

The logo consists of the text 'Fi360' in a white, sans-serif font, centered within a white square border. The background of the entire image is a gradient from orange to red.

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Will Policymakers' Vision for the Fiduciary Standard Be 20/20 in 2020?

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Fiduciary-Focused Topics

Overarching question:

How are policymakers changing the contours of the fiduciary standard?

The influencing factors we'll cover:

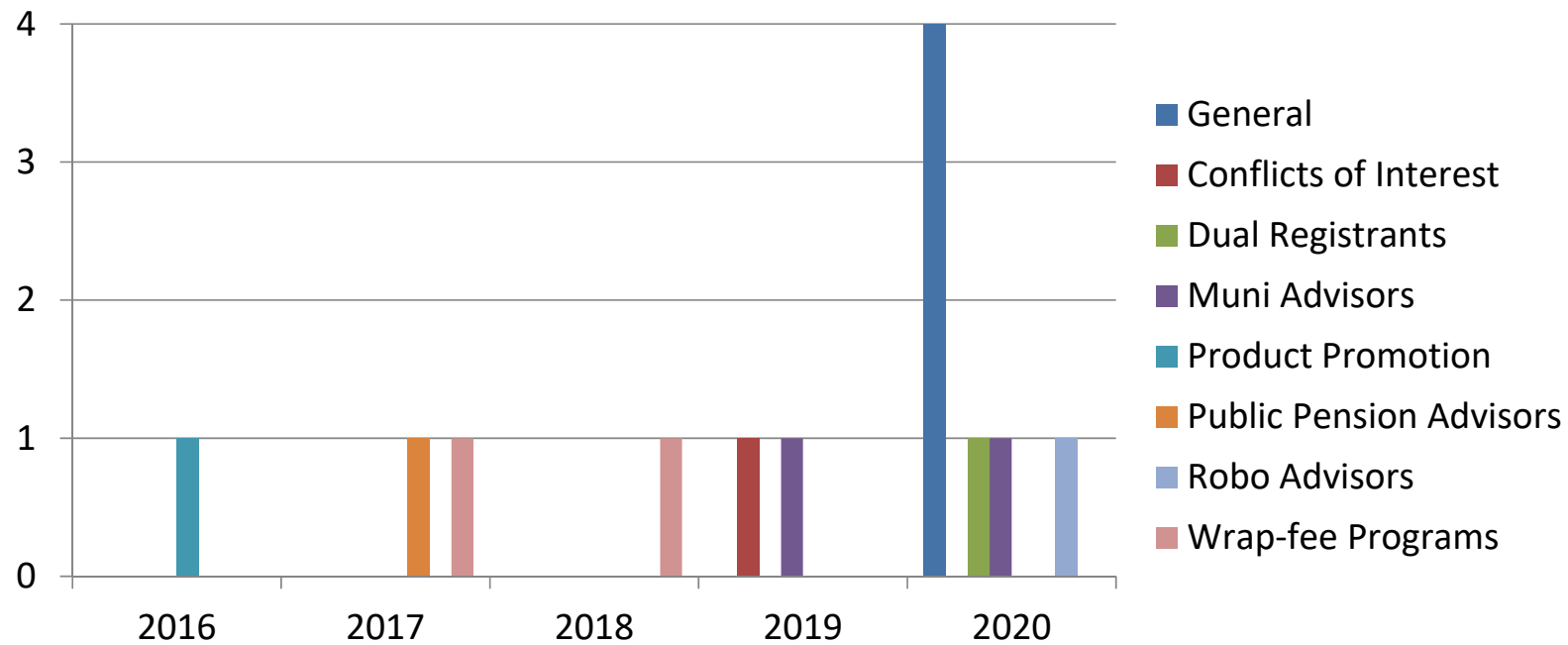
- SEC Realm
 - 2020 Examination Priorities
 - Reg BI and other rulemakings
 - Enforcement
- DOL Realm
 - SECURE Act
 - Enforcement and rulemaking
- Case law developments
- State Initiatives



