# 19-2886(L)

**19-2893(CON)**

## In the United States Court of Appeals for the Second Circuit

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

v.

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

Petition for Review of a Final Rule of the Securities and Exchange Commission

**BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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## CORPORATE DISCLOSURE STATEMENT

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

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank). Specifically, *amici* sponsored Dodd-Frank, participated in drafting it, or serve or served on committees with jurisdiction over the federal financial regulatory agencies. *Amici* are thus well-positioned to explain why Congress authorized the Securities and Exchange Commission (SEC) to promulgate rules providing for a uniform fiduciary standard of care for broker-dealers and investment advisers. As *amici* well know, at the time Dodd-Frank was passed, the existing standards of care permitted some financial advisers to skirt critical rules that limited conflicts of interest, confusing consumers and undermining financial markets. In response to indications that this was a serious problem, Congress required the SEC to study the problem and directed that any rule addressing that problem harmonize the standard of care for broker-dealers and investment advisers, applying a fiduciary standard to both. *Amici* therefore have a strong interest in ensuring that the SEC does not promulgate a less-protective standard for broker-dealers that is at odds with Congress' plan in passing Dodd-

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Frank.

A full listing of *amici* appears in the Appendix.

## INTRODUCTION

In 2008, America experienced a "financial crisis . . . widely considered the worst financial disaster[] since the Great Depression." *Chau v. Lewis*, 771 F.3d 118, 121 (2d Cir. 2014). After extensively studying the root causes of the crisis, Congress responded in 2010 by enacting the Dodd-Frank Act "in an effort to prevent a future [economic] collapse." *Hymes v. Bank of Am., N.A.*, Nos. 18-CV-2352, 18-CV-4157, 2019 WL 4888123, at *4 (2d Cir. Sept. 30, 2019). "Dodd-Frank aimed to 'promote the financial stability of the United States by improving accountability and transparency in the financial system.'" *Dig. Realty Tr., Inc., v. Somers*, 138 S. Ct. 767, 773 (2018) (quoting 124 Stat. 1376).

One of the "shortcomings in financial regulation" the Act addressed was the inconsistency between the standards of conduct applicable to broker-dealers and investment advisers when providing investment advice to consumers. *Id.* At the time, broker-dealers—who provided only general financial advice and "execution-only" services—were regulated by the Securities Exchange Act of 1934. SEC, Study on Investment Advisers & Broker-Dealers iii, 9 (Jan. 2011) (SEC Study). Although that law had been interpreted to require broker-dealers to act in their clients' best interests, *see* Regulation Best Interest, 83 Fed. Reg. 21,574, 21,575 n.6, 21,577 n.15

(May 9, 2018) (2018 Notice), it had also been interpreted to allow them to take their own financial interests into account without disclosing what those interests might be, *see* Regulatory Notice, Suitability: Additional Guidance on FINRA's New Suitability Rule (May 2012), https://www.finra.org/sites/default/files/NoticeDocument/p126431.pdf, at 1-4, (FINRA Notice).

Investment advisers, by contrast, provided more personalized advice and were thus held to a higher standard of care. Under the Investment Advisers Act of 1940, § 201 et seq., *as amended* 15 U.S.C.A. § 801b-1 et seq., they were treated as fiduciaries and required to take *only* their clients' interests into account when offering investment advice. *See Sec. and Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963).

As the financial industry became more complex and market demand for personalized services increased, the boundaries between the services provided by broker-dealers and investment advisers eroded. Yet "even though their services and marketing ha[d] become increasingly indistinguishable to retail investors," broker-dealers and investment advisers continued to "owe investors different standards of care." 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski in support of the Conference Agreement). As the SEC itself concluded, consumers found the distinct standards confusing and were often unaware that broker-dealers did not act with the same fiduciary care as investment advisers. SEC Study at 128

("[M]any retail investors do not understand and are confused by the roles played by investment advisers and broker-dealers and the impact of the different regulatory regimes that apply to each."); *see* 156 Cong. Rec. H2536 (daily ed. June 30, 2010) (statement of Rep. Kanjorski) ("Most people in this country think that [a fiduciary duty of care between broker-dealers and their clients] already exists. It doesn't.").

