118TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
118–224

PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS ACT

SEPTEMBER 26, 2023.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5340]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 5340) to amend the Employee Retirement Income Security Act of 1974 to ensure that pension plans provide notice to participants and beneficiaries on risks associated with certain investments, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Providing Complete Information to Retirement Investors Act".

SEC. 2. BROKERAGE WINDOW DISCLOSURES.

(a) IN GENERAL.—Section 404(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)) is amended by adding at the end the following new paragraph:

"(7) NOTICE REQUIREMENTS FOR BROKERAGE WINDOWS.—

"(A) IN GENERAL.—In the case of a pension plan which provides for individual accounts and which provides a participant or beneficiary the opportunity to choose from designated investment alternatives, a participant or beneficiary shall not be treated as exercising control over assets in the account of the participant or beneficiary unless, with respect to any investment arrangement that is not a designated investment alternative, each

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time before such a participant or beneficiary directs an investment into, out of, or within such investment arrangement, such participant is notified of, and acknowledges, each element of the notice described under paragraph (B).

"(B) NOTICE.—The notice described under this paragraph is a four part information that is substantially similar to the following information:

"1. Your retirement plan offers designated investment alternatives prudently selected and monitored by fiduciaries for the purpose of enabling you to construct an appropriate retirement savings portfolio. In selecting and monitoring designated investment alternatives, your plan's fiduciary considers the risk of loss and the opportunity for gain (or other return) compared with reasonably available investment alternatives.
2. The investments available through this investment arrangement are not designated investment alternatives, and have not been prudently selected and are not monitored by a plan fiduciary.
3. Depending on the investments you select through this investment arrangement, you may experience diminished returns, higher fees, and higher risk than if you select from the plan's designated investment alternatives.
4. The following is a hypothetical illustration of the impact of return at 4 percent, 6 percent, and 8 percent on your account balance projected to age 67.

"(C) ILLUSTRATION.—The notice described under paragraph (B) shall also include a graph displaying the projected retirement balances of such participant or beneficiary at age 67 if the account of such individual were to achieve an annual return equal to each of the following:

"(i) 4 percent.

"(ii) 6 percent.

"(iii) 8 percent.".

(b) DESIGNATED INVESTMENT ALTERNATIVE DEFINED.—Section 3 of such Act (29 U.S.C. 1002) is amended by adding at the end the following new paragraph:

"(46) DESIGNATED INVESTMENT ALTERNATIVE.—

"(A) IN GENERAL.—The term 'designated investment alternative' means any investment alternative designated by a responsible fiduciary of an individual account plan described in subsection 404(c) into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts.

"(B) EXCEPTION.—The term 'designated investment alternative' does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by a responsible plan fiduciary.".

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on January 1, 2025.

PURPOSE

Employee benefit plans have one purpose: to provide employee benefits. Employee benefit plan assets have one purpose: to fund those benefits. The *Employee Retirement Income Security Act of 1974* (ERISA) was designed to ensure that the financial interests of participants and beneficiaries in their benefits do not take a back seat to advancing political and social interests. Some plan sponsors have added brokerage windows to self-directed individual retirement accounts covered by ERISA in order to allow participants to direct their investments in products not offered by the plan, including investments made for their environmental, social, and governance (ESG) benefits that could sacrifice return on investment or increase the risk associated with investment. H.R. 5340 requires plans to remind participants of the impact that differences in return on their retirement savings can make on their standard of living during retirement.

Committee Action

117TH CONGRESS

Second Session—Hearings

On February 26, 2022, the Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, held a hearing titled "Improving Retirement Security and Access to Mental Health Benefits," which discussed the Biden administration's attempt to put its radical environmental and social agendas above the financial interests of retirees by prioritizing ESG factors when investing retirement plan assets. Testifying before the Subcommittee were Dr. Andrew Biggs, Resident Scholar, American Enterprise Institute, Washington, D.C.; Karen Handorf, Senior Counsel, Berger Montague, Washington, D.C.; Amy Matsui, Director of Income Security and Senior Counsel, National Women's Law Center, Washington, D.C.; and Aron Szapiro, Head of Retirement Studies and Public Policy, Morningstar Investment Management, Washington, D.C.

On June 14, 2022, the Committee on Education and Labor held a hearing titled "Examining the Policies and Priorities of the U.S. Department of Labor" to review the Fiscal Year (FY) 2023 budget priorities of the U.S. Department of Labor (DOL). Testifying before the Committee was the Honorable Martin J. Walsh, Secretary, Department of Labor, Washington D.C. At this hearing, concerns were discussed regarding DOL's proposed rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," including the Biden administration's efforts to undermine an investment fiduciary's duties of prudence and loyalty when selecting and monitoring investments for ERISA plans, and the administration's view on incorporating ESG into the administration of ERISA plans.

Second Session—Legislative Action

On March 18, 2022, Rep. Andy Barr (R–KY) introduced the *Ensuring Sound Guidance Act* (H.R. 7151) with Rep. Rick Allen (R–GA) as an original co-sponsor. The bill was referred to the Committee on Education and Labor and the Committee on Financial Services.

118TH CONGRESS

First Session—Hearings

On June 7, 2023, the Committee on Education and the Workforce held a hearing on "Examining the Policies and Priorities of the U.S. Department of Labor" to review the FY 2023 budget priorities of DOL. Testifying before the Committee was the Honorable Julie Su, Acting Secretary, DOL, Washington, D.C. At this hearing, DOL's December 1, 2022, rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" was discussed, including concerns regarding the Biden administration's efforts to undermine an investment fiduciary's duties of prudence and loyalty when selecting and monitoring investments for ERISA plans and the administration's support for incorporating ESG into the administration of ERISA plans.

First Session—Legislative Action

On February 7, 2023, Rep. Barr introduced a joint resolution of disapproval (H.J. Res. 30) under the *Congressional Review Act* (CRA) to nullify the Biden administration's DOL rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." The resolution rescinds the rule and would have the effect of reinstating the Trump administration's November 13, 2020, rule on ESG investing for ERISA plans titled "Financial Factors in Selecting Plan Investments." On February 28, 2023, the House of Representatives passed H.J. Res. 30 by a vote of 219–210, with Senate passage on March 1 by a vote of 50–46. On March 20, the President vetoed the measure. On March 23, the House failed to override the veto by a vote of 219–200.

On June 21, 2023, Rep. Barr introduced the *Ensuring Sound Guidance Act* (H.R. 4237) with Reps. Allen and Bill Huizenga (R–MI) as original co-sponsors.

On September 5, 2023, Rep. Jim Banks (R–IN) introduced the *Providing Complete Information to Retirement Investors Act* (H.R. 5340). The bill was referred to the Committee on Education and the Workforce. On September 14, 2023, the Committee considered H.R. 5340 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 23 to 19. The Committee adopted an Amendment in the Nature of a Substitute (ANS) offered by Rep. Banks that made minor technical changes.