F	1	20/200
I	2	20/100
D	3	20/70
U	4	20/50
C	5	20/40
I	6	20/30
A	7	20/25
R	8	20/20
Y	9	
TRUST LAW	10	
SUITABILITY	11	
BEST INTEREST		
CONFLICTED ADVICE		
PRUDENT EXPERT		

Increased Fiduciary Focus by SEC (OCIE) in 2020

‘Fiduciary’ references in annual exam priority reports, 2016-2020



OCIE Exam Priorities 2020*

- Retail Investors
- Information Security (Cybersecurity)
- Financial Technology (currencies and robo-advisers)
- Focus Areas Involving RIAs and Investment Companies
- Focus Areas Involving Broker-Dealers and Municipal Advisors
- AML Programs
- Market Infrastructure
- FINRA and MSRB

* Full report is at https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf?mod=article_inline






OCIE Priorities* 2016-2020

Year	Standards of Care**	Cyber-Security	Digital Platforms/Robo-Advisers	Never-Before Examined RIAs	Retirement Accounts	Seniors	Share-class Selection
2020	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2019		Yes	Yes	Yes	Yes	Yes	Yes
2018		Yes	Yes	Yes	Yes	Yes	Yes
2017		Yes			Yes	Yes	Yes
2016		Yes			Yes		

* Compliance issues related to retail investment advice.

** Questions on the Reg BI, advisor guidance and Form CRS may be submitted by email to: IABDQuestions@sec.gov .

OCIE and FINRA Common Priorities – 2020

OCIE	REG BI	FORM CRS	REGULATION S-P	BEST EXECUTION	CRYPTO-CURRENCIES
FINRA					

Retail Investors - Examination priorities

Special emphasis on seniors and retirement savers

- Fraud, Sales Practices, and Conflicts
- Retail-targeted investments
 - Mutual funds/ETFs
 - Munis/fixed-income
 - Microcaps
- Standards of Care – Regulation Best Interest
 - Reg BI
 - Adviser interpretative guidance
 - Form CRS



SEC headquarters, Washington, D.C.

Retail Investors – Standards of Care

Pre-June 30th compliance deadline, OCIE will **ASSIST** brokerage firms in preparing for compliance with:

- Regulation Best Interest
- Form CRS

After June 30th, OCIE will **ASSESS** brokerage and advisory firms on:

- Policies and procedures regarding disclosure of conflicts and
- Content and delivery of Form CRS

OCIE has already integrated the fiduciary guidance for RIAs into its examination program.

Regulation Best Interest - Status

- 9/10/19 States, XY Planning Network suits filed in district and appeals courts;
- Both suits consolidated 11/5/19 in 2nd Circuit Court of Appeals.
- New complaints filed by parties on 12/27/19 allege
 - Reg BI exceeds authority granted to SEC under Dodd-Frank Act by not adopting a uniform fiduciary standard for brokers and investment advisers providing retail investment advice
 - Dodd-Frank requires brokers/advisers to act “without regard to the financial interests” of their firms; SEC adopted weaker standard permitting brokers to consider their own interests.
 - Reg BI violates Advisers Act through overly broad interpretation of a broker’s ‘solely incidental’ advice
 - SEC conducted flawed and ‘speculative’ cost-benefits analysis
- Petitioners ask court to vacate Reg BI.
- Amicus briefs in support include Dodd, Frank, FPA, PIABA, Better Markets, CFA
- Final court decision could come after 6/30/20 compliance deadline.



