19-2886(L)

19-2893(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XY PLANNING NETWORK, LLC, FORD FINANCIAL SOLUTIONS, LLC, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF MAINE, DISTRICT OF COLUMBIA, STATE OF NEW MEXICO AND STATE OF OREGON,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, WALTER CLAYTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondents.

On Petitions for Review of a Final Rule of the
Securities and Exchange Commission (File No. S7-07-18)

BRIEF FOR *AMICI CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN COUNCIL OF LIFE INSURERS, AND THE FINANCIAL SERVICES INSTITUTE IN SUPPORT OF RESPONDENTS AND DENIAL OF THE PETITIONS FOR REVIEW

KELLY P. DUNBAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
kelly.dunbar@wilmerhale.com

March 10, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici are associations and organizations representing the interests of broker-dealers and others who rely on broker-dealers for the distribution of securities products to retail investors in the United States. *Amici* have a direct interest in the rule promulgated by the Securities and Exchange Commission ("SEC") that is challenged here—Regulation Best Interest ("Regulation BI").

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers, including local and regional institutions. SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional manager of the Global Financial Markets Association. It regularly files *amicus curiae* briefs in cases raising issues of vital concern to securities industry

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief.

participants. SIFMA actively participated in the rulemaking process leading to the promulgation of the regulation challenged here.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. The Chamber actively participated in the rulemaking process leading to the promulgation of the regulation challenged here.

The American Council of Life Insurers ("ACLI") is the largest life insurance trade association in the United States, representing the interests of hundreds of member companies. ACLI's member companies are the leading providers of financial and retirement security products covering individual and group markets, including life, annuity, disability income, and long-term care insurance products. ACLI's members account for more than 90 percent of the life insurance industry's total assets, premiums, and annuity considerations. Life insurers create and market products and services that fulfill consumers' retirement, estate, tax, and financial

planning needs. These products and services can implicate federal securities laws, including broker-dealer regulation by the SEC and FINRA under the Securities Exchange Act of 1934 and regulation by the SEC under the Investment Advisers Act of 1940. ACLI actively participated in the rulemaking process leading to the promulgation of the regulation challenged here.

The Financial Services Institute ("FSI") was founded in 2004 with a clear mission: to ensure that all individuals have access to competent and affordable financial advice, products, and services delivered by a growing network of independent financial advisers and independent financial services firms. FSI's members are independent broker-dealers and their registered representatives who operate as independent contractors. FSI has over 90 broker-dealer member firms with more than 138,000 affiliated registered representatives who serve more than 14 million American households. FSI also has more than 33,000 independent "financial advisor" members, who are independent contractors of a broker-dealer. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Thus, these financial advisers have a strong incentive to make the long-term achievement of their clients' investment objectives their primary goal. FSI actively participated in the rulemaking process leading to the promulgation of the regulation challenged here.

Because they represent the interests of broker-dealers and those who rely on broker-dealers, *amici* have a substantial interest in and a unique perspective on the issues presented in this case. *Amici* and their members have long supported enhancing the standard of care applicable to broker-dealers when providing personalized investment advice about securities to retail investors. *Amici* and their members, however, have advocated for a principles-based, non-prescriptive approach to regulation that would improve investor protection while ensuring that investors continue to have a choice of and access to brokerage services. *Amici* submit this brief to explain why, from the perspective of *amici* and their members, Regulation BI strikes a reasonable and appropriate balance between enhancing investor protection while preserving retail investor access to investment advice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Brokerage services provided by many of *amici*'s members represent an important, cost-effective means for retail investors in the United States to obtain truthful information about investment options. In providing these services, broker-dealers play an important role in helping U.S. investors execute their strategies, arrange their financial affairs, and plan for retirement. Although circumstances vary, broker-dealers typically provide retail investors transaction-specific recommendations and they often receive compensation on a transaction-specific basis (for example, through commissions). The availability of this "pay as you go"

brokerage model has enabled millions of Americans to help make informed investment decisions.

