

LEGAL UPDATE

An ERISA Journey for ESG via American Airlines by way of Utah?

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Both supporters and opponents of the consideration of environmental, social, and governance (ESG) goals can point to decisions by U.S. district courts in 2025 that are consistent with their positions on the permissibility of ESG-motivated investing in plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). Supporters of the consideration of ESG factors may point to *State of Utah v. Micone* which upheld the validity of the approach of the U.S. Department of Labor (DOL) established in 2022 to the so-called “tiebreaker” approach under ERISA’s general fiduciary rules. Opponents of ESG-motivated investing may cite to *Spence v American Airlines*, finding that the defendants breached their duty of loyalty in how they handled proxy voting by the plan’s investment manager in support of ESG activities that allegedly focused on factors other than the financial interests of plan participants and beneficiaries.

However, even though the two cases involve many of the same underlying legal principles, they did so in very different legal contexts. As discussed below, it may well be the private litigation, rather than the litigation determining the legitimacy of the DOL’s regulation, that will have the greater practical impact on future fiduciary conduct.

Background

ERISA fundamentally requires a fiduciary to focus on financial considerations in managing plan assets. Over the years, the pendulum has swung back and forth, as presidential administrations go between Democratic and Republican party affiliations, regarding the extent to which ancillary factors may be taken into account, particularly in the so-called tiebreaker scenario where a plan fiduciary can decide between investments that would be equally beneficial to plan participants and beneficiaries by looking to ancillary considerations. While the basic premise that financial considerations are paramount is immutable absent a statutory change, Democratic administrations have generally sought to make it easier to take ancillary considerations into account, and Republican administrations have generally sought to make it more difficult.

The swings of the pendulum by hypothesis had to occur against the statutory backdrop that focuses on financial considerations. But the tonal shifts from administration to administration have been unquestionably significant. Thus, for example, a fiduciary with a so-called “green” agenda may have felt emboldened, or at least more comfortable, in taking ESG

into account where there's the sense that the federal government is supportive thereof. Conversely, there may have been a chilling effect in taking into account ESG factors where there was a sense that the federal government was hostile thereto.

For years, these swings of the pendulum took place in the world of what is referred to as sub-regulatory advice – interpretive guidance that does not rise to the level of a regulation. Generally, such guidance has been considered to be less authoritative than a regulation, and is not subject to the detailed notice and comment procedures that apply to regulations.

The first Trump administration significantly altered the path of ESG-related regulatory activity when it addressed these questions in both substantive and procedural ways. On the substantive side, the administration's hostility to ESG in the ERISA context was palpable. While the text of the Trump-era final regulation (the "Trump Regulation") did not explicitly mention ESG, the regulation effectively forced fiduciaries expressly to justify any effort to take into account non-pecuniary factors in making investment decisions.

The tiebreaker scenario was identified as at best a theoretical (almost "black swan") possibility, as a practical matter. (The first Trump Administration had a substantially similar tiebreaker rule, although its triggering event – two economically indistinguishable investments – could be treated as a black swan only if the investments were completely indistinguishable). The Trump Regulation can arguably be characterized as reflecting a concern that, unlike some other investment strategies, an ESG-centric strategy could be motivated in whole or in part by considerations other than the best financial interests of plan participants and beneficiaries; in particular, by a desire to protect, improve or otherwise arise out of a concern for what is best in a political or otherwise non-economic sense. Moreover, process-wise, the Trump administration promulgated an actual regulation, thereby forcing any future administration that might want to swing the pendulum back to make another actual (as opposed to sub-) regulatory change.

However, to the extent that those who opposed the consideration of ESG factors were buoyed by the Trump Regulation, it is important to note that the regulation did not prohibit the consideration of ESG factors. While ERISA focuses on the financial consequences of investment decision-making, it does not contain a general laundry list of prohibited factors that a fiduciary may not consider. The Trump Regulation likewise does not do so.

