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 and 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

BRIEF FOR THE RESPONDENTS

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
Senior Litigation Counsel

DANIEL E. MATRO
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-8248 (Matro)

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BRIEF FOR THE RESPONDENTS

INTRODUCTION

Retail investors seek advice about investments from two types of firms regulated by the Securities and Exchange Commission—broker-dealers and investment advisers. Broker-dealers typically make recommendations as part of their business of effecting securities transactions for which they charge a commission. Investment advisers typically offer ongoing advice for a fee based on a percentage of the assets managed. Investors are able to choose the service and fee structure that suits their needs—when seeking advice about a bond they plan to hold for years, investors may prefer to pay broker-dealers one-time commissions rather than paying advisers recurring fees for ongoing relationships.

Dating back to the enactment of the Investment Advisers Act of 1940, Congress has differentiated between broker-dealers and investment advisers even though both give investment advice. The standards of care they owe to investors when providing advice have developed separately and reflect the differences in services they offer and how investors typically pay for them. Broker-dealers have been subject to a "suitability" standard derived from multiple sources. Investment advisers owe a fiduciary duty, implied from statute by the Supreme Court, which governs the entire, ongoing advisory relationship, including when advisers have discretionary authority over a client's account. Like many principal-agent relationships, the relationship between a retail investor and one who gives advice—be it a broker-dealer or an investment adviser—is subject to conflicts of interest that can affect the advice given, including conflicts that may result from the terms of compensation.

Acting pursuant to express delegations of rulemaking authority, the Commission adopted Regulation Best Interest, 17 C.F.R. 240.15*l*-1, to codify and enhance protections for retail customers from harms related to conflicts of interest. Regulation Best Interest mandates that a broker-dealer making a recommendation of any securities transaction or investment strategy involving securities act in the retail customer's best interest and not place its interests ahead of the customer's. To satisfy this requirement, a broker-dealer must comply with four obligations—disclosure, care, conflict of interest, and compliance. The Commission tailored the standard to how

broker-dealers function—the form of advice they give (typically episodic), the fees they charge (typically transaction-based), and the conflicts that may arise in connection with their recommendations (*e.g.*, incentives to sell higher-commission products or to recommend more frequent transactions). Regulation Best Interest aligns with key principles underlying the fiduciary duty owed by investment advisers, which evolved to fit the services and fee arrangements they offer. But the Commission did not engage in a blunt and wholesale importation of that fiduciary duty because of the distinction between broker-dealers and investment advisers, including the differences between transaction-specific advice and an ongoing advisory relationship and between their typical compensation arrangements.

Two sets of petitioners—(1) a group of seven states and the District of Columbia (collectively, the States) and (2) an organization of financial planners and one of its members (collectively, XYPN)—challenge Regulation Best Interest, even though they are not regulated by the rule. They lack Article III standing, which deprives this Court of subject-matter jurisdiction. But even if they had standing, their argument that the Commission exceeded its statutory authority disregards the text of Dodd-Frank, which gave the Commission express, but discretionary, power to adopt a rule imposing a standard of care for broker-dealers. Petitioners also claim that the Commission acted arbitrarily and capriciously, but they barely engage with the rule's text, how the rule functions, or the Commission's rationale, all of which demonstrate that the Commission assessed multiple viewpoints and promulgated a standard of

conduct tailored to broker-dealers that will enhance protections for investors against potential harms caused by conflicts of interest while preserving investors' ability to choose the type of relationship and fee arrangement that best suits them.

Ultimately, petitioners offer only policy arguments that never find a legal hook. They believe that Congress *should have* subjected broker-dealers and investment advisers to the same standard—by applying to broker-dealers the fiduciary standard that has been tailored to investment advisers; by creating a new uniform standard, despite the differences in services and compensation structures; or by requiring that all financial professionals that provide advice register as investment advisers. But Congress chose none of those paths. Instead, Congress directed the Commission to evaluate multiple alternatives and gave the Commission broad authority to balance investor protection with access to services, which it reasonably exercised in adopting Regulation Best Interest.

COUNTERSTATEMENT OF JURISDICTION

The Commission adopted Regulation Best Interest pursuant to numerous provisions of the Securities Exchange Act of 1934 (Exchange Act), including Sections 15(c)(6) and 17, 15 U.S.C. 78o(c)(6), 78q. Under Section 25(b)(1) of the Exchange Act, a person challenging a Commission rule promulgated under the listed provisions, which include Sections 15(c)(6) and 17, must seek review in the court of appeals. 15 U.S.C. 78y(b)(1). When Congress enacts a "specific grant of statutory jurisdiction to the court of appeals" to review rulemaking, that jurisdiction is exclusive. *NRDC v.*

Abraham, 355 F.3d 179, 194 (2d Cir. 2004); *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332-33 (D.C. Cir. 2013) (discussing Section 25(b)(1)).[1]

Jurisdiction lies exclusively in this Court because the Commission adopted Regulation Best Interest pursuant to provisions listed in Section 25(b)(1). *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33318, 33407 (July 12, 2019) (*Adopting Release*) (SA174).[2] Section 17(a) authorizes the Commission to make rules regarding the "mak[ing] and keep[ing]" of "records," and it provides authority for two of Regulation Best Interest's four component parts, as well as other parts of the rule. *E.g., id.* at SA31, 51, 68, 80-83. Section 15(c)(6), in turn, authorizes the Commission to prescribe rules for broker-dealers relating to payments for transactions, transfers of securities, and account closings, all of which play a role in Regulation Best Interest. *E.g.*, *id.* at SA56 (requiring consideration of "costs associated with the purchase of the security" and "the future sale or exchange of the security."); *id.* at SA19 (covering "recommendations to roll over or transfer assets" between accounts); *id.* at SA37-39 (requiring disclosure of material fees and costs).

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[1] Petitioners also challenged Regulation Best Interest in district court, which properly dismissed for lack of jurisdiction in favor of review here. *New York et al. v. SEC*, No. 1:19-cv-8365 (S.D.N.Y., filed Sep. 9, 2019); *XY Planning Network, LLC et al. v. SEC*, No. 1:19-cv-8415 (S.D.N.Y., filed Sep. 10, 2019).

[2] "SA__" refers to petitioners' Special Appendix, and "PA__" to the Petitioners' Appendix. "States Br. __" refers to the States' opening brief, and "States Add. __" refers to its addendum. "XYPN Br. __" refers to XYPN's opening brief, and "XYPN Add. __" refers to its addendum.

The Commission adopted a "substantial part" of the rule pursuant to these sections, and its reliance on additional provisions does not alter this Court's jurisdiction. *Comm. to Stop Airport Expansion v. FAA*, 320 F.3d 285, 290-91 (2d Cir. 2003); *Sutton v. Dep't of Transp.*, 38 F.3d 621, 625 (2d Cir. 1994); *Ruud v. Dep't of Labor*, 347 F.3d 1086, 1088 (9th Cir. 2003) (citing cases). And, to the extent, there is any uncertainty, it should be resolved in favor of appellate review. *Abraham*, 355 F.3d at 193; *see also N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1133 (D.C. Cir. 2015) ("[If] a direct review provision's applicability to an agency action is ambiguous, we presume that Congress intended to locate jurisdiction in the courts of appeals") (quotation omitted).

The Commission adopted Regulation Best Interest on June 5, 2019, in a meeting open to the public, and posted the rule on its website that day. Publication in the Federal Register occurred on July 12, 2019. The States and XYPN filed their petitions for review on September 9 and 10, 2019, respectively, within sixty days of publication in the Federal Register. The Exchange Act requires a petition to be filed "within sixty days after the promulgation of the rule." 15 U.S.C. 78y(b)(1); *see Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 245 (D.C. Cir. 2003). This Court has looked to the dictionary definition of "promulgate"—"'to make public'"—which it understood to mean, in a pre-Internet era, the date of Federal Register publication. *United Techs. Corp. v. OSHA*, 836 F.2d 52, 54 (2d Cir. 1987). To the extent that Federal Register publication is the date of "promulgation," the petitions for review are timely.

The petitions should nonetheless be dismissed for lack of jurisdiction because both the States and XYPN fail to establish standing. *See supra* Part I.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the petitions for review should be dismissed because petitioners lack standing.

2. Whether the Commission's adoption of Regulation Best Interest was a permissible exercise of its statutory authority.

3. Whether the Commission acted reasonably when it adopted an enhanced standard of conduct tailored to the services and fee arrangements offered by broker-dealers, explained its decision not to impose a fiduciary duty on broker-dealers, and considered the economic effects of Regulation Best Interest.

COUNTERSTATEMENT OF THE CASE

A. Retail investors obtain advice from broker-dealers and investment advisers, which have owed different duties to their customers and clients.

Retail investors seeking help with their investments often turn to a broker-dealer or an investment adviser. Both provide personalized investment advice but usually offer different services under different fee arrangements.

1. Broker-dealers effect transactions for customers, which may include making recommendations.

A broker-dealer engages "in the business of effecting transactions in securities for the account of others" (broker) and "buying and selling securities * * * for [its] own account" (dealer). 15 U.S.C. 78c(a)(4)(A), 78c(a)(5)(A). Under the Exchange

Act, broker-dealers must register with the Commission and comply with the rules of a self-regulatory organization (SRO) of which it is a member, generally the Financial Industry Regulatory Authority (FINRA). 15 U.S.C. 78o(b)(8). FINRA, in turn, creates and enforces rules under the Commission's "oversight." *Standard Inv. Chartered, Inc. v. NASD*, 560 F.3d 118, 119 (2d Cir. 2009) (quotation omitted).

Broker-dealers generally offer a pay-as-you go fee arrangement, charging a commission or other transaction-based fee. Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers*, PA341-44 (Jan. 2011) (*913 Study*); *SEC v. Feng*, 935 F.3d 721, 732 (9th Cir. 2019) (a factor in assessing if a firm or person is a broker is receipt of "transaction-based income such as commissions"). As part of these episodic services, broker-dealers may also make recommendations—a form of advice they have been providing since before the federal securities laws were enacted. *See Certain Broker-Dealers Deemed Not To Be Investment Advisers*, 70 Fed. Reg. 20424, 20428 (Apr. 19, 2005) (*2005 Rule*), *vacated on other grounds by Fin. Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (*FPA*). Indeed, "the giving of advice is an unexceptional feature of the broker-client relationship." *de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1307 (2d Cir. 2002).

Before Regulation Best Interest, no single Commission rule described the standard of care broker-dealers owe when providing recommendations as part of their brokerage business. The primary standard—known as "suitability"—derives from statutory antifraud provisions, FINRA rules, and Commission precedent. *See Adopting*

Release, SA101-02; FINRA Rule 2010. Suitability requires a broker-dealer to have a reasonable basis to believe that a recommendation is suitable for at least some retail customers and is suitable for the particular customer given that customer's investment profile. *Regulation Best Interest*, 83 Fed. Reg. 21574, 21640 (May 9, 2018) (*Proposing Release*) (PA67). A broker-dealer with control over an account must also have a reasonable basis to believe that a series of transactions, even if suitable in isolation, is not excessive or unsuitable. *Id.*

Broker-dealers are subject to antifraud provisions, which prohibit false or misleading statements and omissions, 15 U.S.C. 78j(b), 78o(c), and which generally impose on broker-dealers a duty to give honest and complete information to customers and to disclose material conflicts of interest of which they are aware. *Proposing Release*, PA26 & nn.175-176, PA67; *de Kwiatkowski*, 306 F.3d at 1302. Broker-dealers also have a duty to seek best execution of customer orders. *Adopting Release*, SA56 n.565. These duties "ordinarily end after each transaction is done"—reflecting the episodic nature of the service, broker-dealers do not ordinarily have a "duty to monitor" accounts or "to give advice to [customers] on an ongoing basis." *de Kwiatkowski*, 306 F.3d at 1302.

2. Investment advisers offer ongoing advisory relationships with retail clients.

Under the Advisers Act, an investment adviser is a person who, "for compensation, engages in the business of advising others" about "the value of

securities" or "the advisability of investing in, purchasing, or selling securities." 15 U.S.C. 80b-2(a)(11). The "basic function" of an investment adviser is "furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 187 (1963) (quotation omitted). Advisers frequently exercise discretion over their clients' accounts—for these accounts, which represent over ninety percent of all assets under management, advisers have the power to make specific investment decisions, without the client's consent, on a continuous basis. *913 Study*, PA340. Investment advisers serve a variety of clients, running the gamut from retail investors to large institutional clients like investment companies (*e.g.*, mutual funds) and pension funds. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33669, 33671 (July 12, 2019) (*Fiduciary Interpretation*) (PA290); *913 Study*, PA339-40. Most advisers (about ninety-five percent) charge recurring fees based on a percentage of assets under management, while a minority charge hourly or fixed rates. *913 Study*, PA340.

Congress excluded from the definition of "investment adviser"—and the requirements of the Advisers Act—firms that offer advice as part of their regular business, such as lawyers. 15 U.S.C. § 80b-2(a)(11)(B). Congress also excluded broker-dealers who provide investment advice "solely incidental to the conduct of [their] business as a broker or dealer and who receive[] no special compensation

therefor." 15 U.S.C. 80b-2(a)(11)(C).[3] This exclusion reflects the fact that, prior to 1940, broker-dealers "commonly give a certain amount of advice to their customers in the course of their regular business." *Opinion of General Counsel*, 11 Fed. Reg. 10996, 10996 (Sept. 27, 1946) (reprinting SEC General Counsel opinion letter of Oct. 28, 1940); *accord* Report on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong., 2d Sess., at 3-5 (1939) (Investment Counsel Report) (broker-dealers offered "investment advice to their clients" as "ancillary to their regular business or profession," and the "availability of such service to investors" encouraged them "to patronize particular brokers").

Firms not excluded from the definition are investment advisers that must register with the Commission and comply with numerous laws and regulations relating to recordkeeping, supervision, disclosure, and other matters (unless they are precluded from registering because they are smaller advisers regulated at the state level or they otherwise qualify for a registration exemption). 15 U.S.C. 80b-3(a), 80b-3a; *913 Study*, PA349-79. They are also subject to Section 206—the Advisers Act's primary

[3] On the same day it adopted Regulation Best Interest, the Commission separately issued an interpretation of the "solely incidental to" prong, which confirmed that a broker-dealer satisfies the prong if the advice is provided "in connection with and is reasonably related to the broker-dealer's primary business of effecting securities transactions." *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, 84 Fed. Reg. 33681, 33685 (July 12, 2019) (*Solely Incidental Interpretation*) (PA305).

antifraud provision, which prohibits them from "employ[ing] any device, scheme, or artifice to defraud any client or prospective client," and from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. 80b-6(1)-(2).

The Supreme Court has held that Section 206 imposes a fiduciary duty on investment advisers. *Capital Gains*, 375 U.S. at 191-92; *Transamerica Mortgage Advisors, Ins. v. Lewis*, 444 U.S. 11, 17 (1979). There is no fiduciary duty rule or regulation—its contours have developed through judicial precedent and Commission action. *Fiduciary Interpretation*, PA288, 290 (release issued the same day as Regulation Best Interest, reaffirming and clarifying the Commission's interpretation of the fiduciary duty under the Advisers Act); *913 Study*, PA323, 354-55. A broker-dealer's obligations are generally "limited to matters relevant to affairs entrusted to [it]." *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 536 (2d Cir. 1999) (quotation omitted). By contrast, an investment-adviser fiduciary duty applies to the entire, ongoing relationship. *Fiduciary Interpretation*, PA289; *913 Study*, PA355-56. Advisers have "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading [their] clients." *Capital Gains*, 375 U.S. at 194 (quotation omitted).

