

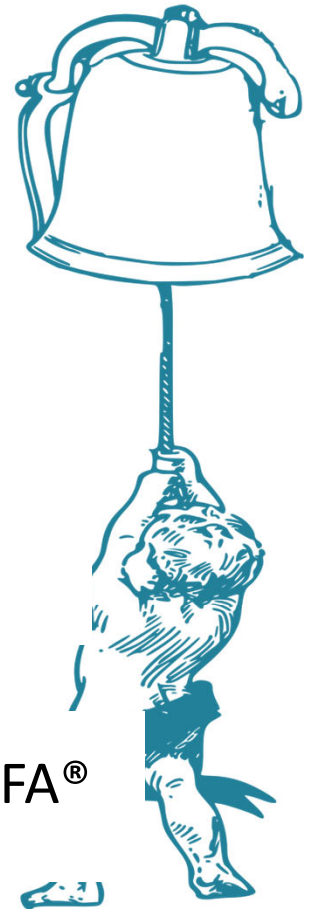
Fi360



In With the New, Out With the Old: A Flood of Quasi-Fiduciary Rules Coming

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Fiduciary Standard Not a ‘Bright Line’

“[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respects has he failed to discharge these obligations? And what are the consequences of his deviations from duty?”

– Justice Felix Frankfurter, *SEC v. Chenery Corp.* (1943)

Step 1: Organize

“The Investment Advisor demonstrates awareness of fiduciary duties and responsibilities.”

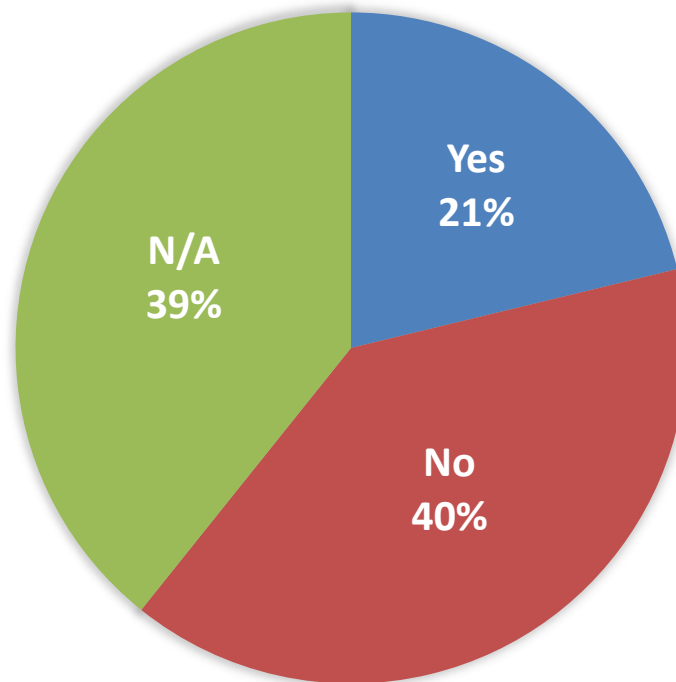
-- Practice 1.1, *Prudent Practices for Investment Advisors*

Topics for Review

- SEC Initiatives
- DOL Activity
- State Fiduciary Initiatives
- ERISA Litigation Trends
- 2019 Legislative Outlook
- Discussion: Branding and Reputation

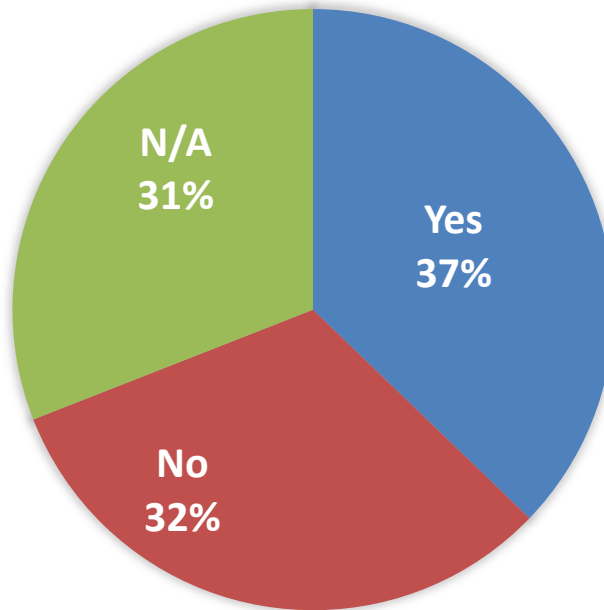
Survey Question #1

Are you using the Department of Labor's temporary safe harbor (Impartial Conduct Standards) for conflicted investment advice?