COMMITTEE VIEWS

INTRODUCTION

H.R. 5340, the *Providing Complete Information to Retirement Investors Act*, affects participant-directed ERISA individual account plans that allow participants to select investments from a menu of designated investment alternatives and through brokerage windows. The bill requires these plans to give critically important information, by means of an online notice at the time investments are directed, to participants before investing through a brokerage window. H.R. 5340 protects the retirement savings of the U.S. workforce, which is the purpose of ERISA.

THE DUTY OF PRUDENCE AND LOYALTY UNDER EXISTING LAW

Under ERISA, an investment fiduciary must act solely in the interest of participants and beneficiates and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan (the "exclusive purpose rule").[1] Courts have held that ERISA's exclusive purpose rule requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries"[2] and to make decisions "with an eye single to the interests of participants and beneficiaries."[3]

In 2014, the U.S. Supreme Court unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary

[1] ERISA §§403(c), 404(a); 29 U.S.C. §§1103(c), 1104(a). Hereinafter, this fiduciary duty is referred to as the "exclusive purpose rule."
[2] Donavan v. Mazzola, 716 F.2d 1226, 1238 (9th Cir. 1983) (citation omitted).
[3] Donavan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir. 1982).

standards.[4] The Court held that ERISA's duty of prudence does not vary depending on a non-pecuniary goal, even if that goal is set out in the plan document.[5] The Court stated,

> Read in the context of ERISA as a whole, the term 'benefits' . . . must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. . . . The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.[6]

The Court's holding applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG, even in a tiebreaker situation in which there are two economically equal investments. Fiduciaries who offer participant-directed investing through brokerage windows allow participants to exercise their investing preferences (including ESG preferences) through the brokerage window to purchase investments that might not have passed muster under ERISA's duties of prudence and loyalty.

ERISA also requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character."[7] Thus, fiduciaries are held to an expert prudence standard. Courts have held that the duty of prudence requires an ERISA fiduciary to monitor the appropriateness of investments continually.[8] However, for the last 30 years, there have been attempts to erode ERISA's principles of prudence and loyalty in order to promote benefits other than the financial interest of participants and beneficiaries (i.e., "collateral benefits").

BROKERAGE WINDOWS IN PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

Under ERISA, individual account plans (also known as defined contribution plans) may allow participants to direct their investments among designated investment alternatives that are prudently selected and monitored by the plan's investment fiduciaries.[9] Some defined contribution plans also offer brokerage windows or self-directed brokerage accounts, allowing participants to select investments beyond those designated investment alternatives. Brokerage windows are a common means for ERISA-defined contribution plans to satisfy participant demand for ESG-type investments that might not be prudent as a designated investment alternative.

When a participant invests through brokerage windows, the participant bypasses an ERISA plan's investment expertise. The par-

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[4] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) (rejecting a "presumption of prudence" for acquisition and holding of employer stock based on the non-pecuniary benefit of employee stock ownership).

[5] *Id.* at 420 ("We cannot accept the claim . . . that the content of ERISA's duty of prudence varies depending on the specific nonpecuniary goal set our in an ERISA plan.")

[6] *Id.* at 421.

[7] ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

[8] Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828–29 (2015) (confirming ERISA fiduciary duty to monitor and remove imprudent trust investments).

[9] 29 C.F.R. § 2550.404c–1(d)(2)(iv); 29 C.F.R. § 2550.404a–5(f).

ticipant's investment selection is not subject to any guardrails on ESG investments, such as the duty of prudence and loyalty under ERISA. As a result, participants may experience lower risk-adjusted returns and higher fees. An aggregate difference of 2 percent in diminished investment returns and higher fees over a 40-year savings period can result in a retirement balance that is 40 percent lower.

BROKERAGE WINDOWS DISTINGUISHED FROM DESIGNATED INVESTMENT ALTERNATIVES

DOL guidance distinguishes between brokerage windows and a "designated investment alternative." DOL generally defines a "designated investment alternative" as "any investment alternative designated by the covered plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts." A designated investment alternative "does not include brokerage windows, self-directed brokerage accounts, or similar arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan." [10]

An ERISA fiduciary is clearly subject to the duties of prudence and loyalty when selecting and monitoring designated investment alternatives into which participants and beneficiaries may direct the investment of assets held in or contributed to their accounts.[11] On the other hand, guidance on fiduciary duty with respect to the selection and monitoring of brokerage windows is limited. One view is that a fiduciary is subject to the duties of prudence and loyalty when selecting and monitoring a brokerage window as an investment vehicle with respect to the service provider and the fees charged to participants but is not responsible for a participant's investment directions that are made through a brokerage window. However, it is not clear that implementing the brokerage window itself as an investment vehicle available to participants under an ERISA plan is subject to the duty of prudence and loyalty.[12]

Case law on brokerage windows in individual account plans is also sparse.[13] In *Moitoso* v. *FMR LLC*, 451 F. Supp.3d 189 (D.

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[10] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 65,910 (Oct. 20, 2010) (adding 29 C.F.R. § 2550.404a–5 "Fiduciary requirements for disclosure in participant-directed individual account plans").

[11] 29 C.F.R. § 2550.404c–1(d)(2)(iv); 29 C.F.R. § 2550.404a–5(f).

[12] *Id*. 29 C.F.R. § 2550.404a–5(h)(4) (providing that a brokerage window is not itself a designated investment alternative because it is not an investment specifically identified as available under the plan by the plan fiduciary). *But see* ERISA ADVISORY COUNCIL, REPORT TO THE HONORABLE MARTIN WALSH, UNITED STATES SECRETARY OF LABOR: UNDERSTANDING BROKERAGE WINDOWS IN SELF-DIRECTED RETIREMENT PLANS (Dec. 2021) (referred to herein as the "2021 EAC Report") (reporting that plan sponsor representatives may decline to offer self-directed brokerage windows as being unsuitable for that particular employer's population (p.12); reporting ERISA fiduciary testimony that the decision to add a brokerage window is a fiduciary decision (p.15); reporting the testimony that the decision to implement a brokerage window is a fiduciary decision even if it is hardwired in the plan document (p. 26, p. 28); reporting testimony that even if a brokerage account is hardwired in the plan document, *Dudenhoeffer* suggests that the duty of prudence trumps (p. 28)).

[13] Few cases have analyzed the extent of an ERISA fiduciary's duties with respect to a brokerage window. *See* Moitoso v. FMR LLC, 451 F. Supp. 3d 189, 208 (D. Mass. 2020) (reviewing limited authority and stating "there is a significant lack of clarity regarding the duties a fiduciary owes with respect to funds within a brokerage window); *see also* Larson v. Allina Health, 350 F. Supp. 3d 780, 799 (D. Colo. 2020) (refusing to dismiss claims against a fiduciary for failing to monitor funds offered through a mutual fund window limiting selections to 300 mutual fund options). Other court decisions have stated without analysis that investments offered within brokerage windows were not monitored. *See, e.g.*, Ramos v. Banner Health, 467 F. Supp. 3d 1067, 1083 (D. Colo. 2020) (finding "[Plan fiduciaries] did not monitor investments available through BrokerageLink nor were they required to do so.").