This investment-adviser fiduciary duty comprises a duty of care and a duty of loyalty. *See 913 Study*, PA355; *Fiduciary Interpretation*, PA290. The duty of care includes, among other things, duties (i) to provide advice in the best interest of the

client, (ii) to seek best execution of a client's transactions, and (iii) to provide advice and monitoring over the course of the relationship. *See 913 Study*, PA355, 361-62; *Fiduciary Interpretation*, PA290-94. The duty of loyalty requires that an adviser not place its own interests ahead of its client's interests. *913 Study*, PA355, 445; *Fiduciary Interpretation*, PA294. An adviser must make full and fair disclosure of material facts relating to the relationship, and must eliminate or disclose "all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which [is] not disinterested." *Capital Gains*, 375 U.S. at 191-92, 200; *see 913 Study*, PA323, 355-57. Failure to disclose a financial interest in advice provided to clients constitutes a breach of fiduciary duty. *913 Study*, PA323, 357; *see also, e.g.*, *Capital Gains*, 375 U.S. at 201 (failure to disclose practice of recommending securities the adviser recently purchased and then trading on the price increase); *Robare Grp., Ltd. v. SEC*, 922 F.3d 468, 477 (D.C. Cir. 2019) (failure to disclose payments received for recommending certain funds).

3. Retail investors can choose between firms depending on the services they want and how they want to pay for them.

Retail investors have access to an array of investment services. More than 3,700 Commission-registered broker-dealers serve over 140 million customer accounts, most of which belong to retail investors. *Adopting Release*, SA90. More than 13,000 Commission-registered investment advisers manage over $84 trillion in assets, although retail investors' assets account for only thirteen percent of the total. *Id.* at

SA93. Many firms offer both brokerage and investment advisory services and are dually registered with the Commission. *Id.* at SA90, 93; *913 Study*, PA345. Approximately fifteen percent of registered broker-dealers are also registered as investment advisers, while over half are affiliated with an investment adviser. *Adopting Release*, SA89-90 & n.893. And sixty percent of registered financial professionals (*i.e.*, natural persons who work for firms) are employed by dually registered entities. *Id.* at SA97.

Investors may choose how they obtain investment advice based on how they want to pay for it. Some investors may wish to pay as they go—to pay a commission corresponding to a transaction. *See 913 Study*, PA346, 484-85; *Adopting Release*, SA2, 84; *see also Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 368 (5th Cir. 2018) ("millions" of investors with small accounts "prefer commission-based fees because they engage in few annual trading transactions"). Investors may choose this option because they cannot afford to pay investment advisers' fees or meet account minimums often imposed by advisers. *Adopting Release*, SA2, 84. Other investors, however, may prefer to pay an asset-based fee for ongoing advice and monitoring, including discretionary investment management. *See id.* at SA66.

B. Dodd-Frank gave the Commission discretion to adopt rules establishing a standard of care for broker-dealers.

1. Congress gave the Commission two rulemaking paths.

Congress addressed standards of care as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1824 (2010) (Dodd-Frank) (SA176-82). Section 913 contains two grants of authority for the Commission to promulgate rules creating standards of care for broker-dealers when they make recommendations to retail customers. Neither mandates that the Commission engage in any rulemaking.

The first grant of authority—Section 913(f)—is entitled "Rulemaking" and states that the Commission "*may* commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to 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 for providing personalized investment advice about securities" to retail customers. *Id.* § 913(f), codified at 15 U.S.C. 78o notes (SA179-80) (emphasis added). Congress authorized the Commission to make a rule after first completing a study, mandated by Section 913(b), to evaluate "the effectiveness of existing" standards of care and "whether there are legal or regulatory gaps" in those standards. Dodd-Frank, § 913(b) (SA176). Congress itemized what the Commission had to study, including the effect of

imposing a fiduciary duty on access to broker-dealer services. *Id.* § 913(c)(1)-(13) (SA177-79). The last paragraph of Section 913(c) directs the Commission to address "any other consideration that the Commission considers necessary and appropriate in determining whether to conduct a rulemaking under subsection (f)." *Id.* § 913(c)(14) (SA179). If the Commission conducted a rulemaking under Section 913(f), Congress stated that the Commission "shall consider the findings[,] conclusions, and recommendations of the study." *Id.* § 913(f) (SA180).

The second grant of discretionary rulemaking authority—Section 913(g)—is entitled "authority to establish a fiduciary duty for brokers and dealers," and states that "[n]otwithstanding any other provision of this Act or the [Advisers Act]," the Commission "*may* promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under Section 211 of the [Advisers Act]." *Id.* § 913(g)(1) (SA180) (emphasis added). Section 913(g)(2), in turn, amends Section 211 of the Advisers Act and states that the Commission "*may* promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers * * * shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser

providing the advice." *Id.* § 913(g)(2) (SA180) (emphasis added). Section 913(g) states that if the Commission uses this path to promulgate "[s]uch rules," they "shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of this Act when providing personalized investment advice about securities." *Id.* (SA180-81).

2. The Commission staff issued the Section 913 Study.

The study required by Section 913(b) was issued in January 2011. *913 Study*, PA322 (stating that the study reflects the views of the Commission staff, not the Commission or the Commissioners, two of whom expressed concern about the adverse effect a uniform fiduciary standard could have on investor choice); *see* SEC Commissioners Kathleen L. Casey and Troy A. Paredes, *Statement Regarding Study on Investment Advisers and Broker Dealers* (Jan. 21, 2011), *available at* https://www.sec.gov/news/speech/2011/spch012211klctap.htm. The staff concluded that retail investors should have "the same or substantially similar protections when obtaining the same or substantially similar services from investment advisers and broker-dealers." *Id.* at PA328. The staff recommended that the Commission exercise its authority under Section 913(g) to adopt a "uniform fiduciary standard of conduct." *Id.* at PA442-43.

The staff recognized that a uniform fiduciary standard could take many forms and that the Commission would have to "specify" its parameters through rulemaking and guidance. *Id.* at PA43-45. The staff stressed that, in shaping such a standard, the

Commission should ensure that retail investors "continue to have access to the various fee structures, account options, and types of advice that investment advisers and broker-dealers provide." *Id.* at PA434; *see also id.* at PA446 ("[I]mplementation of the uniform fiduciary standard should preserve investor choice."). In particular, the staff acknowledged that it may be appropriate to impose different requirements on broker-dealers and investment advisers with respect to how they comply with a uniform fiduciary standard. *Id.* at PA451-53.

3. The Department of Labor adopted a fiduciary rule, which affected the market before being struck down.

A 2016 rule adopted by the Department of Labor played a role in the Commission's rulemaking process. The DOL Rule effectively imposed a type of fiduciary duty on broker-dealers when providing advice to retirement plan participants and individual retirement account (IRA) holders. *See Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946 (Apr. 8, 2016). The rule also affected the ability of broker-dealers to receive transaction-based compensation or engage in principal trades in connection with retirement plans or IRAs. *Adopting Release*, SA5 n.32.

In March 2018, the Fifth Circuit vacated the DOL Rule before it fully went into effect. *Chamber of Commerce*, 885 F.3d 360. The court observed that the partially implemented rule "spawned significant market consequences, including the withdrawal of several major companies, including Metlife, AIG and Merrill Lynch

from some segments of the brokerage and retirement investor market," and that other companies "limited the investment products that can be sold to retirement investors." *Id.* at 368. The Court stated that if the rule remained in effect "[i]t is likely that many financial service providers will exit the market for retirement investors rather than accept the new regulatory regime." *Id.*

C. The Commission adopted Regulation Best Interest in June 2019.

1. The Proposed Rule

In April 2018, the Commission proposed a rule to enhance the standard of conduct for broker-dealers. *Proposing Release*, PA2. The Commission proposed establishing an express best-interest obligation that requires all broker-dealers, when making a recommendation of any securities transaction or investment strategy to a retail customer, to 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 retail customer. *Id.* The Commission received over 6,000 comment letters, held seven investor roundtables, and received input from its Investor Advisory Committee. *Adopting Release*, PA3 & n. 14. A number of commenters cautioned that a uniform fiduciary standard would cause broker-dealers to limit or eliminate services, reducing investor access to brokerage services. *E.g.*, SIFMA Letter (Aug. 7, 2018), at PA2228-31; Ctr. for Capital Mkts. Competitiveness Letter (Aug. 7, 2018), at PA1742-44, 1745-47; Nat'l Ass'n of Ins. & Fin. Advisors Letter (Aug. 2, 2018), at PA948, 952-53, 960.

2. The Final Rule

The Commission voted to adopt Regulation Best Interest in June 2019. *Adopting Release*, SA3. The Commission retained the overall structure of the proposed rule but modified the text and provided guidance in response to comments. *Id.* The Commission found that Regulation Best Interest "appropriately balances the concerns of the various commenters in a way that will best achieve the Commission's important goals of enhancing retail investor protection and decision making, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products." *Id.* at SA6. The Commission set a compliance date of June 30, 2020. *Id.* at SA83.

a. Regulation Best Interest codifies a best interest standard applicable to a broader range of recommendations.

Regulation Best Interest enhances the broker-dealer standard of conduct beyond suitability, reducing the risk that retail investors will be harmed by conflicted advice. *Id.* at SA3. It codifies a standard in a Commission rule for the first time. *Id.* at SA101-02. Regulation Best Interest applies this enhanced standard to a broader range of recommendations, including certain implicit hold recommendations, account-type recommendations (*e.g.*, brokerage or advisory), and recommendations to roll over assets from a workplace retirement plan to an IRA. *Id.* at SA10, 129.

Regulation Best Interest applies to "broker-dealer recommendations of any securities transaction or investment strategy involving securities to a retail customer."

Id. at SA18 (generally using the term "broker-dealer" to mean both a firm and natural persons associated with the firm). The text of the rule—which petitioners barely discuss—provides that a broker-dealer "shall act in the best interest of the retail customer at the time the recommendation is made, without placing [its own interests] ahead of the interest of the retail customer." 17 C.F.R. 240.15*l*-1(a)(1). Broker-dealers can satisfy this general obligation *only* by complying with four component obligations: the Disclosure, Care, Conflict of Interest, and Compliance Obligations. *Id.* 240.15*l*-1(a)(2). In formulating these obligations, the Commission drew upon key principles underlying the fiduciary duties of care and loyalty owed by investment advisers and aligned those duties with the broker-dealer business and the regulatory regime governing it at the time a recommendation is made. *Adopting Release*, SA13, 16.

i. The Disclosure Obligation

The Disclosure Obligation requires that a broker-dealer provide, before or at the time of a recommendation, full and fair disclosure of all material facts about the scope and terms of its relationship with the customer. 17 C.F.R. 240.15*l*-1(a)(2)(i). This includes a disclosure that the broker-dealer is acting in a broker-dealer capacity, the material fees and costs the customer will incur, and the type and scope of the services to be provided. *Id.* 240.15*l*-1(a)(2)(i)(A); *Adopting Release*, SA33-42. A broker-dealer must also provide full and fair disclosure of all material facts relating to conflicts of interest associated with the recommendation that might incline the

broker-dealer to make a recommendation that is not disinterested. *Id.* 240.15*l*-1(a)(2)(i)(B); *Adopting Release*, SA44-47.

The "full and fair disclosure" standard "closely align[s]" with the disclosure requirement for investment advisers. *Id.* at SA48; *see also 913 Study*, PA355-57, 445-46. But the Commission tailored the Disclosure Obligation to the episodic nature of the brokerage relationship. *Adopting Release*, SA48. For example, while investment advisers must disclose all material facts relating to the entire relationship, Regulation Best Interest requires disclosure of material facts relating to the scope and terms of the relationship and to conflicts associated with particular recommendations. *Id.* The Disclosure Obligation is tailored to a broker-dealer's episodic relationship with a retail customer because it is triggered by, and must be satisfied, before or at the time of a specific recommendation. *Id.*

Concurrently with Regulation Best Interest, the Commission adopted a rule, which petitioners have not challenged, that requires broker-dealers *and* investment advisers to deliver a Relationship Summary to retail investors. *Form CRS Relationship Summary; Amendments to Form ADV*, 84 Fed. Reg. 33492 (July 12, 2019) ("*Form CRS*") (PA110). The Relationship Summary distinguishes between these two types of financial professionals, providing information about, *inter alia*, the services offered, the costs of those services, the duties owed, and specific conflicts of interest. *Id.* at PA111. The Relationship Summary and the Disclosure Obligation complement one another—the former provides an "initial layer of disclosure" summarizing the

differences between broker-dealers and investment advisers; the latter provides "more specific and additional, detailed layers of disclosure" regarding the broker-dealer and its specific recommendation. *Adopting Release*, SA30. This layered approach "will increase the likelihood that retail customers understand the nature of their relationship with a broker-dealer or financial professional, and hence how this relationship might affect the recommendations retail customers receive." *Id.* at SA30, 122.

ii. The Care Obligation

The Care Obligation requires that a broker-dealer exercise reasonable diligence, care, and skill when making a recommendation. 17 C.F.R. 240.15*l*-1(a)(2)(ii); *Adopting Release*, SA55-57. The broker-dealer must understand the risks, rewards, and costs associated with the recommendation. 17 C.F.R. 240.15*l*-1(a)(2)(ii)(A). And given those risks, rewards, and costs, the broker-dealer must have a reasonable basis to believe (1) that the recommendation could be in the best interest of at least some retail customers and (2) that, in light of a particular customer's investment profile, the recommendation is in the particular customer's best interest and does not place the broker-dealer's interest ahead of the customer's interest. *Id.* 240.15*l*-1(a)(2)(ii)(A)-(B). If recommending a series of transactions, the broker-dealer must have a reasonable basis to believe that the transactions together are not excessive, even if each is in the customer's best interest when viewed in isolation. *Id.* 240.15*l*-1(a)(2)(ii)(C). The Care Obligation is "substantially similar" to the duty of care under the investment-adviser

fiduciary standard. *Adopting Release*, SA13; *compare Fiduciary Interpretation*, PA291-94 (describing advisers' duty of care); *913 Study*, PA360-61, 453-54.

The Care Obligation "significantly enhances" investor protection as compared to suitability. *Adopting Release*, SA57. Among other things, it expressly requires: that broker-dealers have a reasonable basis to believe that their recommendations are in the best interest of the retail customer; that broker-dealers consider costs when making a recommendation; and that a series of transactions taken together not be excessive, irrespective of whether a broker-dealer exercises control over a customer's account. *Id.* The Care Obligation also expands the scope of coverage—it extends to implicit hold recommendations and account recommendations not previously covered under suitability. *Id.* at SA8, 57.

iii. The Conflict of Interest Obligation

The Conflict of Interest Obligation requires that a broker-dealer establish, maintain, and enforce written policies and procedures reasonably designed to address conflicts of interest associated with its recommendations. *Id.* at SA4, 68-73. "[P]olicies and procedures are an effective tool to identify and address conflicts of interest, and would allow [the Commission] to identify and address potential compliance deficiencies or failures * * * early on, reducing the chance of retail customer harm." *Id.* at SA69. Regulation Best Interest "establishes a broader

obligation to address conflicts both at the firm level and at the associated person level" than do existing FINRA rules. *Id.*

To satisfy this obligation, a broker-dealer's policies and procedures must be reasonably designed to identify and at a minimum disclose, or eliminate, all conflicts of interest associated with recommendations. 17 C.F.R. 240.15*l*-1(a)(2)(iii)(A); *Adopting Release*, SA68. The rule's definition of "conflict of interest" follows the Supreme Court's definition of that term for investment advisers: "an interest that might incline a broker, dealer, or [representative]—consciously or unconsciously—to make a recommendation that is not disinterested." 17 C.F.R. 240.15*l*-1(b)(3); *compare with Capital Gains*, 375 U.S. at 191-92. In this respect, the Conflict of Interest Obligation aligns with an adviser's duty of loyalty, which also requires that an adviser eliminate, or at least expose through full and fair disclosure, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested. *Fiduciary Interpretation*, PA295; *913 Study*, PA446.

