

The logo for Fi360, featuring the text 'Fi360' in a white, sans-serif font. The 'i' has a dot, and the '360' is slightly larger than the 'Fi'. The logo is centered within a white square frame.

Fi360

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2020 Fiduciary Year in Review And a Look Ahead

December 10, 2020

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Topics

- 2020 Review – Impact on the Fiduciary Standard
 - Congress
 - Securities & Exchange Commission
 - Department of Labor
 - States
 - NASAA and NAIC
 - ERISA Litigation
- Wrap-up: What to expect in 2021 and how to prepare



Congress – Gridlock?



Divided Control of Congress

- Partisan disagreement on fiduciary standard
 - Congressional approval may be required for ERISA amendments that allow DOL to revamp Obama-era fiduciary rule
 - Congressional approval likely not needed to impose fiduciary standard on retail brokerage advice (and replace Reg BI)
- Strong bipartisan agreement to increase retirement savings
- DOL, SEC nominees will need bipartisan support from Senate



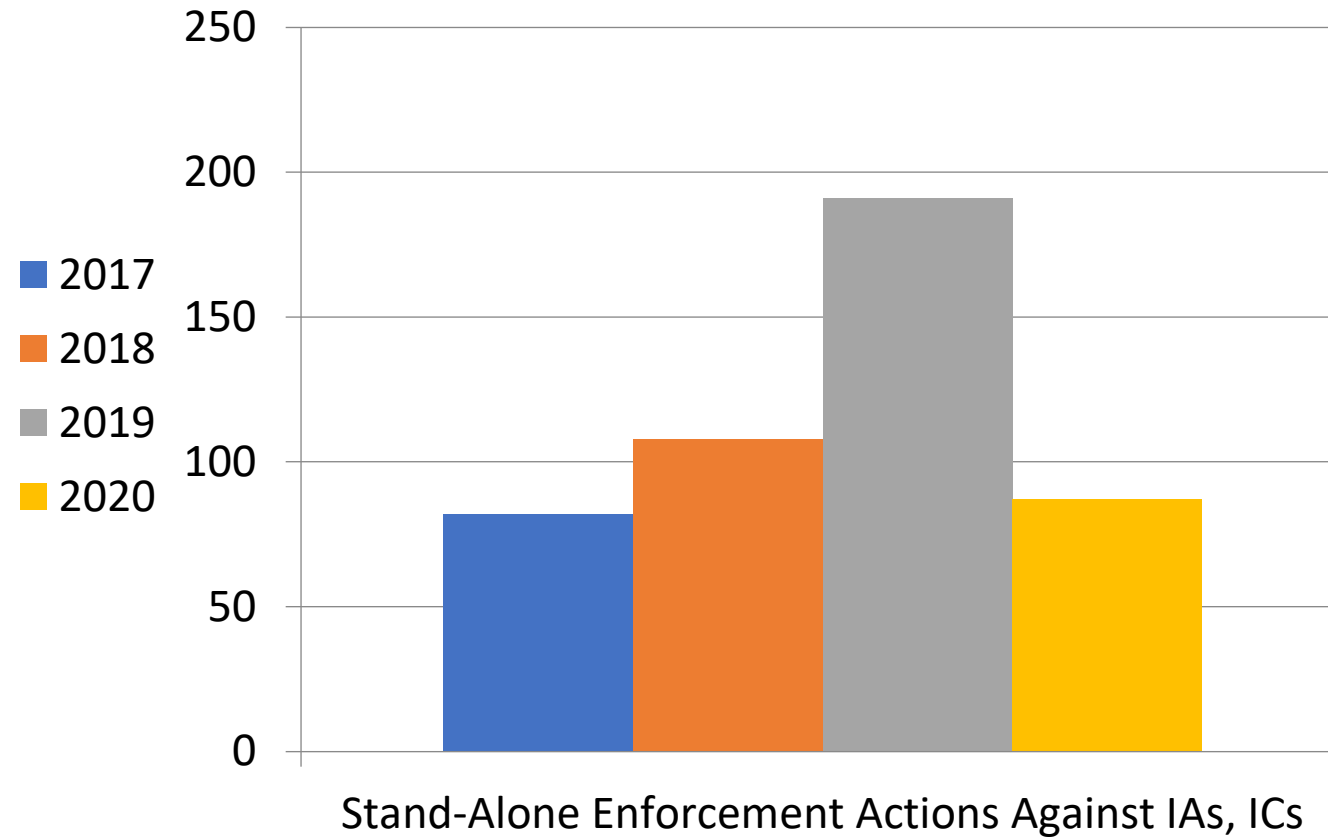
2020 Retrospective Review – SEC



Covid-19

- SEC staff continue to work remotely
- Enforcement
