COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT DEPARTMENT
ROBINHOOD FINANCIAL, LLC, *Plaintiff*, v. WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, AND THE MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH, *Defendants*.	Civil Action No. 2184 cv 00884 BLS

BRIEF OF AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF THE AMICUS CURIAE[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers, including local and regional institutions. SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA and its members have long supported enhancing the standard of conduct applicable to broker-dealers when providing personalized investment advice about securities to retail investors. SIFMA actively participated in the rulemaking process leading to the promulgation of the Massachusetts fiduciary regulation at issue in this case and submits this brief to explain why the regulation does not apply to the conduct of broker-dealers that allows customers to engage in self-directed trading without providing investment recommendations or advice.

INTRODUCTION

In 2020, the Secretary of the Commonwealth promulgated a new fiduciary rule for Massachusetts (the "MA fiduciary rule") that is expressly limited to the provision of "investment advice" or a "recommendation" associated with buying, selling, or exchanging securities. Soon after the rule took effect, the Secretary filed an Administrative Complaint against Robinhood Financial LLC ("Robinhood"), alleging, among other things, that Robinhood had violated the fiduciary rule in operating a brokerage platform on which individuals could make self-directed trades—*i.e.*, trades without the advice or recommendation of Robinhood. Robinhood has now sought to enjoin enforcement of the MA fiduciary rule on its face and as applied to Robinhood,

[1] No party or counsel for a party authored this brief in whole or in part, and no person other than *Amicus*, its members, or its counsel has made monetary contributions intended to fund this brief's preparation or submission.

and has moved for preliminary and injunctive relief to enjoin the Secretary's action against it. The Court should grant the motion.

The MA fiduciary rule—by its express language—does not apply to broker-dealers like Robinhood to the extent that those broker-dealers operate platforms on which customers conduct self-directed trades, without the aid of recommendations or advice from the broker-dealer. So much is clear from the plain language of the rule, which applies a fiduciary duty to broker-dealers only "*when providing investment advice or recommending* an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale or exchange of any security." 950 C.M.R. § 12.207(1)(a)(emphasis added). That the rule is limited in its scope to broker-dealers' provision of investment advice and recommendations is further supported by the statement issued by the Secretary in promulgating that rule, the "Frequently Asked Questions" issued by the Secretary, and the language of a federal rule, Regulation Best Interest ("Regulation BI"), which also applies only to recommendations and investment advice. Thus, contrary to the Secretary's assertions in the Administrative Complaint (at 6), the MA fiduciary rule does not "require[e] broker-dealers registered in Massachusetts to meet a fiduciary conduct standard when dealing with their customers"—only "when providing investment advice" or "recommendations."

Faced with the clear language of the rule, the Secretary's opposition brief tries to redefine the meaning of "recommendation" to encompass allegations that Robinhood makes general, untargeted encouragement of customers to engage with the self-directed investment platform and its display of lists of popular stocks on the Robinhood app. But "recommendation" is well established in the broker-dealer industry as a term of art that plainly does not cover general, untargeted outreach of this nature.

The Secretary's action against Robinhood constitutes an extraordinary overreach by the Secretary to encompass, and then regulate, conduct not governed by the plain language of the MA fiduciary rule. Should the action be permitted to proceed, the result will be to harm broker-dealers, which were not given fair notice that the Secretary intended to apply the MA fiduciary rule to conduct that does not involve recommendations or advice, by reducing their ability to predictably operate in the Commonwealth and potentially driving them out of Massachusetts altogether. Investors will also be harmed; helpful factual information from broker-dealers about investing and securities will likely be less available as broker-dealers will fear that providing such information will subject them to the MA fiduciary rule. In addition, the potential for fiduciary exposure will likely raise the price of brokerage accounts and self-directed trading platforms for investors, depriving Massachusetts customers of the opportunity to execute trades at low (or no) cost.

The Court should reject the Secretary's attempt to expand the scope of the MA fiduciary rule and hold that the rule does not apply to the conduct of broker-dealers that allow customers to engage in self-directed trading without providing investment recommendations or advice.