Under the Conflict of Interest Obligation, however, a broker-dealer must take additional steps to address conflicts specific to the services and fee structures offered by broker-dealers for which disclosure alone is insufficient. *Adopting Release*, SA73. A broker-dealer's policies and procedures must be reasonably designed to identify and mitigate conflicts of interest, such as commissions and compensation received from third-parties (*i.e.*, not from the retail customer), that create an incentive for the broker-dealer's representatives to place their or the broker-dealer's interests ahead of the

customer's. 17 C.F.R. 240.15*l*-1(a)(2)(iii)(B); *Adopting Release*, SA74. When a broker-dealer places material limitations on its recommendations (for example, by offering only proprietary products), its policies and procedures must be reasonably designed to disclose the limitations and associated conflicts, and to prevent those limitations from causing the broker-dealer to place its interests ahead of the customer's. 17 C.F.R. 240.15*l*-1(a)(2)(iii)(C). Finally, a broker-dealer's policies and procedures must be reasonably designed to eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities, or specific types of securities, within a limited period of time. *Id.* 240.15*l*-1(a)(2)(iii)(D).

iv. The Compliance Obligation

The Compliance Obligation requires that broker-dealers establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole. *Id.* 240.15*l*-1(a)(2)(iv); *Adopting Release*, SA80-81. This obligation helps to "ensure that broker-dealers have strong systems of controls in place to prevent violations of Regulation Best Interest * * * and to protect the interests of retail customers." *Id.* at SA80. The Commission also imposed new recordmaking and recordkeeping requirements for specified information that brokers-dealers provide to and collect from customers to whom they make recommendations. 17 C.F.R. 240.17a-3(a)(35). These requirements "provide a means by which [broker-dealers] can demonstrate, and Commission examiners can confirm, their compliance with" Regulation Best Interest. *Adopting Release*, SA81.

b. The Commission explained its decision not to impose a fiduciary standard on broker-dealers.

The adopting release explained why the Commission chose a new, enhanced broker-dealer standard of conduct rather than applying the investment-adviser fiduciary standard to broker-dealers. The Commission determined that a wholesale extension of that fiduciary standard would not be "appropriately tailored to the structure and characteristics of the broker-dealer business model." *Id.* at SA5. And applying the Advisers Act standard "would result in fewer broker-dealers offering transaction-based services to retail customers, which would in turn reduce choice and may raise costs for certain retail customers." *Id.* at SA13; *see also id.* at SA147-48.

In accordance with Section 913(f), the Commission considered the staff's recommendation that the Commission create a new uniform standard for both broker-dealers and investment advisers. The Commission, however, elected to "build upon" the existing regulatory regimes and expertise rather than "discard decades of regulatory and judicial precedent and experience with the fiduciary duty for investment advisers"—a principles-based standard that has governed relationships with retail customers and large institutional clients alike and that "has generally worked well." *Id.* at SA5, 13; *Proposing Release*, PA17-18. A "one size fits all" approach would "not appropriately reflect the fact that broker-dealers and investment advisers play distinct roles in providing recommendations or advice and services to investors," "would risk reducing investor choice and access to existing products, services, service

providers, and payment options," and "would increase costs for firms and for retail investors." *Adopting Release*, SA5, 13, 148-49.

The Commission emphasized that Regulation Best Interest would "achieve many of the key goals advocated for by supporters of a uniform standard of conduct." *Id.* at SA13 n.123. The rule aligns in key respects with the investment-adviser fiduciary standard at the time a recommendation is made. *Id.* at SA13 & n.123. In particular, the Care and Conflict of Interest Obligations are "substantially similar" to the duties of care and loyalty under the Advisers Act, but tailored to the broker-dealer relationship. *Id.* at SA13; *see also Proposing Release*, PA17-18; *913 Study*, PA323, 327, 355-56, 445-46, 453-54. "Both standards of conduct require that when making a recommendation or providing advice, firms and financial professionals act in the best interest of the retail investor and not place the financial professionals' interests ahead of the retail investor." *Adopting Release*, SA146. Moreover, Regulation Best Interest "go[es] beyond the recommendations in the 913 Study" in some areas, including its conflict-of-interest mitigation and elimination requirements and its detailed Care Obligation. *Id.* at SA13.

c. The Commission considered the economic consequences of Regulation Best Interest.

The Commission's detailed economic analysis quantified the economic effects of Regulation Best Interest where practicable and otherwise provided a qualitative assessment of the economic consequences of the regulation. *Id.* at SA117-18.

Compared with the market and regulatory baseline for broker-dealers, namely the suitability standard, *id.* at SA101-17, the Commission concluded that Regulation Best Interest "should enhance the efficiency of recommendations that broker-dealers provide to retail customers, allow retail customers to better evaluate the recommendations received, improve retail customer protection when receiving recommendations from broker-dealers, and, ultimately, reduce agency costs and other costs." *Id.* at SA83-84.

As a result of data and other limitations, the Commission could not quantify all of the benefits and costs of Regulation Best Interest with meaningful precision. *Id.* at SA84, 117-18, 140. It conducted an extensive qualitative analysis of the benefits and costs of Regulation Best Interest generally and its component obligations in particular. *Id.* at SA117-39. In addition, the Commission provided quantitative estimates of some of the costs associated with implementing Regulation Best Interest. *Id.* at SA126-27, 138-39, 140, 142. It also attempted to quantify two potential benefits: the reduction in monetary harm to mutual fund investors from conflicted broker-dealer recommendations and the reduction in mutual fund fees due to increased competition. *Id.* at SA140-42. The Commission analyzed Regulation Best Interest's effects on efficiency, competition, and capital formation. *Id.* at SA142-45. And it analyzed the economic effects of alternative approaches, including applying the investment-adviser fiduciary standard to broker-dealers or adopting a new uniform fiduciary standard. *Id.* at SA145-51.

STANDARD OF REVIEW

The Commission's rule may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The Commission's interpretation of "the scope of [its] statutory authority" to adopt Regulation Best Interest is subject to the deferential two-step *Chevron* test. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013), citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The resulting rule is subject to "the arbitrary-and-capricious standard," under which "judicial review of agency action is necessarily narrow" and the reviewing court may not "substitute its judgment for that of the agency." *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008), citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This review is "narrow" and "highly deferential"—"the test here is primarily one of rationality." *Cty. of Rockland v. NRC*, 709 F.2d 766, 776 (2d Cir. 1983) (quotations omitted). As long as the Commission "examine[d] the relevant data" and "set out a satisfactory explanation including a rational connection between the facts found and the choice made," the rule must be upheld, *Karpova v. Snow*, 497 F.3d 262, 268 (2d Cir. 2007), and a "court will not lightly reach a conclusion that an agency" has not completed these tasks, *Islander*, 525 F.3d at 151.

SUMMARY OF ARGUMENT

1. Petitioners lack Article III standing. They offer different theories; the States claim an injury to their public fiscs while XYPN claims competitor standing. But they

each make the same mistake—their purported injuries arise from the existing suitability regime, which Regulation Best Interest replaces by *increasing* investor protections and *increasing* the burdens on broker-dealers. Consequently, causation is not satisfied because Regulation Best Interest reduces the risk of harm caused by conflicted advice—it requires broker-dealers to do more to protect investors as compared to the status quo. Redressability is another insurmountable obstacle because the relief petitioners seek—vacating Regulation Best Interest—would exacerbate their injuries by reinstating a less protective suitability standard. Even if petitioners could overcome these causation and redressability obstacles, their injuries are too speculative and hypothetical to support standing because they rest on attenuated chains of events involving independent actors not before this Court.

2. If the Court reaches the merits, it should find that the Commission's adoption of Regulation Best Interest is consistent with the express authority granted by Congress in Section 913 of Dodd-Frank. The text, structure, context, and history of Section 913 confirm that Section 913(f) is a broad grant of discretionary authority that allows the Commission to adopt a rule addressing "the legal or regulatory standards of care for brokers, dealers, [and] investment advisers." While Section 913(g) provides a different rulemaking path under which the Commission could adopt a uniform fiduciary standard, Congress's use of the permissive "may" rather than "shall" in both grants of authority demonstrates that Congress gave the Commission the flexibility to choose either path—or to adopt no rule at all. Petitioners' alternative

interpretation that Section 913(f) merely authorizes the Commission to adopt a uniform fiduciary standard under Section 913(g) cannot be squared with the fact that Congress did not link the two provisions and directed the Commission to consider a variety of regulatory approaches rather than order it to adopt a fiduciary standard. Moreover, while Regulation Best Interest does not turn on the meaning of the broker-dealer exclusion in the Advisers Act, as petitioners incorrectly contend, the Commission's interpretation of the exclusion comports with the text and history of the Advisers Act.

3. The Commission's decision to tailor an enhanced standard of conduct to the services and fee arrangements offered by broker-dealers was reasonable and reasonably explained. Regulation Best Interest advances the Commission's twin regulatory objectives of reducing harm from conflicts of interest and preserving retail investors' access to brokerage services. In faulting the Commission for not adopting a uniform fiduciary standard, petitioners disregard or downplay evidence suggesting that a fiduciary standard would reduce access to the transaction-specific recommendations and compensation arrangements provided by broker-dealers, harming investors who benefit from those services and fee structures. Petitioners also fail to substantiate their assumption that Regulation Best Interest is less protective than the investment-adviser fiduciary standard. Indeed, they barely engage with the rule text itself, generally ignoring the rule's enhancements over suitability and the extent to which it aligns with the fiduciary standard at the time a recommendation is made. Petitioners

take issue with a few discrete aspects of Regulation Best Interest's component obligations, including how it addresses investor confusion, but the Commission amply justified its policy choices.

The Commission's extensive economic analysis satisfied its obligation to evaluate the economic consequences of the rule. The Commission engaged in a quantitative and qualitative analysis of the harm caused by broker-dealer conflicts of interest, while reasonably determining that there was insufficient data to generate a meaningfully accurate estimate of the aggregate amount of investor harm. And contrary to petitioners' argument, the Commission reasonably analyzed the potential benefits of the rule's component obligations, explaining that although the magnitude of those benefits could not be predicted with certainty, the rule as a whole will reduce harm from broker-dealer conflicts.

ARGUMENT

I. This Court does not have jurisdiction because petitioners lack Article III standing.

Petitioners do not satisfy the "irreducible constitutional minimum" of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners bear the burden of showing: (1) "an injury in fact—an invasion of a legally protected interest" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical"; (2) a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action

of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (quotation omitted). Petitioners must prove standing under a summary judgment standard—with "specific facts" supported by "affidavit or other evidence." *Id.* at 561 (quotation omitted); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

They fail to do so. Regulation Best Interest does not require petitioners to do or refrain from doing anything—it regulates broker-dealers, none of which have challenged it. Because neither the States nor the XYPN petitioners are "the object of the [challenged] government action," their standing is "substantially more difficult" to establish. *Lujan*, 504 U.S. at 562 (quotation omitted). "[M]uch more is needed" to prove standing, *id.*, which petitioners do not provide because their appeal is premised not on what the Commission did to protect investors but on what it did not do—apply the investment-adviser fiduciary standard to broker-dealers. Consequently, they assert speculative injuries that are not fairly traceable to Regulation Best Interest and will not be redressed—indeed, will be exacerbated—by the relief they request.

A. The States lack standing to challenge Regulation Best Interest.

The States' theory of standing is that conflicted investment advice reduces returns for retail investors, which in turn may lower tax revenues, and several links in the causal chain later, may "increase the likelihood" that the elderly will need to rely on public assistance. States Br. 35-37. The States offer declarations from an academic (States Add. 1-90) and officials (States Add. 90-108), which describe

taxation of investment returns, estimate the current effect of conflicted advice on revenue, and speculate about the future effect of a hypothetical fiduciary standard for broker-dealers.[4] What is missing is the required showing that the rule under challenge—Regulation Best Interest, which enhances investor protections—will decrease future tax revenues and increase spending as compared to the status quo.

This failure of proof affects all three prongs of standing, starting with causation and redressability, which the States never discuss in their brief. States Br. 35-40. They address, at most, the tax revenues that could be affected by conflicted advice under the existing standard that Regulation Best Interest will replace. States Br. 2-3, 16-18, 36-38; States Add. 4-6, 92-106 (estimating tax revenues in 2017 and 2018). Yet, causation is not proven when a petitioner suffers harm "before and after" an agency action and fails to give "any concrete reason to suppose" that the action will worsen the harm. *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994); *Ca. Ass'n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 827 (D.C. Cir. 1985) (alleged injury that "occurred before, existed at the time of, and continue[s] unchanged after the challenged [agency] action * * * cannot tenably trace to" that action).

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[4] The study attached to the academic's declaration (States Add. 17-90) analyzes the effect on the variable annuities market of imposing a state-level fiduciary duty as compared to suitability (but not to Regulation Best Interest). The Commission identified a number of limitations with this study that make it difficult to extrapolate its results to the broader market of annuities sold by broker-dealers, let alone the entire universe of securities. *Adopting Release*, SA147 n.1351.

Rather than cause the supposed injuries, Regulation Best Interest will *mitigate* them. Regulation Best Interest imposes new regulatory burdens on broker-dealers that are tailored to the transaction-specific recommendations and fee arrangements they offer while aligning the standard of conduct with the investment-adviser fiduciary duty at the time a recommendation is made. *See supra* 21-26. The States never show that Regulation Best Interest will lead to more conflicted advice, reduced investment returns, and lower tax revenues—instead of doing the exact opposite.

What the States claim instead is that Regulation Best Interest does not do enough to reduce conflicts by comparison to a hypothetical uniform fiduciary standard, the details of which they never explain. States Br. 35-36. The declarations assume, for instance, "that failure to impose a fiduciary standard on broker dealers will result in conflicted advice to investors," States Add. 97. But they never demonstrate that Regulation Best Interest will somehow lead to more harms from conflicted advice as compared to an investment-adviser fiduciary standard, particularly when the latter may increase costs for investors, which also lowers returns (and thus, by the States' theory, tax revenues). And even if the States could make that showing, Congress did not mandate any Commission rulemaking, let alone require adoption of the investment-adviser fiduciary standard. *See infra* Part II.A; *see also* XYPN Br. 23 (acknowledging Commission "ha[s] authority under Dodd-Frank *not* to issue such a regulation"). The States' only claim is thus that Regulation Best Interest "did not go

far enough in abating [their] pre-existing injury," and that "will not suffice to confer standing." *Lo Shippers Action Comm. v. ICC*, 808 F.2d 64, 65 (D.C. Cir. 1986).

Furthermore, the States' requested relief would not redress their asserted injuries—it would likely make them worse. Striking down Regulation Best Interest would reinstate what the States deem an "ineffective" suitability standard. States Br. 1-2, 76. Returning to that standard is not in the interest of retail investors—or the States' interests in taxing capital gains. Because, "if anything, vacatur[] * * * would significantly exacerbate [their] injuries," the States cannot establish redressability. *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013).

