

The Final Rule: DOL Issues Fourth Set of FAQs



On August 3, 2017, the Department of Labor (DOL) released a [fourth set of FAQs](#) related to its new [“investment advice” fiduciary definition and related exemptions](#) (Final Rule), which became applicable on June 9. Like the May FAQs, the three new FAQs are positioned as transition period guidance, although their content is not so limited.

408b-2 Disclosures during the Transition Period

DOL provided welcome and sensible guidance that, in the unique circumstances surrounding the Final Rule, “covered service providers” required under DOL Reg. 2550.408b-2 to provide disclosures to ERISA plan fiduciaries will not be obliged to update those disclosures to expressly state that they are now “fiduciaries” under the Final Rule until the date when fiduciary status must be disclosed under the Best Interest Contract and Principal Transaction Exemptions (currently January 1, 2018). Under the FAQs, current updates to those disclosures are required only in more limited circumstances.

- To the extent the services provided by the covered service provider have changed in response to the Final Rule, the description of services in the disclosures must be updated currently. DOL noted that communications about the Final Rule already provided to ERISA plans by their service providers may have described service changes adequately for 408b-2 purposes.
- Although not mentioned in the FAQs, any changes in response to the Final Rule to compensation arrangements described in 408b-2 disclosures presumably must be updated currently.
- To the extent that a 408b-2 disclosure expressly disclaims fiduciary status and that disclaimer is no longer accurate as of June 9, the FAQs require that the disclosure be currently updated (i.e., by striking that disclaimer and leaving the disclosure silent as to fiduciary status).
- DOL provided that these change disclosures will be treated as timely if made as soon as practicable after June 9, even if more than 60 days later (the benchmark prescribed in the 408b-2 regulation).
 - » *DOL continues to struggle to provide needed guidance about the Final Rule on a timetable that businesses can operationalize. There are a number of service providers that, with an apparent August 8 deadline (60 days after the applicability date of the Final Rule), could not wait until August 3 for guidance and have already published 408b-2 updates without the benefit of the positions taken in the FAQs.*
 - » *The FAQs leave open the possibility that, if service providers update 408b-2 disclosures currently to describe service or other changes, they may need to update those disclosures again after January 1 to expressly use the “fiduciary” term (although logically that update could be coordinated with statements of fiduciary status required under other exemptions).*
 - » *The FAQs do not appear to address the case of a service provider that was an unintended “functional” fiduciary under prior law.*

Contribution Advice is Not Fiduciary Advice

The FAQs also confirm that communications about the benefits of plan or IRA participation, of increasing plan or IRA contributions, and about methods and means plan sponsors might use to increase employee participation and contributions are not fiduciary investment advice under the Final Rule so long as they do not include recommendations about specific investments. This conclusion applies whether the communication is provided by the plan sponsor, a financial service provider or other providers. This is clearly the right result under both the language of the Final Rule and retirement policy, and DOL is to be commended for settling this point.

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), rescinding and replacing 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 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
+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
- Pleadings in the pending litigations challenging the Final Rule
- Articles, presentations and client alerts
- Videocasts about the Final Rule



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