**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | | |
|---|---|---|
| WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts,<br><br>Plaintiff,<br><br>v.<br><br>SCOTTRADE, INC.,<br><br>Defendant. | ) | Case No. 1:18-cv-10508-NMG |

**DEFENDANT SCOTTRADE, INC.'S MEMORANDUM OF LAW**
**IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND**

MURPHY & MCGONIGLE, P.C.
Christian R. Bartholomew
Admitted *pro hac vice*
cbartholomew@mmlawus.com
1001 G Street, N.W.
Seventh Floor
Washington, D.C. 20001
(201) 220-1940

Cameron S. Matheson, BBO# 636628
cmatheson@mmlawus.com
4870 Sadler Road, Suite 301
Glen Allen, Virginia 23060
(804) 762-5320

*Counsel for Scottrade, Inc.*

Dated: May 11, 2018

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**

## PRELIMINARY STATEMENT

This case involves an unprecedented attempt by a state regulator to enforce the Fiduciary Rule,[1] a federal rule promulgated by a federal agency (the U.S. Department of Labor ("DoL")) under a federal statute, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). A federal appellate court has recently vacated the Rule and it may well be replaced in large part by a new regulation just proposed by the U.S. Securities and Exchange Commission ("SEC"). Nevertheless, in an extraordinary act of overreaching, Plaintiff William Galvin, acting in his official capacity as Secretary of the Commonwealth of Massachusetts ("Plaintiff" or "Galvin"),[2] seeks to enforce the Fiduciary Rule in a Massachusetts administrative enforcement proceeding he commenced against broker-dealer Scottrade, Inc. ("Scottrade").

Galvin's complaint in the state proceeding ("Administrative Complaint" or "AC") purports to allege violations of the Massachusetts Uniform Securities Act ("MUSA"), but his claims are premised entirely on violation of an alleged federal duty created by the Fiduciary Rule; *indeed, the Rule is referenced 39 times in the AC.* Plaintiff demands the imposition of penalties on Scottrade because it allegedly "violated its own internal policies designed to ensure compliance with the . . . Fiduciary Rule". AC at 2.[3] Galvin has made no secret of his purpose, repeatedly and publicly declaring that he

---

[1] 29 C.F.R. § 2510.3-21; Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16,902 (Apr. 7, 2017) (extending applicability date).

[2] Plaintiff insists he is not the plaintiff in this matter, but that is belied by the record and the reality. Thus, the underlying enforcement action against Scottrade is captioned "In the Matter of Scottrade, Inc.," and was commenced by a "Notice of Adjudicatory Proceeding" filed by "William Francis Galvin, Secretary of the Commonwealth, by his Enforcement Section of the Massachusetts Securities Division." Notice of Adjudicatory Proceeding, *In re Scottrade, Inc.*, Docket No. E-2017-0045 (Mass. Sec. Div. Feb. 15, 2018). Moreover, Plaintiff's website makes clear that he is the charging authority. *See, e.g.*, Commonwealth of Massachusetts, *Securities Division*, sec.state.ma.us, http://www.sec.state.ma.us/sct/sctidx.htm (last visited May 3, 2018) ("*Secretary Galvin* Charges Scottrade, Inc. in Connection with the Fiduciary Rule"; "*Secretary Galvin* Charges North Shore Investment Adviser With Real Estate Scheme"; "*Secretary Galvin* Charges Brookline Man in Initial Coin Offering Cryptocurrency Scheme" (emphasis added)) (Ex. A, attached hereto). Finally, appeals from final orders in Galvin's enforcement actions have been filed in Massachusetts Superior Court naming Galvin as a defendant without any apparent objection by Galvin. *See, e.g.*, *Bergin v. Galvin*, No. CIV. A. 98-6016-H, 2000 WL 744567, at *1 (Mass. Super. Ct. May 18, 2000); *Cohmad Sec. Corp. v. Galvin*, No. CIV.A. 2009-02226, 2009 WL 2450537, at *1 (Mass. Super. Ct. Aug. 10, 2009).

[3] *See also id.* at 13 ¶ 57 ("Scottrade violated its own internal policies regarding the Fiduciary Rule, thereby failing to act in good faith to comply with the Fiduciary Rule.").

brought the action against Scottrade to enforce the Fiduciary Rule because the federal government would not. Galvin's action is part of his campaign to enforce his own, personal interpretation of this *now-abolished* federal rule, attempting unilaterally to substitute his judgment for that of Congress, federal regulators, and the federal courts. This attempted usurpation of power threatens to undermine the national uniformity that should govern enforcement of a federal rule issued pursuant to a federal statute with broad federal preemptive effect.

Because the underlying dispute involves a federal question—enforcement of a federal rule promulgated under a federal statute—Scottrade removed this action from the "state court" proceeding as it was entitled to do under both the removal statute (28 U.S.C. § 1441) and applicable precedent from this Circuit. In his remand brief, Plaintiff repeatedly exalts form over substance, and claims that this action against Scottrade is only about state law issues under MUSA, despite the plain allegations in the AC and Plaintiff's repeated statements that he is seeking to enforce the federal Fiduciary Rule.[4] Moreover, Plaintiff makes a series of erroneous and misleading arguments, including, for example, mischaracterizing this case as only involving individual retirement accounts ("IRAs") despite the fact that the AC never uses this phrase (or the related acronym) and instead asserts claims concerning the far broader category of "retirement accounts." Plaintiff even resorts to arguing that this Court should simply ignore controlling First Circuit case law—law that this Court has recently faithfully applied—permitting removal of a state administrative proceeding.

The Court should not be misled by Plaintiff's arguments, which ask the Court to ignore what is really happening here: a state regulator overstepping his bounds by seeking to impose on Scottrade a federal duty that only he believes exists. Because the Court has jurisdiction to address Galvin's attempt to enforce a federal rule issued under a federal statute with broad preemptive effect,

[4] In addition to claiming that he is not the Plaintiff in this matter, *see supra* note 2, and that the AC only asserts state-law claims, Plaintiff even goes so far as to describe his enforcement action against Scottrade—in which there are extensive legal and factual pleadings and hearings and in which he seeks penalties and a censure—as little more than an informal conference between the parties. We address all these claims below.

Scottrade's removal of this action was proper and, accordingly, the Motion to Remand should be denied.

## STATEMENT OF FACTS

In 2016, the DoL issued the Fiduciary Rule, which expanded the definition of "investment advice" fiduciary under ERISA. AC at 2.[5] The Rule had sweeping implications for the conduct of business in the financial industry and, indeed, broker-dealers spent more than $4.7 billion to comply with changes required by the Rule.[6] On June 9, 2017, the impartial conduct standards of the Fiduciary Rule went into effect, requiring financial advisors "who manage retirement accounts or provide retirement advice to act as fiduciaries, placing the interests of their customers ahead of their own." AC at 2. Importantly, in May 2017, even before the standards went into effect, the DoL announced that it would not pursue claims against firms working "diligently and in good faith" to comply with the Fiduciary Rule;[7] in November 2017, DoL extended this enforcement moratorium to July 1, 2019.[8]

Among other things, the Fiduciary Rule mandated that broker-dealers adopt written policies and procedures requiring compliance with the Rule's terms[9] (AC at 9), and Scottrade duly adopted changes to its written policies and procedures that were "designed to ensure compliance with the . . . Fiduciary Rule." AC at 4. Scottrade added policy language tracking the Rule verbatim, stating that:

---

[5] The Fiduciary Rule also applied the same expanded definition of "investment advice" fiduciary under the Internal Revenue Code of 1986 ("IRC"). *See* 29 C.F.R. § 2510.3-21.

[6] *See* DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS 18 (2018), https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf.

[7] *See* Memorandum from John J. Canary, Director of Regulations and Interpretations, to Mabel Capolongo, Director of Enforcement, and Regional Directors, re Temporary Enforcement Policy on Fiduciary Duty Rule, Field Assistance Bulletin No. 2017-02 (May 22, 2017), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.

[8] 18-Month Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 56,545, 56,554 (Nov. 29, 2017); *see also* AC at 4.

[9] Under the new provisions, a broker-dealer may receive compensation that would otherwise be prohibited under ERISA and IRC if it adopts policies and procedures that, among other things, prohibit the use of contests and other actions or incentives that are intended or would reasonably be expected to cause the firm's advisors to make recommendations that are not in the best interest of "Retirement Investors." Best Interest Contract Exemption; Correction, 81 Fed. Reg. 44,773, 44,777 (July 11, 2016), *amended by* 82 Fed. Reg. 16,902 (Apr. 7, 2017), *and* 82 Fed. Reg. 56,545 (Nov. 29, 2017). The term "Retirement Investor" includes participants and beneficiaries of employee benefit plans, as well as IRA owners. *Id.* at 44,783.

> [t]he firm does not use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or reasonably expected to cause associates to make recommendations that are not in the best interest of Retirement Account clients or prospective Retirement Account clients.

AC at 9-10 ¶¶ 32-33 (emphasis omitted).

As noted above,[10] this enforcement action was instituted by a Notice of Adjudicatory Proceeding filed by Galvin and the related Administrative Complaint; the AC alleges that Scottrade ran sales contests that violated Scottrade's "internal policies related to the Fiduciary Rule." AC at 4-5. Such adjudicatory proceedings involve the filing of pleadings by the parties, pre-hearing discovery, motions practice, the power to subpoena witnesses and documents, and the conduct of evidentiary hearings with sworn witness testimony with the right to cross-examine, make objections, etc. 950 C.M.R. §§ 10.06, 10.07, 10.09.[11] The relief ordered may include the termination of the registration of a broker-dealer and the imposition of sanctions, including financial penalties, censures and cease-and-desist orders. *See* Mass. Gen. Laws ch. 110A, § 204(a); 950 C.M.R. § 12.204. The AC expressly seeks such sanctions in this case. AC at 19.

In announcing the charges against Scottrade, Galvin issued a press release in which he made clear that his intent was to enforce the Fiduciary Rule because DoL was not doing so:

> Despite the efforts in Washington to kill the Fiduciary Rule, the impartial conduct provision remains in place . . . . If the Department of Labor will not enforce its own laws and rules, then the states must do what they can to protect retirees from firms who believe they can play with peoples' life savings by conducting sophomoric contests.[12]

Galvin has repeatedly emphasized his intent to enforce the Rule in multiple public statements.[13]

---

[10] *See* Notice of Adjudicatory Proceeding, *supra* note 2 and accompanying text.

[11] A full set of the rules governing the formal Adjudicatory Proceedings in Title 950, Section 10.00, of the Code of Massachusetts Regulations is attached hereto as Ex. B.

[12] Press Release, William Francis Galvin, Secretary of the Commonwealth, *Secretary Galvin Charges Scottrade, Inc. in Connection with the Fiduciary Rule* (Feb. 15, 2018), *available at* https://www.morningstar.com/news/dow-jones/washington-wire/TDJNDN_201802157362/press-release-secretary-galvin-charges-scottrade-inc-in-connection-with-the-fiduciary-rule.print.html (Ex. C, attached hereto).

[13] *See, e.g.*, Melanie Waddell, *State Regulator Galvin is Putting Teeth in DOL Fiduciary Rule*, THINKADVISOR (Feb. 26, 2018, 4:03 PM), https://www.thinkadvisor.com/2018/02/26/the-state-regulator-whos-putting-teeth-in-the-dol/ (quoting Galvin as stating that the case against Scottrade does "deal with the DOL rule. . . . We have in effect a DOL rule that needs

On March 15, 2018, the Court of Appeals for the Fifth Circuit upheld a challenge to the Fiduciary Rule, concluding that the Rule conflicted with the plain text of ERISA. *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 379 (5th Cir. 2018). The Court concluded that the DoL lacked authority to adopt the new fiduciary advice definition and that it had acted arbitrarily and capriciously. *Id.* at 387-88. The Court thus vacated the Rule in its entirety, *id.* at 388, a ruling that has nationwide effect, *see Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (internal quotation marks and brackets omitted) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989))).[14]

Following the Fifth Circuit's vacatur, on April 18, 2018, the SEC proposed a new regulation—Regulation Best Interest—that contains new standards for broker-dealers recommending investments under the Securities Exchange Act of 1934, including for retirement accounts. *See* Regulation Best Interest, Exchange Act Release No. 83,062, Fed. Sec. L. Rep. (CCH) ¶ 82,041 (Apr. 18, 2018). Many believe the SEC's new regulation will replace the Fiduciary Rule, further adding to the unsettled nature of this important area of federal law.[15]

---

to be enforced. . . . *We think the fiduciary rule is extremely important, and we want to protect it and make sure it's enforced*." (emphasis added)) (Ex. D, attached hereto); John Crabb, *Massachusetts' Galvin: Investors Aren't 'Pawns in a Prize Contest,'* IFLR (Feb. 27, 2018), http://www.iflr.com/Article/3790155/Massachusetts-Galvin-investors-arent-pawns-in-a-prize-contest.html (quoting Galvin as stating: "*If we have a rule, we take it seriously and we intend to make sure it is enforced*. . . . We think the rule has already proven its value, and we don't want to see it weakened". (emphasis added)) (Ex. E, attached hereto).