As it was crafting the Dodd-Frank Act, Congress recognized that it could not "expect a full economic recovery" if it did not "restor[e] the public's trust in markets" by eliminating the consumer confusion caused by these different standards of care. *Id.* at S4065 (daily ed. May 20, 2010) (statement of Sen. Kaufman). To address that problem, Congress directed the SEC to conduct a study on the effects of the different standards of conduct for broker-dealers and investment advisers, and to make relevant recommendations to address any inconsistency between the standards. Dodd-Frank § 913(b) & (c), 124 Stat. at 1824-27. Congress also provided that any rule responding to a regulatory gap in this area must provide for a uniform fiduciary duty to apply to all broker-dealers and investment advisers. The Act explicitly required that this uniform standard "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), 124 Stat. at 1828. This provision—Section 913 of Dodd-Frank—was designed to eliminate consumer confusion and disinformation by harmonizing the standards that apply to broker-dealers and investment advisers so consumers always enjoy the same level of care from investment advising professionals.

The SEC's recent rule, however, ignores Congress' plan, failing to harmonize these standards of conduct as Section 913 requires. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019) (2019 Rule). Expert staff at the SEC conducted the study required by Dodd-Frank and concluded that the standards of care for broker-dealers and investment advisers should be harmonized: "[i]n light of the concerns [regarding consumer confusion], and consistent with Congress's grant of authority in Section 913, the Staff recommends that the Commission propose rules that would apply expressly and uniformly to both broker-dealers and investment advisers, . . . a fiduciary standard no less stringent than currently applied to investment advisers." SEC Study at 108. Despite this recommendation, the SEC declined to impose a uniform standard of care. Instead, the new "best interest" rule allows broker-dealers to act in their own "financial or other interest" as long as they do not place their own interest "ahead of the interests of the retail consumer." 2019 Rule, 84 Fed. Reg. at 33,319.

That rule violates Congress' mandate in Section 913, which required that any rule promulgated to address the inconsistent standards of care between investment advisers and broker-dealers must harmonize those standards of care. The rule therefore cannot stand.

## ARGUMENT

### I. Section 913 of the Dodd-Frank Act Was Enacted in Response to the Consumer Confusion and Financial Market Instability Caused by the Inconsistency Between Standards of Conduct for Broker-Dealers and Investment Advisers.

In response to the financial crisis of 2008, which "shattered" lives, "shuttered" small businesses, "evaporated" retirement savings, and caused millions of families to lose their homes, S. Rep. No. 111-176, at 39 (2010), Congress in 2010 enacted the Dodd-Frank Act. Congress extensively studied the roots of the crisis and passed the Act to put in place a regulatory infrastructure that would protect American consumers from similar financial catastrophes in the future. One part of the financial services industry that Congress investigated was personal financial advising and, specifically, how professionals who give financial advice were held accountable to the consumers they serve. *See, e.g.*, 156 Cong. Rec. S4069 (daily ed. May 20, 2010) (statement of Sen. Akaka) ("Unfortunately, too many investors do not know the difference between a broker and an investment advisor. Even fewer are likely to know that their broker has no obligation to act in their best interest."); *id.* at H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski in support of the Conference Agreement) ("Regulators, practitioners, and investor advocates have become increasingly concerned that investors are confused by the legal distinction between broker-dealers and investment advisers. The two professions currently owe investors different standards of care, even though their services and marketing have become increasingly indistinguishable to retail investors."); *Testimony Before the Subcomm. on Fin. Servs. and Gen. Gov't of the S. Comm. on Appropriations*, 111th Cong. (2009), https://www.sec.gov/news/testimony/2009/ts060209mls.htm (testimony of Mary L. Schapiro, Chairman) ("[W]e are closely examining the broker-dealer and investment adviser regulatory regimes and assessing how they can best be harmonized and improved for the benefit of investors.").

Congress found that while broker-dealers and investment advisers both helped people manage their money and investments, the professional standards of conduct that governed the two categories of financial advisers were inconsistent. Broker-dealers were regulated under the Securities Exchange Act of 1934, which Congress passed to address the causes of the 1929 stock market crash and the Great Depression. *See Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 98 (2d Cir. 2017). Because broker-dealers historically offered "execution-only services" and generalized financial advice to consumers, SEC Study at 9, the Securities Exchange Act of 1934 required only that they abide by a duty of fair dealing in their interactions with consumers. That duty, among other things, held broker-dealers to a suitability standard of care: when broker-dealers made recommendations to consumers, those recommendations were required to have a reasonable basis in light of what the broker-dealer knew about the consumer's financial situation. *Id.* at 52. Importantly, however, the Act did not require broker-dealers to act solely in the interests of their clients; they could still take their own interests into account, so long as they did not place their own interests ahead of their clients' interests.

