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Chevron Reversal Could Affect Appeal of DOL's ESG Rule

Challengers of the rule that allows environmental, social and governance factors to be considered in investment decisions cited the overturning of Chevron.

Reported by REMY SAMUELS

The impact of the U.S. Supreme Court's decision overturning the longstanding *Chevron* standard of deference to federal agencies could be on display on Tuesday, July 9, in the appeal to the U.S. 5th Circuit Court of Appeals of a case challenging the Department of Labor's ESG rule.

The case will become the first concerning environmental, social and governance factors to go before a judge in the post-*Chevron* era, with plaintiffs in *Utah et al. v. Julie Su, Acting Secretary of Labor*, arguing that the new *Loper Bright* decision has direct bearing, while the DOL notes it did not rely on *Chevron* in its earlier rebuttal, making the June decision irrelevant to the appeal.

The *Chevron* Doctrine, so-called for its establishment in a 1984 Supreme Court decision, required federal courts to be deferential to federal agencies' interpretations of ambiguous language. The Supreme Court ruled on June 28 in *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce et al.* that the *Chevron* Doctrine would no longer apply to cases involving rulemakings of the federal bureaucracy, and the court should use its independent judgment instead.

Andrew Oringer, partner in and general counsel at Wagner Law Group, which is not part of the litigation, says the plaintiffs will be emboldened by the Supreme Court's decision to have courts determine for themselves what interpretations are permissible.

"Before [the overturning of *Chevron*], the plaintiffs would essentially have had to have cast the DOL rulemaking as being arbitrary and capricious," Oringer says. "Now, effectively, they can argue that it's wrong."

The case to be heard is an appeal filed in October 2023 by 26 Republican state attorneys general against a U.S. District Court ruling that denied their challenge to the 2022 DOL rule allowing ESG factors to be considered when selecting retirement plan investments.

The Prudence in Loyalty in Selecting Plan Investments and Exercising Shareholder Rights Rule officially took effect in January 2023.

The DOL's motion for summary judgment dismissing the complaint was granted by the U.S. District Court for the Northern District of Texas, Amarillo Division, last September. U.S. District Judge Matthew J. Kacsmaryk's decision stated that the ESG rule does not explicitly violate the Employee Retirement Income Security Act because ERISA does not forbid ESG investing or a tiebreaker test that includes non-economic factors.

Both Utah, the lead plaintiff in the case, and the DOL have filed documents with the 5th Circuit, which hears appeals from Louisiana, Mississippi and Texas, addressing the effect of the *Loper Bright* ruling.

Stanford E. Purser, Utah's solicitor general, argued in a June 28 filing that the overturning of *Chevron* means the appeals court should overturn the lower court's decision on the ESG rule. Purser wrote, "DOL's interpretations of ERISA that authorized nonpecuniary tiebreaker considerations came well after enactment, equivocated over time, and lacked thorough statutory analysis."

He wrote that the appeals court must determine if the tiebreaker provision is lawful under the "best reading of the statute."

The DOL rule essentially only allows pension fund managers, when making investment decisions, to consider ESG factors as a tiebreaker when two or more investments "equally serve the financial interests of the plan."

The DOL claimed in a recent filing that it never cited *Chevron* during the course of litigation.

"We agreed with plaintiffs—and agree now—that the court should itself resolve the issue of statutory interpretation that this case presents," wrote Daniel Winik, an attorney for the Department of Justice.

In a March filing, the DOL did reference *Chevron*, but noted the then-pending Supreme Court case and wrote that: "the tiebreaker standard is valid even aside from the *Chevron* framework, because it is not just a reasonable construction but the best construction of ERISA. ... There is no basis for plaintiffs' view that ERISA requires fiduciaries to break a tie among investments by choosing randomly."

Daniel Aronowitz, president of Encore Fiduciary, says the DOL saw the potential of *Chevron* being overturned well in advance, and had been acting accordingly. In his view, *Loper Bright* will not lead to vastly different outcomes or even more lawsuits against the DOL than are already being filed.

"We're going to be in the courts either way ... all [*Loper Bright*] should do is remove the thumb on the scale that was giving deference to the DOL," Aronowitz says. "The DOL is going to have to be more thoughtful and careful in putting out a law that will meet the statutes. They can't put out ambiguous regulations."

The appeal in *Utah v. Su* is scheduled to be heard by a three-judge panel of the 5th Circuit on July 9. The DOL declined to comment on the case.

Tags Chevron, ESG investing in retirement plans, ESG rule

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