

The logo for Fi360 is centered on a white square background. The text "Fi360" is written in a white, sans-serif font. The "i" in "Fi" has a dot, and the "360" is slightly larger than the "Fi".

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Reg Rollbacks

What to Expect From the SEC, DOL and Congress

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Overview

- Legislative activity
- Agency rules, examinations and enforcement
- ERISA litigation trends



SECURE Act 2.0 & RESA



- Key bills moving through Congress
 - H.R. 2954 “Securing a Strong Retirement Act” (SECURE Act 2.0)
 - S. 1770 “Retirement Security and Savings Act” (RESA)
- Joint committee referrals could slow legislative process
 - House: SECURE Act passes Ways & Means; also referred to House Financial Services and Education and Labor committees
 - RESA set for Senate Finance committee vote after Labor Day; additional markup planned in HELP committee
- Final vote on conference bill may be delayed into late Q4 or 2022

Key Overlapping Provisions

- 26 similar provisions encouraging (among other things)
 - Use of CITs, VAs in qualified plans
 - Escalation of default savings rates
 - Increased catch-up limits
 - Uniformity between plan types
 - Plan access by part-time workers
 - Small plan startups via larger tax credits
 - Student loan repayments
- RMD raised to 75
 - Reduction in excise tax, self-correction penalty



Other Provisions

- SECURE Act 2.0
 - Repayment of 'QBAD' distributions
 - Domestic abuse withdrawals
 - 403(b) plans eligible for MEPs, PEPs
- RESA
 - Reduction in certain tax penalties
 - Non-taxable fringe benefit: Individualized retirement planning advice
 - RMD exception for small account balances



Agency Rulemaking, Examinations and Enforcement

- Securities and Exchange Commission
 - Regulation Best Interest (Reg BI)
 - Using Environmental, Social and Governance (ESG) factors in investment decision-making
 - Examination priorities and enforcement
- Department of Labor
 - Fiduciary Rule(s)
 - Using ESG factors in investment decision-making for ERISA accounts
- Key Takeaways

SEC – Expect the Reg BI Package to Evolve



REGULATION BEST INTEREST	FORM CRS	IA GUIDANCE: FIDUCIARY DUTY	IA GUIDANCE: BD EXEMPTION
<p>Disclosure Obligation Conflicts Obligation Care Obligation Compliance Obligation</p>	<p>Both brokers and advisors must describe client relationship in common terms</p>	<p>Client interests must not be subordinated to adviser’s interests</p>	<p>“Solely Incidental” broadly interpreted with focus on method of compensation</p>
<p>Little changed but new emphasis on Conflicts and Care Obligations</p>	<p>Fiduciary advice versus transactional relationships clarified</p>	<p>Client interests interpreted to be paramount</p>	<p>“Solely Incidental” interpretation narrowed to focus more on nature of relationship</p>

SEC – Major Developments in the ESG Realm



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- New webpage: “SEC Response to Climate and ESG Risks and Opportunities”
- First Senior Policy Advisor for Climate and ESG appointed (Chair’s Office)
- New Climate and ESG Task Force established (Division of Enforcement)
- Potential rulemaking is focused on disclosures by public companies – public comment period ended in June

“ The challenge for the Commission is how to facilitate access for the average investor to reliable, issuer-specific, financially material information that is generated in a cost-efficient way and provided in a useful format.”

[Harvard Law School Forum on Corporate Governance, 2021]

SEC – Examination Priorities



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- Reg BI – heavily focused on ***Policies and Procedures*** for compliance*
 - How have firms considered costs in making a recommendation
 - Alterations to product offerings
 - Recommendations to new customers (especially rollovers)
 - Recommendations of complex products and consideration of reasonably available alternatives
 - How conflicts have been Identified and addressed
 - Have app-based broker-dealers implemented effective policies and procedures
- Climate and ESG-related Risks: “[S]taff will ... assess compliance with disclosure obligations under federal securities laws” (Feb. 24, 2021 statement by Acting Chair Allison Herren Lee)