Investment advisers, on the other hand, were regulated under the Investment Advisers Act of 1940, § 201 et seq., *as amended* 15 U.S.C.A. § 801b-1 et seq. During hearings leading up to the passage of the Investment Advisers Act, Congress heard testimony from industry professionals about how investment advisers differed from brokers. *See Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the H. Comm. On Interstate and Foreign Com.*, 76th Cong. 91-93, 110, 138 (1940) (statement of Dwight Rose, Investment Counsel, Association of America); *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the S. Comm. on Banking and Currency*, 76th Cong. 1110-1126 (1940) (statement of David Schenker, Chief Council, SEC Investment Trust Study). In particular, industry experts emphasized the importance of regulations that would eliminate any consumer exposure to risks of self-dealing by their investment advisers and firms. *Id.*

For that reason, as the Supreme Court later recognized in *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, Congress sought "to preserve 'the personalized character of the services of investment advisers,' and to eliminate conflicts of interest between the investment adviser and the clients as safeguards both to ‘unsophisticated investors’ and to ‘bona fide investment counsel.’” 375 U.S. at 191 (citing H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940), S. Rep. No. 1775, 76th Cong., 3d Sess. 21-22 (1940)). To achieve that end, the Investment Advisers Act “reflect[ed] a congressional recognition” that investment advisers owe a fiduciary duty to their clients. *Id.* Put differently, investment advisers owe clients a duty to fully disclose information about the quality of their potential investments, and to provide disinterested advice that does not take into account their own interests. Notably, broker-dealers are exempt from the definition of “investment adviser” under the Investment Advisers Act. 15 U.S.C. § 80b-2(a)(11)(C).

Over time, the distinction between broker-dealers and investment advisers blurred, due in part to the growing complexity of the financial services market. *See, e.g.*, *Oversight of the U.S. Sec. and Exchange Commission: Evaluating Present Reforms and Future Challenges: Hearing Before the Subcomm. On Cap. Mkts., Ins., and Gov’t Sponsored Enterprises of the Comm. on Fin. Servs.*, 111th Cong. 25 (2010) (testimony of Mary Schapiro, Chairman, SEC) (“[F]rom the perspective of an investor, the services provided by an investment adviser and a broker-dealer are largely identical in many cases.”); SEC Study at 96-101. At the time Dodd-Frank was passed, broker-dealers could control the buying and selling of many different securities across many different types of accounts for one client, without always informing the client of each transaction, as was the norm when the Securities Exchange Act of 1934 was passed. Michael V. Seitzinger, Cong. Research Serv., R41381, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Standards of Conduct of Brokers, Dealers, and Investment Advisers* 5 (2015). Thus, over time, broker-dealers often came to act much more like investment advisers, even though their title suggested otherwise.

Adding to this complexity was financial services firms' tendency to use a variety of titles to describe their financial services personnel. For instance, rather than simply a broker, a dealer, or an investment adviser, financial services professionals sometimes refer to themselves as "financial advisors" or "financial consultants," among numerous other monikers. SEC Study at 94 n.447. Moreover, "many financial services firms . . . offer both investment advisory and broker-dealer services." *Id.* at 12. "Dual registration often allows these firms to provide a variety of services not available through entities that are solely registered as investment advisers or broker-dealers." *Id.*

