COHEN WEISS AND SIMON LLP

ULA ERISA Advanced Seminar

Effects of *Loper Bright* on Benefit Plans

September 2024 / Marcy Dunlap and Julia Zuckerman

Segal

Agenda

US Supreme Court Ruling in *Loper Bright v. Raimondo*

Prospective Application?

Potential Implications, Generally

Health Plan Regulations

Retirement Plan Regulations

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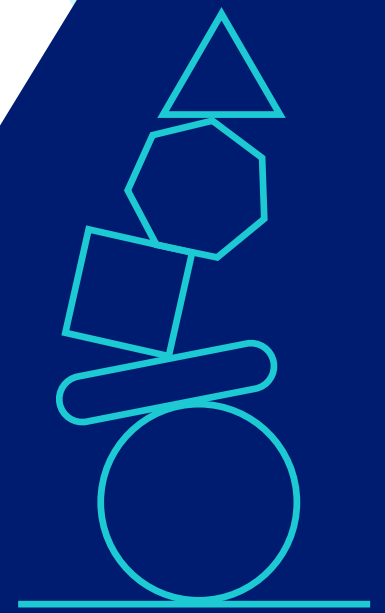
US Supreme Court Ruling in *Loper Bright v. Raimondo*

Background on *Chevron*

- Under the 1985 US Supreme Court *Chevron v. NRDC* ruling, known as the *Chevron* doctrine, federal courts deferred to agency regulations that interpret statutes:
  - Where the statute is ambiguous, and
  - The agency's interpretation is not "arbitrary and capricious"
- Over the past several years, the Supreme Court created multiple exceptions to the *Chevron* doctrine – which weakened its effect



Longstanding Objections to *Chevron*

- Judicial conservatives have long raised concerns with the *Chevron* doctrine on several grounds:
  - As an unconstitutional transfer of the US Constitution's Article III judicial power and Article I legislative power to the Executive Branch
  - As a limit on the exclusive Article III power of the judicial branch to determine "what the law is"
  - Applying the *Chevron* doctrine without a clear framework to resolve statutory ambiguity leaves too much discretion with the courts to engage in results-oriented decisioning

Loper Bright Eliminated *Chevron* Deference

- On June 28, 2024, the Supreme Court held that *Chevron* is inconsistent with, and has always violated, the Administrative Procedures Act (APA)
  - The APA, enacted in 1946, requires that federal courts have sole responsibility to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action
- Chief Justice John Roberts, writing for the Court's majority, said the APA requires courts to use independent judgment in determining whether an agency's actions are within its statutory power
- The Court further explained that *Chevron* was "fundamentally misguided" and that it has resulted in courts' inability to arrive at a uniform and intelligible standard for determining whether a statute is "ambiguous"

Loper Bright Eliminated *Chevron* Deference (Continued)

- The Court emphasized that agency interpretations, especially those issued close to passage of a law, may influence a court's decision and "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" – but a court is not required to defer to the agency's interpretation of the law
- Courts may defer to agency interpretations of fact within the agency's expertise