U.S. Court of Appeals for the 2nd Circuit

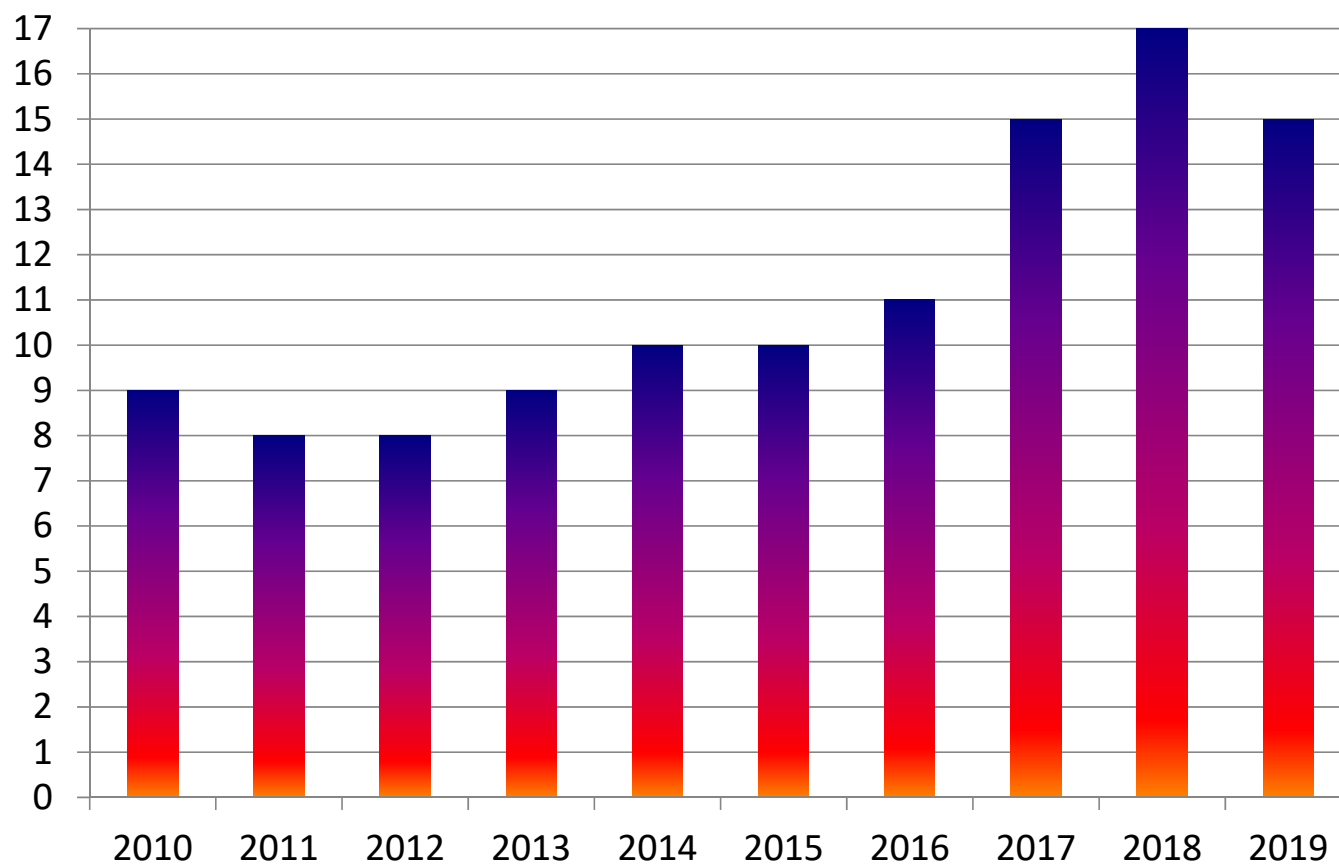
Information Security – Examination Priorities

Specific to RIAs, examiners will focus on protection of clients' personal financial information in the following areas:

- Governance and risk management
- Access controls
- Data loss prevention
- Vendor management
- Training
- Incident response and resiliency



Focus Areas Involving RIAs – Trend in Annual Exams*



* Percentage of SEC-registered advisory firms examined each year.

SEC Enforcement – 2019

Compliance areas where the SEC Division of Enforcement has taken action:

- Fee disclosures
 - Disclosure and selection of mutual fund share classes; in March SEC announced amnesty program returned \$125 million to clients from 79 firms
- Overbilling clients
 - Firm overcharged asset management fees by 40%
 - COO of firm overcharged 300 advisory clients to inflate own salary
- Directed brokerage
 - Firm claimed 70% discount off commission rate; advisory clients paid 4.5 times more than available options. Firm required to disgorge \$5 million to clients, pay \$500k fine.