The Biden administration was decidedly less hostile to ESG, and took the bait of having to change the regulatory language in order to effectuate the next swing of the ESG pendulum. The Biden-era regulation (the "Biden Regulation"), as it had to, was promulgated against a backdrop of the paramount nature of economic considerations, but may arguably be characterized as viewing ESG considerations as just another

set of considerations, no different from traditional economic considerations. Thus, the Biden Regulation stripped out the Trump-era special procedural requirements surrounding the consideration of ancillary investment-related factors, and the DOL, in promulgating the regulation, expressly declined to cast aspersions on the potential validity of the tiebreaker scenario.

Here again, though, there may have been an overreaction on the part of those in favor of pursuing ESG goals that belied the technical underpinnings of the Biden Regulation. Some may have believed that the regulation countenanced the consideration of ESG goals even where there could be an adverse impact on the plan's financial results, and there may have been conflicting signals from the administration itself. But the DOL has been clear that financial considerations must always be paramount. For example, in a brief in the *Utah* case, the DOL stated that "[t]he [DOL's] guidance recognized that fiduciaries . . . can consider collateral factors only in tightly limited circumstances consistent with prioritizing the plan's financial interests....," and then proceeded to state affirmatively that the Biden Regulation did not "license[] fiduciaries to defy their statutory obligations by taking actions that are not in the financial interests of plan beneficiaries. . . . To the contrary, a fiduciary engaging in such conduct would defy the clear text of the rule."

Thus, as noted above, the pendulum swings not with changes to the fundamental rules but with tonal shifts around the edges. While the tonal shifts may be critical to the manner in which fiduciaries behave, the basic rules are what they are. It is noted that ERISA's dogmatic focus on financial returns presents special challenges for international money managers in a global economy. Elsewhere in the world, there may not always be such a focus on the financial and a sublimation of the non-financial, and the contract can serve to accentuate the extent to which ERISA requires a focus on the financial. (It is noted in this regard that Presidential Memorandum of January 20, 2025, on "America First Trade Policy" may also have an impact on global investing under ERISA plans.)

In this context, it may be argued that a lasting effect of the first Trump administration's efforts, regardless of ongoing ESG-related pendulum swings, has been and will be to cause fiduciaries who wish to consider ESG to focus on how ESG factors may affirmatively improve investment returns, rather than on whether the case can be made that the consideration of ESG factors do not adversely affect returns.

Two other observations are worthy of note. First, even when a pro-ESG administration is in place and there is encouragement of the consideration of ESG factors, a fiduciary might be wary of the possibility that a subsequent administration may not be supportive of the consideration of ESG factors (as we have seen, when the Trump administration took

over from Biden's), thus resulting in the consideration of a possible unwinding of previous ESG-centric initiatives. That kind of later unwinding could result in such consequences as the unwinding of prior investment approaches and even (fairly or unfairly) the drawing into question of prior fiduciary choices. Second, excessive focus on a current administration's level of support for ESG can unduly deflect from valid concerns that private litigation may or may not result in judicial decision-making that conforms to the politics of the day.

Utah

The latest *Utah* decision is limited to one narrow legal determination. The District Court for the Northern District of Texas had previously held, applying the then-required doctrine established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* for determining the validity of an agency's regulatory enactments, that the tiebreaker rule as applied in the Biden Regulation was a permissible regulatory interpretation by the DOL under ERISA. While a full discussion of the *Chevron* doctrine is outside the scope of this Alert, the view from 30,000 feet is that the doctrine, born in 1984, required federal courts to afford significant deference to federal agencies' interpretations of federal statutes.

After the District Court's decision in *State of Utah*, in a groundbreaking decision of wide-ranging significance to regulations generally, the Supreme Court in *Loper Bright Enterprises v. Raimondo* reversed *Chevron* and held that it was for a court to exercise its independent judgment in deciding the validity of an agency regulation interpreting a federal statute. In the interim between the first *Utah* decision and *Loper Bright*, the plaintiffs had appealed *Utah* to the U.S. Court of Appeals for the Fifth Circuit. In light of *Loper Bright*, the Fifth Circuit remanded the case to the District Court for the limited purpose of determining whether the DOL's tiebreaker regulation was consistent with the statutory text of ERISA. The Fifth Circuit's approach to its remand had been almost apologetic, stating (footnotes omitted; emphasis in original): "Judicial humility . . . entails not only the occasional recognition of a wrong decision, as the Supreme Court's opinion in *Loper Bright* readily illustrates, . . . but also when to make that decision in the first place. . . . Whatever efficiency or economy is gained by taking up the parties' invitation to decide their dispute in light of the intervening changes, . . . we . . . would be better served by the slight delay occasioned by remanding to the district court for its reasoned judgment." To some, the approach of remanding out of a sense of "judicial humility" highlighted that the Fifth Circuit was remanding not so much out of a concern that the District Court's result was incorrect, but perhaps more in order to allow the District Court to consider the critical intervening development of the *Loper Bright* decision.