Mass. 2020), the court stated, "[I]n sum, there is a significant lack of clarity regarding the duties a fiduciary owes with respect to funds within a brokerage window." Existing case law suggests that an investment vehicle labeled by a plan as a brokerage window may nonetheless be subject to the same duties of prudence and loyalty to the extent that a plan fiduciary has significantly limited the selection of funds available through the window, causing such selections, in essence, to become designated investment alternatives.[14]

H.R. 5340 does not seek to disturb or change the duties of prudence and loyalty associated with brokerage windows (or designated investment alternatives) but only to remind participants and beneficiaries, when investing through true brokerage windows, their individual selections are not being selected or monitored by a fiduciary bound by ERISA's duties of prudence and loyalty. In that regard, however, ERISA implicitly affirms the prevailing view that under a true brokerage window, a participant's investment selections are not substantially winnowed, nor are they monitored by a fiduciary.

2021 EAC REPORT

In 2021, the Advisory Council on Employee Welfare and Pension Benefit Plans (EAC) published the first comprehensive study on brokerage windows in ERISA plans (2021 EAC Report).[15] The Study was informed by testimony from industry experts and provides an insight into the prevalence of brokerage windows and why plan sponsors are choosing to offer brokerage windows, including to provide opportunities for ESG investing. The study also raised concerns about whether all participants using brokerage windows understand the difference between investing through a brokerage window and investing through a plan's designated investment alternatives.

According to the Plan Sponsor Council of America, just over 23 percent of all ERISA individual account plans offer a brokerage window.[16] However, only 1.5 percent of ERISA assets are invested through brokerage windows.[17] Testimony before the EAC from recordkeepers indicated that 46 percent of plans that use Alight as a recordkeeper offer a brokerage window; 23 percent of plans that use Fidelity as their recordkeeper offer a brokerage window, and 20 percent of plans that use Vanguard as their recordkeeper offer a brokerage window.[18] Data presented to EAC demonstrated "an uptick in Millennials investing through brokerage windows,"[19] al-

[14] Moitoso v. FMR LLC, 451 F. Supp. 3d at 208–210 (holding that a brokerage window limiting investments to Fidelity's proprietary mutual fund menu was not itself a "brokerage window" and therefore Fidelity could face liability for failing to monitor funds offered through that window); Larson v. Allina Health, 350 F. Supp. 3d 780, 799 (D. Colo. 2020) (refusing to dismiss claims against a fiduciary for failing to monitor funds offered through a mutual fund window limiting selections to 300 mutual fund options).

[15] EAC, REPORT TO THE HONORABLE MARTIN WALSH, UNITED STATES SECRETARY OF LABOR: UNDERSTANDING BROKERAGE WINDOWS IN SELF-DIRECTED RETIREMENT PLANS (Dec. 2021) (hereinafter 2021 EAC Report).

[16] *Id.* at 13 (citing the Plan Sponsor Council of America's 63rd Annual Survey of Profit Sharing and 401(k) Plans).

[17] 2021 EAC Report, *supra* note 15.

[18] *Id*. at 16.

[19] *Id*. at 44.

though recordkeepers reported low utilization overall (e.g., 3 percent for Fidelity [20] and ½ percent for Vanguard [21]).

According to plan sponsor representatives interviewed for the 2021 EAC Report, brokerage windows allow participants to customize their portfolios outside of the designated investment options, including investing for collateral goals associated with ESG.[22] Recordkeepers similarly told EAC that plan sponsors add brokerage windows to their plans in response to participant requests for broader investment opportunities, including ESG funds, religion-compliant funds, and other investment options.[23] A representative of brokerage service providers explained that plan sponsors often add brokerage windows to accommodate participants who want to customize their investment portfolio beyond the designated investment alternatives, such as investing in a "green" fund.[24] A representative from a large trade group with investment fiduciary members also stated that brokerage windows were offered in plans managed by their investment fiduciary members to "keep participants with specialized investment needs or preferences in the plan, such as faith-based limitations on investments and social policy preferences." [25]

One issue raised several times in the 2021 EAC Report was a participant's ability to distinguish between investments that are designated investment alternatives and brokerage windows. One professional investment fiduciary recognized "the challenges of ensuring participants understand the difference in the fiduciary's role with respect to the designated investment alternatives within the core investment menu in contrast with the limited role over a brokerage window." According to the report, the professional investment fiduciary "thinks it should be clear to participants that there is no endorsement from the fiduciary of investments within a brokerage window, and this may be an area where . . . further guidance [is needed] on what is expected from plan fiduciaries in relation to brokerage windows." [26] According to the report, Mr. Kevin Mahoney, a retirement consultant, also raised concerns that it "is important for participants to understand the additional risks associated with [brokerage windows.]" [27] A preeminent attorney specializing in ERISA fiduciary duties suggested to EAC that participants be educated that there is no monitoring and no prudent selection of the investments available through a brokerage window and that there is a risk the participant could make an investment mistake.[28] An attorney representing the American Benefits Council acknowledged that "the retirement community" understands that designated investment alternatives are "blessed" by the employer but

[20] *Id.* at 32.
[21] *Id.* at 35.
[22] *Id.* at 11 ("All plan sponsor representatives testified that the self-directed brokerage window afforded plan sponsors the opportunity to allow participants to customize their portfolios in was that the standard investment options would not afford. For example, if participants sought to invest in options that supported specific policy goals, such as [ESG] or Sharia investing, those participants would have a greater chance of finding those investment opportunities in the self-directed brokerage window because such investment options would be available, even if few participants elected to invest in them.").
[23] *Id.* at 16.
[24] *Id.* at 21.
[25] *Id.* at 23.
[26] *Id.* at 13 (quoting Kathleen Kelly from Compass Financial Partners).
[27] *Id.* at 14.
[28] *Id.* at 27 (quoting Fred Reisch).

that investments through brokerage windows are not.[29] H.R. 5340 seeks to extend that understanding to the participants and beneficiaries who choose to invest through a brokerage window.

The 2021 EAC Report noted broad consensus among the recordkeepers interviewed that "investment-specific disclosures for brokerage accounts would not be feasible, given the open-ended investment environment" and existing disclosure requirements suffice.[30] An attorney specializing in ERISA and representing the American Benefits Council testified that investment-specific disclosures would be unworkable for most plan sponsors.[31]

While the 2021 EAC Report did not recommend mandating additional disclosures through a brokerage window, H.R. 5340 does not impose investment-specific disclosure requirements, nor does it duplicate existing disclosure requirements. The notice required under H.R. 5340 distinguishes between fiduciary oversight associated with a plan's designated investment alternatives and a brokerage window option. This type of notice does not seem to have been considered by EAC in its report.