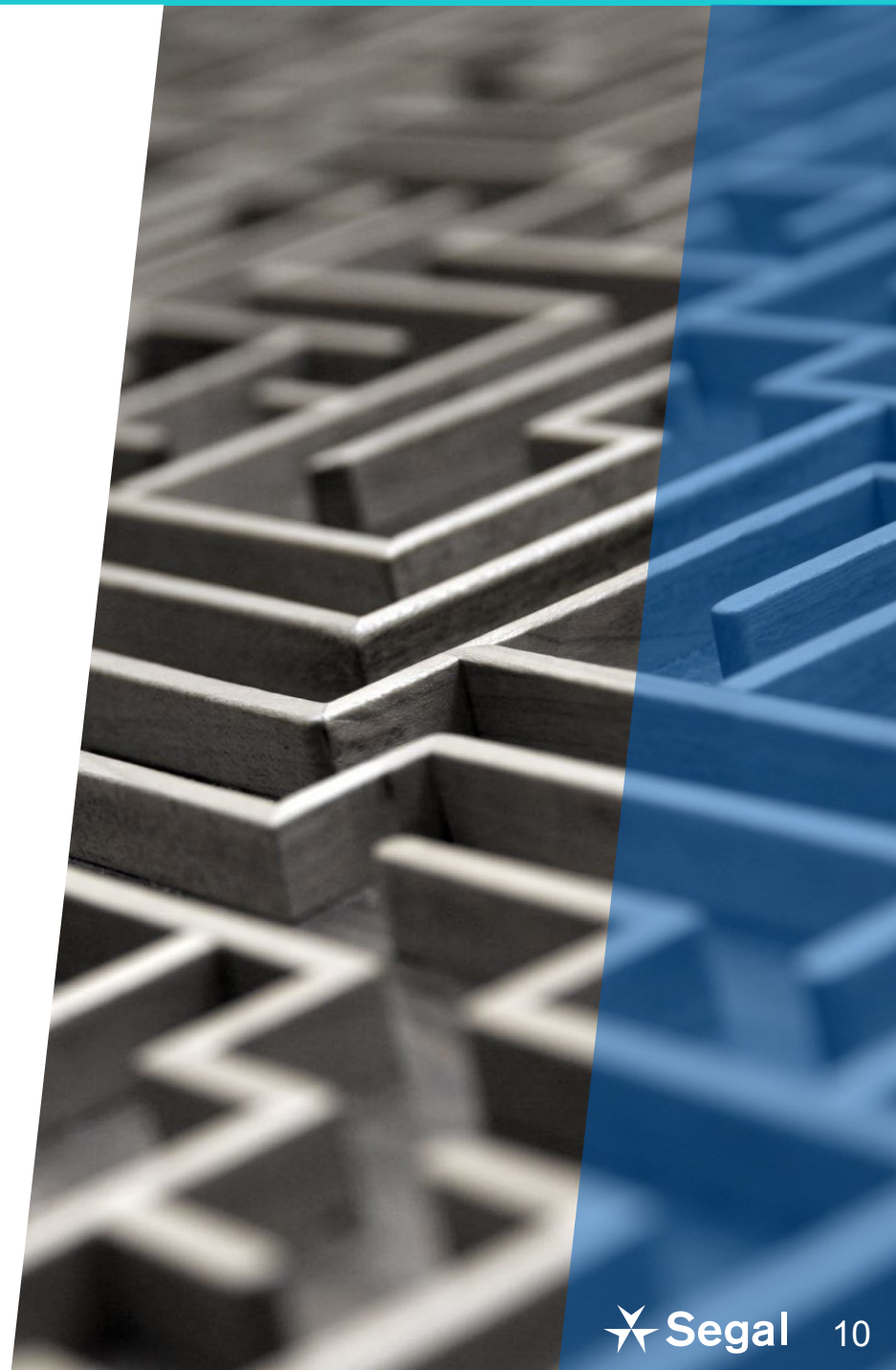
Limit on Application

- The *Loper Bright* holding does not apply when a particular statute properly delegates authority to an agency
- In such an instance, a court must respect an agency's action within that delegation
- However, it is not always clear whether a statute contains an express delegation of authority

Prospective Application?

Prospective Application?

- The Court applied the *Loper Bright* decision prospectively
- In theory, this protected any prior decisions relying on *Chevron* deference
- However, a decision the Court issued a few days later, *Corner Post v. Federal Reserve System*, appears to have significantly weakened the language in *Loper Bright* protecting old regulations

