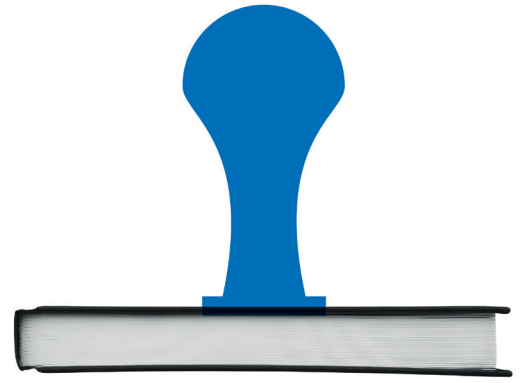


# The Final Rule: Delayed But (Perhaps) Not Denied



On April 4, 2017, the Department of Labor (“DOL”) released [its final rule \(the “Delay Rule”\)](#) postponing the applicability date of its new [“investment advice” fiduciary definition and related exemptions](#) (the “Final Rule”). The Delay Rule, which was published in the April 7 Federal Register, generally delayed the applicability dates under the Final Rule for 60 days, until June 9, 2017, and also modified limited but important conditions in the Final Rule for 2017.

- Under the Delay Rule, the expanded fiduciary definition and the Impartial Conduct Standards (“ICS”) for fiduciaries articulated in various exemptions (“PTEs”) will take effect on June 9, with some streamlining of operational requirements for the remainder of 2017.
- Full compliance with the Final Rule, without any transitional accommodations, remains required by January 1, 2018.

DOL stated that it undertook this “more balanced approach,” rather than a simple 60-day delay, to address both the cost and compliance concerns of the retirement plan services industry and the arguments for expanded fiduciary protections made by consumer groups.

- » *On a technical procedural point, and in an exception from the normal practice of providing advance notice of 30 days or more before final regulations officially take effect, these changes take legal effect immediately on April 10.*

The Delay Rule follows from the Presidential memorandum of February 3, 2017, directing DOL to reexamine the Final Rule to determine whether it will adversely affect the ability of retirement investors to access retirement information and financial advice or is otherwise inconsistent with stated policy priorities of the new Administration. The balancing in the Delay Rule reflects the DOL’s conclusions that:

- A careful and thoughtful process to address the Final Rule in response to the Presidential memorandum is likely to take more time to complete than a 60-day extension would afford; and
- Providers should not be provided more time before becoming legally obligated to give advice meeting the ICS—described as advice that is in the retirement investor’s best interest and free from misrepresentations in exchange for reasonable compensation.

The DOL did indicate that if, after receiving comments on the issues raised by the Presidential memorandum (due April 17), it concludes that significant changes are necessary or that it needs more time to complete its review, it retains the ability to further extend the January 1 applicability date or to grant additional interim relief, such as more streamlined PTEs, as it finalizes its review and decides whether to make more general changes to the Rule or PTEs.

- » *The preamble to the Delay Rule signals that DOL will not be further delaying or otherwise modifying the terms of engagement under the Final Rule for 2017, unless dictated by its review of the Rule.*

More specifically, the Delay Rule:

- Extends for 60 days the applicability date of the final regulation defining who is a “fiduciary,” under the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code of 1986, by reason of providing investment advice for a fee.
  - » *No changes were made to the expanded fiduciary definition or its exceptions.*
  - » *Providers who become fiduciaries under the Final Rule thus have until June 9 to complete their initial preparation for compliance.*
- Extends for 60 days the applicability dates of the Best Interest Contract Exemption (“BICE”) and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, but, for fiduciaries who qualify for the transition relief provided in those PTEs, eliminates all conditions of these two exemptions during the transition period (now June 9, 2017, to January 1, 2018) other than adherence to the ICS.
  - » *In particular, the Delay Rule rescinded the requirements of the transition relief as published in 2016 to provide a transition notice, to designate a PTE compliance officer, and to maintain certain records.*

- » New transition relief was provided under the BICE for level fee robo-advisers, which requires compliance only with the ICS during the transition period.
- » These changes were intended, among other things, to simplify compliance and relieve the exposure to private litigation in respect of IRAs and other non-ERISA arrangements during the transition period.
- Delays the applicability of amendments to Prohibited Transaction Exemption 84-24 until January 1, 2018, other than the ICS, which will become applicable on June 9, 2017.
  - » Accordingly, PTE 84-24 remains available to provide relief in 2017 for insurance products, all annuity products (not just fixed rate annuities) and proprietary mutual funds, as a compliance alternative to the BICE.
  - » The narrowing of the forms of insurance sales compensation allowed under PTE 84-24 was also deferred until January 1.
  - » The formulation of the ICS in PTE 84-24 uniquely requires disclosure of material conflicts, effective as of June 9.
- Extends for 60 days the applicability dates of amendments to other previously granted exemptions.
  - » These amendments universally added the ICS to the PTEs, and in some cases modified the scope of relief provided.

The following chart summarizes these changes to applicability dates, as well as explicit disclosure requirements under the various PTEs applicable during 2017 (to the extent that form of relief is utilized).

