118TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
118–225

ROLL BACK ESG TO INCREASE RETIREMENT EARNINGS 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. 5339]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 5339) to amend the Employee Retirement Income Security Act of 1974 to specify requirements concerning the consideration of pecuniary and non-pecuniary factors, 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 "Roll back ESG To Increase Retirement Earnings Act" or the "RETIRE Act".

SEC. 2. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 AMENDMENT.

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

"(3) INTEREST BASED ON PECUNIARY FACTORS.—

"(A) IN GENERAL.—For purposes of paragraph (1), a fiduciary shall be considered to act solely in the interest of the participants and beneficiaries of the plan with respect to an investment or investment course of action only if the fiduciary's action with respect to such investment or investment course of action is based only on pecuniary factors (except as provided in subparagraph (B)). The fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial bene-

fits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals. The weight given to any pecuniary factor by a fiduciary shall reflect a prudent assessment of the impact of such factor on risk and return.

"(B) USE OF NON-PECUNIARY FACTORS FOR INVESTMENT ALTERNATIVES.—Notwithstanding paragraph (A), if a fiduciary is unable to distinguish between or among investment alternatives or investment courses of action on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor if the fiduciary documents—

"(i) why pecuniary factors were not sufficient to select a plan investment or investment course of action;

"(ii) how the selected investment compares to the alternative investments with regard to the composition of the portfolio with regard to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and the projected return of the portfolio relative to the funding objectives of the plan; and

"(iii) how the selected non-pecuniary factor or factors are consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.

"(C) INVESTMENT ALTERNATIVES FOR PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS.—In selecting or retaining investment options for a pension plan described in subsection (c)(1)(A), a fiduciary is not prohibited from considering, selecting, or retaining an investment option on the basis that such investment option promotes, seeks, or supports one or more non-pecuniary benefits or goals, if—

"(i) the fiduciary satisfies the requirements of paragraph (1) and subparagraphs (A) and (B) of this paragraph in selecting or retaining any such investment option; and

"(ii) such investment option is not added or retained as, or included as a component of, a default investment under subsection (c)(5) (or any other default investment alternative) if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

"(D) DEFINITIONS.—For the purposes of this paragraph:

"(i) The term 'pecuniary factor' means a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1).

"(ii) The term 'investment course of action' means any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to actions taken by a fiduciary on or after the date that is 12 months after the date of enactment of this Act.

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 1975* (ERISA) was designed to ensure that the financial interests of participants and beneficiaries in their benefits do not take a back seat to a fiduciary's environmental, social, and governance (ESG) preferences. The Biden administration's interpretation of ERISA reverses a fiduciary's duty of loyalty by declaring that an investment fiduciary may consider his or her political and social preferences when investing ERISA plan assets. H.R. 5339 makes clear that the financial interests of participants and beneficiaries in their benefits come first.

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." The hearing 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." The purpose of the hearing was to review the Fiscal Year 2023 budget priorities of the U.S. Department of Labor (DOL). Testifying before the Committee was the Honorable Martin J. Walsh, Secretary, DOL, 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." The purpose of the hearing was to review the Fiscal Year 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. Allen introduced the *Roll Back ESG to Increase Retirement Earnings Act* or the *RETIRE Act* (H.R. 5339). The bill was referred to the Committee on Education and the Workforce. On September 14, 2023, the Committee considered H.R. 5339 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. Allen that made minor technical changes. Ranking Member Robert C. "Bobby" Scott (D–VA) offered a substitute amendment codifying the 2022 Biden administration ESG investing rule. The amendment failed by a recorded vote of 19–23.

COMMITTEE VIEWS

INTRODUCTION

H.R. 5339, the *Roll back ESG To Increase Retirement Earnings Act*, clarifies what ERISA and the U.S. Supreme Court already require: that fiduciaries manage plan assets for the exclusive purpose of a participant's or beneficiary's financial interest in his or her benefits under the plan. This legislation is needed because the Biden administration has ignored ERISA's foundational principles in order to allow activists to use ERISA plan assets to advance ESG goals at the expense of the financial interests of ERISA plans. H.R. 5339 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 stated that ERISA's exclusive purpose rule requires fiduciaries to act with "complete and undi-

[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."

vided 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 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.

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").