ARGUMENT

I. THE MA FIDUCIARY RULE IMPOSES FIDUCIARY OBLIGATIONS ON BROKER-DEALERS ONLY FOR INVESTMENT RECOMMENDATIONS AND INVESTMENT ADVICE, NOT SELF-DIRECTED TRADES BY CUSTOMERS.

The Secretary's Administrative Complaint asserts that *all* broker-dealers registered in Massachusetts must "meet a fiduciary conduct standard when dealing with their customers." Admin. Compl. 6. That contention, which is the basis for the Secretary's fiduciary-breach claim against Robinhood, *see id.* at 19-20 ("Robinhood failed to meet the fiduciary duty it owes its customers"), has no basis in the regulation, which plainly imposes fiduciary duties only with respect to broker-dealers' *recommendations* or *investment advice*, and not to self-directed trades like those made by Robinhood customers. Indeed, the language of the MA fiduciary rule, the

releasing statement introducing the rule, and the "Frequently Asked Questions" published with the rule all make clear that the rule is triggered in the limited circumstance where an entity offers a recommendation or investment advice, and *not* by self-directed trades. Such an interpretation is consistent with the federal rule, Regulation BI, which is similarly limited.

A. The Plain Language of the MA Fiduciary Rule: The SJC "accord[s] the words of a regulation their usual and ordinary meaning," *Warcewicz v. Dep't of Envtl. Protection*, 574 N.E. 2d 364, 365 (Mass 1991), and the MA fiduciary rule by its plain language does not apply to self-directed trades made on a broker-dealer platform. Rather, the rule states that a fiduciary duty applies to a broker-dealer only "*when providing investment advice* or *recommending* [(i)] an investment strategy, [(ii)] the opening of or transferring of assets to any type of account, or [(iii)] the purchase, sale, or exchange of any security." 950 C.M.R. § 12.207(1)(a) (emphasis added).

Similarly, the MA fiduciary rule provides that a fiduciary duty may apply to a broker-dealer who "[h]as or exercises discretion in a customer's or client's account, unless the discretion relates solely to the time and/or price for the execution of the order;" "[h]as a contractual fiduciary duty," or "[h]as a contractual obligation to monitor a customer's or client's account on a regular or periodic basis." 950 C.M.R. § 12.207(1)(b). Here, too, it does not apply to a broker-dealer's maintenance of a self-directed trading platform.

Furthermore, the MA fiduciary rule lays out various specific obligations encompassed by the fiduciary duty once it is triggered, and these obligations are unsurprisingly relevant only to the provision of investment advice and recommendations. For example, a broker-dealer whose conduct is governed by the fiduciary rule is required to "make reasonable inquiry" into "[t]he risks, costs and conflicts of interest related to all *recommendations and investment advice* given," as well as "[t]he customer's or client's investment objectives, risk tolerance, financial situation, and

needs." 950 C.M.R. 12.207(2)(a)(1)-(2) (emphasis added). These requirements plainly pertain only to recommendations and investment advice—the first does expressly, and the second would make no sense outside of that context. After all, there would be no reason or opportunity for a broker-dealer to investigate a client's investment objectives, risk tolerance, financial situation, and needs, if the broker-dealer is not making any recommendations or giving any advice to the client about investments. Similarly, the duty of loyalty that attaches once fiduciary status is triggered includes the duty to "avoid conflicts of interest," and "[m]ake *recommendations* and provide *investment advice* without regard to the financial or any other interest of any party other than the customer or client." 950 C.M.R. § 12.207(2)(b)(2)-(3) (emphases added). These obligations, too, make no sense in the context of self-directed trades. *See also* 950 C.M.R. § 12.207(2)(d) (it is presumed to be a breach of the duty of loyalty to "*recommend* any investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security, if the *recommendation* is made in connection with any sales contest.") (emphases added).

In sum, the MA fiduciary rule's plain language shows that it does not apply to self-directed trades. Rather, the rule imposes fiduciary obligations only on those who give investment recommendations and investment advice to clients.

