

IMPROVING RETIREMENT SECURITY AND ACCESS TO MENTAL HEALTH BENEFITS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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IMPROVING RETIREMENT SECURITY AND ACCESS TO MENTAL HEALTH BENEFITS

Tuesday, March 1, 2022

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND
PENSIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:18 a.m., via Zoom, Hon. Mark DeSaulnier (Chairman of the Subcommittee) presiding.

Present: Representatives DeSaulnier, Courtney, Norcross, Wild, McBeth, Levin, Stevens, Scott (Ex Officio), Allen, Walberg, Banks, Miller, Fitzgerald, and Foxx (Ex Officio).

Staff present: Illana Brunner, General Counsel; Daniel Foster, Health and Labor Counsel; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Carrie Hughes, Director of Health and Human Services; Ariel Jona, Policy Associate; Stephanie Lalle, Communications Director; Kevin McDermott, Senior Labor Policy Advisor; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Kayla Pennebecker, Staff Assistant; Veronique Pluviose, Staff Director; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Staff Director; Michael Davis, Minority Legislative Assistant; Mini Ganesh, Minority Staff Assistant; John Martin, Minority Deputy Director of Workplace Policy/Counsel; Hannah Matesic, Minority Director of Member Services and Coalitions; Audra McGeorge, Minority Communications Director; Ethan Pann, Minority Press Assistant; Krystina Skurk, Minority Speechwriter; and Ben Ridder, Minority Professional Staff Member.

Chairman DESAULNIER. Welcome everybody. Good morning. We are ready to begin. I will count down from five and then we will start, five, four, three to one.

The Subcommittee on Health, Employment, Labor and Pensions will come to order. Welcome again everyone. I note that a quorum is present. The subcommittee is meeting today to hear testimony on Improving Retirement Security and Access to Mental Health Benefits. This is an entirely remote hearing. All microphones will be kept muted as a general rule to avoid unnecessary background noise.

Members and witnesses will be responsible for unmuting themselves when they are recognized to speak, or when they wish to seek recognition. I would also ask that members please identify

themselves before they speak. Members should keep their cameras on while in the proceeding.

Members shall be considered present in the proceeding when they are visible on camera, and they shall be considered not present when they are not visible on camera. The only exception to this is if they are experiencing technical difficulty and inform committee staff of such difficulties.

If any member experiences technical difficulty during the hearing you should stay connected on the platform, make sure that you are muted, and use your phone to immediately call the committee's IT director whose number was provided in advance.

Should the Chair experience technical difficulty, Congressman Levin, or another majority member is hereby authorized to assume the gavel in the Chair's absence. This is an entirely remote hearing, and as such the subcommittee's hearing room is officially closed.

Members who choose to sit with their individual devices in the hearing room must wear headphones to avoid feedback, echoes, and distortion resulting from more than one person on the software platform sitting in the same room.

While the recent guidance from the Office of the Attending Physician has made mask wearing optional at this time, please note that we have at both member and staff levels, the committee strongly recommends that masks continue to be worn out of concern for the safety of the unvaccinated, and immunocompromised committee members and staff.

In order to ensure that the committee's 5-minute rule is adhered to, staff will be keeping track of time using the committee's digital timer which will appear in its own thumbnail picture. Members and witnesses are asked to wrap up promptly when their time has expired.

Pursuant to Committee Rule 8(c), opening statements are limited to the Chair and the Ranking Member. This allows us to hear from our witnesses sooner and provides all members with adequate time to ask questions. I now recognize myself for the purpose of making an opening statement.

Today we are meeting to discuss how Congress can improve workers retirement and access to mental health benefits. As our economy continues to recover, and our constituents struggle with higher costs caused by the pandemic, now more than ever, we need to help workers and retirees achieve financial stability, including a secure retirement and high-quality health care, including mental health and behavioral health.

According to the New York Times, roughly 55 million Americans are 65 and older. Those at the peak of the Baby Boom are reaching 65 this year. Many are working later in their lives, relying on their next paycheck to make ends meet. With the Federal Reserve indicating many Americans would struggle to come up with money to finance an unexpected \$400.00 expense, such as a car repair.

Too few are earning enough to save for a dignified retirement. Similarly, health care, particularly mental and behavior health care is too often unaffordable for workers and their families. Even before the pandemic less than half of individuals with mental ill-

ness, and only 11 percent of individuals with a substance abuse disorder received needed behavioral health services or treatment.

The pandemic has underscored the urgency of this crisis. In the past 2 years Congress and this committee have remained committed to improving retirement security and strengthening health coverage for workers and families. Last March congressional democrats and the administration addressed the urgent multi-employer pension crisis and fully protected the pensions of more than 1 million Americans.

Our solution was broadly supported by key stakeholders, including hundreds of employers and the United States Chamber of Commerce. Had we not acted, plans would have failed, workers and retirees would have lost nearly everything they worked so hard to save, and employers would have been forced to close or cut jobs.

In November, the committee advanced the Retirement Improvement and Savings Enhancement RISE Act. This bipartisan legislation would make meaningful improvements to improving the retirement security of American workers, and I want to thank all my colleagues, the ranking members of the committee and the subcommittee.

The committee has played a leading role in strengthening health benefits, including through efforts to improve enforcement of the Mental Health Parity and Addiction Equity Act. However, we know that there is more work to be done, much more work to be done to build a stronger, more inclusive retirement system, and improve access to mental and behavioral health care.

Today I look forward to discussing several commonsense solutions to help us do just that. First the hearing will explore draft legislation that Representative Lucy McBath intends to file. This draft bill makes a number of improvements in the Nation's retirement system, and includes important legislation that has been, or will be filed by our committee colleagues.

Specifically, the discussion draft helps 401K participants better understand the fees they pay on investments. This is based on legislation that Representative Susan Wild plans to introduce soon. It increases lifetime income options in worker's 401K plans. This is based on bipartisan legislation Representative Don Norcross and Tim Walberg, our colleagues recently introduced. I want to thank them for their leadership on this, along with Representatives Wild and McBath.

This also gives workers additional opportunities to be part of their employer's retirement plan. This is based on legislation that Representative Kathy Manning recently introduced. It boosts employee ownership programs through the Department of Labor. This is based on legislation that representatives Joe Courtney and Mark Pocan introduced.

It encourages emergency savings. This is based on bipartisan legislation introduced by Representative Bonnie Watson Coleman and Congressman French Hill. This discussion draft also includes provisions to increase spousal protections in 401K plans that were included in legislation offered by our colleague Representative Lauren Underwood.

I look forward to today's testimony on how this package as a whole can bolster American's retirement security. Second, the

Biden and Harris Administration has taken steps to reverse the prior administration's rules that made it harder for retirement plans to consider climate change, and other environmental social governance, or ESG factors when selecting investments. Workers are interested investing in a way that reflects their values without sacrificing returns, something Representative Andy Levin has been working on, and we look forward to the final rule.

Third, the administration recently released a report examining implementation of mental health parity by health plans. The report found widespread failure by health plans to comply with important requirements of the law. It made several recommendations that would improve enforcement, and strengthen coverage of behavioral health, both for the benefit of workers, their employers, and retirees.

Finally, we will learn about ways to protect workers and their families from barriers they face in enforcing their rights under retirement health plans including mandatory arbitration agreements, discretionary clauses and other technical issues.

Through these commonsense solutions I am hopeful, and I am confident, we can take another step forward to help Americans retire with security and access to all the health care they need and deserve and have paid for. I welcome my Republican colleagues' support, and hopefully we can work together to further secure Americans' financial futures.

Now it is my pleasure to recognize the distinguished ranking member for the purpose of making his opening statement. Representative Allen.

[The statement of Chairman DeSaulnier follows:]



OPENING STATEMENT

House Committee on Education and Labor

Chairman Robert C. "Bobby" Scott

Opening Statement of Chairman Mark DeSaulnier (CA-11)
 Subcommittee on Health, Employment, Labor, and Pensions
Improving Retirement Security and Access to Mental Health Benefits
 Zoom

Tuesday, March 1, 2022 | 10:15 a.m.

Today, we are meeting to discuss how Congress can improve workers' retirement and access to mental health benefits. As our economy continues to recover and our constituents struggle with higher costs caused by the pandemic, now more than ever we need to help workers and retirees achieve financial stability, including a secure retirement and high-quality health care – including mental health and behavioral health.

According to the New York Times, roughly 55 million Americans are 65 and older – and those at the peak of the Baby Boom are reaching 65 this year. Many are working later in their lives, relying on their next paycheck to make ends meet. With the Federal Reserve indicating that many Americans would struggle to come up with the money to finance an unexpected \$400 expense, such as a car repair, too few are earning enough to save for a dignified retirement.

Similarly, health care – particularly mental and behavioral health care – is too often unaffordable for workers and their families. Even before the pandemic, less than half of individuals with mental illness—and only 11 percent of individuals with a substance abuse disorder—received needed behavioral health services or treatment. The pandemic has underscored the urgency of this crisis.

In the past two years, Congress and this Committee have remained committed to improving retirement security and strengthening health coverage for workers and their families.

Last March, Congressional Democrats and the Biden-Harris Administration addressed the urgent multiemployer pension crisis and fully protected the pensions of more than one million Americans. Our solution was broadly supported by key stakeholders, including hundreds of employers and the United States Chamber of Commerce. Had we not acted, plans would have failed; workers and retirees would have lost nearly everything they worked so hard to save; and employers would have been forced to close or cut jobs.

In November, the Committee advanced the *Retirement Improvement and Savings Enhancement (RISE) Act*. This bipartisan legislation would make meaningful improvements to improve the retirement security of American workers. I want to thank all my colleagues and the Ranking Members of the Committee and Subcommittee.

The Committee has also played a leading role in strengthening health benefits, including through efforts to improve enforcement of the *Mental Health Parity and Addiction Equity Act*.

However, we know there is more work to be done – much more work to be done – to build a stronger, more inclusive retirement system and improve access to mental and behavioral health care.

Today, I look forward to discussing several commonsense solutions to help us do just that.

First, the hearing will explore draft legislation that Representative Lucy McBath intends to file. This draft bill makes a number of improvements to the nation's retirement system and includes important legislation that has been or will be filed by our Committee colleagues. Specifically, the discussion draft:

- Helps 401(k) participants better understand the fees they pay on investments. This is based on legislation that Representative Susan Wild plans to introduce soon;
- It increases lifetime income options in workers' 401(k) plans. This is based on bipartisan legislation Representatives Donald Norcross and Tim Walberg, our colleagues, recently introduced. I want to thank them for their leadership on this, along with Representative Wild and McBath.
- It gives workers additional opportunities to be part of their employer's retirement plan. This is based on legislation that Representative Kathy Manning recently introduced;
- It boosts employee ownership programs through the Department of Labor. This is based on legislation that Representatives Joe Courtney and Mark Pocan introduced; and
- Encourages emergency savings. This is based on bipartisan legislation introduced by Representatives Bonnie Watson Coleman and French Hill.
- The discussion draft also includes provisions to increase spousal protections in 401(k) plans that were included in legislation offered by our colleague Representative Lauren Underwood.