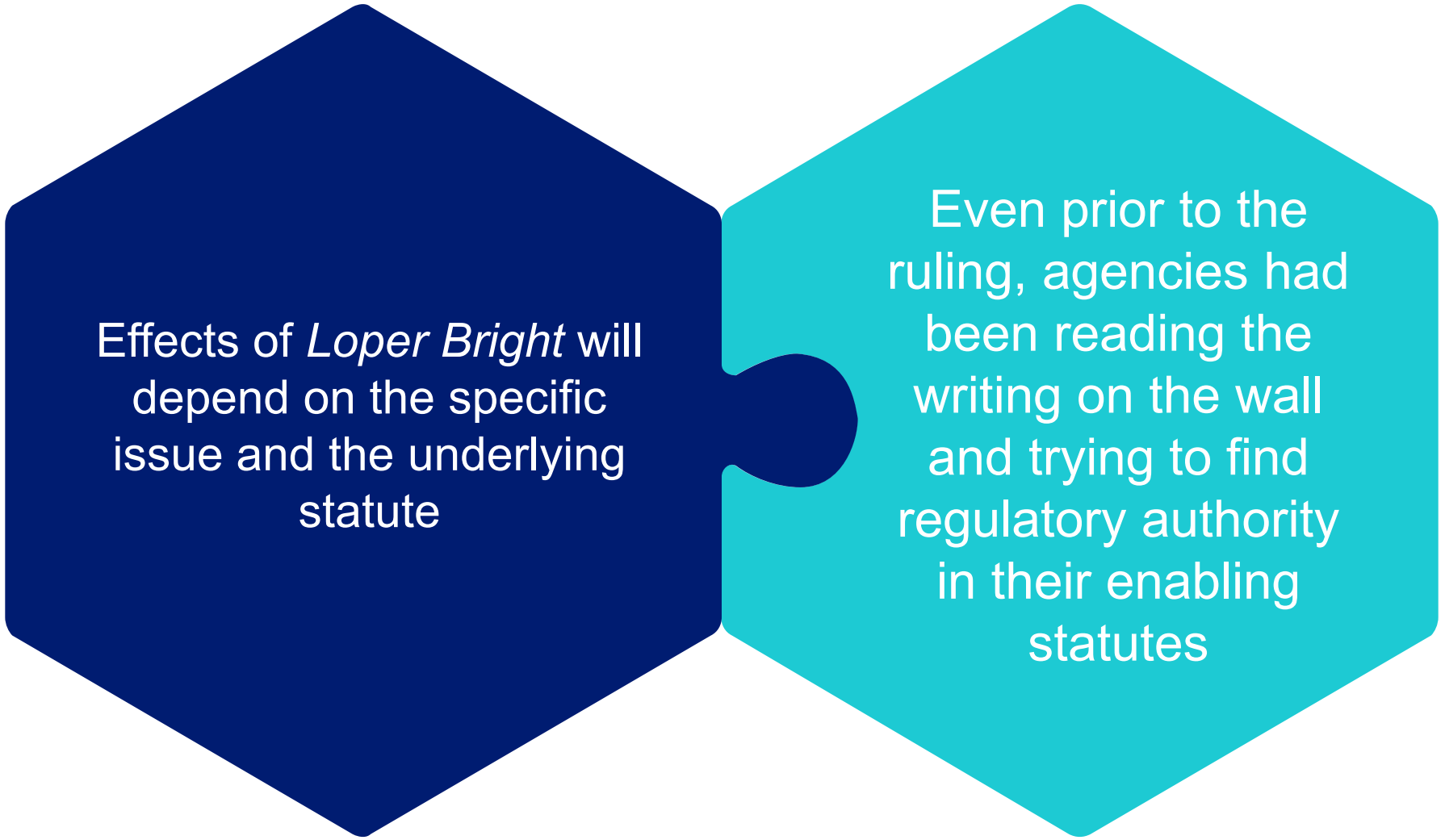


Corner Post v. Board of Governors

- On July 1, 2024, the Court held that the statute of limitations for challenging a regulation is six years from the time a plaintiff is injured by the regulation – rather than six years from when the regulation is issued
- This decision allows plaintiffs to create a new entity and claim that the statute of limitations begins running at the time the entity was created and not at the time the regulation became effective many years earlier
- The *Corner Post* ruling appears to open the door to an APA challenge that the statute of limitations would otherwise bar, so long as a newly formed entity brings the challenge

Potential Implications, Generally

Shake Up of the Regulatory World



Congress May Attempt to Write More Detailed Legislation

- However, Congress lacks the staff time or expertise to identify many of the issues that normally arise after the agencies and stakeholders start looking at the law's language and the law's impact
- Further, obtaining agreement among all parties on statutory language is already a difficult and sensitive matter

Sub-Regulatory Guidance and Enforcement

- Going forward, we may see fewer regulations and more reliance on sub-regulatory guidance
  - Sub-regulatory guidance, such as FAQs and IRS Notices, has never been subject to the APA; this type of guidance provides sponsors with useful interpretive guidance and some reliance – but it is not binding in court; so, the elimination of *Chevron* deference has no direct impact
  - Some stakeholders have criticized the agencies' use of sub-regulatory guidance as a way around the APA
- Agencies may undertake more enforcement activities instead of issuing regulatory guidance