In 1994, DOL first articulated a "tiebreaker rule" in broadly applicable guidance allowing an ERISA fiduciary to consider ESG benefits ("collateral benefits") when choosing between two economically equal investments.[9] From the beginning, the tiebreaker rule was inherently inconsistent with ERISA's exclusive purpose rule.[10]

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[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).

[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] 59 Fed. Reg. 32,606 (June 23, 1994) (incorporated in the Code of Federal Regulations as 29 C.F.R. § 2509.94–1) (Interpretive Bulletin (IB) 94–1)). The term used in IB 94–1 is "economically targeted investments." Prior to issuing 1B 94–1, DOL issued letters concerning a fiduciary's ability to consider the non-pecuniary effects of an investment and granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce non-pecuniary benefits. *See* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,856, 72,856 n.6 (Nov. 13, 2020).

[10] *See* Max M. Schanzebach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stanford L. Rev. 381, 390, 408 (2020) (stating that DOL's tiebreaker rule is "dubious as a matter or textbook financial economics and . . . contrary to the controlling statute and U.S. Supreme Court precedent.); *see also* Edward Zelinsky, *ETI, Phone the Department of Labor: Economically Targeted Investments, IB 94–1 and the Reincarnation of Industrial Policy*, 16 Berkeley J. Emp. Lab. L. 333 (1995) (criticizing DOL's first sub-regulatory guidance on investing for collateral benefits using the tie

Continued

Over the next two decades, DOL addressed the tiebreaker rule through sub-regulatory guidance, with Democrat administrations promoting the tiebreaker rule to use ERISA plan assets for collateral benefits and Republican administrations attempting to limit collateral benefit investing by reinforcing ERISA's exclusive purpose rule.[11]

Two distinguished professors wrote in the Stanford Law Review in 2020 on ERISA's fiduciary duty and ESG investing: "With respect to law, the tiebreaker is irreconcilable with the strict 'sole interest' or 'exclusive benefit' rule [of ERISA]."[12] The article is skeptical that true economic ties exist in the investment world, but if they do, then the appropriate solution is to invest in both instruments for purposes of diversification.

TRUMP ADMINISTRATION ESG RULE

In November 2020, DOL issued a final rule on ESG investing based on skepticism that a true tie can exist between two investments. Under this rule, a fiduciary can consider collateral benefits only if choosing between or among "investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone."[13] The Trump rule requires a plan fiduciary to document (and, in essence, prove) that two investments are indistinguishable based on pecuniary factors before invoking the tiebreaker rule. If a fiduciary invokes the tiebreaker rule, then the fiduciary is required to document how any tiebreaking factor is consistent with the interests of the participants and beneficiaries in their financial benefits under the plan. This provision is intended to prevent abuse of the tiebreaker. The rule also prohibits fiduciaries from choosing default investments that have objectives or principal strategies that are non-pecuniary.

BIDEN ADMINISTRATION ESG RULE

In December 2022, DOL issued a final rule rescinding the Trump rule[14] and allowing a fiduciary to consider collateral benefits when choosing among or between investment alternatives that "equally serve the financial interests of the plan over the appropriate time horizon."[15] As such, the fiduciary may select an investment based on collateral benefits other than investment returns. This tiebreaker rule is vague enough to create a giant loophole, increasing ESG investing and completely eroding ERISA's exclusive purpose rule.

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breaker rule as "unsound as a matter of logic and policy and . . . incompatible with the statutory standards governing the investment decisions of pension fiduciaries.").

[11] Edward Zelinsky, *Interpretive Bulletin 08–01 and Economically Targeted Investing: A Missed Opportunity*, 82 S. Cal. L. Rev. Postscript 11, 12 (criticizing subsequent Republican sub-regulatory guidance as an attempt to limit collateral investing rather than to repudiate it as incoherent and incompatible with ERISA's duty of loyalty).

[12] Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 408 (2020).

[13] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,884 (Nov. 13, 2020).

[14] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022).

[15] 29 C.F.R. § 2550.404a–1(c)(2).