* Based upon Dec. 21, 2020 “Statement on Recent and Upcoming Regulation Best Interest Examinations from the SEC Division of Examinations”



DOL Fiduciary Rule: Past and Future

OBAMA ERA	TRUMP ERA	BIDEN ERA
<p>Five-part test revised:</p> <ul style="list-style-type: none"> • Provide investment advice • On a regular basis • Pursuant to mutual agreement • Serves as primary source of decision-making • Individualized to the plan <p>Impartial Conduct Standards are introduced and widely embraced.</p>	<ul style="list-style-type: none"> • Five-part test returns • New prohibited transaction exemption for conflicted advice • Resembles the Best Interest Contract Exemption (BICE), without the contract • Impartial Conduct Standards become a regulatory mainstay 	<p>Spring 2021 Regulatory Agenda:</p> <ul style="list-style-type: none"> • Notice of Proposed Rulemaking to address fiduciary definition to be released by Dec. 2021 • Trump era PTE likely to be reviewed and revised or replaced • Impartial Conduct Standards continue to be important – Fiduciary duties of care and management of conflicts are focal points
<p>Rule killed in court during transition from Obama to Trump eras</p>	<p>New PTE is an offshoot of original fiduciary rule, not Version 2.0</p>	<p>SEC Best Interest and DOL fiduciary standards are converging</p>

DOL ESG and Proxy Voting Rules



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- **Financial Factors in Selecting Plan Investments (ESG Rule 11-13-20)**
 - Reinforces that ERISA plan investment decisions must be based on pecuniary factors
 - Interprets pecuniary factors narrowly, potentially deterring use of ESG factors
- **Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (Proxy Voting Rule 12-16-20)**
 - Also focuses on pecuniary factors; potentially deters voting on ESG-related issues
- **March 10, 2021, DOL announced review and non-enforcement of ESG and Proxy Voting Rules**
 - Rules are potentially inconsistent with Biden Executive Order “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”

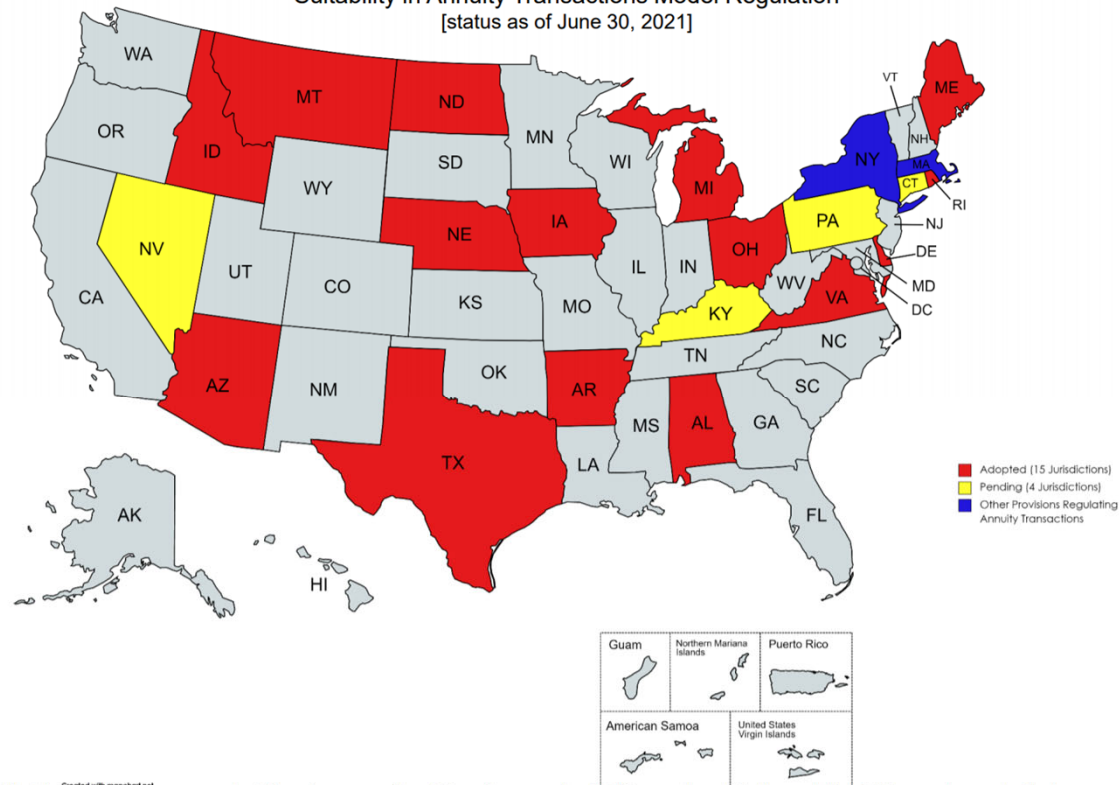
Key Takeaway – ESG Investing is Contextual

