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Insights

CALL FOR VACATUR OF MASSACHUSETTS' FIDUCIARY DUTY STANDARD FOR BROKER/DEALERS

Sep 07, 2023

SUMMARY

Key Takeaways:

- The Massachusetts Supreme Judicial Court upheld the fiduciary duty standard of care imposed on broker/dealers by the Commonwealth of Massachusetts on August 25, 2023.
- Below we explain the practical implications of the recent court opinion and highlight why the United States Supreme Court should grant a Writ of Certiorari and vacate the Massachusetts' fiduciary duty standard.

INTRODUCTION

On August 25, 2023, Justice Wendlandt of the Massachusetts Supreme Judicial Court issued a ruling in *Robinhood Financial, LLC v. Secretary of the Commonwealth* which upheld the legality of the fiduciary duty standard imposed upon broker-dealers by William F. Galvin, Secretary of the Commonwealth of Massachusetts.[i] The Commonwealth of Massachusetts adopted its fiduciary duty standard on February 21, 2020, after declaring that the SEC's Regulation Best Interest ("Regulation BI") was not a "meaningful conduct rule to protect working families from abusive practices in the brokerage industry."[ii] This marks the first time a state has successfully adopted a broker-dealer fiduciary duty standard and defended the law through the highest level of state court appellate processes. Unless the United States Supreme Court grants a Writ of Certiorari and vacates the law, a unique fiduciary duty standard will stand for broker-dealers operating within the Commonwealth of Massachusetts, marking one of the most transformative disruptions within the securities industry in modern history.

PRACTICAL CONSIDERATIONS FOR BROKER-DEALERS

Many other states may now be emboldened to come forward with their own versions of a broker/dealer fiduciary duty standard that exceeds the requirements of the SEC's Regulation BI. From a practical standpoint, the adoption of an absolute fiduciary duty standard results in the following unfavorable consequences:

1. The upending of decades of established legal and regulatory precedents distinguishing the standards of care for a broker/dealer from that of an investment adviser;

2. Uncertainty and confusion in the minds of financial institutions, registered representatives and customers as to the differing standards of care applicable to broker/dealers across jurisdictions;

3. The enhanced standard will come with increased fees/costs to customers, particularly, those who are buy/hold investors or have minimal assets to invest;

4. An incentivization of business models that leave customers to make investment selections on their own without any meaningful advice or guidance from a financial professional; and

5. A reduction of brokerage models and a resulting loss of customer choice in investment account models and business services.

So you might be asking yourself … what are the best arguments in favor of a vacatur of Massachusetts' fiduciary duty standard for broker/dealers? Below is a summary of the historic journey of how we ended up here. Immediately after the background discussion, we turn to the issues associated with seeking a vacatur of the rule within the United States Supreme Court.

HISTORICAL BACKGROUND ON BROKER/DEALER STANDARDS OF CARE

The Suitability Standard of Care.

Until 2020, broker-dealers and their registered representatives were governed almost exclusively by the suitability standard of care. The suitability standard was incapsulated within NASD Rule 2310 (which was created in 1990),[iii] which later morphed into FINRA Rule 2111.[iv] While there were some noticeable tweaks to the suitability standard throughout the years (i.e., expanding the rule to cover investment strategies, including recommendations to hold securities, and describing the three components of suitability to include (a) reasonable-basis obligations, (b) customer specific obligations, and (c) quantitative suitability), the crux of the rule stated that a registered representative must have *reasonable grounds* for believing an investment recommendation is suitable for a customer based on the customer's background and financial needs.

For years, Claimants in securities litigation/arbitration sought to expand upon that standard of care by arguing that broker/dealers and their registered representatives were fiduciaries that owed duties

to investors that extended well beyond just making suitable recommendations. Among those arguments, Claimants' counsel alleged that broker/dealers had an ongoing duty to monitor investments and provide continuing investment advice beyond the point of sale. In response to these arguments, the majority of courts around the country repeatedly found that a broker-dealer and its registered representatives owed no fiduciary duties to customers in brokerage relationships, finding instead that the sale of securities is an arms-length transaction in which all duties end at the point of sale.[v]

The Birth of the Fiduciary Duty Standard of Care.