IMPACT ON THE RETIREMENT SAVINGS OF AMERICA'S WORKERS

DOL's subterfuge on this issue is not harmless. Promoting the use of ERISA plan assets for collateral benefits undermines a central cornerstone of ERISA. Further, such actions may lead to increased risk and lower returns for retirement savings. The cumulative harm, over the lifetime of retirement savings, could have a substantial adverse impact on a participant's lifestyle and welfare during his or her retirement years.

H.R. 5339, *roll back of esg to increase retirement earnings act*

H.R. 5339 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce and reinforces what the Supreme Court has already stated: The exclusive purpose rule of ERISA precludes the consideration of nonpecuniary benefits.[16] ERISA's duty of loyalty does not provide any opportunity for an investment fiduciary to choose an economically inferior investment because it provides nonpecuniary benefits. H.R. 5339 also tightens the tiebreaker rule to require a fiduciary to prove, by way of documentation, that a tie exists because the plan fiduciary is "unable to distinguish on the basis of pecuniary factors alone."[17]

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. 5339 ensures that ERISA's duties of prudence and loyalty will be honored. The intent of ERISA's exclusive purpose rule, as enacted by Congress and as interpreted by the U.S. Supreme Court, remains as clear now as when it was first signed into law. However, the Biden administration's regulations and activist agendas are undermining ERISA's protections. H.R. 5339 is essential for restoring and upholding the intent of ERISA. The U.S. workforce deserves nothing less.

SUMMARY

H.R. 5339 SECTION-BY-SECTION SUMMARY

Section 1. Short title

- Names the bill as the "Roll back ESG To Increase Retirement Earnings Act" or the "RETIRE Act"

Section 2. Employee Retirement Income Security Act of 1974 Amendment

- Section 2(a) amends ERISA Section 404(a) with the following provisions:
  - Clarifies that for purposes of ERISA section 404(a)(1), a fiduciary shall be considered to act solely in the interest of the participants and beneficiaries of the plan with respect to an investment or investment course of action only if the fiduciary's action with respect to such investment or

[16] Fifth Third Bancorp, 573 U.S. at 421 (the "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" does not include "nonpecuniary benefits") (emphasis in original).
[17] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,884.

investment course of action is based only on pecuniary factors (except as provided in subparagraph (B)).

◦ Expressly states that a fiduciary 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 to promote non-pecuniary benefits or goals.

◦ Provides that the weight given to any pecuniary factor by a fiduciary shall reflect a prudent assessment of the impact of such factor on risk and return.

◦ Adds a tiebreaker rule that narrowly defines a tie and narrowly constrains the factors used to consider in breaking a tie. To have a tie, the fiduciary must be unable to distinguish between or among investment alternatives or alternative courses of action on the basis of pecuniary factors alone.

◦ Requires fiduciaries to document, and in essence to prove, why pecuniary factors were not sufficient to select a plan investment or investment course of action.

◦ Requires other documentation to ensure that the investment fiduciary does not make decisions based on non-pecuniary factors. Specifically, requires the fiduciary to document how the selected investment compares to the alternative investments considered with regard to the composition of the portfolio with regard to diversification, the liquidity, and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and the projected return of the portfolio relative to the funding objectives of the plan.

◦ For fiduciaries who "declare a tie" in order to consider non-pecuniary factors, requires documentation of how the selected non-pecuniary factor or factors are consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.

◦ Addresses a fiduciary's selection of investment alternatives for participant-directed individual account plans intended to qualify for relief under existing ERISA section 404(c)(1)(A) by stating a fiduciary's actions must comply with H.R. 4339 in selecting or retaining the investment option. Further, any such investment option may not be added or retained as or included as a component of a default investment under existing section 404(c)(5) of ERISA, or any other type of default investment, if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

◦ Defines "pecuniary factor" as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to [existing ERISA] section 402(b)(1)."

◦ Defines "investment course of action" as "any series or program of investments or actions related to a fiduciary's

performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan."

- Section 2(b) provides that the amendments made by the bill apply to actions taken by a fiduciary on or after the date that is 12 months after the date of enactment.