This increasingly complicated financial marketplace led to a consumer population confused about what standard of care they should expect when they receive services from financial professionals. As the SEC study concluded, laypeople have increasing "difficulty determining whether a financial professional [is] an investment adviser or a broker-dealer and instead believe[] that investment advisers and broker-dealers offer[] the same services and [a]re subject to the same duties." *Id.* at 99; *see id.* at 101 ("retail customers do not understand and are confused by the roles played by investment advisers and broker-dealers, and more importantly, the standards of care applicable" to each category "when providing personalized investment advice and recommendations about securities"). That confusion is "compounded when it involves vulnerable investors," such as "senior investors." 2015 Regulatory and Examinations Priorities Letter from FINRA 2 (Jan. 6, 2015), https://www.finra.org/sites/default/files/p602239.pdf. Indeed, the White House's Council of Economic Advisers has estimated that advice from financial professionals that is subject to conflicts of interest that consumers do not understand costs Americans $17 billion in retirement savings every year. Jason Furman & Betsey Stevenson, *The Effects of Conflicted Investment Advice on Retirement Savings*, Obama White House (Feb. 23, 2015, 9:45 AM ET), https://obamawhitehouse.archives.gov/blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings (noting that "[c]onflicted advice leads to lower investment returns").

In short, consumer confusion and the blurred distinctions between broker-dealers and investment advisers—and the consequences of that inconsistency for everyday Americans—spurred Congress to enact reforms in the Dodd-Frank Act. As the next Section explains, Congress responded by including in the legislation a critical provision designed to tighten the lax regulation of broker-dealers and harmonize the standard of care that applies to all financial advisers.

## II. Congress Passed Section 913 To Ensure that Any Regulatory Response to the Inconsistent Standards of Care Would Provide a Uniform Fiduciary Standard Applicable to Both Broker-Dealers and Investment Advisers.

Congress passed the Dodd-Frank Act to "promote the financial stability of the United States by improving accountability and transparency in the financial system, . . . [and] to protect consumers from abusive financial services practices." Dodd-Frank, 124 Stat. at 1376. One important provision of the Act, Section 913, was adopted specifically to address the inconsistent standards that applied to broker-dealers and investment advisers. As the text and history of that provision make clear, Congress explicitly created a process to ensure that the SEC would examine this problem and that any regulatory response would result in a harmonized standard of care.

**1.** First, the text of Section 913 is clear: it required the SEC to conduct a study to evaluate the effectiveness of the current legal and regulatory standards of care for brokers-dealers and investment advisers, and it ensured that the SEC would address any regulatory gap that it decided required new rulemaking by promulgating a rule that would harmonize the standards of care for broker-dealers and investment advisers.

Under Section 913(b), the SEC was required to investigate whether there were "legal or regulatory *gaps, short-comings, or overlaps* in legal or regulatory standards . . . for brokers, dealers, [and] investment advisers." *Id.* § 913(b)(2) (emphasis added). In particular, Congress directed the SEC to investigate "the substantive differences in the regulation of brokers, dealers, and investment advisers, when providing personalized investment advice and recommendations about securities to retail customers," *id.* § 913(c)(6), "whether retail customers understand that there are different standards of care," *id.* § 913(c)(3), and "whether the existence of different standards of care . . . is a source of confusion for retail customers regarding the quality of personalized investment advice that retail customers receive," *id.* § 913(c)(4). Congress also required the SEC to investigate "the potential impact upon retail customers that could result from potential changes in the regulatory requirements or legal standards of care affecting brokers, dealers, [and] investment advisers." *Id.* § 913(c)(12). Following public comment, the SEC was required to submit this study to Congress. *Id.* § 913(d) & (e).

Based on "the findings[,] conclusions, and recommendations of the study," Section 913(f) in turn authorized the SEC to "commence a rulemaking" to address the study's findings. Specifically, Congress specified in Section 913(g) that any rule should harmonize the standards of care for broker-dealers and investment advisers. First, Congress amended the Securities Exchange Act of 1934 to say that:

> [T]he 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 Investment Advisers Act of 1940.

*Id.* § 913(g)(1) (emphasis added). Congress went on to amend section 211 of the Investment Advisers Act of 1940 to set that standard of conduct:

> 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 (and such other customers as the Commission may by rule provide), 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) (emphasis added). In other words, if the SEC study—required by the plain terms of Dodd-Frank—confirmed that the inconsistent standards of care were causing harms to consumers and the financial markets, any regulatory response was required to address that problem by harmonizing the standards of care for broker-dealers and investment advisers as specified in Section 913(g).