In 2010, following the Global Financial Crisis of 2008-2009, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which directed, among other things, the SEC to conduct a study to evaluate the effectiveness of existing legal or regulatory standards of care for broker-dealers. The Dodd-Frank Act also authorized the SEC, depending on the outcome of its study, to promulgate a new standard of care for broker-dealers equal to the standard of care applicable to investment advisors under the Investment Advisers Act of 1940.[vi]

Therefore, it was the Dodd-Frank Act that set the wheels in motion for a potential shift in the paradigm. That potential change, however, did not come fast enough for many. By 2016, after six (6) years of debate, the SEC had still not promulgated a new standard and, as a result, many proponents for a more stringent fiduciary standard began getting impatient.

The DOL Fiduciary Duty Standard.

The Department of Labor ("DOL") was the first regulatory authority that attempted to take action apart from the SEC. On April 8, 2016, the DOL stepped ahead of the SEC by issuing a final regulation which stated that a person who provides investment advice within pension and retirements plans would be subject to a fiduciary standard.[vii] The rule was originally scheduled to be phased into law commencing April 10, 2017, therefore giving the industry a year to prepare for the changes. However, the commencement date was pushed back numerous times in response to concerns raised within the industry and legal challenges to the rule. Many adversaries of the DOL's action argued that the Dodd-Frank Act provided the SEC with authority to conduct the study and take action, not the DOL. Those adversaries also argued that the SEC was better positioned to make rule changes in the broker/dealer industry. On June 21, 2018, the U.S. Fifth Circuit Court of Appeals officially vacated the DOL rule in its entirety, finding the DOL's fiduciary rule was arbitrary, capricious, and exceeded the agency's regulatory authority under ERISA.[viii] That decision essentially killed the DOL effort. After the 5thCircuit issued the ruling, the DOL chose to refrain from trying to enforce the fiduciary duty any further and, to date, the decision has not been challenged through a Writ of Certiorari.

Nevada, Maryland, & New Jersey Action.

By 2019, a few states started coming forward with their own proposals for a fiduciary duty standard. The chart below reflects those state efforts.

Date	State	Brief Description	Status
01/18/19[ix]	Nevada	Proposed regulation to define fiduciary duties owed to customers as set out by a prior law adopted in 2017.	Fiduciary Rule passed 2017, yet further efforts to define the rule are still on-going[x]
02/08/19[xi]	Maryland	Introduced consumer protection bill that defined broker-dealers as fiduciaries and required them to act in the best interests of the customer with regard to the financial or other interest of the person (or firm) providing the advice.	Rejected by State 04/02/2019[xii]
04/15/19[xiii]	New Jersey	Proposed a draft regulation which imposed fiduciary duty on broker/dealers including requirement that recommendations and transaction fees must be best of all available options	Rejected by State 12/24/21[xiv]

The SEC Regulation BI Standard.

On June 5, 2019, after studying the standard of care applicable to broker/dealers for almost a decade, the SEC voted to adopt Regulation BI, which established a new standard of care for broker-dealers serving retail customers. *See Regulation Best Interest*, 17 C.F.R. § 240.15*l*-1 (2019).[xv] Specifically, Regulation BI imposes a "best-interest obligation" on broker-dealers, requiring them to "act in the best interest of the retail customer *at the time the recommendation* is made, without placing the financial or other interest of the [broker-dealer] ... ahead of the interest of the retail customer." The best-interest obligation has four components: (1) a "disclosure obligation," requiring broker-dealers to disclose any material facts relating to the scope and terms of the relationship with the customer, as well as all material conflicts of interest related to their investment recommendations; (2) a "care obligation," requiring broker-dealers to "[h]ave a reasonable basis to believe that the recommendation is in the best interest of" the customer; (3) a "conflict of interest obligation," requiring broker-dealers to identify, mitigate, and disclose conflicts of interest and to "[p]revent" conflicts that would cause them to "make recommendation[s] that place [their own] interest ahead of the customer;" and (4) a "compliance obligation" requiring broker-dealers to adopt policies and practices "reasonably designed to achieve compliance with Regulation BI."[xvi]

In adopting the new Regulation BI, the SEC categorically rejected a uniform fiduciary standard to be applied equally to broker-dealers and investment advisers, finding as follows:

> We have 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, including under FINRA rules. 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. We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers. Adopting a "one size fits all" approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships. Moreover, applying a new uniform standard to advisers would mean jettisoning to some extent the fiduciary standard under the Advisers Act that has worked well for retail clients and our markets and is backed by decades of regulatory and judicial precedent. Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances. Moreover, because key elements of the standard of conduct that Regulation Best Interest applies to broker-dealers at the time that a recommendation is made to a retail customer will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act, we do not believe that applying the existing fiduciary standard under the Advisers Act to broker-dealers or adopting a new uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products).
>
> We acknowledge certain commenters urged the Commission to take additional or different regulatory actions than the approach we have adopted, including the alternatives discussed above. We do not believe that any rulemaking governing retail investor-advice relationships can solve for every issue presented. After careful consideration of the comments and additional information we have received, we believe that Regulation Best Interest, as modified, appropriately balances the concerns of the various commenters in a way that will 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.[xvii]