[14] The DoL's deadline for requesting a rehearing *en banc* passed on April 30, 2018.

[15] *See* Michael S. Piwowar, SEC Comm'r, Statement at Open Meeting on Form CRS, Proposed Regulation Best Interest and Notice of Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (Proposed Rule) (Apr. 18, 2018), https://www.sec.gov/news/public-statement/statement-piwowar-041818 ("Thankfully, for the sake of retail investors . . . the Fifth Circuit called out the DOL's highly questionable use of authority and vacated its rule. Now, all eyes are on the SEC as we seek to provide a workable, non-political path forward." (footnote omitted)); Steve Garmhausen, *SEC Proposed Its Best-Interest* Rule, BARRON'S (Apr. 18, 2018, 6:40 PM), https://www.barrons.com/articles/sec-proposes-its-best-interest-rule-1524091249 ("The SEC proposed a rule Wednesday that could wind up replacing the Department of Labor's fiduciary rule for brokers and financial advisors."); Francine McKenna, *SEC's new code of conduct rules may eclipse fiduciary standard initiatives*, MARKETWATCH (Apr. 18, 2018), https://www.marketwatch.com/story/secs-new-code-of-conduct-rules-may-eclipse-fiduciary-standard-initiatives-2018-04-17.

## ARGUMENT

### I. THE COURT HAS FEDERAL QUESTION JURISDICTION

#### A. Federal Jurisdiction Exists Over Plaintiff's "State Law" Claims If They Are Completely Preempted or Require Resolution of a Substantial Federal Question

Since the commencement of this action, the Fiduciary Rule has been judicially vacated, and, at the end of the day, Plaintiff cannot succeed in enforcing a non-existent rule. But putting aside the merits issues, the instant motion addresses only the threshold question of jurisdiction. This Court has federal question jurisdiction because Plaintiff's claims arise under a federal rule issued pursuant to federal law, ERISA. Accordingly, Scottrade properly removed the action under 28 U.S.C. § 1441(a).

In seeking remand, Plaintiff relies on the so-called "well-pleaded complaint rule" to argue that he is asserting only state causes of action that cannot be removed. Pl. Br. at 5. Plaintiff acknowledges, however, that there are "two recognized exceptions" to that rule: a case alleging state law claims may arise under federal law and thereby be subject to federal court jurisdiction if (1) the state-law right necessarily requires a resolution of a substantial question of federal law or (2) a "federal statute completely preempts the state-law cause of action." Pl. Br. at 6-7 (quoting *Commonwealth v. Wampanoag Tribe of Gay Head*, 36 F. Supp. 3d 229, 232-33 (D. Mass 2014)). Both exceptions amply apply here and give this Court jurisdiction.

#### B. ERISA Completely Preempts Plaintiff's Claims

The doctrine of compete preemption applies to Plaintiff's claims because they seek to enforce the Fiduciary Rule issued pursuant to ERISA. Plaintiff concedes, as he must, that "ERISA is one of the few federal statutes that can provide the basis for complete preemption." Pl. Br. at 7. This was the Supreme Court's holding in its seminal decision in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004): "ERISA is one of these statutes" that "wholly displaces the state-law cause of action through preemption," so that a "cause of action, *even if pleaded in terms of state law*," is completely preempted when it "is *in reality based on federal law*." *Id.* at 207-08 (emphasis added) (internal quotation marks

omitted). In *Davila*, the Supreme Court addressed ERISA's civil enforcement remedial scheme, and held that "any state-law cause of action that *duplicates*, *supplements*, or *supplants* the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted." *Id.* at 209 (emphasis added); Pl. Br. at 8.

Although Plaintiff's claims are framed and labeled as state-law claims under MUSA, they are completely preempted because they would supplement or supplant ERISA's remedial scheme. Plaintiff argues against complete preemption for two reasons: first, because ERISA's preemption provisions purportedly do not apply to IRAs, and second, because the doctrine purportedly does not apply to Plaintiff because he lacks standing to sue under ERISA's civil enforcement provision. Pl. Br. at 8. Both arguments are simply wrong.

**1. The Court Has Jurisdiction Over Plaintiff's Claims Relating to IRAs**

Plaintiff's initial argument is that ERISA's preemption provisions do not apply to IRAs because they are governed by Title II, which does not create a private right of action or contain a civil enforcement provision. Pl. Br. at 9-10. This argument misses the mark for three reasons: first, the AC's claims relate to *all* retirement accounts, not just IRAs, and thus Plaintiff's argument has no bearing on the preemption of retirement accounts (such as 401(k) accounts) that are not IRAs;[16] second, ERISA's preemption provisions in fact apply to many IRAs, as applicable case law demonstrates; and third, to the extent that certain IRAs do not fall within ERISA's preemption provisions, Plaintiff's claims relating to those accounts may be appropriately addressed through the Court's exercise of supplemental jurisdiction.

[16] As of December 31, 2017, IRAs held an estimated $9.2 trillion in assets, but private sector employee pension benefit plans – covered by Title I of ERISA and its preemption provisions – held nearly as much, approximately $8.9 trillion in assets, including approximately $5.8 trillion in private sector Defined Contribution ("DC") plans, and $3.1 trillion in private sector Defined Benefit ("DB") plans. *See Retirement Assets Total $28.2 Trillion in Fourth Quarter 2017*, ICI.ORG (Apr. 19, 2018), https://www.ici.org/research/stats/retirement/ret_17_q4 (Ex. F, attached hereto). The assets in both DB plans and DC plans can be rolled over or otherwise distributed in a way that would implicate "investment advice" under the Rule, when a broker-dealer makes a recommendation to a retirement client about the disposition of the client's assets. *See* 29 C.F.R. § 2510.31-21(a)(1)(ii).

Plaintiff's brief simply creates out of whole cloth the idea that the AC's claims are somehow limited to IRAs; *in fact, the phrase "individual retirement account" and the acronym "IRA" do not appear in the AC.* Instead, the AC repeatedly refers generally to "retirement account clients" and efforts "to bring in new assets from customers, including through rollover of retirement assets." AC at 4. This is because neither the Rule nor Scottrade's policy are limited to IRAs. The Rule requires that broker-dealers adopt policies regarding investments in *both* IRAs and employee benefit plans[17] and, accordingly, Scottrade's policy is not limited to IRAs but rather broadly covers recommendations to "Retirement Account clients," AC at 9-10 ¶¶ 32-33, which include recommendations regarding the rollover of employee benefit plan assets. Thus, the broad language used in the AC, the Fiduciary Rule, and Scottrade's policy cover not just IRAs but other employer-based retirement accounts (such as 401(k) plans), and any recommendations concerning the rollover thereof.

Plaintiff's brief is also flatly wrong in its blanket assertion that IRAs are not subject to Title I of ERISA. To the contrary, many IRAs are subject to Title I because they fall within the definition of employee benefit plans under ERISA. Under *Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1230 (9th Cir. 2000), certain IRAs that are connected to employers are "employee benefit plans" falling within Title I and are therefore subject to ERISA preemption. *See also United States v. Bartleson*, 74 F. Supp. 3d 947, 978-79 (N.D. Iowa 2015) (stating that "the definition portion of ERISA on '[e]mployee pension benefit plan' excludes some IRAs and includes other IRAs within the scope of ERISA," and holding that the SIMPLE IRA plan at issue fell within the scope of Title I of ERISA); *Altshuler v. Animal Hospitals, Ltd.*, 901 F. Supp. 2d 269, 278 (D. Mass. 2012) (same holding). Thus, because Title I of ERISA governs retirement accounts other than IRAs, as well as certain IRAs connected to employers, claims relating to these accounts are completely preempted and within this Court's jurisdiction.

[17] *See supra* note 9.

Finally, to the extent that the AC asserts claims relating to IRAs that are not completely preempted, this Court has supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a).[18] As the First Circuit explained in *Negron-Fuentes v. UPS Supply Chain Sols.*, 532 F.3d 1 (1st Cir. 2008), even assuming only one of Plaintiff's claims raises a federal question, this Court has supplemental jurisdiction pursuant to 28 U.S.C. §§ 1367(a) and 1441(c) over non-federal claims and the entire case is removable. *Id.* at 7 (finding that removal of plaintiff's *seven* state law claims was proper because *one* claim was completely preempted by ERISA and noting that "any of [plaintiff's] claims, if completely preempted, can support removal of the entire action: the rest can be removed as provisionally within a federal court's supplemental jurisdiction").[19]

**2. Plaintiff Erroneously Argues That There Is No Complete Preemption Because Massachusetts Lacks Standing to Sue Under ERISA's Civil Suit Provision**

Plaintiff also argues that his claims are not completely preempted because a state agency is not an enumerated entity that is eligible to sue under the relevant provisions of ERISA § 502(a) (29 U.S.C. § 1132(a)), the statute's civil enforcement provision. Pl. Br. at 10-12. Plaintiff misinterprets the relevant case law and asks this Court to elevate form over substance contrary to the Supreme Court's holding in *Davila* and relevant First Circuit authority.

Plaintiff's arguments conveniently ignore the fact that his pleading—by his own admission—seeks to enforce a federal rule issued pursuant to ERISA. The AC's allegations establish that Galvin is suing Scottrade for allegedly violating its internal policy that tracks the language of the Fiduciary Rule and was enacted in response to the Rule. AC at 5; *see also* Pl. Br. at 4-5. Indeed, Galvin has expressly and repeatedly declared that his action seeks to enforce the Fiduciary Rule precisely *because* the

[18] Plaintiff's brief does not address supplemental jurisdiction.

[19] *See also Rueli v. Baystate Health, Inc.*, 835 F.3d 53, 59 (1st Cir. 2016) ("Where plaintiffs bring multiple state-law claims based on the 'same nucleus of operative facts,' the court need only determine whether one of them is completely preempted and, therefore, removable. If so, the others may also be removed—even if they are not completely preempted, they will be subject to supplemental jurisdiction in federal court." (citation omitted)).

federal government is not doing so. (Exs. C, D, E).[20] No other case has ever addressed such unique and extraordinary circumstances in which a state regulator is attempting to enforce his own personal interpretation of an ERISA-based rule that should be applied uniformly nationwide.

Using language that has direct application here, *Davila* held that courts should not distinguish "between pre-empted and non-pre-empted claims based on the particular label affixed to them." 542 U.S. at 214; *see also Dudley Supermarket, Inc. v. Transamerica Life Ins. and Annuity Co.*, 302 F.3d 1, 2-4 (1st Cir. 2002) (holding that plaintiff's state-law claims were "in reality" a claim under ERISA, and affirming this Court's holding that ERISA completely preempts the claims). Plaintiff attaches a state-law label to his claims by purporting to allege violations of the MUSA, but the AC makes clear (and Plaintiff admits) that he is suing to enforce the federal law standards established by the Fiduciary Rule issued pursuant to ERISA. Pursuant to *Davila*'s directive, the Court should look beyond Plaintiff's label, and not permit Plaintiff to escape federal court jurisdiction and preemption when his claims are, *by his own admission*, a purposeful attempt to enforce the federal Fiduciary Rule.

In *Davila*, the Supreme Court held that state-law causes of action within the scope of the civil enforcement provision of § 502(a) are completely preempted and removable to federal court. 542 U.S. at 209 (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)). But it does not logically follow, as Plaintiff argues, that complete preemption cannot apply to claims by an entity (here, a state regulator) that is not listed as eligible to sue under the relevant provisions of § 502(a).[21] As *Davila*

---

[20] These admissions are properly considered by the Court on this jurisdictional motion. *Aversa v. United States*, 99 F.3d 1200, 1210 (1st Cir. 1996) (when addressing subject matter jurisdiction, court may consider whatever evidence has been submitted). *See also Rodgers v. Callaway Golf Operations, Inc.*, 796 F. Supp. 2d 232, 237 (D. Mass. 2011) (considering materials outside of the pleadings to determine whether the court had jurisdiction over action removed to federal court); *White v. Comm'r*, 899 F. Supp. 767, 771 (D. Mass. 1995) ("The Court can look beyond the pleadings—to affidavits and depositions—in order to determine jurisdiction.") (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1363 (1990)). Plaintiff's suggestion that the Court is limited to considering only the face of the complaint is based on an out-of-context citation to *Municipality of Mayaguez v. Corporacion Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8, 13 (1st Cir. 2013), which, unlike the above authorities, did not explicitly address the scope of materials that the Court could consider in analyzing federal question jurisdiction.

