



## BICE on Ice?

### Status of the DOL Fiduciary Rule

With recent developments in all three branches of government bearing on the authority and timing of the new Department of Labor (DOL) final rule expanding the definition of fiduciary “investment advice” (the Final Rule) for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA), the already formidable challenges for plan sponsors and retirement product and service providers have been made more difficult.



#### Did you know?

14

Legal developments in 2017 relating to the Final Rule (as of March 7) and counting

39

Days in advance of the Applicability Date when the 60-day delay was proposed

7

Days after the Applicability Date when comments on DOL's study of Final Rule are due

As the April 10, 2017, applicability date of the Final Rule has approached, the pace of developments has only accelerated, greatly complicating decision-making and work streams regarding compliance with the new rule.

## 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 D.C. 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 D.C. litigation for DOL
-153 days	November 8	Election Day
-147 days	November 14	Appeal filed in D.C. 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
<b>Deadline</b>	<b>April 10</b>	<b>Applicability Date - Final Rule fully applicable; all PTE relief available, with limited transition provisions for financial institutions relying on the BICE</b>
+7 days	April 17	Comments due on DOL study of Final Rule
+60 days	June 9	Due date for 408(b)(2) disclosure updates reporting changes to fiduciary status and compensation effective on April 10
+60 days	June 9	New Applicability Date if 60-day delay is adopted <sup>1</sup>
+266 days	January 1, 2018	PTE relief subject to all conditions; transition provisions expire

<sup>1</sup> While DOL's proposal is not specific on this point, we infer that the delay would be effective upon publication and not postponed for Congressional Review Act or other reasons.

## Legislation

To date, only one bill dealing with the Final Rule has been introduced in the 115th Congress. Early in the session, Representative Joe Wilson (R-SC) introduced a bill entitled the "[Protecting American Families' Retirement Advice Act](#)" that would delay the effective date of the Final Rule for 24 months following enactment. The bill was referred to committee and no further action has been scheduled.

Successors to bills introduced in the 114th Congress that would bear on the Final Rule, either:

- By establishing a fiduciary definition and standard differing from the Final Rule -- the "[Affordable Retirement Advice Protection Act](#)" introduced by Senator Isakson (R-GA) and Representative Roe (R-TN), the "[Retirement Choice Protection Act](#)" introduced by Representative Kelley (R-PA), and the "[SAVERS Act](#)" introduced by Representative Roskam (R-IL); or
- By staying the Final Rule pending an SEC rulemaking on the fiduciary status of broker-dealers -- the "[Retail Investor Protection Act](#)" introduced by Representative Wagner (R-MO) and Senator Blunt (R-MO), and Representative Hensarling's (R-TX) "[Financial CHOICE Act](#)";

have not yet been re-introduced in the current Congress.

## Litigation

Of the six cases challenging the validity of the Final Rule, the district court has granted summary judgment for DOL in five – the D.C. litigation in November, and in February the Kansas litigation and the three Texas cases for which proceedings were combined. Appeals have been filed in all those cases, starting with the D.C. case on November 14; substantive briefing has not yet been scheduled in any of those appeals.

The only case still pending in district court is the Minnesota case, in which a hearing on summary judgment was held on March 3. We understand that the Justice Department argued in support of DOL's authority to promulgate the Final Rule and PTEs, while suggesting that the court not rule on the summary judgment motions in light of the pending review of the Final Rule by DOL. In the usual manner, there is no set date for entry of the court's decision. As a point of reference, decisions in the other cases were issued within three months after summary judgment motions were argued or otherwise submitted to the court.

Resources for all six cases, including the parties' pleadings and the opinions of the court, are available at Eversheds Sutherland's [dolfiduciaryrule.com](http://dolfiduciaryrule.com).

- » *Consequently, it is increasingly unlikely that any court decision that would change the trajectory of the Final Rule (assuming an appeal of whatever decision the Minnesota court reaches) would issue before late 2017 or even 2018.*

## Proposed Exemption for Insurance Intermediaries

A significant gap in the Final Rule and corollary exemptions was a prohibited transaction solution for insurance products outside the scope of PTE 84-24 offered through insurance intermediaries such as insurance marketing organizations, field marketing organizations and brokerage general agencies. The Best Interest Contract Exemption (BICE) was available for such products, but these insurance intermediaries themselves were not treated as a type of "Financial Institution" that could utilize the exemption, and there are substantial legal and practical challenges if the insurance company issuing the product were to undertake the responsibilities of the Financial Institution under the BICE. This gap is a primary basis for the litigation challenging the validity of the Final Rule.

On January 9, DOL [proposed a class exemption for insurance intermediaries](#) modeled on the BICE but imposing very meaningful conditions beyond those to which intermediaries like broker-dealers and registered investment advisers are subject under the BICE. A comparison of the terms of the proposed exemption to the BICE is available at [dolfiduciaryrule.com](http://dolfiduciaryrule.com). The proposal offered an extended transition period, to August 15, 2018, to conform to the exemption.

The comment period for the proposed exemption, which was not extended, closed on February 18. To date DOL has posted [33 comment letters](#) on the proposal, primarily if not exclusively from industry participants and their representatives. The comment letters are in substantial agreement that very few of the insurance intermediaries currently active in the market could meet the terms of the proposed exemption.

