

26 State Attorneys General Appeal Biden ESG Rule Decision

Republicans appeal to the U.S. 5th Circuit Court of Appeals, requesting it strike down the rule that permits environmental, social and governance factors to be considered when selecting retirement plan investments.

Reported by [NOAH ZUSS](#)

Plaintiffs led by 26 Republican [attorneys general filed an appeal](#) to request the U.S. 5th Circuit Court of Appeals reverse a district court ruling [on the 2022 Department of Labor rule](#) that permits environmental, social and governance factors to be considered when selecting retirement plan investments. The appeal, filed on January 18, challenges the [September 2023 dismissal](#) of their initial complaint that had challenged the legality of the ESG rule put in place by the DOL under the administration of President Joe Biden.

The brief requests oral arguments before the 5th Circuit, which hears appeals for decisions made in Louisiana, Mississippi and Texas, including the U.S. District Court for the Northern District of Texas, where the attorneys general filed their initial case. Joining state officials in the appeal were a fossil-fuel company, a fossil-fuel advocacy group and a Manhattan Institute scholar, all plaintiffs in the initial case.

The appellants argued that the tiebreaker provision of the [DOL's 2022 rule](#)— Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights—violates the Employee Retirement Income Security Act and requested the 5th Circuit find the rule “arbitrary, capricious and unlawful.”

The 2022 ESG rule provides fiduciaries with greater flexibility to consider collateral nonfinancial factors—as a tiebreaker—when selecting investment options for retirement plans. The appellants argue that allowing consideration of collateral factors as a tiebreaker violates ERISA because fiduciaries must act under the law solely and for the exclusive purpose of providing financial benefits to plan participants.

“Fiduciaries cannot serve two masters, no matter how limited or (allegedly) benign the circumstances,” the appeal states.

The AGs’ brief also argues that U.S. District Judge Matthew Kacsmaryk, the only judge in the Amarillo Division of the Northern District of Texas, a jurisdiction chosen by the appellants when filing the initial complaint, was mistaken in not finding the 2022 rule arbitrary and capricious.

Jason Levy, a counsel in law firm Covington & Burling LLP, which drafted an amicus brief that urged the district court to reject the initial complaint, says, “With respect to the appeal, it’s not entirely clear to what extent the plaintiffs are challenging the fundamental holding from the district court that the main provisions in both rules are faithful to ERISA and Supreme Court precedent, in allowing consideration of ESG factors solely for the purpose of maximizing a financial return.”

The appellants’ brief argues that the court should order the ESG rule returned to the rulemaking of 2020, when under the administration of President Donald Trump, the DOL did not allow nonfiduciary factors to be considered at all.

“The appeal is really focused on an aspect of both the Trump and Biden rule that has very, very little practical significance: the tiebreaker rule,” Levy adds. “As an initial matter, both the Trump and the Biden tiebreaker rules do not have meaningful daylight between the two of them, and we think the district court got it right in acknowledging that there is no meaningful difference between the two tiebreaker rules. They both would allow a fiduciary to take into account nonfinancial collateral purposes only to break a tie between two competing investments.”

In 2020, “motivated by these concerns, [the] DOL placed significant guardrails around collateral considerations,” the appeal notes.

Drew Oringer, a partner in and general counsel at the Wagner Law Group, which is not involved in the litigation says, “the Trump administration took a very skeptical view of the ability of a fiduciary to look to ancillary considerations and did so in actual regulations. So for a subsequent administration to reverse field, actual regulatory changes would be necessary. That is precisely what the Biden administration pursued when it re-amended the applicable regulations.”

The 5th Circuit set a docket schedule requiring the DOL to submit briefs in about a month, according to Levy. Procedurally, the appeal will be before a three-judge panel.

“I don’t think we’ll know who the circuit judges are until after all the briefs are filed,” he says.

The initial lawsuit that challenged the Biden administration DOL ESG rule was filed in January 2023. The original lawsuit is *State of Utah et al. v. Martin J. Walsh and United States Department of Labor*; in the 5th U.S. Circuit Court of Appeals the case is *State of Utah et al. v. Julie A. Su, Acting Secretary, U.S. Department of Labor United States Department of Labor*.

A DOL representative responded to a request for comment by referring inquires to the U.S. Department of Justice. Representatives at the Justice Department did not immediately respond to a request for comment.

Tags

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