 - Covid-related investigations included inflated investment claims involving treatments, testing, and access to N-95 masks, other PPE
- RIA Exams
 - Findings: OCIE focus on business continuity plans (BCPs)
 - Majority of advisory firms had BCPs
 - Implementation of BCPs by firms relatively smooth; minor issues included
 - ✓ Positioning remote location hardware
 - ✓ Providing broad access by employees to systems from remote locations
 - ✓ Coping with loss of critical personnel due to illness
 - ✓ Lack of childcare and tele-school demands

SEC Enforcement Activity Drops in FY 2020*



* Source: SEC Division of Enforcement Annual Reports

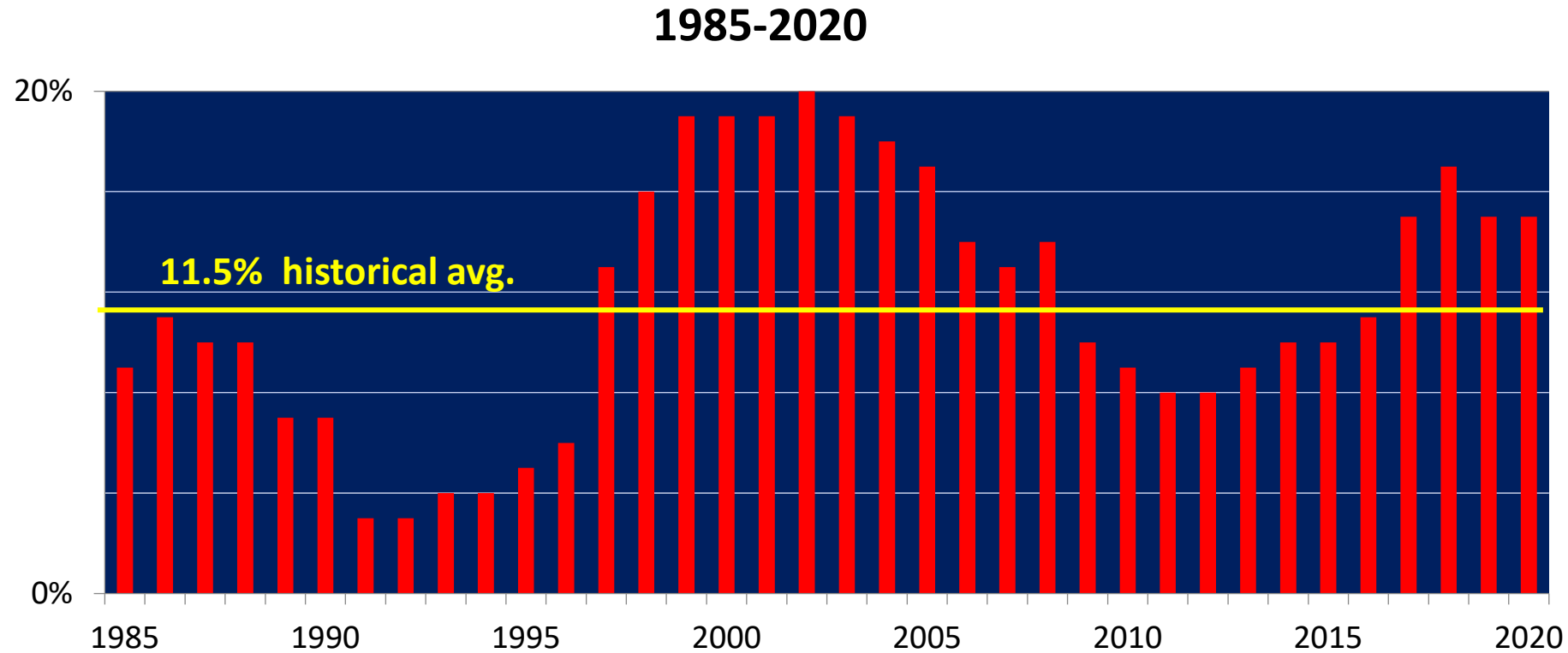


SEC Enforcement Activity

- 405 standalone enforcement actions; down from 526 in FY 2019
 - Decline blamed partly on working remotely, court closures
 - RIA, investment company actions in 2020: 2nd in standalone cases (21%) after securities offerings (32%)
- New focus on 403(b) teacher plans
- Focus on conflicts of interest
 - Mutual fund 12b-1 disclosures continues
 - Cash sweep arrangements involving revenue-sharing
 - Failure to disclose hidden costs in wrap-fee programs
 - Selling single-inverse ETFs to long-term investors



