



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

State Securities Cops Filling In For Feds On Fiduciary Beat

By **Dunstan Prial**

Law360 (February 20, 2018, 10:13 PM EST) -- A high-profile complaint filed by Massachusetts' top securities cop against Scottrade for allegedly violating conflict-of-interest laws is a sign that state regulators will be stepping in to fill a perceived void in federal policing of retirement account advisers, legal experts said Tuesday.

The administrative complaint was **filed last week** by the Enforcement Section of the Massachusetts Securities Division. It's the first effort by a state regulator to use state laws to enforce the U.S. Department of Labor's so-called fiduciary rule for retirement account advisers during a period in which the DOL has backed off enforcement of the federal rule as it undergoes a review at the request of the Trump administration.

"This is an attempt by a state regulator to step up and say, 'Gee, if the federal government is not going to vigorously define the scope of fiduciary protections and enforce them and possibly even scale back on them, then we need to step up,'" said Stephen P. Wilkes, a partner at The Wagner Law Group.

The DOL's fiduciary rule, which was enacted in 2016 and designed to stem unethical sales practices, expanded who qualifies as a fiduciary under the Employee Retirement Income Security Act and raised standards for dispensing retirement advice. The agency has delayed some of the rule's provisions until 2019 while the review is underway. But one of its provisions that has taken effect involves requiring retirement account advisers to place the interests of clients ahead of their own.

Joshua Lichtenstein, an ERISA partner at Ropes & Gray LLP, said the Massachusetts complaint sends a signal that state regulators are keen on maintaining investor protections, in particular for older and retired investors, and that they intend to use state laws already in place to do so.

"This isn't a state regulator enforcing the fiduciary rule. A state regulator doesn't have the ability to enforce the fiduciary rule. It's a state regulator stepping in and saying we are going to seek protections for investors under existing state rules," Lichtenstein said.

"The result could be multiple state regulators saying, 'You know what, we think that the protections under the fiduciary rules are really important and even though the Department of Labor has announced this transition period during which they're not really in an enforcement mindset, we already have our own laws on the books that we think we can use to enforce similar levels of investor protection,'" the attorney added.

A DOL spokesman didn't immediately respond to a request for comment for this story.

Investment firms should take heed of Massachusetts' warning, according to Lichtenstein, by going over their policies adopted after the DOL rule was enacted and making sure those policies are being enforced, despite the department's current review of the rule.

According to the Massachusetts complaint, in response to the DOL rule's provision on impartial conduct, Scottrade adopted its own internal policies, which prohibited sales quotas, appraisals, bonuses, contests and other incentives for retirement account clients. But the policies allegedly ended up being meaningless, and by violating its own written policies "Scottrade and its agents neglected their duty to Massachusetts retirees," the complaint states.

"It's a big deal because, from a legal standpoint, what it means is that managers and advisers need to be very careful about checking what language they have or haven't implemented from plans that they've created to comply with the fiduciary rule," Lichtenstein said. "You have to know what you put into your policies and make sure you're following all of them."

A Scottrade spokeswoman said the company does not comment on ongoing legal matters.

Stephen Hall, legal director and securities specialist with Better Markets, a Washington, D.C., investor advocacy group, said the allegation contained in the Massachusetts complaint shows "that sales contests and quotas are still in full swing, at least at some firms."

"Those are precisely the kinds of activities that the DOL fiduciary duty rule is designed to eradicate because it contaminates advice with conflicts of interest," he said.

Hall said state regulators will "have an important role to play to help fill the vacuum" at the federal level. "Clearly there is a problem that's ongoing, and with the rule at the DOL under review and only partially in effect and not being enforced, there's a huge regulatory gap," Hall added. "Many of the states are beginning to mobilize in this area to compensate for the fact that deregulation is now in full swing at the federal level, both in terms of the rule writing and in terms of enforcement."

That's especially true in this case, according to Hall, because the DOL, he said, has "stayed very critical portions of the fiduciary duty rule and they've also obviously done nothing to enforce it."

"State regulators need to pursue these violations when they discover them for the benefit of millions of American retirement savers who simply cannot afford the kind of bleeding off of retirement assets that come from conflicts of interest," Hall said. "It needs to stop, and I hope and expect that other states will be aggressive in the way that Massachusetts has."

The case is In the Matter of Scottrade Inc., docket number E-2017-0045, before the Office of the Secretary of the Commonwealth Securities Division in Massachusetts.

--Additional reporting by Christine Powell. Editing by Mark Lebetkin and Catherine Sum.