I look forward to today's testimony on how this package as a whole can bolster American's retirement security.

Second, the Biden-Harris Administration has taken steps to reverse the prior Administration's rules that made it harder for retirement plans to consider climate change and other environmental, social, and governance – or ESG – factors when selecting investments. Workers are interested in investing in a way that reflects their values without sacrificing returns, something Representative Andy Levin has been working on and we look forward to the final rule.

Third, the Administration recently released a report examining implementation of mental health parity by health plans. The report found widespread failure by health plans to comply with important requirements of the law and made several recommendations that would improve enforcement and strengthen coverage of behavioral health, both for the benefit of workers, their employers, and retirees.

And, finally, we will learn about ways to protect workers and their families from barriers they face in enforcing their rights under retirement and health plans, including mandatory arbitration agreements, discretionary clauses, and other technical issues.

Through these commonsense solutions, I am hopeful that we can take another step forward to help Americans retire with security and access to all the health care they need. I welcome my Republican colleagues' support and hope we can work together to further secure Americans' financial futures.

Now, it's my pleasure to recognize the distinguished Ranking Member for his opening statement.

Mr. ALLEN. All right. Thank you, Mr. Chairman. I think I am unmuted. Can you hear me, okay?

Chairman DESAULNIER. Yes.

Mr. ALLEN. Okay. Well, I am in the committee hearing room, and I will be just delighted to have you next to me sooner than later, so I would hope we could consider that as we open up our House to the people. Thank you for holding this hearing today. Our retirement system is healthier than it's been in decades.

Employer based retirement savings are thriving. More Americans see the value of saving for the future. Committee republicans are working to make the future of American retirees more secure, strengthening employer-sponsored retirement plans, particularly defined contribution plans are the best way to encourage workers to put money toward retirement savings voluntarily.

The committee is addressing much needed reforms for the defined contribution retirement system through bipartisan legislation. The RISE Act, H.R. 5891 and the Securing a Strong Retirement Act of 2021, H.R. 2954, will expand American workers' access to secure retirement. The committee should focus on enacting these bipartisan bills.

Specifically, the RISE Act expands multi-employer plans, which will make it easier for non-profit organizations, educational institutions, and small businesses to provide retirement benefits to their employees. The RISE Act also expands retirement savings for part-time and traditional workers, helping more Americans get ready for retirement.

The RISE Act also allows employers to offer small, financial incentives to employees for participating in retirement plans. The earlier American workers prepare for retirement the better. Empowering American workers to take ownership of their retirement savings is important for their long-term financial health, and that of their families.

It also contributes significantly to the future economic health of our Nation. We must protect taxpayers from irresponsible bailout schemes. President Biden's bail out of multi-employer pension plans in the so-called American Rescue Plan was reckless and irresponsible, sending 97 billion to underfunded pension plans without addressing the root cause is like scooping water out of a boat while it still has a hole in it, and sinking.

One of my first hearings on this committee was—and this was 8 years ago—dealing with multi-employer pension plans, and we have yet to do anything about it. The multi-employer pension system is in desperate need of systematic reform to protect workers and retirees from further mismanagement and to stop creating incentives for underfunding the plans, plus costing taxpayers millions of dollars.

Unless changes are made, these pension plans will backslide into old destructive patterns. We must demand accountability, transparency, and assurances that taxpayers will never again be asked to bear the burden of mismanaged pension plans. Furthermore, we must be vigilant against the Biden administration's aggressive and punitive regulatory agenda. The administration has demonstrated that it cares more about its radical progressive agenda than the financial well-being of retirees.

This was evidenced by the Department of Labor's proposed rule that will pressure retirement plan fiduciaries to prioritize environmental, social and governance factors when investing retirement plan assets. This is a reversal of protections the Trump administration put in place for retirement savers. Now the President of the United States is going to tell people where to invest their money.

This is ridiculous. That is why republican leader Foxx, and I sent a letter to Secretary Walsh in December requesting that the DOL rescind this proposed rule. Retirement plan fiduciaries are caretakers of retirement accounts, not social justice lawyers. Putting the Biden administration's radical green and social agendas above the financial interest of retirees is unacceptable.

With government run retirement plans faltering, it is more important than ever to strengthen employer-based retirement savings. Our bipartisan legislation will empower both employers and workers to cooperate for a better and more secure future.

Last, I would like to add a note about this hearing. Cramming sweeping and diverse topics into one hearing fails to give these important issues a really thorough bipartisan discussion. I hope this committee could aim to do better in the future, and with that, Mr. Chairman, I yield back.

[The statement of Ranking Member Allen follows:]

03.01.2022 – HELP Subcommittee Haring: Improving Retirement Security and Access to Mental Health Benefits

Opening Remarks from HELP Ranking Member, Rep. Rick Allen

Our retirement system is healthier than it has been in decades. Employer-based retirement savings are thriving, and more Americans are saving for their future.

Committee Republicans are working to make the future of American retirees more secure. Strengthening employer-sponsored retirement plans, particularly defined contribution plans, is the best way to encourage workers to put money toward retirement savings voluntarily.

The Committee is addressing much-needed reforms for the defined-contribution retirement system through bipartisan legislation. The Retirement Improvement and Savings Enhancement (RISE) Act (H.R. 5891) and the Securing a Strong Retirement Act of 2021 (H.R. 2954) will expand American workers' access to a secure retirement. The Committee should focus on enacting these bipartisan bills.

Specifically, the RISE Act expands Multiple Employer Plans, which will make it easier for non-profit organizations, educational institutions, and small businesses to provide retirement benefits to their employees.

The RISE Act also expands retirement savings for part-time and traditional workers, helping more Americans get ready for retirement.

And the RISE Act also allows employers to offer small financial incentives to employees for participating in retirement plans. The earlier American workers prepare for retirement, the better.

Empowering American workers to take ownership of their retirement savings is important for their long-term financial health, and that of their families. It also contributes significantly to the future economic health of our nation.

We must protect taxpayers from irresponsible bailout schemes. President Biden's bailout of multiemployer pension plans in the so-called American Rescue Plan was reckless and irresponsible. Sending \$97 billion to underfunded pension plans without addressing the root cause is like scooping water out of a boat while it still has a hole in it and is sinking.

The multiemployer pension system is in desperate need of systemic reform to protect workers and retirees from further mismanagement, and to stop creating incentives for underfunding plans, plus costing taxpayers millions of dollars.

Unless changes are made, these pension plans will backslide into old, destructive patterns. We must demand accountability, transparency, and assurances that taxpayers will never again be asked to bear the burden of mismanaged pension plans.

Furthermore, we must be vigilant against the Biden administration's aggressive and punitive

regulatory agenda.

The administration has demonstrated that it cares more about its radical progressive agenda than the financial well-being of retirees. This was evidenced by the Department of Labor's (DOL) proposed rule that will pressure retirement plan fiduciaries to prioritize environmental, social, and governance factors when investing retirement plan assets. This is a reversal of protections the Trump administration put in place for retirement savers. So, now the President of the United States is going to tell people where to invest their money—this is ridiculous.

That is why Republican Leader Foxx and I sent a letter to Secretary Walsh in December requesting that DOL rescind this proposed rule. Retirement plan fiduciaries are caretakers of retirement accounts, not social justice warriors. Putting the Biden administration's radical green and social agendas above the financial interests of retirees is unacceptable.

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Lastly, I'd like to add a note about this hearing. Cramming sweeping and diverse topics into one hearing fails to give these important issues a thorough bipartisan discussion.

I hope that this committee can aim to do better in the future."

Chairman DESAULNIER. Thank you, Mr. Allen. Without objection, all other members who wish to insert written statements into the record may do so by submitting them to the committee clerk. You should do this electronically in Microsoft Word format by 5 p.m. on March 15.

It is now my pleasure to thank and introduce our witnesses today. Thank you for being part of the hearing. I will start with Ms. Amy Matsui, whose name sounds familiar to me, is the Director of Income Security and Senior Counsel of the National Women's Health Center.

Ms. Karen Handorf is Senior Counsel at the law firm Berger Montague. Mr. Andrew Biggs is a Senior Fellow and Resident Scholar at the American Enterprise Institute, and Mr. Aron Szapiro is Head of Retirement Studies and Public Policy at Morningstar, Inc. We very much appreciate the witnesses for participating today and look forward to your testimony.

Let me remind the witnesses that we have read your written statements, and they will appear in full in the hearing record. Pursuant to Committee Rule 8(d) and committee practice, each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

Before you begin your testimony, please remember to unmute your microphone. During your testimony staff will be keeping track of time and a light will blink when your time is up. Please be attentive to the time, wrap up when your time is over, and then mute your microphone. If any of you experience technical difficulty during your testimony, or later in the hearing, you should stay connected on the platform, make sure you are muted, and use your phone to immediately call the committee's IT director whose number was provided to you in advance.

We will let all the witnesses make their presentation before we move to member questions. When answering a question please re-

member to unmute your microphone. The witnesses are aware of their responsibility to provide accurate information to the subcommittee, and therefore we will proceed with their testimony.

I will first recognize Ms. Matsui. Your mother-in-law has asked me to be nice to you, and I will. Go ahead.

STATEMENT OF MS. AMY MATSUI, DIRECTOR OF INCOME SECURITY AND SENIOR COUNSEL, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, D.C.

Ms. MATSUI. Thank you Chair DeSaulnier, Ranking Member Allen, Chairman Scott, Ranking Member Foxx, and members of the committee and subcommittee. I appreciate the opportunity to testify about improving women's retirement security. My name is Amy Matsui. I am the Director of Income Security and Senior Counsel of the National Women's Law Center.

In order to ensure a dignified retirement, women need retirement income from employer-sponsored pensions, and retirement savings plans to supplement social security's modest benefits. Because women face workplace inequities and shoulder the burden of family caregiving, they experience disparities in retirement income and retirement savings.

Women, especially women of color and women in low-wage jobs, may have less access to retirement savings plans at work, and even when women participate in retirement savings plans, they may be less able to save from their smaller paychecks.

The gender wage gap alone costs women \$400,000.00 over a 40-year career, with a lifetime loss of earnings for black women and Latinos, approximating one million dollars.

COVID will likely have negative long-term effects on women's lifetime incomes, wealth, and overall economic security. According to an AARP survey last year, more than one in five women reported that they prematurely dipped into their retirement savings or stopped contributing altogether during the pandemic.

For all of these reasons, married women rely on their spouse's retirement income and savings more than men do. Unfortunately, loopholes in spousal protections under ERISA undermine women's retirement security. The Retirement Equity Act of 1984 established spousal protections for traditional defined benefit pension plans by requiring the default form of benefit for married participants to be a joint and survivor annuity.

In order for a married participant to receive pension benefits in a different form, like a single life annuity or a lump sum, the participant spouse must agree to waive his or her spousal rights in writing before a notary public or plan administrator. This prevents the participant spouse from making unilateral decisions that impact their spouse's retirement.

However, the same protections do not apply to defined contribution plans like 401Ks, which are the predominant form of employer-sponsored retirement benefits. A married participant in a DC plan must obtain spousal consent if they want to designate a beneficiary other than their spouse to receive the account balance in case the participant dies while working.