B. Releasing Statement Introducing the Fiduciary Rule: The releasing statement issued with the MA fiduciary rule reinforces what the text makes evident: that the rule applies to a broker-dealer only where the broker-dealer makes investment recommendations or provides investment advice. *See Morales v. Sociedad Española de Auxilio Muto y Beneficencia*, 524 F.3d 54, 60 (1st Cir. 2008) ("regulatory history or exogenous agency statements may help to resolve" the interpretation of a regulation). Most compelling, the releasing statement states by way of summary that "Section 12.207 of the Final Regulations will hold broker-dealers and agents to a fiduciary

standard of conduct *when making recommendations* and providing *investment advice* to customers." Adopting Release, Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents – 950 Mass. Code Regs. 12.200, at 2 (Feb. 21, 2020), https://bit.ly/3bu6XEY (emphases added).

Other aspects of the releasing statement are, like the rule itself, similarly focused on investment recommendations and investment advice. For example, the release provides that the Division is "clarifying" the scope of the rule in response to concerns from commentators that the rule would impose an "ongoing duty on a broker-dealer or agent where one otherwise would not exist," to make clear that "the duty runs during the period in which incidental *advice* is made in connection with the *recommendation* of a security to the customer," and can extend only in limited circumstances, including if the broker-dealer has "discretionary authority over the customer's account" or if the parties agree to impose a duty by contract. *Id.* at 2-3 (emphasis added). The release goes on to address concerns with "the receipt of compensation in connection with making a *recommendation*," *id.* at 5 (emphasis added), and refuses to withdraw the "presumption that *recommendations* made in connection with implied or express quota requirements or other special incentive programs were . . . breaches of the duty of loyalty," *id.* at 7 (emphasis added). Nothing in the releasing statement suggests that the rule applies to a broker-dealer who does not make recommendations or investment advice, but merely provides a platform for self-directed trades.

C. Frequently Asked Questions Published with the Fiduciary Rule: To the extent there were any question, the Secretary's "Frequently Asked Questions" make clear that unsolicited (*i.e.*, self-directed) trades are not subject to the rule:

> Q: What broker-dealer activities or actions are subject to a fiduciary [duty] under the Regulations?

> A: The Regulations make a broker-dealer or agent subject to a fiduciary duty to a customer wh*en providing investment advice or recommending* an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.
>
> . . .
>
> Q: Are unsolicited trades subject to the fiduciary conduct standard?
>
> A: The fiduciary conduct standard applies in connection with *recommendations or advice* provided by a broker-dealer. Activities of a broker-dealer in connection with unsolicited trades will be subject to applicable federal and state conduct rules.

Sec'y of the Commonwealth of Mass., Massachusetts Fiduciary Conduct Standard for Broker-Dealers and Agents, Frequently Asked Questions & Answers (May 1, 2020), https://bit.ly/3oASLQb.

D. Federal Law Regulating Broker-Dealers: The clear language of the MA fiduciary rule, and the interpretation endorsed by the Secretary's own frequently asked questions, parallels the similar federal regulation, known as "Regulation BI."[2] The limits of the federal rule are relevant here, because the Massachusetts legislature expressly provided by statute that Chapter 110A—part of which serves as the enabling legislation for the MA fiduciary rule—"shall be construed as to effectuate its general purpose to . . . coordinate the interpretation and administration of this chapter with the related federal regulation." M.G.L. c. 110A § 415. This provision does not *require* Massachusetts securities laws to be construed the same as similar federal laws or the laws of other states. *See, e.g.*, *Hays v. Ellirch*, 471 Mass 592, 605 (2015) (in declining to adopt federal standard for fraudulent concealment, opining that Section 415 "does not mandate that courts adopt the interpretation of comparable Federal securities statutes, especially where doing so would conflict

[2] *Amicus* understands that the MA fiduciary rule and Regulation BI are not the same (*e.g.*, the MA fiduciary rule imposes a "fiduciary" standard rather than a "best interest" standard). *Amicus*'s point is only that both the federal and state standards, though different, apply to the same *type* of activity—namely, recommendations and investment advice.

with [the] interpretation of other Massachusetts statutes"). It does, however, require Massachusetts courts to "consult Federal case law under the Federal securities act and siphon persuasive reasoning into [their] interpretation of the Massachusetts securities act." *Welch v. Barach*, 84 Mass. App. Ct. 113, 119 (2013). As far as *Amicus* is aware, there is no history of federal regulators using Regulation BI—or any other federal law—to govern the actions of broker-dealers in conjunction with self-directed trades, much less to punish as "unethical" or "dishonest" the failure to act as a fiduciary in that context.

