UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF UTAH, *et al.*,

Plaintiffs,

v.

No. 2:23-cv-16

JULIE A. SU, *et al.*,

Defendants.

REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment confirms what the preliminary injunction opposition already demonstrated: the Rule at issue here is the product of reasoned decisionmaking. *See* Defs.' MSJ, ECF No. 95; PI Opp., ECF No. 69. The Rule clarifies that, under the Employee Retirement Income Security Act of 1974 (ERISA), plan fiduciaries may consider any factor in selecting investments that they reasonably conclude is relevant to a risk and return analysis. *See* Final Rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (Rule). The Rule does so in response to concerns that two earlier rules promulgated by the Department of Labor (DOL) created a chilling effect on ERISA fiduciaries' consideration of environmental, social, and governance (ESG) factors—even when such factors were material to financial performance. It also reaffirms, consistent with ERISA's statutory text, that fiduciaries' exclusive purpose must be to secure financial benefits for plan participants and beneficiaries, and that this purpose may never be subordinated to unrelated goals.

Plaintiffs offer nothing new in response. They continue to deny—contrary to all evidence—that the Rule was properly based upon concerns about a chilling effect. Plaintiffs also erroneously, and baselessly, argue that the Rule permits fiduciaries to evade their duties under ERISA. Neither is true. Plaintiffs cannot manufacture violations of the Administrative Procedure Act by mischaracterizing the Rule and ignoring much of its contents.

The Court should enter judgment in favor of Defendants.

I. The Rule Is the Product of Reasoned Decisionmaking.

Plaintiffs do not—and cannot—contest that DOL need provide only a "'minimal level of analysis' from which [DOL's] reasoning may be discerned" to comply with the deferential arbitrary-and-capricious standard. *See* Defs.' MSJ 3 (quoting *Brackeen v. Haaland*, 994 F.3d 249, 357–58 (5th Cir. 2021) (en banc), *aff'd in part, vacated in part*, --- S. Ct. ----, 2023 WL 4002951 (June 15, 2023)). As Defendants have demonstrated—exhaustively—the agency has easily provided that here.

A. The Rule provides adequate reasoning.

Plaintiffs assert that DOL did not "rebut its prior finding that strict regulations are necessary to protect participants from a lack of rigor related to ESG" and deny the existence of the chilling effect that prompted the Rule. Pls.' Opp. 1–2, ECF No. 99. They are incorrect. *First*, DOL specifically considered comments expressing concern that clarifying fiduciaries' ability to consider ESG factors might come "at the expense of protecting participants from ESG investing 'run amok.'" 87 Fed. Reg. at 73853. DOL determined that the Rule appropriately addressed this concern by prohibiting "subordination of participants' financial benefits" or "sacrificing investment return or taking on additional investment risk" to promote unrelated goals. *Id.* DOL elsewhere determined that the Rule is *more* protective of plan participants' financial benefits than the 2020 Rules because, for example, it puts them on equal footing with other market participants. *See, e.g.*, *id.* at 73826, 73883.

Second, Plaintiffs are wrong to argue that the 2020 Rules did not actually have a chilling effect because those Rules "did not prohibit ESG considerations." Pls.' Opp. 1. A chilling effect is, by definition, an unintended, indirect consequence rather than an intentional prohibition. *Cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972) (explaining that a "chilling" effect occurs when regulations create a "deterrent" even though they "fall short of a direct prohibition"). Language throughout the 2020 Rules' preambles links changes to the Investment Duties regulation to ESG investing and suggests that "ESG investing raises heightened concerns under ERISA." *See* PI Opp. 7–8 (quoting 85 Fed. Reg. 72846, 72848 (Nov. 13, 2020)); *see also* 87 Fed Reg. at 73826. DOL reasonably determined—based on feedback from stakeholders—that this type of language from the 2020 Rules may have created an inadvertent and undesirable "chilling effect on appropriate use of . . . ESG factors," "even in circumstances allowed by the [2020] regulation." 87 Fed. Reg. at 73855.

Third, Plaintiffs are incorrect that DOL's explanation of the chilling effect is insufficient. Pls.' Opp. 2–3. Multiple stakeholders expressed concerns about it directly to DOL, and a substantial number of commenters pointed to it during the comment period. *See, e.g.*, Defs.' MSJ 5. Plaintiffs argue that those comments are "conclusory" and "generic." Pls.' Opp. 2. But they do not explain how the comments could be any more specific. And Plaintiffs point to no feedback denying the existence of a chilling effect—despite the fact that the NPRM made plain the Department's concerns about it. *See, e.g.*, 86 Fed. Reg. 57272, 57275, 57279, 57281 (Oct. 14, 2021).

Plaintiffs also insinuate that DOL should have discounted certain comments because the commenters were "not fiduciaries or [were] unaffiliated with plan sponsors and fiduciaries." Pls.' Opp. 2. It is unclear why only fiduciaries would recognize that a chilling effect exists. And indeed, Plaintiffs elsewhere imply that fiduciaries are "self-interested commenters" whose comments cannot be trusted. *Id.* at 4. Regardless, investors, unions, and regulators all noted the existence of a chilling effect in their comments. *See* Defs.' MSJ 5. And again, Plaintiffs point to no record evidence from *anyone* refuting the existence of a chilling effect.