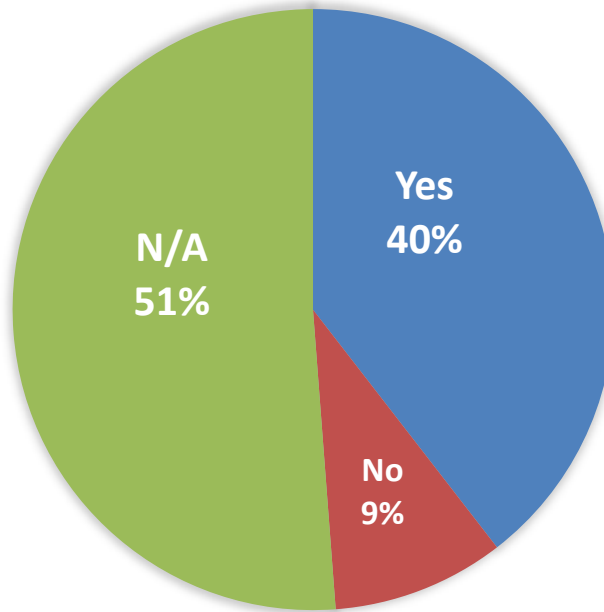
Survey Question #2

Assuming Regulation Best Interest for brokers is approved by the SEC, are you prepared to explain the differences between RBI and the fiduciary standard for investment advisers to your clients?



Survey Question #3

On November 2nd the SEC approved a new rule enhancing disclosure of order handling by brokerage firms. As part of your best execution duty, are you planning to review your broker-dealer(s)' disclosure information?



SEC Initiatives in Focus

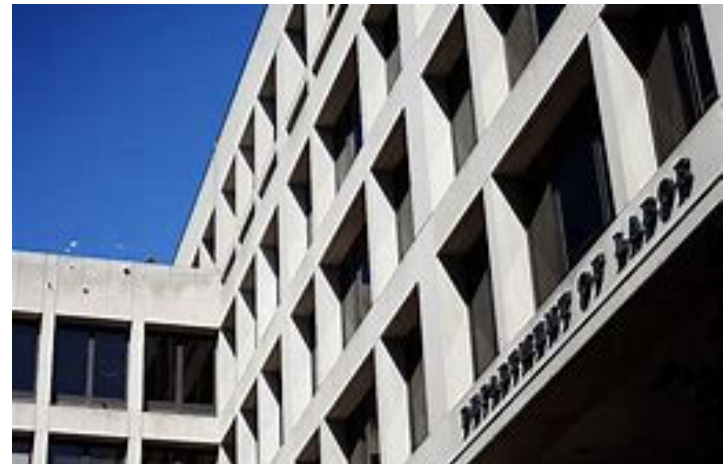
- Regulation Best Interest/Form CRS
- Investment adviser fiduciary guidance
- Order Handling rule (best execution)
- Testimonial and Solicitor rules
- Share Class Selection Disclosure Initiative



SEC Headquarters, Wash. D.C.

DOL Activity

- Fiduciary Rule status
- Post-rule industry trends
- MEPs rule proposal
- Auto-portability rule



DOL Headquarters, Wash. D.C.

DOL Fiduciary Rule Status

- Impartial Conduct Standards still in effect
 - Covers Best Interest Contract conflicts
 - Level fee for rollovers
 - Principal transactions
- DOL sets October 2019 deadline for new rulemaking
 - Waiting on SEC's best interest rule for brokers

Post-DOL Rule Trends? Noise Dominates for Now

InvestmentNews Editorials

Beware: Regulators won't take excuses for reverse-churning

Exam priorities and lawsuits are zeroing in on account switching

Apr 14, 2018 @ 6:00 am

0 Shares

With regulators zeroing in on reverse-churning, and lawsuits popping up around the practice, advisers should be paying attention.