SEC Examination Cycle – Holding Steady at 15%



* Source: SEC annual reports.

SEC Examination Trends

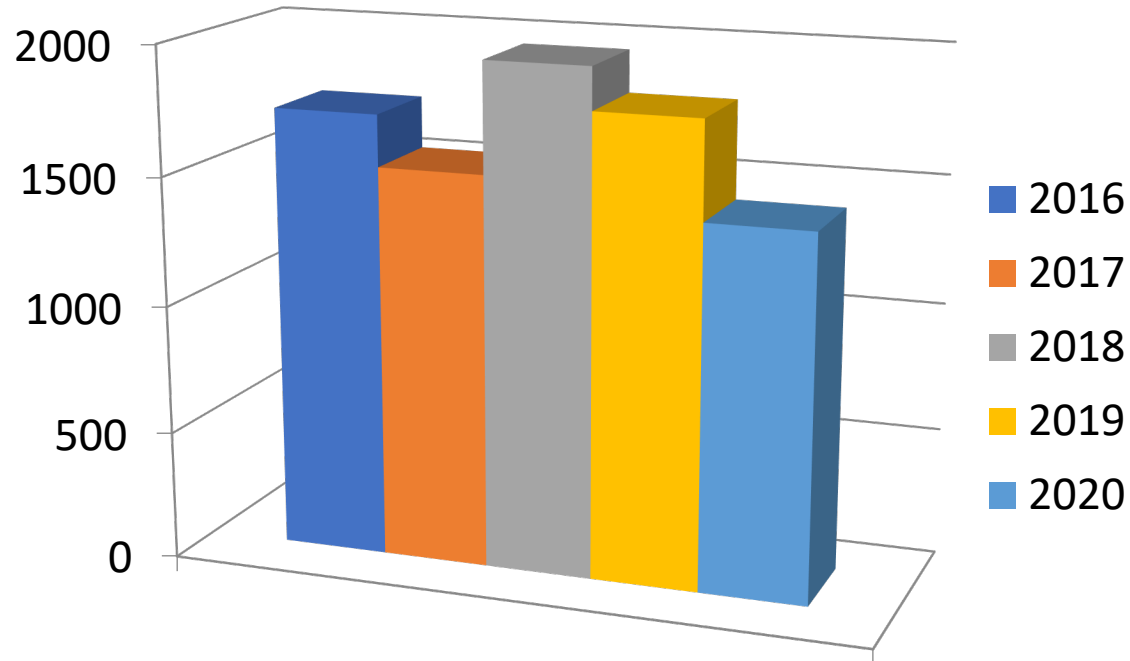


OCIE Risk Alert on Compliance Rule:*

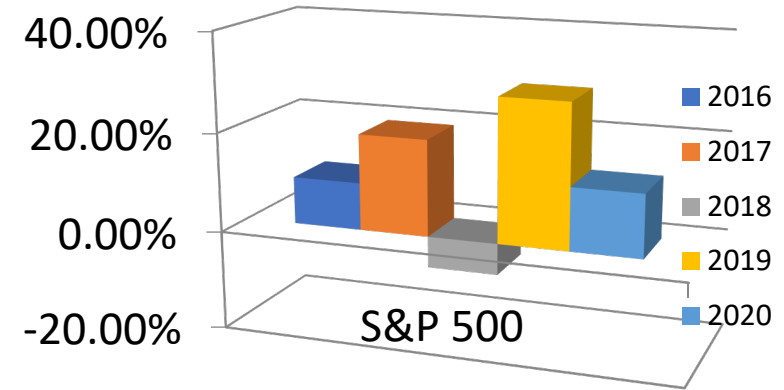
- Numerous deficiencies and weaknesses found at RIA firms
- Significant focus on chief compliance officer (CCO) role
- Deficiencies in portfolio management:
 - Due diligence and oversight of outside managers.
 - Monitoring compliance with client investment and tax planning strategies.
 - Due diligence and oversight of investments, including alternative investments.
 - Compliance with regulatory and client investment restrictions.
 - Adherence with investment advisory agreements.