**2.** The history of the provision's enactment confirms what the text says. The version of the bill that the House of Representatives originally passed established a fiduciary duty on the part of both investment advisers and broker-dealers and harmonized the standards of care for both categories of professionals. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7103 (as passed by the House, Dec. 11, 2009). The Senate's bill, by contrast, required the SEC to conduct a study regarding the differences in standards of care, much like the version that eventually became law. Notably, however, the Senate version gave the SEC much more discretion in determining what the content of any eventual rule would be, providing that the SEC may "commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers, to address by rule, using its authority under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.)." Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 913(f)(1)(A) (as amended by the Senate, May 20, 2010). The Senate version did not include a provision like subsection (g) specifying the content of any rule the SEC promulgated.

The version of Section 913 that became law was a compromise between the House and Senate versions of the bill. Like the Senate version, Dodd-Frank included a provision requiring the SEC to conduct a study regarding the disparity between the standards of care that applied to broker-dealers and investment advisers. Unlike the Senate version, however, the version of Section 913 that became law included the specific standards that any rule altering the standards of care applicable to broker-dealers and investment advisers should include. H.R. Rep. No. 111-517, at 870 (2010) (Conf. Rep.) (emphasis added) (provision "directs the SEC to study the standards of care applicable to broker-dealers and investment advisers giving investment advice to retail customers, and it authorizes the SEC to promulgate rules *imposing a fiduciary duty* on broker-dealers and investment advisers to protect retail customers").

In other words, while the compromise required the SEC to study the problem and confirm that there was indeed a regulatory gap to be addressed, it left the SEC no discretion regarding the standard of conduct that should be included in any rule promulgated to address any regulatory gap that existed: the SEC needed to harmonize the standard of care for broker-dealers and investment advisers. As one Senator explained, "a vital investor protection was also included in the conference report that will ensure that a fiduciary duty is imposed on brokers when giving personalized investment advice." 156 Cong. Rec. S5870 (daily ed. July 15, 2010) (statement of Sen. Akaka); *see id*. at H5236 (daily ed. June 30, 2010) (statement of Rep. Kanjorski in support of the Conference Agreement) (emphasis added) (structure of Section 913 was meant to "allow the regulators to study and come up with rules and regulations that allow *a fiduciary relationship* between broker-dealers, investment advisers, and their clients"); *id.* at H5216 (daily ed. June 30, 2010) (statement of Rep. Frank) ("expect[ed]" that the SEC would use the delegated rulemaking authority "to impose greater fiduciary responsibilities" on broker-dealers than existed at the time); *id.* at H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski in support of the Conference Agreement) ("The two professions currently owe investors different standards of care, even though their services and marketing have become increasingly indistinguishable to retail investors. The issuance of new rules will fix this long-standing problem."); *id.* ("Through this harmonized [fiduciary] standard of care, both broker-dealers and investment advisers will place customers' interests first.").

In short, as the text and history of Section 913 make clear, that provision created a process by which the SEC—following a study—was expected to harmonize the standards of care for broker-dealers and investment advisers. As the next Section explains, the SEC's new rule flatly contradicts this congressional plan.

## III. The "Best Interest" Rule Perpetuates the Very Inconsistency in Standards of Care that Congress Passed the Dodd-Frank Act To Fix and Violates Dodd-Frank.

Consistent with the Dodd-Frank Act's requirements, the SEC completed a study of the standards of care affecting broker-dealers and concluded that broker-dealers should be held to the same fiduciary standard of care that applied to investment advisers. The rule the SEC ultimately proposed, however, failed to address Congress' concerns and its own study's recommendation. Rather, the SEC promulgated a rule that allows broker-dealers to take into consideration their own financial interests, so long as they do not place those interests ahead of their clients' interests. 2019 Rule, 84 Fed. Reg. at 33,318. That rule violates Section 913.

The SEC study's findings are crystal clear: a fiduciary standard for broker-dealers that prohibits them from considering their own financial interests is necessary to adequately protect consumers. The expert staff who conducted the study found extensive evidence that "retail consumers do not understand and are confused by the roles played by investment advisers and broker-dealers, and more importantly, the standards of care applicable to investment advisers and broker-dealers when providing personalized investment advice and recommendations about securities." SEC Study at 101. The study noted that consumers tend to presume that all financial professionals advise them based solely on the customers' best interest, and concluded that consumers "should not have to parse through legal distinctions to determine whether the advice they receive was provided in accordance with their expectations." *Id*.