Unless a married worker elects to receive their DC account balance in the form of a life annuity, ERISA does not require DC

plans to provide a joint and survivor spousal annuity as the default form of benefit. In other words, no spousal consent is required if the participant retires or changes jobs and decides to withdraw the account balance as lump sum, or roll it over into an IRA.

At that point, there is nothing to stop the participant spouse from taking actions that could undermine the other spouse's retirement security. For example, the participant spouse could withdraw his retirement savings and make a risky investment, an extravagant purchase, or a gift that the other spouse did not consent to.

He could squander the funds gambling. In any of those cases the funds would no longer be available for retirement. Practitioners have reported instances where participant spouses have drained their retirement savings accounts to prevent the other spouse from receiving a share during divorce proceedings.

Even if the other spouse finds out they may effectively be without a remedy if their retirement funds are spent, and there are few other assets. Because Federal law does not require married IRA holders to name their spouse as a beneficiary, if the participant spouse rolls their 401K account balance into an IRA, they could name a child, a sibling, or a girlfriend as a beneficiary, cutting out the spouse.

In all of these instances marital retirement savings have been placed out of the reach of spouses. Spouses may be deprived of their retirement savings when they need them the most. They may not even find out that the retirement savings they were counting on are gone until their spouse dies.

Section four of the discussion draft circulated to the subcommittee would provide robust spousal protections and defined contribution plans and protect spouses against the risks I just described. It would give spouses decisionmaking power over how and when retirement savings are withdrawn from the account by requiring the default form of benefit to be a qualified joint survivor annuity, or its equivalent.

It would not however require spousal consent for rollovers to other employer sponsored DC plans, or to IRAs that require spousal consent to have a beneficiary other than spouse named. Women faced a retirement crisis well before the pandemic and are likely to experience an even more uncertain retirement in its wake.

Strengthening spousal rights in defined contribution plans would help ensure that women who rely on their spouse's retirement savings because they have fewer of their own, do not bear the risk of their spouse depleting, or giving those savings away. Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Matsui follows:]

“Improving Retirement Security and Access to Mental Health Benefits”**U.S. House of Representatives, Committee on Education and Labor****Subcommittee on Health, Employment, Labor, and Pensions****March 1, 2022****Testimony of Amy K. Matsui****Director of Income Security, National Women’s Law Center**

Chair DeSaulnier, Ranking Member Allen, and members of the Subcommittee, thank you for the opportunity to submit this testimony. My name is Amy K. Matsui, and I am the Director of Income Security and Senior Counsel at the National Women’s Law Center.

The Center fights for gender justice—in the courts, in public policy, and in society—working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone—especially those who face multiple forms of discrimination. For almost half a century, the Center has been on the leading edge of every major legal and policy victory for women.

Women face a higher risk of economic insecurity throughout their lives, especially in their later years. In 2020, the poverty rate for women 65 and older was 10.1 percent (compared to 7.6 percent for older men)ⁱ—and poverty rates are consistently higher for older Black, Latinx, Asian and Native American women.ⁱⁱ Women need retirement income from employer-sponsored pensions and retirement savings plans (like 401(k)s) to supplement Social Security’s modest benefitsⁱⁱⁱ in order to experience a secure and dignified retirement. Because women face workplace inequities and shoulder the burden of family caregiving, they experience disparities in retirement income and retirement savings. As a result, married women rely on their spouses’ retirement income and savings more than men do. Right now, loopholes in spousal protections under ERISA undermine women’s retirement security—and are long-overdue to be addressed.

Women Workers Faced Challenges to Building a Secure Retirement, Even Before the Pandemic

Women, especially women of color, face deep inequities in the workforce and our economy. Women in the U.S. who work full-time, year-round are typically paid only 83 cents for every dollar paid to their male counterparts, and wage gaps are even larger for Black women, Native American women, and Latinas.^{iv} Women are overrepresented among part-time workers,^v and poorly-paid workers.^{vi} Women bear disproportionate responsibility for caregiving,^{vii} and workers of color are the least likely to have access to affordable, high-quality child care^{viii} and the paid sick days and family and medical leave that enables them to balance work and caring for themselves and their loved ones.^{ix}

Income gaps and work-related disparities translate into lower lifetime earnings for women. The gender wage gap alone can cause women to lose \$400,000 over a 40-year career, with the lifetime loss of earnings for Black women totaling nearly \$1 million, and the lifetime earnings loss for Latinas exceeding \$1.1 million.^x Work-related disruptions caused by caregiving responsibilities, whether they occur early in

women's careers when they are caring for young children or during prime-earning years when they are caring for older relatives or a spouse, also reduce women's cumulative earnings. A mother with one child earns 28 percent less than a childless woman over the course of her lifetime, and each additional child decreases her lifetime earnings by another 3 percent—although fathers do not experience any decrease.^{xi}

Because the primary sources of retirement income—Social Security, employer-sponsored pensions, and tax-favored retirement savings accounts—are based on employment and earnings, women workers face greater barriers to attaining retirement security. Being paid less than men means that women have fewer resources to save for retirement, and lower Social Security and pension benefits in their own right as workers. Taking time out of the workforce likewise reduces the earnings that women can contribute to retirement savings accounts and that are used to calculate Social Security and pension benefits.^{xii} This lifetime impact falls most severely on women of color, who have the largest wage disparities and are more likely to act as caregivers. These are also among the reasons why women lag behind in accumulating assets and wealth more generally,^{xiii} which may make it even harder to earmark savings for retirement.

COVID-19 Will Likely Further Undermine Women's Ability to Save for Retirement

The pandemic has had devastating health and economic impacts on women.^{xiv} Increased caregiving responsibilities, whether due to closed schools and the lack of child care or elder care providers or the illness of family members, fell largely on women.^{xv} Women of color are overrepresented in the front-line workforce, risking their lives to provide health care, child care, and other essential services.^{xvi} And sectors in which women workers predominate and women of color are also overrepresented^{xvii} suffered heavy job losses.

Overall, women have lost nearly 1.8 million net jobs lost since February 2020.^{xviii} While women's unemployment rate dropped to 3.6 percent in January 2022, this overall rate masks further disparities for women of color: 5.8 percent of Black women and 4.9 percent of Latinas remained unemployed.^{xix} Further, if the nearly 1.1 million women who have left the labor force since February 2020 were counted as unemployed in January 2022, women's unemployment rate would have been 5 percent in January.^{xx} And, in January 2022, nearly 1 in 4 unemployed women ages 20 and over (26.3 percent) had been out of work for 6 months or longer.^{xxi}

The pandemic will likely have long-term negative effects on women's lifetime incomes, wealth, and retirement security—especially for women of color, who faced higher rates of material hardship throughout the pandemic,^{xxii} and who tend to recover more slowly from recessions.^{xxiii} Research suggests that younger workers entering the job market in a period of high unemployment may experience reduced earnings for up to 10 years, as well as reduced job mobility,^{xxiv} both of which will impact lifetime earnings. Older women of color who become unemployed during a recession may have a more difficult time finding another job because of race, gender, and age discrimination. Some older workers have dropped out of the workforce altogether: In October 2021, there were 369,000 fewer women ages 55 and older in the labor force than there were in February 2020. Many of these workers are struggling to find work: nearly 2 in 5 women ages 55 and older (38.2 percent) had been out of work for 6 months or longer in October 2021.^{xxv} And, in fact, many of those who would still be in the workforce if the pandemic never happened have been forced to retire earlier than anticipated, especially Black older workers.^{xxvi} Job loss and extended periods of unemployment during the pandemic

will not only undermine women's economic security in the short term, but also reduce their lifetime earnings.

Women May Have Less Access to Retirement Benefits and Savings Plans

Workers are automatically enrolled in traditional defined benefit (DB) pensions and, in the private sector, are not required to contribute.^{xxxvii} DB pensions provide retirement benefits in the form of annuities, and married workers' spouses (including divorced spouses) can also receive pension benefits based on the worker-spouse's pension. DB pension benefits have been shown to help keep lower-income workers out of poverty,^{xxxviii} and annuities are especially beneficial for women because of their longer life expectancies.^{xxxix} However, the share of workers who have a traditional pension has steeply declined in recent years, with employers shifting to defined contribution retirement savings plans.

While more employers offer defined contribution (DC) retirement savings plans (like 401(k) or 403(b) plans), women, workers of color, and lower-income workers may have less access to retirement savings plans at work. Poorly paid jobs, in which women of color predominate, are especially unlikely to offer retirement benefits.^{xxx} There are also racial disparities in retirement savings plan participation: in 2016, 51 percent of white workers participated in DC plans—such as 401(k)s—compared to 33 percent of Black and 28 percent of Latinx workers.^{xxxi} And until recently, employers were not required to offer retirement savings plans to any part-time workers, and women are more likely to work part-time than men.^{xxxii}

Moreover, even if women have access to their employers' retirement savings plans and are eligible to participate, they still need to be able to spare income to contribute to their retirement savings accounts.^{xxxiii} That is because, unlike traditional DB plans, DC plans rely on the worker to put savings into their accounts, sometimes with an employer match.^{xxxiv} With smaller paychecks, women are able to spare less income to save for retirement, and exempting contributions to retirement savings plans from income tax does not make it any easier for them to do so. Given women's lower lifetime earnings, compared to men's, it is unsurprising that men's retirement savings tend to exceed women's.^{xxxv}

During the pandemic, moreover, many women have depleted existing retirement savings (after penalties on withdrawals from 401(k) accounts in 2020 were waived under the CARES Act). According to an AARP survey, more than one in five (22 percent) women reported that they prematurely dipped into their retirement savings or stopped contributing altogether since the COVID pandemic began, jeopardizing their retirement security. Additionally, one in three women said that their financial situation is worse than it was in January 2020 (before the pandemic), and of those women the vast majority said that their ability to save for retirement has worsened.^{xxxvi} The pandemic may therefore have further reduced women's retirement savings.

Married Women Rely on Their Spouses' Pensions and Retirement Savings, But Lack Legal Protections to Retirement Savings

For all of these reasons, married women tend to rely more heavily on their spouses' income and savings than married men do.^{xxxvii} Pension benefits and retirement savings accrued during a marriage are generally considered marital property under state law, under the theory that they represent deferred compensation for the productive efforts of the working spouse.^{xxxviii} While pension benefits and retirement savings can be divided at divorce,^{xxxix} Congress also recognized that it was necessary to

protect spouses' rights to marital retirement benefits even in an intact marriage. The Retirement Equity Act of 1984 (REA), implicitly acknowledged that when the worker-spouse had the right to unilaterally decide whether the other spouse would receive survivor benefits, widows lost out on retirement income.^{xi} Accordingly, the REA established spousal protections for DB plans by requiring the default form of benefit for married participants to be a joint-and-survivor annuity that provides retirement benefits during the couple's joint life along with survivor benefits to a spouse after the participant-spouse's death.^{xii} A participant's spouse must agree to receive benefits in a different form in writing, before a notary public or plan administrator.^{xiii} These protections are, understandably, more important when the spouse has fewer assets and retirement benefits of their own and outlives the participant-spouse. As a result, while spousal protections are gender-neutral, they have tended to benefit women.

