II

118TH CONGRESS
2D SESSION

S. 5174

To amend the Employee Retirement Income Security Act of 1974 to clarify the criteria by which fiduciary responsibility is exercised in protecting shareholder rights.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 25, 2024

Mr. CASSIDY introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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A BILL

To amend the Employee Retirement Income Security Act of 1974 to clarify the criteria by which fiduciary responsibility is exercised in protecting shareholder rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Restoring Integrity in Fiduciary Duty Act’’.

SEC. 2. EXERCISE OF FIDUCIARY DUTY.

(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) INVESTMENTS BASED ON PECUNIARY FACTORS.—

“(A) IN GENERAL.—For the purposes of paragraph (1), a fiduciary—

“(i) may evaluate an investment or investment course of action based only on pecuniary factors, except as provided in subparagraph (B);

“(ii) may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives;

“(iii) may not sacrifice investment return or take on additional investment risk to promote nonpecuniary benefits or goals; and

“(iv) shall weight each pecuniary factor in a manner that appropriately reflects a prudent assessment of the impact of the factor on risk and return.

“(B) USE OF NONPECUNIARY FACTORS FOR INVESTMENT ALTERNATIVES.—Notwithstanding subparagraph (A), when choosing between or among investment alternatives, 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 shall use the capita aut navia standard as the deciding factor in the investment decision, provided that—

"(i) the fiduciary documents detail—

"(I) why pecuniary factors were not sufficient to select the 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, 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 investment is consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan; and "(ii) the fiduciary demonstrates that it did not expend any resources during the investment course of action on nonpecuniary factors that place weight between or among investment alternatives for the purpose of the investment decision.

"(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 may consider, select, or retain an investment option on the basis that such investment option promotes, seeks, or supports 1 or more nonpecuniary benefits or goals, only 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 described in subsection (c)(5) (or any other default investment alternative).

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

"(i) CAPITA AUT NAVIA.—The term 'capita aut navia' means a standard by which a fiduciary chooses at random between or among investment alternatives where pecuniary factors are equal and does not give added weight to 1 investment or another, provided that the investment alternatives have identical risk and return attributes and choosing among the investment alternatives would have comparatively negligible impact, not considering liquidity constraints or transaction costs.

"(ii) INVESTMENT COURSE OF ACTION.—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 a plan described in subsection (c)(1)(A), a designated investment alternative under the plan.

"(iii) MATERIAL.—The term 'material,' when used to qualify a financial risk or financial return—

"(I) means a financial risk or financial return in which there is a substantial likelihood that a reasonable investor would attach importance when—

"(aa) evaluating the potential financial risks or returns of an existing or prospective investment; or

"(bb) exercising, or declining to exercise, any rights with respect to securities; and

"(II) does not include furthering nonpecuniary, environmental, social, political, ideological, or other goals or objectives.

"(iv) PECUNIARY FACTOR.—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).''.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to actions taken by a fiduciary on or after the date that is 1 year after the date of enactment of this Act.

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