"[I]n light of this confusion and lack of understanding," the study went on, "it is important that retail investors be protected *uniformly* when receiving personalized investment advice or recommendations about securities regardless of whether they choose to work with an investment adviser or a broker-dealer." *Id.* (emphasis added). The study therefore recommended that the SEC use its rulemaking authority to adopt a "uniform fiduciary standard" of conduct, which would apply to both broker-dealers and investment advisers. *Id.* The uniform fiduciary standard would require that all brokers, dealers, and investment advisers act "in [consumers'] best interests, without regard to the financial or other interest of the financial professional, in accordance with a fiduciary standard." *Id.*

The SEC study also concluded that the uniform fiduciary standard would best achieve the harmonization of regulation that the drafters of Dodd-Frank contemplated. As the study specifically noted, "*consistent with Congress's grant of authority in Section 913*, the Staff recommends that the Commission propose rules that would apply expressly and uniformly to both broker-dealers and investment advisers, when providing investment advice about securities to retail customers, a fiduciary standard no less stringent than currently applied to investment advisers." *Id.* at 108 (emphasis added). Specifically, "the Staff recommend[ed] that the Commission exercise its rulemaking authority under Dodd-Frank Act Section 913(g), which permits the Commission to promulgate rules to provide . . . [a] 'uniform fiduciary standard.'" *Id.* at 108-09.

Despite the clear recommendation of the SEC study, however, the rule the SEC promulgated failed to put in place a uniform fiduciary standard that requires all investment personnel to act as their clients' fiduciary without regard to their own interest. Instead, the rule merely requires broker-dealers to "[a]ct 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 interests of the retail customer." 2019 Rule, 84 Fed. Reg. at 33,318 (emphasis added). As the Rule frankly acknowledges: "We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act . . . ." *Id.* at 33,322.

This rule is at odds with Section 913 and cannot stand. First, the provision's text is clear: under Section 913, if the SEC study found that the inconsistency between the standards of care for broker-dealers and investment advisers was confusing to consumers and needed to be addressed, any rule addressing that regulatory gap must harmonize the standards. As Section 913(g) specified, any new rule would subject broker-dealers to the "same . . . standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940," Dodd-Frank § 913(g)(1), 124 Stat. at 1828, and "the standard of conduct for all brokers, dealers, and investment advisers . . . 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). In short, that plain text of section 913(g) specifies the standard of conduct in any rule the SEC promulgates, and the SEC's new rule is inconsistent with that statutory language.

In its final rule, the SEC suggests that it issued the rule pursuant to a "grant of rulemaking authority in Section 913(f)," on the theory that that Section 913(f) provides an "overlapping, yet distinct, rulemaking power" with Section 913(g). 2019 Rule, 84 Fed. Reg. at 33,330. To be sure, Section 913(f) provides the SEC with the authority to "*commence* a rulemaking . . . to address the legal or regulatory standards of care for brokers, dealers, [and] investment advisers . . . for providing personalized investment advice about securities to such retail customers." Dodd-Frank § 913(f), 124 Stat. at 1827-28 (emphasis added). However, Section 913(f) must be read in conjunction with the provision that immediately follows it—Section 913(g)—which provides specific limits on the SEC's rulemaking authority. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting that the "specific governs the general," particularly when provisions "are interrelated and closely positioned" (internal citation and quotation marks omitted)). Taken together, those two provisions mean that if the SEC "commence[s] a rulemaking . . . to address the legal or regulatory standards of care for brokers, dealers, [and] investment advisors," per Section 913(f), then the resulting rule must "provide that, with respect to a broker or dealer, when providing personalized investment advice . . . 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," per Section 913(g). This reading of Sections 913(f) and (g) makes sense because Section 913(f) uses the language "commence a rulemaking," while Section 913(g) authorizes the SEC to "promulgate rules." In other words, Section 913(f) authorizes the rulemaking process, while Section 913(g) governs the substance of any rule the SEC promulgates.

By contrast, the SEC's interpretation of Section 913—that it allows the SEC to provide a different, lesser standard for broker-dealers that does not harmonize the standards across all financial professionals—would render superfluous Section 913(g), which specifically dictates that the SEC's rule implement a uniform fiduciary standard of care. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012) (rejecting interpretations that render "statutory language meaningless"). There was no reason for Congress to include a specific standard of care in Section 913(g) if Congress' plan were to grant the SEC the power to promulgate *any* standard of care for broker-dealers under Section 913(f).