The concern stems from conflicts of interest that advisers face when deciding whether to move clients from commission-based accounts to often more expensive fee-based accounts (depending on how much trading occurs, which additional services are provided and how much the fee is). But some advisers have felt pushed in that direction regardless of the circumstances, especially in retirement accounts, because of the compliance demands of the **Labor Department's fiduciary rule**.

LIMRA Secure Retirement Institute: Fixed Indexed Annuities Shatter Sales Record in Second Quarter 2018

Total annuity sales jump 10 percent in the second quarter

WINDSOR, Conn., Aug. 21, 2018 – Fixed indexed annuity (FIA) sales were \$17.6 billion, 17 percent higher than second quarter 2017 and 21 percent higher than first quarter sales results, according to LIMRA Secure Retirement Institute Second Quarter 2018 Sales Survey.

"This quarter's FIA sales topped the record set in the fourth quarter 2015 by 12 percent," said Todd Giesing, annuity research director, LIMRA Secure Retirement Institute. "Growth was wide-spread with all

FIDUCIARY FOCUS

SIFMA says Reg BI raises broker standard above investment adviser requirements

Investor advocate Roper: SIFMA wouldn't support SEC proposal if it reformed broker practices

Dec 6, 2018 @ 2:09 pm

By [Mark Schoeff Jr.](#)

A major financial industry trade association asserted Thursday that the Securities and Exchange Commission's investment advice reform proposal would result in brokers having to meet a higher standard of care than investment advisers.

The SEC proposal revolves around the so-called [Regulation Best Interest](#), which would require brokers to act in the best interests of the clients and is designed to be a step up from the current suitability standard administered by the Financial Industry Regulatory Authority Inc.

State Fiduciary Initiatives

- New York
- New Jersey
- Nevada
- NAIC Model Suitability Rule
- Auto-IRA programs



New York State Capital, Albany

NY Assembly Bill 2464 (2017-2018)

Fiduciary disclaimer language:

“I am not a fiduciary. Therefore, I am not required to act in your best interests, and am allowed to recommend investments that may earn higher fees for me or my firm, even if those investments may not have the best combination of fees, risks, and expected returns for you.”

[Note: Investment advisors subject to a fiduciary duty regarding “certain types of investment advice” must disclose the “extent to which the fiduciary duty does and does not apply.”]

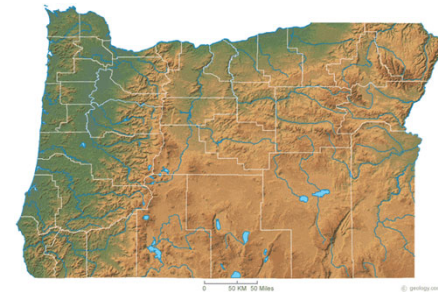
NY Dep't. of Fin. Svcs. Best Interest Rule

New rule entitled “Suitability and Best Interests in Life Insurance and Annuity Transactions”