IMPACT ON THE RETIREMENT SAVINGS OF AMERICA'S WORKERS

A participant's decision to bypass designated investment alternatives may not be harmless. The decision to self-select investments through a brokerage window may result in increased risk and lower return on retirement savings. This is imprudent when a participant has a choice to invest through professionally selected and monitored designated investment alternatives. The cumulative harm, over a lifetime of retirement saving, could have a substantial adverse impact on a participant's lifestyle and welfare during his or her retirement years.

H.R. 5340, PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS ACT

H.R. 5340 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce while preserving access to brokerage windows offered in self-directed individual account plans. The bill requires plans to inform participants of any designated investment alternatives and the significance of those alternatives for retirement savings. The bill also quantifies for participants the impact that a reduction in income on their retirement savings will have over a lifetime of saving.

CONCLUSION

To protect the financial interests of participants and beneficiaries in their benefits, and to reinforce ERISA's existing duties of prudence and loyalty, H.R. 5340 ensures that participants who self-direct their retirement savings through brokerage windows and who have access to designated investment alternatives under their plans will be informed of the significant differences of investing through a self-directed brokerage account as compared to a designated investment alternative and the potential long-range impact on their retirement savings.

[29] *Id.* at 25.
[30] *Id.* at 20.
[31] *Id.* at 24.

SUMMARY

H.R. 5340 SECTION-BY-SECTION SUMMARY

Section 1. Short title

- Names the bill as the "Providing Complete Information to Retirement Investors Act"

Section 2. Employee Retirement Income Security Act of 1974 Amendment

Section 2(a) amends ERISA Section 404(c) by adding a new paragraph "Notice Requirements for Brokerage Windows" with the provisions discussed below.

- A notice requirement must be met for certain plans to qualify for relief under ERISA Section 404(c)(1) with respect to any investment that is not a designated investment alternative.
- The notice applies to a pension plan that provides individual accounts and provides a participant or beneficiary the opportunity to choose from designated investment alternatives.
- The notice applies to any participant or beneficiary directing an investment into, out of, or within an investment that is not a designated investment alternative each time that the participant or beneficiary makes such a direction.
- The participant or beneficiary is required, as part of the notice process, to acknowledge each element of the notice.
- The notice is to be given sequentially in four separate parts, and the participant must acknowledge each part. The notice may be tailored to the plan's situation as long as it is substantially similar to the wording in the statute.
- The four parts of the notice are as follows:
    1. Your retirement plan offers designated investment alternatives prudently selected and monitored by fiduciaries for the purpose of enabling you to construct an appropriate retirement savings portfolio. In selecting and monitoring designated investment alternatives, your plan's fiduciary considers the risk of loss and the opportunity for gain (or other return) compared with reasonably available alternative investments.
    2. The investments available through this investment arrangement are not designated investment alternatives, and have not been prudently selected, and are not monitored by a plan fiduciary.
    3. Depending on the investments you select through the investment arrangement, you may experience diminished returns, higher fees, and higher risk than if you select from the plan's designated investment alternatives.
    4. The following is a hypothetical illustration of the impact of return at 4 percent, 6 percent, and 8 percent on your retirement balance projected to age 67.
- The bill requires a graph to be displayed along with the fourth element of the notice to display the projected retirement balance (using the latest available account balance) at age 67 based on an annual return of 4 percent, 6 percent, and 8 percent.

Section 2(b) amends ERISA by adding a definition of "designated investment alternative" as "any investment alternative designated by a responsible fiduciary of an individual account plan described in section 404(c) into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts," but this does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by a responsible plan fiduciary.

Section 2(b) also provides that the amendments made by the bill under subsection (a) (the notice requirements) take effect on January 1, 2025.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)3 of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 5340 takes important steps to protect the interests of the workforce in their benefits provided under ERISA plans with respect to brokerage windows. H.R. 5340 is applicable only to investments subject to ERISA and therefore does not affect the legislative branch.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4), the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the Congressional Budget and Impoundment Control Act of 1974.

EARMARK STATEMENT

H.R. 5340 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: 9/14/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call:11 Bill: H.R. 5340 Amendment Number: n/a

Disposition: Adopted by a Full Committee Roll Call Vote (23-19)

Sponsor/Amendment: Rep. Banks / BANKS_130 MOTION TO REPORT

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. GRIJALVA (AZ)		X	
Mr. THOMPSON (PA)	X			Mr. COURNTEY (CT)		X	
Mr. WALBERG (MI)	X			Mr. SABLAN (MP)		X	
Mr. GROTHMAN (WI)	X			Ms. WILSON (FL)		X	
Ms. STEFANIK (NY)	X			Ms. BONAMICI (OR)		X	
Mr. ALLEN (GA)	X			Mr. TAKANO (CA)		X	
Mr. BANKS (IN)	X			Ms. ADAMS (NC)		X	
Mr. COMER (KY)			X	Mr. DESAULNIER (CA)		X	
Mr. SMUCKER (PA)	X			Mr. NORCROSS (NJ)		X	
Mr. OWENS (UT)	X			Ms. JAYAPAL (WA)		X	
Mr. GOOD (VA)	X			Ms. WILD (PA)		X	
Mrs. MCCLAIN (MI)	X			Ms. MCBATH (GA)			X
Mrs. MILLER (IL)	X			Mrs. HAYES (CT)		X	
Mrs. STEEL (CA)	X			Ms. OMAR (MN)		X	
Mr. ESTES (KS)	X			Ms. STEVENS (MI)		X	
Ms. LETLOW (LA)			X	Ms. LEGER FERNÁNDEZ (NM)		X	
Mr. KILEY (CA)	X			Ms. MANNING (NC)		X	
Mr. BEAN (FL)	X			Mr. MRVAN (IN)		X	
Mr. BURLISON (MO)	X			Mr. BOWMAN (NY)		X	
Mr. MORAN (TX)	X						
Mr. JAMES (MI)	X						
Ms. CHAVEZ-DEREMER (OR)	X						
Mr. WILLIAMS (NY)	X						
Ms. HOUCHIN (IN)	X						

TOTALS: Ayes: 23 Nos:19 Not Voting: 3

Total: 45 / Quorum:42 / Report:

(25 R - 20 D)

Statement of General Performance Goals and Objectives

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 5340 is to protect the interests of the workforce in their benefits provided under ERISA plans with respect to brokerage windows.

Duplication of Federal Programs

No provision of H.R. 5340 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Statement of Oversight Findings and Recommendations of the Committee

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

Required Committee Hearing and Related Hearings

In compliance with clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the following hearing held during the 118th Congress was used to develop or consider H.R. 5340: "Examining the Policies and Priorities of the U.S. Department of Labor".

New Budget Authority and CBO Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 5340 from the Director of the Congressional Budget Office:

At a Glance

Pension Legislation

As ordered reported by the House Committee on Education and the Workforce on September 14, 2023

On September 14, 2023, the House Committee on Education and the Workforce ordered to be reported four bills related to the investments of retirement plans. This single, comprehensive document provides estimates for those bills.