The Second Circuit Court of Appeals later upheld the SEC's Regulation BI, finding that the SEC rightfully considered and rejected a uniform fiduciary duty standard to apply with equal weight to both broker/dealers and investment advisers in favor of preserving customer choice to select a non-fiduciary option.[xviii]

In the wake of the SEC's Regulation BI, many proponents of a true fiduciary standard remain unsatisfied. The advocates criticize the SEC's final promulgation stating that it does not resemble the same standard imposed upon investment advisers (which are held to a fiduciary standard by the Investment Advisers Act of 1940) and is thus inadequate to truly protect customer interests.

Commonwealth of Massachusetts

On June 14, 2019, the Massachusetts Securities Division circulated a preliminary proposal to adopt a fiduciary duty for broker-dealers similar to the standards required of registered investment advisers. The Division published an updated proposal on December 13, 2019, and held a public hearing to discuss the rule on January 7, 2020. Despite receiving concern and criticism of the proposal from industry participants, the Commonwealth of Massachusetts adopted the rule on February 21, 2020[xix], at which time the Secretary of the Commonwealth declared that Massachusetts felt compelled to move forward with the rule because the SEC's Regulation BI was "not a meaningful conduct rule to protect working families from abusive practices in the brokerage industry."[xx]

According to the Massachusetts fiduciary rule, a broker/dealer shall be deemed to have engaged in "unethical or dishonest conduct or practices" by "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."[xxi] Of particular significance, the Massachusetts rule declares broker/dealer conduct which may meet the standard of care in all other jurisdictions to be an unethical and dishonest business practice.

By December 2020, the Massachusetts Secretary of State set out to enforce his new fiduciary duty rule against Robinhood Financial, LLC. Among the allegations, the Secretary alleged that Robinhood violated its fiduciary duties by adopting strategies that treated trading like a game to lure young, inexperienced customers, into risky trades, including by having confetti rain down on a user's screen each time he/she entered a trade on the Robinhood App. Robinhood defended its business practices, arguing that its platform does not include financial professionals making investment recommendations to investors; rather, customers select their respective investments based on their own research. Robinhood also argued that the Secretary of the Commonwealth exceeded his powers under the Massachusetts Uniform Securities Act by promulgating the fiduciary duty

standard and the standard is pre-empted by federal law. On March 30, 2022, Suffolk County Superior Court Judge Michael Ricciuti found that the fiduciary duty standard adopted by the Commonwealth was invalid as it conflicted with federal law.[xxii]

The victory, however, proved to be short-lived. On August 25, 2023, Justice Wendland of the Massachusetts Supreme Judicial Court issued a ruling in *Robinhood Financial, LLC v. Secretary of the Commonwealth* which upheld the legality of the fiduciary duty standard imposed upon broker-dealers by the Commonwealth of Massachusetts, finding that the Secretary of the Commonwealth did not exceed his powers and federal law did not preempt the new standard applicable to broker/dealers operating within Massachusetts. This marks the first time a state has successfully adopted a broker-dealer fiduciary duty standard and defended the law through the highest level of state court appeals. Unless the United States Supreme Court grants a Writ of Certiorari and overturns the decision, a finalized and absolute fiduciary duty standard will stand for broker-dealers operating within the Commonwealth of Massachusetts.

WRIT OF CERTIORARI – THIS ISSUE IS RIPE FOR REVIEW

Robinhood will face headwinds in seeking to get the Massachusetts' fiduciary duty standard vacated by the Supreme Court. Despite the odds, however, the issues presented by the Massachusetts' fiduciary duty standard are ripe for review and, in our opinion, the Supreme Court should grant certiorari and vacate the rule. Otherwise, years of legal fights across multiple states are likely to ensue, casting an enormous expense on all involved, and clouding certainty on legal standards within the securities industry for years to come.