In contrast to broker-dealers, investment advisers have played a different, but also important role, in helping retail investors make investment decisions. Unlike broker-dealers, investment advisers often provide advisory services to investors in the context of ongoing portfolio management. Reflecting the continuing nature of this arrangement, investment advisers are typically compensated on a fee-basis—often a fee pegged to a percentage of the value of the assets under management. Because of the fee-based nature of compensation, many investment advisers impose certain minimum account requirements that investors must have to obtain advisory services. As a result, investment advisers may not be a realistic option for investors with small- or medium-sized investment balances.

Retail investors have benefited immensely from the ability to choose the service and fee structure for receiving investment advice that best meets their unique needs. Recognizing the different roles that broker-dealers and investment advisers serve in assisting retail investors, federal securities and other laws have long been interpreted to subject broker-dealers and investment advisers to different standards of care when interacting with retail investors: broker-dealers have been governed by a "suitability" standard, while investment advisers have been subject to a "fiduciary" standard. In enacting Dodd-Frank, Congress charged the SEC—

the expert federal agency overseeing the securities laws—with the duty to study various issues relating to the standard of care applicable to broker-dealers and whether that standard ought to be changed, taking into account the costs and benefits of doing so, including potential effects on retail investors that would result from a change in the standard of care. Congress also authorized, but did not require, the SEC to take regulatory action based on the results of its study.

In exercising its authority under Dodd-Frank in issuing Regulation BI and on the basis of a developed administrative record, the SEC promulgated a principles-based, non-prescriptive, and tailored approach to broker-dealer regulation that carefully balances an interest in enhanced investor protection with an equally compelling interest in protecting investor choice in and access to investment advice. The SEC stopped short of imposing the investment adviser fiduciary standard on broker-dealers based on well-founded concerns that the costs and burdens of doing so would compel many broker-dealers to abandon the "pay as you go" brokerage model in favor of a fee-based advisory model—a result that would be profoundly detrimental to retail investors by depriving them of choice and pricing many retail investors out of the market for investment advice.

Dissatisfied with the balance the SEC struck in Regulation BI, petitioners and their *amici* seek to second-guess the SEC's policy judgments. The upshot of their claims is that the SEC should have reflexively applied the fiduciary standard

long applicable to investment advisers to broker-dealers. Those objections are unfounded. Among other things, they uniformly ignore that Regulation BI will in fact accomplish a significant, durable improvement in retail investor protection, while at the same time preserving the brokerage model as a choice for investors, a result that undoubtedly redounds to the benefit of investors. Petitioners offer no persuasive reason for this Court to upset the balance the SEC struck.

The SEC ably defends Regulation BI against petitioners' claims in its brief. *Amici* write separately here to explain why, from the perspective of members of the financial services industries, Regulation BI reflects a rational and appropriate balance of competing interests and why the SEC had statutory authority to enact the tailored approach to broker-dealer regulation that it did.

ARGUMENT

I. REGULATION BI CAREFULLY BALANCES COMPETING STATUTORY INTERESTS AND REFLECTS AN EXERCISE OF EXPERT JUDGMENT THAT IS SUPPORTED BY A SUBSTANTIAL ADMINISTRATIVE RECORD

Regulation BI is the product of a comprehensive, multiyear effort by the SEC to improve investor protection, fairness, and transparency in connection with brokerage services—a goal *amici* and their members have long supported and one that will undoubtedly strengthen U.S. capital markets. At the same time, Regulation BI reflects a calibrated balance of that interest with the equally important goal of ensuring that brokerage services remain a realistic option for

retail investors—especially those investors with small- or medium-sized investment balances—thus preserving access to a range of investment services. The SEC's balancing of these objectives was based on real-world data and well-reasoned analysis. The objections of opponents of Regulation BI, including petitioners and their *amici* here, are unfounded.

A. The SEC Appropriately Structured Regulation BI To Improve Retail Investor Protection

There can be little debate that Regulation BI accomplishes a meaningful, durable improvement in retail investor protection. Claims that the regulation is "circular, vague, and ineffective," State Petitioners' Br. 63, are empty rhetoric, ignoring the scope of the rule and the significant practical enhancements it contains. *Amici* can attest that Regulation BI affects nearly every aspect of a broker-dealer's operations, including business and product strategy, legal, compliance, HR, marketing, technology, management, operations, finance, and risk. *Amici's* members are working full-time to assess the regulation, address conflicts of interest, and implement required compliance measures and disclosures throughout the customer life cycle.