None of the bills would affect direct spending or revenues, so pay-as-you-go procedures would not apply. All four bills would increase spending subject to appropriation by insignificant amounts. None of the bills would increase on-budget deficits in any of the four consecutive 10-year periods beginning in 2034. Two of the bills would impose private-sector mandates but none would impose intergovernmental mandates. Details of the estimated costs of each bill are discussed in the text below.

Bill	Change in the Deficit Over the 2023-2033 Period ($ in Millions)	Changes in Spending Subject to Appropriation Over the 2023-2028 Period (Outlays, $ in Millions)	Mandate Effects?
H.R. 5337	0	*	Yes
H.R. 5338	0	*	Excluded
H.R. 5339	0	*	No
H.R. 5340	0	*	Yes

* = between zero and $500,000.

Bill summaries: On September 14, 2023, the Committee on Education and the Workforce ordered to be reported four bills related to the investments of retirement plans. This document provides estimates for each piece of legislation.

Generally, the bills would:

- Change the standards that the fiduciaries of private pension plans must use when making investment decisions, including decisions on whether and how to vote proxies and decisions about selecting plan employees.
- Require plans to provide information to participants investing in brokerage windows, which allow participants to select from a broad variety of investments.

Background: Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries of private pension plans must act in the interest of plan participants, including when making investment decisions. The rule "Financial Factors in Selecting Plan Investments," issued on November 13, 2020, required fiduciaries to make investment decisions based solely on "pecuniary factors." That rule included a "tiebreaker" standard, under which fiduciaries could consider other benefits when "alternative investment options are economically indistinguishable." A related rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," issued on December 16, 2020, guided whether and how fiduciaries were to exercise proxy votes. That rule stated that fiduciaries must make such decisions "for the exclusive purpose of providing benefits to participants."

On December 1, 2022, the Department of Labor (DOL) issued a new rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," which clarified how plan fiduciaries may consider climate change and other environmental, social, or governance (commonly referred to as ESG) factors when making investment decisions. Under the new regulation, fiduciaries may consider "the economic effects of climate change and other environmental, social, or governance factors," but investment decisions "may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk."

For additional background, see CBO's estimate of H.J. Res. 30, which disapproved the 2022 rule. The resolution was approved by the Congress but vetoed by the President, so that rule remains in effect.

Estimated Federal cost: The costs of the legislation fall within budget function 600 (income security).

Basis of estimate: CBO and the staff of the Joint Committee on Taxation (JCT) estimate that none of the bills would affect expected revenues or net direct spending. CBO estimates that implementing each of the bills would affect spending subject to appropriation. This cost estimate does not include any effects of interaction among the bills. If all four bills were combined and enacted as a single piece of legislation, CBO expects that the net difference in estimated costs would be insignificant.

H.R. 5337, the Retirement Proxy Protection Act, would specify plans' obligations relating to proxy voting. It would reinstate many of the provisions included in the December 2020 rule "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights."

H.R. 5338, the No Discrimination in My Benefits Act, would require that any selection of plan employees or service providers be made "without regard to race, color, religion, sex, or national origin."

H.R. 5339, the RETIRE Act, would reinstate many of the provisions in the November 2020 rule "Financial Factors in Selecting Plan Investments."

H.R. 5340, the Providing Complete Information to Retirement Investors Act, would require the provision of additional information to plan participants before they select nonstandard investments. In self-directed pension plans, such as 401(k)s, participants generally select from a menu of designated investment alternatives offered by the plan. Some plans also offer "brokerage windows," which allow participants access to a broad variety of investments.

Direct spending and revenues: Enacting H.R. 5337, H.R. 5338, or H.R. 5339 could affect federal revenues if the amount that individuals or employers contribute to tax-preferred plans changed. Additionally, premiums (which are recorded as offsetting receipts and reduce direct spending) received by the Pension Benefit Guaranty Corporation could be affected because those premiums are based in part on the amount of plan assets.

However, because fiduciaries must maximize investment performance, CBO and JCT do not expect H.R. 5337, H.R. 5338, or H.R. 5339 to substantially affect investment outcomes. Projections of investment returns are inherently uncertain, but we expect an equally likely chance of small increases or small decreases in federal revenues and outlays stemming from this resolution. The new rule may induce individual employers and workers to raise or lower their pension contributions, but CBO and JCT project that total contributions will not change and thus there would be no effect on expected revenues and net direct spending.

Under H.R. 5340, plans would be required to warn participants in brokerage windows about the extra potential risk associated with those investments. CBO and JCT do not expect H.R. 5340 to significantly change participants' investment choices, and to the extent that they do change, we expect an equally likely chance of small increases or small decreases in federal revenues and outlays.

Spending subject to appropriation: CBO estimates that each of the bills would increase spending subject to appropriation by insignificant amounts, less than $500,000 over the 2023–2028 period. The administrative burden on DOL to issue the regulations associated with the legislation would be minimal. Based on experience with similar changes, CBO estimates that administrative costs would be insignificant. Any such spending would be subject to the availability of appropriated funds.

Pay-as-you-go considerations: None.

Increase in long-term net direct spending and deficits: None.

Mandates: H.R. 5337 would impose a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting ERISA plan fiduciaries from prioritizing a non-pecuniary objective when exercising shareholder rights. CBO estimates that the cost of the mandate would not exceed the private-sector threshold established in UMRA ($198 million in 2023, adjusted annually for inflation). The bill would not impose any intergovernmental mandates.

CBO has not reviewed H.R. 5338 for intergovernmental or private-sector mandates. Section 4 of UMRA excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that this legislation falls within that exclusion because it would prohibit discrimination in hiring or retaining personnel based on race, color, religion, sex, or national origin.

H.R. 5339 would not impose any private-sector or intergovernmental mandates as defined in UMRA.

H.R. 5340 would impose a private-sector mandate as defined in UMRA by requiring pension plans that offer brokerage windows to warn participants of potential risk associated with alternative investments. Because of the small burden associated with providing an additional warning, CBO estimates that the cost of the mandate would not exceed the private-sector threshold established in UMRA ($198 million in 2023, adjusted annually for inflation). The bill would not impose any intergovernmental mandates.

Estimate prepared by: Federal costs: Noah Meyerson; Federal revenues: Staff of the Joint Committee on Taxation; Mandates: Staff of the Joint Committee on Taxation and Andrew Laughlin.

Estimate reviewed by: Justin Humphrey, Chief, Finance, Housing, and Education Cost Estimates Unit; Kathleen FitzGerald, Chief, Public and Private Mandates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis.

Estimate approved by: Phillip L. Swagel, Director, Congressional Budget Office.

Committee Cost Estimate

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5340. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the committee adopts as its own the cost estimate of the bill prepared by the Director of the

Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

* * * * * * *

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

* * * * * * *

DEFINITIONS

SEC. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of the Internal Revenue Code of 1986) making payments or supplements described in section 457(e)(11)(D)(i) of such Code, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of such Code) making payments of benefits described in section 457(f)(4)(A) of such Code, shall, for purposes of this title, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(C) A pooled employer plan shall be treated as—

(i) a single employee pension benefit plan or single pension plan; and

(ii) a plan to which section 210(a) applies.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term “State” includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term “United States” when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331–1343).