The last problem is that the States' claimed injuries are "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation omitted). "[A]llegations of possible future injury are not sufficient," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013) (quotation omitted), yet the States' declarants provide nothing more than a statement of current tax revenues and an assumption "that failure to impose a fiduciary standard on broker dealers" will produce lower tax receipts in the future *E.g.*, States Add. 97, 106. But investment returns are determined by myriad variables, including whether investors seek advice about securities, the costs associated with the transaction, how long the customer holds the investment, and the market conditions affecting its value at the time of a taxable event. *See Adopting Release*, SA84-85. Courts do not accept "theories that rest on speculation about the decisions of independent actors," and the chain of events from an investor following advice to paying taxes on

gains and then to public assistance for the elderly if those gains are lower is far too attenuated to show an injury-in-fact. *Clapper*, 568 U.S. at 414.

The States' attribution of their alleged injuries to the Commission's "failure to impose a fiduciary standard on broker-dealers" (States Add. 92) is equally speculative. The States do not explain what their preferred standard would entail, let alone analyze how differences between that hypothetical standard and Regulation Best Interest would affect tax revenues or spending. Instead, the States incorrectly assert that an adviser's fiduciary duty requires conflict-free advice. States Br. 1, 35. The fiduciary standard requires an adviser to fully and fairly disclose conflicts of interest, obtain the client's informed consent, and to act in the client's best interest, but does not bar an investment adviser from having an interest in the advice it gives. *See infra* 78-80; *913 Study*, PA323, 355-57, 439, 445-46; *Fiduciary Interpretation*, PA290, 294-97. Under Regulation Best Interest, comparable—and in some instances more specific—restrictions now apply to broker-dealers, which undermines the States' assertion that Regulation Best Interest may somehow, several causal steps and perhaps decades down the line, injure the States. *See infra* 78-80.

The States also fail to address the possibility that imposing a fiduciary duty on broker-dealers would have adverse effects on their tax revenues. *See* States Add. 95 (acknowledging that decline in net state tax revenue assumes "no alternative increase to offset the negative impact"). A fiduciary standard would likely cause some broker-dealers to leave the market—as the States' own declarant found—which could lower

returns for investors who have no choice but to pay more for advice and could also reduce tax revenues derived from the broker-dealers who leave the market. *913 Study*, PA491-95 (describing potential effects); States Add. 54-56 (study showing that imposition of fiduciary duty reduced the number of broker-dealers selling certain types of annuities); States Add. 102 (recognizing that revenue is affected not only by taxation of investor gains but also taxation of broker-dealers operating in the state).

All these what-ifs and could-bes highlight the distinction between the States' speculative injuries and those in the cases they cite. States Br. 35, 37, citing *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), and *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). In both *Azar* and *Texas*, a regulation directly triggered specific expenditures. *Azar*, 911 F.3d at 572-73 (finding, based on agency's analysis, that regulation expanding exemptions from insurance coverage would cause more women to rely on state for health care); *Texas*, 809 F.3d at 152-53, 155 (finding that regulation had "especially direct" effect of enabling more applications for state-subsidized driver's licenses). And in *Wyoming*, an original jurisdiction case between two states, Wyoming was "directly affected in a substantial and real way" by an Oklahoma law that "on its face and in practical effect" reduced the use of Wyoming coal by Oklahoma utilities and the amount of tax revenue that flowed to Wyoming. 502 U.S. at 447-50 & n.9, 456 (quotation omitted). Regulation Best Interest, by contrast, does not target and has only an attenuated bearing on tax revenues. Because the supposed injuries, at most, arise from the kind of "unavoidable

economic repercussions of virtually all federal policies," they do not support standing. *Wyoming v. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012), quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976).

B. The XYPN petitioners lack standing to challenge Regulation Best Interest, which increases the burden on their competitors.

XYPN and Ford, one of its members, also fail to prove standing. They advance a theory of competitor standing, contending that Regulation Best Interest disadvantages investment advisers competing with broker-dealers. XYPN Br. 28-31. But they fail to articulate a cognizable injury because Regulation Best Interest does not "bestow" on broker-dealers a "lower regulatory burden" or reduce their "legal exposure." *Id.*; XYPN Add. 5. It does the opposite—it increases the regulatory burdens and legal exposure for broker-dealers. Indeed, complying with Regulation Best Interest will likely cost broker-dealers billions of dollars upfront and billions more annually. *Adopting Release*, SA142.

Because broker-dealers "labor[] under a *greater* regulatory burden as a result of" Regulation Best Interest, XYPN cannot rely on competitor standing. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015). The cases cited by XYPN prove this point by contrast. XYPN Br. 29, 31. In *FPA*, a financial planners' organization had standing because the challenged rule exempted a group of broker-dealers from regulation, as opposed to creating more regulations for them. 482 F.3d at 486. And in *CREW v. Trump*, the hospitality-industry plaintiffs had standing because they

alleged that the President's ownership of competing hotels aided those establishments, whereas Regulation Best Interest augments the obligations for competitors. 939 F.3d 131, 143-44 (2d Cir. 2019).

XYPN objects that Regulation Best Interest has less competitive benefit than a uniform fiduciary standard because the rule does not do enough to incentivize broker-dealers to register as investment advisers and pay to become XYPN members. XYPN Br. 31; XYPN Add. 2. But that cannot constitute "an invasion of a legally protected interest," *Lujan*, 504 U.S. at 560, because, as XYPN concedes (XYPN Br. 23), the Commission was not required to import the investment-adviser fiduciary standard to broker-dealers. Plus, XYPN offers nothing more than speculation that broker-dealers who are prompted by a rule change to register as investment advisers would pay to join XYPN. In any event, to the extent XYPN believes an increase in registered investment advisers helps rather than hurts its members, their standing argument is still flawed because the burdens imposed by Regulation Best Interest may cause some broker-dealers to register as investment advisers, enlarging the universe of potential XYPN members. *Adopting Release*, SA125, 134, 137, 143.

XYPN also asserts that, substance of the rule aside, the name of the rule—"Best Interest"—makes it harder for its members to differentiate themselves from broker-dealers. XYPN Br. 30. But they provide no declarations from customers demonstrating that the "best interest" label will leave them unable to distinguish between intermediaries, particularly when XYPN emphasizes fiduciary obligations as a

selling point. XYPN Add. 1-2, 4-5; *see also* www.xyplanningnetwork.com (advertising "sworn fiduciaries" that sign "fiduciary oaths"). Contrary to XYPN's understanding, broker-dealers and advisers do not offer "identical products and services" because they generally differ in how they serve and charge customers. XYPN Br. 30. The Commission took steps to ameliorate confusion through the Disclosure Obligation, which requires disclosures of fees, costs, services, as well as a capacity disclosure that is presumptively violated when a standalone broker-dealer uses the title "advisor" or "adviser." This obligation dovetails with the Relationship Summary and allows retail customers to differentiate between the respective services provided (such as monitoring account performance) and the fees and costs charged by broker-dealers and investment advisers. *Adopting Release*, SA32-47. The speculation that the "best interest" label will prompt investors to choose the former over the latter does not provide the "much more" needed when standing depends on "choices made by independent actors not before the court[]." *Lujan*, 504 U.S. at 562.[5]

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[5] XYPN incorrectly describes Regulation Best Interest as a "lower standard of care" and implies that only broker-dealers, not investment advisers, "may consider their own financial interests." XYPN Br. 30. However, the duties of loyalty and care owed by investment advisers are "substantially similar" to the obligations imposed by Regulation Best Interest at the time of a recommendation. *Adopting Release*, SA13; *infra* 78-80. Just as advisers must disclose any financial interest in the advice they give, *Capital Gains*, 375 U.S. at 194, broker-dealers under Regulation Best Interest must disclose all conflicts associated with a recommendation, ensure that the recommendation is in the customer's best interest, and establish policies and procedures designed to disclose, mitigate, or eliminate conflicts of interest specific to the recommendation.

Causation and redressability are no less fatal to XYPN's standing. XYPN acknowledges that, before June 2019, broker-dealers provided advice, received compensation, and were not subject to the fiduciary duty owed by investment advisers. XYPN Br. 1, 3, 29, 38-39. Regulation Best Interest does not alter that state of affairs, and it does not "permit brokers to be compensated for financial planning advice * * * without registering as an investment adviser." XYPN Add. 2. The rule does not permit broker-dealers to engage in activities they were unable to do before without registering—it takes no position on whether a broker-dealer that engages in financial planning must register as an adviser and it does not expand the scope of the statutory broker-dealer exclusion more generally. Instead, Regulation Best Interest presumes that a broker-dealer fits within that exclusion because otherwise it would be subject to the investment-adviser fiduciary standard. *See infra* 60-61. Even if XYPN were correct that its members remain at a disadvantage because the Commission did not adopt what they believe to be a more stringent standard, that injury "cannot tenably trace" to Regulation Best Interest—by XYPN's own argument, the competitive imbalance, if any, predates the rule. *Ca. Ass'n of Physically Handicapped*, 778 F.2d at 827.

Nor has XYPN proven causation for their labeling theory. According to XYPN, under suitability, retail consumers are "confused by the difference between broker-dealers and investment advisers." XYPN Br. 53. XYPN offers no evidence—from customers—that the "best interest" label will exacerbate this preexisting

confusion, as opposed to ameliorating it. *See Clapper*, 568 U.S. at 414 (courts do not accept "standing theories that rest on speculation about the decisions of independent actors"). Instead, it offers speculation that the "best interest" label is *more likely* to induce customers to choose a brokerage relationship even though they offer no evidence that customers will view a "best interest" broker-dealer as more attractive than a "sworn fiduciary" investment adviser. This paucity of proof is far from the "much more" needed when standing depends on "choices made by independent actors not before the court[]." *Lujan*, 504 U.S. at 562.

The root of XYPN's causation problem is similar to the States'—their claim is not that Regulation Best Interest harms them, but rather that it does not, in their view, do more to force broker-dealers to register as investment advisers and perhaps pay XYPN for a membership. XYPN Br. 31. But a purported failure to do more to mitigate a preexisting competitive injury under suitability is not a basis for causation, particularly when the Commission was under no statutory requirement to adopt a fiduciary standard. *See Lo Shippers Action Comm.*, 808 F.2d at 65.

Redressability is the final flaw for XYPN. Vacating Regulation Best Interest would go back to suitability, exacerbating the competitive injuries claimed by XYPN because it would reduce the regulatory burden on broker-dealers. *See Texas*, 726 F.3d at 198. Even though XYPN concedes that the Commission is not required to impose a fiduciary standard, it contends that striking down Regulation Best Interest would "increas[e] the likelihood that the SEC issues a new rule that creates equal standards."

XYPN Br. 31. But the mere possibility of the Commission reaching a different decision in the future does not satisfy redressability, particularly when there is no command for the Commission to adopt any particular rule—or any rule at all. *N.Y. Coastal P'ship v. Dep't of Interior*, 341 F.3d 112, 116-17 (2d Cir. 2003) (no redressability where government defendants lacked a statutory duty "to act in a manner that would likely redress [plaintiffs'] alleged injuries"); *accord I.L. v. Alabama*, 739 F.3d 1273, 1280 (11th Cir. 2014) "[T]he contingency of [legislative] action makes the redress of plaintiffs' injury * * * speculative") (quotation omitted); *Miami Bldg. & Constr. Trades Council v. Sec'y of Defense*, 493 F.3d 201, 205 (D.C. Cir. 2007) ("[C]ourts have been loath to find standing when redress depends largely on policy decisions yet to be made by government officials.") (quotation omitted).

II. The Commission acted within its statutory authority, and consistent with the Advisers Act, when it adopted Regulation Best Interest.

Congress gave the Commission broad discretionary authority—in Section 913(f) of Dodd-Frank—to adopt a new standard of care for broker-dealers. Struggling against the plain meaning of the statutory language, petitioners assert that the Commission exceeded its authority under Section 913—and contravened the Advisers Act definition of "investment adviser"—because it did not impose a fiduciary standard. States Br. 41, 49; XYPN Br. 32, 35-36. But the text, structure, context, and history of Section 913, as well that of the Advisers Act, show that the Commission was faithful to these provisions when it adopted Regulation Best

Interest. Petitioners fail to offer a persuasive alternative interpretation of Section 913 or the Advisers Act, let alone establish that these statutes "can reasonably bear only" the meaning advanced by petitioners. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017).

A. The text, structure, and context of Section 913 support the Commission's interpretation.

"Statutory analysis necessarily begins with the plain meaning of a law's text." *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) (quotation omitted). In this instance, "the statutory text, considering the ordinary or natural meaning of the words chosen by Congress, as well as the placement and purpose of those words in the statutory scheme," demonstrates that the Commission possessed authority under Section 913(f) to adopt Regulation Best Interest. *Id.* (quotation omitted). To the extent there is any ambiguity, the Court should defer to the Commission's interpretation because it is "based on a permissible construction of the statute." *City of Arlington*, 569 U.S. at 307.

Section 913(f) is a broad grant of discretionary authority. It is the last of a series of linked subsections, all of which use a mandatory voice *except* for Section 913(f). Dodd-Frank, § 913(b)-(f), 124 Stat. at 1824-28 (SA176-80). Section 913(b) states that the "Commission *shall* conduct a study" to evaluate "gaps, shortcomings, or overlaps" in the broker-dealer and investment adviser standards of care. *Id.* § 913(b)(2) (SA176-77) (emphasis added). Section 913(c) enumerates issues

"the Commission *shall* consider" in that study, including "access to personalized investment advice" and its cost. *Id.* § 913(c)(1)-(13) (SA177-79) (emphasis added). And Section 913(c)(14) tells the Commission to address other issues "the Commission considers necessary and appropriate in determining whether to conduct a rulemaking under subsection (f)." *Id.* § 913(c)(14) (SA179). Finally, Section 913 states that the Commission "*shall* submit a report on the study" to Congress and that the Commission "*shall* seek and consider public input" in preparing the report. *Id.* § 913(d)-(e) (SA179) (emphases added).

Then, switching to a permissive voice, Section 913(f) states that the Commission "*may* commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to 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 for providing personalized investment advice about securities to such retail customers." *Id.* § 913(f), codified at 15 U.S.C. 78o notes (SA179-80) (emphasis added); *cf. id.* §§ 209, 619, 124 Stat. at 1460, 1629 (comparable, albeit mandatory, grants of authority in Dodd-Frank to adopt rules that "address" various conflicts of interest). Congress returns to a command in the next sentence of Section 913, stating that if the Commission commences such a rulemaking, it "shall consider the findings[,] conclusions, and recommendations of the study required under subsection (b)." *Id.* § 913(f) (SA180).

Congress opened up a separate rulemaking path in Section 913(g), which is also permissive and, significantly, does not reference Sections 913(a)-(f). Section 913(g)(2) adds a new Section 211(g) to the Advisers Act, 15 U.S.C. 80b-11(g), which states that "the Commission may promulgate rules" that would impose upon broker-dealers and advisers a single standard "no less stringent than the standard applicable to investment advisers under" Section 206 of the Advisers Act. Dodd-Frank, § 913(g)(2), 124 Stat. at 1828-29 (SA180-81). Section 913(g)(1), in turn, adds a new subsection to the Exchange Act, 15 U.S.C. 78o(k), which states that "the Commission may promulgate rules" imposing upon broker-dealers the same "standard of conduct applicable to an investment adviser under Section 211" of the Advisers Act. *Id.* § 913(g)(1) (SA180).

The use of permissive rather than mandatory language makes clear that Congress authorized the Commission to choose between these two paths—or to choose no rulemaking at all. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,'' which implies discretion, the word 'shall' usually connotes a requirement."); *Patchogue Nursing Ctr. v. Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986) ("By choosing the word 'may,' rather than 'shall,' 'must,' or other mandatory language, Congress allowed the Secretary to exercise discretion in deciding whether regulations were needed to effectuate the statute."). And even within each path, Congress knew how to mandate action when it wanted. In Section 913(a)-(f), Congress used "shall" to describe the study and other events, but used "may" when granting the Commission authority to decide whether to make a rule at all.