Regulation BI enacts a comprehensive and tailored regulatory regime for broker-dealers when providing recommendations involving securities transactions or investment strategies involving securities to retail investors. Regulation BI "enhances the broker-dealer standard of conduct beyond existing suitability

obligations, and aligns the standard of conduct with retail customers' reasonable expectations." Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,319 (July 12, 2019) (codified at 17 C.F.R. §§ 240.15*l*-1, 240.17a-3, 240.17a-4). The regulation imposes four new, distinct obligations: a Disclosure Obligation; a Care Obligation; a Conflict of Interest Obligation; and a Compliance Obligation. *See id.* at 33,321. These obligations require a broker-dealer to (1) disclose all material facts about the scope and terms of the relationship and all material facts relating to conflicts of interest; (2) exercise diligence, care, and skill, including understanding the risks, rewards, and costs associated with a recommendation; (3) mitigate or in certain instances eliminate the conflict; and (4) establish robust policies and procedures to achieve compliance with Regulation BI in its entirety.[2]

[2] Specifically, the regulation provides that, "when making a recommendation of any securities transaction or investment strategy involving securities" a broker-dealer "shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the [broker-dealer] ahead of the interest of the retail customer." 17 C.F.R. § 240.15*l*-1(a)(1). To act in the customer's "best interest," a broker-dealer must satisfy three primary component duties: (i) "disclos[e] … [a]ll material facts relating to the scope and terms of the relationship with the retail customer"; (ii) "exercise[] reasonable diligence, care, and skill" "in making the recommendation"; and (iii) generally "disclose" or "mitigate" "conflicts of interest associated with such recommendations." *Id.* § 240.15*l*-1(a)(2).

Assertions that this new "best interest" regime is not appropriately structured to protect retail investors are mistaken. For example, glossing over the varied obligations imposed under Regulation BI, petitioners assert the regulation is little more than a disclosure requirement. *See, e.g.*, XY Planning Br. 57 ("Regulation Best Interest relies heavily on the effectiveness of disclosures."). That is not so. While effective disclosure ought to be part of any regulation designed to empower investors to make informed choices, disclosure is only one of *four* core regulatory obligations. As explained, broker-dealers must additionally fulfill the substantive Care Obligation, the Conflict of Interest Obligation, and the Compliance Obligation. Chairman Jay Clayton has repeatedly emphasized that disclosure alone does not satisfy Regulation BI, explaining that the regulation instead requires broker-dealers to establish policies and procedures designed to identify and mitigate conflicts of interest. *See, e.g.*, Clayton, Chairman, SEC, *Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors* (July 8, 2019).[3] Furthermore, in its annual examination priorities document, the SEC's Office of Compliance Inspections and Examinations ("OCIE") has made clear that Regulation BI "cannot be satisfied through disclosure alone." SEC, Office of

[3] *Available at* https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty.

Compliance Inspections and Examinations, *2020 Examination Priorities* 12.[4] Thus, as the SEC itself explains, criticisms that the regulation is a watered-down disclosure regime are pure misdirection. *See* SEC Br. 81-82.

Amicus briefs in support of petitioners repeat the approach of misstating the full scope of Regulation BI. For example, certain members of Congress assert that Regulation BI "does not appear to heighten the standard of care for broker-dealers beyond the standard that already existed under the regulatory scheme in place when Dodd-Frank was enacted[.]" Congressional Amicus Br. 23. That is wrong. Regulation BI adds meaningful new investor protections that enhance both the existing standards and FINRA's suitability rules. *E.g.*, 84 Fed. Reg. at 33,327. Notably, Regulation BI establishes an explicit requirement that recommendations to retail investors must be in the customer's "best interest," not just suitable. Broker-dealers must exercise reasonable "diligence, care and skill" in making recommendations, which holds a broker-dealer accountable for failures of knowledge or skill. And broker-dealers must explicitly consider the cost of a security or strategy in making a recommendation. They must consider "reasonably available alternatives" as part of having a "reasonable basis to believe" that the recommendation is in the best interest of the customer. This package of tailored

[4] *Available at* https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf?mod=article_inline.

obligations readily differentiates the "best interest" standard from suitability rules. *See* SEC Br. 77-78.

