

CHEVRON'S RETIREMENT AND ERISA'S FUTURE: JUDICIAL REVIEW OF EBSA RULES AFTER *LOPER*

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INTRODUCTION

Millions of Americans with a 401(k) plan, an Individual Retirement Account (IRA), a pension, or simply a dream of one day retiring to Florida, benefit from but may have never heard of the Employee Retirement Income Security Act of 1974 (ERISA).¹ Enacted in the wake of a massive independent automaker's collapse and a fraud conviction for the notorious labor leader, Jimmy Hoffa, ERISA promised to safeguard the retirement security of millions of American workers by ensuring the proper management of benefit plan assets.² Over fifty years after ERISA's passage, the landscape for benefit plans in the U.S. has changed dramatically and the administrative agencies responsible for overseeing these plans are facing new challenges in keeping up with rapid developments in the financial sector and trends in benefit plan offerings.³ A growing number of individuals find themselves responsible for managing their own retirement savings, and many are unable to set aside enough money for their future needs.⁴ Many others are forced to sacrifice tax advantages by withdrawing early, or find themselves struggling to determine how much to withdraw during retirement.⁵ As high-risk, high-return investment classes, such as crypto, become more mainstream, sponsors of such investments place increased emphasis on tapping into the well of

1. 29 U.S.C. §§ 1001–1461.

2. Taylor Heinrich, *ERISA: A Journey from a Promise of Protection to a Retirement Crisis—50th Anniversary Edition*, PIETRAGALLO BUS. BLOG (May 29, 2024), <https://www.pietragallo.com/business-blog/erisa-a-journey-from-a-promise-of-protection-to-a-retirement-crisis-50th-anniversary-edition/> [https://perma.cc/ALJ5-UA8F].

3. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); see also Heinrich, *supra* note 2 (“By the end of 2023, total U.S. retirement assets were 38.4 trillion dollars; 3.2 trillion dollars, or 8.3% (down from 37.1% in 1975), of those assets, were in private sector defined benefit plans.”).

4. See Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 742 (2020) (“[E]mployers have overwhelmingly switched to defined contribution plans, commonly known as 401(k) plans, in which an individual employee’s decisions about how much to save for retirement and how to invest that savings determine the benefits that the employee will have available upon retirement.”).

5. See Brian J. O’Connor, *You Saved and Saved for Retirement. Now You Need a Plan to Cash Out.*, N.Y. TIMES (July 12, 2025), <https://www.nytimes.com/2025/07/12/business/retirement-assets-savings.html> [https://perma.cc/NEC7-H34C]; see also Anne Tergesen, *Americans See Their 401(k)s Not Just as Nest Eggs but as Rainy Day Funds*, WALL ST. J. (July 26, 2025), <https://www.wsj.com/personal-finance/retirement/401k-withdrawal-emergency-savings-25926369> [https://perma.cc/V57K-XC2U].

benefit plan assets.⁶ Consequently, the importance of ERISA's protections has never been more pronounced.⁷

Despite its noble ambitions, ERISA has drawn criticism for both failing to fully deliver on its promise and, in some ways, creating more procedural barriers for the very plan participants Congress intended to protect.⁸ Several judges have struggled to interpret the statute, even ridiculing it in their opinions.⁹ Others, like the Honorable William M. Acker Jr.—who declared a willingness to believe that within ERISA lurked “a redeeming feature,”—resisted the cynicism.¹⁰ Despite conflicting sentiments, it is clear today, over half a century since its passage, that ERISA has withstood the test of time.¹¹

The uncertain future of administrative law creates additional obstacles for plan participants, administrators, and plan asset managers, all of whom are now faced with less clear guidance on their rights and responsibilities under ERISA.¹² In 2024, the U.S. Supreme Court overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹³ thus requiring courts to review agency interpretations of law de novo under Section 706 of the Administrative Procedure Act (APA).¹⁴ This means that agencies like the Department of Labor (DOL or the Department) (through the Employee Benefits Security Administration (EBSA)) now bear the burden of persuading courts of the veracity of their views without the benefit of interpretive supremacy.¹⁵

6. Tara Siegel Bernard, *Trump Order Clears Way for Crypto and Private Equity in 401(k)s*, N.Y. TIMES (Aug. 7, 2025), <https://www.nytimes.com/2025/08/07/business/trump-401k-crypto.html> [<https://perma.cc/J4PX-EQH8>].

7. *See id.*

8. *See id.* (citing a shift of risk to employees rather than plan sponsors). *See also* William M. Acker Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285 (1999) (discussing preemptions role in limiting claimants causes of actions).

9. *See, e.g.*, *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 459 (3d Cir. 2003) (Becker, J., concurring) (“In sum, ERISA’s remedial scheme gives HMOs every incentive to act in their own and not in their beneficiaries best interest while simultaneously making it incredibly difficult for plan participants to pursue what meager remedies they possess, a confounding result for a statute whose original purpose was to protect employees.”).

10. *Florence Nightingale Nursing Serv. v. Blue Cross & Blue Shield of Ala.*, 832 F. Supp. 1456, 1457 (N.D. Ala. 1993).

11. *See Acker, supra* note 8, at 285 (“Since writing *Florence Nightingale*, I have changed my mind. ERISA is beyond redemption.”).

12. *Utah v. Su*, 109 F.4th 313, 318–19 (5th Cir. 2024).

13. 467 U.S. 837 (1984).

14. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *see also* Administrative Procedure Act, 5 U.S.C. § 706 (2023).

15. *See Loper*, 144 S. Ct. 2244.

This shift comes at a time when the rules governing ERISA plans face significant litigation challenges. Among the DOL rules currently being challenged in court are the 2022 Environmental, Social, and Governance (ESG) Rule, the 2024 Fiduciary Rule, tobacco surcharge rules, and procedural rules.¹⁶ Instead of trying to decipher fiduciary responsibilities amidst a chorus of conflicting lower court rulings, benefit plan administrators may exercise their allotted discretion to limit benefits, shift offerings from defined benefit plans to defined contribution plans, or opt to simply not sponsor the voluntary plans at all.¹⁷ Without clarity on their rights, plan beneficiaries may miss out on the very protections ERISA is intended to ensure.¹⁸

Even in the wake of *Loper Bright Enterprises v. Raimondo*,¹⁹ there are still proactive steps that the DOL can take to provide stability and guidance to avoid costly litigation for plans and their participants.²⁰ While the DOL now faces a higher bar to defend its rules, plan administrators may still benefit from some form of judicial deference under a combination of alternate standards such as those proposed in *Skidmore v. Swift*,²¹ *Firestone Tire & Rubber Co. v. Bruch*,²² and *Black & Decker Disability Plan v. Nord*.²³ The asymmetry in judicial deference between regulations and plan language suggests an opportunity for administrative recalibration.²⁴ The depth of ambiguous language in ERISA, combined with courts' struggles to apply a consistent standard of review in litigation, places the DOL in a unique position to successfully guide courts' review of ERISA claims in the future.²⁵

16. See *Su*, 109 F.4th at 318–19; see also Am. Council of Life Insurers v. U.S. Dep't of Lab., No. 4:24-cv-00482-O, 2024 WL 3572297, at *2 (N.D. Tex. July 26, 2024).

17. Heinrich, *supra* note 2 (citing a drop in defined benefit plans from 37.1% of the U.S. retirement market in 1974 to 8.3% in 2023); see also Fisch et al., *supra* note 4, at 744 (explaining that employers limit responsibility by offering defined contribution plans instead of defined benefit plans).

18. See Heinrich, *supra* note 2 (citing the rise in 401(k)s shifting investment risk to employees); see also Fisch et al., *supra* note 4, at 743–44 (arguing that a significant portion of 401(k) participants lack financial literacy).

19. 144 S. Ct. 2244 (2024).

20. See *infra* Part IV.

21. 323 U.S. 134, 140 (1944).

22. 489 U.S. 101 (1989).

23. 538 U.S. 822 (2003); see also *infra* Part II.

24. U.S. DEP'T OF LAB., *History of EBSA and ERISA* [hereinafter DOL, *History of ERISA*], <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/8HQA-NHJB>].

25. See *id.*; see also *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 414 (2014) (discussing circuit splits surrounding a judicially created “presumption of prudence”); *Meiners v.*

This Comment begins with an overview of the origins of ERISA and its development over the last fifty years.²⁶ Next, this Comment examines current challenges to the ERISA rules promulgated by the DOL.²⁷ This Comment ultimately provides recommendations for how the DOL may take action in order to retain stability and provide more consistent outcomes across lower courts that would otherwise be strained under differing circuit precedents.²⁸ Faced with the demise of *Chevron* deference, the DOL should utilize the ERISA-specific deference standard set forth in *Firestone* by reinforcing plan administrator discretion through interpretive guidance and model plan language.²⁹ Simultaneously, the DOL should strengthen its reliance on *Skidmore* by issuing more persuasive rules.³⁰ The combination of these administrative strategies will provide courts with workable deference standards that promote consistency, reduce litigation risk for plan fiduciaries, and safeguard ERISA stewardship by the DOL.

I. ERISA'S HISTORY AND PURPOSE

A. *The Origin of ERISA*

With the rise of collective bargaining following World War II the U.S. saw a massive spike in demand for employer-provided benefit plans, which would supplement insufficient public welfare programs such as Social Security.³¹ Defined benefit (DB) plans, such as private pensions, became a primary target of collective bargaining by many different unions.³² Driven by the economic boom following the war and massive demand for automobiles, unions such as the United Auto Workers (UAW) were successful in negotiating for DB plans that promised to provide stable income to former employees in their retirement.³³ However, many independent automakers that had agreed

Wells Fargo & Co., 898 F.3d 820 (8th Cir. 2018) (requiring “meaningful benchmark[s]” to support an ERISA excessive fee claim).

