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XY Planning Network Petitions SEC for New Rulemaking On Title Restrictions and “Solely Incidental” Sales Advice

XY Planning Network continues to advocate for the separation of brokers and advisors as it petitions the SEC to implement title reform under Section 208(c)

Bozeman, Mont. (September 20, 2021) — Today, [XY Planning Network \(XYPN\)](#) formally submitted two petitions to revive rulemakings — including one that the U.S. Securities and Exchange Commission abandoned more than a dozen years ago — urging the Commission to modernize the regulation of financial advisors and enhance investor protection.

According to XYPN, in enacting the Investment Advisers Act in 1940, Section 208(c) restricted the use of advisor titles to “investment counselors” registered under the Act, including restrictions on advisory activities by non-registrants. XYPN also urged the Commission to complete its 2007 rulemaking in which the SEC said it would first review a pending study of consumer perceptions towards financial planners and other investment professionals.

Using Google Ngram graphics, XYPN illustrated how popular use of the once common title “investment counselor” peaked around 1940 and then slowly declined during a corresponding rise in the use of “financial advisor” and “financial planner” titles. As a result, stockbrokers (especially dual registrants) and their firms have actively marketed their services — including financial planning — no differently from advisors who operate under a much higher fiduciary standard. Brokers and their firms continue to be subject to a lower sales-oriented regulatory standard that allows broad use of advisor-like titles while continuing to operate a more conflicted, sales-driven implementation model, leading to consumer confusion.

“The entire genesis of the Investment Advisers Act of 1940 was to create a clear separation between the ‘tipsters and touts’ that sold brokerage products, and the bona fide investment adviser,” said Michael Kitces, Executive Chairman and co-founder of XYPN. “Today, we call upon the SEC to modernize this important provision of the Investment Advisers Act, and clarify that firms providing

investment counsel today — even by a different name — are still subject to the limitations of Section 208(c)."

XYPN's second petition filed with the SEC highlights how brokerage firms have increasingly offered financial planning services to consumers — an implicitly advice-centric function — while claiming that their planning advice is solely incidental to their sale of brokerage products. Yet in its 2005 exemption for broker-dealers offering fee-based accounts, the SEC recognized the emergence of financial planning as a distinct profession, providing a depth of services beyond the mere obligation of brokers to know their customers. The 2005 rule, vacated two years later by a federal appeals court for other reasons, had required brokers offering financial planning services to register as investment advisers. XYPN's petition calls on the SEC to complete its original 2007 Rulemaking process.

At their core, XYPN's petitions urge the SEC to:

1. Formally complete its [2007 proposed rule](#) to restrict brokers from marketing themselves as financial planners, offering financial planning services, or delivering a financial plan. Doing so amounts to advice that clearly isn't "solely incidental" to brokerage services, according to XYPN; and
2. Issue rules modernizing interpretation of Section 208(c) of the Advisers Act and clarify what titles and other marketing may constitute "representing as an investment counsel," thereby triggering additional title restrictions under the Act.

Notably, XYPN's petitions do *not* request the Commission to revisit the rulemaking process for Reg BI. Kitces noted that the regulation of brokerage services is outside the scope of financial advice.

"XYPN believes that the SEC's Regulation Best Interest did an excellent job lifting the standard of care for brokers who are delivering brokerage services," Kitces said. "The focus of our petitions for rulemakings is not on changing the standard of care for brokers, but instead clarifying when a broker ceases to act in the capacity of a brokerage salesperson and begins to operate in the capacity of a *bona fide* advisor. This requires clarifying the dividing line between professional advice subject to a fiduciary standard and sales advice attached to product transactions by a broker."

About XY Planning Network:

[XY Planning Network](#) is the leading 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 without product sales or asset minimums. The Network offers a virtual community for new and established financial advisors who want to serve a younger clientele and provides members compliance support services, marketing support, business tools and templates, and a wide range of technology solutions.

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