[21] The First Circuit has never so held, and the cases cited by Plaintiff are distinguishable and, in fact, support Scottrade's position. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983), *Nahigian v. Leonard*, 233 F. Supp. 2d 151 (D. Mass. 2002) and *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 309 F. Supp. 2d 165 (D. Mass. 2004), were each decided before the Supreme Court's decision in *Davila*,

recognized, Congress made specific policy choices in determining which parties could sue under ERISA and which could not. *Id.* at 208-09. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). Congress made a choice to exclude state agencies or their representatives—like Plaintiff—from the entities that could sue to enforce ERISA's provisions. Congress' choice not to allow such claims completely preempts Plaintiff's state-law claims that seek to enforce the Fiduciary Rule. This suit is nothing more than a statutorily unauthorized attempt to enforce ERISA's Fiduciary Rule, and thus, under *Davila*, Plaintiff's claims are preempted because they improperly "supplement[] or supplant[]" "the clear congressional intent to make the ERISA remedy exclusive." *Id.* at 209.

In addition, Plaintiff's argument—that no standing to enforce ERISA equates to no jurisdiction—is mistaken as a matter of law because statutory standing and federal question jurisdiction are two separate issues. For example, in *Perry v. New England Business Service, Inc.*, 347 F.3d 343, 344-45 (1st Cir. 2003), the First Circuit held that the district court had subject matter jurisdiction to address a plaintiff's claim for benefits under an ERISA plan. The Court concluded that federal question jurisdiction existed even though the plaintiff did not have statutory standing to sue

---

and hence do not analyze whether the state law cause of action "*duplicates*, *supplements*, or *supplants* the ERISA civil enforcement remedy". 542 U.S. at 209 (emphasis added). *Franchise Tax Board* involved an attempt by state tax authorities to enforce a tax levy on many grounds unrelated to ERISA, 463 U.S. at 26, unlike Plaintiff's action here that is solely intended to enforce the federal standards set forth in the Fiduciary Rule promulgated under ERISA. Moreover, *Nahigian* found that the plaintiff was not a defined "participant" under ERISA § 502(a), but nonetheless applied a "zone of interests" test to determine whether he had standing to sue despite not strictly fitting within the statute's enumerated categories. 233 F. Supp. 2d at 168-69. Similarly, in *In re Pharmaceutical Industry*, the court recognized that the plaintiff had standing to sue under ERISA despite the fact that the plaintiff was not the type of entity enumerated in § 502(a). 309 F. Supp. 2d at 172. The out-of-circuit cases Plaintiff cites similarly recognized that parties not enumerated in § 502(a) of ERISA can have standing to sue under the statute. *See McCulloch Ortho. Surg. Servs. v. Aetna Inc.*, 857 F.3d 141, 146 (2d Cir. 2017); *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 329 (2d Cir. 2011). Finally, *N.J. Carpenters v. Tishman Construction Co.*, 760 F.3d 297 (3d Cir. 2014), is inapposite because the court's holding was completely unrelated to the question of whether the plaintiff was the type of party permitted to sue under § 502(a). *Id.* at 304-05 (finding no complete preemption under § 502(a)(1)(b) because plaintiff's claim for recovery of wages was not based upon an ERISA plan). In none of the cases cited by Plaintiff did a state regulator sue in a state forum for the explicit purpose of enforcing a rule promulgated under ERISA, which Plaintiff has done here.

because she did not fall within the definition of a "participant" eligible to sue under the statute. *Id.* at 344-46. The First Circuit affirmed the dismissal of the plaintiff's claims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), not on jurisdictional grounds. *Id.* Based on the same reasoning, the fact that Plaintiff is not an enumerated party able to sue under the relevant provisions of ERISA § 502(a) means only that his allegations in the AC fail to state a claim for relief. It does not mean that this Court lacks subject matter jurisdiction.

This same analysis was applied in a recent decision, *DB Healthcare, LLC v. Blue Cross Blue Shield of Arizona, Inc.*, 852 F.3d 868 (9th Cir. 2017), which drew a clear distinction between standing to sue under ERISA and federal subject matter jurisdiction:

> We note, preliminarily, that our cases discussing whether a plaintiff is authorized to sue under ERISA's civil enforcement provisions often refer to the question as whether the plaintiff has "standing" or "statutory standing" to sue under ERISA. This common shorthand suggests that subject matter jurisdiction may also be at stake. It is not. The question whether Congress has granted a private right of action to a particular plaintiff is *not* a jurisdictional requirement. "[A] dismissal for lack of statutory standing [under ERISA] is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction."

*Id.* at 873 (emphasis in original) (citations omitted) (quoting *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009)). Plaintiff does not have standing to sue under ERISA, but that means only that he cannot state a claim for relief under the statute, not that this Court lacks subject matter jurisdiction to decide the issue.

Finally, although Plaintiff argues for a strict, literal reading of the enumerated parties eligible to sue under § 502(a), the law of this Circuit is not so limited. As explained by the First Circuit in *State Street Bank v. Denman Tire Corp.*, 240 F.3d 83 (1st Cir. 2001), "[d]espite the limits on standing to sue and remedies available in suits involving ERISA plans, courts recognize that in certain cases, a party otherwise unable to sue under ERISA may nevertheless pursue a federal common law action for restitution or other equitable relief." *Id.* at 88-89. Such federal common law claims "will only give rise to a claim pursuant to ERISA in the limited class of cases 'where the issue in dispute is of *central*

*concern* to the federal statute.'" *Id.* at 89 (emphasis added) (citation omitted). Plaintiff does not address *State Street* or the authorities cited therein holding that federal courts have discretion to more broadly accept jurisdiction of claims that are of "central concern" under the statute.

It is simply beyond cavil that this is a case of "central concern" under ERISA given the great significance of the Fiduciary Rule to the financial industry, and the unique circumstances presented here in which a state regulator has taken the extraordinary step of filing claims in a state proceeding to enforce his own interpretation of a federal rule because federal regulators have not acted. Indeed, Galvin himself has repeatedly made clear that he is attempting to usurp federal authority to enforce and interpret a rule promulgated pursuant to ERISA. Consistent with *State Street Bank*, the Court should exercise jurisdiction here where the issues presented are of "central concern" under ERISA. On this basis *as well*, the Motion to Remand should be denied.

### C. Federal Jurisdiction Exists Because Resolving the AC's State Law Claims Necessarily Involves Resolving a Substantial Issue of Federal Law

This Court also has federal question jurisdiction because the AC's claims necessarily raise a substantial, disputed question of federal law that is capable of resolution in federal court without disrupting the federal-state balance approved by Congress.[22] The Supreme Court has recognized "for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). As the Court explained in *Grable*, this "doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solitude, and hope

[22] Plaintiff acknowledges the viability of this doctrine but contends, incorrectly, that if the Court has jurisdiction over this suit under *Grable*, the Court will determine, on summary judgment or at trial, whether Scottrade violated the MUSA. Pl. Br. at 13. In fact, Scottrade will move to dismiss Plaintiff's claims because, *inter alia*, they are premised on alleged violations of a vacated federal rule.

of uniformity that a federal forum offers on federal issues. . . ." *Id.* (upholding federal jurisdiction over a quiet title action that turned on whether plaintiff received adequate notice as defined by federal law).

"[T]the Supreme Court has repeatedly reaffirmed the viability" of this doctrine, sometimes referred to as the federal ingredient doctrine, *Municipality of Mayaguez*, 726 F.3d at 13, and the First Circuit has observed that the doctrine "remains vibrant in this circuit," *Metheny v. Becker*, 352 F.3d 458, 460 (1st Cir. 2003); *see also Commonwealth v. Wampanoag Tribe of Gay Head*, 36 F. Supp. 3d 229, 236 (D. Mass. 2014) (holding that there was federal jurisdiction based on the doctrine in a suit brought in state court by Massachusetts against an Indian tribe and denying motion to remand).

Because this case is of "central concern" to ERISA, as discussed above, this is precisely the type of case in which the doctrine should be applied. A state regulator is attempting to usurp federal authority and impose his own personal interpretation of federal law, threatening to upend congressional intent that ERISA have broad preemptive effect and uniform application nationwide. *Davila*, 542 U.S. at 208 (stating that "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans," and that ERISA's "expansive pre-emption provisions . . . are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern'"). There are four required elements for federal jurisdiction to exist under the doctrine: the federal issue must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Each of the elements is present here.

Adjudication of the claims alleged in the AC necessarily involves determining whether Scottrade violated the federal Fiduciary Rule. As the First Circuit explained in *Rhode Island Fishermen's Alliance, Inc. v. Rhode Island Department of Environmental Management*, 585 F.3d 42, 48 (1st Cir. 2009), federal question jurisdiction exists over a state-law cause of action "that contains an

embedded question of federal law that is both substantial and disputed."[23] That is precisely this case. The AC alleges that Scottrade violated its internal policies that tracked the language of the Fiduciary Rule and were implemented by Scottrade to comply with the Rule. Indeed, the AC expressly cites to the impartial conduct standards of the Fiduciary Rule, which require advisors managing retirement accounts to place the interests of their customers ahead of their own, AC at 2, and then charges that Scottrade engaged in sales contests that "could reasonably be expected to cause Scottrade agents to make recommendations in their own best interests rather than the best interests of their customers, including those with retirement accounts," *id.* at 4. The AC further cites to the DoL's announcement that it will not pursue claims against fiduciaries working diligently and in good faith to comply with the Rule, and then alleges that Scottrade has engaged in activities that constitute "a clear demonstration that [it] has failed to act in good faith to comply with the Fiduciary Rule." *Id.* at 4-5. Thus, Plaintiff's own allegations in the AC leave no doubt that the Fiduciary Rule standards of conduct are embedded in his claims, and that adjudication of those claims will turn on the application and interpretation of the Rule.[24]

Second, the federal issues are "actually disputed." Plaintiff contends that the Fiduciary Rule and Scottrade's policy prohibited Scottrade from engaging in the alleged "sales contests." Scottrade will argue that its conduct was consistent with the Fiduciary Rule and its policy. Moreover, given the

[23] *See also Franchise Tax Bd.*, 463 U.S. at 9 ("We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law . . . ." (citations omitted)); *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.*, 716 F.3d 218, 225 (1st Cir. 2013) (finding federal issue was necessarily raised by state breach of contract claim when "the alleged breach occurred only because the contractor was following the federal agency's explicit instructions"); *see also D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 101 (2d Cir. 2001) ("[T]he gravamen of [plaintiff's] state law claims is that the NYSE and its officers conspired to violate the federal securities laws and various rules promulgated by the NYSE and failed to perform its statutory duty, *created under federal law*, to enforce its members compliance with those laws." (emphasis in original)).

[24] In an apparent effort to avoid the obvious import of these direct allegations in the AC, and of his own public statements, Plaintiff suggests that Scottrade only "happened to have adopted" policies based on the Rule and speculates that a MUSA violation would have existed "if Scottrade had thought up" the policies on its own, apart from the Rule. Pl. Br. at 14. But this hypothetical only highlights the weakness of Plaintiff's position because it is undisputed—and indeed Plaintiff's own AC specifically so alleges—that Scottrade adopted the policy because the Rule required it.

Fifth Circuit's vacatur, the parties have a further dispute regarding whether the Rule—and hence Scottrade's policy—are applicable at all.

Third, the federal issue is certainly "substantial." This inquiry looks "to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260; *see also Municipality of Mayaguez*, 726 F.3d at 14 ("[A]n issue may be substantial where the outcome of the claim could turn on a new interpretation of a federal statute or regulation which will govern a large number of cases."). Courts have found a substantial federal issue when the lack of federal jurisdiction would threaten uniformity. *See NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1024 (2d Cir. 2014) (finding that the disputed issue – whether NASDAQ violated its statutory obligation to provide a fair and orderly market in conducting an IPO – was substantial because it was "sufficiently significant to the development of a uniform body of federal securities regulation").

The Fiduciary Rule is relatively new (promulgated in 2016), and its meaning and enforceability have been the subject of significant dispute over the last several years, resulting in the DoL's decision to delay, until July 2019, the key portion of the Rule that the AC seeks to enforce because the DoL may "ultimately determine[] to revise or repeal" "conditions or requirements" in the Rule,[25] and culminating in the Fifth Circuit's vacatur of the Rule in March 2018. The Rule has critical significance to how business is conducted in the financial industry, demonstrated by the fact that broker-dealers have spent more than $4.7 billion to comply with the Rule.[26] This action by a single state regulator to enforce the Rule risks creating conflicting standards and threatens the uniformity of federal law in this important area. Indeed, it is difficult to imagine facts that present a greater risk of creating conflicting standards, given that (1) the Rule has been vacated by the Fifth Circuit, (2) the DoL has acknowledged that it may revise or repeal the very section of the Rule that the AC seeks to enforce, and (3) the Rule

[25] 18-Month Extension of Transition Period, 82 Fed. Reg. at 56,545 (granting the delay in part because "regulated parties may incur undue expense to comply with conditions or requirements that the Department ultimately determines to revise or repeal").

[26] *See* DELOITTE, *supra* note 6, at 18.

is in the process of perhaps being replaced by the proposed new SEC regulation that will have nationwide effect. These issues are evolving, unsettled, and complex, and should be addressed in a uniform manner, not through imposition of one state's regulatory action.