Other SEC Rulemakings

Pending

- Expanded definition of Accredited Investor
- Client testimonial, advertising, solicitor rule amendments
- Exemptive relief for actively managed ETFs
- Microcap disclosures

Backburner

- Stress testing for large asset managers, investment companies
- Enhancing disclosure of execution quality by broker-dealers

OCIE Risk Alerts – 2019 Recap

- 4/16/19 – Regulation S-P privacy notices – deficiencies identified in opt-out disclosures, annual and initial delivery notices
- 5/23/19 – Cybersecurity/safeguarding client records – OCIE noted improper use of security features on network storage systems, insufficient data classification policies, other
- 7/23/19 – Compliance, supervision and disclosure of conflicts – Failure by some RIAs to disclose past disciplinary histories
- 9/4/19 – Principal and cross-trading compliance – OCIE staff reminded RIAs of common compliance issues such as disclosure of conflicts in writing and obtaining client consent



Takeaways from what's happening in the SEC's realm

Promoting Fiduciary Accountability	Detracting From Fiduciary Accountability
More fiduciary references in exam priorities and the frequency of exams is increasing	Reg BI does not impose a uniform fiduciary standard
Reg BI introduced fiduciary principles to the existing suitability standard for broker-dealers	Reg BI interprets best interest to allow balancing of client and broker-dealer interests
Heightened attention to conflicted sales practices; Conflict of Interest Obligation	Guidance for RIAs suggests clients' interests cannot be subordinated versus must be placed first
Heightened attention to due diligence; Care Obligation	Interpretative guidance regarding "incidental advice" focuses on how an advice provider is paid rather than the nature of the client relationship
Disclosure alone is not enough; the best interest obligation must be met	Form CRS does not address the differences between sales and advisory relationships
Ongoing monitoring would require registration as an RIA	Other SEC rulemaking may increase investor choice but reduce investor protection

DOL Actions – Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019

- Incentives for mostly small business owners to create 401(k) plans or join MEPs; relief from “bad actor” rule
- Tax credits to defray plan setup costs
- Auto escalation for participant contributions increased from 10 to 15 percent
- Credit card loans from DC plans banned
- Investors may contribute to qualified plans after age 70½
- RMD pushed back to age 72
- Portability of annuity contracts in qualified plans
- Stretch IRA reduced to 10 years
- Primary effective date was January 1, 2020



SECURE Act Safe Harbor for Annuity Options

Conditions under new fiduciary safe harbor

- Fiduciary must engage in “objective, thorough and analytical search” at time of selection, including
 - Insurance company’s financial capability to make payments
 - Costs, including fees and commissions, in light of benefits, product features and administrative support, are reasonable
 - Written representations by insurer on
 - Appropriate licensure status and
 - Meets state’s insurance requirements
- Plan not required to select lowest-contract contract
- Fiduciary must periodically review provider selection decision



DOL Enforcement – FY 2019



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EBSA Statistics

- Benefits Advisors* closed more than 166,000 inquiries, recovering \$510m in benefits; opened 501 new investigations from referrals
- Closed 1,146 civil cases; 67% resulted in \$2 billion in recovered damages
- Referred 89 cases to litigation where voluntary compliance efforts failed or were inappropriate
- Closed 275 criminal investigations, leading to 76 indictments of individuals, including plan officials, corporate officers and service providers

Other

- Publicized enforcement actions included two cases involving overpayment to business owners in shares of company stock sold to ESOPs
- Plan Investment Conflicts (PIC) Project – investigates issues related to service provider compensation, conflicts

* EBSA Benefits Advisors is an agency office that plan participants can contact with questions and complaints.