Similarly, in Section 913(g), Congress alternated between "may" (for the rulemaking) and "shall" (for the substance of a resulting rule). If the Commission began rulemaking under Section 913(g), Congress limited the Commission's power with "shall" phrases—*e.g.*, a broker-dealer's receipt of commissions "shall not, in and of itself, be considered a violation," and "[n]othing in this section shall require" a broker-dealer "to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities." Dodd-Frank, § 913(g)(1)-(2) (SA180-81). Moreover, other text in Section 913(g) mandates that the Commission "shall" facilitate disclosures about "the terms of the[] relationships" investors have with "brokers, dealers, and investment advisers," and "examine, and where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes." Section 913(g), adding Exchange Act Section 15(l), 15 U.S.C. 78o(l), and Advisers Act Section 211(h), 15 U.S.C. 80b-11(h) (SA180-81).

The broader Dodd-Frank context confirms that the use of "may" in Section 913 was not accidental. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted). Congress knew how to order rulemaking when it wanted—Dodd-Frank contains over 100 mandates to the Commission and other agencies to adopt rules or

take other actions, often with great specificity. Curtis W. Copeland, Cong. Research Serv., *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act* 28-58 (Nov. 3, 2010) (listing mandatory rulemaking provisions). As just one example, Section 932 orders the Commission to adopt rules for disclosures by credit-rating organizations ("The Commission shall, by rule, require * * *"), and specifies the content of those rules ("The rules of the Commission under this subsection shall require, at a minimum * * *"). Dodd-Frank § 932, 124 Stat. at 1878. Section 913 does not contain any similar language, and "when the same [statute] uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Weinstein v. Albright*, 261 F.3d 127, 137 (2d Cir. 2001).

The structure of Section 913 further confirms that Congress created separate rulemaking paths. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892-93 (2018) (looking to "the specific context in which th[e] language is used, and the broader statutory structure"). Crucially, there is no textual link between Section 913(g) and Sections 913(a)-(f). Dodd-Frank § 913(g), 124 Stat. at 1828-30 (SA180-81). "The absence of any cross-reference between the two provisions suggests independence." *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695, 705 (5th Cir. 2019), citing *Chamber of Commerce*, 885 F.3d at 381 ("Congress's use and withholding of terms within a statute is taken to be intentional.").

Instead of linking the two subsections, Congress affirmatively decoupled them. The first clause of subsection (g) provides that, "[n]otwithstanding any other provision" of Dodd-Frank or the Advisers Act, the Commission "may" adopt a uniform standard, subject to certain restrictions. Dodd-Frank, § 913(g) (SA180). "A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (2012); *see NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (the word "notwithstanding" demonstrates "which provision prevails in the event of a clash").

Despite the lack of a cross-reference, petitioners contend that Section 913(f) is a "procedural" authorization to begin a rulemaking proceeding in which the Commission had to adopt a uniform standard under Section 913(g). XYPN Br. 34 (arguing that the two provisions form a "pair[]"); States Br. 57-58 (similar). Petitioners cite no case suggesting that if Congress authorizes an agency to "commence" rulemaking, separate authority is needed for the agency to complete the rulemaking. Moreover, when Congress authorizes a rulemaking "while separately providing substantive standards" for the rule (States Br. 58) or creating a deadline for it, Congress provides an express cross-reference to the standards it wants the rules to incorporate or to the timeline it wants the agency to follow. *See United States v. Reorganized Cf & I Fabricators of Utah*, 518 U.S. 213, 220 (1996) (finding the "absence of any explicit connector between" two provisions to indicate that one did not turn on

the other); *Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 898 (2d Cir. 1989) (rejecting argument that mandatory rulemaking language controls a separate non-mandatory provision when the latter "contains no cross-reference" to the former).

Several Dodd-Frank provisions feature the type of cross-reference that is missing from Section 913(g). Take Section 913, for starters—Section 913(c), which lists the considerations for the 913(b) study, allowed the Commission to add issues it deemed "necessary and appropriate in determining *whether to conduct a rulemaking under subsection (f)*." Dodd-Frank § 913(c)(14) (SA179) (emphasis added). The language used in (c)(14)—describing a rulemaking under subsection (f), not subsection (g)—provides another textual clue that Section 913(f) is a self-contained grant of authority.

Other provisions of Dodd-Frank further demonstrate that Congress knew how to include a cross-reference when it wanted to link two provisions. In Section 932(a)(4)(A), Congress mandated that the Commission adopt rules, with subparagraph (B) ordering that "[t]he rules issued under subparagraph (A) shall" meet certain conditions. 124 Stat. at 1874. In Section 941(b), which added Section 15G of the Exchange Act, Congress mandated that the Commission (jointly with other agencies) promulgate rules in Section 15G(b)(1)-(2), and then stated in Section 15G(c) that "[t]he regulations prescribed under subsection (b) shall" meet specific standards. *Id.* at 1891, codified at 15 U.S.C. 78*o*-11(b)-(c); *accord e.g.*, Dodd-Frank §§ 619, 622(d)-(e), 939F(d), 124 Stat. at 1621-22, 1633, 1889-90. Comparable cross-references appear in

the statutes cited by petitioners. States Br. 57-58, citing 29 U.S.C. 655(c)(3); 30 U.S.C. 811(b); 47 U.S.C. 340(c)(1)(B).

Aside from its lack of textual support, petitioners' interpretation "makes a mess of" the statute. *SW Gen., Inc.*, 137 S. Ct. at 941. If Section 913(f) is "purely procedural" (XYPN Br. 34), then it is purely superfluous. The Commission's authority under Section 913(g) "to promulgate rules" adopting a uniform fiduciary standard necessarily encompasses the authority to initiate a rulemaking proceeding. *See* 2B N. Singer & S. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 55.4 (7th ed. update 2019) ("Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication."). If Section 913(f) were needed to commence the rulemaking, there would be no need for the "may promulgate rules" sentence in Section 913(g)—one would just see a reference back to 913(f). Moreover, the requirement to consider the findings of the 913 Study in Section 913(f) only makes sense if Section 913(f) constitutes authority to adopt a rule since Section 913(g) does not incorporate that requirement.

Unlike petitioners' interpretation, and contrary to XYPN's contention, XYPN Br. 36-37, the Commission's interpretation gives meaning to both Sections 913(f) and (g). *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quotation omitted) ("[T]he canon against surplusage assists only where a competing interpretation gives effect to every clause and word of a statute."). If the Commission decided to adopt a single

fiduciary standard that would apply to both broker-dealers and investment advisers, that rulemaking was subject to mandatory constraints. Section 913(g) is not "subsumed by" Section 913(f), XYPN Br. 36, because Section 913(g) is the only place Congress enumerates these substantive constraints. The mere existence of overlapping rulemaking authority does not make the Commission's interpretation unreasonable. *See, e.g.*, *Skilling v. United* States, 561 U.S. 358, 413 n.45 (2010) (a provision's "[o]verlap with other federal statutes does not render [it] superfluous"); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 21-23 (2006) ("small amount of additional work" done by overlapping provision satisfies the superfluity canon); *In re AmTrust Fin. Corp.*, 694 F.3d 741, 754 (6th Cir. 2012) ("partial overlap * * * is not enough to make [an interpretation] unreasonable").

B. Dodd-Frank's history reinforces the Commission's interpretation.

To the extent the Court considers the "history of the statute," it supports the Commission's interpretation of Section 913. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108, 110 (2d Cir. 2012). Section 913, as enacted, reflects a compromise between dueling House and Senate bills. The House bill mandated a rulemaking ("the Commission *shall* promulgate") that would equate the standards of conduct for broker-dealers and investment advisers. H.R. 4173, § 7103, 111th Cong. (2009) (emphasis added). The Senate bill did not mandate a particular standard, but did mandate *some* rulemaking under certain circumstances—the Commission had to conduct a study, and if the study identified "any gaps or overlap in the legal or

regulatory standards" for broker-dealers and investments advisers, "the Commission, not later than 2 years after [enactment], shall commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers, to address such regulatory gaps and overlap" using its existing authority. S. 3217, § 913(b)-(c), (f), 111th Cong. (S. Amend. No. 3739, Apr. 29, 2010).

The enacted law merged the House and Senate bills—with a critical change. Instead of mandating a rulemaking, both Section 913(f) (corresponding to the Senate bill) and Section 913(g) (corresponding to the House bill) became permissive. In merging the bills, and changing "shall" to "may," Congress gave the Commission flexibility to choose between the House approach (a uniform standard), the Senate approach (a rule addressing regulatory gaps, but not necessarily a uniform standard), or no rule at all (leaving suitability in place). The deletion of "shall" is "fairly seen" as a "deliberate elimination of any possibility" of construing the final statute to have the meaning the rejected version would have had. *Doe v. Chao*, 540 U.S. 614, 623 (2004).

The commentary that XYPN cherry-picks (XYPN Br. 37-38) does not suggest otherwise. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements * * * cannot amend the clear and unambiguous language of a statute."). General statements about "gaps in regulation" and "regulatory arbitrage" (XYPN Br. 38) in the broader financial sector shed no light on the compromise regarding standards of care for investment advice. Similarly, statements (from members Kanjorski, Frank, and Akaka) about Section 913 allowing the Commission to adopt a fiduciary standard

do not demonstrate that Congress, as a legislature, commanded the Commission to adopt that particular rule. XYPN Br. 39; States Br. 50-51.

The text of Section 913 provides the best evidence of what Congress intended, and it confirms that "equaliz[ing] the regulatory burdens" on broker-dealers and investment advisers (XYPN Br. 38) was not Congress's only concern. Congress also understood that uniformity might adversely affect retail customers by raising costs or or reducing access to advice. *See* Dodd-Frank § 913(c) (directing the Commission to consider impacts on retail customers) (SA178-79). And to the extent floor statements are relevant, even Senator Johnson, whom petitioners quote, explained that "[S]ection 913 does not immediately impose any new duties on brokers, dealers and investment advisers nor does it mandate any particular duty or outcome, but it gives the SEC, subsequent to the conclusion of the study, the authority to conduct a rulemaking on the standard of care, including the authority to impose a fiduciary duty." 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Johnson).[6]

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[6] A small group of legislators filed an amicus brief contending that Congress intended for the Commission to create "a uniform fiduciary duty to apply to all broker-dealers and investment advisers." Members Amicus Br. 4. These amici "of course do not speak for the Congress *qua* the Congress," *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 219 n.19 (D.C. Cir. 2013), *aff'd* 576 U.S. 1 (2015), and to the extent their brief can be construed as "subsequent legislative history," it provides "an unreliable guide to legislative intent," *Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991). Their *ex post* views cannot override the "reasonable interpretation" that can be "gleaned from [Section 913's] language and legislative history prior to its enactment." *New York v. Sullivan*, 889 F.2d 401, 408 (2d Cir. 1989) (quotation omitted).

When petitioners claim that Congress intended for broker-dealers to be subject to a fiduciary duty, *e.g.*, States Br. 44, they are relying on proposed legislation that Congress did not enact. Congress could have mandated that result by enacting the House bill. But it did not. Instead, it gave the Commission discretion to adopt a different standard for broker-dealers.

C. Petitioners' interpretation of Congress's "purpose" does not track the text and history of Dodd-Frank.

Petitioners divine a supposed "intent" to impose a fiduciary duty on broker-dealers that cannot be reconciled with the actual law that Congress enacted. States Br. 43, 56; XYPN Br. 37-38; *see Lindsay v. Ass'n of Prof'l Flight Attendants*, 581 F.3d 47, 52 (2d Cir. 2009) ("Because our task is to ascertain Congress's intent, we look first to the text and structure of the statute."). In Section 913, Congress directed the Commission to evaluate several issues, including how regulatory changes could affect "access to personalized investment advice[] and recommendations" and "the range of products and services offered by broker-dealers." Dodd-Frank § 913(c)(9)-(13) (SA178-79). Petitioners cannot explain why Congress would have ordered the Commission to conduct the study and evaluate many different factors if a uniform standard were the only permissible outcome. A better interpretation is that Congress could not agree on the best course and left it for the Commission to decide. *See* 156 Cong. Rec. S5889 (daily ed. July 15, 2010) (statement of Sen. Johnson) (stating that the Commission should "thoroughly, objectively and without bias evaluate legal and

regulatory standards, gaps, shortcomings and overlaps * * * [and] to conduct the study without prejudging its findings, conclusions, and recommendations").

The States go even farther, arguing that Section 913 advances "Congress's intent that investment advice given to retail investors be subject to the Advisers Act." States Br. 46-47. In the States' view, Congress was choosing between two options: regulating broker-dealers "entirely under the Advisers Act" or *just* imposing a fiduciary duty on them. States Br. 19-22, 41-42, 47, 50. Section 913(g), so their story goes, offered an "alternative to wholesale regulation under the Advisers Act" whereby broker-dealers did not have to satisfy the "full panoply" of Advisers Act requirements if they complied with a fiduciary standard. *Id.* at 41, 47, 49-50.

There is no textual or historical support for this theory. Such a dramatic change would have required Congress to alter the definition of "investment adviser" in Section 202(a)(11). The States cite a Senate "discussion draft" proposing to do just that—eliminate the broker-dealer exclusion. States Br. 21. But this draft was never introduced as a bill, let alone voted out of committee, let alone passed by the Senate, let alone enacted into law. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded."). Nor do the States identify any evidence that Congress disagreed with—let alone intended to change—the Commission's longstanding interpretation of the

broker-dealer exclusion, which accords with the Advisers Act's text and history. *See infra* 62-70.

If Congress had wanted to impose the investment-adviser fiduciary duty or another form of fiduciary duty on broker-dealers, it had options. Congress could have repealed the broker-dealer exclusion, which would require broker-dealers to register as investment advisers whenever they provide advice. It could have directly legislated a fiduciary duty for broker-dealers, just like it imposed fiduciary duties on other entities in Dodd-Frank. *See* Dodd-Frank § 975(c), 124 Stat. at 1920 (amending Exchange Act to state that a municipal advisor "shall be deemed to have a fiduciary duty to any municipal entity"). Or it could have enacted the House bill and mandated that the Commission impose a new uniform fiduciary standard applicable to broker-dealers and investment advisers. But it did none of those things, and this Court should reject the notion that Congress *implied* a radical alteration of an eighty-year old statutory scheme. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

D. Regulation Best Interest does not turn on the Commission's interpretation of the broker-dealer exclusion, which accords with the text and history of the Advisers Act.

Petitioners incorrectly argue that Regulation Best Interest contravenes the broker-dealer exclusion of the Advisers Act. States Br. 51-55; XYPN Br. 41-53. A

broker-dealer that, "for compensation, engages in the business of advising others * * * as to the advisability of investing in, purchasing, or selling securities" is not an "investment adviser," within the definition of the Advisers Act, if it satisfies both the "solely incidental to" prong and the "special compensation" prong of the exclusion in subparagraph (C). 15 U.S.C. 80b-2(a)(11)(C). Separately from Regulation Best Interest, the Commission issued a release interpreting the "solely incidental to" prong, but not the "special compensation" prong. *Solely Incidental*, PA305. Petitioners contend that Regulation Best Interest is "arbitrary and capricious because it relies on" this interpretive release. XYPN Br. 41. Petitioners cannot challenge this interpretation, which they never appealed. But their premise is false anyway—Regulation Best Interest does not turn on the Commission's reiteration of its long-standing interpretation, which is faithful to the text and history of the Advisers Act.