Health Plan Regulations

Final ACA Section 1557 Regulation

- Following *Loper Bright*, three federal district courts held that portions of the ACA Section 1557 final regulation violated the APA – and enjoined enforcement of all or part of the regulation
- According to ACA Section 1557, entities receiving federal financial assistance from HHS cannot discriminate on the basis of race, color, national origin, sex, age or disability regarding health programs
  - Under the final rules issued on May 6, 2024, effective for plan years beginning on or after January 1, 2025, plans cannot exclude or limit services related to gender-affirming care and must have must implement certain administrative, training, accessibility and notice requirements
- Several states sued HHS seeking to block enforcement of the final regulations and to stay the effective date, arguing that the regulations' redefinition of sex discrimination was, among other things, unlawful under the APA

Final ACA Section 1557 Regulation (Continued)

- In *Tennessee v. Becerra*, a Mississippi District Court ruled there was a substantial likelihood that HHS exceeded its statutory authority when it interpreted the phrase "on the basis of sex" in Title IX
  - The Court stayed the effective date of the regulation nationwide as to certain provisions, in so far as they extend "discrimination on the basis of sex" to include gender identity
  - It also enjoyed HHS on a nationwide basis from implementing or enforcing the provisions as to gender identity
- In *Texas v. Becerra*, a Texas District Court invoked *Loper Bright* to stay the entire final regulation in Texas and Montana
- Likewise, in *Florida v. Becerra*, a Florida District Court enjoined HHS from enforcing the entire final rule in Florida

Preventive Services Coverage Requirements

- In *Braidwood Management, Inc. v. Becerra,* plaintiffs challenged the ACA's preventive services mandate on the grounds that it violates the US Constitution because members of the United States Preventive Services Task Force (USPSTF) were not appointed consistent with Article II's Appointments Clause
- This mandate requires plans to cover certain preventive services with no cost-sharing on an in-network basis, relying on preventive services recommendations from three entities:
  - USPSTF, which gives "A" or "B" ratings for specific evidence-based items and services
  - The Health Resources and Services Administration (HRSA), which has guidelines on preventive care and screening for infants, children, adolescents and women
  - The Advisory Committee on Immunization Practices (ACIP), which issues recommendations on immunizations

Preventive Services Coverage Requirements (Continued)

- Following several years of litigation, on June 21, 2024 (prior to the *Loper Bright* ruling), the Fifth Circuit found that the USPSTF members were not properly appointed under Article II and rejected the argument that ratification by the Secretary of HHS could cure this constitutional defect
  - However, the court disagreed with the district court's remedy of a national injunction and concluded that the ruling applied only to the plaintiffs in the case at hand
- The Fifth Circuit also found that HHS has authority to ratify the ACIP and HRSA recommendations, but reserved judgment on whether it had effectively done so – and remanded this issue back to the district court
- Nevertheless, the Fifth Circuit ruling opened the door to additional challenges to the authority of the three entities responsible for announcing preventive services recommendations – the regulations of which are no longer entitled *Chevron* deference

The Qualifying Payment Amount (QPA)

- On August 2, 2024, in *Texas Medical Association v. HHS*, the Fifth Circuit ruled that the 2022 regulation defining the QPA under the No Surprises Act (NSA) exceeded the agencies' statutory authority
- The NSA established an independent dispute resolution (arbitration) process for resolving payment disputes between plans and providers with regard to out-of-network rates for emergency services and certain non-emergency services, as defined by the NSA
  - The NSA requires the calculation of the QPA, which is essentially the median rate the insurer would pay for similar services in-network in the same geographic area

The Qualifying Payment Amount (QPA) (Continued)

- The lawsuit challenged the regulation requiring that, in resolving disputes, arbitrators consider the QPA first and non-QPA factors (such as the providers level of training and market share) as a secondary matter, and restricted the ways in which arbitrators can consider non-QPA factors
  - The plaintiffs argued, and the Texas District Court agreed, that the regulation inappropriately limited an arbitrator's discretionary authority to consider how to balance all factors specified in the NSA

The Qualifying Payment Amount (Continued)

- Applying *Loper Bright*, the Fifth Circuit ruled that the agencies are not entitled to deference and had acted contrary to the text of the NSA at issue
  - The Fifth Circuit explained that the NSA already specifies substantive standards for the dispute resolution process – and, therefore, the regulation unlawfully supplanted the statutory language
- The Fifth Circuit vacated the challenged provisions