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. 5339 takes important steps to protect the interests of the workforce in their benefits provided under ERISA plans. H.R. 5339 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. 5339 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:9 Bill: H.R. 5339 Amendment Number: n/a

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

Sponsor/Amendment: Rep. DeSaulnier/ ESG_D_ANS

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: 19 Nos:23 Not Voting:3

Total: 45 / Quorum:42 / Report:

(25 R - 20 D)

Date:9/14/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call:10 Bill: H.R. 5339 Amendment Number: n/a

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

Sponsor/Amendment: Rep. Allen/ ALLEGA_008 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. 5339 is to protect the interests of the workforce in their benefits provided under ERISA plans.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 5339 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. 5339: "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. 5339 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. 5339. 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 B—REGULATORY PROVISIONS

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

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)).

(3) INTEREST BASED ON PECUNIARY FACTORS.—

(A) IN GENERAL.—For purposes of paragraph (1), a fiduciary shall be considered to act solely in the interest of the participants and beneficiaries of the plan with respect to an investment or investment course of action only if the fidu-

ciary's action with respect to such investment or investment course of action is based only on pecuniary factors (except as provided in subparagraph (B)). The fiduciary 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 to promote non-pecuniary benefits or goals. The weight given to any pecuniary factor by a fiduciary shall reflect a prudent assessment of the impact of such factor on risk and return.

(B) USE OF NON-PECUNIARY FACTORS FOR INVESTMENT ALTERNATIVES.—Notwithstanding paragraph (A), if a fiduciary is unable to distinguish between or among investment alternatives or investment courses of action on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor if the fiduciary documents—

(i) why pecuniary factors were not sufficient to select a plan investment or investment course of action;

(ii) how the selected investment compares to the alternative investments with regard to the composition of the portfolio with regard to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and the projected return of the portfolio relative to the funding objectives of the plan; and

(iii) how the selected non-pecuniary factor or factors are consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.

(C) INVESTMENT ALTERNATIVES FOR PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS.—In selecting or retaining investment options for a pension plan described in subsection (c)(1)(A), a fiduciary is not prohibited from considering, selecting, or retaining an investment option on the basis that such investment option promotes, seeks, or supports one or more non-pecuniary benefits or goals, if—

(i) the fiduciary satisfies the requirements of paragraph (1) and subparagraphs (A) and (B) of this paragraph in selecting or retaining any such investment option; and

(ii) such investment option is not added or retained as, or included as a component of, a default investment under subsection (c)(5) (or any other default investment alternative) if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

(D) DEFINITIONS.—For the purposes of this paragraph:

(i) The term "pecuniary factor" means a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1).

(ii) The term "investment course of action" means any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan.

(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 accord-

ance 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).

(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. 5339, the *Roll back ESG To Increase Retirement Earnings (RETIRE) Act*, amends the *Employee Retirement Income Security Act of 1974* (ERISA)[1] to codify a Trump Administration regulation regarding environmental, social, governance (ESG) investing. The Trump-era rule sought to impose needless barriers and first-of-its kind paperwork requirements related to ESG investing in defined contribution plans, such as 401k plans. H.R. 5339 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).

CONTEXT FOR H.R. 5339: ESG INVESTING AND THE LABOR DEPARTMENT'S POSITION ON IT PRIOR TO THE TRUMP ADMINISTRATION

ESG factors are categories of statistical data about companies that inform investors, including retirement plans, of potential risks and opportunities when evaluating a company for inclusion in an investment portfolio. Workers across the country are interested in ESG data, as it allows them to evaluate whether an investment reflects their values on issues such as combating climate change or promoting health and labor standards, without sacrificing returns. Additionally, ESG-data usage can be viewed as part of a risk mitigation strategy in investment. Private sector retirement plans should be able to consider investments that account for companies' negative externalities, such as high liability risks, fossil fuel dependent business practices, and poor treatment of workers. These are among the factors that could cause a stock to suffer over the decades, the type of long-term time horizon pivotal to strong retirement investing.

The Government Accountability Office (GAO) made a similar point in its review of the use of ESG factors and retirement plans, noting such "plans have investment timelines spanning decades and must manage investment risks to provide benefits for workers for many years to come . . . The use of environmental, social, and governance (ESG) factors has emerged as a way for investors, such as retirement plans, to capture information on climate change and other potential risks and opportunities . . ."[2] According to GAO, "[w]hether or not retirement plans consider the projected impacts from climate change and other ESG risk factors could affect investment returns and, in turn, the financial health of retirees."[3] This

[1] 29 U.S.C. § 1104(a).

