UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-2886

Caption [use short title]

XY PLANNING NETWORK, LLC; FORD FINANCIAL SOLUTIONS, LLC, et al.,
Petitioners,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et al.,
Respondents.

Motion for: Leave to File Brief as Amicus Curiae in Support of Petitioners

Set forth below precise, complete statement of relief sought:

Motion seeks leave to file brief as amicus curiae for review of final rule of the Securities Exchange Commission.

MOVING PARTY: Financial Planning Association
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: U.S. SECURITIES & EXCHANGE COMMISSION

MOVING ATTORNEY: Todd M. Galante, Esq.

OPPOSING ATTORNEY: Jeffrey A. Berger, Esq.

[name of attorney, with firm, address, phone number and e-mail]

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U.S. Securities & Exchange Commission
100 F. Street, N.E., Washington, DC 20549-9040
(202) 551-5112 bergerje@sec.gov

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Todd M. Galante, Esq. **Date:** 1/3/2020

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

CASE NO.: 19-2886(L)

19:2893(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XY PLANNING NETWORK, LLC; FORD FINANCIAL SOLUTIONS, LLC, et al.,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et al.,

Respondents.

On Petition of Petitioners XY Planning Network, LLC, and Ford Financial Planning, LLC.

MOTION OF THE FINANCIAL PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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January 3, 2019

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), Financial Planning Association respectfully requests leave of this Court to file the attached brief as amicus curiae in support of petitioners XY Planning, LLC and Ford Financial Solutions, LLC.

Financial Planning Association (called "FPA") is a 501(c)(6) not-for-profit organization that operates nationally with over 23,000 members.

This petition turns on whether the U.S. Securities and Exchange Commission exceeded its statutory authority and/or acted arbitrary and capricious in the promulgation of SEC Rule 15l-1 - Regulation Best Interests.

In the proposed brief, FPA seeks to aid the Court's consideration of this appeal in two ways: first, providing a history of the financial planning industry and its goals; second, reviewing the SEC's past position concerning financial planners as investment advisers, and third, by discussing relevant public policy concerns—a topic raised by FPA ostensibly as a consideration weighing in favor of granting the petition—that can only be fairly and thoroughly addressed by FPA.

With respect to the first issue, FPA's experience and intimate familiarity with the financial planning industry afford a unique, if not definitive, perspective on the operation of the industry, and some of the underlying reasons that caused the FPA to instituted petition the U.S. Court of Appeals for the District of Columbia vacate a rule adopted in 2005 that adversely affected financial planners. Regarding the second

issue FPA address the inconsistency of the SEC's treatment of financial planners relative to the IA and broker-dealers. Concerning the third issue the FPA provides a perspective about the SEC's past views the need for financial planners to be regulated under the Investment Adviser Act of 1940, as amended, FPA asks that public policy be a factor in the Court's interpretation of petition. Assuming the Court finds such considerations relevant, FPA seeks to share its own perspective on the public policy issues at stake, given its unmatched experience with the industry, its purpose, and the industry participants.

Amicus counsel contacted the Commission twice and left voice messages with its counsel for consent to file an amicus brief. The Commission has not responded to date.

FPA seeks to share its understanding of how the industry works and the implications of an erroneous decision might be, as a pivotal guide and advisor to the Court. For the foregoing reasons, FPA respectfully requests the Court's permission to file the attached brief.

Petitioners have consented to FPA's participation as amicus.

Respectfully submitted,

/s/ Todd M. Galante, Esq.

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CASE NO.: 19-2886(L)

19:2893(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XY PLANNING NETWORK, LLC; FORD FINANCIAL SOLUTIONS, LLC, et al.,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et al.,

Respondents.

On Petition of Petitioners XY Planning Network, LLC, and Ford Financial Planning, LLC.

BRIEF OF AMICUS CURIAE FINANCIAL PLANNING ASSOCIATION IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW OF A FINAL RULE OF THE SECURITIES AND EXCHANGE COMMISSION (File No. S7-07-18)

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January 3, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), Financial Planning Association states it is a not-for- profit organization, and it does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

The Financial Planning Association ("FPA") is a Sec. 501(c)(6) not-for-profit organization with 22,000 members and a network of local chapters for professional financial planners that promote the profession of financial planning and the CERTIFIED FINANCIAL PLANNER™ mark "CFP®" that represents the "cornerstone of the profession." CFP® professionals, who are FPA's core members as referenced in the FPA Bylaws, are required to adhere to a code of ethics that includes a fiduciary duty as outlined by the Certified Financial Planner Board of Standards, Inc.

