

The Final Rule:

DOL Proposes to Extend Transition Period until July 1, 2019, and Issues Additional Non-Enforcement Policy for Arbitration Limitations



By a [notice](#) published in the Federal Register on August 31, 2017, the Department of Labor (DOL) proposed to extend from January 1, 2018, until July 1, 2019, the date for compliance with the full conditions in its new [“investment advice” fiduciary definition and related exemptions](#) (Final Rule), which became generally applicable on June 9.

- Under [guidance issued in April](#), the expanded fiduciary definition and the Impartial Conduct Standards for fiduciaries articulated in various exemptions (PTEs) were delayed 60 days, from April 10 to June 9.
- Compliance with other conditions in the Best Interest Contract Exemption or “BICE (PTE 2016-01) and the Principal Transaction Exemption (PTE 2016-02), and with other amendments to PTE 84-24 was delayed until January 1, 2018, at which point full compliance with the Final Rule, without any transitional accommodation, would be required.
- At that time, DOL explained its determination on timing as a balancing of its conclusions that:
 - A careful and thoughtful process to address the Final Rule in response to the Presidential memorandum of February 3, 2017, was likely to take more time than a 60-day delay would afford; and
 - Providers should not be allowed more time before becoming legally obligated to give investment advice meeting the Impartial Conduct Standards—described as recommendations in the best interest of the retirement investor free from misrepresentations, in exchange for reasonable compensation.
- DOL explicitly noted that, if after receiving comments on the issues raised in the Presidential memorandum (due April 17, and now as augmented by responses to [DOL’s June 29 Request for Information](#)), it concluded that significant changes were necessary or more time was required to complete its review of the Final Rule, it retained the ability to further defer the January 1 date or to grant additional interim relief.

After reflection on the commentary it received, DOL has proposed to extend the transition period under BICE, the Principal Transaction Exemption and PTE 84-24 until July 1, 2019.

- DOL explained that in making this proposal, it considered the interests of retirement investors, which it believes are being well served by the Impartial Conduct Standards as in effect during the transition period.
- DOL stated that the delay may be needed to complete its mandated reexamination of the Final Rule, coordinate with the SEC, develop any changes to the Final Rule indicated by that process, and propose its intended streamlined exemption reflecting recent innovations in the financial services industries; as well as to avoid unnecessary costs to financial services providers and confusion for investors if DOL were to compel compliance with conditions currently in the Final Rule that may be revised, repealed or replaced.

- In the notice, DOL specifically asked for comments, *inter alia*, on alternative ways to formulate this delay, such as an event-driven or tiered approach rather than a time-certain 18 months; on whether compliance conditions should be attached to the delay; and on whether the non-enforcement policy previously adopted by DOL for the current transition period should also be extended by 18 months.

Comments are due September 15.

In addition, on August 30, the DOL issued [Field Assistance Bulletin 2017-03](#), announcing a non-enforcement policy (applicable for both ERISA and prohibited transaction excise tax purposes) with regard to the arbitration limitations contained in the BICE and Principal Transaction Exemption. As currently drafted, neither exemption is available as of the full compliance date (i.e., after the transition period) if the underlying contract or documentation requires a waiver or qualification of the retirement investor's right to participate in a class action. The US government has since taken the litigation position that it cannot enforce these types of conditions as applied to arbitration agreements because they cannot be reconciled with the Federal Arbitration Act. Accordingly, the Field Assistance Bulletin states that the DOL will maintain the non-enforcement policy for so long as the condition remains part of the exemptions.

Considerations for Service Providers

In the notice, DOL repeated its expectation that, while the warranties otherwise required under the BICE and Principal Transaction Exemption are not required during the transition period, financial institutions should adopt such policies and procedures as they reasonably conclude are necessary for their advisers' compliance with the Impartial Conduct Standards. During this period, providers have flexibility to choose how to "safeguard" compliance with those standards, whether by "tamping down" conflicts associated with adviser compensation, or increasing monitoring and surveillance of investment recommendations, or by other approaches or a combination of approaches. DOL specifically noted that neither a warranty regarding specific policies and procedures nor compliance with every condition of the PTE is necessary during this transition period.

DOL also verified that PTE 84-24, with the Impartial Conduct Standards, remains available (including to insurance intermediaries) for fixed indexed and variable annuities during the transition period.

The non-enforcement policy for the arbitration limitation, which DOL had signaled in the pending Minnesota litigation challenging the Final Rule, is a helpful development, but a revision to the exemptions will be required for this position to be unambiguously effective in a private litigation setting.

