



The Final Rule: DOL Fiduciary Rule Affirmed and Revoked

The extraordinary developments surrounding the Department of Labor (DOL) [“investment advice” fiduciary definition and related exemptions](#) (Final Rule), which became generally applicable on June 9, 2017, reached a new peak during the week of March 12, 2018.

- On March 13, the [Tenth Circuit Court of Appeals](#), 55 days after oral argument, rejected a claim that DOL violated the Administrative Procedure Act (APA) in its treatment of fixed index annuities under the Final Rule.
- On March 15, a [split panel of the Fifth Circuit](#), 227 days after oral argument, ruled that DOL broadly overreached its authority in promulgating the Final Rule – specifically in its redefinition of “investment advice” fiduciary and in the terms of the Best Interest Contract Exemption – and vacated the Rule in its entirety as arbitrary, capricious and unlawful under the APA.
- On March 16, DOL announced that it is suspending enforcement of the Final Rule pending further review. (In general, DOL has been following a compliance assistance approach to the Rule in the field, rather than an enforcement approach.)

The immediate consequences of these developments are that:

- The vacatur of an agency rule by a circuit court has a national effect, no later than upon issuance of the court’s mandate; and
- By vacating the Final Rule in its entirety, the Fifth Circuit appears to have reversed DOL’s replacement of the existing five-part fiduciary definition and modification of existing exemptions, which were embedded in the Rule, thus reinstating prior law.

Notwithstanding the change in Administrations, DOL has zealously and vigorously defended the Final Rule in court, and it has options available should it decide to continue that defense. The DOL could:

- Petition the Fifth Circuit for a rehearing or rehearing en banc, which DOL would be required to file on or before April 30, during which time there would be a stay in the decision. Otherwise, the Fifth Circuit will issue its mandate on or about May 7; and/or
- Petition the US Supreme Court for a writ of certiorari, which would be due by June 13 (absent a request for rehearing).

The insurance organizations prosecuting the Tenth Circuit litigation could also seek rehearing or certiorari. In addition, proceedings in Minnesota district court and the DC Circuit challenging the Final Rule in various ways could resume, and those courts would not be bound by either the Fifth Circuit or Tenth Circuit decision.

- The parties in the Minnesota litigation most recently filed a status report on March 5 and requested a continuation of the November 3, 2017 stay in those proceedings.
- Pursuant to a February 22 order, the parties in the DC Circuit litigation are to file a status report within 10 days after the Fifth Circuit decision, that is, by March 25.

Alternatively, DOL could be persuaded, by the intellectual heft of the Fifth Circuit panel opinion or its own continuing review of the Rule mandated by the White House or otherwise, that the retirement system would be better served if it moved on from the Final Rule and considered a new approach to these issues.

- Any new proposal by DOL would necessarily be informed by the Fifth Circuit opinion.
- The early indications are that the Securities and Exchange Commission will continue with its “best interest” project, with the objective of issuing a proposal this summer.
- There is an emerging interest among the states in promulgating “best interest” standards under state insurance or securities laws.

It may be inevitable, in (i) a federal system with (ii) national rulemaking authority divided among multiple agencies, that plan sponsors and providers will be compelled to deal with a patchwork of federal and state “best interest” standards of differing scope and content, with its attendant burden on compliance programs, increase in costs to the retirement system, and confusion among retirement investors. It would be well, however, if the various rulemaking authorities could take a broader, less parochial view in deciding if and how to regulate these issues.

At least pending clarification from DOL on how it intends to proceed following the Fifth Circuit opinion, the wise course for plan sponsors and providers is to:

- Continue with the practices and procedures adopted in response to the Final Rule, but
- Inventory the changes to those practices and procedures, as well as to agreements, manuals and other documentation, that might merit reconsideration if the vacatur of the Final Rule takes definitive effect.

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	5th Circuit argument 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 expiration date for transition relief
+222 days	January 17	10th Circuit argument on appeal of Kansas litigation
+251 days	February 15	Massachusetts files Scottrade complaint
+278 days	March 13	Decision for DOL by 10th Circuit in Kansas litigation
+280 days	March 15	Decision for plaintiffs by 5th Circuit in Texas litigation
+281 days	March 16	DOL suspends enforcement of Final Rule pending review
+752 days	July 1, 2019	Revised expiration date for transition relief

For More Information

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