On average, only 3% of all Petitions for Writ of Certiorari are actually granted.[xxiii] According to the Cornell Law School, "A petition for a Writ of Certiorari will be granted only for compelling reasons."[xxiv] Moreover, the Supreme Court has wide latitude in deciding what cases to review.[xxv] Below are some common examples of scenarios that might compel the Supreme Court to take action:

i. a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

ii. a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

iii. a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[xxvi]

Despite the challenging odds, industry members and participants are hopeful that the Supreme Court will look favorably to reviewing the Massachusetts law as it has captured the attention of the entire broker/dealer community and, many would argue, it has upended the legal landscape as we once knew it. The Massachusetts law is undoubtedly inconsistent with a century of established legal and regulatory precedent distinguishing the legal standards of care applicable to broker/dealers from that owed by investment advisers. Those legal standards have formed the basis of both state and federal court decisions. Thus, given the Commonwealth of Massachusetts' wholesale departure from those established precedents, combined with the SEC's recent comprehensive study of legal standards of care within the securities industry and its intentional decision to avoid adopting a true fiduciary duty for broker/dealers in its final promulgation of Regulation BI, the Massachusetts' decision is certainly one that should garner the Supreme Court's attention and full consideration. Assuming it does, we believe the Supreme Court should vacate the Massachusetts' fiduciary duty now to prevent years of continued legal battles within state courts across the nation.

SUMMARY OF MOST COMPELLING ARGUMENTS FOR VACATUR [XXVII]

Massachusetts' Fiduciary Rule Undermines the Express Purpose of the Uniform Securities Act and Conflicts with Both Federal and State Law.

The Uniform Securities Act was created in 1956 with the following express purpose:

> Sec. 415. [STATUTORY POLICY.] This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation.[xxviii]

Massachusetts adopted the Unform Securities Act in 1972 ("MUSA").[xxix] It is 1 of 41 states to have adopted, or substantially adopted with modifications, the 1956 Act.[xxx] The language in Sec. 415 noted above is found at Chapter 110A within MUSA. By taking the drastic step of promulgating a fiduciary standard for broker/dealers that is admittedly inconsistent with federal law and the law of the states in which MUSA's purpose was to ensure standardization of the law, the Secretary of the Commonwealth exceeded his authority and the stated purposes of MUSA.

Moreover, as noted above, the Massachusetts rule renders conduct which is widely recognized as acceptable and legal pursuant to federal securities laws, and the laws of almost every other state across the country, as unethical and/or dishonest. Such a result highlights the conflicting nature of the laws and justifies vacatur of the rule.

The Massachusetts' Fiduciary Standard is Specifically Preempted by Regulation BI.

Preemption is a viable argument when there is concurrent and competing laws promulgated by state and federal power. Article VI, cl. 2 of the Constitution provides that the laws of United States

shall be the supreme law of the land.[xxxi] The Supreme Court has "long recognized that state laws that conflict with federal laws are without effect."[xxxii] The purpose of Congress is at the ultimate touchstone in every preemption case.[xxxiii] Thus, the doctrine of preemption is based on Congress' power to prohibit states from encroaching in a particular regulatory field by passing laws that frustrate Congress' ability to regulate that area.

There are two recognized types of preemption, express preemption and implied preemption.[xxxiv] Express preemption occurs when Congress explicitly states that it intends to preempt state regulation on a particular subject matter; however, a preemption clause does not end the analyses because the question of the substance and scope of Congress' displacement of state law still remains.[xxxv] Preemptive intent may also be "inferred" if the scope of the statute indicates that Congress intended federal law to occupy a legislative field, or if there is an actual conflict between the state and federal law.[xxxvi] When deciding questions of express or implied preemption, the Supreme Court begins the analysis "with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[xxxvii]

On these facts, there is a compelling argument in favor of preemption. While the SEC's Regulation BI does not express an absolute intent to preempt *all* state action, it certainly does not close the door to preemption upon certain facts, contingent specifically upon the language and scope of the proposed state law. Specifically, the SEC's promulgation states as follows:

> Whether Regulation Best Interest would have a pre-emptive effect on any state law would be determined in future judicial proceedings and would depend on the language and operation of the particular state law at issue. We considered whether we could determine the economic impact of possible, future state-law pre-emption on retail customers, but concluded that we cannot analyze the economic effects of the possible preemption of state law at this point because the factors that will shape those judicial determinations are too speculative. Among the unknown factors are: (1) the final language in any proposed state legislation or regulation adopting a fiduciary or other standard for broker-dealers; (2) whether that language would constitute the type of law, rule, or regulation that is expressly preempted by the securities law or impliedly preempted under principles applied by courts; and (3) whether, if there was preemption, that preclusion of state law would have any positive or negative effects on investors when compared with the economic effects of Regulation Best Interest.