Moreover, and also contrary to claims that Regulation BI will be ineffective, the regulation is backed by a robust enforcement regime. OCIE has already indicated that Regulation BI compliance will be one of its top priorities in 2020. *See 2020 Examination Priorities* 12. OCIE explained that there will be no grace period for Regulation BI compliance and that it "intends to assess implementation of the requirements" after the June 30, 2020 compliance date. *Id.*[5] In addition, SEC staff in the Division of Trading and Markets have released answers to frequently asked questions, suggesting that enforcement is on the horizon. *See* SEC, Division of Trading and Markets, *Frequently Asked Questions on Regulation Best Interest*.[6] Similarly, FINRA has made clear in its annual risk monitoring and examination priorities letter that examining firms' compliance with Regulation BI

[5] In addition, OCIE Director Peter Driscoll recently stated that the SEC soon will release risk alerts on Regulation BI, which will outline how the SEC will approach examinations for compliance. *See* Schoeff, Jr., *SEC poised to release guidance on Reg BI implementation this month*, InvestmentNews (March 6, 2020), https://www.investmentnews.com/sec-poised-to-release-guidance-on-reg-bi-implementation-this-month-189555.

[6] *Available at* https://www.sec.gov/tm/faq-regulation-best-interest.

will be a top priority. *See* FINRA, *2020 Risk Monitoring and Examination Priorities Letter*.[7]

In short, Regulation BI establishes a balanced, principles-based regulatory approach that builds on and expands existing regulatory regimes for broker-dealers and that will accomplish a significant change in regulation, all to the benefit of retail investors. The rule's obligations will fully apply on June 30, 2020, and the SEC has made clear that enforcement will be a priority. Given all of this, *amici's* members are devoting overwhelming financial and human resources in creating the infrastructure necessary to come into compliance with Regulation BI, including, for example, through creating new recordkeeping, training, and supervision policies and procedures. *See, e.g.*, Deloitte, *A Firm's Guide to Implementation of Regulation Best Interest and the Form CRS Relationship Summary* (Sept. 27, 2019) (detailing compliance obligations).[8] The picture painted by petitioners and their *amici*—that Regulation BI requires nothing or changes little—are simply rhetorical arguments that overlook this on-the-ground reality.

---

[7] *Available at* https://www.finra.org/rules-guidance/communications-firms/2020-risk-monitoring-and-examination-priorities-letter. FINRA has also issued a checklist to help its members assess new obligations under Regulation BI. *See* FINRA, *Reg BI and Form CRS Firm Checklist*, https://www.finra.org/sites/default/files/2019-10/reg-bi-checklist.pdf; *see also* FINRA, *SEC Regulation Best Interest (Reg BI)*, https://www.finra.org/rules-guidance/key-topics/regulation-best-interest.

[8] *See* https://www.sifma.org/wp-content/uploads/2019/09/SIFMA-Reg-BI-Program-Implementation-Guide.pdf.

B. The SEC Appropriately Structured Regulation BI To Protect Investor Choice

At bottom, petitioners and their *amici's* real complaint with Regulation BI is their policy view that it did not go far enough, and that the SEC should have instead reflexively extended the fiduciary standard applicable to investment advisers to broker-dealers. These policy objections to Regulation BI provide no basis for setting aside the regulation under the Administrative Procedure Act, as the SEC persuasively explains. *See* SEC Br. 70-71. But these objections unvaryingly also overlook that imposing a one-size-fits-all fiduciary standard on broker-dealers would have reduced retail investor access to advice about securities; impaired access to vital information investors need for financial planning, including retirement decisions; and priced many investors out of the market for such advice. Contrary to the one-sided presentation by petitioners, having assembled a robust administrative record, the SEC appropriately weighed and balanced these competing concerns.