The Petitioners' petition seeks a ruling from the Court that the recently adopted SEC Rule Regulation Best Interest is unlawful and seeks that it be vacated under 5 U.S.C. § 706. Petitioners operate financial planning businesses. Regulation Best Interest permits broker-dealers to provide investment advice that amounts to financial planning to their customers without registration under the Investment Advisers Act (the "Act") and the attendant fiduciary duty standard of care in the conduct of an adviser's business. Under Regulation Best Interest, brokers are subject to a "best interest" standard that is undefined by the regulation, while a financial

[1] Pursuant to Federal Rules of Appellate Procedure 29(a)(E) and Local Rule 29.1(b), amicus states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than amicus or its members or counsel, contributed money intended to finance the preparation or submission of this brief.

planner is required to register as an investment adviser under the Act. The judicial determination of Regulation Best Interest is a matter of significant concern for FPA and the potential adverse impact it will have on the profession of financial planning, CFP® professionals and FPA's ability to attract members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The SEC's adoption of Regulation Best Interest permits brokers to provide financial advice that typically is provided by financial planners. Although the SEC requires financial planners to register as investment advisers under the Act, Regulation Best Interest allows brokers to avoid such registration and operate under a lesser duty of care under the newly promulgated Regulation Best Interest as opposed to the higher fiduciary standard mandated by the Act. Additionally, significant policy concerns weigh against Regulation Best Interest, including the confusion in the marketplace by investors. The FPA strongly disagrees that the SEC should have adopted a regulation that allows brokers to avoid registration as investment advisers who are permitted to provide similar investment advice as financial planners do without being subject to the same standard of care – the fiduciary duty standard of care.

BACKGROUND

I. Financial Planning Association

Sales. That was the term used to describe financial services for decades.[2] Mutual funds were introduced in 1924, and shortly thereafter, Congress passed several laws to protect investors: the Securities Act of 1933, the Securities Exchange Commission Act of 1934, and the 1940 Investment Advisers Act. *Id.* at 2. Then for the next 30 years, little changed. *Id*. During this time, securities firms sold equities and banks provided trust services all to wealthy clients for commissions. *Id*. Life insurance policies were the average American's investments. *Id*. "The term financial planner was rarely used, and when it was, it often identified an insurance agent who offered estate planning and annuities in addition to life insurance." *Id*.

Several decades later, on December 12, 1969, the financial planning profession was born in Chicago when eleven men gathered "to raise[d] the level of professionalism in retail financial services and to make 'financial consulting,' rather than salesmanship, the driving force of their industry." *Id*. at 3. For several years, the terms "financial counseling" and "financial counselors" were used instead of the terms "financial planning" or "financial planners."

[2] Brandon, Jr., E. Denby, Welch, H. Oliver, *The History of Financial Planning*, (2009), pg. 3.

Today, the Financial Planning Association is the principal membership organization for CERTIFIED FINANCIAL PLANNER™ professionals, educators, financial service providers, and students, with 22,000 members nationally. FPA provides opportunities for professional development, business support, advocacy, and community at the national and chapter levels.

II. Financial Planning and The SEC

Financial planners provide a variety of investment advice principally to individuals and small businesses that includes advice on estate planning, life insurance, annuities, investments, investment strategy, and IRA roll-overs, and they may prepare financial plans based on the client's financial circumstances and goals.

A financial plan typically addresses present and future assets and liabilities, savings, retirement, employee benefits, and real estate, and may provide recommendations that set forth general and specific action to be taken by the client. The financial planner may recommend the establishment of a retirement account, savings program, investment in securities, and investment strategy. The financial planner usually assists the client in implementing the financial plan that may involve the purchase of investment products by the client. The financial planner may charge a client a fixed fee or hourly rate for the development of a financial plan or not charge for the preparation of the plan and earn commissions on the sales of investment products recommended in the plan to the client. The financial planner may also

review the performance of the investment plan periodically with the client and make recommendations to adjust the plan.

Since 1987, the SEC has taken the position that financial planners must register as investment advisers under the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et seq.

The determination of whether a financial planner falls within the definition of an investment adviser depends on whether the planner provides advice, issues reports or analysis regarding securities, is in the business of providing such service, and provides such service for compensation. *Applicability of Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, SEC IA Release 1092 (October 8, 1987) ("IA-1092;);* 15 *U.S.C.* § 80b-2(a)(11)

IA–1092 broadened the scope of an investment adviser. Besides a person who gives advice, makes recommendations, or issues reports or analyses concerning specific securities, the SEC interpreted Section 202(a)(11) investment adviser definition to include persons who provide advice or issue reports or analyses that contain general references to securities. Persons who advise clients about the pros and cons of investing in securities, in general, are investment advisers. IA-1092 did not establish a new ground for the SEC's interpretation. In 1981, the SEC expressed a similar view that persons such as financial planners who advise investors about the

desirability of investing in securities are subject to the Act. *Applicability to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services*, 17 CFR Part 276 (August 13, 1981), SEC Release IA-770.