Under Regulation BI, investment "recommendations" likewise trigger a duty of care (there, measured by a "best interest" standard, rather than a fiduciary one):

> A broker, dealer, or a natural person who is an associated person of a broker or dealer, *when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer*, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.

17 C.F.R. § 240.15l*l*-1(a)(1) (emphasis added). The subsequently described "disclosure," "care," and "conflict of interest" obligations are also linked to making a recommendation. *See id.* § 240.15*l*-1(a)(2)(i)-(iii). The SEC statement issued with the federal rule also makes clear that the SEC understands the rule to apply only to recommendations. It states that the SEC adopted Regulation BI to "establish[] a standard of conduct for broker-dealers . . . when they make a *recommendation* to a retail customer of any securities transaction or investment strategy involving securities." Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (June 5, 2019) (emphasis added). The releasing statement also says that Regulation BI "*would not* . . . apply to self-directed or otherwise unsolicited transactions by a retail customer." *Id.* at 33,335.

II. THE ADMINISTRATIVE COMPLAINT DOES NOT ALLEGE THAT ROBINHOOD MADE ANY "RECOMMENDATIONS" OR OFFERED ANY "INVESTMENT ADVICE," AND THEREFORE THE MA FIDUCIARY RULE DOES NOT APPLY.

The Administrative Complaint nowhere alleges that Robinhood provided investment advice or made recommendations to customers. Instead, it broadly asserts that all broker-dealer activities are subject to fiduciary obligations in *all* of their "dealing[s] with their customers," including Robinhood's internal standards for "approving customers" for trading and Robinhood's "inviting" customers to use its platform. Admin. Compl. 6, 19-20. And it seeks to hold Robinhood liable for fiduciary breach for its customers' self-directed trading choices. In particular, the Secretary alleges that Robinhood has violated the fiduciary rule:

> By failing to implement policies and procedures reasonably designed to prevent and respond to outages and disruptions on its trading platform . . . .
>
> By providing lists to encourage customers to purchase securities without any consideration of suitability . . . .
>
> By employing a number of strategies to encourage and incentivize customers to engage continuously and repeatedly with the Robinhood application . . . .
>
> . . . by successfully encouraging inexperienced investors to continuously and repeatedly execute trades on its platform . . . .
>
> By approving customers for options trading that did not meet the necessary criteria . . . .
>
> By inviting and enticing customers to use its platform in the manner that Robinhood does . . . .

Admin. Compl. ¶¶ 88-93. None of these activities—which are common among broker-dealer operations—has anything to do with providing investment advice or recommendations to customers. Because, as explained above, the MA fiduciary rule does not extend beyond investment advice or investment recommendations, the Secretary's action against Robinhood represents an extraordinary overreach of power.

The Secretary's opposition to Robinhood's preliminary-injunction motion (at 9-11, 29-30) suggests that the "recommendation" or "investment advice" language of the regulation might be satisfied by Robinhood's allegedly encouraging the use of the platform generally and maintaining lists of popular stocks.[3] But the Secretary's position is wholly unsupported.

In the broker-dealer context, "recommendation" is a term of art with a well-established regulatory meaning developed through regulatory guidance from the Financial Industry Regulatory Authority (FINRA); FINRA's predecessor, the National Association of Securities Dealers (NASD); and the Securities and Exchange Commission (SEC). provides the first line of oversight for the brokerage industry under the supervision of the SEC. Together, these federal entities have, for decades, regulated the broker-dealer industry, and their guidance interpreting the meaning of industry-specific regulatory terms like "recommendation" establishes the common understanding of those terms by industry participants.