Finally, the federal issue is capable of resolution in federal court without disrupting the federal-state balance. This inquiry turns on "whether federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts." *Rhode Island Fishermen's All., Inc.*, 585 F.3d at 51 (internal quotation marks omitted). Where "the federal government has an overwhelming interest in seeing the issue decided according to a uniform principle," and "there is no countervailing state interest in having the dispute adjudicated in a state forum," courts have found that the federal interest is capable of resolution in federal court without disrupting the federal-state balance. *One & Ken Valley Hous. Grp.*, 716 F.3d at 225. The federal government has an overwhelming interest in uniform application of ERISA and the Fiduciary Rule, given that "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Davila*, 542 U.S. at 208 (stating that ERISA's "expansive pre-emption provisions . . . are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern'"). Massachusetts has no compelling interest in adjudicating claimed violations of a federal rule promulgated under a federal statute. Resolution of this federal issue in federal court would not disrupt the federal-state balance.

## II. UNDER CONTROLLING FIRST CIRCUIT AUTHORITY, THIS ACTION IS REMOVABLE BECAUSE IT WAS BROUGHT IN THE EQUIVALENT OF A STATE COURT

Once again elevating form over substance, Plaintiff argues that because the literal language of the removal statute, 28 U.S.C.§ 1441(a), provides for removal from a "state court," the formal Adjudicatory Proceeding commenced by Galvin cannot be removed, citing a small number of out-of-circuit opinions applying a literal test. Pl. Br. at 16. But, Plaintiff concedes (as he must) that this is simply not the law in this Circuit. Under the First Circuit's seminal decision in *Volkswagen de Puerto*

*Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38, 44 (1st Cir. 1972), the Court must apply a functional test to analyze whether a state agency may be deemed the equivalent of a state court.

Recognizing that *Volkswagen* leads inexorably to the conclusion that removal was appropriate, Plaintiff makes the remarkable argument that this Court should ignore or limit *Volkswagen*. Pl. Br. at 17 n.13. There is utterly no basis for this assertion, as the First Circuit has never reversed, much less criticized, *Volkswagen*. Moreover, the courts in this Circuit have recently and regularly applied *Volkswagen* to allow removal of actions commenced before various state agencies. *See Nationwide Mut. Ins. v. N.H. Dep't of Labor*, No. 07-cv-241 (PB), 2007 WL 2695387, at *6-7 (D.N.H. Sept. 12, 2007) (applying *Volkswagen* factors to conclude that plaintiff was likely to succeed in establishing that state law claim was preempted by ERISA and properly removed to federal court from state agency); *Spellman v. United Parcel Serv., Inc.*, 540 F. Supp. 2d 237, 241 n.10 (D. Me. 2008) (removal of action from state agency appropriate under *Volkswagen*). Plaintiff omits any reference to these cases.

Under the functional test established in *Volkswagen*, courts in this Circuit consider three factors: (i) a state agency's "procedures and enforcement powers"; (ii) the locus of traditional jurisdiction over the subject; and (iii) the respective state and federal interests in the subject matter and provision of a forum. The formal Adjudicatory Proceeding initiated by Plaintiff is the functional equivalent of a state court. Such a proceeding involves court-like powers and procedures; the rules expressly provide for the filing of pleadings, pre-hearing discovery, motion practice, hearings with witness testimony under oath and the opportunity for cross-examination, the power to subpoena witnesses and documents, post-trial briefing, and final decisions and orders. *See* 950 C.M.R. §§ 10.06, 10.07, 10.09 (Ex. B). Penalties include suspension of a broker-dealer's registration and the imposition of sanctions such as cease-and-desist orders and financial penalties. *See* Mass. Gen. Laws ch. 110A, § 204(a); 950 C.M.R. § 12.204. Thus, as its name suggests, the formal Adjudicatory Proceeding operates in a formal manner, with procedures, protections, and powers similar to a court.

The second and third prongs of the *Volkswagen* test (the locus of traditional jurisdiction and the federal and state interests) also weigh heavily in favor of removal because this action involves a federal rule enacted under a federal statute in an area that Congress intended to be "exclusively a federal concern." *Davila*, 542 U.S. at 208 (internal quotation omitted). Plaintiff's cursory analysis of these factors ignores the critical fact that Plaintiff is seeking to enforce compliance with the standards of the federal Fiduciary Rule promulgated pursuant to ERISA. Plainly, federal courts are the traditional locus for adjudicating ERISA-based claims and have the greater interest in doing so. Indeed, the presence of ERISA-based claims was critical to the court's analysis in *Nationwide.* In language that is equally applicable here, the court stated:

> *There is a strong federal interest in completely assuming subject matter jurisdiction over ERISA issues*; and, while the State agency may disagree, the removal of Holmes' claim furthers that interest. *ERISA preemption includes those issues which may address non-federal or state claims within an ERISA framework. See Forcier v. Metro. Life Ins. Co.*, 469 F.3d 178, 186 (1st Cir. 2006) (acknowledging that ERISA's "expansive pre-emption provisions ... were intended to ensure that employee benefit plan regulation would be exclusively a federal concern.").

2007 WL 2695387, at *7 (emphasis added) (citation and internal quotation marks omitted).

Plaintiff's brief does not address *Nationwide* and other similar cases, and instead focuses heavily on this Court's decision in *Whelchel v. Regus Management Group, LLC*, 914 F. Supp. 2d 83 (D. Mass. 2012). Plaintiff's reliance is misplaced because *Whelchel* did not involve a claim premised on federal law; instead, the defendant sought removal based on diversity jurisdiction. 914 F. Supp 2d at 88. This Court correctly observed that, under *Volkswagen*, whether there is a strong federal interest in the matter is the most important consideration, and held that, "[i]n order to justify removal, the federal court must have a greater interest than simply providing a forum for diverse parties." *Id*. The Court distinguished the case from ones that involved federal question jurisdiction, noting that "[r]emoval may be appropriate in cases where federal law is directly applicable," and then endorsed *Nationwide* as a case where "removal [was] appropriate because ERISA expressly preempt[ed] [the] state law claim." *Id.*

Accordingly, because this case explicitly turns on the determination of federal law, specifically a federal rule promulgated pursuant to a federal statute that Congress intended to have broad preemptive effect, removal was appropriate under *Volkswagen*, *Nationwide*, and *Whelchel.*

## CONCLUSION

The Motion to Remand should be denied in its entirety.

Dated: May 11, 2018

Respectfully submitted,

*/s/ Christian R. Bartholomew*
MURPHY & MCGONIGLE, P.C.
Christian R. Bartholomew
Admitted *pro hac vice*
cbartholomew@mmlawus.com
1001 G Street, N.W.
Seventh Floor
Washington, D.C. 20001
(201) 220-1940

Cameron S. Matheson, BBO# 636628
cmatheson@mmlawus.com
4870 Sadler Road, Suite 301
Glen Allen, Virginia 23060
(804) 762-5320

*Counsel for Scottrade, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that the forgoing document, which was filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on May 11, 2018.

*/s/ Cameron S. Matheson*
Cameron S. Matheson

# EXHIBIT A


# Securities Division

**Securities Online Investor Complaint Form**

**Click here to file information on Fraudulent or Dishonest Investment Conduct**

**Illegal Pyramid Schemes**

**Disguised as Multi-level Marketing Businesses (MLMs) (PDF Brochure)**

English Español Portugu s

## News and Updates

Secretary Galvin Opens Investigation Into Wells Fargo Advisors (PDF)

Secretary Galvin Locates Hundreds of Retirees Owed Pension Payments by Metlife, Expands Investigation (PDF)

Secretary Galvin Warns About Bitcoin Mania (PDF)

Secretary Galvin Blasts S.E.C. Commissioner Over Fiduciary Rule Criticism (PDF)

House Financial Services Financial CHOICE Act of 2017. Secretary Galvin Urges Preservation of State Enforcement Authority (PDF)

Secretary Galvin's Statement on Trump Administration on Fiduciary Rule (PDF)

Secretary Galvin Issues Findings on Firms Hiring Bad Brokers - Warns Broker-Dealers who fail to Self-Police

Report on Survey Regarding the Implications of the Department of Labor's Fiduciary Rule and Best Interest Contract Exemption on Massachusetts-Registered Investment Advisers (PDF)

Massachusetts Securities Division Issues Policy Statement State Registered Investment Advisers' Use of Third Party Robo-Advisers (PDF)

Massachusetts Securities Division Issues Policy Statement Robo-Advisers / Fiduciary Standards (PDF)

Massachusetts Securities Division Request for Public Comments on Proposed Regulations

New Massachusetts Crowdfunding Regulation and Summary and Highlights

2016 Renewals for Investment Adviser and Investment Adviser Representative Registrations, Notice Filers and Exempt Reporting Advisers (PDF)

## RICE Conference Cybersecurity & Data Privacy Training

May 2, 2018 – **Register Here**

**Preliminary Request for Public Comment on Proposed Fee Table for State-Registered Investment Advisers**

## Enforcement Section

Overview

Massachusetts Uniform Securities Act

Secretary Galvin Issues White Paper Opposing Further Limitations on State Enforcement Power (PDF)

Structured Products Guidance (PDF)

Online Investor Complaint Form

## Registration, Inspections, Compliance, and Examinations Section (RICE)

Mission Statement

Overview

Fee Schedule (BD)

Registration Information (BD)

Fee Schedule (IA)

Registration Information (IA)

More ...

## Corporate Finance Section

Overview

Policy Statements

Fee Schedule

Uniform Forms

FAQs

## Investor Information

## Enforcement Actions

Secretary Galvin Issues Orders in Connection with ICO Cryptocurrency Sweep
**March 27, 2018**

Secretary Galvin Charges Peabody Private Equity Investment Fund with Ponzi Scheme
**March 15, 2018**

Secretary Galvin Charges Scottrade, Inc. in Connection with the Fiduciary Rule
**February 15, 2018**

Secretary Galvin Charges North Shore Investment Adviser With Real Estate Scheme
**February 14, 2018**

Secretary Galvin Charges Brookline Man in Initial Coin Offering Cryptocurrency Scheme
**January 17, 2018**

Secretary Galvin Charges Milton Man in House-Flipping Scam
**December 12, 2017**

Secretary Galvin Charges Waltham Man with Fraud in Investment Advisory Activity
**October 19, 2017**

Secretary Galvin Charges SII with Unethical Sales of Non-Traded REITs
**September 20, 2017**

Secretary Galvin Charges Allston Man with Fraud in Private Equity Fund
**June 8, 2017**

Secretary Galvin Fines LPL $1 Million for Failed Supervision of Agents at Digital Federal Credit Union
**May 4, 2017**

Secretary Galvin Settles Sales Contest Charges with Morgan Stanley
**April 10, 2017**

Broker-Dealer Operating Out of Massachusetts Community Banks Fined $100,000, Ordered to Offer Restitution to Exploited Senior Citizens
**March 23, 2017**

Secretary Galvin Settlement with LPL Financial LLC Provides $3.7 Million in Investor Relief, Fines and Disgorgement of Profits
**January 30, 2017**

Secretary Galvin Files Against Cambridge Hedge Fund Partnered with Toronto-Based Donville Kent Asset Management
**January 18, 2017**

Secretary Galvin Charges Roger Zullo and LPL Financial

Secretary Galvin Calls For Timely And Understandable Disclosure Of Changes In Employer 401K Plans (PDF)

Secretary Galvin Warns of Illegal Pyramid Schemes Disguised as Multi-Level Marketing Businesses (MLMs)

New CORI Requirements for Investment Adviser Representative Applications

Crowdfunding: Tips to Help Get You Ready for Equity Crowdfunding (PDF)

Switch Investment Advisers Report (PDF)

Massachusetts-Registered Investment Adviser Compliance with Custody and Independent Verification Requirements (November 14, 2013) (PDF)

Secretary Galvin Urges SEC to Insist on Fiduciary Standards for Broker-Dealers – Releases Survey Results of MA IAs' Overwhelming Disapproval for Change in Fiduciary Standard

Protect Yourself from the "Grandparent Scam"

Secretary Galvin Proposes New Regulations Related to Investment Adviser Representative Registration

Secretary Galvin Raps Schwab for Arbitration Changes; Warns Investors to Monitor Amendments to Their Arbitration Agreements

Report on Massachusetts Investment Advisers' Use of Mandatory Pre-Dispute Arbitration Clauses

Secretary of the Commonwealth William F. Galvin Commends Mary Schapiro on her years as S.E.C. Chairman; Congratulates Commissioner Elisse Walter as New S.E.C. Chair (PDF)

Policy Statement Regarding Compliance with Bonding Requirements for Advisers with Discretion

Secretary Galvin Calls for Strong Rules on Crowdfunding (PDF)

