Four years on and $700,000 in, The Robare Group fights on

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Legal briefs have been filed with the **U.S. Court of Appeals** in Washington in *The Robare Group v. SEC*, the latest installment in a four-year legal battle over whether the Houston-based advisory firm adequately disclosed payments it received from **Fidelity**.

You may recall the **SEC** Enforcement Division in 2012 targeted the firm over its Form ADV brochure that used the word "may" in relation to receiving the custodian's payments. The SEC says **The Robare Group** ($177M in AUM) received $400,000 over nine years, or about 2.5% of its gross revenue. The firm says it wasn't always a lock that it would gain the payments, justifying the use of "may."

An SEC ALJ sided with the firm, tossing the case in 2015 (**IA Watch**, June 9, 2015), only to have the Commission in a 3-0 vote a year later find the firm, CCO **Mark Robare** and his partner and son-in-law **Jack Jones** had "failed adequately to disclose material conflicts of interest" (**IA Watch**, Nov. 8, 2016). However, one commissioner felt no fine should be assessed. The other two dished out $200,000 in fines.

'System is broken'

Winning in the ALJ setting yet losing before the Commission still throws Robare and Jones (**IA Watch**, Jan. 26, 2017). "It would have been more fair if they had to abide by their own judge's decision," says Robare. "The system is broken."

"I don't know how they can ever lose if they can be prosecutor and ultimate referee," adds Jones.

Legal filings make clear the SEC isn't giving an inch. The RIA and Mark "Robare failed to reasonably fulfill their fiduciary duty to fully and fairly disclose all conflicts of interest and thus violated Section 206(2) of the Advisers Act," the SEC argued in court filings submitted last month. "Ample evidence supports the Commission's finding that petitioners acted intentionally, as opposed to involuntarily, in omitting material facts on its Forms ADV."

The SEC had no comment, leaving its legal documents to speak for it.

Jones notes that they prevailed "against long odds" in the ALJ setting yet are forced to fight on because they believe they did nothing wrong. No clients were harmed. They turned to multiple parties, including two compliance consultants to improve their Form ADV disclosures. The firm had no insurance to cover its mounting legal bills of $700,000, Robare states.

In Robare's legal briefs, their attorneys state retaining industry experts to help the adviser with its Form ADV disclosures "is something to be extolled."

The SEC counters that the firm's "alleged reliance" on consultants to craft their Form ADV "does not negate the Commission's negligence finding."

A far-reaching case

A decision in this case carries ramifications for all advisers because the Form ADV brochure is ubiquitous. Many advisers have decided to drop the word "may" in their brochures when tied to revenue sharing (**IA Watch**, May 3, 2018).

At **IA Watch**'s compliance conference in San Francisco Nov. 8, **David Smolen**, GC/CCO at **GI Partners** ($14B in AUM), said he revisits the use of the word in his firm's brochure annually. "If we don't always do something, we'll keep 'may,'" he noted.

A fuzzy standard

The lack of clarity from the SEC on what is the standard with Form ADV disclosures is an issue in the case. Robare's attorneys note a past OCIE exam never questioned the adviser's disclosures. Another time, examiners suggested the firm improve its disclosures "without articulating how that was to be done."

They point to testimony from an SEC expert before the ALJ in which the person said it would be "impossible" to give "specific guidance as to the substance of appropriate disclosures." In addition, they state other documents – including one clients had to sign and date – disclosed the Fidelity payments.

The SEC responds that the adviser only disclosed the agreement in 2011 "after Fidelity threatened to stop paying if it did not."

"They made those arguments in front of the ALJ and we won before the ALJ," says **Heidi VonderHeide**, one of Robare's attorneys and a partner with **Ulmer** in Chicago.

Mark Robare says the SEC's claim is untrue. Fidelity wanted a separate disclosure, which the firm created. He adds the firm revised its disclosures any time its consultants and broker-dealer suggested doing so. The SEC asserts the adviser purposely omitted some of Fidelity's requested disclosure language.

The ALJ system

The case spotlights the SEC's ALJ setting, which has attracted much attention lately and even became the subject of a recent **U.S. Supreme Court** decision (**IA Watch**, June 22, 2018). The SEC states that the "Commission reversed the ALJ because he did not apply the proper legal standard."

Robare's court documents respond that the "ALJ correctly concluded, the applicable standard of care was not self-evident given the 'difficult environment' investment advisers operated in and the 'challenges' even experienced compliance professionals encountered in complying with the evolving Form ADV disclosure requirements."

It could be another year before a panel of three appellate judges decides the case.

Mark Robare says the firm hasn't lost any clients as a result of the case but he wonders how many potential new ones may have been scared away after a **Google** search of the firm.