Both FINRA and the SEC have made clear that simply using or distributing advertising and offering materials—conduct comparable to Robinhood's general advertising of its platform or provision of lists of available or popular stocks—do not constitute making a recommendation. *See, e.g.*, FINRA, Interpretive Letter Re: NASD Notice to Members 96-60 (Mar. 4, 1997), https://bit.ly/3tVziKO ("a reference to an investment company or an offer of investment company shares in an advertisement or piece of sales literature would not by itself constitute a 'recommendation' for purposes of [NASD Conduct] Rule 2310"); Rules Regarding Conduct, Supervision and Records of Brokers and Dealers Not Members of National Securities Association,

[3] Elsewhere the Secretary suggests (at 30) that the MA fiduciary rule could apply to Robinhood irrespective of whether Robinhood makes recommendations or offers investment advice, because "Robinhood works in a profession where broker dealers have long been chargeable with fiduciary obligations." But as explained above, the MA fiduciary rule attaches *to specific conduct*, not merely *to a profession*: As a matter of law, Robinhood's status as a broker-dealer does not trigger application of the rule.

32 Fed. Reg. 11637, 11638 (Aug. 11, 1967) (the "general distribution of a market letter, research report or other similar material" is not a recommendation); Suitability Requirements for Transactions in Certain Securities, 54 Fed. Reg. 6693, 6697 (Feb. 14, 1989) (suitability determinations "would not apply to general advertisements not involving a direct recommendation to the individual"). Even the distribution of offering materials that the broker-dealer assisted in preparing, without more, does not constitute a recommendation. *See DBCC v. Kunz*, No. C3A960029, 1999 NASD Discip. LEXIS 20, at *63 (NAC July 7, 1999), *aff'd,* 55 S.E.C. 551, 2002 SEC LEXIS 105 (2002).

Instead, a "recommendation" has long been understood to refer to investment advice tailored to a particular customer or group of customers about a particular security or group of securities (and now, under the MA fiduciary rule and Regulation BI, it also refers to investment advice—still tailored to a particular customer or group of customers—regarding a general investment strategy). For example, in promulgating Regulation BI, the SEC stated that "[t]he more individually tailored the communication to a specific customer or a targeted group of customers, the greater the likelihood that the communication may be viewed as a "recommendation." SEC, Frequently Asked Questions on Regulation Best Interest (Aug. 24, 2020), http://www.sec.gov/tm/faq-regulation-best-interest. NASD (and subsequently FINRA) have long articulated the same understanding: "the more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater likelihood that the communication may be viewed as a 'recommendation.'" NASD, Notice to Members 01-23, 66 Fed. Reg. 20,697, 20,699 (Apr. 24, 2001); FINRA, Regulatory Notice 11-02, Know Your Customer and Suitability, at 3 (Oct. 7, 2011), https://bit.ly/343DL3T (same).

Relevant case law is in accord: with respect to marketing and advertising materials, the recommendation inquiry focuses on whether the communication was "individually tailored." *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 366 (5th Cir. 2018) ("the more individually tailored" a communication, the more likely it is a "recommendation"); *Fernandez v. UBS AG*, Case No. 15-CV-2859, 2018 WL 4440498, at *20 (S.D.N.Y. Sept. 17, 2018) ("[T]here is nothing to suggest that NASD intended that 'recommend' encompassed communications directed to the public at large."); *BNP Paribas Mortg. Corp. v. Bank of America, N.A.*, 866 F. Supp. 2d 257, 268 (S.D.N.Y. 2012) (*citing* NASD's definition of "recommendation").

Thus, Robinhood's widescale, general distribution of materials noting the availability, performance, or popularity of stocks—akin to the distribution of market reports and general advertisements—without any personalization or individualized advice relating to those stocks is not a "recommendation." Indeed, regulators' examples of broker-dealer communications that do *not* constitute recommendations are directly aligned with Robinhood's conduct. For example, NASD described the following scenarios as conduct that is *not* viewed as recommendations:

- a broker-dealer's website maintaining "electronic libraries," including research reports with buy/sell recommendations from the author, news, quotes, and charts;
- a broker-dealer's website enabling customers to sort through the data available about the performance of a broad range of stocks and mutual funds, company fundamentals, and industry sectors;
- a broker-dealer's website providing research tools that allow customers to screen through a wide universe of securities and to request lists of securities that meet broad, objective criteria; and
- a broker-dealer allowing customers to subscribe to e-mails or other electronic communications that alert customers to news affecting the securities in the customer's portfolio or on the customer's "watch list."