However, although Congress established robust spousal protections for traditional DB pension plans, the same protections do not apply to DC plans. The REA's requirement of the joint-and-survivor spousal annuity as the default form of benefit only applies to married DC plan participants if the plan offers an annuity benefit (and few DC plans have done so),^{xiii} and the participant spouse elects payment of benefits in the form of a life annuity.^{xiv} This discrepancy in ERISA means that spouses lack the legal right to participate in the decision of whether the DC plan account balance will be received as a lump sum or as an annuity at retirement. The potential impact of this discrepancy on spouses' retirement security has increased, as DC plans have increasingly supplanted DB plans.

There is only one circumstance in which a participant in a DC plan must obtain spousal consent: if a participant in a DC plan declines to choose an annuity form of benefit, he or she must obtain spousal consent before designating a beneficiary other than the spouse who would receive the account balance if the participant died while participating in the plan.^{xiv} But spousal consent is not required for hardship withdrawals or loans taken out against the DC account funds. And no spousal consent is required if the participant retires or changes jobs and decides to withdraw the account balance.

At that point, there is nothing to stop the participant-spouse from taking actions that could deplete their retirement savings, jeopardizing the other spouse's future retirement. As the GAO observed in a 2014 report, "In a worst case scenario, the spouse who participates in the DC plan could withdraw all the assets and spend them in ways that do not provide for the couple's retirement security."^{xvi} For example, the participant-spouse could make a risky investment, an extravagant purchase, or a gift that the other spouse did not consent to. He could lose the funds to a gambling habit or other addiction. In any of those cases, those retirement savings would be depleted and unavailable for retirement, to the spouse's detriment. The withdrawal will be subject to income taxes and, if the spent funds were withdrawn before age 59 ½, the participant-spouse could also incur tax penalties^{xvii} for which the other spouse would be jointly and severally liable, if the couple jointly filed taxes.

Practitioners have reported instances where participant-spouses, in anticipation of divorce, have sought to drain retirement savings accounts in order to prevent the other spouse from receiving their share during divorce proceedings. Some participant-spouses will go so far as to change jobs in advance of divorce. For example, in one divorce case described by a practitioner, the husband was the primary breadwinner. Although he had a 401(k) through his company, he was not a high-earner and did not have an attorney. The wife was a stay-at-home parent and qualified for representation through a legal services organization. When he realized that his wife would be awarded a portion of his 401(k), the husband quit his job and withdrew all the money. This was the only real asset that the couple had, so the wife could

not recoup the portion of the benefits she would have been entitled to from another asset. If her consent had been required, then he would not have been able to deplete the one asset the couple had.

A participant-spouse leaving a job could, alternatively, roll the account balance into an IRA – an increasingly common practice.^{xlviii} The potential implications of transferring DC account balances into an IRA for spouses are worth considering. Although spouses may have rights under state community property law,^{xlix} IRA account holders are not required, under federal law, to designate a spouse as the beneficiary of the account, even if it contains marital assets. This means that even if marital retirement savings are rolled over into an IRA from a DC plan, the worker-spouse can name a child from a previous marriage, sibling, or even a girlfriend as the recipient of those funds at his death – depriving their spouse of retirement assets they may have been counting on for retirement. Moreover, there is certainly no requirement that the worker-spouse obtain spousal consent to elect to receive account funds in a form other than a joint-and-survivor annuity, or make any other withdrawal from an IRA. As a result, if DC plan account funds are rolled over into an IRA following a job change or retirement, those funds are shielded from joint decisionmaking. What is more, spouses may be deprived of those funds when they are most in need of them, but least able to replenish them.

In sum, as the GAO wrote in 2014, “there is no protection against the assets being invested unwisely, inadvertently spent down too quickly, or simply withdrawn fully upon a job change and rolled into an IRA, with a change in beneficiary.”^{li} The limited spousal protections in DC plans means that there is a significant risk that retirement funds upon which the spouse will be relying for a secure retirement will be placed outside the spouse’s control – and the spouse bears the full measure of that risk, with no recourse.

Policymakers Should Strengthen Spousal Rights in Defined Contribution Plans

For all of the forgoing reasons, policymakers should strengthen spousal rights to defined contribution plans. By making the default form of benefit from DC plans a joint-and-survivor annuity, or its equivalent, if spousal consent is not obtained, Congress can close the gap in the ERISA’s protections and fully effectuate the intent of the REA. The Women’s Retirement Protection Act of 2021, for example, provides an example of robust spousal protections for the predominant form of employer-sponsored retirement benefits. While requiring spousal consent for distributions or rollovers to IRAs, this legislation would not do so for transfers to other employer-sponsored DC plans to be made. The legislation also creates an exception for instances where obtaining spousal consent would be inappropriate, which could include situations where the participant-spouse is a survivor of domestic violence, and the act of obtaining consent would subject him or her to the threat of economic coercion or physical risk.

While the spousal protections in DB plans are well-established and have been administered for nearly four decades,^{lii} arguments have been made against extending these protections to DC plans. Industry groups have argued that ERISA’s existing qualified joint-and-survivor annuity requirement for DB plans should be restricted or eliminated because many spouses consent to the waiver of the annuity.^{liii} But this assertion ignores the fact that the waiver means the legal protection is operating as intended: unless there has been fraud, the spouse has participated in a joint decision about marital pension benefits. Without that legal right, the worker spouse can unilaterally decide how pension benefits are received – creating the very risk to spousal retirement security that the REA was intended to eliminate. Others have argued that there is insufficient evidence that the weaker spousal protections in DC plans actually harm spouses. However, the fact that current law does not prohibit the scenarios described above means that

it is difficult to assess how frequently they occur. Because a participant-spouse who withdraws DC account assets without consent (and the plan that allows him to do so) are not violating any laws, unless the plan has been put on notice that there is a divorce pending, under some circumstances, there is no illegal behavior to report. There is no entity or agency (such as pension counseling projects, plan administrators, or state or federal agencies) that spouses would know to contact to report this wholly legal act, and no entity or agency is known to track such reports. Moreover, many spouses would not even become aware that the retirement assets were removed from their control before they have been spent or transferred to another – in other words, until it is too late.

Finally, an argument has also been raised that spousal consent for DC plans is not necessary because more women are working than in previous generations, and thus have access to their own retirement savings.ⁱⁱⁱ This ignores that, as described above, many women continue to experience economic disadvantage and barriers to participation in the workforce, and thus to accruing sufficient retirement savings – and therefore continue to rely on their spouse's retirement savings.

Conclusion

Women faced a retirement crisis well before the pandemic, and may experience decreased lifetime earnings, depleted savings, and an even more uncertain retirement in its wake. Strengthening spousal rights in defined contribution plans under ERISA would help ensure that women who rely on their spouses' retirement savings because they have fewer of their own, do not risk economic insecurity in retirement because their spouse has depleted or given away retirement savings accrued during their marriage. The Center urges policymakers to close a longstanding and increasingly significant gap in ERISA's protections and eliminate this risk to women's retirement security.

ⁱ SARAH JAVAID & JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 2021 (Sept. 2021), <https://nwlc.org/resource/national-snapshot-poverty-among-women-families-2021/>.

ⁱⁱ See, e.g., AMANDA FINS, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 2020 (Dec. 2020), <https://nwlc.org/wp-content/uploads/2020/12/PovertySnapshot2020.pdf>; AMANDA FINS, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 2019 (Oct. 2019), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/10/PovertySnapshot2019-2.pdf>; MEIKA BERLAN & MORGAN HARWOOD, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 2018 (Sept. 2018), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/National-Snapshot.pdf>; KAYLA PATRICK, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 2016 (Sept. 2017), <https://nwlc.org/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf>.

ⁱⁱⁱ The average monthly benefit for all women beneficiaries 65 and older was \$1,320.56, or \$15,846.72 per year as of December 2019. Nat'l Women's Law Ctr. calculations based on U.S. SOCIAL SECURITY ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN: 5.A OASDI CURRENT-PAY BENEFITS: SUMMARY, Table 5.A1 (2020), <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/5a.pdf>.

^{iv} See NAT'L WOMEN'S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Sept. 2021), <https://nwlc.org/resource/the-wage-gap-the-who-how-why-and-what-to-do-2/>; see also JOCELYN FRYE, CTR. FOR AM. PROGRESS, RACISM AND SEXISM COMBINE TO SHORTCHANGE WORKING BLACK WOMEN (Aug. 2019), <https://www.americanprogress.org/issues/women/news/2019/08/22/473775/racism-sexism-combine-shortchange-working-black-women/>.

- ^v CLAIRE EWING-NELSON, NAT'L WOMEN'S LAW CTR., PART-TIME WORKERS ARE PAID LESS, HAVE LESS ACCESS TO BENEFITS — AND MOST ARE WOMEN (Feb. 2020), <https://nwlc-clw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/02/Part-Time-Workers-Factsheet-2.26.20.pdf>.
- ^{vi} JASMINE TUCKER & JULIE VOGTMAN, NAT'L WOMEN'S LAW CTR., WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS (April 2020), https://nwlcclw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.
- ^{vii} See, e.g., AARP & NAT'L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S. 2020 (June 2020), https://www.caregiving.org/wp-content/uploads/2020/06/AARP1316_RPT_CaregivingintheUS_WEB.pdf; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, PATTERNS OF CAREGIVING AND WORK: EVIDENCE FROM TWO SURVEYS (March 2021), <https://www.bls.gov/opub/mlr/2021/article/patterns-of-caregiving-and-work-evidence-from-two-surveys.htm>.
- ^{viii} See, e.g., NAT'L WOMEN'S LAW CTR. & CTR. FOR STUDY OF SOCIAL POL'Y, A LIFETIME'S WORTH OF BENEFITS: THE EFFECTS OF AFFORDABLE, HIGH-QUALITY CHILD CARE ON FAMILY INCOME, THE GENDER EARNINGS GAP, AND WOMEN'S RETIREMENT SECURITY (April 2021), <https://nwlc.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits-FD.pdf>.
- ^{ix} See JESSICA MASON & PAULA MOLINA ACOSTA, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, CALLED TO CARE: A RACIALLY JUST RECOVERY DEMANDS PAID FAMILY AND MEDICAL LEAVE (March 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/called-to-care-a-racially-just-recovery-demands-paid-family-and-medical-leave.pdf>.
- ^x See, e.g., JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., THE WAGE GAP HAS ROBBED WOMEN OF THEIR ABILITY TO WEATHER COVID-19 (March 2021), <https://nwlc.org/wp-content/uploads/2021/03/EPD-2021-v1.pdf>.
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- ^{xii} TRACEY GRONNIGER & AMBER CHRIST, ASSET FUNDERS NETWORK, FROM SURVIVING TO THRIVING: ENSURING THE GOLDEN YEARS REMAIN GOLDEN FOR OLDER WOMEN (2020), https://assetfunders.org/wp-content/uploads/AFN_2020_EconomicSecurityOlderWomen_BRIEF_SINGLE-2.18.20.pdf.
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^{xvi} NAT'L WOMEN'S LAW CTR., WOMEN MAKE UP THE MAJORITY OF FRONT LINE WORKERS OF THE COVID-19 CRISIS (March 2020), https://nwlc.org/wp-content/uploads/2020/05/final_NWLC_Frontlines_FactSheet-002.pdf.