Secretary Galvin Approves New Regulations (1/19/2012). Private Fund Exemption, Investment Adviser Discretion and Custody Requirements

News and Updates Archives

Investor Education
About the Securities Division
Securities Links

LLC in Fraudulent Annuity Sales to Seniors
**December 1, 2016**

Secretary Galvin Charges Walpole Man with Fraudulent Advising
**November 22, 2016**

Secretary Galvin - Senior Bank Customers Exploited at Local Community Banks by Aggressive Sales Contests and Improper Sales
**November 15, 2016**

Secretary Galvin Charges Hingham Man in Ponzi Scheme
**November 1, 2016**

Secretary Galvin Targets Two Broker-Dealer Firms with History of Hiring Bad Brokers
**October 20, 2016**

Secretary Galvin Charges State Street Entity in Long-Term Overcharging
**April 20, 2016**

Secretary Galvin Charges Citizens Securities in Improper Sales to Elder Citizens Bank Customer
**January 7, 2016**

Secretary Galvin Charges Realty Capital Securites LLC with Proxy Voting Fraud and Seeks Revocation
**November 12, 2015**

Secretary Galvin Charges Fidelity Brokerage Services with Dishonest and Unethical Conduct Allowing Unregistered Investment Advisers to Conduct Business
**October 26, 2015**

Secretary Galvin Fines LPL Financial $250,000 for Failure to Supervise the State's Senior Designation Rule
**July 15, 2015**

Secretary Galvin Charges Securities America in Failure to Supervise Ads Aimed at Seniors
**July 8, 2015**

Secretary Galvin Charges Waltham Man with Securities Fraud
**June 30, 2015**

Secretary Galvin in Conjunction with the State of Alabama Charges Alabama Group in Ponzi Scheme Fraud on Massachusetts Investor
**June 10, 2015**

Secretary Galvin Charges Uxbridge Man with Ponzi Scheme in Affinity Sale of Unregistered Securities
**June 2, 2015**

Secretary Galvin Charges Plymouth Man and Firm for Acting as Unregistered Investment Advisers, Orders California Funds to Offer Refunds and Pay a Civil Penalty for Selling Unregistered Mortgage Loans
**May 4, 2015**

Secretary Galvin Settles Failure to Supervise Charge with Merrill Lynch for $2.5 Million
**March 23, 2015**

Enforcement Actions Archives (2012-2014)

# EXHIBIT B

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.01

10.01: Scope of Rules.

950 CMR 10.00 governs procedure in "adjudicatory proceedings" before the Division, subject to and in accordance with the provisions of the M.G.L. c. 30A, the Administrative Procedure Act (APA). 950 CMR 10.00 does not apply to investigations, except where made specifically applicable.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.01, 950 MA ADC 10.01

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.02

10.02: Construction and Definitions.

(a) Construction. These rules shall be construed to secure a just and speedy determination of every proceeding.

(b) Definitions. The following words when used in the rules, except as otherwise required by the context shall have the following meaning:

1. "Adjudicatory Proceeding". A proceeding before the Division in which the legal rights, duties or privileges of specifically named persons are required by constitutional right, by provision of M.G.L. c. 30A, 110A or by any other provision of the General Laws, to be determined, after opportunity for an agency hearing.

2. "the Division". The Securities Division of the Office of the Secretary of the Commonwealth.

3. "Director". The Director of the Division as defined in 950 CMR 14.406(a)(1).

4. "Authorized Representative". An attorney, legal guardian or other person authorized by a Party to represent him in an Adjudicatory Proceeding.

5. "Papers". All written communications filed in an Adjudicatory Proceeding, including motions, pleadings, and other documents.

6. "Party". The Division and/or the specifically named Person(s) whose legal rights, duties or privileges are being determined in an Adjudicatory Proceeding; any other Person(s) who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding; or any Person allowed by the Division to intervene.

7. "Person". An individual or legal entity(ies).

8. "Presiding Officer". The hearing shall be conducted by a Presiding Officer who may be the Director or a hearing officer appointed by the Director to conduct the hearing. The hearing officer may be a member of the Division, a person authorized by law to serve as a hearing officer or administrative law judge, or any other person who is selected by the Director. When serving as Presiding Officer, the hearing officer shall have all the powers of the Presiding Officer in the conduct of a hearing as contained herein, except that the hearing officer shall not be empowered to make any decision which would finally determine the proceedings. At the conclusion of the hearing, the hearing officer shall submit recommended findings of fact and conclusions of law to the Director for his consideration.

9. "Respondent". Party who must make an answer in an Adjudicatory Proceeding.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.02, 950 MA ADC 10.02

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.03

10.03: Representation.

(a) Appearance. An individual may appear in his own behalf. An authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust. Any Party in an Adjudicatory Proceeding shall have the right to be accompanied, represented and advised by an Authorized Representative, provided, however, no Authorized Representative shall be permitted to engage in the practice of law unless authorized to do so within the Commonwealth.

(b) Notice of Appearance. An appearance shall be made in every Adjudicatory Proceeding by filing a written notice with the Division and the Presiding Officer. Such notice shall contain the name, address and telephone number of the Authorized Representative.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.03, 950 MA ADC 10.03

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.04

10.04: Time

(a) Timely Filing. Papers required or permitted to be filed under these regulations, or any provision of the applicable law must be filed with the Securities Division, Office of the Secretary of the Commonwealth, John W. McCormack Bldg., 17th Floor, One Ashburton Place, Boston, MA 02108 or such other place as the Division shall designate within the time limits for such filing as are set by regulation, order of the Presiding Officer or other provision of law.

Papers filed in the following manner shall be deemed to be filed as set forth herein:

1. Hand-delivery during business hours. Hand-delivery during regular business hours shall be deemed filed on the day delivered.

2. Hand-delivery during non-business hours. Hand-delivery at times other than during regular business hours shall be deemed filed on the next regular business day.

3. Mailing. Placing in U.S. mail shall be deemed filed on the date postmarked.

All Papers shall show the date received by the Division, and the Division shall cooperate in giving date receipts to Persons filing Papers by hand-delivery during regular business hours.

(b) Notice of Agency Actions. Notice of actions and other communications from the Division shall be presumably deemed received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail.

(c) Computation of Time. Unless otherwise specifically provided by law or these rules, computation of any time period referred to in these rules shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, or legal holiday or any other day on which the Division is closed, in which event the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the Division is closed shall be excluded in the computation.

(d) Extension of Time. It shall be within the discretion of the Division or Presiding Officer, for good cause shown, to extend any time limit contained in these rules. All requests for extensions of time shall be made by motion before the expiration of the original or previously extended time period.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.04, 950 MA ADC 10.04

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.05

10.05: Filings Generally.

(a) Title. Papers filed with the Division shall state the docket number, the title of the proceeding and the name of the Person in whose behalf the filing is made.

(b) Signatures. Papers filed with the Division shall be signed and dated by the Party on whose behalf the filing is made or by the Party's Authorized Representative and shall state the address and telephone number of such Party or Authorized Representative; except all answers, answers to interrogatories and all responses containing factual representations must be signed by the Party. Signature by a Party constitutes a certification by the signer that he has read the document, knows the content thereof, and that such statements are true, and that it is not interposed for delay. If the document has been signed by an Authorized Representative, where permitted, such signature constitutes a certification that he has full power and authority to sign; that he has read the document; that, after reasonable enquiry, he believes that there is a good ground to support it; and, that it is not interposed for delay.

(c) Form. Size and Printing Requirements. All Papers, except those submittals and documents which are kept in a larger format during the ordinary course of a Party's business, shall be hand-printed or typewritten on paper 8 to 8-1/2 inches wide, by 10 to 11 inches long, with left-hand margins not less than 1-1/2 inches wide and other margins not less than 1 inch. The impression shall be on only one side of the page, unless there are more than four pages, and shall be doubled spaced except that quotations in excess of three lines shall be single-spaced and indented.

(d) Copies. The original of all Papers shall be filed in duplicate, one copy filed with the Presiding Officer and one copy filed with the Division.

(e) Service. Service of all papers shall be made by delivery by hand (including express courier service), or by United States mail, and shall be deemed complete as of the date of delivery by hand or by date of deposit in an official United States mail facility. All Papers filed with the Division shall be accompanied by a statement signed under the penalty of perjury that copies have been sent, specifying the mode of service, date, the Party to whom sent, the Party's address, and address of service. Failure to comply with this rule shall be grounds for refusal by the Division to accept Papers for filing.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.05, 950 MA ADC 10.05

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.06

10.06: Initiation of Formal Adjudicatory Proceedings

(a) Commencement of Adjudicatory Proceeding. The Division may commence an Adjudicatory Proceeding by filing in writing a Notice of Adjudicatory Proceeding signed by the Director or other duly designated person acting in that capacity and an Administrative Complaint.

(b) Form and Content. The Administrative Complaint shall state clearly and concisely the facts which are grounds for the proceeding, the relief sought, and any additional information required by applicable statutes and regulations. The Notice shall inform the party or parties named of their right to request an administrative hearing in the time prescribed by this regulation.

(c) Temporary order to cease and desist. Simultaneous with the commencement of an adjudicatory proceeding or at any time thereafter until conclusion of the proceeding, the Division may request a temporary order to cease and desist from the Presiding Officer. The request may be made ex parte. The request for a temporary order to cease and desist shall contain a statement setting forth the basis for such request, including, the likely irreparable harm to the public interest which would result if such an order were not issued. The statement may be made in an affirmation filed by the Division and supported by facts contained in the Administrative Complaint and supporting papers. Unless otherwise provided, the order must be served within 24 hours of the time of its signing. The order must notify the Party subject to the order of his right to request an administrative hearing and that such hearing must be set down within 20 days after receipt by the Division of the request for hearing to determine if the order shall become permanent and final.

(d) Summary Suspension or Postponement of Registration of Broker-Dealer or Agent; Summary Suspension or Postponement of Effectiveness of Registration Statement; Summary Denial or Revocation of Exemption from Registration. Simultaneous with the commencement of an adjudicatory proceeding or at any time thereafter until conclusion of the proceeding, the Presiding Officer may, upon motion of the Division or upon his or her own motion, summarily suspend or postpone the registration of a broker/dealer or agent, summarily suspend or postpone the effectiveness of a registration statement or summarily deny or revoke an exemption from registration. A motion may be made ex parte. The order of suspension, postponement, denial or revocation shall set forth the basis for the Order, including specific findings on the need for ex parte order, if required by law. If a registration of broker/dealer is at issue, the order shall provide for notice to the applicant or registrant; if the applicant or registrant is an agent, notice to the agent and the employer, or prospective employer of the agent; if a registration statement or exemption from registration is at issue, notice to interested parties of the right to request a hearing and that such hearing will be set down within fifteen days of receipt of written request for hearing. The Presiding Officer may also order a hearing upon Motion of the Division or upon his or her own motion.

(e) Answer. Within 21 days of service of the Notice of Adjudicatory Hearing and Administrative Complaint, the Respondent shall file an answer to it. Failure to answer timely will be considered a default and may result in the entry of a default judgment or such other action as the Presiding Officer may deem appropriate.

(f) Form of Answer. The Answer shall contain full, direct and specific answers to each claim set forth in the Administrative Complaint admitting, denying, or explaining material facts. If there is insufficient knowledge to answer with specificity, it shall so be stated and, thus, shall be treated as a denial of the claim. The Answer shall contain all affirmative defenses which are relied upon and shall cite the statute(s) and/or regulation(s) which form the basis of each defense. Failure to answer in the manner set forth above may result in the allegations set forth in the Administrative Complaint being deemed as admitted or such other actions as the Presiding Officer may deem appropriate.

(g) Amendments and Withdrawal of Pleadings. The Presiding Officer upon his own initiative or upon the motion of any Party may, in his discretion, order any Party to file a pleading, or to reply to any pleading and further permit either Party to amend its pleadings upon conditions just to all Parties.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.06, 950 MA ADC 10.06

**End of Document**

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.07

10.07: Motions.

(a) General Requirements.

1. Presentation/Objection to Motion. An application to the Presiding Officer should be made by motion. Motions may be made in writing at any time after the commencement of an Adjudicatory Proceeding, or they may be made orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. Unless otherwise ordered by the Presiding Officer, a party opposing a motion must file its response within 14 days after service of the motion. Any party may request a hearing on the motion. The Presiding Officer may, in his discretion, grant or deny a request for hearing. A request for hearing may be denied on any of the following grounds: oral argument or testimony would not substantially advance the Presiding Officer's understanding of the issues, a delay in deciding the motion until hearing would severely prejudice a party, or a hearing would not be in the public interest.

2. Action on Motions. The Presiding Officer shall, if he determines a hearing on the motion is warranted, give at least three days notice of the time and place for hearing. The Presiding Officer may grant requests for continuances or may in the event of unexcused absence of a Party permit the hearing to proceed, and the unexcused Party's motion or objections will be regarded as submitted. The Presiding Officer may act on a motion when all Parties have responded thereto, or the deadline for response has passed, whichever comes first.