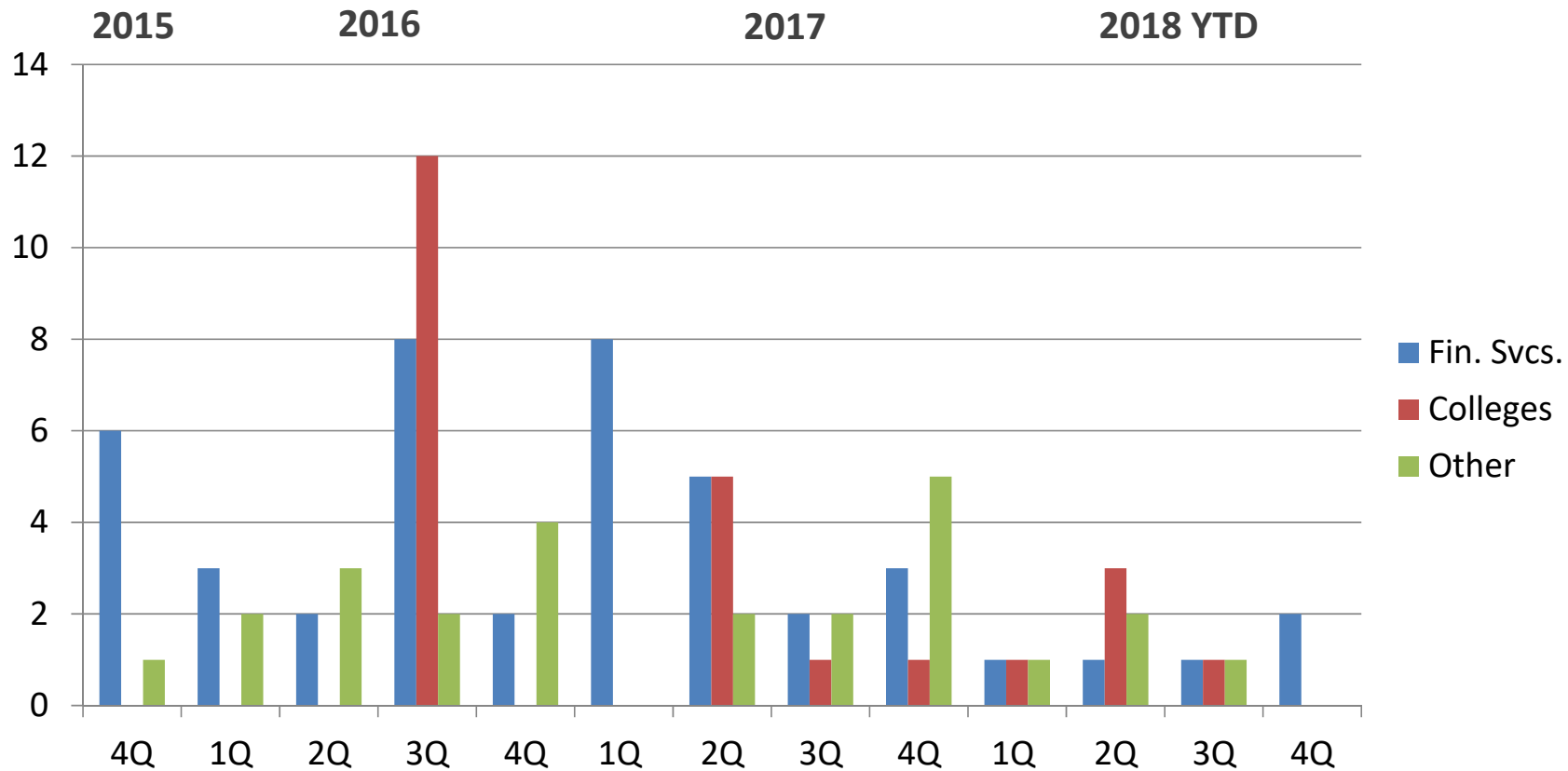
- **Duty of Loyalty:** Insurer or agent “shall act in the best interest of the consumer... Only the interests of the consumer shall be considered in making the recommendation.”
- **Duty of Care:** Rule tracks ERISA’s prudence standard; also lists specific suitability factors
- **Titles:** Prohibits use of advisor-like titles unless properly licensed or certified.
- **Compensation:** Does not require compensation to be reasonable, unlike vacated DOL rule.
- **Scope:** Standard applies to recommendations involving new and in-force policies of consumers; but not to ERISA plans.
- **Key Dates:** Rule applicable to annuity transactions Aug. 1, 2019; to life insurance transactions Feb. 1, 2020.
- **Notably Missing:** ‘Fiduciary’ absent from 12-page rule.

State Auto-IRAs Face Legal Challenges

- OregonSaves program settles with ERIC on 3/26/18
 - ERIC sought injunction 10/12/17 to prevent program from requiring exemption filings by ERISA plan sponsors
- CA taxpayers group sues CalSavers 5/31/18, says ERISA preempts state program.
 - State response is it doesn't create an employee benefit plan under ERISA because it wasn't established by an employer, but by the state