26. See *infra* Part I.

27. See *infra* Part III.

28. See *infra* Part IV.

29. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111–15 (1989); see also Jay Kirschbaun, *Supreme Court and Employee Benefits—Potential Implications for Employee Benefit Plans*, WORLD INS. (Aug. 7, 2024), <http://worldinsurance.com/eb/articles/supreme-court-and-employee-benefits> [https://perma.cc/SH8Q-WRLH].

30. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

31. See James A. Wooten, “*The Most Glorious Story of Failure in the Business*”: *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 685–86 (2001).

32. See *id.* at 690.

33. See *id.* at 692.

to provide these costly benefits began to default on their underfunded promises as the postwar demand for automobiles dwindled and larger competitors were able to capture greater market share.³⁴

The immediate political catalyst for ERISA was the collapse of the Studebaker-Packard Corporation's pension plan in the early 1960s.³⁵ The company, following a merger of two seemingly successful independent automakers, closed its South Bend, Indiana plant in 1963 and defaulted on its pension obligations.³⁶ While retirees over the age of sixty received their full benefits, thousands of younger employees received only "a fraction . . . [or] nothing at all."³⁷ This failure exposed the volatility of private pension plans and a lack of enforceable protections for workers.³⁸ Retirement plans were not viewed merely as "fringe benefits," but deferred compensation negotiated in lieu of higher wages during an employee's working years.³⁹ The Studebaker plan, like most UAW plans, was underfunded for years; however, no remedy had been imposed before a downturn in demand forced the carmaker into default.⁴⁰ The result was not only an economic dislocation, but a political reckoning that made pension reform a congressional mandate.⁴¹

The Studebaker collapse also coincided with broader concerns about pension mismanagement, including allegations of corruption and organized crime involvement in the administration of union pension funds.⁴² Congressional hearings throughout the 1950s and 1960s uncovered alarming abuses in some plans affiliated with the Teamsters and other unions, some of which were under the influence of allegedly mob-connected trustees.⁴³ These revelations stoked fears that the private retirement system was not just fragile but structurally compromised.⁴⁴ Policymakers came to see pension reform not only as an economic necessity, but also as a moral imperative to restore public trust.⁴⁵

34. *See id.* at 693 ("The independents' share of domestic auto production fell from over 14% in 1952 to 7.1% in the final quarter of 1953.").

35. *See id.* at 684.

36. *See id.* at 683–84.

37. *See id.* at 684 ("Retirees and retirement-eligible employees aged sixty and older received their full pension, but the plan defaulted on its obligations to younger employees.").

38. *Id.* at 685 ("UAW retirement plans almost never had enough assets to pay all of their pension obligations.").

39. *See id.* at 686–87.

40. *See id.* at 684.

41. *Id.*

42. *See* Heinrich, *supra* note 2 (citing James Hoffa's conviction on pension fraud).

43. *Id.*

44. *Id.*

45. *Id.*

In response, Congress in 1974 passed ERISA to establish a set of structural safeguards for employee retirement funds.⁴⁶ These included minimum funding standards,⁴⁷ reporting and disclosure requirements,⁴⁸ fiduciary duties,⁴⁹ and a private right of action for plan participants.⁵⁰ ERISA also created the Pension Benefit Guaranty Corporation (PBGC) to insure certain defined benefit plans, an institutional response to the Studebaker failure and others like it.⁵¹ Through these reforms, Congress sought to restore worker confidence in the private retirement system by ensuring that the promises made by employers would not vanish at the moment they were most needed.⁵²

B. Regulatory Agency Oversight of ERISA Plans

The regulation of ERISA-covered plans is distributed across three primary federal entities, each of which is responsible for distinct aspects of the law.⁵³ These agencies issue interpretive guidance and formal rules to clarify ERISA's ambiguous terms, such as "fiduciary," "investment advice," and "plan assets."⁵⁴ Title I of ERISA, which governs fiduciary duties, reporting and disclosure obligations, participation requirements, and civil enforcement provisions, is administered by the DOL through its subagency EBSA.⁵⁵ The DOL is also tasked with promulgating regulations and issuing subregulatory guidance, including, among others, Field Assistance Bulletins, Advisory Opinions, and Interpretive Bulletins, to clarify statutory terms and establish compliance standards for fiduciaries.⁵⁶

Title II of ERISA, which amended the Internal Revenue Code to provide tax advantages for qualifying benefit plans, falls under the jurisdiction of the

46. 29 U.S.C. §§ 1001–1461.

47. § 1082.

48. § 1021.

49. § 1104.

50. § 1132.

51. § 1302(a).

52. *Id.*

53. §§ 1001–1461; see also DOL, *History of ERISA*, *supra* note 24.

54. 29 U.S.C. § 1002 (emphases added); see 29 C.F.R. § 2510.3-21 (2022) (defining "fiduciary"); 26 C.F.R. § 1.401(a)-1 (IRS rules); U.S. DEP'T OF LAB., *Field Assistance Bulletins*, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins> [<https://perma.cc/9CQV-Y3MQ>].

55. See DOL, *History of ERISA*, *supra* note 24.

56. See U.S. DEP'T OF LAB., *Compliance Assistance Releases and Bulletins*, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance> [<https://perma.cc/3JGC-8ZNR>] (last visited Oct. 6, 2025).

Internal Revenue Service (IRS).⁵⁷ The IRS ensures that plans comply with tax qualification rules, such as nondiscrimination testing, contribution limits, and minimum participation requirements.⁵⁸ Failure to comply with these provisions can result in adverse tax consequences for both employers and plan participants.⁵⁹

Title IV of ERISA, which establishes the framework for terminating defined benefit pension plans and insures certain benefits, is administered by the PBGC.⁶⁰ The PBGC is a federally chartered corporation that collects premiums from covered plans and steps in to pay benefits when a plan sponsor becomes insolvent.⁶¹ This function was a direct response to the mass fallout from the Studebaker and similar plan collapses, designed to serve as a financial backstop for DB plans.⁶²

Title III of ERISA provides the framework for interagency coordination, jurisdiction, and enforcement of the Act, dividing responsibility among the DOL, the IRS, and the PBGC.⁶³ This tripartite structure reflects ERISA's complexity and its attempt to balance competing policy objectives: encouraging employers to offer plans voluntarily, protecting participants' rights, and maintaining regulatory oversight over plan assets and fiduciaries.⁶⁴ However, it also introduces overlapping jurisdictional questions and interpretive inconsistencies that can be exploited in litigation or undermine regulatory clarity.⁶⁵ In this environment, guidance from any one agency, particularly the DOL as the administrator of Title I, plays an important role in shaping expectations across the benefit plan ecosystem.⁶⁶

57. DOL, *History of ERISA*, *supra* note 24 (“Noncompliance with . . . tax qualification requirements of ERISA may result in disqualification of a plan and/or other penalties.”); I.R.C. §§ 401–420; 29 U.S.C. § 1201.

58. See I.R.C. §§ 401(a)(4) (requiring plans “not discriminate in favor of highly compensated employees”), 415 (contribution limits), 410 (participation requirements); 26 C.F.R. § 1.401(a)-4 (elaborating on nondiscrimination requirements).

59. See I.R.C. § 4972 (excise taxes); Rev. Proc. 2023-4 (IRS correction programs for qualification failures).

60. 29 U.S.C. §§ 1301–1461; see DOL, *History of ERISA*, *supra* note 24.

61. See 29 U.S.C. §§ 1306–1307, 1322.

62. See Wooten, *supra* note 31, at 684–85.

63. See 29 U.S.C. §§ 1201–1242.

64. See *id.*

65. See Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1113–15 (2001) (discussing judicial inconsistencies in applying ERISA).

66. See *id.* at 1086–87; see also U.S. DEP'T OF LAB., *EBSA Mission Statement*, <https://dol.gov/agencies/ebsa/about-ebsa> [<https://perma.cc/DP2S-NESL>]; Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713, *reprinted in* 5 U.S.C. app. at 752 (reallocating administrative and enforcement authority of ERISA between agencies and resolving certain jurisdictional overlaps).

C. *Frameworks of Judicial Review in ERISA Litigation*

Although ERISA creates causes of action for a variety of claims, the available remedies vary based on the specific type of claim.⁶⁷ ERISA litigation involving denials of benefits are unique from most lawsuits because they generally must be appealed through internal plan administrative processes before reaching Article III courts.⁶⁸ Only after the administrative process is exhausted will district courts review these claims.⁶⁹ The internal appeals process creates a record including administrator interpretations of plan provisions that courts receive and review.⁷⁰ After the internal plan appeals process concludes, federal courts reviewing ERISA cases must then determine which standard of judicial review applies to a benefit determination.⁷¹

Although ERISA itself is silent on this issue, three competing approaches have historically shaped judicial interpretation: the trust law approach, the labor law approach, and the contract law approach.⁷² The first framework, borrowed from the common law of trusts, emphasized fiduciary principles and led courts to adopt an abuse of discretion standard where discretion is expressly granted to the internal plan administrator.⁷³ The utilization of trusts and insurance vehicles as funding mechanisms for plans tethered ERISA review to longstanding trust doctrines.⁷⁴ Trust law principles, however, were not a perfect fit for ERISA. Early DOL interpretations of ERISA, which also aligned with congressional intent to impose fiduciary duties similar to those of traditional trustees, expanded the meaning of discretionary

67. See Kennedy, *supra* note 65, at 1092–93 (explaining that the Employee Retirement Income Security Act of 1974 (ERISA) § 502 provides for three causes of action: (1) 502(a)(1), covering requests for recovery and explanation of benefits and allowing for legal and equitable relief; (2) 502(a)(2), covering breaches of fiduciary duty and limiting relief to the plan as a whole; and (3) 502(a)(3), covering general violations under ERISA but limiting relief to equitable forms).