Spectrum of Capital (based upon OECD and other sources capturing the range of ESG investing)

Philanthropy	Impact Investing	Social Investing	Sustainable Investing	Responsible Investing	Traditional Financial Only Investing
Address specific societal challenges that do not generate financial returns	Address specific societal challenges that require below market returns	Seek investments with both social and financial returns	Pursue ESG opportunities to enhance risk-adjusted returns	Incorporate ESG factors to traditional investing to mitigate ESG-related risks	Focus on delivering competitive financial returns
Social return only	Expectation of below market returns	Willingness to accept below market returns	Apply ESG factors to enhance value and returns	Mitigate ESG risks to protect value and achieve competitive returns	Limited or no regard for ESG practices
Focus on Client Directives and Objectives			Focus on Financial Objectives and Regulatory Limitations		

Key Takeaway – States Have Best-Interest Rules, Too

Implementation of 2020 Revisions to Model #275
Suitability in Annuity Transactions Model Regulation
[status as of June 30, 2021]



Disclaimer: This map represents state action or pending state action regarding NAIC amendments to the model(s). This map does not reflect a determination as to whether the pending or enacted legislation contains all elements of NAIC amendments to the model(s) or whether a state meets any applicable accreditation standards.

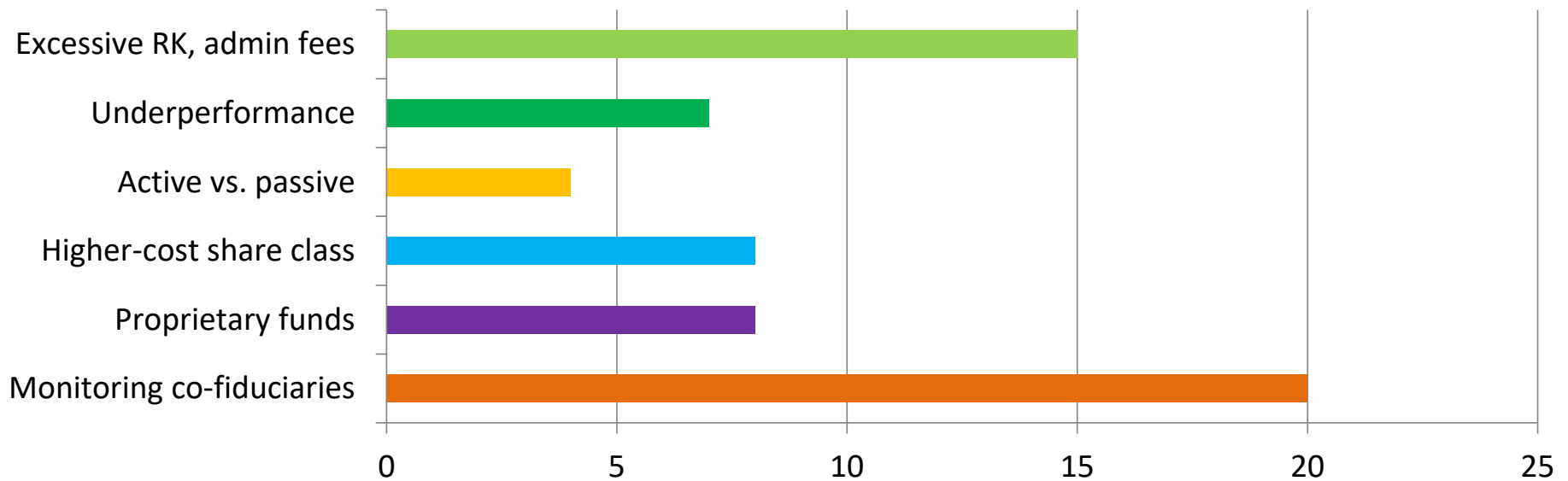
Source: https://content.naic.org/sites/default/files/inline-files/275%20Formal%20Map_2020%20June%2030%20revisions.pdf