In 1999, the SEC changed its view about the distinction between brokers and advisers by proposing Rule 202(a)(11)-1. Regardless of the form of compensation to customers, brokers would be excluded from the definition of an investment adviser. *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, 64 Fed. Reg. 61,226 (Nov. 4, 1999) (proposed rule). Arguably, the SEC was reacting to changes in the marketplace. Broker-dealers expanded their portfolio of services to attract customers. Customers could pay for securities transactions that included advice and other services by paying a fixed fee or a percentage of assets with the broker. The introduction of discount brokerage firms that provided no advice for discounted trade costs competed with the traditional "full-service" brokers. The SEC realized that brokers' new business model triggered registration as an investment adviser under the Act with the loss of their exemption under Section 202(a)(11). The proposed rule permitted traditional brokers to provide customers different levels of service that ranged from execution-only programs that charged a discounted fee while still maintaining the traditional type of brokerage arrangement including fee-based programs based on the amount of assets with a broker-dealer.

The SEC believed that brokers offering fee-based programs might be receiving "special compensation" under the Act. The SEC reasoned that, while in 1940 the form of broker compensation was an appropriate distinction between brokers and investment advisers, the development of new services by brokers cast doubt on the past Congressional assumptions that underlie the Act.

Months after Congress enacted the Act, the SEC's General Counsel issued an *Opinion of General Counsel Relating to Section 202(a)(11)(C),* 1040 SEC LEXUS 1466 (1940) ("1940 SEC Op.") that, in part, concluded that broker-dealers receiving special compensation for investment advice cannot qualify for a broker-dealer exception merely because the broker is engaging in market transactions in securities.

The SEC adopted the Proposed Rule in 2005 (the "2005 Rule"). *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, 70 Fed. Reg. 20,424 (Apr. 19, 2005); 15 *U.S.C.* § 80b-2(a)(11). The 2005 Rule deemed a broker-dealer not to be an investment adviser solely as a result of receiving special compensation if the securities advice given to customers is made on a non-discretionary basis, and it is solely incidental to the brokerage services offered to said customers and certain disclosures are made to the customers. However, if broker-dealers performed financial planning services, the exemption from registering as an investment adviser was not available. The presumed rationale is that brokerage service is incidental to financial planning. However, FPA instituted an action to vacate Rule 2005 after the

SEC's staff declared that if an investment adviser who also happened to be a broker-dealer (1) used the advertising slogan, "anybody can be a broker; you pay us for our investment advice," and then (2) obtained a higher fee for advising clients what securities to buy, that advice would still not be subject to the Act unless the adviser "also provides investment advice as part of a financial plan or in connection with providing financial planning services." *No-Action Letter under Investment Advisers Act of 1940,* 2005 SEC No-Action LEXUS 853, *2 (Dec. 16, 2005). The 2005 Rule did not define "solely incidental," and rejected the premise that advice is substantial and that the brokerage part of the relationship is incidental. *In Financial Planning Association v. Securities and Exchange Commission,* 482 F.3d 481 (D.C. Cir, 2007), vacated the 2005 Rule on other grounds that the SEC exceeded its authority in adopting the rule.

SUMMARY OF ARGUMENT

Regulation Best Interest narrows the scope of the Act by allowing broker-dealers to evade the registrations requirement and customer protections of the Act and creates a regulatory arbitrage.

ARGUMENT

I. SEC'S REGULATION BEST INTEREST ALLOWS BROKER-DEALERS TO ACT AS FINANCIAL PLANNERS WITHOUT COMPLYING WITH THE INVESTMENT ADVISERS ACT.

The Act "reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship[.] *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 80, 191-192 (1963). Under the Act, advisers must disclose essential information when forming an advisor-client relationship, including any conflicts of interest, methods of analysis, sources of information, business activities, education, professional qualifications, and disciplinary events. 17 C.F.R. §§ 275.204-3(a); 275.206(4)-4(1); 275.206(4)-4(2). The Act and its regulations prohibit investment advisers from making self-interested transactions without full disclosure and prior client consent. Section 206(3) of the Act, 15 U.S.C. §80b-6(3); 17 C.F.R. §2875.206(3).

The Act definition of "investment adviser" encompasses a full spectrum of activity that represents Congressional intent of the Act's broad application. Section 202(a)(11) of the Act defined "investment adviser" as:

> "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities…."

Congress exempted six categories from classification as an investment adviser. 15 U.S.C. § 80(b)-2(a)(11)(A) through (11)(F). A broker-dealer may avoid being designated as an investment adviser provided two prongs are satisfied. First, the broker or dealer is providing investment advice solely incidental to the conduct of its business. Secondly, the broker or dealer receives no special compensation. *Id*. 2(a)(11)(C).