68. See *id.* at 1091 (listing participant rights when denied a benefit: “(1) a clear explanation of the specific reasons for the denial, (2) the right to appeal that decision internally with the plan administrator, and (3) a full and fair review of the claim on internal appeal”).

69. *Id.* at 1092–93.

70. *Id.* at 1092; see Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993) (explaining the exhaustion requirement as a judicially created doctrine to promote consistent treatment and a full record).

71. See Kennedy, *supra* note 65, at 1092.

72. See *id.* at 1094–95.

73. See *id.* at 1104–06 (discussing the trust law model as the dominant paradigm influencing judicial review and the emergence of the abuse of discretion standard where discretion is granted).

74. See *id.* at 1092–93 (explaining that ERISA’s fiduciary standards were modeled after common law trust principles, reflecting congressional intent to hold fiduciaries to traditional trustee duties); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989).

authority beyond traditional trust law doctrines to include anyone who exercises sufficient administrative powers as a fiduciary.⁷⁵

The labor law approach, by contrast, views ERISA claims through the lens of § 301 of the Labor Management Relations Act (LMRA).⁷⁶ Under this view, benefit claims resemble breach-of-contract suits under collective bargaining agreements, with courts playing an active role in resolving factual and legal disputes.⁷⁷ Courts sympathetic to this approach favored less deference to plan administrators and broader access to discovery and procedural protections for claimants.⁷⁸

The contract law approach framed ERISA plans as unilateral contracts between employers and employees.⁷⁹ This lens emphasized traditional doctrines of contract construction and enforcement but risked treating benefit plans like commercial agreements rather than fiduciary arrangements.⁸⁰ Though this approach surfaced in early litigation, courts largely rejected it in favor of the trust paradigm adopted in *Firestone*.⁸¹

These competing interpretive roots have left a legacy of inconsistent judicial standards.⁸² After *Firestone*, the deferential abuse of discretion standard has become dominant in cases involving plans that explicitly delegate authority.⁸³ Yet, courts still scrutinize potential conflicts of interest.⁸⁴ In *Metropolitan Life Insurance Co. v. Glenn*,⁸⁵ the Court held that a dual-role administrator (one

75. Kennedy, *supra* note 65, at 1106 (“The meaning of discretionary authority under ERISA has an entirely different meaning than that used in trust law.”).

76. *See id.* at 1097–98 (describing how some courts analogized ERISA disputes to § 301 of the Labor Management Relations Act (LMRA) cases due to their origins in collectively bargained benefit plans).

77. *See id.* at 1098–99 (noting that courts using the labor law approach tended to employ a more interventionist review and permitted broader judicial fact-finding).

78. *See id.* at 1099 (explaining that courts influenced by labor law principles often permitted more expansive discovery rights and procedural safeguards for claimants).

79. *See id.* at 1100 (describing the contract law theory as one that viewed ERISA plans as unilateral contracts).

80. *See id.* at 1100–01 (highlighting that while the contract model emphasized interpretive consistency, it underplayed fiduciary obligations central to ERISA).

81. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111–15 (1989) (rejecting the contract approach in favor of trust law principles).

82. *See Kennedy, supra* note 65, at 1101–02 (discussing fragmentation in judicial approaches prior to *Firestone* and inconsistent lower court decisions thereafter).

83. *See id.* at 1102 (explaining widespread adoption of deferential review post-*Firestone* for plans with explicit grants of discretion).

84. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115–17 (2008) (noting that a structural conflict of interest is one factor in abuse of discretion review).

85. *See id.*

who both decides claims and pays benefits) faces a structural conflict that must be considered through the abuse of discretion analysis.⁸⁶

This deference to private fiduciaries now stands in contrast to the post-*Loper* framework for reviewing agency interpretations of law.⁸⁷ While *Chevron* once granted strong deference to administrative agencies, *Loper* requires courts to apply de novo review under the APA.⁸⁸ Thus, courts may now defer less to the DOL interpretation of ERISA than to a private insurance company's administration of an ERISA plan.⁸⁹

The resulting asymmetry creates tension in ERISA jurisprudence. Plan participants challenging DOL rules receive heightened judicial scrutiny, while those contesting plan administrator decisions face a far more deferential standard.⁹⁰ This doctrinal imbalance has real consequences: participants may be left with fewer legal avenues for relief, and courts may develop conflicting precedents regarding the same statutory language.⁹¹

Federal courts reviewing ERISA cases must determine which standard of judicial review applies to a benefit determination.⁹² This dual-track review regime has become a defining feature of ERISA litigation.⁹³ The deferential abuse of discretion standard has been widely adopted in cases involving employer-sponsored plans that explicitly delegate authority.⁹⁴ However, courts often scrutinize potential conflicts of interest, especially where the plan administrator is also the payer of benefits.⁹⁵ In *Metropolitan Life Insurance*, the Court held that such dual roles should be considered as a factor in determining whether the administrator abused its discretion.⁹⁶

These standards differ from the framework courts historically applied to agency action under *Chevron*.⁹⁷ While *Chevron* granted strong deference to agency interpretations of ambiguous statutes, *Firestone* introduced a context-

86. *See id.*

87. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (eliminating *Chevron* deference and replacing it with a default presumption of de novo judicial review of agency interpretations).

88. *Id.*

89. *Compare id.* at 2263, with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (2008).

90. *See Utah v. Su*, 109 F.4th 313, 319–21 (5th Cir. 2024).

91. *See id.*

92. *See Loper*, 144 S. Ct. at 2263 (requiring de novo review). *But see Firestone*, 489 U.S. at 115 (requiring de novo review but allowing abuse of discretion review if plan documents expressly grant discretionary authority).

93. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112–15 (2008).

94. *See id.*

95. *See id.*

96. *See id.* at 108.

97. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

specific inquiry rooted in trust law.⁹⁸ Notably, even after *Loper* eliminated *Chevron* deference, courts may still defer to plan administrators under *Firestone* and its progeny, creating an asymmetry in administrative law: courts are now less likely to defer to public agencies than to private fiduciaries administering ERISA plans.⁹⁹

This doctrinal divide has significant implications for ERISA enforcement.¹⁰⁰ Plan participants challenging DOL rules may benefit from de novo review under *Loper*, while facing deferential review when challenging plan administrator determinations.¹⁰¹ The resulting inconsistency raises concerns about fairness and predictability and underscores the importance of thoughtful administrative action.¹⁰²

II. JUDICIAL REVIEW OF ERISA CLAIMS UNDER *CHEVRON*

A. *The Role of Chevron Deference*

Before *Loper*, the DOL's interpretations of ambiguous ERISA provisions were routinely upheld under *Chevron* deference.¹⁰³ Under this two-step framework, courts first asked whether the statute was ambiguous.¹⁰⁴ If so, they proceeded to the second step, which asked whether the agency's interpretation was reasonable.¹⁰⁵ This enabled the DOL to promulgate rules and guidance documents with the expectation that courts would uphold the interpretations if reasonably connected to the statutory text.¹⁰⁶

ERISA's statutory structure both invites agency interpretation and requires it.¹⁰⁷ While Congress explicitly mandated the DOL to issue certain procedural regulations, it was silent on other matters relating to agency

98. Compare *id.* with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

99. *Firestone*, 489 U.S. at 111–15; see also John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1320–24 (2007) (criticizing judicial deference to conflicted private fiduciaries).

100. See Langbein, *supra* note 99, at 1325–27 (highlighting structural asymmetry in ERISA enforcement post-*Firestone*).

101. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); Langbein, *supra* note 99, at 1322–24.

102. See Langbein, *supra* note 99, at 1325–35.

103. See *Chevron*, 467 U.S. 837.

104. *Loper*, 144 S. Ct. at 2264.

105. See *id.*

106. *Id.* at 2256; 29 U.S.C. § 1135 (authorizing the Secretary of Labor to “prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter”).

107. See 29 U.S.C. § 1135.

authority in statutory interpretation.¹⁰⁸ Congress deliberately left core terms such as “fiduciary,” “investment advice,” “plan assets,” and “prudence” undefined or context-sensitive.¹⁰⁹ The DOL and EBSA filled these gaps through formal notice-and-comment rulemaking and informal guidance such as Field Assistance Bulletins and Advisory Opinions.¹¹⁰ Courts, in turn, often deferred to these interpretations. For example, in litigation surrounding the 2016 Fiduciary Rule, the DOL argued that its reinterpretation of “investment advice” was a permissible construction of 29 C.F.R. § 2510.3-21.¹¹¹ Although the Fifth Circuit ultimately vacated the rule in *Chamber of Commerce of the United States v. U.S. Department of Labor*,¹¹² the case was still adjudicated under *Chevron*.

The pre-*Loper* regime gave the DOL regulatory flexibility while providing plan sponsors, fiduciaries, and asset managers with a relatively predictable compliance environment based on deference.¹¹³ Subregulatory guidance often functioned as de facto safe harbors because of the deference courts were likely to extend under *Chevron*.¹¹⁴ This was particularly important in areas of interpretive volatility such as ESG investing, IRA rollovers, and surcharge qualifications, where regulated entities often relied on EBSA interpretations to align their practices with ERISA’s fiduciary requirements.¹¹⁵

However, this judicial deference was not unlimited. Even under *Chevron*, courts occasionally rejected DOL rules deemed to exceed the agency’s

108. 29 U.S.C. § 1002(21)(A), 1104(a).

109. See Mark Debofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, 728–29 (2004).

110. See U.S. Dep’t of Lab., Field Assistance Bulletin No. 2006-01 (Apr. 19, 2006); see also 5 U.S.C. § 553(b); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022).

