



The Final Rule:

Considerations and Analysis of the DOL's 18-Month Transition Period Extension

By a notice published in the Federal Register on November 29, 2017, the Department of Labor (DOL) extended 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 from June 9, 2017, until January 1, 2018 (Transition Period), 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 would retain the ability to further defer the January 1 date or to grant additional interim relief.
- On August 31, DOL published a proposal to extend the Transition Period under BICE, the Principal Transaction Exemption and PTE 84-24 until July 1, 2019.

After considering the commentary it received, DOL has extended the Transition Period as proposed, without change. Thus, the same transition rules and standards in effect on June 9 will remain in effect until July 1, 2019. Of particular note, the DOL explained that:

- It needs more time to "carefully and thoughtfully review" the commentary it has received and to honor the President's directive, as well as to coordinate with the SEC, FINRA, NAIC and other regulators.
- It anticipates proposing a new streamlined class exemption in the near future, which presumably would address innovative products being developed in response to the Final Rule.
- It "sees no compelling reason" to further extend the "grandfathering exemption" (although it did solicit supplemental comments on this point going forward). The applicability date for determining whether a transaction may be grandfathered remains June 9, 2017.

In addition, the DOL announced that its temporary non-enforcement policy first articulated in Field Assistance Bulletin (FAB) 2017-02 is extended (and that the Treasury Department and IRS have confirmed to DOL that similar excise tax relief described in Announcement 2017-04 will remain in effect) during the Transition Period. In the terms of the relief announced in the FAB, the DOL “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.”

Considerations for Service Providers

- Service providers may stand down on expending additional resources on contingency planning for the possibility that the delay of the more onerous conditions of the PTEs would not go forward as expected.
- At the same time, providers should not lose sight of the fact that the remainder of the Final Rule is in full effect—with the expanded definition of fiduciary. Compliance with a PTE is necessary for a fiduciary to cover any conflict of interest prohibited transactions.
 - During the extended transition period, the applicable PTE in many cases will be the BICE and its conditions are essentially the Impartial Conduct Standards. Providers should be prepared to demonstrate how they satisfy these conditions, namely that they are: (1) giving prudent advice in the retirement investors’ best interest; (2) charging no more than reasonable compensation; and (3) avoiding misleading statements.
 - In that regard, DOL reiterated its view that it expects that advisers and financial institutions will adopt prudent supervisory mechanisms to prevent violations of these standards and that they fairly and accurately describe recommended transactions and compensation practices.
 - If a particular transaction is not covered by the BICE because, for example, the adviser is an employer of employees covered under the plan, another PTE will need to be identified.
- DOL directly confirmed its position that advice regarding rollovers of plan assets may be investment advice under ERISA. While one can argue the correctness of this conclusion, providers may be best served to operate under that assumption, even where the provider generally does not service ERISA plans.

Considerations for Plan Sponsors

- Plan sponsors and administrators may wish to confirm that existing plan service providers maintain a comprehensive compliance strategy and will rely (or will continue to rely) on any needed prohibited transaction exemptions.
- In that regard, some providers may have already implemented changes in their services agreements, while others have not. It is also possible that some revisions that had previously been made final will be revisited.

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
+111 days	September 27	HR 3857 to repeal and replace Final Rule introduced by Rep. Wagner
+126 days	October 12	HR 3857 reported out of House committee
+172 days	November 27	Extension of transition relief released by DOL
+206 days	January 1, 2018	Original end for expiration of transition relief
+752 days	July 1, 2019	Revised end date for expiration of transition relief

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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