## Proposed Delay in Applicability Date and Examination of Final Rule

Early in the Trump Administration, the White House directed DOL to examine the impact of the Final Rule on access to retirement information and financial advice, including:

- Whether the Final Rule will harm retirement investors due to reduced access to investment products and services;
- Whether the Final Rule will disrupt the financial services industries in a manner harmful to retirement investors; and
- Whether the Final Rule will increase litigation and thus the costs of the retirement system borne by retirement investors.

Pursuant to that directive, DOL published on March 2:

- A proposal to delay the applicability date of the Final Rule (and of corollary changes to the complex of prohibited transaction exemptions) for 60 days, to June 9, to permit DOL's study of this issue. DOL judged this delay to be "economically significant" in light of the presumed harm to retirement investors suggested by its Regulatory Impact Analysis in support of the Final Rule. Importantly, however, DOL admitted that its data is "uncertain and incomplete" and may overstate the benefits and understate the costs of the Final Rule. DOL solicited comments on the costs and benefits of the proposed delay and on whether the delay should be extended beyond 60 days or be focused on particular provisions of the Final Rule. Comments on the proposed 60-day delay are due March 17.
  - » *If the delay is adopted, existing law, including the 1975 regulation defining investment advice fiduciary, the terms of class exemptions as they existed before the Final Rule, and Interpretive Bulletin 96-1, would remain in effect until June 9.*
  - » *The proposal would not extend the January 1, 2018, date for ending the BICE transition relief and coming into compliance with all the terms of that exemption.*
- A request for comments to inform DOL's study of the Final Rule, due on April 17. DOL posited a number of questions in supplement to the ultimate questions referred to it by the White House, including:
  - Whether the Final Rule is moving the market to a more optimal mix of products and services for retirement investors;
  - Whether there have been innovations or changes in the delivery or financial advice including investor education because of the Final Rule and whether the changes make retirement investors better or worse off;
  - Whether firms are changing their target markets, for example, moving to deemphasize or expand in the small market segments;
  - Whether the demand in the retirement market for investment products and services is changing and, if so, how the financial services industries are responding to that changing demand;
  - Whether financial services companies are changing their offerings in response to the Final Rule including changes to their line-ups of investment products and/or products pricing;
  - Whether advisory services, including the pricing of those services, the means by which services are paid for and advisors are compensated, and compensation arrangements for advisory services surrounding the sale of insurance products such as fixed-rate, fixed-indexed, and variable annuities, have changed because of the Final Rule;
  - Whether costs relating to the Final Rule and exemptions have already been incurred and cannot be mitigated by revisions or a delay;
  - Whether the Regulatory Impact Analysis inadequately considered any issue;
  - Whether litigation under the Final Rule would affect the market for retirement products and services or would be abusive and what has been the impact of such litigation, including whether class action lawsuits under ERISA have led to better or worse outcomes for plan participants;
  - Whether problematic provisions of the Final Rule could be removed while preserving the objective of an enforceable best interest standard for retirement investment advice; and
  - Whether the financial services industries would abide by a fiduciary standard in the absence of the Final Rule such that its predicted benefits to consumers might be retained.

Depending on the outcome of its study, DOL indicated that it would either allow the Final Rule to take effect, issue a further extension of the Applicability Date, propose to withdraw the Final Rule, or propose to modify the Final Rule (including PTEs).

## Eversheds Sutherland Commentary

- » *There is every indication that the status of the Final Rule will continue to be the most politically contentious ERISA development since the enactment of the statute in 1974.*
- » *While DOL almost certainly had authority to adopt a 60-day delay without notice and comment rulemaking under the "good cause" provisions of the Administrative Procedure Act, the process it has chosen ensures that all stakeholders will have an opportunity to be heard at each stage of its examination of the Final Rule.*
- » *As we see it, it is beyond question that the Final Rule will have the effects that concern the White House – disrupting and reorganizing the financial services industries with respect to the products and services offered in the retirement market, shortening the shelf of products and services available to investors in that market, and instigating private litigation as a principal enforcement tool under the Final Rule.*

- » *We also think it is beyond question that, during the preceding Administration, the best efforts of DOL and the White House over several years did not identify any reliable quantification of the incidence with which retirement investors actually receive bad advice due to conflicted interests on the part of advisers, and that the costs of compliance in the Regulatory Impact Analysis were for the usual reasons materially understated.*
- » *At the same time, we have no doubt that proponents of the Final Rule will continue to advocate strongly for their views.*
- » *Accordingly, it will continue to be important that the administrative record in front of DOL, as it considers the questions raised by the White House against the backdrop of its existing Regulatory Impact Analysis, fully reflect the input and perspective of all stakeholders.*
- » *It seems improbable that DOL will have a decision to announce on the 60-day delay before early April.*
- » *Even with a 60-day delay, if adopted, we think the greater chance is that DOL will not be able to complete its study within the time allotted, and likely sometime in May will take the steps necessary to further delay the Applicability Date.*
- » *For the moment, however, plan sponsors and retirement product and service providers – whom DOL made legally accountable for implementation of the Final Rule – are compelled to plan in the alternative, on short notice, for an April 10 Applicability Date, a June 9 Applicability Date, some later Applicability Date to be announced in the future, or a change altogether in the direction of the Final Rule.*

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## For More Information

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

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



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