111. *Chamber of Com. of the U.S. v. U.S. Dep’t of Lab.*, 885 F.3d 360, 363–65 (5th Cir. 2018).

112. 885 F.3d 360, 368–69 (5th Cir. 2018).

113. Adam R. Carlisle & Lindsey H. Chopin, *Where Does the End of Chevron Deference Leave ERISA?*, ERISA LITIGATION ADVISOR (July 2, 2024), <https://www.erisalitigationadvisor.com/2024/07/articles/where-does-the-end-of-chevron-deference-leave-erisa/> [https://perma.cc/EBX4-SL4Y] (“ERISA litigants often rely on administrative guidance from DOL, Treasury, etc. to interpret ERISA and advocate for their positions.”).

114. See *id.* (“Without deference to agency guidance where appropriate under *Chevron*, interpretation of ambiguous ERISA provisions now rests entirely with the judiciary, with the potential for inconsistent interpretation of ERISA’s requirements from jurisdiction to jurisdiction.”).

115. See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022); U.S. DEP’T OF LAB., Field Assistance Bulletin No. 2006-03 (Dec. 20, 2006).

delegated authority or to lack reasoned explanation.¹¹⁶ Still, the regime placed a heavy thumb on the scale in favor of agency expertise.¹¹⁷

At the same time, courts reviewed many plan-level benefit denial claims *de novo* under separate judicial doctrines.¹¹⁸ Notably, *Firestone* held that courts should review benefit denials under a *de novo* standard unless the plan explicitly grants discretionary authority, in which case abuse of discretion review applies.¹¹⁹ This framework was reaffirmed in *Black & Decker*, where the Court held that plan administrators were not required to defer to treating physicians.¹²⁰ These plan-level deference doctrines allow for agency interpretations to be bypassed through contractual structure, and allow for discretionary authority to be granted through plan terms.¹²¹ As a result, public agency rules were reviewed under *Chevron*, but could be ignored if private plan administrator decisions were reviewed under *Firestone*-style deference.¹²²

B. *Firestone as an ERISA-Specific Framework for Deference*

In *Firestone*, the Supreme Court established the foundational standard for judicial review of benefit denials under ERISA, creating a distinct framework rooted in the common law of trusts.¹²³ The case involved former Firestone employees who were denied severance benefits after a corporate restructuring.¹²⁴ The plan did not expressly grant the administrator discretion to interpret the plan's terms, and the plaintiffs challenged the denial under 29 U.S.C. § 1132(a)(1)(B).¹²⁵ The Court, resolving a circuit split, held that denials of ERISA benefits are to be reviewed *de novo* unless the plan grants the administrator discretionary authority.¹²⁶ Where such discretion exists, courts apply a more deferential abuse of discretion standard.¹²⁷ This doctrinal framework has since become the governing law for ERISA benefit claims

116. See *Chamber of Com.*, at 379–80 (holding that the DOL's 2016 fiduciary rule exceeded the agency's statutory authority under ERISA and the Internal Revenue Code and vacating the rule in its entirety); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

117. See *Chamber of Com.*, at 379–80.

118. See *Firestone*, 489 U.S. at 113.

119. See *id.* at 115.

120. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

121. See *Firestone*, 489 U.S. at 113.

122. See *Black & Decker*, 538 U.S. 822 (allowing higher standard of review based on plan language resulting in benefit denial despite conflict of interest and contrary medical guidance).

123. See *Firestone*, 489 U.S. at 111–13; see also Langbein, *supra* note 99, at 1317–18.

124. See *Firestone*, 489 U.S. at 105–06.

125. *Id.* at 106–07; 29 U.S.C. § 1132(a)(1)(B).

126. *Firestone*, 489 U.S. at 115.

127. See *id.*

and has major implications for how courts review fiduciary decisions under the statute.¹²⁸

Firestone's embrace of trust law principles was no accident.¹²⁹ The Court noted that ERISA was enacted against the backdrop of traditional trust doctrine, and Congress specifically incorporated fiduciary standards derived from the law of trusts into the statute.¹³⁰ By defaulting to de novo review, but permitting deference where the plan expressly provides for it, *Firestone* established a dual-track system that balances participant protection with respect for plan sponsor discretion.¹³¹ The decision aligned with ERISA's remedial goals by affording beneficiaries a meaningful opportunity to contest denials, while allowing employers to structure plans that would receive judicial deference when properly drafted.¹³²

The deference afforded under *Firestone* was further clarified in *Metropolitan Life Insurance*, where the Court held that a structural conflict of interest, such as when the entity administering claims also funds the benefits, must be weighed as a factor in determining abuse of discretion.¹³³ This refinement added nuance to the standard by emphasizing that deference is not absolute and may be diminished where conflicts exist.¹³⁴ Similarly, in *Black & Decker*, the Court held that plan administrators are not required to defer to the opinions of treating physicians, reinforcing their interpretive latitude under discretionary plans.¹³⁵

The Supreme Court further limited deference to plan terms in *Fifth Third Bancorp v. Dudenhoeffer*.¹³⁶ The Court held that plan terms would be discarded if they contradicted public policy.¹³⁷ This recalibrated *Firestone's* deference standard to require a statutory foothold for plan terms that may defy agency interpretations.¹³⁸ The *Fifth Third Bancorp* Court unanimously overruled fragmented lower court decisions that created a "presumption of prudence" for administrators of Employee Stock Ownership Plans (ESOPs).¹³⁹ The failure

128. See Kennedy, *supra* note 65, at 1115.

129. See *id.*

130. See *id.*

131. See *id.* at 1094.

132. See *id.* at 1114.

133. See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008).

134. See *id.*

135. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003).

136. 573 U.S. 409, 414 (2014) (reviewing prudence requirements in plan documents that fell below the minimum required by statute).

137. *Id.* at 421–22 (“[T]rust documents cannot excuse trustees from their duties under ERISA.”).

138. See *id.* at 421.

139. *Id.* at 414–15.

of lower courts to react to nuanced investment vehicles with reliable rulings underscored the need for clear guidance on ERISA interpretation that does not undercut Congress.¹⁴⁰ While the Court qualified the amount of discretion that can be given through plan language, its ruling focused on statutory limits, rather than administrative, suggesting that the *Firestone* plan language may still trump administrative guidance.¹⁴¹ Together, these decisions affirm a strong, but not absolute, deference to private fiduciaries, provided that statutory fidelity, procedural fairness, and structural integrity are maintained.¹⁴²

This framework now stands in stark contrast to the post-*Loper* regime, where agency interpretations of law no longer receive *Chevron* deference and must withstand de novo judicial scrutiny under the APA.¹⁴³ The result is a doctrinal asymmetry: federal courts give less deference to public agencies like the DOL interpreting ERISA than to private insurance companies administering benefit plans.¹⁴⁴ While the DOL must now persuade courts through reasoned explanation alone, plan administrators may continue to rely on abuse of discretion review to defend their decisions.¹⁴⁵

This divergence raises critical questions about consistency and fairness in ERISA litigation.¹⁴⁶ A plan participant may be subject to strict procedural limits and deferential review when challenging a denial by a private administrator but receive broader judicial engagement when contesting a DOL rule intended to protect their rights.¹⁴⁷ The DOL's regulatory authority is thus weakened at the very moment when clarity and national uniformity are most needed.¹⁴⁸

Nonetheless, *Firestone* could be transformed into a powerful administrative tool.¹⁴⁹ In a recent letter to the Assistant Secretary of EBSA, the American Benefits Council encouraged the expansion and codification of *Firestone* deference through EBSA's notice-and-comment process in order to curb litigation in the wake of *Loper*.¹⁵⁰ Ironically, it is possible that the weakening of

140. See *id.* (discussing circuit splits relating to the presumption of prudence).

141. See *id.* at 421 (“This provision makes clear that the duty of prudence trumps the instructions of a plan document. . .”).

142. See *id.*; see also *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115–17 (2008); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003).

143. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); 5 U.S.C. § 706.

144. See Langbein, *supra* note 99, at 1342.

145. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); see also *Loper*, 144 S. Ct. 2244.

146. See Langbein, *supra* note 99, at 1339–40.

147. See *Loper*, 144 S. Ct. at 2271–73.

148. See *id.* at 2267–68.

149. See *infra* Part IV.A.

150. Letter from Lynn Dudley, Senior Vice President, Am. Benefits Council, to Dan

regulatory authority may conversely strengthen the role of subregulatory guidance. The DOL can, outside of its regular notice-and-comment process, issue subregulatory guidance that encourages plan sponsors to include clear grants of discretionary authority and EBSA's own model plan language directly into plan documents, thereby securing deferential review under existing law.¹⁵¹ This language, along with posted guidance in field assistance bulletins and advisory opinions, can also clarify the interaction between plan-level discretion and agency interpretations, reducing the risk of judicial override.¹⁵² While the deference standards in *Firestone* and *Loper* have had different applications in the past, both mandatory and discretionary model plan language issued by the IRS are tested practices that EBSA could utilize in order to bridge the two deference frameworks into a lasting and judicially viable standard.¹⁵³ By reinforcing *Firestone*'s framework, the DOL can promote predictable litigation outcomes and help stabilize the regulatory environment in the absence of *Chevron*.¹⁵⁴

III. JUDICIAL REVIEW OF ERISA CLAIMS UNDER *LOPER*

A. *Loper* and the End of Chevron Deference

The Supreme Court's decision in *Loper* marked a fundamental turning point in administrative law, ending a forty-year era of judicial deference to agency interpretations under the *Chevron* doctrine.¹⁵⁵ In a 6–3 decision, the Court explicitly overruled *Chevron*, which had required courts to defer to reasonable agency interpretations of ambiguous statutes.¹⁵⁶ The majority held that this framework improperly delegated interpretive authority to the Executive Branch, contravening the APA's directive that “courts must ‘decide all relevant questions of law’” and “interpret constitutional and statutory provisions.”¹⁵⁷

Aronowitz, Assistant Sec'y, Emp. Benefits Sec. Admin., U.S. Dep't of Lab. (Oct. 23, 2025), <https://www.americanbenefitscouncil.org/pub/?id=b0bf50ca-92ab-5b3c-a2b5-b1aec3a91ec3> [https://perma.cc/K6RN-SYYV].