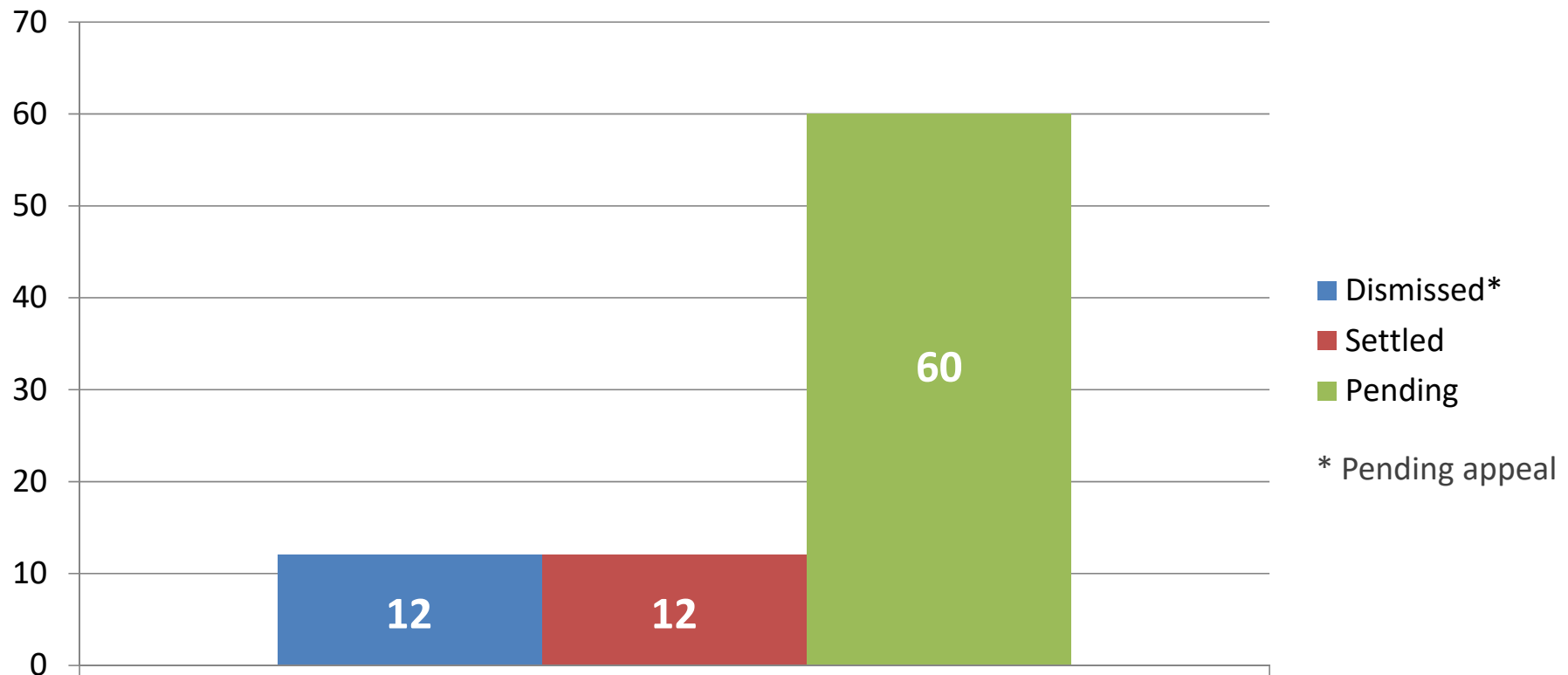


ERISA Excessive Fee Suits – Filed



Source: Bloomberg Law ERISA Litigation Tracker

ERISA Excessive Fee Suits – Status



Source: Bloomberg Law

Focus on Latest University Case Dismissal

- *Davis v. Washington University* – decided 9/28/18 on motion to dismiss all counts.
- Claims included excessive recordkeeping fees, imprudent investments, failure to select lower-cost institutional share classes, having two recordkeepers (TIAA and Vanguard), and a loan program in violation of ERISA.
- Wash U plan offered 36 TIAA, 83 Vanguard options
- District judge held
 - Plaintiffs failed to allege a flawed process in choosing options
 - Diverse selection of options negates claim of breach of fiduciary duty
 - “Nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund” (citing *Hecker*)
 - Recordkeeping fee based on assets instead of participant #s not imprudent
 - Bundling of TIAA products an ‘acceptable’ industry practice



Legislative Outlook -- Lame Duck and 2019

- Partisan gridlock continues
 - Presidential veto, Senate GOP control
 - Potential impeachment hearings
 - Retirement bill in cross-fire
- Focus more on agency, state activity