Considerations for Plan Sponsors

This proposal would change only the duration of the transition period under the Final Rule. The response by providers to the Final Rule during the transition period may continue to evolve, based on market developments and other relevant factors, but in this notice DOL is not directing any change in approach for providers. Accordingly, the policies and procedures that plan sponsors developed for the transition period starting June 9 should remain effective if this proposal is adopted, and any incremental process leading into the January 1, 2018, full compliance date can be deferred.

Countdown to Applicability Date

-367 days	April 8, 2016	Final Rule published
-307 days	June 7	Effective Date – Final Rule officially became law
-277 days	July 7	Technical corrections to BICE, PTE 2016-02 released
-228 days	August 25	District court hearing in DC litigation
-201 days	September 21	District court hearing in Kansas litigation
-165 days	October 27	First FAQs issued by DOL
-157 days	November 4	Decision in DC litigation for DOL
-153 days	November 8	Election Day
-147 days	November 14	Appeal filed in DC litigation
-144 days	November 17	District court hearing in Texas litigation
-133 days	November 28	Decision in Kansas litigation for DOL on preliminary injunction
-94 days	January 6, 2017	HR 355, delaying Final Rule for 2 years, introduced by Rep. Wilson
-89 days	January 11	SEC no-action letter issued on new mutual fund share classes
-87 days	January 13	Second FAQs issued by DOL
-81 days	January 19	Class exemption (PTE) for insurance intermediaries proposed by DOL
-80 days	January 20	Inauguration Day; White House moratorium on regulations not in effect
-66 days	February 3	Presidential memorandum directing DOL study of Final Rule
-61 days	February 8	Decision in Texas litigation for DOL
-60 days	February 9	DOL proposal to delay Applicability Date transmitted to OMB
-52 days	February 17	Decision in Kansas litigation for DOL on summary judgment
-51 days	February 18	End of comment period on proposed insurance intermediary PTE
-47 days	February 22	Appeal filed in Kansas litigation
-45 days	February 24	Appeal filed in Texas litigation by US Chamber; other plaintiffs filed appeals on February 28
-39 days	March 2	60-day delay to Applicability Date proposed by DOL
-38 days	March 3	District court hearing in Minnesota litigation
-24 days	March 17	Comments due on proposed 60-day delay

-6 days	April 4	Applicability Date delayed to June 9
Original Deadline	April 10	Original Applicability Date
-53 days	April 17	Comments due on DOL study of Final Rule
-44 days	April 26	Financial CHOICE bill, subordinating DOL fiduciary rule to an SEC rule, introduced by Rep. Hensarling
-36 days	May 4	Financial CHOICE bill reported out of House committee
-18 days	May 22	June 9 Applicability Date confirmed by DOL; third FAQs and enforcement policy released
-8 days	June 1	Informal request for public comment on standards for broker-dealers and investment advisers issued by SEC Chair Clayton
-1 day	June 8	Financial CHOICE bill passed in House; bills introduced in House and Senate (HR 2823 and S 1321) to rescind and replace Final Rule
New Deadline	June 9	Revised Applicability Date – Final Rule fully applicable; all PTE relief available, with limited transition conditions for financial institutions relying on the BICE and Principal Transaction PTE and deferral of most PTE 84-24 revisions
+20 days	June 29	RFI for further public comment on Final Rule released by DOL
+40 days	July 19	HR 2823 reported out of House committee
+42 days	July 21	Due date for RFI responses related to January 1, 2018, date
+45 days	July 24	House DOL appropriations bill (HR 3358), which would nullify Final Rule, reported out of committee
+52 days	July 31	Fifth Circuit hearing on appeal of Texas litigation
+55 days	August 3	Fourth FAQs issued by DOL
+59 days	August 7	Due date for substantive responses to RFI
+60 days	August 8	60-day benchmark for 408(b)(2) disclosure updates related to Final Rule
+83 days	August 30	Proposal released to extend transition relief to July 1, 2019
+98 days	September 15	Due date for comments on proposed extension of transition relief
+206 days	January 1, 2018	PTE relief subject to all conditions; transition provisions expire
+752 days	July 1, 2019	Proposed new end date for transition relief

For More Information

For resources and commentary regarding the Final Rule, visit Eversheds Sutherland's [dolfiduciaryrule.com](https://www.eversheds-sutherland.com/dolfiduciaryrule.com).

- Text of and supporting materials for the Proposed and Final Rule
- Articles, presentations and client alerts
- Pleadings in the pending litigations challenging the Final Rule
- Videocasts about the Final Rule



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