

# Hundreds of pages of regulations amount to nothing until they're enforced



*We don't know how Reg BI or the CFP credential's fiduciary standard work in practice because there has been no substantial punishment for violating them.*

February 9, 2023

By Mark Schoeff Jr.

## InvestmentNews

Investor advocates, financial advisors and industry officials are never at a loss for words when I ask them their opinions about Regulation Best Interest. What no one can tell me nearly three years after Reg BI went into force is whether it's working.

We have yet to see much in the way of investor protection results because of a law or regulation. Rules are whatever regulators say they are.

Most regulations, including Reg BI, are **hundreds of pages** long. But they don't come to life until they're enforced. That's why Reg BI **remains a cipher**.

The Securities and Exchange Commission has only pursued **one enforcement case** based on its broker standard of conduct, which prohibits registered representatives from putting their financial interests ahead of their customers' interests. It's meant to offer stronger investor protection against broker conflicts than its predecessor, the suitability rule.

The Financial Industry Regulatory Authority Inc. has only conducted three Reg BI enforcements.

The SEC's case came last summer, while the two most recent Finra actions **occurred last week**.

None of the cases reveal anything particularly novel about how Reg BI will work in practice. The SEC and Finra cite violations of Reg BI requirements, but the same allegations could have been made under suitability.

There's nothing that jumps out in the cases that makes you sit up and say, "aha," that's what the SEC meant when it said reasonably available alternatives must be considered for each recommendation.

None of them contain passages you can point to and say: That's how reps have to evaluate the costs of recommendations. That's how they have to mitigate — or eliminate — conflicts.

In fairness to the SEC, it's not as if the financial industry is waiting for Godot. The agency recently **published a risk alert** outlining the results of Reg BI examinations. They showed that some brokerages lack policies, procedures and technology systems required to comply with Reg BI.

In its examination priorities report this week, the SEC went on at some length about various Reg BI requirements that will be **probed with heightened scrutiny**. Financial professionals dually registered as advisors and brokers, watch out.

The agency also has released Reg BI guidance documents.

But what we haven't seen, for the most part, are concrete examples of how Reg BI will change the way brokers make recommendations to retail customers.

Micah Hauptman, director of investor protection at the Consumer Federation of America, praised the SEC risk alert for illuminating Reg BI shortfalls. But he's growing impatient for more from the regulator.

"It's another piece in the puzzle showing lack of compliance, and it adds to the evidence [state regulators] and Finra have published about non-compliance," Hauptman said. "But the big missing piece of the puzzle, which is conspicuous by its absence, is enforcement of the standard."

When SEC Chairman Gary Gensler makes enforcement a priority, it gets done, Hauptman said. He cited cryptocurrency examples.

"When we see a lack of enforcement here, it suggests [Gensler] is not bringing the same zeal to this issue, which is frustrating," Hauptman said.

## **WAITING ON CFP FIDUCIARY CASES**

It's not just the SEC and Finra that have had a dearth of enforcement cases for a standard of conduct.

The Certified Financial Planner Board of Standards Inc. **more than two years ago implemented** a fiduciary rule that requires everyone holding the CFP credential to act in clients' or customers' best interests at all times while providing investment advice. It mirrors the fiduciary conduct required of investment advisors.

The CFP Board has only had one **fiduciary enforcement case**. Announced in November, it revolved around how a CFP dealt with clients who divorced. It wasn't related to product or strategy recommendations.

Has the fiduciary requirement raised the bar for CFPs? CFP officials say yes, but they can't quite prove it.

"One of the challenges in showing people that's the case is we haven't had any cases yet," CFP Board Chairman Daniel Moisand told reporters in late January. "That standard has only been in place since 2020. We need an incident that occurred after that point. We need to discover it or be made aware of it in a complaint and go through the process."

Such an enforcement action will shed light on the CFP standard's effectiveness. Until then, moral suasion is the best tool to ensure that all

CFPs — including brokers who are governed by Reg BI — live up to its fiduciary standard.

“The consequences of not doing it are public and significant reputational risk,” said CFP Board CEO Kevin Keller.

The potential punishment for not complying with rules is what keeps advisors and firms in line. But it’s impossible to know the consequences until regulators and standard setters bring the enforcement heat.