(11) The term “commerce” means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term “industry or activity affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry “affecting commerce” within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

(13) The term “Secretary” means the Secretary of Labor.

(14) The term “party in interest” means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 is permitted to make payments under section 4223 shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan, or (iv) in the case of a pooled employer plan, the pooled plan provider.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

(20) The term "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)).

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 204(b)(1)(G).

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2)) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term "present value", with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term "accrued liability" means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term "unfunded accrued liability" means the excess of the accrued liability, under an actuarial cost method which so provides, over the present value of the assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669). The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)

(33)(A) The term “church plan” means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986.

(B) The term “church plan” does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1986), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of the Internal Revenue Code of 1986) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 202, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 204, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1986 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term "multiemployer plan" means a plan—

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 4001(b)(1) are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this title, notwithstanding the preceding provisions of this paragraph, for any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term "multiemployer plan" means a plan described in section 3(37) of this Act as in effect immediately before such date.

(E) Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 4403(b) and (c), that the plan shall not be treated as a multiemployer plan for all purposes under this Act or the Internal Revenue Code of 1954 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

(i) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of this Act and section 414(f)(1)(C) of the Internal Revenue Code of 1954 (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F)(i) For purposes of this title a qualified football coaches plan—

(I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

(II) notwithstanding section 401(k)(4)(B) of the Internal Revenue Code of 1986, may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term "qualified football coaches plan" means any defined contribution plan which is established and maintained by an organization—

(I) which is described in section 501(c) of such Code;

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of such Code; and

(III) which was in existence on September 18, 1986.

(G)(i) Within 1 year after the enactment of the Pension Protection Act of 2006—

(I) an election under subparagraph (E) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under subparagraph (E), and

(II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph or that is described in clause (vi) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if—

(aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(bb) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 of the Internal Revenue Code of 1986, and

(cc) the plan was established prior to September 2, 1974.

(ii) An election under this subparagraph shall be effective for all purposes under this Act and under the Internal Revenue Code of 1986, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under clause (i)(II).

(iii) Once made, an election under this subparagraph shall be irrevocable, except that a plan described in clause (i)(II) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 of the Internal Revenue Code of 1986.

(iv) The fact that a plan makes an election under clause (i)(II) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(v)(I) No later than 30 days before an election is made under this subparagraph, the plan administrator shall provide notice of the pending election to each plan participant and beneficiary, each labor organization representing such participants or beneficiaries, and each employer that has an obligation to contribute to the plan, describing the principal differences between the guarantee programs under title IV and the benefit restrictions under this title for single employer and multiemployer plans, along with such other information as the plan administrator chooses to include.

(II) Within 180 days after the date of enactment of the Pension Protection Act of 2006, the Secretary shall prescribe a model notice under this clause.

(III) A plan administrator's failure to provide the notice required under this subparagraph shall be treated for purposes of section 502(c)(2) as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 101(b)(1).

(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in section 501(c)(5) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which was established in Chicago, Illinois, on August 12, 1881.

(vii) For purposes of this Act and the Internal Revenue Code of 1986, a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))—

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph—

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent,

(iv) the term "rural electric cooperative" means—

(I) any organization which is exempt from tax under section 501(a) of the Internal Revenue Code of 1986 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations described in subclause (I), and

(v) the term “rural telephone cooperative association” means an organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) SINGLE-EMPLOYER PLAN.—The term “single-employer plan” means an employee benefit plan other than a multiemployer plan.

(42) the term “plan assets” means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term “benefit plan investor” means an employee benefit plan subject to part 4, any plan to which section 4975 of the Internal Revenue Code of 1986 applies, and any entity whose underlying assets include plan assets by reason of a plan’s investment in such entity.

(43) POOLED EMPLOYER PLAN.—

(A) IN GENERAL.—The term “pooled employer plan” means a plan—

(i) which is an individual account plan established or maintained for the purpose of providing benefits to the employees of 2 or more employers;

(ii) which is a plan described in section 401(a) of the Internal Revenue Code of 1986 which includes a trust exempt from tax under section 501(a) of such Code, a plan that consists of annuity contracts described in section 403(b) of such Code, or a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof); and

(iii) the terms of which meet the requirements of subparagraph (B).

Such term shall not include a plan maintained by employers which have a common interest other than having adopted the plan, but such term shall include any plan (other than a plan excepted from the application of this title by section 4(b)(2)) maintained for the benefit of the employees of more than 1 employer that consists of annuity contracts described in section 403(b) of such Code and that meets the requirements of subparagraph (B) of section 413(e)(1) of such Code.

(B) REQUIREMENTS FOR PLAN TERMS.—The requirements of this subparagraph are met with respect to any plan if the terms of the plan—

(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;

(ii) designate a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions to the plan and require such fiduciary to implement written contribution collection procedures that are reasonable, diligent, and systematic;

(iii) provide that each employer in the plan retains fiduciary responsibility for—

(I) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and

(II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees);

(iv) provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with section 208 or paragraph (44)(C)(i)(II);

(v) require—

(I) the pooled plan provider to provide to employers in the plan any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan; and

(II) each employer in the plan to take such actions as the Secretary or the pooled plan provider determines are necessary to administer the plan or for the plan to meet any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code, a plan that consists of annuity contracts described in section 403(b) of such Code, or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable, including providing any disclosures or other information which the Secretary may require or which the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such requirements; and

(vi) provide that any disclosure or other information required to be provided under clause (v) may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

(C) EXCEPTIONS.—The term "pooled employer plan" does not include—

(i) a multiemployer plan; or

(ii) a plan established before the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019 unless the plan administrator elects that the plan will be treated as a pooled employer plan and the plan meets the requirements of this title applicable to a pooled employer plan established on or after such date.

(D) TREATMENT OF EMPLOYERS AS PLAN SPONSORS.—Except with respect to the administrative duties of the pooled plan provider described in paragraph (44)(A)(i), each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

(44) POOLED PLAN PROVIDER.—

(A) IN GENERAL.—The term "pooled plan provider" means a person who—

(i) is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that—

(I) the plan meets any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code, a plan that consists of annuity contracts described in section 403(b) of such Code, or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable; and

(II) each employer in the plan takes such actions as the Secretary or pooled plan provider determines are necessary for the plan to meet the requirements described in subclause (I), including providing the disclosures and information described in paragraph (43)(B)(v)(II);

(ii) registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider;

(iii) acknowledges in writing that such person is a named fiduciary, and the plan administrator, with respect to the pooled employer plan; and

(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.

(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this paragraph and paragraph (43).

(C) GUIDANCE.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this paragraph and paragraph (43), including guidance—

(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under either such paragraph; and

(ii) which requires in appropriate cases that if an employer in the plan fails to take the actions required under subparagraph (A)(i)(II)—

(I) the assets of the plan attributable to employees of such employer (or beneficiaries of such employees) are transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986 for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate in such guidance; and

(II) such employer (and not the plan with respect to which the failure occurred or any other employer in such plan) shall, except to the extent provided in such guidance, be liable for any liabilities with respect to such plan attributable to employees of such employer (or beneficiaries of such employees).