^{xvii} See, e.g., CLAIRE EWING-NELSON, NAT'L WOMEN'S LAW CTR., ONE IN FIVE CHILD CARE JOBS HAVE BEEN LOST SINCE FEBRUARY, AND WOMEN ARE PAYING THE PRICE (August 2020), <https://nwlc.org/resources/one-in-five-child-care-jobs-have-been-lost-since-february-and-women-are-paying-the-price/>; CLAIRE EWING-NELSON, NAT'L WOMEN'S LAW CTR., MORE THAN THREE IN FOUR OF THE HEALTH CARE WORKERS FIGHTING COVID-19 ARE WOMEN (August 2020), <https://nwlc.org/resources/more-than-three-in-four-of-the-health-care-workers-fighting-covid-19-are-women/>.

^{xviii} JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., MEN HAVE NOW RECOUPED THEIR PANDEMIC-RELATED LABOR FORCE LOSSES WHILE WOMEN LAG BEHIND (Feb. 2022), <https://nwlc.org/resource/men-recouped-losses-women-lag-behind/>.

^{xix} *Id.*

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} See, e.g., NAT'L WOMEN'S LAW CTR., NWLC ANALYSIS OF U.S. CENSUS BUREAU COVID-19 HOUSEHOLD PULSE SURVEYS, <https://nwlc.org/resources/nwlc-analysis-of-u-s-census-bureau-covid-19-household-pulse-surveys/>.

^{xxiii} See, e.g., JARED BERNSTEIN & JANELLE JONES, CTR. ON BUDGET & POL'Y PRIORITIES, GROUNDWORK COLLABORATIVE, THE IMPACT OF THE COVID-19 RECESSION ON THE JOBS AND INCOMES OF PERSONS OF COLOR (May 13, 2020), https://groundworkcollaborative.org/wp-content/uploads/2020/05/Groundwork-Bernstein-Jones-paper_5.13.pdf (stating that the incomes of low-paid workers are expected to decline precipitously, with the incomes of Black workers falling more, and even faster); see also CHANDRA CHILDERS & GLADYS MCLEAN, INST. FOR WOMEN'S POL'Y RSCH., BLACK AND HISPANIC WOMEN LAG IN RECOVERING FROM THE RECESSION (August 2017), <https://iwpr.org/publications/black-hispanic-women-lag-recovering-recession/>.

^{xxiv} See, e.g., Catherine Bosley, Max Reyes, Jeff Green & Bloomberg, *How Millennials Are Being Set Back by Back-to-Back Financial Crises*, FORTUNE (April 11, 2020), <https://fortune.com/2020/04/11/millennials-coronavirus-great-recession-economy-personal-finance/>; *Facing Adulthood With an Economic Disaster's Lasting Scars*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/business/economy/coronavirus-young-old.html>; Janet Adamy, *Millennials Slammed by Second Financial Crisis Fall Even Further Behind*, WALL ST. J. (Aug. 9, 2020), <https://www.wsj.com/articles/millennials-covid-financial-crisis-fall-behind-jobless-11596811470>.

^{xxv} National Women's Law Center calculations using U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (BLS), LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: A-38, PERSONS NOT IN THE LABOR FORCE BY DESIRE AND AVAILABILITY FOR WORK, AGE, AND SEX (November 8, 2021), <https://www.bls.gov/web/empsit/cpseea38.htm>.

^{xxvi} See, e.g., OWEN DAVIS, BRIDGET FISHER, TERESA GHILARDUCCI, & SIAVASH RADPOUR, THE NEW SCHOOL FOR SOC. RSCH., THE PANDEMIC RETIREMENT SURGE INCREASED RETIREMENT INEQUALITY (June 2021), <https://www.economicpolicyresearch.org/jobs-report/the-pandemic-retirement-surge-increased-retirement-inequality> (noting that between March 2020 and June 2021, at least 1.7 million more older workers than expected retired due to the pandemic recession and that Black workers without a college degree experienced the highest increase in the percent share of those retired before 65, from 16.5 percent to 17.9 percent); see also MATTHEW S. RUTLEDGE, NORMA B. COE & KENDREW WONG, CTR. FOR RET. RSCH. AT BOSTON COLLEGE, WHO CLAIMED SOCIAL SECURITY EARLY DUE TO THE GREAT RECESSION (July 2012), <https://crr.bc.edu/briefs/who-claimed-social-security-early-due-to-the-great-recession/>.

^{xxvii} MONIQUE MORRISSEY, ECONOMIC POL'Y INST., THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE FAILED MOST AMERICAN WORKERS (March 2016), <https://www.epi.org/publication/retirement-in-america/>.

^{xxviii} BETH ALMEIDA & FRANK PORELL, NAT'L INST. ON RET. SEC., THE PENSION FACTOR: ASSESSING THE ROLE OF DEFINED BENEFIT PLANS IN REDUCING ELDER HARDSHIPS (July 2009), <https://www.nirsonline.org/reports/the-pension-factor-assessing-the-role-of-defined-benefit-plans-in-reducing-elder-hardships/>.

- ^{xxix} See, e.g., Ctr. For Disease Control, National Vital Statistics Rapid Release, Provisional Life Expectancy Estimates for June through January 2020 (Feb. 2021), <https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf>.
- ^{xxx} TUCKER & VOGTMAN, *supra* note 6.
- ^{xxxi} MORRISSEY, *supra* note 27.
- ^{xxxii} CHRISTIAN E. WELLER ET AL., NAT'L INST. ON RET. SEC., STILL SHORTCHANGED: AN UPDATE ON WOMEN'S RETIREMENT PREPAREDNESS 3 (May 2020), <https://www.nirsonline.org/wp-content/uploads/2020/04/Still-Shortchanged-Final.pdf>.
- ^{xxxiii} MORRISSEY, *supra* note 27.
- ^{xxxiv} *Id.*
- ^{xxxv} GRACE ENDA & WILLIAM G. GALE, HOW DOES GENDER EQUALITY AFFECT WOMEN IN RETIREMENT? (July 2020), <https://www.brookings.edu/essay/how-does-gender-equality-affect-women-in-retirement/>.
- ^{xxxvi} AARP, *supra* note 14.
- ^{xxxvii} McCULLOCH, *supra* note 13, at 2; see also Joan Entmacher & Amy Matsui, *Addressing the Challenges Women Face In Retirement: Improving Social Security, Pensions, and SSI*, 46 J. MARSHALL L. REV. 749, 766 & 789 (2013), <https://repository.law.uic.edu/lawreview/vol46/iss3/4/>.
- ^{xxxviii} See, e.g., LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 422-38 (4th ed. 2010); see also Statement on Signing the Retirement Equity Act of 1984 (Aug. 1984), <https://www.reaganlibrary.gov/archives/speech/statement-signing-retirement-equity-act-1984> ("The Retirement Equity Act also clarifies that each person in a marriage has a right to benefit from the other's pension.").
- ^{xxxix} See Harris, Carbone & Teitelbaum, *supra*; Form and Payment of Benefits, 29 U.S.C. § 1056(d) (2021).
- ^{xl} Statement on Signing the Retirement Equity Act of 1984, *supra* note 38 ("[The REA] improves and protects the vital role of pensions as retirement income to widows.").
- ^{xli} See Retirement Equity Act of 1984, Pub. L. No. 98-397, § 203(a), 98 Stat. 1426 (1984) (providing that DB plans must establish qualified joint and survivor annuities and preretirement survivor annuities as the default form of benefit for married participants).
- ^{xlii} See id. § 203(b) (providing that spouse must consent in writing before a notary public if a married participant elects a form of benefit other than the default joint-and-survivor annuity).
- ^{xliii} See MICHAEL J. BRIEN & CONSTANTIJN W. A. PANIS, ANNUITIES IN THE CONTEXT OF DEFINED CONTRIBUTION PLANS: A STUDY FOR THE U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION 12 (Nov. 2011), <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/annuities-in-the-context-of-defined-contribution-plans.pdf>.
- ^{xliv} See 26 U.S.C. § 417(a)(11)(B)(iii) (2021).
- ^{xlv} See 26 U.S.C. § 417(a)(11)(B)(iii) (2021).
- ^{xlvi} U. S. GOVERNMENT ACCOUNTABILITY OFFICE, RETIREMENT SECURITY: TRENDS IN MARRIAGE AND WORK PATTERNS MAY INCREASE ECONOMIC VULNERABILITY FOR SOME RETIREES 48 (January 2014), <https://www.gao.gov/assets/gao-14-33.pdf>.
- ^{xlvii} Internal Revenue Service, Retirement Plans, Hardships, Early Withdrawals, and Loans (Apr. 2021), <https://www.irs.gov/retirement-plans/hardships-early-withdrawals-and-loans>.
- ^{xlviii} EBRI, Fast Facts: The Changing Landscape of Individual Account Retirement Plan Assets and the Differences by Race/Ethnicity (Apr. 2021), https://www.ebri.org/docs/default-source/fast-facts/ff-394-retassets2-1apr21.pdf?sfvrsn=85e73a2f_6.
- ^{xlix} For federal income tax purposes, IRAs are deemed to be separate property. 26 U.S.C. § 408(g). But federal tax law does not abrogate community property rights under applicable state law. See, e.g., I.R.S. P.L.R. 199937055 (Sept. 17, 1999) (finding that community property-based rights to IRAs should be determined under applicable state law). Specifically, in states that have adopted community property regimes (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin and, to a limited extent, Alaska and Puerto Rico), spouses have rights to IRA assets, even if the IRA is titled in the other spouse's name alone, if the assets were earned or acquired during the marriage (except as an inheritance or gift to one spouse). *Id.*; Wells Fargo Advisors, Individual Retirement Account Add/Change of Beneficiary Form, <https://www.wellsfargoadvisors.com/bw/wellstrade/forms/578639.pdf> (listing community property states where spousal consent may be necessary when the beneficiary is not a spouse).

ⁱ U. S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 46.

ⁱⁱ In addition, the Federal Thrift Savings Plan requires spousal consent for FERS participants. See Thrift Savings Plan, Spouse's Rights, <https://www.tsp.gov/planning-for-life-events/spouses-rights/>.

ⁱⁱⁱ See, e.g., Lifetime Income RFI Comment Letter, DEFINED CONTRIBUTION INSTITUTIONAL INV. ASS'N 14 (May 3, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB33-656.pdf>.

ⁱⁱⁱⁱ U. S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 46, at 49.

Chairman DESAULNIER. Thank you. We will now hear from Ms. Handorf. Please proceed.

**STATEMENT OF MS. KAREN HANDORF, SENIOR COUNSEL,
BERGER MONTAGUE, ALEXANDRIA, VIRGINIA**

Ms. HANDORF. Good morning, Mr. Chairman, Ranking Members, and members of the subcommittee, and thank you for the opportunity to testify today. The Department of Labor's 2022 Mental

Health Parity Report revealed stunning lack of mental health parity compliance by targeted plans and indicates a widespread non-compliance in general.