3. Factual Basis. The Parties may offer at a hearing on the motion only such evidence as is relevant to the particular motion. This evidence may consist of facts which are presented orally by sworn testimony, supported by affidavit, or which appear in records, files, depositions, or answers to interrogatories.

(b) Motion for More Definite Statement. If a pleading to which a responsive pleading is required is so vague or ambiguous that a Party cannot reasonably frame a responsive pleading, the responding Party may within the time permitted for such responsive pleading, move for a more definite statement before filing its responsive pleading. The motion shall set forth the defects complained of and the details desired. If the motion is granted, the more definite statement shall be filed within ten days of the notice of the order being sent or within such other time as may be ordered.

(c) Motion to Strike. A Party may move to strike, or the Presiding Officer on its own motion may strike from any pleading any insufficient allegation or defense or any redundant, immaterial, impertinent or scandalous matter.

(d) Motion to Dismiss. Any Party may move to dismiss for failure of the other Party to prosecute or to comply with these rules or with any order of the Division or Presiding Officer. Upon completion by the initiating Party of the presentation of evidence, the responding Party may move to dismiss on the grounds that, upon the facts and/or the law, the Division has not sustained its case. The Presiding Officer may act upon the motion then, or may wait until the close of all the evidence.

(e) Motion for Decision on the Pleadings. After the pleadings are closed, and within such time as not to delay the proceedings, any Party may move for judgment on the pleadings. If matters outside the pleadings are presented, the motion shall be treated as one for summary decision.

(f) Motion for Summary Decision. Any Party may with or without supporting affidavits move for summary decision in his favor, as to all or part of a matter. If the motion is granted as to part of the matter and further proceedings are necessary to decide the remaining issues, a hearing shall so be held.

(g) Briefs. The Presiding Officer may direct that the parties brief any issue presented by a motion or a pleading or a party may upon motion request that the presiding officer direct briefing of any appropriate issue presented.

(h) Substitution of Parties. The Presiding Officer may, on motion, at any time in the course of an Adjudicatory Proceeding, permit such substitution of Parties as justice or convenience may require.

(i) Consolidation of Proceedings. In such cases as there are multiple Adjudicatory Proceedings and where these Adjudicatory Proceedings involve common issues, a Party shall notify the Presiding Officer of this fact, stating with particularity the common issues, and the Presiding Officer may in his discretion consolidate the proceedings.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.07, 950 MA ADC 10.07

**End of Document**

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.08

10.08: Intervention and Participation

(a) Initiation. Any Person not initially a Party, who with good cause wishes to intervene in, or participate in an Adjudicatory Proceeding shall file a written motion with appropriate pleading for leave to intervene or participate in the proceeding.

(b) Form and Content. The motion shall state the name and address of the Person making the motion. It shall describe the manner in which the Person making the motion is affected by the proceeding. It shall state the contention of the Person making the motion as to why intervention or participation should be allowed, the relief sought and the statutory or other law in support thereof.

(c) Filing the Petition. Unless an applicable statute requires otherwise, the motion and appropriate pleading may be filed at any time following the commencement of the Adjudicatory Proceeding, but in no event, later than the date fixed by the Presiding Officer. Motions filed may be allowed at the discretion of the Presiding Officer, provided that the Parties are given notice and opportunity to object.

(d) Rights of Intervenors. Intervenors shall be Persons substantially and specifically affected by the proceeding. Any Person permitted to intervene shall have all the rights of, and be subject to, all limitations imposed upon a Party, however, the Presiding Officer may exclude repetitive or irrelevant material. Every petition to intervene shall be treated as a petition in the alternative to participate.

(e) Rights of Participants. Any Person specifically affected by a proceeding shall be permitted to participate. Permission to participate shall be limited to the right to argue orally at the close of hearing and to file a brief. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the Person allowed to participate is a Party in interest who may be aggrieved by any final decision. A Person who moved to intervene and who was allowed only to participate, may participate without waiving its rights to administrative or judicial review of the denial of said motion to intervene.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.08, 950 MA ADC 10.08

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.09

## 10.09: Hearings and Conferences

(a) Pre-hearing Conference. The Presiding Officer may upon his own initiative or upon the application of any Party, call upon the Parties to appear for a conference to consider:

1. the simplification or clarification of the issues;

2. the possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreement which will avoid unnecessary proof;

3. the limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;

4. the possibility of agreement disposing of all or any of the issues in dispute; and

5. such other matters as may aid in the disposition of the Adjudicatory Proceeding.

Those matters agreed upon by the Parties shall be electronically recorded in the presence of the Parties and/or reduced to writing and shall be signed by the Parties, and shall thereafter constitute part of the record.

The scheduling of a Pre-hearing Conference shall be solely within the discretion of the Presiding Officer.

(b) Pretrial Preparation. At a time scheduled by the Presiding Officer prior to the hearing, the Parties may be required to submit Pretrial memoranda setting forth the:

1. legal issue presented;

2. law relied upon;

3. factual representations to be proven;

4. witnesses to be called and the purpose of their testimony;

5. documents intended to be introduced at the hearing. Such documentation must be filed with the pre-trial memorandum;

6. such other material or representations as the Presiding Officer may direct.

Failure to comply with this requirement may result in a default judgment being entered, or refusal by the Presiding Officer to admit material or hear witnesses or such other appropriate relief as the Presiding Officer may direct.

(c) Authentication of Documents. After receipt of pretrial memoranda, including all documents listed, the Presiding Officer may require a Party to file any objections as to the authenticity of any document listed. Such objection, unless otherwise ordered, must be filed at least 10 days prior to the hearing. Failure to object to the authenticity of a document may be deemed a waiver of any such objection at the hearing.

(d) Submission Without a Hearing. A Party other than the Division may elect to waive a hearing and to submit its case upon the record. Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses.

(e) Hearings, When and Where Held. Hearings will be held at a location designated by the Division. Any Party may, by motion, request that a hearing be held at some place other than that designated, due to disability or infirmity of any Party or witness, or where justice and equity would best be served.

Upon motion of any Party and upon good cause shown, the Presiding Officer may in his or her discretion advance a case for hearing.

(f) Conduct of Hearings.

1. General. Hearings shall be as informal as may be reasonable and appropriate under the circumstances.

2. Decorum. All Parties, Authorized Representatives, witnesses and other Persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Division or Presiding Officer may take appropriate action.

3. Duties of Presiding Officer. The Presiding Officer shall conduct the hearing, make all decisions regarding admission or exclusion of evidence or any other procedural matters, and administer an oath or affirmation to all witnesses.

(g) Order of Proceedings.

1. Opening. Except as otherwise required by law, it shall be the usual practice that in proceedings initiated by the Notice of Adjudicatory Proceedings, the Division shall open.

2. Discretion of Presiding Officer. Where evidence is peculiarly within the knowledge of one Party, or in cases in which Adjudicatory Proceedings have been consolidated, or where there are multiple Parties, the Presiding Officer may direct who shall open and shall designate the order of presentation.

(h) Presentation.

1. Rights of Parties. All Parties shall have the right to present evidence, cross-examine, make objections, bring motions and make oral arguments. Cross-examination shall occur immediately after any witness' testimony has been received. Whenever appropriate, the Presiding Officer shall permit redirect and recross.

2. First Presentation. The Party opening the hearing shall have the right to present his position through evidence and testimony first.

3. Second Presentation. The Party taking the position contrary to that of the Party opening shall have the right to present his position upon completion of the opening Party's case.

(i) Witnesses and Evidence.

1. Oath. A witness' testimony shall be under oath or affirmation.

2. Evidence. Unless otherwise provided by any law, the Presiding Officer need not observe the rules of evidence observed by courts but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Weight to be given evidence presented will be within the discretion of the Presiding Officer.

3. Offer of Proof. An offer of proof made in connection with an objection taken to a ruling of the Presiding Officer rejecting or excluding preferred testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by such testimony; and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(j) Evidence Included. All evidence, including any records, investigative reports, documents, and stipulations which is to be relied upon in making a decision must be offered and made a part of the record. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

(k) Administrative Notice. The Presiding Officer may take notice of any fact which may be judicially noticed by the courts of this Commonwealth or of general technical or scientific facts within the Presiding Officer's specialized knowledge only if the Parties are notified of the material so noticed and are given an opportunity to contest the facts so noticed.

(l) Subpoenas. In conducting Adjudicatory Proceedings, the Presiding Officers may issue, vacate, modify and enforce subpoenas requiring the attendance and testimony of witnesses and/or the production of documents or other evidence in accordance with the following provisions:

1. Issuance. A Party may make written application to the Presiding Officer, which may issue the subpoena requested in the name of the Division. The Presiding Officer may issue the subpoena. Where it appears to the Presiding Officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he may in his discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. In the event the person requested to issue the subpoena shall after consideration of all the circumstances determine that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. Every subpoena shall show on its face the name and address of the requesting Party. Notice shall not be required for issuance of a subpoena. The form of subpoena shall adhere to the form used in civil cases before the courts.

2. Motion to Vacate or Modify. Any Person to whom a subpoena is directed may, within a reasonable period, file in writing a motion that the subpoena be vacated or modified. The Presiding Officer shall give prompt notice to the Party who requested issuance of the subpoena. The Presiding Officer may grant such petition in whole, or in part, upon a finding that the testimony, or the evidence, whose production is requested, does not relate with reasonable directness to any matter in question or upon a finding that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

3. Costs. Except for witnesses requested by the Division, witnesses summoned by the Presiding Officer shall be paid the same fees for attendance and travel as in civil cases before the courts. Except for witnesses requested by

the Division, the requesting Party shall pay all costs involved with the subpoena, including fees for attendance and travel.

(m) Transcript of Proceedings.

1. Recording and Transcripts. Testimony and argument at the hearing shall be either recorded electronically or stenographically. Transcripts of the proceedings shall be supplied to any Party, upon request, at his own expense. Any Party, upon motion, may request a stenographer to transcribe the proceedings, at his own expense. In such event, a stenographic record shall be provided to the Presiding Officer at no expense to the Division, and upon such other terms as the Presiding Officer shall order.

2. Correction of Transcript. Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing Parties, may be incorporated into the record, if and when approved by the Presiding Officer, at any time during the hearing, or after the close of evidence, but not more than ten days or such other time as shall be allowed by the Presiding Officer from the date of receipt of the transcript. The Presiding Officer may call for the submission of proposed corrections and may make disposition thereof at appropriate times during the course of the proceeding.

(n) Briefs. At the close of the taking of testimony, the Presiding Officer may fix a time for the filing of briefs.

(o) Settling the Record.

1. Contents of Record. The record of the proceeding may consist of the following items: pleadings, pre-hearing conference memoranda, magnetic tapes, orders, briefs, memoranda, answers to interrogatories, depositions, transcripts, exhibits, and other papers or documents which the Presiding Officer has specifically designated be made a part of the record. The record shall at all reasonable times be available for inspection by the Parties. The Presiding Officer may accept legible photocopies of orginals.

2. Evidence After Completion. No evidence shall be admitted after completion of a hearing or after a case submitted on the record, unless otherwise ordered by the Presiding Officer.

3. Weight of Evidence. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. The Presiding Officer may in any case require either Party, with appropriate notice to the other Party, to submit additional evidence on any matter relevant to the Adjudicatory Proceeding.

4. Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a Party, at the time that a ruling is made or sought, makes known his objection to such action and his grounds, therefor, provided that, if a Party has no opportunity to object to a ruling at the time it is made, or to request a particular ruling at an appropriate time, such Party, within three days of notification of action taken or refused, shall state his objection and his grounds therefor.

(p) Decisions and Final Orders. Every decision and final order shall be in writing and shall be signed by the Director. If a person other the the Director is serving as Presiding Officer, he or she shall prepare recommended findings of fact and conclusion of law to be submitted to the Director. The Director shall review the recommendation and shall be responsible for the issuance of the decision and final order. Every decision and final order shall contain a statement of the reasons therefor, including a determination of every issue of fact or law necessary to the decision and final order. The Director may approve, reject or modify the recommendation of the hearing officer or may refer the matter back to the hearing officer for further proceeding as the Director may decide. The final decision and order shall be mailed to all parties within ten days of signing by the Director.

(q) Reopening of Hearings. On its own motion or on motion of any Party, the Presiding Officer may at any time before a final decision and order are issued request that the hearing be reopened for the purpose of receiving new evidence.

(r) Motion for Reconsideration. Any Party may file a Motion for Reconsideration, setting forth specifically the grounds or statutory provision relied upon to sustain the Motion, within ten days from the date a copy of the final decision and order is mailed to the Parties by the Presiding Officer and the Parties shall be notified of their right to appeal as set forth in M.G.L. c. 30A.

(s) Further Appeal. After the issuance of a final decision and order, any Party who has the right to seek administrative or judicial review of the decision may file an appeal with the appropriate court.