Fiduciary Trends - 2019

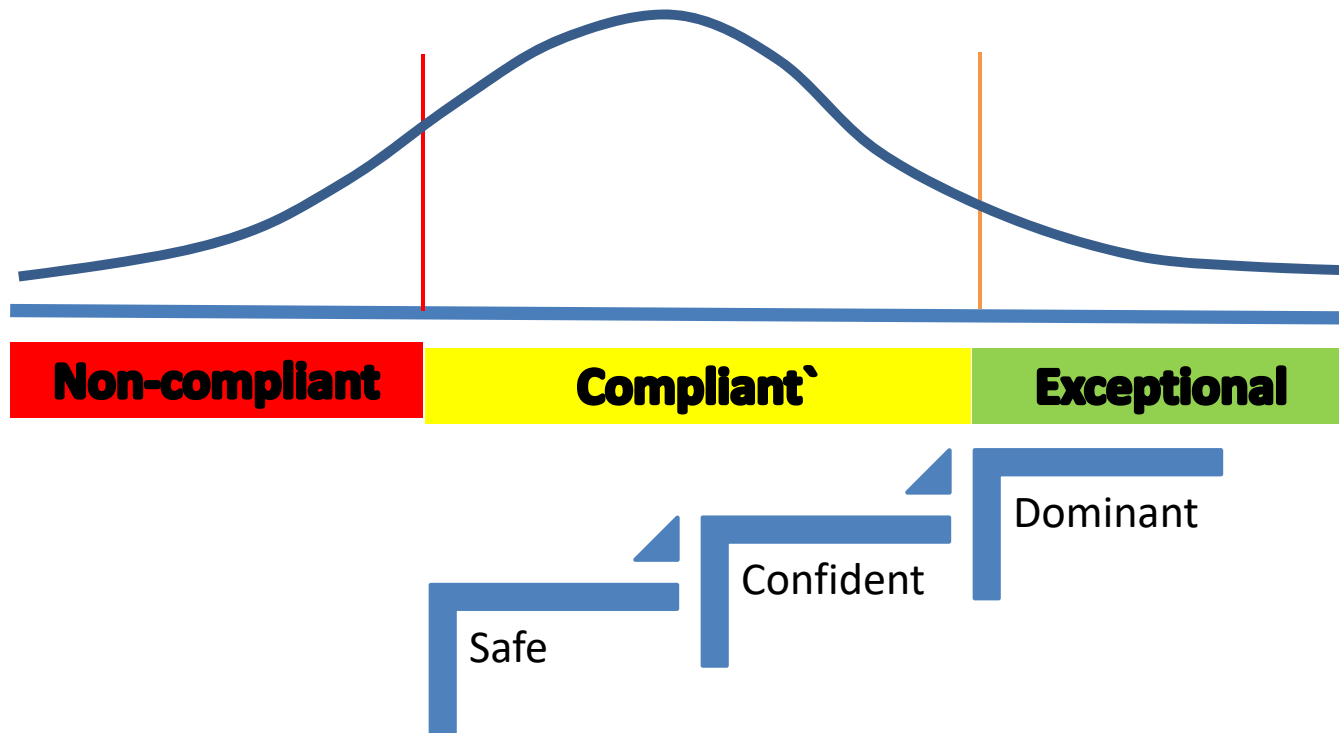
- Quasi-fiduciary rules means fewer fiduciary advisors, more 'semi-fiduciaries'
- Consumers will remain confused over 'best interest' vs. fiduciary standard
- Fiduciary duty of care (prudent expert standard) growing stronger
- Fiduciary duty of loyalty weakened by greater reliance on disclosure, **BUT**
- Residuals from old DOL Fiduciary Rule remain. Heightened scrutiny continues:
 - Rollover advice
 - Investment expenses
 - Suitability of retirement products



Compliance Versus Professional Conduct



Focus on the Right Side of the Curve



Your Reputation Is Measured In Trust

$$\begin{array}{c} \text{TRUSTWORTHINESS} \\ = \\ (\text{CREDIBILITY} + \text{RELIABILITY} + \text{ENGAGEMENT}) \\ \hline \text{SELF-ORIENTATION} \end{array}$$

Source: “The Trusted Advisor”, a book by David Maister, Charles Green, and Robert Gaiford, 2001

Building a Reputation Based Upon Trust

Credibility	Reliability	Engagement; Client Orientation
Credentials	Process Standards	Personalized services
Specialized knowledge	Technology	Custom communications
Recognition/Verification	Continuity	Transparency

Q & A

Please submit any questions using the GoToWebinar interface

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

THANK
YOU