To leverage its resources the Department of Labor should be given the requested authority to deal directly with insurance carriers and insurers acting as third-party administrators. The relevant terms of insured plans issued by carriers are likely to be administered and be identical by the carrier in the same way.

The relevant terms of prototype plans sold by carriers to self-insured employers are also likely to be identical and administered by the insurer acting as a third-party administrator in the same way. If there are violations of mental health parity requirements, either in plan documents, or through plan administration, they are likely to show up in all plans insured or administered by the same carrier.

DOL could leverage its limited resources if it could correct the problems at the insurer third-party service provider level, rather than seeking compliance from each employer individually. DOL should also be given civil penalty enforcement authority for parity violations. Under the current system there's no financial deterrent.

A non-compliant employer only has to fix the non-compliant plan and pay the benefits it should have paid in the first place. If non-compliance results in a stiff penalty, employers will be more likely to comply before DOL knocks on the door. Employers are also more likely to comply if make-whole relief is available to participants who have been harmed by benefit denials.

This is fair to the injured participant, and will incentivize employers to comply, or they will have to bear the financial consequences. Compliance will be even more likely if the Department is given the authority to make-whole relief on behalf of all participants who have been injured by a violation. DOL cannot do it alone. Congress intended for participants to have effective remedies, and ready access to the Federal courts.

It is imperative that Congress lift the roadblocks that keep participants from protecting their own rights. One major roadblock is the deferential standard of review of benefit determinations. Many plan documents give broad discretion to those deciding benefit claims. Courts review those decisions under an extremely deferential standard of review.

Benefits that would have been granted under a de novo standard are not under this discretionary standard. Because these discretionary standards undermine promised coverage, 26 states have banned them from insurance policies issued in their states. They should also be banned in ERISA.

An ERISA ban will protect plan participant's rights to receive hard-earned benefits, and it will ensure uniformity among plans in different states and between insured and self-insured plans. Plan arbitration clauses are another major roadblock to private enforcement. These provisions deny participants their right to litigate their claims in Federal court.

Some also prohibit class action lawsuits or limit the participant's ability to obtain relief for the plan as a whole. Some include confidentiality clauses and make it impossible for participants to inform others of fiduciary breaches. These arbitration clauses make

it unlikely that a plan participant will challenge even egregious misconduct.

Almost always, the monetary value of their individual claim will be a lot less than the cost of legal representation, and as a result, systemic violations impacting all plan participants will not be redressed. In many cases individual arbitration simply does not work with the remedial structure of ERISA.

Plan investment decisions impact all plan participants in the same way, and relief for those violations should be uniform among participants. Individual arbitrations are likely to result in conflicting decisions about fiduciary misconduct, and inconsistent and non-uniform remedies for plan participants.

There are many other significant roadblocks to effective private enforcement of ERISA as outlined in my written testimony. If we are committed to employer-sponsored health and pension plans, we must give DOL and participants the ability to make them work. Thank you.

[The prepared statement of Ms. Handorf follows:]

TESTIMONY OF KAREN L. HANDORF**Hearing on “IMPROVING RETIREMENT SECURITY AND ACCESS TO
MENTAL HEALTH BENEFITS”****U.S. House of Representatives Committee on Education & Labor****Subcommittee on Health, Employment, Labor, and Pensions****March 1, 2022**

Chairperson DeSaulnier, Ranking Member Allen, and members of the Subcommittee. Thank you for the opportunity to testify at today’s hearing on “Improving Retirement Security and Access to Mental Health Benefits.”

I am a Senior Counsel in the Employee Benefits and ERISA Practice Group at the law firm of Berger Montague P.C., in its Washington, D.C. office. I have spent almost 40 years representing participants and beneficiaries of employee benefit plans in litigation brought under the Employee Retirement Income Security Act (ERISA) in the district courts and on appeal. I began my ERISA career in 1982 as a trial attorney with the Office of the Solicitor, Plan Benefits Security Division, U.S. Department of Labor (PBSD), which provides legal advice and litigation support to the Employee Benefits Security Administration (EBSA). During my 25-year career at PBSD, I conducted and supervised ERISA fiduciary litigation in the district and appellate courts, supervised ERISA civil penalty enforcement actions, and supervised the amicus brief writing program through which the Department of Labor (DOL) expressed its views on novel and difficult ERISA issues in private litigation. During the last six years of my career at DOL, I served as the Deputy Associate Solicitor of PBSD. Since leaving DOL in 2007, I have represented participants and beneficiaries of employer sponsored welfare and pension plans in class action litigation brought against fiduciaries alleged to have violated ERISA. The current focus of my work at Berger Montague is ERISA-covered health plans.¹

I applaud Congress for its recent legislation strengthening ERISA’s protections by giving DOL additional tools to enforce The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (P.L. 110-343) (MHPAEA), as well as requiring disclosure of health plan broker and consultant

¹ I am grateful for the assistance of my Berger Montague colleague Senior Counsel Julie Selesnick in preparing this testimony.

compensation, prohibiting gag clauses and enacting the No Surprises Act. I also applaud DOL's work and substantial expenditure of resources to bring health plans into MHPAEA compliance as described in the 2022 MHPAEA Report to Congress submitted by the Departments of Labor, Health and Human Services, and Treasury (the Departments), titled Realizing Parity, Reducing Stigma, and Raising Awareness: Increasing Access to Mental Health and Substance Use Disorder Coverage (2022 Report).

My testimony today will first focus on EBSA's MHPAEA enforcement activity and the Departments' recommendations for strengthening MHPAEA's consumer protections. I will then discuss amendments that should be made to ERISA to remove barriers to effective private enforcement of participants' ERISA rights, including rights to mental health parity.

The Need for More DOL Enforcement Authority and Resources

I was disheartened, but not surprised, by the level of MHPAEA non-compliance reported by the Departments in the 2022 Report. EBSA issued 156 letters to plans and issuers requesting comparative analyses for 216 unique non-quantitative treatment limitations (NQTLs) across 86 investigations and none of the responses contained sufficient analyses for review upon receipt. 2022 Report at 4, 8. Although plans were required to have their analyses ready for EBSA review as of February 10, 2021, 40 percent of those receiving letters requested extensions with a significant number stating that their analysis was not complete and some stating that they had not even started the analysis. *Id.* at 14. DOL reports that when it did have sufficient information to allow a comparative review of 48 NQTLs corresponding to 30 plans and issuers, none of the comparative analyses were compliant. *Id.* at 15. When EBSA issued letters detailing the insufficiencies and gave plans and issuers an opportunity to supplement their analyses, many of the supplementations did not cure the insufficiencies or revealed new insufficiencies. *Id.* at 18.

The level of noncompliance by plans and issuers targeted by EBSA indicates widespread non-compliance among plans and issuers in general. The 2022 Report notes that many plans were unable to provide comparative analyses of their NQTLs because plan sponsors erroneously assumed their service providers had already prepared such an analysis or would prepare one for them. 2022 Report at 14. EBSA discovered, however, that the plans' service providers had not prepared

an analysis and were also not complying with MHPAEA while administering the plans. *Id.*

The lack of compliance with MHPAEA is most likely symptomatic of a much greater problem. Most employers sponsoring self-insured plans adopt a prototype plan and sign an administrative service agreement, sometimes called an administrative service only agreement (ASO) with one of the large insurance carriers – Blue Cross, UnitedHealth, Cigna, Aetna, Humana (BUCAHs) – and assume that they have no more responsibility for the plan until contract renewal. Their choices among network plans are limited because the market in a particular area is usually dominated by one carrier. Often, the broker directing them to one of the BUCAHs is operating under significant conflicts of interest because the broker receives compensation by the carrier it recommends. Employers think that they are getting access to lower cost networks when, in fact, the evidence shows that in many cases it would be cheaper for an employee to pay for the care out of pocket than use insurance.²

The BUCAHs, acting as third-party administrators (TPAs), have no incentive to cut costs because they are not paying the tab; the employer and employees are. Employers who attempt to audit claims payments are met with resistance and limitations on the number and type of claims that can be audited. TPAs are further disincentivized to ensure that only valid claims are paid because their contracts allow them to collect a percentage of what they recover if they fix their own mistakes in paying the claim in the first instance. And in some instances, TPAs who are also insurers self-deal by recouping overpayments made from fully-insured plans to providers by taking money legitimately owed to those same providers from self-funded plans.³

It is well-established that employers are fiduciaries when they hire service providers and have a duty to monitor them on an ongoing basis.⁴ Congress gave employers much-needed tools to assist them in this important task when it passed the broker and consultant fee disclosure requirements and prohibited gag clauses under Division BB of the Consolidated Appropriations Act of 2021 (CAA). Based on my discussions with experts and service providers in the employee benefits

² See, e.g. How New Data On Hospital “Discounted Cash Prices” Might Lead To Patient Savings, Health Affairs Blog, November 8, 2021, DOI: 10.1377/hblog20211103.716124

³ See, e.g. *Lutz Surgical Partners v. Aetna, Inc.*, Case No. 3:15-cv-02595 (BRM) (TJB) (D.N.J. Jun. 21, 2021).

⁴ See *Tibble v. Edison Int’l*, 135 S. Ct. 1823 (2015).

field, many employers are not aware of their responsibilities under these provisions (just as they were not aware of their responsibilities under MHPAEA) and very few are prepared to comply with them. Shockingly, many employers are not even aware that they have fiduciary duties with respect to their health plans even though health plan fiduciaries have been subject to ERISA's fiduciary rules since the statute was passed more than 40 years ago.

While many employers have been asleep at the wheel, the cost of employer-sponsored healthcare has sky-rocketed. According to a recent survey, the average employee premium for family coverage has increased 22% over the last five years and 47% over the last ten years. During this same period, workers' wages increased only 5% and inflation increased 1.9%.⁵ A recent Gallup poll showed that nearly 100 million Americans consider their health care system "expensive" and "broken," and 65% of those surveyed believe that employers have the most power to bring down health care costs, with 65% saying that they have a lot of power and 25% saying they have some.⁶

Enhance EBSA's Ability to Enforce MHPAEA

If Congress is committed to enforcement of MHPAEA and an employer-sponsored healthcare system that actually delivers the benefits promised for a price workers can afford, it must give EBSA tools to leverage its limited resources (additional financial resources would also be extremely helpful). As the 2022 Report notes, DOL is responsible for overseeing over two million group health plans covering 136.5 million individuals. This is in addition to its responsibility for overseeing other types of welfare plans and more than 700,000 retirement plans holding more than \$10 trillion in assets.⁷ EBSA is a relatively small agency with fewer than 1,000 employees overall and only 364 investigators as of FYE 2020.⁸ With so few

⁵ Employer Health Benefits 2021 Annual Survey at 6, Kaiser Family Foundation, November 10, 2021; <https://www.kff.org/health-costs/report/2021-employer-health-benefits-survey/>, accessed February 25, 2022.