151. See *infra* Part IV.A–B.

152. See *infra* Part IV.

153. See INTERNAL REVENUE SERV., DEFINED CONTRIBUTION PRE-APPROVED PLANS LISTING OF REQUIRED MODIFICATIONS AND INFORMATION PACKAGE (LRM) (2024), <https://www.irs.gov/pub/irs-tege/dc-lrm0124.pdf> [https://perma.cc/6VVL-7P97]; see also I.R.S. Notice 2024-82.

154. See *infra* Part IV.

155. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

156. See *id.*

157. *Id.* at 2260–61; see also 5 U.S.C. § 706.

The decision also clarified the status of previous decisions that relied on *Chevron*.¹⁵⁸ While those decisions remain binding under principles of stare decisis, lower courts are no longer to apply *Chevron* deference prospectively.¹⁵⁹ Instead, courts must engage in de novo review regardless of the technical complexity of the subject matter or the historical reliance on agency expertise.¹⁶⁰

For ERISA, this ruling is especially consequential. ERISA's structure is deeply intertwined with administrative law and requires input from the DOL, IRS, and even the SEC.¹⁶¹ The DOL has long relied on *Chevron* to defend its interpretation of terms like “fiduciary,” “investment advice,” and “participant-directed account.”¹⁶² Courts frequently upheld these interpretations so long as they fell within the bounds of reasonableness.¹⁶³ Now, however, the DOL must defend their regulatory authority on the merits—persuasiveness, logic, and statutory fidelity—without the benefit of formal deference.¹⁶⁴

Courts may now look to *Skidmore* for an alternative to *Chevron* when considering deference to agency interpretation.¹⁶⁵ Under *Skidmore*, courts are not bound to agency interpretations but may give weight to them if they are persuasive.¹⁶⁶ The factors considered by courts focus on the agency interpretations' consistency with statutory text, reasoning, and precedent.¹⁶⁷ While *Skidmore* offers an alternative deference standard, it remains to be seen

158. See *Loper*, 144 S. Ct. 2244.

159. *Id.* at 2262–63 (courts must respect precedent but not the *Chevron* framework going forward).

160. *Id.* at 2261–62; § 706.

161. See James Van Brammer, *Lawmakers Urge SEC to Support Trump Order to Expand 401(k) Investment Options*, PLANSPONSOR (Sept. 24, 2025), <https://www.plansponsor.com/lawmakers-urge-sec-to-support-trump-order-to-expand-401k-investment-options/> [https://perma.cc/9UZX-2LQG] (highlighting support for an executive order urging the SEC to “swiftly implement changes that would open 401(k) retirement accounts to a broader range of alternative investments”).

162. Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 365, 369 (5th Cir. 2018) (invalidating fiduciary rule); see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

163. See *Chamber of Com.*, 885 F.3d at 369.

164. See Jack M. Beermann, *Loper Bright and the Future of Chevron Deference*, 65 WM. & MARY L. REV. ONLINE 1, 2–3 (2024).

165. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

166. See *id.*

167. See *id.* (“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

whether courts will be consistent in their application of *Skidmore* factors.¹⁶⁸ Furthermore, courts may be more likely to find certain politically charged rules more or less persuasive based on differing policy guidance from one administration to the next.¹⁶⁹

The *Loper* decision also sharpens the contrast between public and private deference under ERISA.¹⁷⁰ While agencies are now stripped of presumptive interpretive authority, private plan administrators remain eligible for deferential review under *Firestone* when exercising discretionary authority.¹⁷¹ This creates an odd asymmetry in ERISA litigation: courts must scrutinize the DOL's views de novo, yet may defer to a private insurer's benefit denial if it was not an abuse of discretion.¹⁷²

In the wake of *Loper*, courts evaluating DOL rules, like the ESG and Fiduciary Rules, must resolve questions of statutory meaning without leaning on the agency's regulatory history.¹⁷³ This may increase judicial inconsistency and undermine the DOL's efforts to promote uniform fiduciary standards.¹⁷⁴ Absent deference, the DOL must now convince courts through the persuasiveness of its reasoning, invoking what remains of *Skidmore* and anticipating judicial skepticism.¹⁷⁵ For a statute as notoriously opaque as ERISA, this places extraordinary pressure on agency rulemaking.¹⁷⁶

B. Challenges to DOL ESG Rule

The Supreme Court's decision in *Loper* dismantled the *Chevron* doctrine and ushered in a new era of de novo judicial review for agency interpretations of law.¹⁷⁷ This change has immediate implications for ERISA-related

168. See *id.* at 139–40; e.g., *Mayfield v. U.S. Dep't of Lab.*, 117 F.4th 611, 619–20 (5th Cir. 2024); *Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024).

169. See Press Release, Emp. Benefits Sec. Admin., U.S. Department of Labor Rescinds 2022 Guidance on Cryptocurrency in 401(k) Plans, (May 28, 2025), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20250528> [<https://perma.cc/CNT2-EKHZ>] (reversing previous administration's position on digital assets).

170. Compare *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2293 (2024) (Gorsuch, J., concurring) with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105–06 (1989) (creating a discrepancy in ERISA litigation in private insurer's interpretative authority).

171. See *Firestone*, 489 U.S. at 115.

172. *Id.*

173. See *Loper*, 144 S. Ct. at 2293 (Gorsuch, J., concurring); see also *Chamber of Com. of the U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018).

174. See Langbein, *supra* note 99, at 1326–28.

175. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

176. See *id.*

177. See *Loper*, 144 S. Ct. at 2293 (Gorsuch, J., concurring).

rulemaking, where statutory terms often require expert interpretation and where courts had historically deferred to the DOL's views.¹⁷⁸

In 2022, the DOL issued its ESG rule, clarifying that plan fiduciaries may consider environmental, social, and governance factors as part of the ordinary risk-and-return analysis, and may use such factors as a "tiebreaker" between otherwise financially equivalent investments.¹⁷⁹ The rule reaffirmed that fiduciaries may not subordinate participants' financial interests to unrelated objectives.¹⁸⁰

A coalition of states and private plaintiffs challenged the rule in the Northern District of Texas, claiming it conflicted with ERISA's duty of loyalty and with prior DOL guidance.¹⁸¹ In 2023, the district court granted summary judgment for DOL, applying *Chevron* deference to uphold the rule.¹⁸² On appeal, however, the Fifth Circuit vacated and remanded in light of *Loper*, directing the district court to evaluate the rule without *Chevron* deference.¹⁸³ The Fifth Circuit left the rule in place during remand.¹⁸⁴ On February 14, 2025, the district court again upheld the rule under de novo review, finding that it aligned with ERISA's statutory text and was not arbitrary or capricious under the APA.¹⁸⁵ The court emphasized that ESG factors may be considered only within the bounds of prudent investment analysis and, when used as a tiebreaker, do not override the requirement to act solely in participants' financial interests.¹⁸⁶

Although the rule withstood de novo review, these cases illustrate the vulnerability of DOL rulemaking to judicial skepticism in the absence of deference.¹⁸⁷ As one of the first rules to be examined under de novo review, *Utah v. Su*¹⁸⁸ signaled that conclusory justifications or ambiguous statutory readings would no longer survive unchallenged without a persuasive evidentiary

178. See *Chamber of Com.*, 885 F.3d at 369; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

179. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822, 73,824 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).

180. *Id.* at 73,822–23 (noting that the 2020 rule created a chilling effect on ESG consideration).

181. *Utah v. Walsh*, No. 2:23-cv-00016-Z, 2023 WL 2663256, at *1 (N.D. Tex. Mar. 28, 2023).

182. *Utah v. Walsh*, No. 2:23-cv-00016-Z, 2023 WL 6205926, at *1, *5 (N.D. Tex. Sept. 21, 2023).

183. *Utah v. Su*, 109 F.4th 313, 318–19, 322 (5th Cir. 2024).

184. *Id.* at 321–22.

185. *Utah v. Micone*, 766 F. Supp. 3d 669, 682–86 (N.D. Tex. 2025).

186. *Id.* at 675, 681.

187. See *id.* at 676–77.

188. 109 F.4th 313(5th Cir. 2024).

record.¹⁸⁹ As the authority of agencies is challenged more extensively, a domino effect may set in and the foundation of agency rulemaking in certain areas could collapse. Future litigation could invoke the major questions doctrine, asserting that ESG investing is too politically charged to be regulated by agencies at all absent clear congressional authorization.¹⁹⁰

C. Challenges to DOL Fiduciary Rule

The DOL promulgates rules like the ESG and Fiduciary Rules to fulfill its statutory mandate under Title I of ERISA.¹⁹¹ The agency aims to clarify the scope of fiduciary duties and ensure that plan sponsors, administrators, and advisors act in the best interests of participants.¹⁹² Rules are typically issued through notice-and-comment rulemaking under the APA, often accompanied by regulatory impact analyses and explanatory preambles.¹⁹³ In the past, *Chevron* deference offered a cushion against judicial reversal, allowing the agency to craft pragmatic responses to evolving market conditions.¹⁹⁴ That cushion is now gone.¹⁹⁵ Absent *Chevron*, the DOL must now bolster its rulemaking with rigorous fact-finding, clear statutory grounding, and persuasive reasoning capable of surviving *de novo* review.¹⁹⁶

The fragility of agency interpretations under ERISA was already evident in *American Council of Life Insurers v. United States Department of Labor*,¹⁹⁷ which concerned the DOL's 2024 Fiduciary Rule.¹⁹⁸ This rule sought to expand fiduciary liability under ERISA by clarifying that one-time investment advice, such as recommending a rollover from a 401(k) to an IRA, could trigger fiduciary status if made under circumstances suggesting a relationship of trust and reliance.¹⁹⁹

189. *Su*, 109 F.4th at 318–19.

190. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022) (explaining the major questions doctrine, that agencies cannot act on issues of major social, political, or economic importance without express congressional authorization).

191. 29 U.S.C. § 1135.

192. *See* § 1104(a); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822, 73,823 (Dec. 1, 2022).

193. *See* 5 U.S.C. § 553; Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122, 32,123 (Apr. 25, 2024) (to be codified at 29 C.F.R. pt. 2510).

194. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

195. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

196. *See id.*

197. No. 4:24-cv-00482-O, 2024 WL 3572297, at *1 (N.D. Tex. July 26, 2024).

198. *Id.* at *8 (holding that the expanded fiduciary rule exceeds DOL's statutory authority).

199. Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024) (to be codified at 29 C.F.R. pt. 2510).

The DOL promulgated the rule through notice-and-comment rulemaking under the APA, relying on economic studies and industry data to support its view that investment professionals often influenced retirement outcomes through isolated but critical pieces of advice.²⁰⁰ The DOL argued that the existing five-part test for fiduciary status, established in 1975, no longer reflected the realities of modern retirement planning, where one-time advice often replaced ongoing advisory relationships.²⁰¹

In response, the American Council of Life Insurers filed suit in the Northern District of Texas.²⁰² The plaintiffs argued that the DOL's new interpretation effectively rewrote the statute's definition of fiduciary without congressional approval.²⁰³ They further contended that Congress had considered and rejected similar proposals in legislative sessions, signaling that the agency lacked authority to adopt them by regulation.²⁰⁴

The district court agreed.²⁰⁵ In its April 2024 decision, the court held that the DOL's rule conflicted with ERISA's unambiguous terms and exceeded its interpretive authority.²⁰⁶ The court characterized the rule as an impermissible expansion of fiduciary status and declined to defer to the agency's views, even though the Supreme Court had not yet overruled *Chevron*.²⁰⁷ As a result of a shift in administrations, the DOL ultimately decided not to continue its appeal of the ruling.²⁰⁸

These decisions underscore a broader trend: in the absence of judicial deference, DOL rules must now survive on their persuasive strength alone.²⁰⁹ Courts are more likely to invalidate regulations that rely on ambiguous

200. *Id.* at 32,123.

201. *Id.* at 32,186; *see also* 89 Fed. Reg. 23,424, 23,463–64 (Apr. 3, 2024); *Am. Council of Life Insurers*, 2024 WL 3572297, at *2.

202. *Am. Council of Life Insurers*, 2024 WL 3572297, at *1.

203. *See id.* at *3.

204. *See id.* at *5 (citing *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 371 (5th Cir. 2018)).

205. *Id.* at *8–9.

206. *Id.*

207. *See id.* at *5.

208. James Van Bramer, *DOL Stops Defending Biden-Era Fiduciary Rule*, PLANSPONSOR (Dec. 17, 2025), <https://www.plansponsor.com/dol-stops-defending-biden-era-fiduciary-rule/> [<https://perma.cc/Z39V-4JW2>]; Sanyam D. Parikh & R. Sterling Parkinson, *DOL Obtains Further Extension to Decide Whether to Fight for the Fiduciary Rule*, KILPATRICK: ERISA BLOG (Apr. 21, 2025), <https://ktslaw.com/en/Blog/ERISA/2025/4/DOL-Obtains-Further-Extension-to-Decide-Whether-to-Fight-for-the-Fiduciary-Rule> [<https://perma.cc/4RKE-RXT2>].

209. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

statutory language, particularly when the rule implicates contested economic or political judgments.²¹⁰

D. Challenges to DOL Tobacco Surcharge Rule

Significant challenges to DOL regulatory authority are emerging in district courts through litigation over the DOL's tobacco surcharge regulations.²¹¹ ERISA's nondiscrimination mandate under 29 U.S.C. § 1182 generally prohibits varying premiums based on health factors, including tobacco use.²¹² However, § 1182 includes a wellness program exception that allows premium differentials if the program is "reasonably designed" to promote health or prevent disease and offers an alternative means of qualifying for the reward.²¹³ The DOL operationalizes this exception through its implementing regulations at 29 C.F.R. § 2590.702(f), which formally define a "reasonable alternative standard" (RAS) and require that participants who satisfy the RAS receive the full reward.²¹⁴ Through the 2013 regulatory preamble, the DOL further interprets this requirement to include retroactive reimbursement when participants qualify mid-year.²¹⁵

Since late 2024, a wave of class actions and DOL enforcement actions has challenged employer wellness programs that imposed tobacco surcharges without complying with these regulatory safeguards.²¹⁶ In response, defendants have increasingly invoked *Loper* to challenge the DOL's authority, arguing that courts must disregard the wellness regulations and preamble interpretations absent explicit statutory authorization.²¹⁷ District courts so far have rejected these arguments.²¹⁸ In *Mehlberg v. Compass Group USA, Inc.*,²¹⁹

210. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022) (discussing the major questions doctrine).

211. Ryan M. Tucker & René E. Thorne, *Tobacco Surcharge Litigation Flares Up*, ERISA LITIG. ADVISOR (Dec. 3, 2024), <https://www.erisalitigationadvisor.com/2024/12/articles/tobacco-surcharge-litigation-flares-up/> [<https://perma.cc/9SPK-7JCE>] (citing nearly 30 suits).

212. 29 U.S.C. § 1182(a)(1), (b)(1)–(2); see also *Sec'y of Lab. v. Macy's, Inc.*, No. 1:17-cv-541, 2024 WL 4302093, at *1, *3 (S.D. Ohio Sept. 26, 2024) (discussing the statute's application of § 1182 to tobacco use and smoking cessation programs).

213. 29 U.S.C. § 1182(b)(2)(B); 29 C.F.R. § 2590.702(b)–(c) (2014).

214. 29 C.F.R. § 2590.702(f) (2014).

215. See 29 C.F.R. § 2590.702(f) (2014).

216. See Tucker & Thorne, *supra* note 211 (“[U]nder the DOL regulations, a plan provides a [RAS] if participants can avoid the surcharge by completing a tobacco cessation program, regardless of whether they stop using tobacco.”).

217. See text accompanying *infra* notes 227–228.

218. See *id.*

219. No. 24-cv-04179, 2025 WL 1260700, at *1, *5 (W.D. Mo. Apr. 15, 2025).

the Western District of Missouri denied dismissal, holding that plaintiffs plausibly alleged violations of the “full reward” requirement based on the DOL’s 2013 regulatory preamble and concluding that *Loper* does not nullify regulations issued through notice-and-comment rulemaking. Similarly, in *Bokma v. Performance Food Group, Inc.*,²²⁰ the Eastern District of Virginia denied dismissal, emphasizing that 29 U.S.C. § 1182(b) and the Public Health Service Act (PHSA) § 2705 expressly authorize RAS and notice requirements and concluding that *Loper* “does not empower courts to disregard duly promulgated regulations.”²²¹

The Department itself has also pursued enforcement actions. In *Secretary of Labor v. Macy’s, Inc.*,²²² the DOL alleged that the Macy’s wellness plan violated ERISA and the Affordable Care Act (ACA) by conditioning surcharge waivers on cessation programs without properly offering an RAS or honoring physician accommodations.²²³ Macy’s argued that *Loper* stripped the DOL of authority to impose these requirements absent specific statutory delegation.²²⁴ The Southern District of Ohio disagreed, holding that while *Loper* mandates de novo review, it does not automatically invalidate the wellness rules.²²⁵

These cases make the tobacco surcharge litigation one of the first significant tests of DOL regulatory authority after *Loper*, alongside challenges to the DOL’s ESG rule.²²⁶ In both contexts, courts have applied independent review while upholding DOL regulations where they rest on explicit statutory mandates.²²⁷ As in *Su*, the outcome of these wellness cases will influence how courts apply *Skidmore*, clarifying when agency expertise remains persuasive despite the absence of *Chevron* deference.²²⁸

220. 783 F. Supp. 3d 882 (E.D. Va. 2025).

221. *Id.* at 887–88, 895–97.

222. No. 1:17-cv-541, 2024 WL 4302093, at *1, *3 (S.D. Ohio Sept. 26, 2024).

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.* at *2–3; *see also* *Utah v. Su*, 109 F.4th 313, 317–19, 322 (5th Cir. 2024) (re-manding the case to district court in order to reassess the merits in light of *Loper Bright*).

227. *See* *Mehlberg v. Compass Grp. USA, Inc.*, No. 24-cv-04179, 2025 WL 1260700, at *5–6 (W.D. Mo. Apr. 15, 2025); *Bokma v. Performance Food Grp., Inc.*, 783 F. Supp. 3d 882, 895–96 (E.D. Va. 2025).

228. *See Su*, 109 F.4th at 318–19, 322; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* Elizabeth Hopkins, *Texas Judge Sticks to His Guns on Validity of Biden-Era ESG Rule*, KANTOR & KANTOR LLP: YOUR ERISA WATCH (Feb. 26, 2025), <https://www.youerisawatch.com/2025/02/texas-judge-sticks-to-his-guns-on-validity-of-biden-era-esg-rule/> [<https://perma.cc/2PPG-PVXT>] (explaining that the district court determined the ESG rule was not contrary to law because the statute permits defendants to look at collateral factors when investment options equally serve a plan).

