

‘Smart Money’ Says 2nd Circuit Won’t Halt SEC Regulation Best Interest, PlanAdvisor, ft. Nancy Hendrickson

Nancy L. Hendrickson, partner in Kaufman Dolowich & Voluck's Chicago office, was quoted in an article written by John Manganaro for PlanAdvisor published October 24, 2019.

Advisory firms waiting to see whether the 2nd Circuit will delay or outright halt the implementation of the SEC's Regulation Best Interest are wasting precious time.

The U.S. District Court for the Southern District of New York several weeks ago dismissed a consolidated lawsuit seeking to derail implementation of the U.S. Securities and Exchange Commission (SEC) Regulation Best Interest (Reg BI) rulemaking package.

Important to note, the case was dismissed due to the Court's self-declared lack of subject matter jurisdiction, and the ruling notes that motions had already been filed by the parties in the appropriate appellate court. In this case, because the Attorney General of New York is leading the litigation, this means the 2nd U.S. Circuit Court of Appeals will have to decide whether to hear the case and what to do about it.

Claims in the consolidated lawsuit, which includes as plaintiffs both private fiduciary advisers as well as a group of prominent State Attorneys General, suggest Reg BI fails to meet the clear demands established by Congress in the Dodd–Frank Act.

Nancy Hendrickson, partner and co-chair of the financial services practice group at Kaufman Dolowich & Voluck, has been following the lawsuit closely, given her role representing clients in connection with SEC investigations, disciplinary actions and enforcement proceedings. Discussing potential outcomes with PLANADVISER, Hendrickson says she was not surprised that the District Court ruled in the way it did, but she was struck by the Court's very brief and direct rejection of the lawsuit.

“The Securities and Exchange Act has a provision in it which it is stated that an aggrieved party that wants to challenge an agency action or order needs to file it in the circuit court of appeals for whatever circuit they reside in,” Hendrickson says. “What was surprising to see was that the District Court read the letters and motions from each parties’ counsel and said flat out, ‘We don’t even need briefs on this jurisdictional issue. We are going to dismiss the case outright in a three page summary decision.’ I don’t think either side was expecting that rapid outcome.”

Now that the case is to be reviewed by the 2nd Circuit, Hendrickson says, this changes the process in a significant way relative to what would have occurred in the District Court.

“With the matter before the 2nd Circuit, this means it is a very different review procedure—essentially it’s no longer a full blown lawsuit at this point,” she explains. “The process in the 2nd Circuit will be much more expedited than a full trial. In the trial court, you would see the creation of a much fuller record and then have the trial, and then the judge renders a decision. Here, the Circuit Court is simply going to use the record that was created in the rulemaking process. There won’t be much more information generated or used.”

As it stands currently, the record before the 2nd Circuit includes some 2,900 exhibits, but more than 2,600 of the exhibits are public comment letters. There are also transcripts of roundtable meetings and similar types of documents.

“That’s the record the plaintiffs are going to have to use in order to build their case,” Hendrickson explains. “The next step in the process is that plaintiffs have to file a brief, and then the SEC will have 90 days or so to respond. Then there could be one more reply from plaintiffs, and then we’ll have the oral arguments. That’s it.”

In her view, right now the “smart money” is on the SEC prevailing—meaning that Reg BI will take effect according to the original timeline.

“If firms are waiting to see how this plays out in the courts, they are likely wasting precious time they could be using to put new processes and procedures in place,” Hendrickson says. “The important compliance date of June 30, 2020, will be here before we know it.”

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