* SEC's Office of Compliance Inspections and Examinations. Risk alert published Nov. 19, 2020

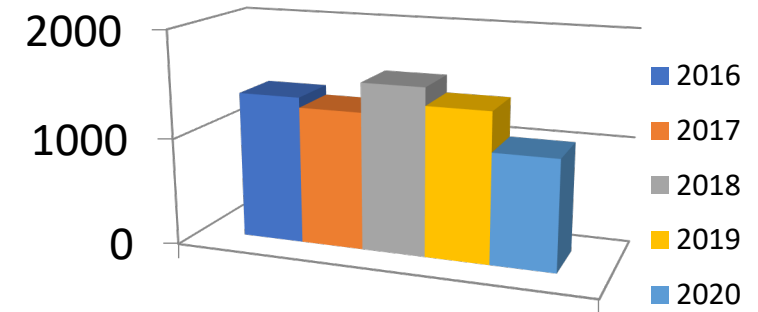
Fiduciary Breach Claims Down in Arbitrations



Fiduciary Breach Claims*



* 2020 returns through 11/27/20



Suitability Claims*

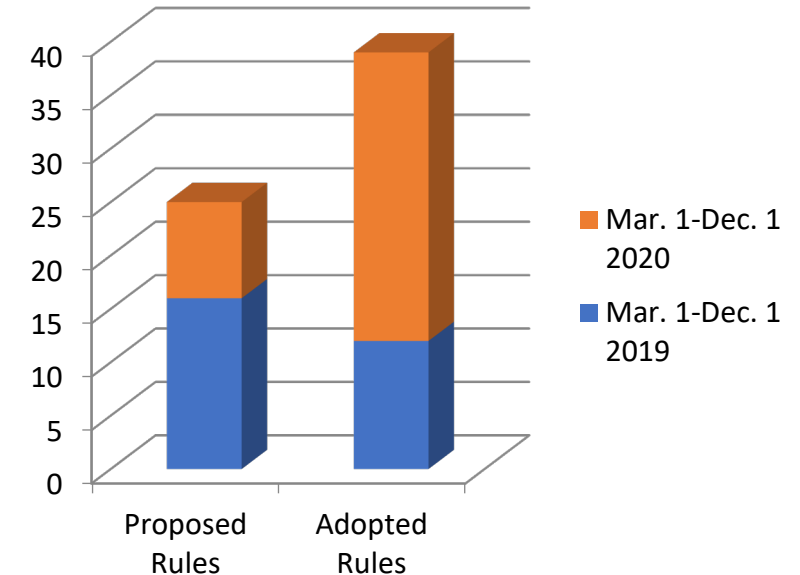
* All data for fiduciary breach and suitability claims through October of each year. Source: FINRA



SEC Regulatory Activity during Covid-19

New rulemakings jump

- SEC staff still working remotely
 - 27 new rules Ok'd during coronavirus
 - New proposed rules drop by 25%
 - Final rules more than double
- Key SEC rules impacting advisors
 - Form CRS (effective 6/30/20)
 - Fiduciary duty OK, can't modify boilerplate 'best interest' disclosure
 - Definition of 'accredited investor'



Retirement Plans and Covid-19

Early data positive suggest savings on track*

- Retirement savers have maintained 'long-term' outlook
 - Only 2.2% of DC plan participants stopped contributing
 - 9.5% changed asset allocations in account balances
 - Withdrawals only slightly higher than average (3.4%)
 - Few plans have suspended employer match, almost none terminated
- Longer-term economic outlook suggests risks remain**
 - Initial federal support ends this month
 - Major retailers filing for bankruptcy
 - Large employers announcing significant layoffs

* Investment Company Institute, first 3Qs, 11/20/20; Plan Sponsor Council of America, June 2020

** Angela Antonelli, research professor at Georgetown University, column in *Market Watch*, "What has Covid-19 done to our retirement savings?" 9/10/20



Current status of DOL Actions

- Conflicted Advice PTE
- ESG and Proxy Voting rules
- Lifetime Income disclosure