The Secretary shall take into account under clause (ii) whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements described in subparagraph (A)(i)(II) has continued over a period of time that demonstrates a lack of commitment to compliance. The Secretary may waive the requirements of subclause (ii)(I) in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the employer referred to in such clause (and the beneficiaries of such employees) to retain the assets in the plan with respect to which the employer's failure occurred.

(D) GOOD FAITH COMPLIANCE WITH LAW BEFORE GUIDANCE.—An employer or pooled plan provider shall not be treated as failing to meet a requirement of guidance issued by the Secretary under subparagraph (C) if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of this paragraph, or paragraph (43), to which such guidance relates.

(E) AGGREGATION RULES.—For purposes of this paragraph, in determining whether a person meets the requirements of this paragraph to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as one person.

(45) PENSION-LINKED EMERGENCY SAVINGS ACCOUNT.—The term "pension-linked emergency savings account" means a short-term savings account established and maintained as part of an individual account plan, in accordance with section 801, on behalf of an eligible participant (as such term is defined in section 801(b)) that—

(A) is a designated Roth account (within the meaning of section 402A of the Internal Revenue Code of 1986) and accepts only participant contributions, as described in section 801(d)(1)(A), which are designated Roth contributions subject to the rules of section 402A(e) of such Code; and

(B) meets the requirements of part 8 of subtitle B.

(46) DESIGNATED INVESTMENT ALTERNATIVE.—

(A) IN GENERAL.—The term "designated investment alternative" means any investment alternative designated by a responsible fiduciary of an individual account plan described in subsection 404(c) into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts.

(B) EXCEPTION.—The term "designated investment alternative" does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by a responsible plan fiduciary.

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SUBTITLE B—REGULATORY PROVISIONS

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PART 4—FIDUCIARY RESPONSIBILITY

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FIDUCIARY DUTIES

SEC. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c)(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this title in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this title for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 101(i)(7).

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of the Internal Revenue Code of 1986, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 101(g), shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated

trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of the Internal Revenue Code of 1986 shall apply with respect to the notices described in this subparagraph.

(6) DEFAULT INVESTMENT ARRANGEMENTS FOR A PENSION-LINKED EMERGENCY SAVINGS ACCOUNT.—For purposes of paragraph (1), a participant in a pension-linked emergency savings account shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which are invested in accordance with section 801(c)(1)(A)(iii).

(7) NOTICE REQUIREMENTS FOR BROKERAGE WINDOWS.—

(A) IN GENERAL.—In the case of a pension plan which provides for individual accounts and which provides a participant or beneficiary the opportunity to choose from designated investment alternatives, a participant or beneficiary shall not be treated as exercising control over assets in the account of the participant or beneficiary unless, with respect to any investment arrangement that is not a designated investment alternative, each time before such a participant or beneficiary directs an investment into, out of, or within such investment arrangement, such participant is notified of, and acknowledges, each element of the notice described under paragraph (B).

(B) NOTICE.—The notice described under this paragraph is a four part information that is substantially similar to the following information:

1. Your retirement plan offers designated investment alternatives prudently selected and monitored by fiduciaries for the purpose of enabling you to construct an appropriate retirement savings portfolio. In selecting and monitoring designated investment alternatives, your plan's fiduciary considers the risk of loss and the opportunity for gain (or other return) compared with reasonably available investment alternatives.

2. The investments available through this investment arrangement are not designated investment alternatives, and have not been prudently selected and are not monitored by a plan fiduciary.

3. Depending on the investments you select through this investment arrangement, you may experience diminished returns, higher fees, and higher risk than if you select from the plan's designated investment alternatives.

4. The following is a hypothetical illustration of the impact of return at 4 percent, 6 percent, and 8 percent on your account balance projected to age 67.

(C) ILLUSTRATION.—The notice described under paragraph (B) shall also include a graph displaying the projected retirement balances of such participant or beneficiary at age 67 if the account of such individual were to achieve an annual return equal to each of the following:

(i) 4 percent.

(ii) 6 percent.

(iii) 8 percent.

(d)(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of the Internal Revenue Code of 1986, a fiduciary shall discharge the fiduciary's duties under this title and title IV in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of such Code with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of such Code with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of such Code with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of such Code with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of such Code with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of the Internal Revenue Code of 1986 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to the Internal Revenue Code of 1986 shall be a reference to such Code as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

(e) SAFE HARBOR FOR ANNUITY SELECTION.—

(1) IN GENERAL.—With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

(A) engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) with respect to each insurer identified under subparagraph (A)—

(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) on the basis of such consideration, concludes that—

(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract as described in subparagraph (B)(ii) is reasonable.

(2) FINANCIAL CAPABILITY OF THE INSURER.—A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) has filed audited financial statements in accordance with the laws of its domiciliary State under applicable statutory accounting principles;

(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and

(IV) is not operating under an order of supervision, rehabilitation, or liquidation;

(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and

(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and

(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.

(3) NO REQUIREMENT TO SELECT LOWEST COST.—Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract.

(4) TIME OF SELECTION.—

(A) IN GENERAL.—For purposes of this subsection, the time of selection is—

(i) the time that the insurer and the contract are selected for distribution of benefits to a specific participant or beneficiary; or

(ii) if the fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (1)(C) with respect to a selected insurer, taking into account the considerations described in such paragraph, the time that the insurer and the contract are selected to provide benefits at future dates to participants or beneficiaries under the plan.

Nothing in the preceding sentence shall be construed to require the fiduciary to review the appropriateness of a selection after the purchase of a contract for a participant or beneficiary.

(B) PERIODIC REVIEW.—A fiduciary will be deemed to have conducted the periodic review described in subparagraph (A)(ii) if the fiduciary obtains the written representations described in clauses (i), (ii), and (iii) of paragraph (2)(A) from the insurer on an annual basis, unless the fiduciary receives any notice described in paragraph (2)(A)(iv) or otherwise becomes aware of facts that would cause the fiduciary to question such representations.

(5) LIMITED LIABILITY.—A fiduciary which satisfies the requirements of this subsection shall not be liable following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to an insurer's inability to satisfy its financial obligations under the terms of such contract.

(6) DEFINITIONS.—For purposes of this subsection—

(A) INSURER.—The term "insurer" means an insurance company, insurance service, or insurance organization, including affiliates of such companies.

(B) GUARANTEED RETIREMENT INCOME CONTRACT.—The term "guaranteed retirement income contract" means an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary as part of an individual account plan.