(t) Withdrawal of Exhibits. After a decision has become final and all appeal periods have lapsed, the Director may in his/her discretion, upon motion, permit the withdrawal of original exhibits or any part thereof by the Party or Person entitled thereto.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.09, 950 MA ADC 10.09

**End of Document** 

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.10

10.10: Settlement of Proceeding

At any time after the commencement of an investigation by the Division, the Division and the respondent or party(ies) subject to investigation may agree to settle the investigation or proceeding. The settlement must be approved by the Director of the Division who may, in his discretion, approve the settlement so long as he finds it is fair, reasonable and in the public interest. The settlement may be entered as a Final Order under M.G.L. c. 110A §§ 412, 204, 304, 407A. Violations of such a Final Order is subject to criminal and civil penalties as provided by law.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.10, 950 MA ADC 10.10

End of Document

Code of Massachusetts Regulations Currentness
Title 950: Office of the Secretary of the Commonwealth
Chapter 10.00: Adjudicatory Proceedings: Securities Division (Refs & Annos)

950 CMR 10.11

10.11: Orders

All Orders which constitute a final disposition of a proceeding must be issued by the Director of the Division.

The Massachusetts Administrative Code titles are current through Register No. 1363, dated April 20, 2018

Mass. Regs. Code tit. 950, § 10.11, 950 MA ADC 10.11

End of Document

# EXHIBIT C

# Press Release: SECRETARY GALVIN CHARGES SCOTTRADE, INC. IN CONNECTION WITH THE FIDUCIARY RULE

02/15/18 10:32 AM EST

William Francis Galvin

Secretary of the Commonwealth

Contact: Debra O'Malley February 15, 2018

Telephone: 617-727-9180

Secretary of the Commonwealth William F. Galvin today charged Scottrade Inc., a broker-dealer registered in the Commonwealth, with dishonest and unethical activity and failure to supervise. Galvin's office alleges that Scottrade, Inc. knowingly violated the firm's impartial conduct standard, which was adopted to comply with the Department of Labor's Fiduciary Rule.

The Fiduciary Rule mandates that all financial professionals who work with retirement plans or provide retirement planning advice act as fiduciaries, and are therefore legally and ethically bound to meet the standards of that status. To comply with the rule, which requires those who provide retirement investment advice to act in the best interest of their clients, Scottrade adopted a rule prohibiting sales quotas, appraisals, bonuses, contests, and other incentives for retirement or prospective retirement account clients.

The complaint, filed by Galvin's Securities Division today, alleges that despite the impartial conduct standard required by the Fiduciary Rule, Scottrade held at least two sales contests which included retirement assets after June 9, 2017, when the rule went into effect. The performance of agents who participated in the contests was tracked and appraised, and awards and incentives were given out in connection with retirement assets. The complaint alleges that these contests were in violation of the firm's impartial conduct rule and demonstrate a failure of the firm to make a good faith effort to comply with the Fiduciary Rule.

"Despite the efforts in Washington to kill the Fiduciary Rule, the impartial conduct provision remains in place," Galvin said. "If the Department of Labor will not enforce its own laws and rules, then the states must do what they can to protect retirees from firms who believe they can play with peoples' life savings by conducting sophomoric contests."

The complaint seeks a cease and desist order, censure, and an administrative fine.

(END) Dow Jones Newswires

February 15, 2018 10:32 ET (15:32 GMT)

# EXHIBIT D

# State Regulator Galvin Is Putting Teeth in DOL Fiduciary Rule

"We bring legal actions, and we usually win them," William Galvin, Massachusetts' top securities regulator, tells ThinkAdvisor.

By Melanie Waddell | February 26, 2018

*Editor's note: This interview first appeared in Human Capital, a newsletter by Washington Bureau Chief Melanie Waddell about the people who shape the financial regulatory space. Melanie writes:*

*"I just had to speak with Massachusetts Securities Regulator William Galvin this week about the action his office took last week against Scottrade for violating the Labor Department's fiduciary rule – the first state action of its kind. There's been some debate among ERISA attorneys about whether the Massachusetts action was indeed directly related to DOL rule infractions. Galvin's take: It most certainly was."*

As Massachusetts secretary of state, William Galvin oversees the state's securities division and is considered one of the most active state securities regulators when it comes to cracking down on financial wrongdoing (though he begs to differ). A graduate of Boston College, he received a Juris Doctor

(https://law.us16.list-manage.com/track/click?u=ee3697cee92f337f0ddb9163e&id=0940f44d86&e=7769095cf3) from Suffolk University Law School and has served a stint as the state's acting governor.

In levying the action against Scottrade on Feb. 15 (https://law.us16.list-manage.com/track/click?u=ee3697cee92f337f0ddb9163e&id=e2351cefc2&e=7769095cf3), Galvin alleged that Scottrade violated the impartial conduct standards laid out in Labor's fiduciary rule, which took effect on June 9, 2017. Galvin charged the broker-dealer with "dishonest and unethical activity and failure to supervise" for conducting internal sales contests that violated Labor's impartial conduct standards. Does it count? ERISA attorneys have argued that Galvin's complaint was not based on a violation of the DOL fiduciary rule itself, but that Massachusetts took the rule's impartial conduct standards and applied them to the state's blue sky laws. Galvin's response: The case against Scottrade does "deal with the DOL rule." Scottrade "had their own policy in place" to comply with the rule, and "they acknowledged the rule and engaged in contests designed to reward in violation of the rule."

Eugene Scalia, an administrative law partner with Gibson, Dunn & Crutcher who is suing Labor over its fiduciary rule, fired back that Galvin's action is "without merit." Scalia's comments are "rhetoric," Galvin said. "We bring legal actions, and we usually win them."

Bottom line: "We have in effect a DOL rule that needs to be enforced," Galvin said.

As to the likely outcome of anticipated revisions by Labor to its fiduciary rule, "I think it's pretty obvious this administration is hostile toward the rule," Galvin said. "We think the fiduciary rule is extremely important, and we want to protect it and make sure it's enforced."

In the run-up to the expected release later this year of a separate SEC fiduciary rule, Galvin said that he's also "watching to see whether opponents of the [Labor] rule will attempt to argue that Labor's fiduciary rule somehow prevents the states from bringing state law-based dishonest and unethical actions."

Another concern: that the SEC will propose a rule that "would serve to dilute Labor's fiduciary rule." The SEC could write a rule to "prevent the states from taking investor protection actions that are unlikely to be taken under the current light-touch regulation coming out of Washington."

Next in the Scottrade action, there will be an administrative hearing, "Scottrade will have a chance to respond," Galvin said. "It's pretty rapid; within 30 days."

***— Check out How Scottrade Could Have Avoided DOL Rule Charges (http://www.thinkadvisor.com/2018/02/23/how-scottrade-could-have-avoided-dol-rule-charges) on ThinkAdvisor.***

---

# EXHIBIT E

- Previous
- Next

# Massachusetts' Galvin: investors aren't 'pawns in a prize contest'

**Author: John Crabb | Published: 27 Feb 2018**

The Secretary of the Commonwealth of Massachusetts, William Galvin, has filed a complaint against Arizona-based discount brokerage Scottrade, citing a violation against the Department of Labor's (DoL) fiduciary standard rule.

Scottrade, the complaint alleges, knowingly violated its own internal policies that were put in place to ensure compliance with the rule by instigating a number of internal contests based on the sale of retirement accounts.


*Scottrade offered a series of sales contests to incentivise brokers to sell retirement accounts*

The move comes amidst a period of uncertainty regarding the rule, the enforcement of large parts of which have been delayed until July 2019. The Securities and Exchange Commission (SEC) has also made it clear that it is exploring its own version of the rule that could supersede that of the DoL.

**State v DoL**

While the complaint heavily referenced the fiduciary rule itself, the regulator filed its complaint based on the fact that Scottrade violated section 204 of the Massachusetts Uniform Securities Act – which protects the public interest of the state's investors.

Speaking with IFLR, Galvin outlined that as well as ignoring its own policies that were in place to ensure compliance by running sales competitions, Scottrade ignored the fiduciary rule and violated state law.

"Obviously the rule provides that you have to put the customer or the client first, and not have a hidden contest or any kind of benefit to the agent who is trying to sell things within the retirement portfolio," he said. "We allege that after the rule went into effect, this was exactly what Scottrade did."

**KEY TAKEAWAYS**

- **The Secretary of the Commonwealth of Massachusetts has filed a complaint against discount brokerage Scottrade, citing a violation against the DoL's fiduciary standard rule;**
- **The regulator filed its complaint based on the fact that Scottrade allegedly violated section 204 of the Massachusetts Uniform Securities Act which protects the public interest of the state's investors;**
- **The discount trader had offered a number of internal target based competitions, which the regulator claims were in direct violation of its internal compliance with the much debated rule;**
- **It is uncertain if the complaint will set a precedent, although chief regulator William Galvin asserts that that is not the intention – they are simply enforcing the rules designed to give protect retirement investors.**

Although the fiduciary rule is in effect, Labor Secretary Alexander Acosta confirmed in May that the DoL will limit enforcement on a temporary basis.

"We will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and the related exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions," he said at the time.

The complaint argued that the aggressive sales practice of Scottrade, at the time in the process of a sale to TD Ameritrade, did not in fact work diligently to put the interests of its customers ahead of its own – 'a clear demonstration that Scottrade has failed to act in good faith to comply with the Fiduciary Rule'.

"If we have a rule, we take it seriously and we intend to make sure it is enforced," said Galvin. "We think the rule has already proven its value, and we don't want to see it weakened."

**"If we have a rule, we take it seriously and we intend to make sure it is enforced"**

**Precedent setting?**

The complaint filed by the securities division may mark the start of a new chapter in the saga of the DoL's fiduciary rule, said Ropes & Gray partner Josh Lichtenstein.

"There are a number of questions that will need to be resolved following the filing of this action, but the securities division's action reinforces the importance of ensuring that compliance policies adopted in connection with the fiduciary rule are actually followed by institutions and their financial advisors," he said. "The filing also serves as a reminder that institutions should review their procedures to ensure that they are appropriate for complying with the rule as it stands during the current transition period."

It remains to be seen if the filing will set a precedent that will see other states follow suit with similar claims of their own. Last September a number of states including New York, New Jersey, Connecticut and Massachusetts, passed bills requiring retirement advisers to expand their individual fiduciary requirements in lieu of the federal level protection.

According to Galvin, when initiating this complaint setting an example is not the intention – pointing out that the regulator has always taken a strong position when it comes to protecting its investors.

"I am not looking to set a precedent but I am looking to enforce the rule," he said. "The rule is designed to give retirement investors some level of protection and security that the people they are doing business with are only interested in them, and aren't using them as pawns in some sort of prize contest."

Unfortunately, the SEC and the Trump administration don't have the same philosophy of strict enforcement that we do, he continued.

He added: "We are not bound by them. If we see a violation that effects our investors, our retirees, our retirement investors, then we are going to take action irrespective of the SEC or any others - we would be delighted if they did, but they didn't."

***See also***

***SECs Clayton no silver bullet to solve fiduciary conundrum***

***SEC poses biggest threat to DoL fiduciary rule***

***Fiduciary rule poll it's not too late***

# EXHIBIT F

INVESTMENT COMPANY INSTITUTE®

www.ici.org

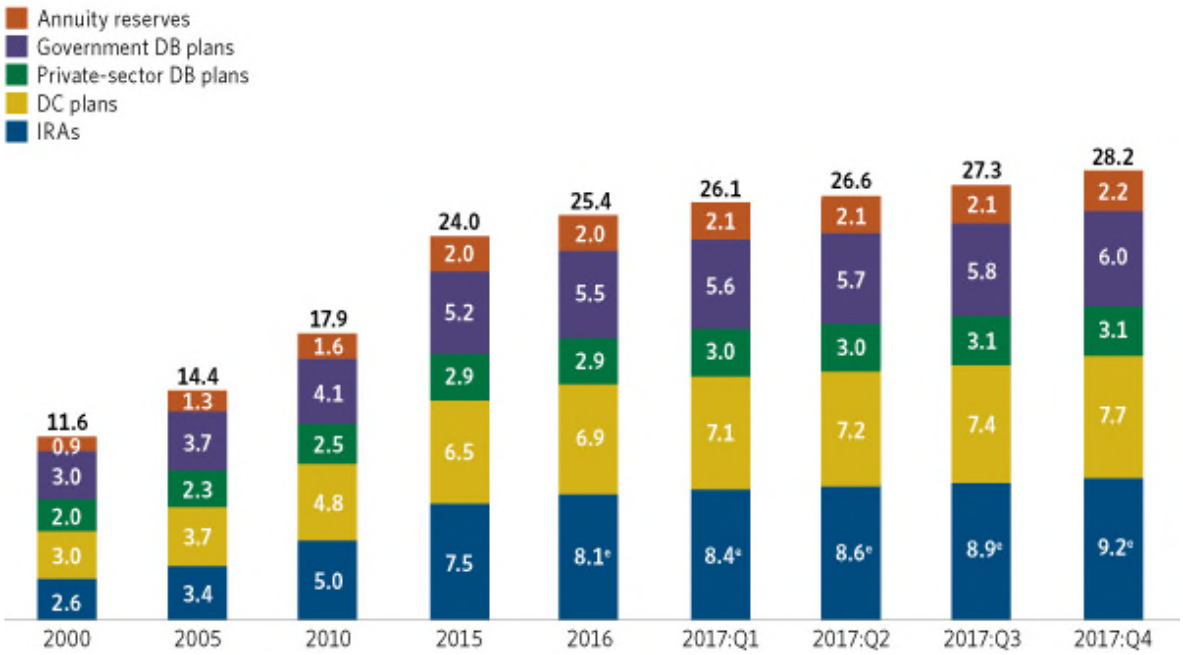
## Retirement Assets Total $28.2 Trillion in Fourth Quarter 2017

*Note: These data, which were originally released on March 22, 2018, have been updated to incorporate newly available data on IRA assets and flows for 2015 from the Internal Revenue Service Statistics of Income Division. Incorporating the 2015 IRA data caused revisions to previously released estimates of IRA assets and total retirement assets from the first quarter of 2015 through the fourth quarter of 2017.*

**Washington, DC, April 19, 2018** – Total US retirement assets were $28.2 trillion as of December 31, 2017, up 3.4 percent from the end of September and up 11.2 percent for the year. Retirement assets accounted for 35 percent of all household financial assets in the United States at the end of 2017.