⁶ Have Americans reached a breaking point with our health care system? Scott Woolridge, Benefits Pro, Dec. 21, 2021; <https://tinyurl.com/ywt3tumx>, accessed February 25, 2022.

⁷ EBSA Restores Over \$2.4 Billion to Employee Benefit Plans, Participants and Beneficiaries, Fact sheet; U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC, 20210, Updated as of October 14, 2021; <https://tinyurl.com/2p8srwdh>, accessed February 25, 2022.

⁸ Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans, May 27, 2021; U.S. Government

resources, EBSA has done a remarkable job of enforcing a very complex statute covering such a wide range of plans and impacting the national economy in such a significant way.

One way that EBSA can leverage its resources more efficiently is if Congress passes legislation based on the 2022 Report's recommendations. First, EBSA should be given the authority to assess civil monetary penalties for parity violations. Under the current statutory scheme, there are no strong financial incentives for an employer to comply with MHPAEA before being investigated by EBSA because the only penalty for noncompliance is for the employer to do what it should have done in the first place – bring the plan into compliance and pay the required benefits. The threat of substantial civil monetary penalties would serve as a strong deterrent to non-compliance and incentivize employers to take their fiduciary duties seriously or risk financial consequences.

Second, ERISA should be amended to give DOL the authority to directly pursue parity violations by issuers and issuers serving as TPAs. Section 502(b)(3) of ERISA, 29 U.S.C. § 1132(b)(3), prohibits the Secretary of Labor from enforcing mental health parity provisions against health insurance issuers offering health insurance coverage in connection with a group health plan. More than one-third (36%) of ERISA participants and beneficiaries are covered by fully insured plans.⁹ Moreover, most employers with self-insured plans purchase prototype plans from these same major insurers. Those same employers rely on the insurers to administer their plans including making final and binding coverage determination in mental health cases. Because the insurers generally apply the same utilization review criteria across their entire commercial book of business, they are incentivized to reduce benefit costs and deny coverage in both insured and self-insured plans, resulting in systemic violations.¹⁰

Accountability Office, GAO-21-376; <https://www.gao.gov/products/gao-21-376>, accessed February 23, 2022.

⁹ Employer Health Benefits 2021 Annual Survey at 9, Kaiser Family Foundation, November 10, 2021; <https://www.kff.org/health-costs/report/2021-employer-health-benefits-survey/>, accessed February 25, 2022.

¹⁰ See, e.g., *Wit v. United Behavioral Health*, No. 14-cv-02346-JCS, 2019 WL 1033730 (N.D. Cal. Mar. 5, 2019) (finding that United Behavioral Health's single set of guidelines for making coverage determinations meant its decisions for self-insured plans were infected by its conflicts of interest with respect to the fully insured plans it provided).

Enabling DOL to directly pursue issuers and TPAs would leverage DOL's resources to enforce MHPAEA significantly. Because of the significant control issuers have over all aspects of employer-sponsored healthcare, I would urge Congress to extend that authority beyond MHPAEA to enforcement of all ERISA provisions relating to employer-sponsored healthcare plans.

Third, Congress should amend ERISA to clarify that participants and beneficiaries of ERISA-covered plans are entitled to be made whole when their claims are denied and additionally give the Secretary of Labor authority to seek such relief on their behalf. While the Supreme Court in *Cigna Corp. v. Amara*¹¹ laid the groundwork for an argument that participants are entitled to be made whole and courts have granted such relief, it is not explicit in the statute and is subject to judicial interpretation. This would not only redress the harm caused by parity violations, but it would also incentivize compliance. Plan fiduciaries are more likely to comply with MHPAEA and provide the required benefits if they know that they will be liable for the harm caused to participants if they do not do so. Moreover, the threat of a lawsuit by DOL on behalf of large numbers of injured participants for make-whole relief is much more likely to result in compliance.

Finally, Congress should significantly alter the existing standards of MHPAEA. The admirable goals of MHPAEA cannot be met by the above measures alone. The attempt to make comparable mental health and medical coverage, plan by plan, is inherently unwieldy and unenforceable. Congress should, at a minimum, consider DOL's recommendation that MHPAEA be amended to ensure that mental health and substance use disorder benefits are defined in an objective and uniform manner pursuant to external benchmarks based on nationally recognized standards.

Amend ERISA to Strengthen Participants' Rights to Protect their Interests

Even if Congress could increase EBSA's resources exponentially, private enforcement of ERISA's protections for participants and beneficiaries in health plans as well as pension plans must be strengthened. One of the primary purposes of ERISA is to protect the interests of plan participants and beneficiaries "by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and

¹¹ *Cigna Corp. v. Amara*, 563 U.S. 421 (2011).

ready access to the Federal courts.” 29 U.S.C. § 1001(b).¹² ERISA, as interpreted, has fallen far short of that purpose.

It would be impossible to provide enough funding for the DOL to oversee and enforce ERISA on behalf of two million group health plans covering 136.5 million individuals, 700,000+ retirement plans holding more than \$10 trillion in assets, and the many other benefit plans DOL is charged with regulating (*i.e.*, dental plans, vision plans, wellness plans, short-term disability plans, long-term disability plans, severance plans). For this reason, it is imperative that Congress strengthen the rights of participants and beneficiaries to protect their own interests in their ERISA-covered employee benefit plans. While the statute was enacted explicitly for this purpose, the following issues have all served to weaken the rights of participants and beneficiaries and have made it more difficult for them to protect their own interests, placing and even greater burden on DOL to enforce ERISA.

Discretionary Clauses.

Since the Supreme Court’s decision in *Firestone Tire & Rubber Co. v. Bruch*,¹³ the vast majority of employee benefit plans grant insurance companies and others deciding benefit claims broad discretion to determine eligibility for benefits and to interpret the terms of the plan. These clauses change the default *de novo* review standard that courts would otherwise apply in reviewing benefit denials to a standard that is extremely deferential to the plan fiduciaries (referred to as either the abuse of discretion standard or the arbitrary and capricious standard). In practice, this deferential standard of review makes it extremely difficult for plan participants and beneficiaries, particularly those challenging healthcare or disability denials, to obtain promised benefits even if the court determines that it would decide the matter differently under a *de novo* standard of review. The deferential standard of review also severely limits the scope of discovery in a suit challenging a benefit denial. All of this unfairly disadvantages sick, retired, and disabled individuals challenging benefit denials.

¹² See S. Rep. No. 127, 93d Cong. 1st Sess. 35 (1973) (ERISA’s enforcement provisions are “designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. *** The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.”).

¹³ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 1010 (1989).

Indeed, many states have banned such clauses in insurance policies issued in their states. According to the National Association of Insurance Commissioners (NAIC), as of the spring of 2020, 26 states have enacted laws prohibiting these clauses in at least some kinds of insurance policies.¹⁴ Some of these bans are based on a model rule adopted by the NAIC. The NAIC and these states have generally cited the misleading nature of discretionary clauses and the fact that they undermine promises of coverage. While courts have nearly always upheld these bans, such bans are only applicable to insured plans, and not to self-funded plans, because of ERISA's broad preemption provision.

The same reasons that support the adoption of the model rule drafted by the NAIC and the adoption of bans on discretionary clauses by so many states also support adoption of a federal ban in ERISA. A federal ban enacted through ERISA will also serve to ensure uniformity among plans in different states and between insured and self-funded plans. Finally, such a ban is in keeping with ERISA's statutory goal to protect plan participants and beneficiaries and ensure that they receive the benefits they have been promised.

Arbitration Clauses.

Plan sponsors are increasingly including provisions in their employee benefit plans requiring participants to arbitrate benefit and fiduciary breach claims instead of bringing suit in federal court as permitted under ERISA. Some courts have upheld plan arbitration provisions that also prohibit class action lawsuits and/or severely limit a participant's ability to obtain relief to the plan as a whole.¹⁵ Other courts have held the opposite.¹⁶ Some plan fiduciaries assert that participants have agreed to these arbitration provisions by continuing to work and participate in the plan, even when they have not received a copy of the plan document and the arbitration provisions are not included in the summary plan description. Some arbitration

¹⁴ Prohibition on the Use of Discretionary Clauses Model Act, Jennifer Neuerburg; ST-42-2, NAIC Model Laws, Regulations, Guidelines and Other Resources—Spring 2020; <https://tinyurl.com/4tpmu4sw> accessed February 24, 2022.

¹⁵ See, e.g., *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019); *Holmes v. Baptist Health South Florida, Inc.*, No. 21-22986-Civ-Scola, 2022 WL 180638 (S.D. Fla. Jan. 1, 2020); *Coleman v. Brozen*, Case No. 4:19-cv-705, 2020 U.S. Dist. LEXIS 79367, at *9 (E.D. Tex. May 6, 2020).

¹⁶ See, e.g., *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613 (7th Cir. 2021); *Cedeno v. Argent Trust Company*, No. 20-cv-9987 (JGK), 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021); *Hensiek v. Bd. of Dirs. of Casino Queen Holding Co.*, No. 3:20-cv-377-DWD, 2021 WL 267655 (S.D. Ill. Jan. 25, 2021); *Hawkins v. Cintas Corp.*, No. 1:19-cv-1062, 2021 U.S. Dist. LEXIS 14766, 2021 WL 274431 (S.D. Oh. Jan. 27, 2021).

provisions include confidentiality clauses that make it impossible for participants to inform others of fiduciary breaches.¹⁷

Plan fiduciaries are also asserting that participants are required to arbitrate benefit and fiduciary breach claims based on employment agreements.¹⁸ Participants are often unaware that by agreeing to arbitrate employment claims, they are also agreeing to arbitrate plan claims. These provisions erect barriers in conflict with ERISA's stated purpose of "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1002(b). They also potentially make plan fiduciaries subject to conflicting arbitration decisions, even when the behavior in question impacts all plan participants equally, violating ERISA's goal of consistent and uniform application of fiduciary standards among plan participants.

In addition, some plans purport to prohibit participants and beneficiaries from bringing actions against the plan or against plan fiduciaries as class actions or as representatives of the plan. The cost of pursuing an individual participant's claim may outweigh the value of the individual claim. Thus, these restrictions may defeat the ability of participants and beneficiaries who have a small claim from obtaining redress even if the violation at issue is systemic and many other participants or beneficiaries would have similar claims that could be addressed on a class or representative basis.

Representational Standing.

ERISA was enacted to protect the interests of participants and beneficiaries in employee benefit plans by subjecting those who administer plans to stringent fiduciary standards and by giving participants and beneficiaries ready access to the federal courts to protect those interests. ERISA section 502(a)(2), 29 U.S.C. 1132(a)(2), expressly gives plan participants and beneficiaries a cause of action for fiduciary breaches that impact a plan and provides for appropriate relief to the plan for those breaches under section 409 of the Act, 29 U.S.C. 1109.

In *Thole v. U.S. Bank*,¹⁹ the Supreme Court ruled that a plan participant lacks standing under Article III of the Constitution to assert a fiduciary breach claim

¹⁷ See, e.g., *California Commerce Club, Inc.*, 369 NLRB No. 106 (June 19, 2020) (The National Labor Relations Board (NLRB) held that confidentiality language in an arbitration agreement an employer required its employees to sign as a condition of employment was a lawful action).

