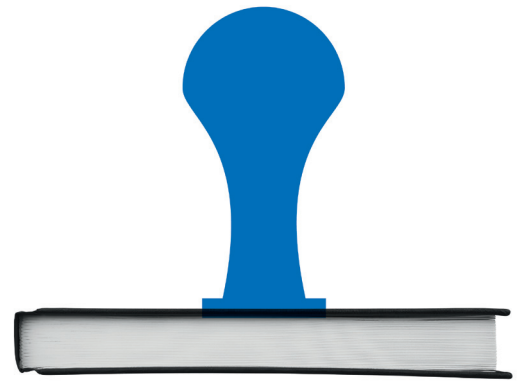


The Final Rule:

June 9 is the launch date after all



With its [announcements of May 22, 2017](#), starting with an op-ed in *The Wall Street Journal*, the Department of Labor (DOL) confirmed that, absent last-minute action in the courts or by Congress, its new [“investment advice” fiduciary definition and related exemptions](#) (Final Rule) will become applicable on June 9, on the [terms specified on April 4](#). That is:

- The new fiduciary definition will be applicable after 11:59 p.m. local time on June 9.
- The Best Interest Contract Exemption (BICE) will be available starting June 9, on limited conditions for the 2017 transition period.
- Similarly, the only amendment to PTE 84-24 applicable on June 9 will be the addition of the impartial conduct standards; the other amendments become applicable on January 1, 2018.
- The other changes to the complex of class exemptions applicable to investment activities will be applicable June 9.

DOL determined that at this time it lacked a principled basis under the Administrative Procedure Act to further delay the Final Rule, although it continues its evaluation pursuant to the [Presidential memorandum of February 3, 2017](#), and announced that it will be issuing a Request for Information soliciting public comment on specific exemptions or regulatory changes based on developments since the April 2016 rulemaking.

» *Thus, while the June 9 applicability date became certain, the future direction of the Final Rule remains uncertain, extending the difficulty and inefficiency of business decision-making around implementation during 2017 and starting January 1, 2018.*

Compliance During 2017

In conjunction with this announcement, DOL also updated its stated [enforcement policy for 2017](#) and released a [third set of fifteen FAQs](#), which primarily address transition period issues.

Topic	FAQ
Definition of fiduciary “investment advice”	12-14
Applicability Date	11
BICE, Principal Transaction PTE	1, 6-8
PTE 84-24	2, 9-10
Other PTEs	3
Ongoing DOL regulatory process	4-5
DOL enforcement policy	15

- The enforcement policy constitutes the most definitive statement to date that, during 2017, DOL and IRS “will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.” [See also Q&A-15.]
- In addition, in Q&A-6, DOL recognized that many providers are still in process with respect to compensation systems and product offerings fully compliant with the warranties under the BICE (which have been deferred to 2018). DOL stated that advice in 2017 will satisfy the impartial conduct standards (as in effect under the BICE transition rule) if it is prudent, based on the customer’s interest rather than on the adviser’s or provider’s interest, free from material misrepresentations, and provided for no more than reasonable compensation.

- » *That is, under Q&A-6, the possibility of conflicts created by variations in compensation for sales of different products or services or of proprietary products does not automatically disqualify the advice under the impartial conduct standards.*
- » *While that FAQ is framed in terms of the BICE transition rule, it should in principle also apply to the impartial conduct standards as added to other exemptions.*
- » *DOL observed that, as a consequence, providers have flexibility during the transition period in choosing an approach to compliance with the impartial conduct standards. Some firms may tamp down conflicts of interest associated with compensation while others might increase their monitoring of recommendations or pursue other approaches.*
- » *DOL also stated, however, that it expected advisers to be “candid” about limitations on the product shelf or such variations in compensation, and firms to adopt policies and procedures as they reasonably conclude are needed to meet the impartial conduct standards during 2017. (DOL noted that the special rules for proprietary products and third-party payments in Section IV of BICE are optional during 2017 under the transition rule.)*
- DOL’s views of course need to be considered against the risk of private litigation for 2017 activities at least with respect to ERISA plans.

DOL helpfully addressed several other points arising for the 2017 transition period, including the following:

- Robo-advisers may rely in 2017 on the BICE transition rule, as well as the level fee “BIC lite” rule. [Q&A-7]
- The grandfathering relief in BICE is available for investments made and systematic purchase programs established by 11:59 p.m. local time on June 9. [Q&A-8, 11]
- DOL confirmed that PTE 84-24 remains available for IRA transactions for 2017, including mutual fund transactions. [Q&A-2, 9]
In the insurance setting, relief is available if a portion of the compensation received by the insurance company, agent, broker or other person enumerated in the exemption is paid on to another entity such as an independent marketing organization (or, presumably, a general agent). [Q&A-10]
- For existing IRA and non-ERISA plan customers as of June 9, fiduciaries can rely on negative consent (rather than written authorization) so long as the required disclosure and consent termination forms are provided by June 9. [Q&A-3]

Fiduciary Definition

DOL also provided sensible answers on two questions about the scope of the fiduciary definition:

- For purposes of establishing the bona fides of an independent fiduciary managing or controlling at least \$50 million in assets, a party interacting with that fiduciary may rely on negative consent to standardized representations in the party’s disclosures or other documentation. [Q&A-13]
- Developers of non-client specific model portfolios for financial intermediaries are not fiduciaries if the developer is not in privity with or paid by the retirement investor and certain other conditions are met. [Q&A-15]
» *While this set of FAQs is framed as applying to the transition period, these interpretations logically should continue after the Final Rule goes into full effect in 2018.*

DOL continued to be coy, however, about advice with respect to contributions to retirement savings.

- In the [January FAQs](#), DOL indicated that a plan sponsor and its personnel can affirmatively promote increased contributions to individual participants without becoming fiduciaries, in the absence of a fee for providing that recommendation. [January 9 Q&A-10]
- In this latest set of FAQs, DOL describes three different communications to participants about increased contributions, apparently from paid service providers. These communications appear artfully limited to include only information about the effects of increased contributions and a process for increasing contributions if the participant is so inclined, without an overt “call to action.” DOL concludes that these communications constitute non-fiduciary investment education, and usefully elaborates that is the case regardless of who provides the communication, how frequently or in what form it is provided, or whether it is combined with other information. [FAQ-12]
» *The distinctions DOL may be hinting at in these FAQs, however, are not productive. The Final Rule is explicit in generally including recommendations about distributions as fiduciary advice, but says nothing about contributions, and rightfully so. As a matter of both statutory interpretation and retirement policy, contributions present a very different case from that of distributions. Given the benefits to both participants and the retirement system of increased contributions, retirement service providers should not be exposed to fiduciary claims if and when they recommend that participants increase contributions, even if it also serves the provider’s economic interest for them to do so.*

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
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 deferral of most PTE 84-24 revisions
+60 days	August 8	Due date for 408(b)(2) disclosure updates reporting changes to fiduciary status and compensation effective on June 9
+206 days	January 1, 2018	PTE relief subject to all conditions; transition provisions expire

For More Information

For resources and commentary regarding the Final Rule, visit Eversheds Sutherland's 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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