Second, the SEC's rule is at odds with Congress' plan in passing Section 913. As *amici* know, Congress' plan was to strengthen consumer protections for broker-dealers and to harmonize the standards of conduct that apply to broker-dealers and investment advisers. Specifically, it sought to ensure that all financial professionals who engage in investment advising act with the disinterested motivation of a fiduciary, rather than allowing for conflicted advice, and it knew that doing so would save Americans billions of dollars every year and promote the financial stability of the United States and American consumers.

For that reason, as the legislative record makes clear, Congress passed Dodd-Frank to empower the SEC to study the regulatory standards governing financial advising, and to ensure that it would address any regulatory gap that existed by commencing a rulemaking process under Section 913(f) and implementing one of the standards prescribed in Section 913(g). *See supra* at 16 (discussing legislative record). In short, "Congress had an intention on the precise question at issue," *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 508 (2d Cir. 2017) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984)), and the SEC's new rule was "not what Congress intended and undermines the compromise that the House and Senate reached in Dodd-Frank." Letter from Maxine Waters, Ranking Member, House Comm. on Fin. Servs. to Jay Clayton, Chairman, U.S. SEC 1-2 (Sept. 12, 2018), https://financialservices.house.gov/uploadedfiles/cmw_-_reg_bi_to_sec_-_9.12.2018.pdf.

Notably, the SEC's new rule does not appear to heighten the standard of care for broker-dealers beyond the standard that already existed under the regulatory scheme in place when Dodd-Frank was enacted, despite Congress' clear plan that the SEC use its authority under Section 913 to heighten the standard of care that applies to broker-dealers. The SEC notes that "there is no specific obligation under the Exchange Act that broker-dealers make recommendations that are in their customers' best interest," 2018 Notice, 83 Fed. Reg. at 21,575, and therefore claims that the rule "[e]nhanc[es] the obligations that apply when a broker-dealer makes a recommendation to a retail customer," 2019 Rule, 84 Fed. Reg. at 33,318. However, long before this rule was even proposed, the suitability standard was generally understood to require broker-dealers to act in consumers' bests interests. *See, e.g.*, *In re Application of Raghavan Sathianathan*, Exchange Act Release No. 34-54722, 89 SEC Docket 710, 715 (Nov. 8, 2006) ("As [the SEC] ha[s] frequently stated, a broker's recommendations must be consistent with his customers' best interests."). And after Congress passed Dodd-Frank, the Financial Industry Regulatory Authority (FINRA), which regulates broker-dealers, reaffirmed that "[t]he suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests." FINRA Notice at 3. That standard is almost identical to the one the SEC promulgated in the 2019 Rule. As *amici* well know, and Dodd-Frank's text and history make clear, Congress did not include Section 913 in Dodd-Frank simply so the SEC could codify the *existing* standard in a new rule.

In short, the SEC's rule fails to harmonize the standards for broker-dealers and investment advisers through a fiduciary rule, and is therefore at odds with the text and structure of Section 913, as well as Congress' plan in passing it. The rule cannot stand.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court set aside the Securities and Exchange Commission's final agency action entitled "Regulation Best Interest: The Broker-Dealer Standard of Conduct," published at 84 Fed. Reg. 33,318 (July 12, 2019).

Respectfully submitted,

*/s/ Brianne J. Gorod*
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Dated: January 3, 2020

# APPENDIX

LIST OF *AMICI*

**U.S. Senate**

Brown, Sherrod
Senator of Ohio

Dodd, Christopher J.
Former Senator of Connecticut

**U.S. House of Representatives**

Waters, Maxine
Representative of California

Clay, Wm. Lacy
Representative of Missouri

Frank, Barney
Former Representative of Massachusetts

Green, Al
Representative of Texas

Kanjorski, Paul E.
Former Representative of Pennsylvania

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Nadler, Jerrold
Representative of New York

Porter, Katie
Representative of California

Schakowsky, Jan
Representative of Illinois

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 3rd day of January, 2020.

*/s/ Brianne J. Gorod*
Brianne J. Gorod

*Counsel for Amici Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit, using the appellate CM/ECF system.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 3rd day of January, 2020.

*/s/ Brianne J. Gorod*
Brianne J. Gorod

*Counsel for Amici Curiae*