The term "no special compensation" is not defined in the Act. However, Congressional history suggests that "no compensation" means the broker or dealer may receive any form of compensation other than transactional commissions. See S. Report No. 76-1775, 75th Cong. 3d. Sess. 22 (1940) (§ 202(2)(11)(C) of the Act applies to broker-dealers "insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions"). Regulation Best Interest, however, allows a broker to charge a fixed fee for its services.

The other prong requires that any investment advisory services be "solely incidental" to the broker-dealers business. The SEC interprets "solely incidental" to mean a "broker-dealer's provision of advice as to the value and characteristics of securities or as to the advisability of transacting in securities." *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, 17 C.F.R. 276 [SEC IA Release

No. IA-5249, June 5, 2019]. In 2011 the Court of Appeals of the Tenth Circuit in *Thomas v. Metropolitan Life Insurance Company*, 631 F.3d 1153 (2011), concerned the SEC's interpretation of the solely incidental prong. The court agreed with the SEC's interpretation of the prong that is similar to the interpretation outlined in the SEC Release. However, the court was faced with the scope of the broker-dealer exclusion in the context of a private suit alleging that the broker had violated the Act by failing to disclose incentives to sell proprietary products.

However, financial planners present a different factual issue than the *Thomas* court faced. Here, the SEC failed to address financial planners in Regulation Best Interest while acknowledging in 2005 that the preparation of financial plans for customers triggers the Act. The SEC's position codified in the 2005 Rule that broker-dealers who provide advice as part of a financial plan or in connection with financial planning, and holds themselves out providing financial planning, delivers a financial plan, or represents the advice is provided as part of a financial plan or in connection with financial planning will not be exempted from the Act registration requirement. 70 Fed. Reg. 20,454 (April 19, 2005), *vacated on other grounds by Fin. Planning Ass'n*, 482 F.3d at 483.

II. Strong Policy reasons support Petitioners' request to vacate SEC Regulation Best Interest.

The SEC's adoption of Regulation of Best Interest and failure to adopt a uniform standard of care for broker-dealers and investment advisers when providing personalized investment advice to retail customers, as contemplated by Section 913 of Dodd-Frank, implicates several important policy issues for the court's consideration:

First, the SEC action avoiding Section 913(g) of Dodd Frank and proceeding under Section 913(f) of Dodd Frank suggests that the SEC superseded its view on the regulation of broker-dealers and investments and ignored the direction by Congress to develop a uniform fiduciary standard and its staff recommendation in its Section 913 Study to adopt parallel rules under the Act and the Exchange Act establishing a uniform fiduciary standard that is identical to broker-dealers.

Second, the failure of the SEC to impose a fiduciary standard undermines the regulatory regime that Congress established with the Exchange Act and the Act. The SEC treats the Act more narrowly by limiting the definition of an investment adviser with its many protections, including its fiduciary standard of care. A person is now able to play regulatory arbitrage.

For example, a financial planner prepares a comprehensive financial plan that covers insurance, estate planning, securities investments, among other areas. He

charges a fixed fee. He must be registered as an investment adviser to provide the service. He then assists the client in effecting the plan that he does through his related financial services company, including a broker-dealer. The financial planner is a fiduciary to the customer.

A registered representative of a broker-dealer informs the client that he will prepare a financial plan and will not charge you a fee but will be paid commissions on the financial product that he sells to the client in carrying out the financial plan. The registered representative is not a fiduciary.

Under the SEC's Regulation Best Interests, the registered representative can act as a planner but evade the Act.

Third, Regulation Best Interest undercuts retail investors' ability to distinguish between standards of care applicable to various types of financial professionals. Retail investors are entitled to receive investment advice that is in their best interest regardless of whether the advice comes from a broker-dealer or a financial planner.

Regulation Best Interest does not impose a fiduciary duty standard and further fails to define the contours of the 'best interest" standard. Absent a fiduciary standard, investors will continue to be vulnerable and will not receive the protections of the Act.

Fourth, the securities industry practices outpaced federal regulations. Broker-dealers develop new revenue models that the current securities regulatory regime may not have contemplated. Many new complex products such as equity-indexed annuities, master limited partnerships, reverse mortgages, index funds, target-date funds, and many other products contain complex rules, requirements, and fees. Different standards of care, depending on whether an investor receives a recommendation from a broker-dealer or investment adviser, is fundamentally unfair and confusing to the investor. Retail investors deserve a regulatory system this is designed to promote the best interest of investors

CONCLUSION

This Court should find in favor the Petitioners and hold Regulation Best Interest to be unlawful and set it aside under 5 U.S.C. § 706.

Dated this 3rd day of January 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4) because the brief contains 3,596 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

January 3, 2020

/s/ Todd M. Galante, Esq.
Todd M. Galante, Esq.
Counsel for Financial Planning Association

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Todd M. Galante, Esq.
Todd M. Galante, Esq.