicial Court precedent or to empower him, in the absence of clear direction, to re-define familiar securities concepts through rulemaking and thereby change, and make non-uniform, the law that applies to broker-dealers operating in Massachusetts. Accordingly, the Court shall declare Section 12.207 (1) (a) and the other sections implementing it void as contrary to MUSA. See Buckman, 484 Mass. at 27 ("[t]o the extent the secretary's regulations are contrary to the plain language and purpose of the statute, they [will be] ... declared void."

ORDER

For the foregoing reasons, the Secretary's motion is **DENIED** and Robinhood's motion is **ALLOWED**. The Court further **DECLARES** that 950 C.M.R. § 12.207 (1) (A), and those sections implementing it, Section 12.204 (1) (a) (4) and Section 12.204 (1) (a) (29), are unlawful.

In light of the significant public policy concerns at issue in this case, the Court **STAYS** this Order for thirty days to permit the Secretary time to pursue an appeal.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: March 30, 2022

EXHIBIT D

Date Filed 5/18/2022 4:12 PM
Superior Court - Suffolk
Docket Number 2184CV00884

NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
BUSINESS LITIGATION SESSION

ROBINHOOD FINANCIAL LLC,

Plaintiff,

v.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, and the MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH,

Defendants.

CIVIL ACTION NO.: 2184CV00884BLS

~~[PROPOSED]~~ FINAL JUDGMENT

In accordance with the Decision issued on March 30, 2022, it is:

DECLARED that the regulation adopted by the Secretary on March 6, 2020, codified at 950 C.M.R. 12.207(1)(a) is invalid and those sections implementing it, 950 C.M.R. 12.204(1)(a)(4) and 12.204(1)(a)(29), are unlawful in so far as they implement 12.207(1)(a). Count II of the Complaint is dismissed without prejudice as moot. This Final Judgment becomes effective upon entry by the Court.

Nunc
Sent
5/19/22

MD Ricciuti

Hon. Michael D. ~~Ricciuti~~ Ricciuti
Justice of the Superior Court

JUDGMENT ENTERED ON DOCKET May 18, 2022
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

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