Copay Accumulators

- Rx drug manufacturers often provide coupons to patients to help with the cost of a drug at the pharmacy, particularly for high-cost brand name or specialty drugs
- A 2021 HHS regulation allows plans to exclude the value of these coupons in determining a participant's maximum out-of-pocket amount
- In 2022, the HIV and Hepatitis Policy Institute, the Diabetes Patient Advocacy Coalition and the Diabetes Leadership Council sued HHS over this policy – and in 2023, the District Court for DC found the guidance arbitrary and capricious because it authorized a choice of conduct based on contradictory interpretations of the same statute; the court vacated the regulation

Copay Accumulators (Continued)

- HHS stated in a subsequent court filing that it "intends to address, through rulemaking, the issues left open by the Court's opinion, including whether financial assistance provided to patients by drug manufacturers qualifies as "cost sharing" under the Affordable Care Act"
- HHS will undoubtedly consider the lack of *Chevron* deference in proposing a new rule

Other health benefits regulations that could be challenged in the wake of *Loper Bright*

- The recently published updated regulations implementing the Mental Health Parity and Addiction Equity Act
- Other No Surprises Act regulations, such as pending guidance addressing the advance EOB requirement
- Treasury/IRS guidance defining flexible spending account and health reimbursement arrangement requirements
- HHS's rules interpreting the Inflation Reduction Act

Retirement Plan Regulations

ESG Regulation

- Following *Loper Bright*, on July 18, 2024, the Fifth Circuit Court of Appeals vacated a District Court's ruling upholding the Biden administration's November 2022 final rule repudiating Trump-era rules on financial factors in selecting plan investments (known as the environmental, social, and governance (ESG) rule) and the fiduciary duties that apply to proxy voting and the exercise of shareholders rights
- Under the rule, fiduciaries may treat ESG factors as directly related to risk and reward opportunity, and ESG-focused investment options could be used as a plan's qualified default investment alternative (QDIA)
- There is ongoing litigation (in addition to legislative efforts) to block this rule

ESG Regulation (Continued)

- Specifically, a group of 26 attorneys general from Republican-led states sued in *State of Utah v. Walsh*, seeking to invalidate the ESG rule by arguing that it violates the APA and ERISA
- On September 21, 2023, Trump-appointed Judge Matthew Kacsmaryk of the Northern District of Texas granted the DOL's motion for summary judgment – holding that the Final Rule is consistent with ERISA and a reasonable exercise of the DOL's rulemaking authority
- In vacating the Texas District Court's ruling (case is now entitled *State of Utah v. Su*), the Fifth Circuit noted that that the District Court had relied on *Chevron* in deferring to the DOL's analysis and finding that the DOL properly promulgated the rule
- The Fifth Circuit remanded the case to the District Court for reconsideration in light of *Loper Bright*

DOL's Retirement Security Rule

- Texas District Courts have issued nationwide stays in lawsuits challenging the DOL's April 2024 rule defining who is considered an investment advice fiduciary for purposes of ERISA and proposed amendments to class prohibited transaction exemptions available to investment advice fiduciaries
- The so-called "fiduciary rule" closed the loophole for "one-time advice", providing that such advice can be treated as fiduciary investment advice if an investment advice fiduciary standard the rule describes is otherwise satisfied
- In 2016, the DOL promulgated a similar rule – which the Fifth Circuit in its 2018 *Chamber of Commerce v. Dept. of Labor* ruling struck down as arbitrary and capricious under *Chevron*
- The new regulation was scheduled to be effective on September 23, 2024

DOL's Retirement Security Rule (Continued)