[2] U.S. Govt. Accountability Off., GAO–18–398, Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would be Helpful 7 (2018), https://www.gao.gov/assets/700/691930.pdf.

[3] *Id.* at 1.

is an essential point about ESG investing: ESG factors can impact a retirement saver's 401(k) plan *whether plan fiduciaries consider them or not.* Committee Democrats believe it is common sense for plan fiduciaries to be permitted to consider ESG factors, and federal law should not discourage them from doing so.

Prior to the Trump Administration, the Department of Labor (DOL) periodically issued guidance regarding ESG factors and consistently ensured that retirement plan fiduciaries exclusively focus on financial returns. However, in instances when competing investments served the plan's economic interests equally well, plan fiduciaries typically could use collateral considerations—such as ESG risk factors—as "tie breakers" for an investment choice.[4]

THE TRUMP ADMINISTRATION'S UNSUBSTANTIATED CONCERN TOWARD PLAN FIDUCIARIES AND ESG INVESTING

In 2020, the Trump Administration proposed a rule related to ESG investing that significantly departed from the above-mentioned guidance. The proposed rule's preamble said DOL "is concerned . . . that the growing emphasis on ESG investing may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan."[5] However, DOL failed to provide any evidence to validate this concern. The proposed rule did not cite any litigation from plan participants or fiduciary breaches related to ESG investing. Additionally, the proposed rule did not cite any agency enforcement actions related to ESG; and this issue was not among DOL's enforcement priorities in its budget for fiscal year (FY) 2020 when the rule was proposed or their three prior budgets.[6] Curiously, the proposed rule even acknowledges that "most fiduciaries are operating in compliance" with DOL's existing ESG guidelines.[7]

Had Committee Republicans held a legislative hearing on H.R. 5339, Committee Members could have heard testimony and asked witnesses questions about the unsubstantiated claims regarding ESG investing that informed the Trump-era rule and H.R. 5339. Unfortunately, Committee Republicans failed to hold such a legislative hearing and instead hastily marked up the bill shortly after it was introduced.

H.R. 5339 CODIFIES A FLAWED TRUMP-ERA ESG RULE

Specifically, the Trump-era's ESG rule required that fiduciaries make investment decisions solely based on "pecuniary" factors, defined in the final rule as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons con-

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[4] *See* Interpretive Bulletin 94–1, 59 Fed. Reg. 32606 (June 23, 1994), https://www.govinfo.gov/content/pkg/FR- 1994-06-23/html/94-15162.htm.

[5] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (June 30, 2020) [hereinafter 2020 Proposed Rule], https://www.govinfo.gov/content/pkg/FR-2020-06-30/pdf/2020-13705.pdfK.

[6] *See* FY 2021 Budget, U.S. Dep't of Labor, https://www.dol.gov/general/budget, FY 2020 Budget, U.S. Dep't of Labor, https://www.dol.gov/general/budget/index-2020, FY 2019 Budget, U.S. Dep't of Labor, https://www.dol.gov/general/budget/index-2019, FY 2018 Budget, U.S. Dep't of Labor, https://www.dol.gov/general/budget/index-2018.

[7] 2020 Proposed Rule, *supra* note 5, at 39120.

sistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of the *Employee Retirement Income Security Act or ERISA*."[8] The Trump-era rule permitted consideration of non-pecuniary (ESG) factors when a fiduciary is unable to distinguish reasonably available alternatives on the basis of pecuniary factors alone.[9] However, in such "tie breaker" cases, the Trump-era rule imposed a first-of-its-kind "documentation requirement" on a plan fiduciary when concluding that a distinguishing factor could not be found and why the selected investment was chosen based on the purposes of the plan.[10] This establishes some presumption by the Trump-era DOL that ESG factors are "non-pecuniary," a presumption not supported by evidence. The rule's "pecuniary" vs. "non-pecuniary" distinction is arbitrary, flawed, and out of step with how ESG factors are considered by retirement asset managers, and many other investors. The Trump-era rule also prohibited investments with an objective, goal, or principal investment strategy that includes the use of one or more non-pecuniary (ESG) factors from being considered a qualified default investment alternative (QDIAs), such as a target date fund (TDF).[11]