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MINORITY VIEWS

INTRODUCTION

H.R. 5340, the *Providing Complete Information to Retirement Investors Act*, amends the Employee Retirement Income Security Act of 1974 (ERISA) to require a notice be sent to retirement plan participants when they make certain investments. In general, Committee Democrats strongly support ensuring workers receive appropriate notices and disclosures regarding their retirement savings, particularly with respect to fees on investments. However, H.R. 5340 is not focused on that worthwhile goal. Lacking a policy rationale, the bill exists only to perpetuate House Republicans' curious and misguided agenda against environmental, social, and governance (ESG) investing. H.R. 5340 is opposed by organizations such as the AFL–CIO, Americans for Financial Reform, and US SIF: The Forum for Sustainable and Responsible Investment (US SIF).

H.R. 5340 IS A SOLUTION IN SEARCH OF A PROBLEM

A brokerage window is a feature of defined contribution (DC) plans, such as 401(k)s, that allows retirement plan participants to invest in a broader array of investments than the designated investment alternative options selected by the plan fiduciaries. A range of investment products can be offered in the brokerage window. Such products can include mutual funds, exchange-traded funds (ETF), and, in some cases, individual stocks and bonds. Of the mutual funds that may be offered, some may be ESG-themed funds—which is the clear target of H.R. 5340—but other themed investment funds, such as religious-based funds, could be implicated. Fewer than one-third of plans offer a brokerage window, and roughly two percent of plan participants with access to one chose to use it.[1] The average brokerage window account balance exceeds $334,000—which is far greater than what many Americans have saved in their DC plans.[2]

Committee Democrats are currently not aware of any recent Department of Labor (DOL) enforcement actions targeting brokerage windows. Enforcement actions might have evidenced the need for greater transparency around brokerage window investments or additional protections for participants who use them. Moreover, in 2021, the Advisory Council on Employee Welfare and Pension Benefit Plans, which is usually referred to as the ERISA Advisory

[1] Advisory Council on Employee Welfare & Pension Benefit Plan, *Report to the Hon. Secretary Walsh, United States Sec. of Labor, Understanding Brokerage Windows in Self-Directed Retirement Plans*, [hereinafter "Council Report"]. https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf.

[2] *Id.* at 23.

Council (Council), examined brokerage windows.[3] The purpose of this examination was to "gain a better understanding of their prevalence usages, and implementation."[4] The Council "considered and debated at length" whether additional disclosures were warranted for participants who invest through a brokerage window.[5] Most Council members "concluded that, on balance, the limited marginal benefits that might be obtained by requiring disclosures would be outweighed by associated costs."[6]

H.R.5340 IS POORLY DRAFTED AND THE PRODUCT OF A FLAWED LEGISLATIVE PROCESS

In addition to there being no policy basis for H.R. 5340, the bill's required notice is designed to discourage participants from using the brokerage window. Specifically, H.R. 5340 requires that a notice be sent to participants or beneficiaries each time they invest in to, out of, or within an investment that is not a designated investment by the plan. The notice is defined in the bill as a "four part information" substantially like the following:

> 1. Your retirement plan offers designated investment alternatives prudently selected and monitored by fiduciaries for the purpose of enabling you to construct an appropriate retirement savings portfolio. In selecting and monitoring designated investment alternatives, your plan's fiduciary considers the risk of loss and the opportunity for gain (or other return) compared with reasonably available investment alternatives.
> 2. The investments available through this investment arrangement are not designated investment alternatives and have not been prudently selected and are not monitored by a plan fiduciary.
> 3. Depending on the investments you select through this investment arrangement, you may experience diminished returns, higher fees, and higher risk than if you select from the plan's designated investment alternatives.
> 4. The following is a hypothetical illustration of the impact of return at 4 percent, 6 percent, and 8 percent on your retirement balance projected to age 67.

The bill also requires the notice to include a graph displaying projected retirement balances if the account of such individual were to achieve an annual return of 4 percent, 6 percent, or 8 percent.

H.R. 5340's notice represents a significant departure from ERISA's primary 401(k) fee disclosure that is objective, information-based, and required to be presented in a manner for the average participant to understand.[7] The bill's required notice is clearly subjective and intended to discourage participants from using the brokerage window. According to the Americans for Financial Reform, "[i]t is unclear why this bill would require a graph

[3] The ERISA Advisory Council was established under Section 512 of the Employee Retirement Income Security Act to advise the Secretary of Labor on matters related to welfare and pension benefit plans.
[4] Council Report, *supra* note 1 at 4.
[5] Council Report, *supra* note 1 at 46.
[6] Council Report, *supra* note 1 at 47.
[7] *See* 29 C.F.R. § 2550.404a–5.

. . . . The graph would likely be confusing and misleading to beneficiaries trying to make decisions about their retirement investments, suggesting that choosing an investment alternative not chosen by a fiduciary would necessarily result in a specific rate of return."[8]

If H.R. 5340 became law, participants interested in an ESG-themed fund or bond, or a religiously themed fund offered in their plan's brokerage window may opt not to invest in it due to the language of the notice. Or those participants may look to make a themed investment via the commercial market outside of the ERISA-protected retirement system. Committee Members should question whether that potential outcome—driving retirement savers out of ERISA—makes sense and is in their best interests.

H.R. 5340 was introduced on September 5, 2023, and the Committee on Education and the Workforce rushed to mark it up on September 14, 2023 without first convening a legislative hearing on the bill. This deprived Committee Members of the opportunity to learn more and ask questions about the bill's full implications.

H.R. 5340 IS PART OF COMMITTEE REPUBLICANS' MISGUIDED WAR ON ESG INVESTING

While H.R. 5340 would require notices for all brokerage window investments not just ESG-themed funds, Committee Republicans have tied this bill with their broader anti-ESG efforts. For example, the bill's author, Rep. Jim Banks (R–IN), said the bill would "make sure ERISA participants are fully aware of the financial risks associated with ESG before they choose how to invest their hard-earned savings."[9]

Committee Republicans are wrong about ESG. Appropriate consideration of ESG factors—such as fossil fuel dependency—remains central to retirement plan participants' long term economic interests. That is why Committee Democrats believe retirement plan fiduciaries should be permitted to consider ESG-related considerations when evaluating investments. Doing so makes sense and serves workers' long-term financial interest.

H.R. 5340 is premised on the Committee Republicans' mistaken view that they—not retirement savers and plan fiduciaries—know best when it comes to ESG investing. Committee Democrats strongly disagree.

CONCLUSION

There is no apparent policy justification for H.R. 5340, or the other bills comprising Committee Republicans' baseless and unpopular anti-ESG agenda. For the reasons stated above, Committee Democrats opposed H.R. 5340 when the Committee on Education and the Workforce considered it on September 14, 2023. We urge the House of Representatives to do the same.

[8] *See* Letter from Americans for Financial Reform to Hon. Virginia Foxx and Hon. Bobby Scott (Sept. 13, 2023), https://ourfinancialsecurity.org/wp-content/uploads/2023/09/9.13.23-Corporate Governance-Letter-of-Opposition-to-Anti-ESG Bills.pdf, at 6.

[9] Press Release, Office of Congressman Jim Banks, Rep. Banks Introduces Bill to Protect Pensions from ESG (September 6, 2023), https://banks.house.gov/news/documentsingle.aspx?DocumentID=2199.

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