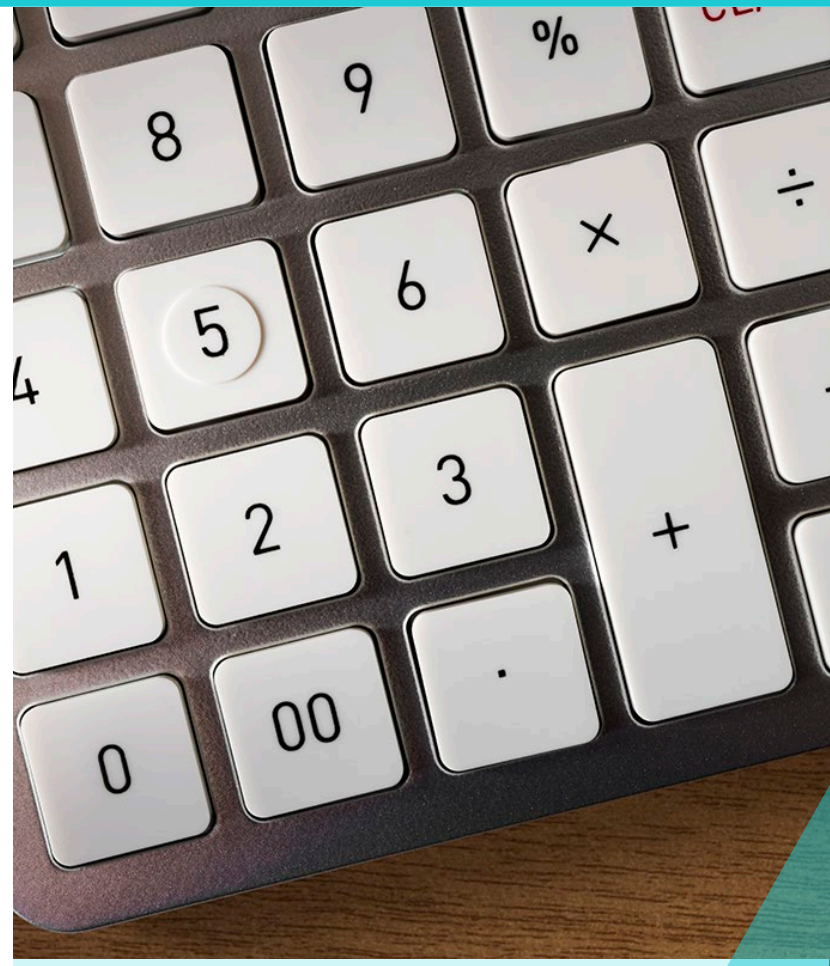
- Plaintiffs filed two lawsuits challenging the rule soon after DOL issued it, seeking to vacate the rule (and related prohibited transaction exemptions) as exceeding DOL's authority – and requesting that the courts stay the effective date
  - *Federation of Americans for Consumer Choice v. DOL* was filed the Eastern District of Texas on May 2, 2024
  - *American Council of Life Insurers v. DOL* was filed in the Northern District of Texas on May 24, 2024
- The District Courts issued nationwide stays in each case shortly after the *Loper Bright* ruling
- The opinion of District Court for the Northern District of Texas stated that the plaintiffs are "virtually certain" to succeed in their claims against DOL

Conditions for Special Financial Assistance

- The American Rescue Plan Act of 2021 (ARPA) provided Special Financial Assistance (SFA) for troubled multiemployer pension plans – with Congress delegating authority to the PBGC to issue "reasonable conditions" for SFA applications and for withdrawal liability calculated by SFA recipients
- On July 8, 2022, the PBGC issued a final rule detailing the eligibility criteria, application process, and certain restrictions and conditions associated with the use of SFA funds – and expressing PBGC's opinion that "payment of an SFA was not intended to reduce withdrawal liability or to make it easier for employers to withdraw"
- Therefore, the final rule requires that plans "phase-in" the SFA as a plan asset over a 10-year period, an approach that can significantly increase withdrawal liability.

Conditions for Special Financial Assistance (Continued)

- PBGC's rule has been challenged by debtors and other stakeholders in the Yellow Corporation Chapter 11 bankruptcy proceedings in Delaware
  - If the bankruptcy court sets aside PBGC's regulation, the SFA that plans received would count as plan assets and the plans' withdrawal liability claims against Yellow's assets would be significantly smaller – meaning that there would be larger payments for creditors and equity holders
- Without *Chevron*, the Court is not required to defer to PBGC's interpretation of what the law permits or requires regarding calculation of withdrawal liability, arguably making it easier for a judge to rule that PBGC's regulation is inconsistent with ERISA



Other retirement benefits regulations that could be challenged in the wake of *Loper Bright*

- SECURE 2.0 guidance, including:
  - Treasury's proposed rule on coverage requirements for long-term, part-time employees
- PBGC's revised actuarial assumptions and proposed rule on withdrawal liability interest rate assumption
- IRS rules on present value determinations

Thank You

Marcy Dunlap
Partner
Cohen Weiss and Simon
mdunlap@cwsny.com
212-356-0225

Julia Zuckerman
Vice President and
Senior Consultant
Segal
jzuckerman@segalco.com
917.674.0310