H.R. 5339 CODIFIES AN UNPOPULAR TRUMP ERA ESG RULE

Committee Democrats were not the first voices expressing opposition to the Trump-era rule. Such opposition came from all corners when the rule was proposed several years ago. According to an analysis of the more than 8,700 public comments on the proposed rule that was conducted by US SIF and other organizations, 96 percent of the comments or petition signatures from individuals expressed opposition.[12] One of the key findings of the analysis was that "[o]pposition was especially high among investment-related groups, with asset managers, financial advisors, financial service providers, asset owners, pension plans, and investment organizations either unanimous or all but unanimous opposing the proposal."[13] Specifically, BlackRock, Fidelity, State Street Global Advisors, T. Rowe Price, and Vanguard submitted opposing comments to DOL.[14]

DEMOCRATIC AMENDMENT OFFERED DURING MARKUP OF H.R. 5339

Committee Democrats put forward one substitute amendment to improve the bill. Offered by Rep. Mark DeSaulnier (D–CA–10), this amendment would have codified the Biden Administration's ESG rule. The Biden Administration's ESG rule, which was finalized in 2022 and replaced the Trump-era rule, retained the long-standing

[8] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020) [hereinafter 2020 Final Rule], https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf.
[9] *Id.* at 72851.
[10] *Id.* at 72851.
[11] *Id.* at 72851.
[12] Press Release, Ceres, Investor Organizations and Financial Industry Firms' Analysis of Public Comments on Department of Labor's ESG Proposal Shows Landslide of Opposition (Aug. 20, 2020), https://www.ceres.org/news-center/press-releases/investor-organizations-and-financial-industry-firms-analysis-public.
[13] *Id.*
[14] Rachel Koning Beals, *Trump's Labor Department's rule discouraging ESG investing in retirement plans is finalized over swell of objections*, Marketwatch, (Oct. 30, 2020), https://www.marketwatch.com/story/trumps-labor- rule-discouraging-esg-investing-in-retirement-plans-is-finalized-over-swell-of-objections-11604089492.

duty of a fiduciary to focus on relevant risk-return factors in selecting investments. The rule specified that a fiduciary may not sacrifice investment returns or take on additional investment risk for reasons unrelated to plan performance. However, the Biden Administration's final rule clarified that a fiduciary may reasonably conclude that permissible factors relevant to their risk-return analysis include the economic effects of climate change and other ESG factors on a particular investment. The final rule thus *permits* fiduciaries to consider ESG factors, but only when consistent with the requirement that all investments must serve investors' economic interests. It *does not require* consideration of ESG factors, and moreover is explicit that ESG considerations alone cannot justify lower investment returns or assuming additional risk when inconsistent with underlying economic interests.

US SIF and other organizations conducted further analysis of the comments submitted to DOL on the Biden Administration's proposed ESG rule and found nearly the opposite results from the Trump-era proposed rule. Of the over 22,000 comments submitted by individuals, 97.4 percent were in support of the proposed rule.[15] And of the 144 letters submitted by institutions—such as corporations, asset managers, financial firms, trade groups, and labor organizations—83 percent were supportive, with some recommending modifications.[16]

Amendment	Offered By	Description	Action Taken
#2	Mr. DeSaulnier	Codifies the Biden Administration's final ESG rule.	Defeated

CONCLUSION

H.R. 5339 would codify a deeply problematic and unpopular Trump-era ESG rule that would harm retirement savers. For the reasons stated above, Committee Democrats opposed H.R. 5339 when the Committee considered it on September 14, 2023. We urge the House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.

GREGORIO KILILI CAMACHO SABLAN.
MARK DESAULNIER.
JAHANA HAYES.
HALEY M. STEVENS.

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[15] Eric Pitt, Ceres Accelerator for Sustainable Capital Markets, Bryan McGannon and Ginny Brooks, US SIF: The Forum for Sustainable and Responsible Investment, Garbriel Malek, Stephanie Jones, and Clare Staib-Kaufman, Environmental Defense Fund, *Public comments overwhelmingly support the US Labor Department proposed rule addressing the inclusion of ESG criteria and proxy voting in ERISA-governed retirement plans*, (Jan. 25, 2022), https://www.ussif.org/Files/Public_Policy/DOL_Comment_Analysis_1.25.22.pdf.

[16] *Id.* at 3.