In enacting an improved standard of care for broker-dealers, the SEC was faced with balancing many interests. The SEC wanted to improve "retail investor protection" (and it did so, as discussed above), but it also did not want to detrimentally decrease "retail investor access (in terms of choice and cost) to differing types of investment services and products." 84 Fed. Reg. at 33,323. Investors currently enjoy access to a vast market of financial advice and products,

at a range of prices—including those affordable to ordinary retail investors. Although the SEC concluded that reform of broker-dealer regulation was necessary, it recognized that an ill-fitted standard "would risk reducing investor choice and access" and "would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships." *Id*. at 33,322.

The SEC's decision not to impose the investment adviser fiduciary standard on broker-dealers was thus principally based on preserving investor choice. The SEC observed that, under the fiduciary standard long applied to investment advisers, "broker-dealers would face increased compliance costs resulting from having to conform their advice models to a regulatory regime that was not formed for a transaction-based model." 84 Fed. Reg. at 33,464. That "would result in fewer broker-dealers offering transaction-based services to retail customers," *id.* at 33,330, as broker-dealers sought to avoid those compliance costs by shifting to a fee-based advisory model, *id.* at 33,464. Imposing the investment adviser fiduciary duty on broker-dealers, the SEC found, would "significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations." *Id.* at 33,322 & n.31; *see id.* at 33,464-33,465. The SEC determined that imposing that same standard on broker-dealers would be unwise because it would undermine the "important

goal[]" of "preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products." *Id.* at 33,323; *see id.* at 33,463 (same); *id.* at 33,389 (noting "the importance of the brokerage model as a potentially cost-effective option for investors"). This is precisely the type of balancing of costs and benefits that Congress tasked the SEC with undertaking. *E.g.*, Dodd-Frank § 913(c) (requiring SEC to consider "potential impact on retail customers, including the potential impact on access of retail customers to the range of products and services offered by brokers and dealers").

The administrative record amply supported the SEC's analysis. To begin with, the benefits to many investors of the "pay as you go" broker-dealer model are significant and well-established. Empirical data demonstrate that investors select the compensation model (whether commission-based or fee-based) that best suits their needs and trading behavior. *See* NERA Economic Consulting, *Comment on the Department of Labor Proposal and Regulatory Impact Analysis* 6-7 (July 17, 2015) ("NERA Study")[9] (cited at PA2271-2272). For example, investors who expect to trade often may rationally choose fee-based accounts, while those who do not trade often are likely to choose commission-based accounts. *Id.* at 7. In fact, a

[9] *Available at* https://www.sifma.org/wp-content/uploads/2017/05/nera-analysis-comment-on-the-department-of-labor-proposal-and-regulatory-impact-analysis.pdf.

2010 study found that 95% of households hold commission-based accounts, while only 5% of households hold fee-based accounts, *see* Oliver Wyman, SIFMA, *Standard of Care Harmonization: Impact Assessment for SEC* 4 (Oct. 2010) ("OW Study")[10] (cited at PA2272-2273), confirming that investors value access to "pay as you go" models of receiving investment advice.

These data accord with common sense. Retail investors who intend to buy and hold a long-term investment (such as a bond) may conclude that paying a one-time commission to a broker-dealer is more cost effective than paying an ongoing advisory fee to an investment adviser to hold the same investment. Moreover, many investors would be unable to pay for an ongoing fiduciary advisory model. Investors with limited investment assets often do not qualify for advisory accounts because they do not meet account minimums. For example, if an investment adviser has a $25,000 minimum account balance (which is conservative), more than 40% of persons owning retail commission-based accounts would be unable to qualify. *See* NERA Study 9, 12. If a firm has a $50,000 minimum, more than 57% of account-holders would be unable to open fee-based accounts. *Id.* at 9. And if a firm has a $75,000 minimum, two-thirds of account-holders would be left without any professional investment advice. *Id.* If the costs and burdens associated with

[10] *Available at* https://www.sifma.org/wp-content/uploads/2017/05/study-standard-of-care-harmonization-impact-assessment-for-sec.pdf.

maintaining commission-based accounts become too high for broker-dealers (as they would under the investment adviser fiduciary standard), many retail investors would simply lose access to investment advice. *See* PA867-877.