DOL's Proposed New PTE for Conflicted Advice

Provisions	Implications
Formally reinstates DOL's five-part test to establish fiduciary accountability	<ul style="list-style-type: none">• This effectively happened in 2018 when the Fifth Circuit vacated the 2016 Fiduciary Rule• Handicaps enforcement of fiduciary status
Creates a PTE that provides greater latitude for "investment advice fiduciaries" to receive compensation conflicts	<ul style="list-style-type: none">• Requires acknowledgment of fiduciary status• Mirrors the requirements of DOL's BIC Exemption• Applies to rollovers and certain principal transactions
Relies upon Impartial Conduct Standards (ICS) to protect investors	<ul style="list-style-type: none">• Adhere to best interest standard• Must not subordinate investor interests• Receive only reasonable compensation• Make no materially misleading statements• Establish, maintain, and follow policies and procedures
Includes a "retrospective review" requirement to detect/prevent violations of ICS and PTE	<ul style="list-style-type: none">• Written review, conducted at least annually• Certified by financial institution's CEO or equivalent



DOL's Proposed New "Fiduciary" PTE – Current Status

- The final rule was sent to OMB for final review on November 24
- Rollover provision reversing Advisory Opinion 2005-23A ("Deseret letter") under fire from financial institutions; consumer groups argue that the 5-part test renders investor protections ineffective
- Would become effective 60 days after publication in Federal Register
- Guesstimates of timing
 - Final rule release anywhere from now to January 19
 - Compliance deadline one year after the rule is final



ESG Investments – Rules and Regulations for Fiduciary Responsibilities (ERISA Part 2550)

- Final Rule published in the Federal Register November 13, 2020
 - Confirms that investment decisions must be based solely on financial considerations
 - Prohibits fiduciaries from subordinating interests of participants to pursue non-pecuniary goals
 - Requires consideration of reasonably available alternatives
 - Sets investment analysis and documentation requirements when non-pecuniary factors are used as tie breakers
 - Prohibits the use of non-pecuniary factors in the selection of QDIAs
- Effective date is January 12, 2021; plans have until April 30, 2022 to make any necessary changes to QDIAs



DOL's "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" Proposed Rule

- Proposed September 4, 2020; 30-day comment period
 - Seeks to address a “persistent misunderstanding” that fiduciaries are required to vote all proxies – asserts that they are not
 - Affirms that the fiduciary duties of loyalty and prudence include responsibilities regarding proxy voting and other shareholder rights
 - Fiduciaries would need to decide whether and how to vote based upon the likelihood and amount of net economic impact on the plan
 - Fiduciaries would be prohibited from voting proxies that would not have sufficient economic impact to justify the effort and cost
 - Favors recommendations of management; disadvantages ESG-related proposals
- Outlook for this proposed rule is unknown



DOL's Lifetime Income Illustrations Rule

- Interim Final Rule pursuant to SECURE Act issued on August 18, 2020
- Requires defined contribution plans to include two lifetime income illustrations on benefit statements at least every 12 months
 - Single Life Annuity
 - Qualified Joint and 100% Annuity
- Prescribes method of computation and wording of descriptions
- Effective date of the final rule will be September 18, 2021
- Intended to help participants understand how their balances translate to monthly income and spur them to better prepare for retirement



State Initiatives



- Fiduciary rules for securities brokers pending:
 - NJ, NV
 - Massachusetts fiduciary rule enforcement began 9/1/20
- North American Securities Administrators Association (NASAA)
 - Policies and Procedures model rule adopted 11/24/20;
 - CE model rule for IARs (federal and state) adopted 11/24/20.
- National Association of Insurance Commissioners (NAIC)
 - 'Best interest' suitability transactions model rule (updated)
 - Adopted in 4 states; pending in 2
 - FAQ guidance for complying with rule proposed 9/4/20

ERISA Litigation

- 90+ class-actions filed against 401(k) plan fiduciaries in 2020
- **Snapshot:** 12 class-actions filed Oct.-Nov.
 - Recent decisions mixed:
 - 3 earlier suits dismissed during this period
 - 2 settled, one for \$2.5m; another pending
 - Common claims include:
 - Underperforming target-date funds
 - Active vs. passively managed investment options
 - Excessive recordkeeping fees
 - Failure to monitor
 - Failure to use lower-cost share classes
 - Teamster pension plan
 - Expensive, illiquid private equity investments



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 revised or 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



Questions



THANK
YOU
