



CADWALADER
CLIMATE
Connecting Climate Change and the Law

Texas Federal Judge: DOL ESG Investing Rule Does Not Violate ERISA

November 7, 2023



By Sara Bussiere
Special Counsel | Global Litigation



By Timbre Shriver
Associate | Global Litigation

On September 21, 2023, a Texas federal court **dismissed an action** commenced by more than two dozen Republican state attorneys general challenging a 2022 Department of Labor (DOL) Rule that addressed consideration of ESG factors by retirement plan fiduciaries in their decision-making. **As we previously reported**, Plaintiffs had alleged that the Rule violated the Administrative Procedure Act because it is arbitrary and capricious and “runs afoul” of ERISA.

The DOL Rule provided that fiduciaries' investment decisions "must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis." But the Rule also clarified that risk and return factors "may include" ESG factors depending on individual facts and circumstances. On summary judgment, the Court found that the Rule did not violate ERISA's mandate that a fiduciary must discharge his or her duties concerning a plan "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of" providing "benefits" to them. While recognizing that the term “benefits” refers to “financial benefits,” the Court found that the DOL Rule did not require fiduciaries to prioritize other goals. According to the Court: “Indeed, since at least 2015, DOL has posited that ESG factors ‘may have a direct relationship to the economic value of the plan's investment.’ 80 Fed. Reg. at 65 136. And likewise, the 2020 [prior iteration of the] Rule stated that failing to consider ESG-related risk-return factors could constitute a violation of the duty of prudence in some circumstances: ‘For example, a company's improper disposal of hazardous waste would likely implicate business risks and opportunities, litigation exposure, and regulatory obligations.’ 85 Fed. Reg. at 72848.

In addition, the Court found, the Rule “explains that fiduciaries remain free ‘to determine that an ESG-focused investment is not in fact’” consistent with a fiduciary's duty of prudence, 87 Fed. Reg. at 7383 1, and “stresses that a ‘fiduciary's determination with respect to an investment ...

must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis.’ Hence, ‘risk and return factors may include [ESG] factors on the particular investment,’ but ‘[w]hether any particular consideration is a risk-return factor depends on the individual facts and circumstances.’” In short, the Rule “makes unambiguous that it is not establishing a mandate that ESG factors are relevant under every circumstance, nor is it creating an incentive for a fiduciary to put a thumb on the scale in favor of ESG factors.”

Taking the Temperature: On September 21, 2023, plaintiffs filed a notice of appeal of the decision to the Fifth Circuit, and a similar suit is also pending against the DOL, filed by two retirement plan participants, in a Wisconsin federal court on February 21 (*Braun v. Walsh*), such that challenges to the DOL Rule will persist.

As we’ve previously reported, in March Democratic Senators Jon Tester (D-MT) and Joe Manchin (D-WV) joined Senate Republicans to pass H.J. Res. 30, aimed at repealing the rule. The legislative move was largely symbolic, as President Biden was expected to and ultimately did **veto the measure**. The anti-ESG faction within Congress continues to press their position, both legislatively, with the introduction of new bills aimed **directly** and **indirectly** at the DOL rule.