These harms to investors, as the SEC explained, "are not theoretical." 84 Fed. Reg. at 33,322; SEC Br. 73. *Amici* and their members can emphatically attest to that fact. The invalidated Department of Labor fiduciary rule, for example, caused broker-dealers to consider limiting or eliminating brokerage services, requiring investors of modest means to purchase additional services or forego them altogether. 84 Fed. Reg. at 33,322. The SEC pointed to "a number of industry studies" demonstrating that "as a result of the DOL [f]iduciary [r]ule, industry participants had already or were planning to alter services and products available to retail customers." *Id.* n.33. For example, a study conducted by Deloitte found that 53% of study participants eliminated or limited access to brokerage services as part of an approach for complying with the DOL fiduciary rule. *See* Deloitte, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors* 5 (Aug. 9, 2017) ("Deloitte Study")[11] (cited at PA2272). And in numerous other studies, financial professionals reported that they would offer fewer products and take on fewer small accounts as a result

[11] *Available at* https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf.

of the rule. *See, e.g.*, PA867-868. The compliance costs associated with the DOL fiduciary rule would have required many firms to shift to an advisory model, with account minimum requirements—which would in turn price many low- and middle-balance investors out of the market for advice. *See* PA867-877.

The SEC reasonably concluded that this loss of access to investment advice would be harmful. The need for assistance in financial planning, including for retirement, is significant. *See* PA1008 (Wilkerson, ACLI, *Comment on Regulation Best Interest* 8 (Aug. 3, 2018)). And, as the SEC explained, "[a] number of commenters provided academic studies of the benefits that investors may obtain from hiring financial professionals," including overcoming "'investment mistakes.'" 84 Fed. Reg. at 33,425 & nn.1046-1048 (collecting studies). These studies demonstrate that professional financial advice helps investors minimize costly investment mistakes; allocate portfolios in a more diversified manner; minimize taxes; increase savings; and take advantage of economies of scale with respect to the cost of information. *Id.* All of those benefits would be lost to investors who could not afford an advisory model.

In short, Regulation BI meaningfully improves investor protections, but it does so in a manner tailored to protect retail investor access to and choice in investment services. Far from being arbitrary and capricious, the regulation reflects an appropriate consideration of the full costs and benefits of regulatory

action, based on an extensive administrative record. Petitioners and their *amici* may, and undoubtedly would, have struck a different balance, but Congress charged the SEC—the expert federal agency overseeing the securities industry—with striking that balance. The SEC discharged that responsibility in a rational manner.

II. THE SEC HAD THE STATUTORY AUTHORITY TO PROMULGATE REGULATION BI

As the SEC thoroughly explains, the Commission had ample statutory authority to promulgate Regulation BI. *See* SEC Br. 45-70. Resisting that conclusion, petitioners claim that Congress imposed a statutory straightjacket on the SEC: in their view, Congress mandated that the agency impose the investment adviser fiduciary standard on broker-dealers or do nothing at all. Statutory text, structure, and context foreclose that highly implausible interpretation of § 913 of Dodd-Frank.

At least two features of § 913's text and structure dispose of petitioners' statutory claim. To start, § 913(f)—the statutory authority that the SEC invoked in issuing Regulation BI—is both conspicuously broad and discretionary. That subsection provides that "[t]he Commission may," but need not, "commence a rulemaking"; that the SEC should do so "as necessary or appropriate in the public interest and for the protection of retail customers"; and that in any rulemaking, the SEC may "address the legal or regulatory standards of care for brokers, dealers,

investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers." In view of that statutory text, it makes little sense to claim that Congress, having granted the SEC broad, discretionary authority to "address the … standards of care for [broker-dealers]," nonetheless intended to dictate the outcome of the rulemaking by giving the SEC the inflexible authority only to apply the investment adviser fiduciary standard on broker-dealers.

