

## The Final Rule: The Fifth Request for Public Comments



On June 29, 2017, the Department of Labor (DOL) released a [request for information \(RFI\)](#), seeking public comments yet again on its new "[investment advice](#)" [fiduciary definition and related exemptions](#) (Final Rule) which became applicable on June 9.

- This is the fifth request for public comments under the Administrative Procedure Act since DOL undertook this rulemaking in October 2010, and the second in the last four months.
- There could be a sixth iteration later this year, in connection with any proposed changes to the Final Rule, proposed new exemptions, and/or delay of the January 1, 2018, date for compliance with the full conditions of the Best Interest Contract Exemption (BICE), the Principal Transaction Exemption and PTE 84-24.
- In addition, on June 1, US Securities and Exchange Commission (SEC) Chair Jay Clayton issued a statement requesting comments on the standard of conduct under the securities laws that should be applicable to investment advisers and broker-dealers serving retail investors, which includes retirement investors.
  - » *Unquestionably, this rulemaking process has become uncommonly burdensome for both proponents and critics of the Final Rule, who may be filing their seventh and eighth comment letters on the record with DOL.*
  - » *This latest development also extends again the period of uncertainty with which retirement product and service providers must contend in accommodating to the Final Rule.*
  - » *At least in the short term, this process is imposing unquantified inefficiencies and costs on the operation of the private retirement system, which ultimately are borne by the participants in that system.*

DOL's [March 2 request for comments](#), which was directed in part to delaying the applicability date for the Final Rule from April 10 to June 9, also solicited and generated [public input](#) on a wide range of substantive questions related to the Rule. The June 29 RFI mirrors the approach taken in the March 2 notice by bifurcating the request between:

- Comments on deferring the January 1 date, which are due 15 days after publication in the Federal Register; and
- Comments on substantive matters, which are due 30 days after publication.
  - » *DOL included a specific request in the RFI for timely submission of comments so that they can be considered. The January 1 date is, however, inescapably tied to whether and what changes are made to the Final Rule, so the substantive comments will inform and no doubt include input on the compliance date.*

The June 29 RFI differs from the March 2 notice in the attention it gives to recent market developments, particularly since June 9, and the possibility of new exemptions.

The topics on which the RFI requested comments include the following:

### **January 1, 2018 Compliance Date**

- Would a delay reduce burdens on providers and investors, otherwise be advantageous, or carry any risk?
- What would be the costs and benefits of such a delay?

### **General Questions**

- What has the regulated community done to comply with the Final Rule, particularly since June 9? Are there market innovations that DOL should take into account?
- Does the Final Rule appropriately balance consumers' interest in receiving investment advice while protecting them from conflicts of interest, and effectively allow access to a wide range of products?
- Do the incremental costs of the compliance conditions that take effect on January 1 exceed their benefits, and is there a better approach?

### **Definition of Fiduciary "Investment Advice"**

- Should recommendations to make or increase contributions to a plan or IRA be excluded from the definition of fiduciary advice?
- Are there helpful changes that might be adopted for the "independent fiduciary with financial expertise" exclusion?

### **Alternative Streamlined Exemptions**

- Is there a basis for developing streamlined exemptions for mutual fund "clean shares" and/or fee-based annuities?
- Are there other market innovations that create an opportunity for more streamlined relief?
- Could DOL base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to DOL?
- If the SEC or other regulators were to adopt updated standards of conduct for advisers, could a streamlined exemption be adopted for advisers who comply with those standards?
- Should there be an amendment to the Final Rule or streamlined exemption for bank deposit products and HSAs? Do cash sweep services need a special rule?

### **BICE, Principal Transaction PTE**

- What would be the impact, from a compliance and enforcement perspective, of eliminating or altering the contract requirement for IRAs and/or the warranties?
- Are there ways to simplify or improve the BICE disclosures, subject to more complete disclosure on request?
- Should the Principal Transaction PTE be expanded, beyond the specified types of investments, or otherwise revised to better promote investor interests and market flexibility?
- To what extent are firms relying on the BICE grandfather rule, and can it be improved?

### **PTE 84-24**

- What would be the consequences of permitting insurance intermediaries to serve as Financial Institutions under BICE, and how should annuities be regulated as between BICE and PTE 84-24?

### **For More Information**

For resources and commentary regarding the Final Rule, visit Eversheds Sutherland's [dolfiduciaryrule.com](http://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



## 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
<b>New Deadline</b>	<b>June 9</b>	<b>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</b>
+20 days	June 29	RFI for further public comment on Final Rule released by DOL
+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