**US Total Retirement Market Assets**

*Trillions of dollars, end-of-period, selected periods*




e Data are estimated.

Note: For definitions of plan categories, see Table 1 in "The US Retirement Market, Fourth Quarter 2017." Components may not add to the total because of rounding.

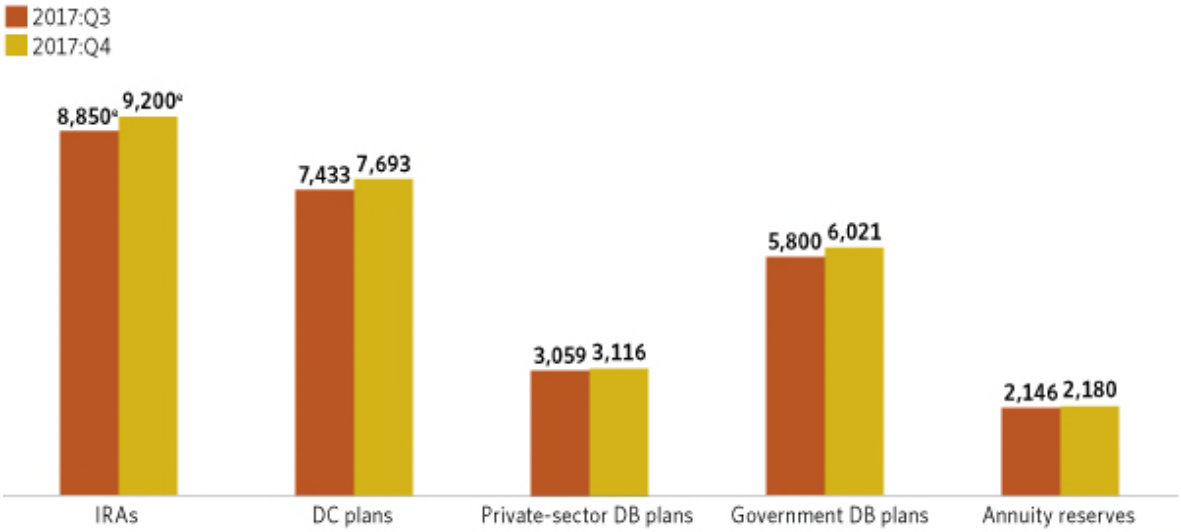
Sources: Investment Company Institute, Federal Reserve Board, Department of Labor, National Association of Government Defined Contribution Administrators, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division

Assets in individual retirement accounts (IRAs) totaled $9.2 trillion at the end of the fourth quarter of 2017, an increase of 4.0 percent from the end of the third quarter. Defined contribution (DC) plan assets were $7.7 trillion in the fourth quarter, up 3.5 percent from the end of the third quarter of 2017.

Government defined benefit (DB) plans— including federal, state, and local government plans—held $6.0 trillion in assets as of the end of December, a 3.8 percent increase from the end of September. Private-sector DB plans held $3.1 trillion in assets at the end of the fourth quarter of 2017, and annuity reserves outside of retirement accounts accounted for another $2.2 trillion.

**Retirement Assets by Type**

*Billions of dollars, end-of-period, 2017:Q3–2017:Q4*




[e] Data are estimated.

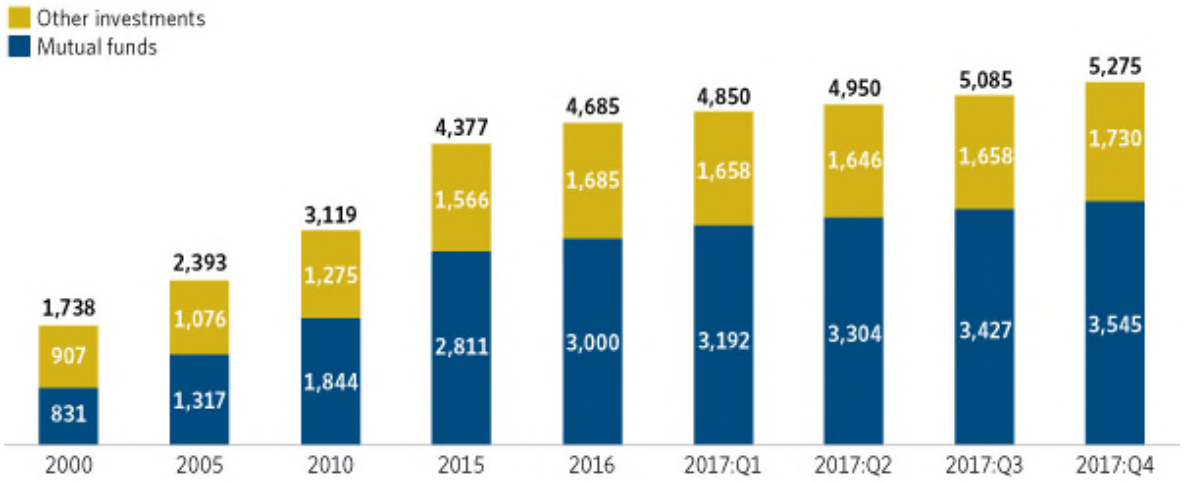
Sources: Investment Company Institute and Federal Reserve Board

## Defined Contribution Plans

Americans held $7.7 trillion in all employer-based DC retirement plans on December 31, 2017, of which $5.3 trillion was held in 401(k) plans. In addition to 401(k) plans, at the end of the fourth quarter, $540 billion was held in other private-sector DC plans, $993 billion in 403(b) plans, $321 billion in 457 plans, and $563 billion in the Federal Employees Retirement System's Thrift Savings Plan (TSP). Mutual funds managed $3.5 trillion, or 67 percent, of assets held in 401(k) plans at the end of December 2017. With $2.1 trillion, equity funds were the most common type of funds held in 401(k) plans, followed by $971 billion in hybrid funds, which include target date funds.

**401(k) Plan Assets**

*Billions of dollars, end-of-period, selected periods*



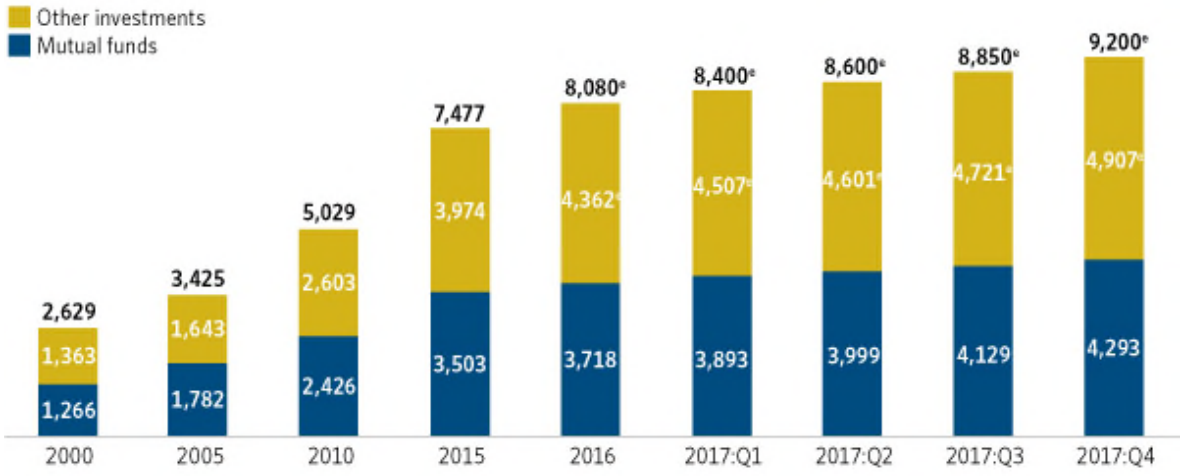

Sources: Investment Company Institute, Federal Reserve Board, and Department of Labor

## Individual Retirement Accounts

IRAs held $9.2 trillion in assets at the end of the fourth quarter of 2017, up 4.0 percent from the end of the third quarter. Forty-seven percent of IRA assets, or $4.3 trillion, was invested in mutual funds, predominately in equity funds ($2.4 trillion).

**IRA Market Assets**

*Billions of dollars, end-of-period, selected periods*




e Data are estimated.

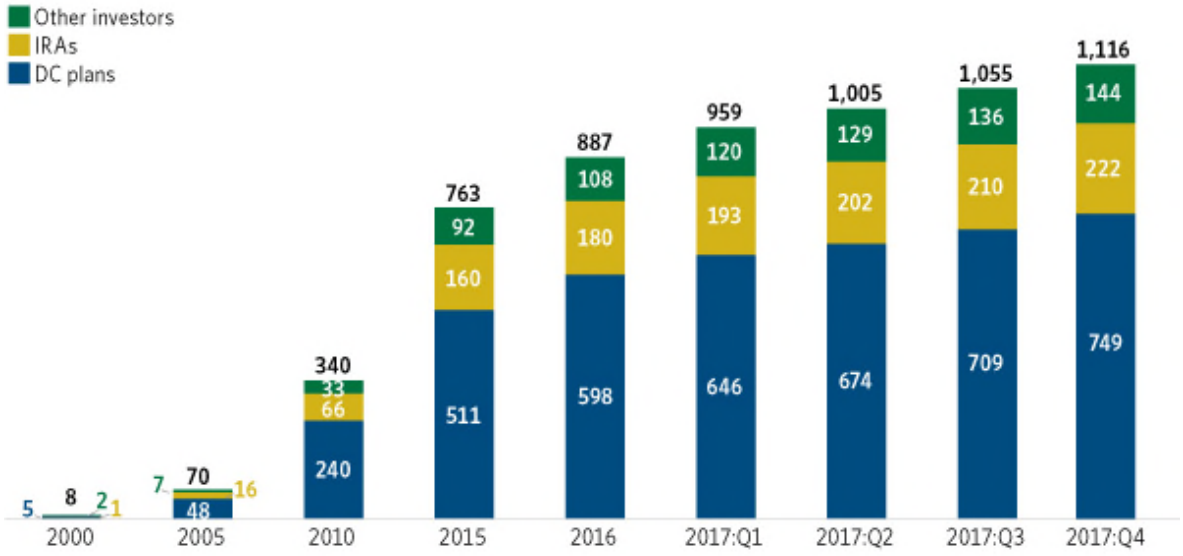
Sources: Investment Company Institute, Federal Reserve Board, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division

## Other Developments

As of December 31, 2017, target date mutual fund assets totaled $1.1 trillion, up 5.8 percent in the fourth quarter and up 25.8 percent for the year. Retirement accounts held the bulk of target date mutual fund assets: 87 percent of target date mutual fund assets were held through DC plans (67 percent of the total) and IRAs (20 percent) at year-end 2017.

**Target Date Mutual Fund Assets**

*Billions of dollars, end-of-period, selected periods*




Note: Components may not add to the total because of rounding.
Source: Investment Company Institute

The quarterly retirement data tables are available at "The US Retirement Market, Fourth Quarter 2017."

## Technical Notes

The Investment Company Institute's total retirement market estimates reflect revisions to previously published data.

These estimates incorporate US Department of Labor (DOL) Form 5500 data for 2015 (which resulted in downward revisions to DC plan assets beginning in the first quarter of 2015).

The latest estimates also incorporate newly available data on IRA assets and flows for 2015 from the Internal Revenue Service Statistics of Income Division, resulting in upward revisions to IRA assets beginning in the first quarter of 2015.