XY Planning Nixes Supreme Court Challenge of Reg BI, Plans to Take Fiduciary Fight to States

XY Planning Network (XYPN), a membership organization comprised of more than 1,300 independent fee-for-service financial advisors, will not appeal its 2nd Circuit ruling on Regulation Best Interest.

However, the organization has engaged Duane Thompson, president and founder of Potomac Strategies LLC, an industry lobbyist and fiduciary advocate, to continue its fiduciary fight at the state level.

Thompson was the architect of the Financial Planning Association's successful lawsuit against the SEC's since-vacated non-fiduciary broker-dealer exemption, more widely known as the Merrill Lynch Rule.

Thompson will assist XY Planning Network in its state advocacy efforts for a fiduciary standard for all financial advice, and that the fee-for-service business model be regulated like other fee models (e.g., assets under management).

In September 2019, XY Planning Network co-founders Alan Moore and Michael Kitces made waves when they announced their decision to file a lawsuit against the SEC challenging Regulation Best Interest during the opening of their annual national conference.

In its lawsuit, XY Planning claimed that the SEC's rule ignores Congress' requirement to delineate between brokerage sales and investment advice, creating a competitive disadvantage for registered investment advisors. Registered investment advisers have traditionally been held to a fiduciary standard, while brokers-dealers were held to the less stringent suitability standard.

After a nine-month legal battle to vacate the new broker advice standard ensued, the U.S. Court of Appeals for the 2nd Circuit ultimately ruled against XYPN on June 26, 2020, acknowledging that Regulation Best Interest would "put [XYPN] and other investment advisers at a competitive disadvantage compared to the status quo."

The SEC claims that Reg BI goes beyond the suitability standard and requires broker-dealers to "act in the best interest" of their retail customers when making an investment recommendation of any securities transaction or investment. Under the regulation, brokers are required to provide customers with a document that discloses the types of services offered, the legal standards of conduct, applicable fees, and conflicts of interest that may exist.

When the Court's decision to uphold Reg BI was announced, XYPN leadership vowed continued support and advocacy for "distinguishing between the product distribution and capital formation function of brokers, from advisors who are in the business of advice and who owe a fiduciary duty to their clients."

A number of states, including Massachusetts, Nevada, New Jersey, have enacted their own state-based fiduciary duties that uniformly apply a fiduciary duty for both investment advisers and brokers providing advice in their states.

"As a membership organization with more than 1,300 advisors and RIAs in all 50 states, we recognize the challenges of uniformity in state fiduciary rulemaking," said XYPN co-founder Michael Kitces. "Nonetheless, with the firms that manufacture and distribute products blocking effective Federal regulation, we believe the states represent the best path to advance fiduciary regulation of advice."

He added, "Ultimately, XYPN feels a duty to protect not just the RIA community, but the consumers that community serves. With Thompson's contributions, our fight to hold advisors delivering financial advice to the highest standard of care for their clients continues."

XY Planning Network bills itself as a financial planning platform for fee-for-service financial advisors who want to serve Gen X and Gen Y clients, providing comprehensive financial planning services for a monthly subscription fee and without product sales or asset minimums.

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XY Planning Network Considers Further Legal Challenges to SEC's Regulation Best Interest

On Friday, the Second Circuit Court of Appeals rejected a lawsuit challenging the Securities and Exchange Commission's Regulation Best Interest, which goes into effect today. The court's three-judge panel upheld the broker advice rule in a unanimous decision.

Michael Kitces, co-founder of XY Planning Network (XYPN), a financial planning platform for fee-based financial advisors and one of the plaintiffs in the case, is weighing his options.

Kitces told reporters on Monday that he is considering requesting the appeals court to hear the case en banc with all of the court judges present, or possibly appealing the case to the Supreme Court.

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Weeks after XY Planning filed its lawsuit in September, the attorneys general of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, and the District of Columbia, filed a similar suit challenging Reg BI, arguing that it fails "to meet basic investor protections that were laid out in the historic 2010 Dodd-Frank Act." Due to their similarity, the two lawsuits were combined, and the court heard oral arguments on June 2nd.

The Second Circuit Court ruled that Dodd-Frank Act authorizes Regulation Best Interest, and that the rule is not arbitrary and capricious.

"[The petitioners] argue that the [Dodd-Frank Act] requires the SEC to adopt a rule holding broker-dealers to the same fiduciary standard as investment advisers," the court stated in its ruling. “But Section 913(f) of the Dodd-Frank Act grants the SEC broad rulemaking authority, and Regulation Best Interest clearly falls within the discretion granted to the SEC by Congress. Although Regulation Best Interest may not be the policy that petitioners would have preferred, it is what the SEC chose after a reasoned and lawful rulemaking process.”

“We strongly disagree with the court’s permissive interpretation allowing the SEC to alter the substantive consumer protections Congress mandated in both the Investment Advisers Act and Dodd–Frank, will be exploring our options about whether to challenge this ruling further, and will continue to work proactively with the growing number of states and their own securities regulators who understand the business of advice has always only ever been fiduciary …and should remain that way for the protection of consumers,” Kitces said in a statement following the ruling.

Currently, Nevada, Massachusetts, New Jersey are enacting state fiduciary standards.

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