1. Petitioners' arguments about the broker-dealer exclusion spring from the incorrect premise that Regulation Best Interest "relies on" the meaning of "solely incidental to" or "special compensation." XPYN Br. 41. While the Commission cited the interpretive release, neither the rule text nor the Commission's explanation for Regulation Best Interest pivots on the meaning of "solely incidental to" (or "special compensation"). That is because the rule presumes a firm fits within the exclusion when providing a recommendation subject to the rule. If a broker-dealer offers advice that is not "solely incidental to the conduct of [its] business as a broker

or dealer," *or* it receives "special compensation" for that advice, it *is* an "investment adviser," subject to the obligations of the Advisers Act, including the fiduciary duty.

Regulation Best Interest does not alter that fact. Contrary to XYPN's contention (XYPN Br. 44, 47), the rule does not establish that a broker-dealer may hold itself out as an investment adviser without consequence. Rather, in declining to adopt a prohibition on the use of the term "adviser" in a broker-dealer's name or title, the Commission explained that such use would typically violate Regulation Best Interest's capacity disclosure requirement. *Adopting Release*, SA34-36; *see also infra* 84-85. Moreover, such conduct "could support a conclusion depending on other facts and circumstances, that the primary business of the firm is advisory in nature, in which case the advice provided by the broker-dealer would not be solely incidental to the conduct of its brokerage business." *Id.* at SA34 n.335, 36-37.

Because Regulation Best Interest does not turn on the Commission's interpretation of the broker-dealer exclusion, its validity of the latter is not before the Court. Petitioners never challenged the interpretative release (PA301-09); their petitions for review, filed over ninety days after its entry, does not mention it. 15 U.S.C. 80b-13(a) (petitions must be filed within sixty days after entry); *NY Repub. State Comm.*, 799 F.3d at 1134 (addressing timing for challenges to Advisers Act rules). Nor have petitioners even attempted to demonstrate that they would have standing to attack the interpretation, which creates no new legal obligations for broker-dealers—let alone States or advisers—but rather confirms and clarifies the Commission's long-

standing understanding of "solely incidental to." *Solely Incidental*, PA303, 307; *see N.Y.C. Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) (interpretive rules "do not create rights, but merely 'clarify an existing statute or regulation,'" and "do not have force of law"), quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993).

2. In any event, the Commission's understanding of "solely incidental to" comports with the Advisers Act's text and history. Petitioners focus on the words "solely incidental" in isolation (States Br. 51-52; XYPN Br. 44-45), but the statute requires that advisory services be "solely incidental *to the conduct of his business as a broker or dealer*." 15 U.S.C. 80b-2(a)(11)(C) (emphasis added); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 234 (2008) ("[A] single word must not be read in isolation but instead defined by reference to its statutory context."). The prepositional phrase beginning with "to," which petitioners elide, creates a relationship between a primary function ("the business of effecting transactions in securities," 15 U.S.C. 78c(a)(4)), and a secondary one ("advising others," 15 U.S.C. 80b-2(a)(11)). *See* WEBSTER'S NEW INT'L DICTIONARY 2656 (2d ed. 1937) ("to" indicates a "relation denoted by adjectives," such as "proportion").[7]

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[7] Even in isolation, "incidental" was understood (around 1940) in relational terms to mean "[d]epending upon or appertaining to something else as primary." BLACK'S LAW DICTIONARY 942-43 (3d ed. 1933); *accord* WEBSTER'S NEW INT'L DICTIONARY 1257 (2d ed. 1937) ("not of prime concern," "[l]iable to happen or to follow as a chance feature or incident"); FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1243 (rev. ed. 1940) ("Occurring in the course of or coming as a result or an adjunct of something else").

The Commission's focus on the relationship between brokerage business and advice accords with the Advisers Act's plain meaning. *See Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 117 (2d Cir. 2007) ("Our task * * * is not simply to interpret individual words but to construe statutes."). The Commission interprets the prong to mean that a broker-dealer's provision of advice is solely incidental to the conduct of its business as broker-dealer if the advice is provided "in connection with" and is "reasonably related" to the "primary business of effecting securities transactions." *Solely Incidental*, PA305. If a recommendation is not reasonably related to its primary brokerage business, or if its "primary business is giving advice," the broker-dealer can no longer rely on the exclusion from the Advisers Act, including the fiduciary duty for investment advisers. *Id.*; *see also Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1162 (10th Cir. 2011) ("[B]roker-dealers who give advice that is not connected to the sale of securities—or whose primary business consists of giving advice—do not meet the [solely incidental to] prong" of the exclusion.). Thus, the Commission illustrated, if a broker-dealer exercises unlimited discretion over an account, the relationship is primarily advisory because the advice is comprehensive and continuous. *Solely Incidental*, PA306. The case petitioners cite, which interprets "incidental" in a different statute, only confirms that the phrase "incidental to" implies that one aspect of a business is primary in relation to another. States Br. 52, citing *Barton Mines Corp. v. Commissioner*, 446 F.2d 981, 991-92 (2d Cir. 1971) (upholding a tax regulation for

mining that defined "incidental" to mean "any process *related* to a mining process" that is secondary to the primary mining activity) (emphasis added).

The Commission's interpretation accords with the Advisers Act's history. Broker-dealers did not just recently start providing advice, as petitioners seem to believe. Until the 1920s, broker-dealers were among the "principal" providers of "information and advice" to investors, as "ancillary to their regular business." Twentieth Century Fund, STOCK MARKET CONTROL 128 (1934); Investment Counsel Report at 3-4. The development that prompted the Advisers Act was "the growth of a class of investment counselors unaffiliated with any other form of financial organization" who provided *only* advice. Investment Counsel Report at 3-4. Unlike broker-dealers, these "investment counselors" (in the parlance of the time) faced "no statutory legal restrictions." Twentieth Century Fund, THE SECURITY MARKETS 633-47 (1935). Congress rejected the idea that these advice-only investment counselors should be free from federal oversight, particularly when broker-dealers were subject to regulation by the Commission, SROs, and the states. *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking & Currency*, 76th Cong., 3d Sess. 711-16, 736-53 (1940); *see also 2005 Rule*, 74 Fed. Reg. at 20429-30 (discussing hearings).

Thus, Congress defined "investment adviser" broadly, but excluded "brokers (insofar as their advice is merely incidental to brokerage transactions for which they receive only brokerage commissions)." S. Rep. No. 76-1775, at 22 (1940); *see also Lowe*

v. SEC, 472 U.S. 181, 194 (1985) (describing evolution of the language). As both the majority and dissent in *FPA* recognized, Congress's primary objective was to regulate the provision of advice by broker-dealers only when provided separately—without connection to—its brokerage business. 482 F.3d at 485, 489-90 & n.7; *id.* at 498-501 (Garland, J., dissenting). "Congress was concerned about the potential for fraud and misrepresentation" when advice was provided "by others whose only business was to provide advice for a fee" but "Congress did not express the same concern about investment advice included within a larger package of brokerage services." *Id.* at 499; *accord Thomas*, 631 F.3d at 1164 ("[I]nvestment brokers and dealers—who were regulated under [the Exchange Act]—gave investment advice yet were not the target of the new regulation.").

Petitioners' understanding of "solely incidental to" as turning on the amount or importance of the advice lacks any textual or historical basis. XYPN Br. 45; States Br. 52-53. The "narrow view" that advice must be unimportant or limited ignores that "the advice broker-dealers gave as part of their traditional brokerage services in 1940"— as in the present—was "often substantial in amount and importance to the customer." *2005 Rule*, 70 Fed. Reg. at 20437 & nn.140-42; *accord* Twentieth Century Fund, THE SECURITY MARKETS 633-646 (1935) ("To a substantial extent the brokerage house acts as an information bureau for customers concerning securities."). The exclusion for broker-dealers turned on the relationship between the advisory function *to their brokerage business*, not the significance of the advice *to the investor*. The

phrase, after all, is "solely incidental to * * * the conduct of his business as a broker," not "solely incidental to the investor" who receives the advice. As the *Thomas* court concluded, "solely incidental to" does not "hinge upon the quantum or importance of the broker-dealer's advice," because broker-dealers satisfy this "prong of the exemption so long as they give investment advice only in connection with the primary business of selling securities." 631 F.3d at 1164; *accord Thorp Revocable Tr. v. Ameritas Inv. Corp.*, 57 F. Supp. 3d 508, 528 (E.D.N.C. 2014) (applying *Thomas*).

Petitioners' contrary interpretation would produce strange results. It would require courts to focus "on the quantum or importance of the advice without regard to its relationship with the broker-dealer's business"—a broker-dealer could give advice unconnected to its brokerage business so long as the advice is deemed inconsequential after the fact. *Thomas*, 631 F.3d at 1162. Conversely, under the "professional" exclusion in subparagraph (B)—which uses the same "solely incidental to" phrase—a lawyer advising about a significant securities transaction for estate-planning purposes would have to register as an investment adviser even though such advice is part of his legal counsel. 15 U.S.C. 80b-202(a)(11)(B). Similarly, accountants offering advice about timing transactions to mitigate tax consequences would be swept within the definition of "investment adviser." *Id.* Even to the extent such a "significance" test were workable, there is no indication Congress meant to regulate other professions as investment advisers simply because their advice could later be deemed important. *See Thomas*, 631 F.3d at 1162 (focusing on significance or amount

raises a "difficult problem of line-drawing—how much advice is too much, and how could we measure the importance of the advice?").

The Commission's interpretation is nothing new, despite petitioners' contrary insistence. XYPN Br. 46. The Commission has long described "solely incidental to" as applying "when the advisory services rendered are in connection with and reasonably related to the brokerage services provided." *2005 Rule*, 70 Fed. Reg. at 20436; *compare with Opinion of General Counsel*, 11 Fed. Reg. 10996, 10996 (Sept. 27, 1946) (the exclusion is Congress's "recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business"). The discussion of financial planning in the 2005 Rule does not contradict this longstanding view, as XYPN erroneously contends, but instead reflects it. XYPN Br. 46. Vacated on other grounds in *FPA*, the 2005 Rule provided, among other things, that a broker-dealer does not meet the "solely incidental to" prong if it provides advice as part of a financial plan and holds itself out as a financial planner. The Commission explained that financial planning was a "relatively new service" involving the preparation of a "comprehensive financial program," and was being offered by broker-dealers "independent of their brokerage services"—that is, "separate" and "distinct" from their traditional business of providing "transaction-specific advice." *2005 Rule*, 70 Fed. Reg. at 20438-39.

3. While the Commission did not interpret the meaning of the "special compensation" prong in Regulation Best Interest or the interpretive release, petitioners nonetheless claim that Regulation Best Interest turns on a misreading of this statutory language. XPYN Br. 48-51. But it is petitioners who misread the text—they focus on the mention of "compensation" in the Regulation Best Interest release, but the phrase in the statutory text is "*special* compensation." 15 U.S.C. 80b-2(a)(11)(C) (emphasis added). The "overall context" of the broker-dealer exclusion "clarifies that 'special compensation' means compensation received specifically for investment advice in a form other than traditional commissions or analogous transaction-based compensation." *Thomas*, 631 F.3d at 1164. Particularly since the definition of "investment adviser" describes a person who acts "for compensation"—there must be some exchange of value for the definition to come into play—the use of the word "special" refers to situations when there is "a clearly definable charge for investment advice" and not simply because a broker-dealer receives a transactional fee in the course of its brokerage business. *Solely Incidental*, PA307 n.68; *accord Thomas*, 631 F.3d at 1165 (recounting history of special compensation prong); *Kassover v. UBS AG*, 619 F. Supp. 2d 28, 34 (S.D.N.Y. 2008) (applying special compensation prong).

The discussion of "compensation" in Regulation Best Interest that XYPN cites is neither surprising nor inconsistent with the Advisers Act. Regulation Best Interest requires a broker-dealer to disclose material facts regarding conflicts of interest,

including conflicts that arise from "compensation associated with recommendations." *Adopting Release*, SA46-47, cited by XYPN Br. 49-50. For example, broker-dealers may receive compensation from certain funds for distribution, shareholder services, and other expenses, potentially creating "an incentive to recommend certain products over other products." *Id.* at SA46; *see generally Mutual Fund Distribution Fees; Confirmations*, 75 Fed. Reg. 47064, 47065-73 (Aug. 4, 2010). Courts have consistently rejected XYPN's argument (XYPN Br. 50) that such third-party compensation constitutes "special compensation" because it is not "received specifically in exchange for giving advice, as opposed to some other service." *Wiener v. Eaton Vance Distribs., Inc.*, No. 10-10515, 2011 WL 1233131, at *8 (D. Mass. Mar. 30, 2011) (quoting *Thomas*, 631 F.3d at 1165); *accord Kassover*, 619 F. Supp. 2d at 34 (to be special compensation, fees must have been "paid to [the broker-dealer] for providing investment advisory services to Plaintiffs"). And in any event, Regulation Best Interest does not address, let alone change, whether these forms of compensation could amount to special compensation under the broker-dealer exclusion, so the rule could not run afoul of that provision.

XYPN also points to the Commission's explanation of what it means for a retail customer to "use" a recommendation for Regulation Best Interest's purposes. *Id.* at SA27-28, cited by XYPN Br. 49. But when the Commission explained that Regulation Best Interest may still apply to a recommendation even in some situations where the broker-dealer does not receive compensation, the Commission was not somehow permitting broker-dealers to accept a separate fee for advice. Instead, it was

not taking any position on the special compensation prong at all. To argue, as petitioners do, that "a broker-dealer receives 'special compensation' whenever the broker-dealer receives an economic benefit from a transaction involving investment advice * * * would render the word 'special' superfluous and ignore the statute's clear distinction between 'compensation' and 'special compensation.'" *Thomas*, 631 F.3d at 1166 (quotation omitted).

4. Ultimately, it is petitioners who wish to depart from the Advisers Act because, in their view, the market has fundamentally changed since 1940. States Br. 54-55; XYPN Br. 52. While revisionist in its premise—broker-dealers have long offered "personalized investment advice," States Br. 54—this argument is beside the point. Congress did *not* alter the broker-dealer exclusion, despite the market changes that petitioners emphasize. It has sustained its decision, made over eighty years ago, not to regulate broker-dealers as investment advisers when they provide advice as part of their primary brokerage business and do not receive special compensation.

III. The Commission's decision to tailor an enhanced standard of conduct to the services and fee arrangements offered by broker-dealers and its explanation for that choice were not arbitrary and capricious.

The Commission drew on key principles underlying the fiduciary duty for investment advisers in order to enhance protections for retail investors and preserve their access to "differing types of investment services and products." *Adopting Release*, SA6, 13. Petitioners' scattershot objections do not establish that the Commission's decision was "irrational" under the "highly deferential" arbitrary and capricious test.

Cty. of Rockland, 709 F.2d at 776 (quotation omitted). This Court "may not itself weigh the evidence or substitute its judgment for that of the agency," and it "will not lightly reach a conclusion that an agency has not examined all relevant data or satisfactorily demonstrated a rational connection between the facts it has found and its final decision." *Islander E. Pipeline*, 525 F.3d at 150-51. Because the Commission "provided a coherent and reasonable explanation of its exercise of discretion," Regulation Best Interest should be upheld. *Conn. Office of Consumer Counsel v. FCC*, 915 F.2d 75, 78 (2d Cir. 1990) (quotation and alteration omitted).

A. The Commission reasonably concluded that Regulation Best Interest, and not a uniform fiduciary standard, would enhance protections for retail investors while preserving their access to broker-dealers.

Petitioners' argument that Regulation Best Interest is arbitrary and capricious mischaracterizes the Commission's objectives, ignores the ways in which Regulation Best Interest enhances investor protections, and attacks aspects of Regulation Best Interest that are not meaningfully different from the fiduciary standard. Ultimately, petitioners "quibble with the balance struck by" the Commission but identify "no basis * * * for overruling [the Commission's] considered judgment." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519-20 (D.C. Cir. 2009).