In sum, the agency's explanation of the rationale underlying the Rule is neither "conclusory [nor] unsupported." *Contra* Pls.' Opp. 2 (quoting *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1137–38 (5th Cir. 2021)). DOL explained that multiple stakeholders warned of the chilling effect of the 2020 Rules before the NPRM was issued, and numerous submitted comments later confirmed this concern. *See, e.g.*, Defs.' MSJ 5. The Rule thus directly contradicts Plaintiffs' claim that it lacks reasoning or support.[1]

B. The Rule's provisions are reasonable and based on proper considerations.

Plaintiffs conclude with a jumble of unsupported and conclusory arguments. Pls.' Opp. 3–4.

[1] Plaintiffs are mistaken to the extent they argue that the "substantial evidence" standard applies here. *See* Pls.' Opp. 2. That standard applies only "in a case subject to sections 556 and 557 . . . or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E). Informal rulemaking under 5 U.S.C. § 553 is subject to arbitrary and capricious review. *See, e.g.*, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

These arguments fail. *First*, to the extent Plaintiffs repeat their contention that the Rule, and the tiebreaker provision specifically, are contrary to ERISA, Defendants have demonstrated that the Rule is within DOL's statutory authority and harmonious with ERISA's plain text. PI Opp. 22–25.

Second, to the extent Plaintiffs argue that the Rule contravenes *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), or fails to consider it, they ignore the Rule's text. Consistent with *Dudenhoeffer*, the Rule provides that fiduciaries "may not subordinate the interests of the participants and beneficiaries in their retirement income . . . to other interests" or "sacrifice investment return or take on additional investment risk to promote [unrelated] goals." 87 Fed. Reg. at 73885. That includes ESG goals unrelated to a risk and return analysis.[2] What is more, DOL explained that the "pecuniary/non-pecuniary distinction" in the 2020 Rules was "being perceived by plan fiduciaries and others as undermining the fundamental principle *Dudenhoeffer* expressed," and that changing that terminology would permit fiduciaries to "tak[e] advantage of . . . ESG risk factors in selecting investments . . . when it is financially prudent to do so," consistent with *Dudenhoeffer*. *Id.* Whether the term "non-pecuniary" comes from *Dudenhoeffer* is beside the point; the term was "novel" in the ERISA context and created confusion among fiduciaries. *See id.* at 73933–34. This conclusion is well supported and appropriately documented, which is all the APA requires.

Third, to the extent Plaintiffs assert that the Rule was intended to promote ESG integration in violation of ERISA, the text of both the Rule and the resulting regulation soundly refute that. As explained, the regulation requires fiduciaries to act "solely in the interests of" and "for the exclusive purpose of providing benefits to participants and their beneficiaries." *Id.* at 73884.

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[2] Nor is the tiebreaker provision inconsistent with *Dudenhoeffer*. It maintains fiduciaries' exclusive focus on providing financial benefits to plan participants because it is available only where two competing investments stand to financially benefit plan participants equally—a situation ERISA does not address. *See* PI Opp. 22–25.

II. Any Relief Granted Should Be Narrowly Tailored.

Although Plaintiffs' challenge should be rejected in its entirety, any relief granted should be appropriately limited. *First*, consistent with the agency's intent, any portion of the Rule found unlawful should be severed, allowing the rest to remain in effect. *See* 87 Fed. Reg. at 73886; *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 (1988); *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 187–88 (D.C. Cir. 2022) ("whether an agency order is severable turns on the agency's intent"). Plaintiffs do not specifically challenge the majority of the Investment Duties regulation, much of which has been in effect for over 40 years. *See* 87 Fed. Reg. at 73883. As DOL explained, the original 1979 regulation "has been relied upon by fiduciaries for many years . . . and complete removal of the provisions could lead to potential disruptions in plan investment activity." *Id.* There is no question that "the remainder of the regulation could function sensibly" if a limited part of the current Rule were held invalid. *See Belmont*, 38 F.4th at 188 (quoting *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 12, 22 (D.C. Cir. 2001)).

Second, any relief granted should apply only to Plaintiffs with standing. *See* PI Opp. 14–18, 40. Contrary to Plaintiffs' assertion that their standing is "unrebutted," Pls.' Opp. 5, Defendants have thoroughly explained why the Plaintiff States lack standing, PI Opp. 14–18.[3] Plaintiffs do not dispute that the Declaratory Judgment Act is available only to parties with standing. *See* Defs.' MSJ 10. In addition, Plaintiffs are incorrect to the extent they imply universal vacatur is *required* in this Circuit. *See Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (recognizing that even if "vacatur of an agency action is the default rule," circumstances exist where "a more limited remedy is appropriate"). And the remedy of universal vacatur is supported by neither the text nor history of the APA. Defs.' MSJ 10.

Finally, Plaintiffs do not defend their baseless request that the Court retain jurisdiction of this matter following final judgment. Pls.' Opp. 5. That request should be rejected. *See* Defs.' MSJ 10.

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[3] Just yesterday, the Supreme Court rejected standing arguments similar to those the Plaintiff States advance here. *See Haaland v. Brackeen*, --- S. Ct. ----, 2023 WL 4002951, at *19 (U.S. June 15, 2023).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I electronically filed this brief with the Clerk of the Court for the United States District Court for the Northern District of Texas by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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