That statutory interpretation makes even less sense read in the context of § 913 as a whole. Section 913(f) also states that, in the discretionary rulemaking described in that subsection, "[t]he Commission shall consider the findings conclusions, and recommendations of the study required under subsection (b)." Section 913(b) in turn charges the SEC with undertaking a comprehensive study of existing regulations of broker-dealers and whether those regulations should be improved. Congress required this study to assess, among other things, the "effectiveness of existing legal or regulatory standards of care" for broker-dealers, § 913(b)(1), and "whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards," § 913(b)(2). Congress also specified numerous considerations the SEC was to take into account, including existing regulations; the potential effects on investors from new regulations; the potential impact of eliminating the broker-dealer exclusion from the Investment Advisers Act; and "any other consideration that the Commission considers necessary and

appropriate in determining whether to conduct a rulemaking." § 913(c). The fact that Congress saw fit to charge the SEC with undertaking such a comprehensive study to inform a rulemaking under § 913(f) shows plainly that Congress did not have a preordained answer to the question of how to regulate broker-dealers in mind. If Congress wanted to make uniform the standards governing broker-dealers and investment advisers, it easily could have done so itself. Instead, it delegated to the SEC the responsibility to examine the issue in depth, analyze a range of issues, and, if in the public interest, promulgate a tailored rule that makes sense.

Against all of that, petitioners and their *amici* argue that the SEC failed to comply with § 913*(g)* of Dodd-Frank, which separately authorizes the SEC to adopt for broker-dealers the same conduct standard applied to investment advisers. That reads too much into too little. Although Congress certainly gave the SEC the *authority* in § 913(g) to make those standards uniform, Congress did not *mandate* that result. The text of § 913(g) is permissive, not mandatory, *see* § 913(g) ("may promulgate rules"), and nothing in § 913(g) limits the authority delegated under § 913(f). Moreover, the notion that Congress intended to tie the SEC's hands with a binary choice (no regulation or a uniform investment adviser fiduciary standard) is an implausible understanding of Congress's intent given the text and structure of § 913, as explained above and in the SEC's brief.

A small number of Congressional *amici* take a different position, Congressional Amicus Br. 4, but any reliance on those views would be doubly flawed. For one thing, after-the-fact statements by a small numbers of legislators should be entitled to no interpretive weight, particularly when the text and structure of § 913 are clear. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote"); SEC Br. 56 n.6.

In any event, former Congressman Frank (a signatory to the *amicus* brief here) previously expressed his view that § 913 was *not* a directive to the SEC to adopt uniform standards of conduct. In a 2011 letter to the SEC, Congressman Frank stated § 913 "recognizes some of the differences between broker-dealers and investment advisors, particularly with respect to the receipt of commission income and the fact that many broker-dealers do not continually provide advice to their customers." Letter from Barney Frank, Ranking Member, House Committee on Financial Services, to Mary Schapiro, Chairwoman of the U.S. Securities and Exchange Commission (May 31, 2011).[12] The Congressman explained, consistent with the SEC's position now, that "[i]f Congress intended the SEC to simply copy the '40 Act and apply it to broker-dealers, it would have simply repealed the

[12] *Available at* https://tinyurl.com/ryr3dvo.

broker-dealer exemption – an approach Congress considered but rejected." *Id.* He emphasized that "[t]he new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisors." *Id.* That is precisely what the SEC did in promulgating Regulation BI.

To sum up: § 913 of Dodd-Frank delegates to the SEC the authority to improve the standard of care applicable to broker-dealers. But Congress did not mandate a uniform fiduciary standard. Also, despite the claims by the petitioners and their *amici*, it did not require that, if the SEC acts at all, its only choice is to impose the investment adviser fiduciary duty on broker-dealers. The SEC has decades of experience regulating broker-dealers and investment advisers. Congress sought to take advantage of that deep expertise by requiring the SEC to study issues surrounding the regulation of broker-dealers but by leaving the agency the flexibility to weigh the costs and benefits of action and to determine if—and what type of—new regulation was necessary. Regulation BI is just the type of tailored regime Congress contemplated under § 913(f) and it is within the SEC's statutory authority under that provision of Dodd-Frank.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

/s/ Kelly P. Dunbar

KELLY P. DUNBAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
kelly.dunbar@wilmerhale.com

March 10, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(g) and 2d Cir. Local Rules 29.1(c) & 32.1(a)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,256 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Kelly P. Dunbar
KELLY P. DUNBAR