1. Regulation Best Interest reasonably balances the Commission's regulatory objectives.

Petitioners generally ignore the protections that Regulation Best Interest creates as well as investors' interest in having access to the services and fee arrangements

offered by broker-dealers. There has been "broad acknowledgement of the benefits of, and support for, the continuing existence of the broker-dealer business model * * * as an option for retail customers seeking investment recommendations"—including by Congress in 2010. *Adopting Release*, SA2; *see supra* 56, 57. The "pay as you go" arrangement allows retail customers "to pay for investment recommendations on a transaction-by-transaction basis." *Id.* at SA73. It is a "cost-effective" option for investors, particularly lower-income investors, who want episodic advice without having to pay a percentage of their investment assets or who cannot meet account minimums often imposed by investment advisers. *Id.* at SA2, 72.

Regulation Best Interest reflects the Commission's concern that requiring broker-dealers to conform to a regulatory regime that is tailored to the services and fee arrangements offered by investment advisers would reduce the availability of brokerage services. *Id.* at SA145-46, 147-49. The contours of the fiduciary duty for investment advisers have been shaped by the ongoing nature of advisory relationships with an array of different types of investors, ranging from retail customers to hundred-billion-dollar pension funds. *Fiduciary Interpretation*, PA290-91. Transplanting that fiduciary duty to the broker-dealer context without accounting for the episodic nature of the business could cause broker-dealers to stop offering transactional services, prompt them to offer "advice in the capacity of investment adviser" through fee-based accounts, or otherwise increase the cost of advice. *Adopting Release*, SA145-

46, 147-49. As a result, retail investors could face reduced access to brokerage services and higher costs, which reduce returns. *Id.*

These concerns are "not theoretical." *Id.* at SA5. Based on studies, comment letters, and its expertise, the Commission agreed with the Fifth Circuit that the DOL Rule reduced access to brokerage services and increased costs for investors, as broker-dealers shifted from commission-based to fee-based accounts, passed on higher costs to customers, or left the market entirely. *Id.* at SA5 & n.33, 104-07, 150; *see also Chamber of Commerce*, 885 F.3d at 368. The Commission observed that these trends "appear[] to have ended" after the Fifth Circuit vacated the rule. *Adopting Release*, SA103. Various commenters echoed the concern that an insufficiently tailored fiduciary standard would jeopardize investor access. *See supra* 19; Cetera Fin. Grp. Letter (Aug. 7, 2018), at PA2526-27, 2529-30; Ameriprise Letter (Aug. 6, 2018), at PA1301, 1305; Primerica Letter (Aug. 7, 2018), at PA1802-03.

Given this background, the Commission appropriately found that extending the fiduciary standard to broker-dealers "would result in fewer broker-dealers offering transaction-based services to retail customers, which would in turn reduce choice and may raise costs for certain retail customers." *Adopting Release*, SA13; *see also id.* at SA5, 145-46. The Commission also reasonably determined that crafting a new uniform fiduciary standard for broker-dealers and investment advisers would have similar effects, while increasing costs for advisers' clients and jettisoning the precedent that

shaped the fiduciary standard, which has worked well for investment advisers. *Id.* at SA5, 148-49.

To avoid these results, the Commission tailored Regulation Best Interest to protect "access to the services, products, and payment options offered by broker dealers," while incorporating "substantially similar" obligations as the fiduciary duty. *Adopting Release*, SA6, 13 & n.123; *see also Proposing Release*, PA17-18; *913 Study*, PA323, 327, 355-57, 360-61, 445-46, 453-54. Regulation Best Interest reflects the generally "transactional and episodic" nature of the brokerage relationship, and applies at the time of the recommendation, rather than to an entire advisory relationship. *E.g.*, 17 C.F.R. 240.15*l*(a)(2)(i)(A)(3), (ii)(B)-(C); *Adopting Release*, SA14, 146. Its component obligations reflect the pay-as-you-go, transactional services that broker-dealers offer. 17 C.F.R. 240.15*l*(a)(2)(i)(A)(2), (ii)(A); *Adopting Release*, SA73. And they are "tailored to address the specific conflicts raised by the transaction-based" recommendations—such as excessive trading, limited product menus, and "sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities." 17 C.F.R. 240.15*l*(a)(2)(iii)(D); *Adopting Release*, SA14, 72-80, 146.

Petitioners fail to demonstrate that the Commission's choice of the tailored approach in Regulation Best Interest over a uniform standard was "unreasonable." States Br. 70. The Commission's concerns about retail customer access to broker-dealers were not "speculation," as the States incorrectly suggest. Evidence regarding the effects of imposing fiduciary duties on broker-dealers derived from multiple

sources, not just a "handful of industry surveys." States Br. 71. This evidence showed not only that broker-dealers "expected" to change their services, but that many had reduced or eliminated services in response to the DOL Rule and restored them after it was vacated. *See Adopting Release*, SA104-07, 150. Even material cited by the States in their failed attempt to show Article III standing indicates that a "fiduciary duty does reduce the number of broker-dealer firms operating in a market." States Add. 57; *see also Adopting Release*, SA 147 n.1351 (discussing this study, which finds that a fiduciary duty would "cause some broker-dealers to exit the market").

The States erroneously contend that the Commission "failed to mention" differences between a hypothetical uniform fiduciary standard and the DOL Rule (State Br. 71), but the Commission acknowledged that they were not the same and could have different effects. *See Adopting Release*, SA148-50 (considering a uniform standard and a standard modeled on the DOL Rule as independent alternatives). Both approaches treat broker-dealers as fiduciaries without fully accounting for how broker-dealers function, and the Commission reasonably concluded that the DOL Rule's effects, along with other evidence, justified taking investor access and costs into account in deciding whether to impose the investment-adviser fiduciary duty on broker-dealers. *Id.* at SA5, 13, 16. In any event, the existence of uncertain or conflicting evidence does not make agency action arbitrary and capricious—"[i]t is not infrequent that the available data does not settle a regulatory issue and the agency

must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52.

Finally, the States incorrectly assert that the Commission ignored relevant considerations in its analysis of regulatory alternatives. States Br. 71-72. The Commission, at length, explained how it balanced reducing harm from conflicted advice with preserving investor choice—it was the central focus of the release. *E.g.*, *Adopting Release*, SA145-51. Contrary to the States' suggestion, the Commission specifically considered the interests of investors with fewer resources or lower financial literacy. It discussed the evidence that such investors are more vulnerable to harm from conflicted advice. *Id.* at SA114-16; *see also id.* at SA86, 89, 110, 111, 113. But it also determined that they are most likely to be "pushed outside the market for investment advice" by a fiduciary standard that does not conform to the transaction-specific recommendations and fee arrangements offered by broker-dealers. *Id.* at SA147-48, 149; *see also id.* at SA106 (citing study finding that "customers with smaller account balances were nearly ten times more likely to have been negatively affected by the DOL Fiduciary Rule than customers with larger account balances"). The States may weigh the tradeoffs differently, but in "bringing its expertise and its best judgment to bear upon" the relative merits of a tailored versus uniform standard, the Commission satisfied its obligation to consider reasonable alternatives. *Chamber of Commerce v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005); *compare with City of Brookings Mun.*

Tel. Co. v. FCC, 822 F.2d 1153, 1170 (D.C. Cir. 1987), cited at States Br. 72 (agency violated APA by "failing even to consider the proposed alternative").

2. Regulation Best Interest aligns with the fiduciary duty for investment advisers at the time a recommendation is made.

Petitioners' belief that Regulation Best Interest fails to protect investors rests on the false premise that Regulation Best Interest will be less effective at addressing potential harm from conflicted advice than the investment-adviser fiduciary duty. States Br. 61-65. Petitioners invoke the "fiduciary standard" without explaining what they think that means or how they think it would apply, as a practical matter, to broker-dealers. But labeling a person "a fiduciary only begins analysis; it gives direction to further inquiry," including "[w]hat obligations does he owe as a fiduciary?" *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). The Commission provided a reasonable explanation of why it adopted a standard that incorporates key principles of the fiduciary duty—and aligns closely to it at the time a recommendation is made—while accounting for how broker-dealers function.

The States begin by incorrectly claiming that Regulation Best Interest is "substantively similar to FINRA's suitability rule." States Br. 61-62, 68. Regulation Best Interest goes beyond suitability in both the duties it imposes and the scope of advice it covers, which includes recommendations relating to account types and asset

rollovers. *Adopting Release*, SA10, 57 (summarizing enhancements).[8] These enhancements, which petitioners barely discuss, support the Commission's determination that the duties for broker-dealers and investment advisers align at the time a recommendation is made. *Id.* at SA13-14.

The States are also wrong that Regulation Best Interest is "more lenient" than the investment-adviser fiduciary standard with respect to conflicts of interest. States Br. 62. An investment adviser "must, at all times, serve the best interest of its client" and refrain from "plac[ing] its own interest ahead of its client's interests." *Fiduciary Interpretation*, PA290, 294; *Capital Gains*, 375 U.S. at 196; *913 Study*, PA323, 445. Under its duty of loyalty, an adviser "must eliminate or make full and fair disclosure of all conflicts of interest" that might incline the adviser to give advice that is not disinterested. *Fiduciary Interpretation*, PA290; *Capital Gains*, 375 U.S. at 191-92. And under its duty of care, an adviser must provide advice that is in the best interest of the client. *Fiduciary Interpretation*, PA291-92; *see also 913 Study*, PA453-54.

Although the investment-adviser fiduciary standard applies more broadly—to the entire advisory relationship—Regulation Best Interest imposes "substantially similar" obligations on broker-dealers at the time they make recommendations to

[8] FINRA guidance interpreting suitability to require recommendations that are "consistent with the [customer's] best interest" does not prove that suitability imposes the same obligations. States Br. 68. Regulation Best Interest codifies substantive obligations that suitability has not been understood to require and removes any ambiguity "as to whether the recommendation must be in the retail customer's best interest or something less." *Adopting Release*, SA57, 120.

retail customers. *Adopting Release*, SA13-14. The text of the rule—which petitioners barely mention—requires a broker-dealer to "act in the best interest of the retail customer at the time the recommendation is made, without placing [its] interest * * * ahead of the interest of the retail customer." 17 C.F.R. 240.15*l*-1(a)(1). Aligning with the investment-adviser fiduciary duty of care, the Care Obligation requires a broker-dealer to have a reasonable basis to believe that each recommendation is in the best interest of the customer. *Id.* 240.15*l*-1(a)(2)(ii)(B). And aligning with the investment-adviser fiduciary duty of loyalty, Regulation Best Interest requires a broker-dealer to disclose all "material facts relating to conflicts of interest that are associated with the recommendation," *id.* 240.15*l*-1(a)(2)(i)(B), and have policies and procedures reasonably designed to "[i]dentify and at a minimum disclose, * * * or eliminate all [such] conflicts of interest," *id.* 240.15*l*-1(a)(2)(iii)(A). The definition of "conflict of interest" in the rule follows the Supreme Court's description of that term for investment advisers. *Compare* 240.15*l*-1(b)(3) ("Conflict of interest means an interest that might incline a [broker-dealer]—consciously or unconsciously—to make a recommendation that is not disinterested") *with Capital Gains*, 375 U.S. at 191-92.

Petitioners perceive a gap between Regulation Best Interest and the investment-adviser fiduciary duty, in part, because they misconceive of the fiduciary duty as eliminating the possibility that an investment adviser can ever have a financial interest in the advice given. *E.g.,* States Br. 62; XYPN Br. 33. But courts and the Commission have understood the fiduciary duty as requiring investment advisers to

provide full and fair disclosure of their interest, and either eliminate or obtain client consent for the conflict. *See, e.g.*, *Capital Gains*, 357 U.S. at 196-97; *Robare*, 922 F.3d at 477; *cf. Adopting Release*, SA2 & n.6, 86 n.858, 109 (explaining that advisory relationships, like brokerage relationships, have "inherent conflicts of interest" that may result in advice that is not disinterested). Petitioners' notion that the fiduciary duty forbids investment advisers from having a fully disclosed financial interest in the advice they give is a fiction——the mere fact that investment advisers are compensated for providing advice creates a conflict. Under Regulation Best Interest, broker-dealers and investment advisers owe comparable obligations to fully and fairly disclose such conflicts, and to refrain from placing their interests ahead of the customer's or the client's interest. *See 913 Study*, PA323, 355-57, 439, 445-46; *Fiduciary Interpretation*, PA290, 294-97; *Adopting Release*, SA4, 15, 17.[9]

Regulation Best Interest also imposes "more specific obligations on broker-dealers." *Adopting Release*, SA14, 146. For instance, broker-dealers must have policies and procedures reasonably designed (1) to mitigate conflicts of interest associated

[9] Petitioners incorrectly assert that by requiring a broker-dealer to act "without placing [its interest] ahead of [the customer's interest]," rather than "without regard to" its own interest, Regulation Best Interest imposes a lower standard than Section 913(g). States Br. 48-49; XYPN Br. 33. But there is no meaningful difference between the two formulations—both mirror the analogous obligation under the investment-adviser fiduciary standard. *Adopting Release*, SA14-15; States Br. 20 (citing H.R. Rep. No. 111-687, pt. 1, at 75 (2010)). The Commission opted not to use the "without regard to" formulation, however, because it could be misinterpreted (as the States' brief illustrates) to mean a bar against providing advice that is "subject to conflicts of interest" when there is full and fair disclosure. *Adopting Release*, SA14-15.

with a recommendation that might incentivize an associated person of a broker-dealer to place its interests or the broker-dealer's interest ahead of the customer's; (2) to identify, disclose, and prevent material limitations placed on the recommendations that cause broker-dealers to place their interests ahead of the customer's; and (3) to eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time. 17 C.F.R. 240.15*l*-1(a)(2)(iii)(B)-(D); *see Adopting Release*, SA9-10, 14, 78-79. These requirements are "tailored to address the specific conflicts raised by the transaction-based nature of the broker-dealer model"—such as excessive trading, sales incentives, and limited product menus—and are "consistent with the generally rules-based regulatory regime" that has long applied to broker-dealers. *Adopting Release*, SA14. Multiple commenters suggested that, by imposing these obligations, Regulation Best Interest would be more stringent than the investment-adviser fiduciary duty. *E.g.*, SIFMA Letter (Aug. 7, 2018), at PA2247-48; Ctr. for Capital Mkts. Competitiveness Letter (Aug. 7, 2018), at PA1758; Primerica Letter (Aug. 7, 2018), at PA1802-03.

The States fail to show that the Commission's adoption of the Conflict of Interest Obligation, with a definition of "conflict of interest" straight from *Capital Gains*, was an unreasonable way to address harms from conflicted advice or that it somehow lowers the standard of care for broker-dealers as compared with the standard that applies to investment advisers. States Br. 64-65. The States incorrectly

suggest that Regulation Best Interest relies on disclosure alone, ignoring its affirmative requirements, including those relating to conflict mitigation and elimination. *Adopting Release*, SA9-10, 73, 124. And they never square their criticism of Regulation Best Interest's disclosure requirements with the actual mechanics of the investment-adviser fiduciary standard, which also "relies heavily" on disclosure (XYPN Br. 57; States Br. 64), or with Congress's emphasis on the importance of disclosure, as captured throughout Section 913. *See, e.g.*, *Capital Gains*, 375 U.S. at 186 (Advisers Act was intended "to substitute a philosophy of full disclosure for the philosophy of caveat emptor"); Dodd-Frank § 913(g) (requiring the Commission to "facilitate the provision of simple and clear disclosures" and granting authority to require "disclosure of range of products offered") (SA180-81).