66 Fed. Reg. at 206699. Robinhood's alleged stock push notifications are indistinguishable from these examples. Moreover, no customer could reasonably have interpreted Robinhood's alleged

notifications as a recommendation *tailored* to the customer (or even group of customers), which, as explained above, is a crucial consideration in determining whether something qualifies as a "recommendation." *See* p. 11, *supra*.

In short, the MA fiduciary rule was not written on a blank slate—generalized communications like the ones alleged in the Administrative Complaint are not "recommendations" (and the Administrative Complaint does not even allege that they are). Had the Secretary intended to deviate from the well-settled understanding of the term "recommendation" and extend that term to conduct that regulators have, for decades, advised broker-dealers would *not* constitute a recommendation, one would have expected to have seen some mention of that deviation to provide fair notice to regulated entities about what would subject them to fiduciary obligations and potential enforcement actions like this one. Yet there is none. To the contrary, although the Secretary, in promulgating the rule, declined to define the terms "recommendation" and "advice," the Secretary noted expressly that he was aware of their well-established meaning, including "the FINRA interpretation of these terms" and he stated that the "terms are commonly used and clear on their face." *See* Sec'y of the Commonwealth, Sec. Div., Request for Comment, at 6 (Dec. 13, 2019), https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Request-for-Public-Comment.pdf. The common use of these terms in the broker-dealer context does not support the Secretary's position in this case.

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The Secretary's action against Robinhood, if permitted to proceed, has serious negative implications beyond this case. Broker-dealers, like all businesses, need to be able to rely on the ordinary meaning of regulations as they were written and as they were explained by the regulator in published comments in order to manage their conduct, their risks, and their costs—and to allow

them to promptly challenge those regulations if they go beyond the constraints set by state and federal law. Given the well-established meaning of "recommendation" in the industry, and the Secretary's failure to explicitly include—or to even remotely suggest—a contrary definition in the rule, broker-dealers had zero notice, at the time the MA fiduciary rule was issued, that the rule could possibly be applied to their self-directed trading platforms.

Moreover, reading into the rule a new, expansive, and unprecedented definition of "recommendation"—particularly one that is contrary to the established and common meaning of the term—would reduce the confidence of businesses to predictably operate in the Commonwealth. If the MA fiduciary rule applies in the context of this case, then it could apply to *any* action or inaction by *any* broker-dealer who markets or advertises its business. It would have no bounds despite the regulation's clear text. This would greatly harm the business models of broker-dealers, potentially driving self-directed trading platforms out of Massachusetts altogether and therefore substantially decreasing the low-cost investment options available to Massachusetts residents. At the least, it would put Massachusetts' many broker-dealer employers at a massive disadvantage to their competitors in other states.

Investors in Massachusetts would also suffer if the Secretary's expansive interpretation of "recommendation" and "investment advice" is adopted. Firms would likely avoid providing useful information and educational materials to their investors, out of fear that the information would subject them to the MA fiduciary rule. In addition, the cost of brokerage accounts and self-directed investing platforms would almost certainly increase, as companies are required to account in their pricing models for the potential for lawsuits based on fiduciary breach. The added cost would deprive customers of the opportunity to execute self-directed trades at a reasonable price.

CONCLUSION

The Court should grant Robinhood's motion and hold that brokerage accounts like those offered by Robinhood that do not provide "recommendations" or "investment advice" to their customers, as those terms have traditionally been understood, are not subject to the MA fiduciary rule.

Respectfully submitted,

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION,

By their attorneys,

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CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that on May 21, 2021, I caused copies of the foregoing Brief Amicus Curiae by the Securities Industry and Financial Markets Association to be filed through eFileMA.com and delivered via email to each party identified below, pursuant to the March 30, 2020 Supreme Judicial Court Order Concerning Email Service in Cases Under Rule 5(b) of Mass. Rules of Civil Procedure.

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