Case Law Update – 2019

- Half of ERISA class-action settlements involved excessive fee claims in 401(k) and 403(b) non-governmental plans
- Settlement dollars up 35% over 2018 (\$449m. in 2019)
- Five of 20 university suits settled
- Four financial services firm suits settled
- Seven other cases settled, ranging from ABB Inc. (\$55m.) to Gucci America (\$1.2M)
- Few retirement plan advisors were named in class-action litigation

Key Case Law Developments

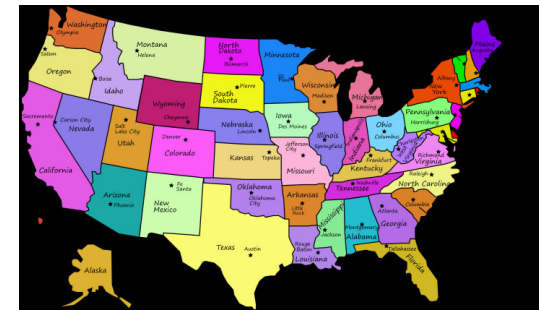


- Arbitration in lieu of ERISA class-actions?
Dorman v. Schwab
 - 9th Circuit strikes down 35-year-old precedent
- Is actual knowledge of breach required to trigger 3-year ERISA statute of limitations? *Intel v. Sulyma*
 - Supreme Court to hear whether posting of online disclosures sufficient to start clock.