3. The Commission reasonably justified its policy choices.

In their failed attempt to show that the Commission did not justify the rule, petitioners disregard most of the adopting release in which the Commission explained its rationale. They critique the absence of a definition of "best interest" (States Br. 63-64), but the Commission explained why it did not define the term. The Commission noted that the absence of a textual definition of "best interest" for investment advisers has not prevented courts and the Commission from applying the principle in a flexible manner that "work[s] well for advisers' retail clients and our markets." *Adopting Release*, SA17. The Commission emphasized that while the obligation to act in the customer's best interest generally aligns with the fiduciary standard, Regulation

Best Interest takes a more prescriptive approach because the four obligations "expressly set forth what it means to 'act in the best interest' of the retail customer," and "failure to comply with any of the components" violates the rule. *Id.* at SA13, 16.

Petitioners highlight the portion of the release discussing how broker-dealers document recommendations, but they disregard the Commission's rationale for its policy choice. State Br. 63-65. Broker-dealers must disclose "the general basis for [their] recommendations" as a "material fact relating to the scope and terms of the relationship," as well as any conflicts associated with the recommendation. 17 C.F.R. 240.15*l*-1(a)(2)(i)(A)-(B); *Adopting Release*, SA42. They must "obtain and analyze enough customer information to have a reasonable basis to believe that the recommendation" is in the customer's best interest. 17 C.F.R. 240.15*l*-1(a)(2)(ii); *Adopting Release*, SA62. And they must make and keep records of information collected from and provided to customers. 17 C.F.R. 240.17a-3(a)(35); *Adopting Release*, SA81.

The Commission declined to require individualized documentation as a general matter. It explained that requiring broker-dealers to disclose "the individualized basis for each recommendation" would in many cases "simply repeat the more standardized disclosure." *Adopting Release*, SA42-43. But the Commission cautioned that if standardized disclosure does not disclose the basis for and risks associated with each recommendation—or the basis is not clear from the recommendation itself—broker-dealers may need to document individual recommendations to satisfy the Disclosure

and Care Obligations. *Id.* at SA61-62, 65. Ultimately, the Commission reasonably concluded that "the Care Obligation's substantive requirement to have a reasonable basis for the recommendation, combined with the Disclosure, Conflict of Interest and Compliance Obligations, provides sufficient protections." *Id.* at SA42.

The States also criticize the Commission's decision not to prescribe a standardized written disclosure (States Br. 73), but the Commission's discussed that issue in depth. *See Karpova*, 497 F.3d at 268 ("[S]o long as the agency * * * has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action."). The Commission acknowledged the "potential value" of standardized disclosures. *Adopting Release*, SA49. But given the "wide variety of business models and practices," the Commission concluded that it was "important to provide broker-dealers with flexibility" to formulate their disclosures based on their businesses and their customers. *Id.* Allowing broker-dealers to tailor their disclosures does not negate their value—tailored disclosures will likely be more valuable to retail customers, as the Commission explained. *Id.* at SA49-50.

Finally, the Commission reasonably explained its decision not to ban broker-dealers from using the terms "adviser" or "advisor" in their names or titles but to make it a presumptive violation of Regulation Best Interest for standalone broker-dealers (*i.e.*, those not also registered as investment advisers) to use these names or titles. The Commission recognized that the use of these names and titles "can have

the effect of erroneously conveying to investors that they are regulated as investment advisers." *Id.* at SA35. But the Commission concluded that it was unnecessary to flatly prohibit their use because, in most instances, a broker-dealer that titled itself an "adviser" or "advisor" would violate its obligation to fully and fairly disclose the capacity in which it is acting. *Id.* Moreover, some broker-dealers reasonably use these terms because they have an advisory business that does not serve retail customers, such as when they advise state and local governments. *Id.* at SA36. Although the Commission declined to prohibit particular marketing practices, it cautioned broker-dealers that their overall marketing should not contradict their capacity disclosures and that holding themselves out as advisers could affect whether they meet the broker-dealer exclusion, depending on the facts and circumstances. *Id.* at SA34 n.335, 36-37.

4. The Commission reasonably addressed the issue of retail investor confusion.

Petitioners believe that a uniform fiduciary standard is the best way to address investor confusion, but the Commission disagreed and explained why its approach was reasonable. XYPN Br. 53; States Br. 73-75. The Disclosure Obligation requires "full and fair disclosure" of the capacity in which a broker-dealer is acting, the services provided in that capacity, and applicable fees and costs. 17 C.F.R. 240.15*l*-1(a)(2)(i). It is complemented by a new set of disclosures—adopted separately in Form CRS, which petitioners have not challenged. Form CRS requires broker-dealers and

investment advisers to deliver a Relationship Summary containing "succinct information" about, *inter alia*, the services offered, their cost, and conflicts. *Form CRS*, PA111. The Disclosure Obligation of Regulation Best Interest and the Relationship Summary "complement each other," "provide different levels of key information," and "improve the quality and consistency of disclosures," by reducing "information asymmetry" between customers and broker-dealers and "facilitat[ing] customer comparisons," particularly with respect to fees. *Adopting Release*, SA30.

Petitioners argue that these disclosures will fail to ameliorate investor confusion about the applicable standards of conduct. XYPN Br. 27, 57-58; States Br. 64, 73-74. But petitioners offer nothing more than their opinion that Regulation Best Interest's capacity disclosure will be ineffective. Instead, they focus on supposed problems with Form CRS, which is not at issue in this appeal. But even if Form CRS were properly up for review, the evidence before the Commission supported its determination that "the proposed relationship summary would be useful for retail investors," including with regard to understanding the applicable standards of conduct. *Form CRS*, PA113-14, 117. In particular, study participants overwhelmingly said that the Relationship Summary would help them make informed decisions, and the Commission altered the Relationship Summary from the proposal in response to studies submitted by commenters, including those on which XYPN relies. *Id.* at PA113, 117, 149-51, 193, 204-05.

Petitioners misstate how the Commission factored potential investor confusion into its decision to adopt Regulation Best Interest instead of a uniform fiduciary standard. XYPN Br. 59. The Commission explained that Regulation Best Interest advances the dual purposes of enhancing protections while preserving choice even if "some retail customers are not able to understand the information disclosed by a broker-dealer," because in all instances retail customers are entitled to recommendations that are in their best interest and that do not place the financial professional's interests ahead of their own. *Adopting Release*, SA13, 124. While the Commission recognized that a uniform standard "could reduce retail customers' confusion with respect to the duties owed to them by [] broker dealers and investment advisers," it also determined that such "uniformity could come at a cost to both investors and financial service providers" in terms of reduced choice and a higher cost of advice. *Id.* at SA145-46. Petitioners may disagree with how the Commission balanced investor choice and possible investor confusion—petitioners appear willing to trade away the former for the chance of reducing the latter—but because the Commission set "out a satisfactory explanation including a rational connection between the facts found and the choice made," the Commission's contrary judgment is not arbitrary and capricious. *Karpova*, 497 F.3d at 268

B. The Commission satisfied its obligation to consider and evaluate the potential economic consequences of Regulation Best Interest.

When the Commission engages in rulemaking, it must "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. 78c(f). This statutory requirement mandates that the Commission "determine as best it can the economic implications of the rule." *Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016) (quotation omitted). The Commission engaged in a thorough economic analysis that started with the economic baseline, assessed the benefits and costs of each of the four obligations, and examined reasonable alternatives. *Adopting Release*, SA89-151. While XYPN does not challenge the Commission's economic analysis, the States take issue with a few discrete parts, contending primarily that the Commission did not "justify its decision to adopt" Regulation Best Interest "instead of a fiduciary standard." States Br. 65. Their arguments lack merit because the Commission provided a "reasoned analysis" of the balance it struck between the costs and benefits of the rule to investors and regulated entities. *Lindeen*, 825 F.3d at 657.

1. The Commission reasonably considered the harm to investors stemming from conflicts of interest.

The States contend that the Commission's economic analysis is inadequate because it did not quantify all of the costs associated with conflicts of interest. States Br. 66-67. But neither the APA nor relevant case law requires the Commission to quantify every potential cost or benefit. To the contrary, the Commission "need

not—indeed cannot—base its every action upon empirical data" and "may be entitled to conduct * * * a general analysis based on informed conjecture." *Chamber of Commerce*, 412 F.3d at 142 (quotation omitted). Thus, when the Commission "d[oes] not have the data necessary to quantify precisely" a particular cost or benefit, a qualitative discussion is sufficient as long as the Commission "articulate[s] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Lindeen*, 825 F.3d at 658 (quotation and alterations omitted); *see also Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369 (D.C. Cir. 2014), *overruled on other grounds by Am. Meat Instit. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Investment Co. Inst. v. CFTC*, 720 F.3d 370, 377, 379-80 (D.C. Cir. 2013). The only case cited by the States is not to the contrary, as it holds, under a statute governing environmental impact statements, that an agency cannot "defer" to later its "analysis" of its actions. *Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002). The Commission, by contrast, tackled its analytical requirements head on and produced a detailed analysis that identified the obstacles to quantification, including the large "number of assumptions" needed "to forecast how broker-dealers will respond to Regulation Best Interest, and how those responses will, in turn, affect the broader market for investment advice and the retail customers' participation in financial markets." *Adopting Release*, SA84; *see also id.* at SA117-18.

The States focus on "aggregate investor harms" and intimate that the Commission ignored relevant studies (States Br. 67), but the Commission analyzed the

differing views on measuring harm from conflicted advice. The Commission surveyed the relevant literature, including the studies by the Council on Economic Advisers (CEA) and DOL that tried to estimate aggregate harm and that the States emphasize. *Adopting Release*, SA108-14, 118-19. But the Commission, in agreement with multiple commenters, identified methodological problems with those studies, which likely overestimated aggregate harm. *Id.* at SA112-13 & nn.1099, 1103. The CEA and DOL studies did not produce "a meaningful estimate of the aggregate investor harm" because, among other problems, they did not "cleanly distinguish under-performance attributable to broker-dealers from under-performance attributable to investment advisers," or account for "other factors that are unrelated to conflicts of interest." *Id.* at SA119, 142.

Newer studies and data, the Commission noted, "suggest that the magnitude of potential investor harm likely is not as large as" the CEA and DOL estimated and that "potential harm to investors arising from conflicts of interest may be declining." *Id.* at SA113-14. Thus, while the Commission "d[id] not dispute the existence of broker-dealer behavior under the baseline that is harmful to investors," it reasonably concluded that "quantifying that harm, and therefore quantifying the benefits associated with reducing it, depends on many contingent factors that would render any estimates insufficiently precise to inform our policy choices." *Id.* at SA119; *see also id.* at SA140. The Commission assessed the data at length, and the Commission's

conclusion is "not arbitrary and capricious simply because there is conflicting evidence." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 93 (2d Cir. 2000).

Even with these empirical issues, the Commission supplemented its qualitative analysis by applying the CEA and DOL's methodology to estimate the potential benefit to mutual fund investors. *Adopting Release*, SA140-42. It estimated that a reduction in underperformance of broker-sold mutual funds—a subset of securities affected by Regulation Best Interest—would save investors between $4.1 billion and $9.7 billion per year. *Id.* at SA141-42. The Commission explained that this range "most likely overestimates the expected reduction in harm associated with broker-sold mutual funds due to Regulation Best Interest." *Id.* at SA142. Contrary to the States' assertion (State Br. 68), the Commission's caveated statement that Regulation Best Interest's benefits "could be as large as" that amount was not a definitive finding that the rule will entirely eliminate those losses. *Adopting Release*, SA142.

The States fault the Commission for not deriving a meaningful estimate of aggregate investor harm from other studies it discussed, but they do not explain how that could have been done. Nor was the Commission obligated to "commission a new study" to quantify the harm from broker-dealer conflicts. States Br. 67; *cf.* *Chamber of Commerce*, 412 F.3d at 142 (Commission was not required "to do an empirical study"). The Commission is not required "to measure the immeasurable." *Lindeen*, 825 F.3d at 658 (quotation omitted). When quantitative data is not available,

the Commission's careful "discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits." *Id.*

2. The Commission reasonably analyzed Regulation Best Interest's likely economic benefits.

The States similarly miss the mark when they object to the Commission's analysis of the potential benefits associated with the Disclosure and Conflict of Interest Obligations. States Br. 68-69. The Disclosure Obligation imposes "more comprehensive and more specific" obligations through "an explicit and broad disclosure requirement under the Exchange Act." *Adopting Release*, SA121, 137. The Commission concluded that, to the extent broker-dealers are not already making the required disclosures under existing regulatory requirements, the Disclosure Obligation "should increase the consistency of disclosure practices across broker-dealers * * * relative to the baseline, thereby increasing the likelihood that retail customers have the information they need to make a more informed and efficient investment decision at the time they receive a recommendation." *Id.* at SA123.

The States dispute this analysis because Regulation Best Interest does not standardize the form or manner of disclosures. States Br. 69. But the Commission reasonably determined that Regulation Best Interest improves the consistency of disclosure practices over the status quo by establishing a minimum standard for all broker-dealers. *Adopting Release*, SA123. The Commission's acknowledgment that the magnitude of this benefit depends on how much information broker-dealers

previously disclosed, among other factors, is a sign of responsible decision-making, not arbitrary action. *Id.* at SA123-24. Absent data enabling more precise predictive judgments—and the States do not point to any—the Commission was required only to "acknowledge factual uncertainties and identify the considerations it found persuasive." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The Commission did just that: it explained that "the Disclosure Obligation is just one component of Regulation Best Interest that as a whole will enhance the efficiency of recommendations that broker-dealers provide to retail customers, help retail customers evaluate the recommendations received, and improve retail customer protection when receiving recommendations from broker-dealers." *Adopting Release*, SA124.

The Commission also reasonably analyzed the benefits of the Conflict of Interest Obligation. The States incorrectly suggest that the Disclosure and Conflict of Interest Obligations are "largely" the same. States Br. 64 n.22. To comply with the Conflict of Interest Obligation, broker-dealers must establish, maintain, and enforce written policies and procedures reasonably designed to identify all conflicts of interest and, depending on the type of conflict, disclose, mitigate, or eliminate them. 17 C.F.R. 240.15*l*-1(a)(2)(iii). This is a "new requirement relative to the current regulatory regime"—broker-dealers must now manage conflicts arising from their compensation practices, product menus, and other potential sources of conflicts. *Adopting Release*, SA131-37. Moreover, a broker-dealer must have policies and

procedures reasonably designed to eliminate certain high-pressure sales practices that cannot reasonably be addressed through disclosure or mitigation. *Id.* at SA137.

The States do not discuss any of these regulatory enhancements. Instead, they argue that the Commission should not have described as a benefit the broker-dealer's "option" to eliminate rather than disclose or mitigate conflicts because broker-dealers have always had that option. States Br. 70. But the States misunderstand the relevant benefit, which is tied to the requirements imposed by the Conflict of Interest Obligation that may cause broker-dealers to eliminate some conflicts "that are not required to be eliminated" if they determine that they cannot adequately manage the conflict or seek to reduce the costs of managing that conflict. *Adopting Release*, SA133. The fact that the magnitude of the benefits depends on "voluntary decisions made by broker-dealers" (States Br. 70) does not mean that the Commission failed to articulate "a rational connection between the facts found and the choice made." *Lindeen*, 825 F.3d at 658 (quotation omitted).

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction. If the Court finds that the petitioners have standing, it should deny the petitions.

Respectfully submitted,

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
Senior Litigation Counsel

/s/ Daniel E. Matro
DANIEL E. MATRO
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-8248 (Matro)

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 22,996 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, 14 point—using Microsoft Word.

/s/ Daniel E. Matro