On remand, the District Court has now held that the remand from the Fifth Circuit did not require it to reconsider its holdings with respect to the other challenges to its earlier decision that the regulation was arbitrary and capricious and violated the major questions doctrine. The District Court on remand rejected the plaintiff's arguments regarding the regulation's consideration of ESG factors, including the curious arguments that it would be preferable to decide between two financially equivalent benefits by a coin flip rather than ESG considerations, or if two investment options are financially equivalent, then invest in both. (While it generally may not be surprising that a judge would rule on remand in the same fashion as was ruled in the initial decision, it is notable that Judge Kacsmaryk had previously authored decisions striking down several Biden-era actions, including a decision overturning the Biden administration's healthcare nondiscrimination policies under the Patient Protection and Affordable Care Act.)

So the Biden Regulation has thus far survived judicial challenge, to the approval of some in the pro-ESG camp and to the consternation of those opposed to considering ESG. However, is this result really where the rubber hits the road (or runway)? As indicated above, the tiebreaker scenario has been part of the ERISA world for years, and exists in the context of a fiduciary's need to consider financial factors as being paramount. A critical question then becomes: assuming arguendo that a tiebreaker scenario is theoretically cognizable under ERISA, is that the end of the inquiry for those fiduciaries seeking to rely on ESG factors in their decision-making? Which brings us to the cautionary tale of the *American Airlines* case, which came after the initial upholding of the Biden Regulation in the first *Utah* decision.

American Airlines

In contrast to the issue addressed in *Utah*, the issue in *American Airlines* was whether the plan fiduciaries violated their fiduciary duties of prudence and loyalty by including funds managed by its primary investment manager that pursued non-financial and non-pecuniary ESG policy goals through proxy voting and shareholder activism. The District Court reached the unusual conclusion that, although the duty of prudence was not violated because the conduct of the fiduciaries at least equaled current industry standards (putting aside for the moment whether industry standards were flawed), the duty of loyalty was breached. The court found that the fiduciaries disregarded the manager's ESG-related investment philosophy, which was consistent with the plan sponsor's own corporate interests, particularly with respect to climate change, and did not sufficiently focus on financial considerations by failing to monitor and evaluate the manager's non-pecuniary ESG investing. (In reaching this conclusion, one of the factors that the District Court focused on was

that the manager was a 5% shareholder of the plan sponsor and had also provided debt assistance to it.) The calculation of damages is to follow.

Conclusion

ERISA fundamentally requires that investment decisions made by fiduciaries generally regard financial considerations as paramount. Tonal shifts from administration to administration, which presumably will continue over time, may have emboldening or chilling effects on the consideration of ancillary factors such as ESG factors (or even anti-ESG factors) as the pendulum continues to swing, but the underlying statutory construct remains constant. In addition, even focusing just on the level of governmental support could be treacherous, as, someday, as we have just seen, a Democratic administration is bound to give way to a Republican one, thereby

raising the specter of whether it may be desirable, even focusing only on the regulatory environment, to unwind previously implemented ESG-centric investment strategies. All of these considerations seem to have come home to roost in the *Utah* and *American Airlines* cases.

As to *Utah*, for now, the relatively neutral approach of the Biden Regulation remains in effect. However, even assuming that the Fifth Circuit is given the opportunity to and does affirm the District Court, the ultimate fate of the Biden Regulation under the second (and current) Trump administration is unclear. Additional tonal shifts may yet be on the horizon.

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