ERISA Litigation Trends



- 25 excessive fee lawsuits filed 1st half 2021
 - 36 complaints filed 1st half 2020
- Plan size of defendants \$160M-\$6B in assets

Most Commonly Filed Claims in 2021*



*As of 7/1/21

Supreme Court Appeal

- *Hughes v. Northwestern* excessive fee case – appeal from 7th Cir.
- 7th Cir. Opinion held:
 - Plans can offer a wide range of investment options
 - Per head, flat admin. fee not required
 - Multiple RKs OK (one for annuities)
- Solicitor General amicus brief in support of workers asked High Court to review
 - Selection of lower-cost share classes
 - Failure to monitor/reduce RK costs
- Related issue at question
 - Multiple investments defense (NW plans had 187 and 242 options)
 - Whether fiduciary has obligation to remove imprudent options, i.e., with unreasonably high fees

What to Expect in 2021

Congress	Federal/Regulation	State Activity	Litigation/Enforcement	
SECURE Act 2.0 likely (additional retirement saving incentives)	SEC tweaks Reg BI, Form CRS	Extensive state adoption of NAIC 'Best Interest' rule for annuity transactions	SEC, FINRA 'education' on Reg BI compliance transitions to enforcement; crackdown on Form CRS omissions	
Congress supports 'auto IRAs' at federal level	In reversal, DOL to encourage ESG in qualified plans	States (NJ and NV) to renew fiduciary rulemakings	Massachusetts to test compliance with BD fiduciary rule through enforcement	Likely
ESG legislation (to mandate ESG options in qualified plans)	DOL PTE for conflicted advice withdrawn	Possible state legislation to impose wealth, financial services taxes.	SEC to continue targeting deficient 12b-1 disclosures in exams, enforcement	Maybe
Fiduciary legislation, e.g. DOL fiduciary rule	DOL lifetime disclosures modified		Pace of ERISA excessive fee litigation to continue; 90+ complaints filed in 2020	No

What's On Track YTD

Congress	Federal/ Regulation	State Activity	Litigation/ Enforcement
SECURE Act 2.0 likely (additional retirement saving incentives) ✓	SEC tweaks Reg BI, Form CRS ?	Extensive state adoption of NAIC 'Best Interest' rule for annuity transactions ✓	SEC, FINRA 'transition' on Reg BI compliance transitions to enforcement; crackdown on Form CRS omissions ?
Congress supports 'auto IRAs' at federal level ?	In reversal, DOL to encourage ESG in qualified plans ✓	States (NJ and NV) to renew fiduciary rulemakings ?	Massachusetts to test compliance with BD fiduciary rule through enforcement ✓
ESG legislation (to mandate ESG options in qualified plans) ✓	DOL PTE for conflicted advice withdrawn ✓	Possible state legislation to impose wealth financial services taxes. ✗	SEC to continue targeting deficient 12b-1 disclosures in exams, enforcement ✓
Fiduciary legislation, e.g. DOL fiduciary rule ✓	DOL lifetime disclosure modified ?		Pace of ERISA excessive fee litigation to continue; 90+ complaints filed in 2020 ✓

Q & A

Please submit any questions using the GoToWebinar interface

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

THANK
YOU