State Initiatives

Fiduciary rules for broker-dealers pending

- Massachusetts
- New Jersey
- Nevada

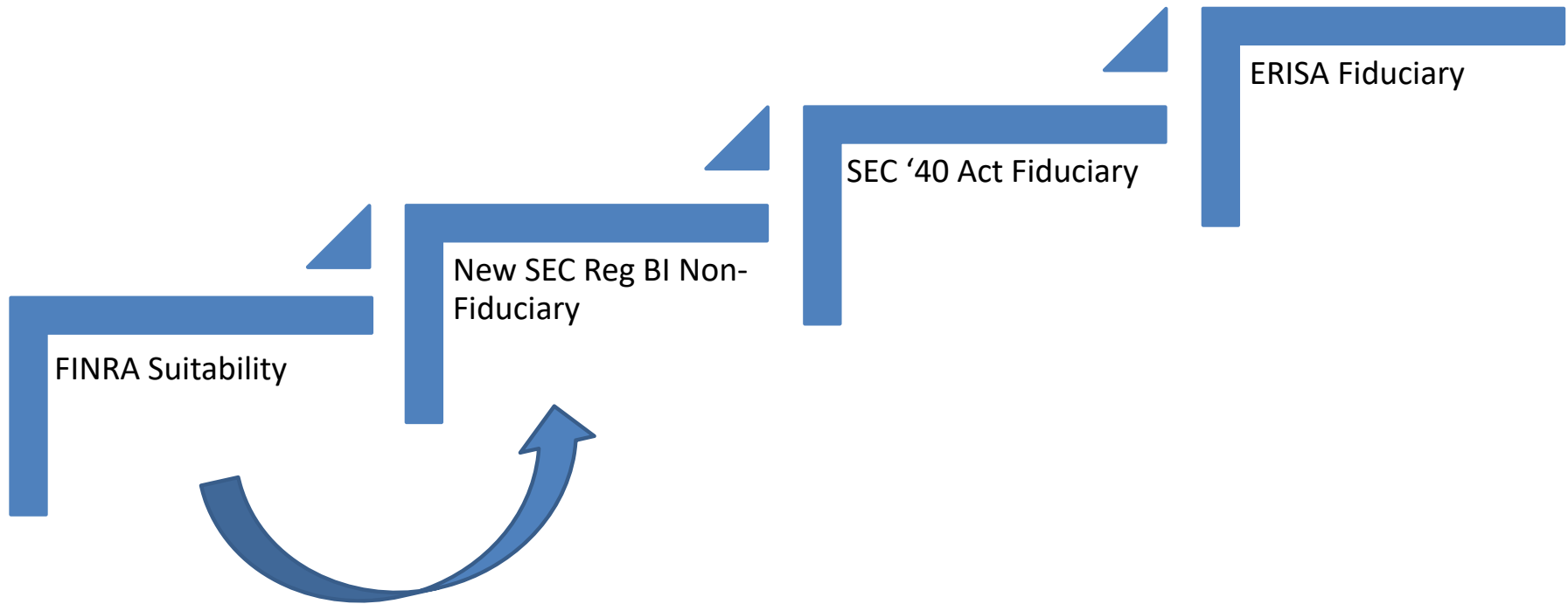


NAIC annuity transactions rule

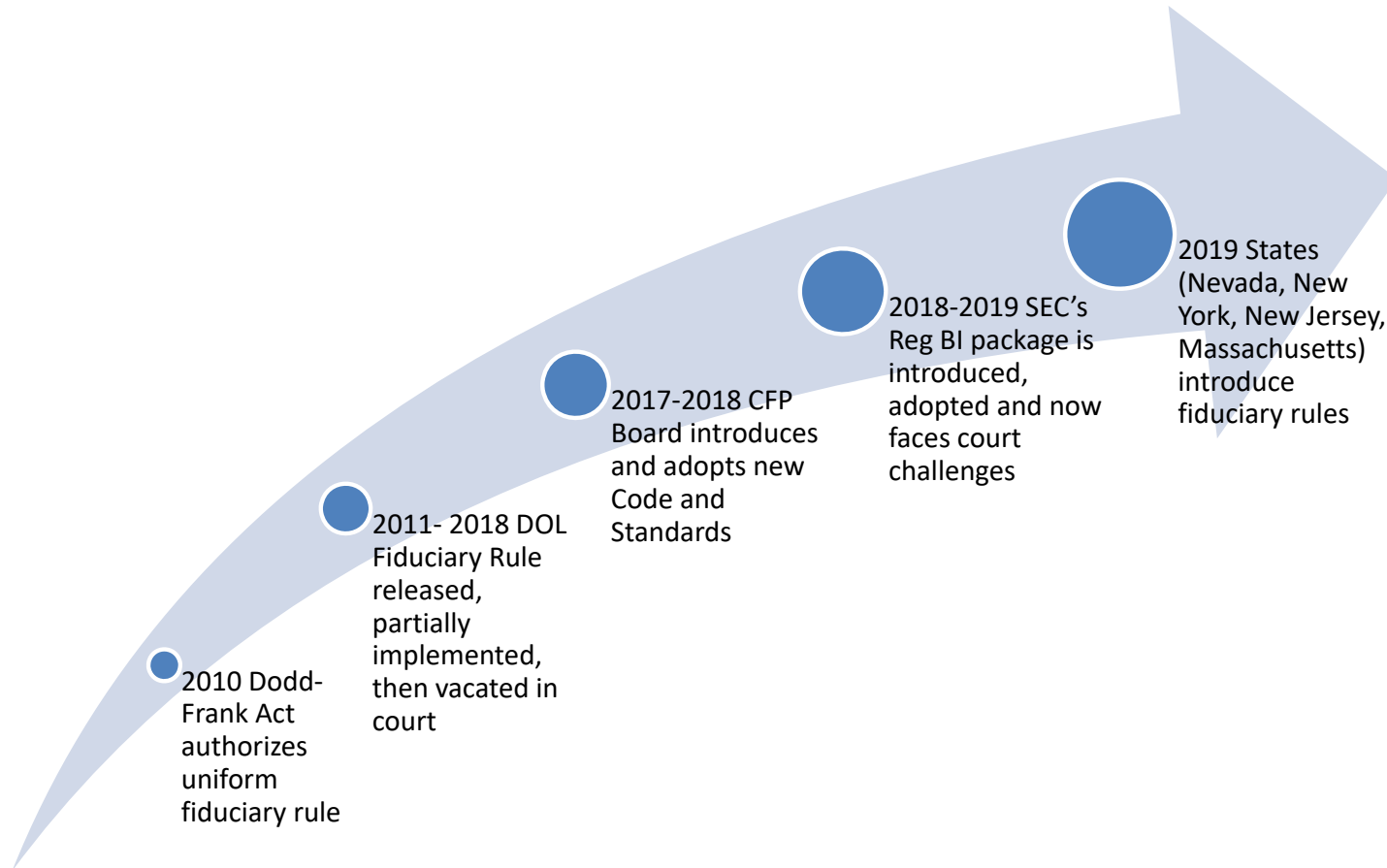
Auto-IRA programs

- Oregon launch 2017; now 53,000 funded accounts, \$34M in assets
- California launched 7/1/19; \$1.4M in assets
- Will new 'open' MEPs rule impact state programs?