The early trend suggests that longstanding notice-and-comment regulations tied directly to statutory authority, like the wellness rules, remain relatively insulated post-*Loper*.²²⁹ However, the litigation highlights growing uncertainty: where DOL regulations rely on ambiguous statutory terms or policy judgments, courts may be less willing to sustain them without robust evidentiary support.²³⁰ These lawsuits thus represent an important proving ground for the DOL's regulatory approach and illustrate the heightened litigation risks agencies face when defending ERISA rules under de novo review.²³¹

E. Challenges to DOL Procedural Rules

Statutory fidelity will likely be a point of debate for most challenges to regulations moving forward.²³² The regulations explicitly rooted in statutory mandates will continue to be upheld while more tangentially related rules will be subject to greater scrutiny.²³³ For example, courts have continued to enforce the DOL's procedural rules governing ERISA claims and appeals under Section 503.²³⁴ Codified at 29 C.F.R. § 2560.503-1, these rules establish strict timelines, require detailed denial notices, and mandate internal appeal procedures designed to ensure a "full and fair review."²³⁵ Because they rest on an explicit statutory delegation, these regulations currently enjoy greater stability than the DOL's substantive policy rules, even after *Loper*.²³⁶ However, the Supreme Court has not addressed this question directly, leaving open the possibility of future circuit splits over even seemingly stable rules surrounding procedural enforcement.²³⁷

229. See *Macy's*, 2024 WL 4302093, at *1; *Thaler v. Perlmutter*, 130 F.4th 1039, 1047–48 (D.C. Cir. 2025); *In re MCP No. 185*, 124 F.4th 993, 1005 (6th Cir. 2025).

230. See *Tucker & Thorne*, *supra* note 211 (“[A] court may find that the DOL’s regulatory interpretation of [29 U.S.C § 1182] is not the ‘best reading’ of the statute.”).

231. See *id.*

232. See Mark DeBofsky, *ERISA Ruling Is a Win for DOL Regulatory Authority*, DEBOFSKY LAW INSIGHTS (Dec. 5, 2024) [hereinafter DeBofsky, *ERISA Ruling*], <https://www.debofsky.com/articles/erisa-ruling-is-a-win-for-dol-regulatory-authority/> [<https://perma.cc/FQ4F-LSR7>] (discussing challenges to DOL procedural rules).

233. See *id.*; see also *Macy's*, 2024 WL 4302093, at *2–3.

234. See DeBofsky, *ERISA Ruling*, *supra* note 232.

235. See *id.*

236. See *id.*

237. See *id.* (“[A]s the Supreme Court made clear in *Firestone*, there is no provision in ERISA law dictating the judicial standard of review applicable in adjudicating benefit claim disputes.”).

Recent cases illustrate this relative stability and further qualify the limits of *Firestone* deference.²³⁸ In *Rappaport v. Guardian Life Insurance Co. of America*,²³⁹ the Southern District of New York held that a plan administrator's failure to comply with Section 503's procedural rules forfeits deferential review under *Firestone*.²⁴⁰ *Guardian* argued that *Loper* undermined the DOL's authority to impose procedural consequences, but the court rejected that argument, holding the rules remain binding because they implement Congress's express mandate.²⁴¹ The court applied de novo review under 29 C.F.R. § 2560.503-1(l)(2)(i), which treats noncompliance as an exhaustion-triggering denial "without the exercise of discretion."²⁴²

Similarly, in *Halo v. Yale Health Plan*,²⁴³ the Second Circuit adopted a *strict compliance* standard, holding that plan administrators must follow ERISA's procedural rules precisely or lose deferential review, except where violations are inadvertent and harmless.²⁴⁴ Although *Halo* predates *Loper*, courts, including *Rappaport*, continue to rely on its reasoning, treating these procedural safeguards as integral to ERISA's remedial framework and sheltered from *Chevron*'s demise.²⁴⁵

While these rulings may appear to insulate the DOL from challenges and weaken plan language meant to trigger *Firestone*-style deference, the result is in line with precedent like *Fifth Third Bancorp*, which allow for deference so long as statutory fidelity is preserved.²⁴⁶ Together, *Rappaport* and *Halo* highlight an emerging divide in ERISA litigation after *Loper*. Courts now apply independent judicial review when evaluating ambiguous statutory provisions, but they continue to uphold longstanding procedural regulations where Congress has clearly delegated authority.²⁴⁷ This distinction has significant implications for the DOL's regulatory strategy. Procedural rules grounded in § 503 remain a stable foundation, but substantive policies, including fiduciary definitions, ESG-related duties, and tobacco surcharge incentives, face greater challenge under de novo review.²⁴⁸

238. See *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 414 (2014) (limiting discretion to statutory confines despite explicit plan language).

239. No. 1:22-cv-08100, 2024 WL 4872736, at *1 (S.D.N.Y. Nov. 22, 2024).

240. See *id.* at *9.

241. See *id.* at *11–12.

242. See *id.* at *12–13; 29 C.F.R. § 2560.503-1(l)(2)(i).

243. 819 F.3d 42 (2d Cir. 2016).

244. See *id.* at 60–61.

245. See *id.*; *Rappaport*, 2024 WL 4872736, at *9, *11–12.

246. See *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 414 (2014).

247. See *Halo*, 819 F.3d at 52.

248. See *id.* at 58. But see *supra* Part III.B–D.

The landscape of ERISA rulemaking has shifted fundamentally.²⁴⁹ As the ESG and fiduciary rule challenges, tobacco surcharge litigation, and procedural enforcement disputes demonstrate, *Loper* has created a new judicial environment in which courts scrutinize agency interpretations without deference.²⁵⁰ While longstanding procedural rules remain stable for now, even they are not immune from future circuit splits or Supreme Court intervention.²⁵¹ The DOL's ability to maintain regulatory authority, protect participants, and shape ERISA policy will depend on its willingness to adapt.²⁵² This requires moving beyond *Chevron*-based assumptions and embracing a strategy grounded in persuasive reasoning, robust evidentiary support, and a reaffirmation of plan administrator discretion.²⁵³ The following section offers specific recommendations for how the DOL can recalibrate its policymaking approach to meet this new reality.²⁵⁴

IV. RECOMMENDATIONS

A. Reinforce Plan Administrator Discretion Under *Firestone*

The most ERISA-specific opportunity for administrative stability in the post-*Loper* era lies in reinforcing judicial deference to plan-level fiduciary decisions under *Firestone*.²⁵⁵ In *Firestone*, the Supreme Court held that when plan documents grant discretionary authority to administrators, courts should review benefit denials under an abuse of discretion standard rather than de novo.²⁵⁶ This approach reflects trust-law principles embedded in ERISA's statutory structure and has long served as a critical source of stability for fiduciaries navigating complex benefit determinations.²⁵⁷

The DOL and EBSA should take proactive steps to preserve and promote this doctrine. Although *Firestone* applies to judicial review of private decisions rather than agency action, it creates a parallel deference framework that can offset the destabilizing effects of *Loper*.²⁵⁸ Specifically, the DOL should begin to issue subregulatory guidance that encourages plan

249. See *supra* Part III.A.

250. See *supra* Part III.A.

251. See *supra* Part III.E.

252. See *infra* Part IV.

253. See *infra* Part IV.

254. See *infra* Part IV.

255. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989).

256. See *id.* at 115.

257. See *id.* at 111–13 (holding that regardless of a statute's ambiguity, courts no longer need to defer to an agency's interpretation of the law).

258. See *id.*; see also *Loper Bright Enters. v. Raimondo*, 603 S. Ct. 2244, 2273 (2024).

sponsors to adopt clear discretionary authority clauses in plan instruments.²⁵⁹ The agency can also publish model plan language and technical FAQs explaining how judicial deference to fiduciaries operates and how it interacts with regulatory compliance.²⁶⁰

These efforts would provide much-needed clarity to plan sponsors and reduce litigation risk for fiduciaries.²⁶¹ Courts remain more likely to uphold fiduciary decisions when plans are structured to trigger *Firestone* deference, especially where the administrator can show consistency and procedural diligence.²⁶² Importantly, this strategy places no new burdens on the DOL's budget and sidesteps the challenges of rulemaking under *Loper*.²⁶³ Instead, it leverages existing judicial precedent to promote compliance and stability at the plan level—where ERISA's protective purposes are ultimately enforced.²⁶⁴

Finally, this approach acknowledges the broader fiscal constraints facing the DOL and the PBGC.²⁶⁵ Recent expansions of Special Financial Assistance (SFA) eligibility under the American Rescue Plan have increased the PBGC's obligations, while the DOL continues to operate under limited enforcement resources.²⁶⁶ Guidance reinforcing plan-level discretion costs little to implement but carries significant upside in reducing the volume and stakes of future litigation.²⁶⁷

B. Strengthen Rulemaking Under *Skidmore*

While *Chevron* is gone, *Skidmore* offers a potential soft landing that the DOL should consider while fulfilling its regulatory agenda.²⁶⁸ Under *Skidmore*,

259. See generally Questions and Answers Relating to Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.75-8 (2024) (demonstrating use of subregulatory guidance).

260. See *Employee Benefits Security Administration*, DEP'T OF LAB., <https://www.dol.gov/agencies/ebsa> [<https://perma.cc/FUX4-7EQW>] (last visited Jan. 21, 2026).

261. See *Firestone*, 489 U.S. at 111.

262. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008).

263. See *Loper*, 603 S. Ct. at 2273.

264. See *Firestone*, 489 U.S. at 111.

265. See PENSION BENEFIT GUAR. CORP., FISCAL YEAR (FY) 2024 ANNUAL REPORT 5 (2024), <https://www.pbgc.gov/sites/default/files/documents/pbgc-annual-report-2024.pdf> [<https://perma.cc/3L8R-AAWQ>].

