

Client Alert | July 24, 2024

## Fifth Circuit Sends DOL's ESG Rule Back to District Court



The U.S. Court of Appeals for the Fifth Circuit on July 18 vacated a decision by the U.S. District Court for the Northern District of Texas that found the environmental, social and governance rule ([ESG rule](#)) promulgated in 2022 by the U.S. Department of Labor (DOL) did not run afoul of the Employee Retirement Income Security Act (ERISA) or the Administrative Procedure Act (APA). In reaching its conclusion last September, the [district court had relied upon the Chevron doctrine](#) and deferred to the DOL's analysis in finding that the rule was properly promulgated. In [State of Utah v. Su](#), the Fifth Circuit remanded the case to the district court for reconsideration in light of the U.S. Supreme Court's decision in [Loper Bright Enterprises v. Raimondo](#), 144 S. Ct. 2244 (2024), which overturned the *Chevron* doctrine.

In January 2023, a coalition including 26 states and other interested parties sued the DOL, seeking to vacate the ESG rule, arguing that the rule exceeded the plain language of ERISA and was arbitrary and capricious under the APA. The ESG rule addresses the factors that fiduciaries can consider when making plan investments pursuant to their obligations under ERISA. The rule also provides that ERISA fiduciaries may (but need not) consider the "economic effects of ... environmental, social and governance factors" when competing investment options "equally serve the financial interests of the plan." After affording the DOL deference to its interpretation of ERISA to justify the agency's rulemaking, the district court found that the rule was properly promulgated and not "contrary to the statute."

The plaintiffs appealed the district court's decision to the Fifth Circuit. Even though *Loper Bright* had not yet been decided, the DOL did not argue on appeal that it was entitled to any deference regarding its rulemaking but rather asserted that the ESG rule conformed to the plain language of ERISA. Even after *Loper Bright* was decided on June 28, neither party requested a remand despite the fact that the district court relied upon the *Chevron* doctrine to justify the agency's rulemaking. The Fifth Circuit, however, ordered a remand.

While we will not have a final decision on the legitimacy of the ESG rule for some time, the Fifth Circuit's decision demonstrates the impact of the *Loper Bright* decision on pending matters challenging agency rulemaking. Currently, the U.S. Securities and Exchange Commission (SEC)'s climate rule applicable to public company disclosures and its new broker-dealer rule are pending industry challenges in the Eighth Circuit and the Northern District of Texas, respectively. Pursuant to *Loper Bright*, the SEC's interpretation of the federal securities laws will not be entitled to deference in either action.

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## Key Takeaways

- The Fifth Circuit did not determine whether the ESG rule was properly promulgated, and hence the rule remains in effect. ERISA fiduciaries must continue to follow the requirements of the rule until and unless it is found to be improper.
- The U.S. District Court for the Northern District of Texas will reconsider the case without any deference to the DOL's analysis. The decision will be based upon the plain language of ERISA, and both sides have recently argued before the Fifth Circuit that such language supports their respective positions.
- If the case is subsequently appealed again, for purposes of efficiency, the same panel of judges on the Fifth Circuit will consider the appeal.
- Firms should consider the validity and application of any new rules that apply to them and consider all possible defenses should enforcement issues arise relating to any newly promulgated as well as long-standing administrative rules.



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