	Revised Applicability Date	Explicit disclosure requirements from June 9 to December 31		
		Written statement of fiduciary status	Material conflicts	Other disclosures
Expanded "3x3" fiduciary definition	June 9			
<b>BICE (PTE 2016-01)</b>				
• "Transition" BIC/ICS only	June 9			
• "Full" BIC	June 9	X	X	X
• Level fee fiduciary BIC "Lite"	June 9	X		
• Bank networking BIC	June 9			
• Grandfather BIC	June 9			
<b>Principal Transactions (PTE 2016-02)</b>				
• Transition relief/ICS only	June 9			
• Full exemption	June 9	X	X	X
<b>PTE 84-24 (insurance, annuities, proprietary mutual funds)</b>				
• Imposition of ICS	June 9		X	X
• Narrowing of exemption, other amendments	January 1			
<b>PTE 75-1 (broker-dealer transactions)</b>				
• Revocation of non-fiduciary services exemption	June 9			
• Revocation of non-proprietary mutual fund exemption	June 9			
• Imposition of ICS for underwriting, market maker exemptions	June 9			
• Lending by investment advice fiduciary to avoid failed securities transaction	June 9			X
<b>PTE 86-128 (execution of securities transactions)</b>				
• Revocation for IRAs, investment advice fiduciaries	June 9			
• Imposition of ICS	June 9			
• New non-proprietary mutual fund exemption	June 9			X
<b>PTE 77-4 (proprietary mutual funds)</b>				
• Imposition of ICS	June 9			X
<b>PTE 80-83 (IPO proceeds to retire indebtedness)</b>				
• Imposition of ICS	June 9			
<b>PTE 83-1 (mortgage pool investment trusts)</b>				
• Imposition of ICS	June 9			

There is a question about the disclosure obligations, if any, that may be implicit in the ICS.

- » *The preamble reflects a general expectation that fiduciaries would “fairly and accurately describe recommended transactions and compensation practices pursuant to the Impartial Conduct Standards.”*
- » *The explicit gloss in amended PTE 84-24 and its 2016 preamble that the ICS require disclosure of material conflicts does not appear to extend to other exemptions, although that point is not entirely clear.*

## Considerations for Service Providers

**Timing:** While the delay will be of some help, providers will need to make very quick decisions about how to proceed under the Delay Rule in 2017—for example, to finalize compliance processes, product and service offerings, compensation changes, marketing communications, field training, call center scripts, and other matters about which it has been difficult to take definitive action since the Presidential memorandum was issued—in order to be prepared for implementation on June 9.

**Impartial Conduct Standards:** Even in the absence of the BICE warranties and other explicit requirements, policies and procedures to observe the ICS and document compliance will need to be operational by June 9.

**Rollover Advice:** As provided in the Final Rule, advice as to rollovers will become fiduciary activity on June 9, for which a compliance solution will be required.

**BICE:** The DOL recognized the inefficiencies and market disruption of requiring compliance with BICE requirements, other than the ICS, during a time when the Final Rule is in a state of flux. Moreover, the DOL explained that this approach “eliminates or minimizes the risk of litigation, including class-action litigation, in the IRA marketplace.” It is important to note, however, that new fiduciaries serving ERISA plans will become subject to ERISA’s statutory private rights of action, which include breach of fiduciary duty claims.

For fiduciaries intending to rely on the BIC “Lite” level fee fiduciary rule in 2017, rather than transition BIC, there appears to be no change in applicable requirements (including the written statement of fiduciary status) other than the delay to June 9.

**PTE 84-24:** The amendments and partial revocation of old PTE 84-24 will not be effective until January 1, 2018, other than the section adding the ICS. Significantly, fiduciaries recommending variable annuity and indexed annuity sales and receiving commissions or other transactional compensation may continue to rely upon PTE 84-24 in 2017. While the preamble anticipates that providers would generally prefer BICE transitional relief, where available, there will be circumstances where PTE 84-24 will provide more practical and effective relief during 2017. The preamble suggests that DOL will be giving further attention to its proposed PTE for insurance intermediaries over the course of 2017.

**Independent Fiduciary/“Sellers” Exception:** There was no change in the provisions for documentation of the terms of this exception starting in 2017, other than the delay to June 9.

**408(b)(2) Notices:** Providers serving ERISA plans who were not previously subject to the section 408(b)(2) disclosure regime will be obligated to provide those disclosures (as applicable) if they are becoming fiduciaries under the Final Rule. Existing section 408(b)(2) notices should also be reviewed, to determine the extent to which they may become inaccurate as of June 9 (e.g., with respect to services currently described as non-fiduciary in nature that are affected by the Final Rule). The 408(b)(2) disclosure regulations generally require change notices of this sort to be provided within 60 days.

## Considerations for Plan Sponsors

**New Fiduciaries:** Plan sponsors now have an additional 60 days to complete the revisions to their fiduciary procedures and initial processing of providers who are being switched from non-fiduciary to fiduciary status by the Final Rule. To the extent those procedures contemplated the receipt of BICE transition notices for 2017, an appropriate adjustment of that procedure will be needed. Refinement of the RFP process for soliciting providers, as necessary to take account of the new rule, can also be delayed until June 9.

**Service Provider Agreements:** Some providers have already implemented changes in their services agreements, while others have not. Particularly in light of developments over the last several months, it would not be unexpected to see some delay in this regard. It is possible that some revisions that were previously finalized will need to be revisited.

**Investment Education vs. Investment Advice:** DOL’s changes to the rules distinguishing between non-fiduciary investment education and fiduciary investment advice were embedded in the expanded fiduciary definition. As such, these changes will go into effect on June 9. Plan sponsors and their providers should proceed as planned to effectuate any new practices and communications related to these changes.

## 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	Extension of Applicability Date released
<b>Original Deadline</b>	<b>April 10</b>	<b>Original Applicability Date</b>
	April 17	Comments due on DOL study of 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 provisions for financial institutions relying on the BICE</b>
+60 days	August 8	Due date for 408(b)(2) disclosure updates reporting changes to fiduciary status and compensation effective on April 10
+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](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



[eversheds-sutherland.com](http://eversheds-sutherland.com)

© Eversheds Sutherland (US) LLP 2017. All rights are reserved to their respective owners.

Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit [www.eversheds-sutherland.com](http://www.eversheds-sutherland.com). 040717