266. See *American Rescue Plan (ARP) Special Financial Assistance Program*, PENSION BENEFIT GUAR. CORP. [hereinafter *Special Financial Assistance Program*], <https://www.pbgc.gov/arp-sfa> [<https://perma.cc/KE92-QCN3>] (Sept. 17, 2025).

267. See *id.*

268. See U.S. OFF. OF INFO. & REGUL. AFFS., *Agency Rule List – Spring 2025*, REGINFO.GOV [hereinafter *DOL Regulatory Agenda*], https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=

courts may still credit agency interpretations that demonstrate persuasive reasoning, technical depth, and policy consistency.²⁶⁹ In the context of ERISA, where regulatory clarity often depends on actuarial modeling and complex economic assumptions, *Skidmore* provides a viable pathway for the DOL to preserve its influence, but only if its rules are carefully constructed.²⁷⁰

To strengthen its rules under *Skidmore*, the DOL must elevate the rigor and transparency of its notice-and-comment process.²⁷¹ Final rules should include robust factual records, detailed economic impact analyses, and clear statutory justifications.²⁷² Regulatory preambles should engage with dissenting comments, preempt likely legal challenges, and explain why certain interpretive paths were chosen over others.²⁷³ This level of precision will increase the persuasive force of DOL regulations and reduce the likelihood of judicial override.²⁷⁴

Importantly, high-quality rulemaking also deters litigation by setting clear standards for compliance and by reducing the possibility of differing interpretations by courts.²⁷⁵ Under *Loper*, ambiguous or conclusory guidance is especially vulnerable to invalidation.²⁷⁶ In contrast, a persuasive rule backed by well-documented reasoning and supported by technical evidence is more likely to withstand de novo review.²⁷⁷ For a resource-constrained agency like the DOL, reducing the risk of remands or injunctions in a cost-efficient manner is a financial imperative.²⁷⁸ Low quality rules not only waste administrative time but also invite expensive litigation that the agency and plan participants cannot afford.²⁷⁹

&showStage=active&agencyCd=3046 [https://perma.cc/92S2-J4D4] (last visited Jan. 22, 2025); see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

269. See *Skidmore*, 323 U.S. at 140.

270. See *id.*

271. See *id.* (“The weight of [an administrative judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

272. See *id.*

273. See *id.*; Kevin Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1277 (2016).

274. See *Skidmore*, 323 U.S. at 140; Stack, *supra* note 273, at 1280.

275. See *Special Financial Assistance Program*, *supra* note 266; Stack, *supra* note 273, at 1276.

276. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2265 (2024).

277. See *Skidmore*, 323 U.S. at 140.

278. See U.S. DEP'T OF LAB., *FY 2026 Budget in Brief*, <https://www.dol.gov/sites/dolgov/files/general/budget/2026/FY2026BIB.pdf> [https://perma.cc/V6LF-AP5K]; cf. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-667, FREEDOM OF INFORMATION ACT: LITIGATION COSTS FOR JUSTICE AND AGENCIES COULD NOT BE FULLY DETERMINED 16 (2016).

279. See *FY 2026 Budget in Brief*, *supra* note 278; see also 29 U.S.C. §§ 1083–1084; Cent.

Finally, the DOL should not ignore ERISA's structural connection to the Internal Revenue Code. Many compliance provisions, including non-discrimination rules and minimum funding standards, derive authority from the tax code and have long enjoyed interpretive consistency due to their tie to Treasury regulations.²⁸⁰ The DOL can invoke this cross-agency framework in its regulatory preambles to bolster interpretive stability and reinforce the legitimacy of overlapping standards.²⁸¹ Courts may view such alignment favorably under *Skidmore*, particularly when it shows coordination among expert bodies.²⁸²

C. Combine Administrative Tools to Promote Predictability

While legislative reform may eventually clarify ambiguous ERISA terms, Congress is unlikely to act quickly. Administrative action, however, is already in the works.²⁸³ In the interim, neither *Skidmore* nor *Firestone* alone will resolve the uncertainty left by *Loper*. But taken together, they may be able to form a durable foundation for DOL policymaking. The DOL should issue integrative guidance that not only clarifies its own regulatory interpretations but also frames those interpretations in harmony with *Firestone*-style discretion.²⁸⁴ For instance, the agency could explain how fiduciaries can implement ESG policies or rollover procedures in ways that both comply with DOL rules and retain judicial deference under *Firestone*.²⁸⁵

These efforts should be coordinated through informal rulemaking, technical releases, and model plan templates.²⁸⁶ By addressing common

Laborers' Pension Fund v. Heinz, 541 U.S. 739, 747–49 (2004) (explaining that Treasury's regulations apply to ERISA Title I, illustrating the interpretive consistency for tax-rooted requirements like nondiscrimination and minimum funding).

280. See Langbein, *supra* note 99, at 1326–27 (noting ERISA's dual-source authority under labor and tax titles).

281. See I.R.C. §§ 401(a)(4), 412; 26 C.F.R. pt. 1.

282. See *Skidmore*, 323 U.S. at 140 (courts consider the coherence of agency views); Amanda Shami, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 FORDHAM L. REV. 1577, 1587 (2014).

283. Tara Siegel Bernard, *Trump Order Clears Way for Crypto and Private Equity in 401(k)s*, N.Y. TIMES (Aug. 7, 2025), <https://www.nytimes.com/2025/08/07/business/trump-401k-crypto.html> [<https://perma.cc/L4Y2-DGPX>] (discussing executive order setting policy and ordering DOL to promulgate rules on specific investments vehicles).

284. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); see also Interpretive Bulletin 94-1, 59 Fed. Reg. 32, 606, 32,607 (June 23, 1994) (to be codified at 29 C.F.R. pt. 2509) (early example of coordinated fiduciary guidance).

285. See *Utah v. Su*, 109 F.4th 313, 318–19 (5th Cir. 2024) (remanding DOL's ESG Rule).

286. See U.S. DEP'T OF LAB., FIELD ASSISTANCE BULL. NO. 2018-01 (Apr. 2022) (explaining ESG implementation); see also Langbein, *supra* note 99, at 1322–23.

interpretive questions, such as the standard for “sole interest” under ERISA § 404(a) and offering safe harbor procedures, the DOL can reduce the likelihood of costly litigation and provide regulated parties with a clearer compliance roadmap.²⁸⁷

The goal is not to recreate *Chevron*'s presumption of validity but to build a hybrid system where plan-level discretion and agency expertise jointly support the statute's protective mission.²⁸⁸ In doing so, the DOL can fulfill its obligations under Title I of ERISA, safeguard the interests of plan participants, and conserve administrative resources at a moment of fiscal and legal uncertainty.²⁸⁹

CONCLUSION

The fall of *Chevron* should force a fundamental rethinking of how ERISA is interpreted and enforced.²⁹⁰ Without the shield of deference, the DOL must now persuade courts on the strength of its reasoning alone.²⁹¹ Yet private plan administrators remain insulated by *Firestone*-style discretion, creating a striking imbalance: government regulators face exacting judicial review, while private fiduciaries retain leeway in construing the very same statutory terms.²⁹²

This shift presents both a challenge and an opportunity. By leaning into the judicial respect for fiduciary discretion and reviving the persuasive weight of *Skidmore*, the DOL can reassert its influence without relying on formal authority.²⁹³ Strategic subregulatory guidance, carefully developed rulemaking records, and coordinated cross-agency interpretations can help restore stability in a fractured legal landscape.²⁹⁴

These approaches are not silver bullets. They are, however, practical. They preserve the DOL's ability to protect participants, guide fiduciaries, and reduce litigation risks in a system that cannot wait for legislative repair.²⁹⁵

287. See 29 C.F.R. § 2550.404(a)(1); 29 U.S.C. § 1104(a)(1); see also EMP. BENEFITS SEC. ADMIN., COMPLIANCE ASSISTANCE RELEASE NO. 2021-01 (Jan. 21, 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2021-01.pdf> [<https://perma.cc/8UZR-2N8X>].

288. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *Firestone*, 489 U.S. at 111.

289. See 29 U.S.C. § 1131–1144.

290. See *Loper*, 144 S. Ct. 2244, 2261.

291. See 5 U.S.C. § 706; see also *Skidmore*, 323 U.S. at 140.

292. See *Firestone*, 489 U.S. at 115; *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115–17 (2008); *Fifth Third Bancorp v. Dudenhoeffer* 573 U.S. 409, 414 (2014).

293. See *Skidmore*, 323 U.S. at 140.

294. See *id.*

295. See 29 U.S.C. § 1104(a)(1); see also EMP. BENEFITS SEC. ADMIN., COMPLIANCE

When Judge Acker wondered whether ERISA contained “a redeeming feature,” he voiced a skepticism that still resonates.²⁹⁶ But even in the wake of *Loper*, that feature may yet emerge. Not through sweeping judicial doctrines, but through careful, deliberate administration.²⁹⁷

ASSISTANCE RELEASE NO. 2022-01 (Mar. 10, 2022), <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.pdf> [<https://perma.cc/WW64-GNJJ>] (setting standard of “extreme care” for plan investments in cryptocurrencies); EMP. BENEFITS SEC. ADMIN., COMPLIANCE ASSISTANCE RELEASE NO 2025-01 (May 28, 2025), <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01.pdf> [<https://perma.cc/VMZ5-6T8F>] (rescinding guidance without congressional act).

296. See Acker Jr., *supra* note 8, at 285 (“ERISA is beyond redemption.”).

297. See *id.* (“Occasionally, a statute comes along that is so poorly contemplated by the draftspersons that it cannot be saved by judicial interpretation, innovation, or manipulation. It becomes a litigant's plaything and a judge's nightmare. ERISA falls into this category.”).