The Massachusetts' rule, as written, extends well beyond the bounds of Regulation BI to the point that it results in encroaching upon many of the harms the SEC intentionally chose to steer away from by refusing to adopt a unform fiduciary duty standard for broker/dealers and investment advisers alike. Those concerns are fully outlined in the section on Regulation BI above. Thus, whether couched in terms of express or implied preemption, our view is the analysis is essentially the same. Clearly, there were results that the SEC did not want to occur by adopting a true fiduciary

duty standard, and the Massachusetts' rule, as written, encroaches upon those specific concerning results.

This argument is also strengthened and supported by the fact that when enacting the Dodd-Frank Act, Congress solely empowered the SEC to engage in a thoughtful and comprehensive study before promulgating a final rule addressing the standards of care for broker/dealers. Moreover, the SEC engaged in such activity for the better part of a decade before reaching its thoughtful and intentional conclusions and promulgation of Regulation BI.

Conversely, the Secretary of the Commonwealth of Massachusetts issued its promulgation only nine (9) days after Regulation BI was introduced, and there is nothing in the record to suggest it engaged in a study commensurate with that conducted by the SEC before enacting the Massachusetts' standard.

CONCLUSION

For all of these reasons, the Supreme Court should exercise its broad discretion by granting a Writ of Certiorari and the Massachusetts' fiduciary standard for broker/dealers should be vacated, and quickly, as it threatens the entire fabric of the broker/dealer industry as we once knew it.

FOOTNOTES

[i] https://www.mass.gov/files/documents/2023/08/25/y13381.pdf

[ii] Mass. Securities Chief Sets Up State Rules, Blasting SEC Regs

[iii] https://www.finra.org/rules-guidance/rulebooks/retired-rules/2310

[iv] https://www/finra.org/rules-guidance/rulebooks/finra-rules/2111

[v] *See, e.g.*,*de Kwiatowski v. Bear, Sterns & Co., Inc., et al.*, 306 F.3d 1293 (2ndCir. 2002).

[vi] H.R.4173 - Dodd-Frank Wall Street Reform and Consumer Protection Act

[vii] Everything You Need to Know About the DOL Fiduciary Rule

[viii] *See Chamber of Commerce of the United States v. United States DOL*, 885 F.3d 360 (5thCir. 2018).

[ix] https://www.nvsos.gov/sos/licensing/securities/new-fiduciary-duty

[x] https://www.napa-net.org/news-info/daily-news/nevada-resumes-fiduciary-rule-rewrite

[xi] Maryland jumps into fiduciary fray with legislation requiring brokers to act in best interests of clients

[xii] https://mgaleg.maryland.gov/mgawebsite/legislation/details/sb0786?ys+2019rs

[xiii] https://www.njconsumeraffairs.gov/proposals/pages/bos-04152019-proposal.aspx

[xiv] New Jersey Bureau of Securities Proposal for Fiduciary Rule Will Expire as Bureau Continues Efforts to Protect Investors in an Evolving Market

[xv] https://www/sec.gov/files/rules/final/2019/34-86031.pdf

[xvi] Id.

[xvii] Id.

[xviii] See*XY Planning Network, LLC v. SEC*, 963 F.3d 244, 250 (2d Cir. 2020).

[xix] 950 CMR 12.200: Registration of broker-dealer, agents, investment adviser, investment adviser representatives and notice filing procedures for federal covered advisers

[xx] Mass. Securities Chief Sets Up State Rules, Blasting SEC Regs

[xxi] See endnote xix.

[xxii] In win for Robinhood, judge declares Massachusetts investment advice rule invalid

[xxiii] Success Rate of a Petition for Writ of Certiorari to the Supreme Court

[xxiv] Rule 10. Considerations Governing Review on Writ of Certiorari

[xxv] Id.

[xxvi] Id.

[xxvii] Robinhood's full brief is here.

[xxviii] See § 425 [Statutory Policy] found within the Uniform Securities Act (1956).

[xxix] See Cabot Corp. v. Baddour, 477 N.E.2d 399 (1985).

[xxx] Report on the Uniformity of State Regulatory Requirements for Offerings of Securities That Are Not "Covered Securities"

[xxxi] See*Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

[xxxii] See*Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[xxxiii] See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[xxxiv] See*Altria at 76-77.*

[xxxv] See*Altria at 76.*

[xxxvi] See*Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

[xxxvii] See*Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).*

RELATED PRACTICE AREAS

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