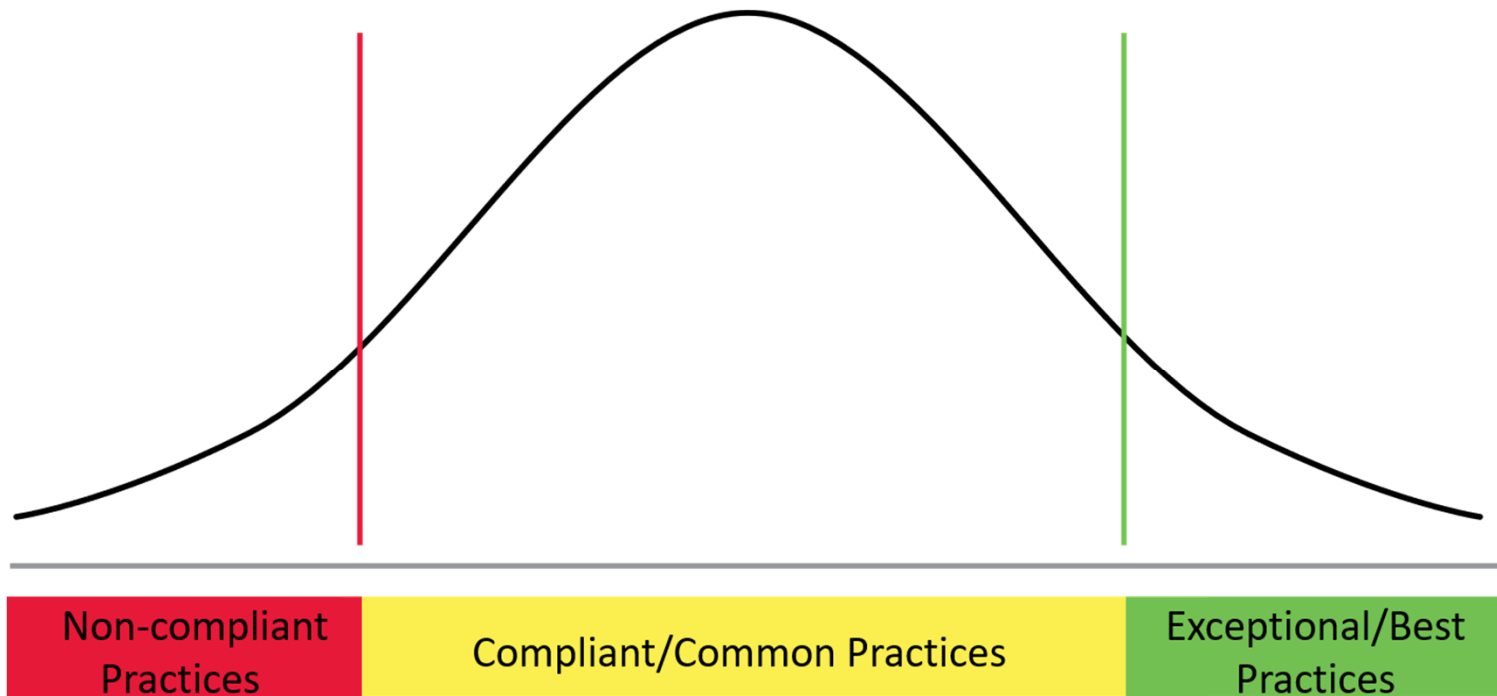
Overall Takeaway # 1 – Federal regulations are climbing shaky steps higher



Overall Takeaway # 2 – The Fiduciary Trend is Up!



Overall Takeaway # 3: Compliant \neq Competitive



Q & A

Please submit any questions using the GoToWebinar interface

Additional questions can also be sent to support@fi360.com

THANK
YOU