¹⁸ See, e.g., *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, 990 F.3d 173 (2d Cir. 2021); *Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000).

¹⁹ 140 S. Ct. 1615 (2020).

involving a defined benefit pension plan where the participant continues to receive vested benefits. The effect of this decision is to deprive participants and beneficiaries of the right to hold plan fiduciaries accountable for losses to the plan from fiduciary breaches or to obtain other equitable relief to protect the plan unless the plan does not have enough assets to pay benefits. While an injury to a participant's plan will, other things being equal, increase the risk that the plan's participants and beneficiaries will ultimately fail to receive their full promised benefits, the court failed to view this risk as a sufficient injury to confer standing under Article III.

Thole has been applied to deny Article III standing to health plan participants seeking to correct fiduciary breaches. Even though plan participants contribute to the cost of their own benefits through premium deductions, deductibles and co-payments, courts have held that they do not have Article III standing to challenge fiduciary breaches in the management of their health plans that increase costs unless they have been denied a benefit because of the wrongdoing.²⁰

Anti-Assignment Provisions.

Some plans prohibit participants or beneficiaries from assigning their claims for health care benefits. Giving effect to these anti-assignment provisions, some courts have refused to honor assignments by plan participants or beneficiaries to their medical providers.²¹ The medical provider, however, normally has greater knowledge and resources to pursue claims that may relieve the participant of a payment obligation if successful. Indeed, it is very often the case during the claims process that the plan's TPA (often an insurance company) deals with the medical provider rather than the participant, whose treatment or illness may hinder the participant's ability to deal with the claim and who, in any event, likely cannot explain the clinically appropriate reasons for the medical necessity of the treatment. Medical providers nearly always obtain assignments from their patients but have no way to know if the plan has a provision that purports to prohibit such assignments. This inability to know if an assignment will be honored, and the very real risk that it will not, adds to the medical provider's risk of non-payment and may lead some providers to refuse to treat even insured patients unless they pre-pay for their treatment, which many people cannot afford to do. For these reasons,

²⁰ See, e.g., *Scott v. UnitedHealth Group, Inc.*, 540 F. Supp. 3d 857 (D. Minn. 2021); *Winsor v. Sequoia Benefits & Ins. Services, Inc.*, No. 21-cv-00227-JSC, 2021 WL 5053087 (N.D. Cal. Nov. 2, 2021).

²¹ See, e.g., *Davidowitz v. Delta Dental Plan of Calif., Inc.*, 946 F.2d 1476, 1481 (9th Cir. 1991).

it is simply more equitable and efficient to allow a medical provider to pursue the claim if the patient assigns the claim to that provider.

Attorney's Fees for Participants and Beneficiaries that Prevail in Actions for Benefits.

In many disputes over benefits or payments from a plan, the participant or beneficiary must retain legal counsel and other experts to analyze difficult legal, medical and contractual issues and to protect their rights during the plan's internal claims process. Indeed, because claimants generally are forbidden from supplementing the plan's claims procedure file with additional pertinent evidence during the lawsuit, it is very important that the record in the claims file contain complete information, which is hard for a plan participant to analyze without legal counsel.

The current language of ERISA section 502(g)(1), 29 USC 1132(g)(1), states that in any action brought "by a participant, beneficiary, or a fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Courts have read this provision as not authorizing the award of attorney's fees for that portion of the attorney's work and costs incurred in the pre-judicial claims process (the administrative phase), even if a participant achieves some success on the merits of his benefits claim in the court action.²² This makes it more difficult for claimants to retain legal counsel, particularly in cases with relatively small claims, and results in unfair claims denials. Section 502(g)(1) should be amended to require courts to consider attorney's fees and costs incurred during the administrative phase of the claims process, as well as those incurred in the court action, when deciding on an award of attorney's fees and costs. It should also be amended to enable courts to award fees incurred for consultants and other experts during the administrative phase.

In addition, some courts do not allow a prevailing party's expert witness fees incurred in the court action to be included as a cost under section 502(g).²³ Section 502(g) should be amended to make clear that such expenses are includible when a court awards costs of action filed in the claims dispute.

²² See, e.g., *Cann v. Carpenters' Pension Trust for N. Calif.*, 989 F.2d 313, 317 (9th Cir. 1993); *Anderson v. Procter & Gamble Co.*, 220 F.3d 449 (6th Cir. 2000).

²³ See, e.g., *Agredano v. Mut. of Omaha Companies*, 75 F.3d 541, 542 (9th Cir. 1996) (affirming district court order denying plaintiff's request for expert witness fees, in which it stated that "[t]here is no right to expert witness fees under ERISA"); *Holland v. Valhi, Inc.*, 22 F.3d 968, 979-80 (10th Cir. 1994) (holding that section 502(g)(1) does not authorize courts to shift expert witness fees except to the extent allowed by 28 U.S.C. §§ 1920 and 1821).

Venue.

Currently, section 502(e)(2) of ERISA, 29 USC 1132(e)(2), allows suits to enforce ERISA's protections in federal court to be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found. Some employee benefit plans, however, require that participants and beneficiaries agree to bring any such suits in a particular federal district, such as where the plan is administered. Courts have upheld these plan provisions.²⁴ In effect, this may limit participants and beneficiaries to bringing ERISA claims in courts that are hundreds or even thousands of miles from where they live or work, which is likely to be prohibitively inconvenient and expensive for the participant or beneficiary. These plan provisions frustrate the statutory protections and discourage participants and beneficiaries from enforcing their rights under ERISA.

Statute of Limitations for Benefit Claims.

ERISA contains a statute of limitations for suits to enforce ERISA's fiduciary requirements but does not contain a statute of limitations for suits to recover benefits or for other relief pursuant section 502(a)(1)(B), 29 USC 1132(a)(1)(B). Courts generally apply whatever time limits the plan provides, or in the absence of a plan provision that has been disclosed to the claimant in the final adverse determination, courts look to statutes of limitations applicable to similar claims under state law in the district where the suit is brought.²⁵ These courts do not always agree about the analogous state law and the statutory periods can vary greatly even with respect to the same kind of state-law claim. In addition, courts disagree about when claims accrue. ERISA should be amended to provide for a uniform statute of limitations for denial of benefits claims that also defines when a claim accrues.

Effect of Fraud or Concealment on the Statute of Limitations.

Section 413 of ERISA, 29 USC 1113, sets out the statute of limitations for legal actions under Title I of the Act. Cases must be brought within 6 years after the violation occurs, or within 3 years after the plaintiff had actual knowledge of the violation, whichever is earlier. However, in cases where the fiduciary breaches are

²⁴ See, e.g., *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014); *In re Mathias*, 867 F.3d 727 (7th Cir. 2017).

²⁵ See, e.g., *Patterson v. Chrysler Grp., LLC*, 845 F.3d 756, 762–63 (6th Cir. 2017); *Castaldi v. River Ave. Contracting Corp.*, No. 14-CV-5435, 2015 WL 3929691, at *8 (S.D.N.Y. June 22, 2015); *Syed v. Hercules Inc.*, 214 F.3d 155, 166 (3d Cir. 2000); *Lang v. Aetna Life Ins. Co.*, 196 F.3d 1102, 1104 (10th Cir. 1999).

fraudulent or where they have been concealed, the action may be brought within 6 years after the discovery of the fiduciary breaches. Courts have consistently read the “fraud or concealment” language of section 413 to mean only fraud, thereby effectively reading out the term “concealment” as a separate basis for invoking the 6-year period.²⁶ The proposed amendment would return section 413 to its original plain meaning by treating concealment as a separate and distinct basis for the longer limitation period.

Exculpatory Provisions.

Plan fiduciaries sometimes agree to contractual provisions in service provider agreements that require the plan to hold harmless or reimburse the TPA or other plan service provider if they have been found liable for illegal conduct. These provisions are essentially contracts of adhesion and result in ERISA plan fiduciaries spending plan assets meant to pay for plan benefits on reimbursing the illegal conduct of their service providers. Those acting on behalf of employee benefit plans often lack the bargaining power or will to restrict these provisions which should be made illegal.

Exhaustion of Fiduciary Breach Claims.

The majority of courts have held that participants and beneficiaries who are alleging that plan fiduciaries have violated ERISA fiduciary duties may file suit in court without having to exhaust internal plan procedures such as those that are designed to resolve benefit claims.²⁷ Some courts, however, including the Seventh and Eleventh Circuits, have required plan participants or beneficiaries that wish to sue plan fiduciaries for breaching their fiduciary duties under ERISA to first exhaust any plan procedures to allow plan fiduciaries to consider whether to correct or defend the asserted violations.²⁸ This sets up an unfair and unnecessary obstacle to court access for workers who wish to protect their employee benefit plans from mismanagement or other wrongdoing by plan fiduciaries.

²⁶ *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994); *Schaefer v. Arkansas Medical Soc’y*, 853 F.2d 1487, 1491 (8th Cir. 1988).

²⁷ See, e.g., *Zipf v. AT&T Co.*, 799 F.2d 889 (3d Cir. 1986); *Smith v. Syndor*, 184 F.3d 356 (4th Cir. 1999); *Chailland v. Brown & Root, Inc.*, 45 F.3d 947 (5th Cir. 1995); *Hitchcock v. Cumberland Univ.*, 851 F.3d 552 (6th Cir. 2017); *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412 (9th Cir. 1991); *Held v. Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990); *Stephens v. PBGC*, 755 F.3d 959 (D.C. Cir. 2014).

²⁸ See, e.g., *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647 (7th Cir. 1996); *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217 (11th Cir. 2008).

Disclosure of Documents.

ERISA has long required plans to disclose certain documents to their participants and beneficiaries, upon request. Section 104(b) of the Act, 29 U.S.C. § 1024(b), requires plans to provide certain specific types of documents as well as “other instruments under which the plan is established or operated.” Participants and beneficiaries have cited this provision in requesting copies of asset valuation reports and actuarial reports used to determine benefit amounts in certain plans as well as audit reports of plan accounting practices required by the Act. Courts, however, have interpreted this language as not requiring plans to disclose such reports.²⁹ Amending ERISA to clarify that all of the documents discussed in this paragraph, and any contracts entered into with covered service providers for which plan assets are used to pay (such as ASO contracts between TPAs and plans), are required to be produced in response to a request made pursuant to section 104(b), would allow Plaintiffs to better research the issues affecting their claim prior to litigation. Not only will this increase transparency and help participants and beneficiaries protect their employee benefits, but it will also discourage the filing of class action lawsuits when the documentary evidence does not support a violation. Plaintiffs lacking the necessary documents often file the complaint on “information and belief” only to later find out that documents to which the plaintiff did not have access defeated or changed the nature of their claims.

Conclusion

Congress passed ERISA to protect the interests of participants and beneficiaries of employee benefit plans because it believed it was in the public interest to have such plans. The financial stress placed on workers who contribute their hard-earned dollars toward out-of-control healthcare costs is a major cause of the mental health crisis facing our nation. Every dollar spent by an employer on an inefficient healthcare system is a dollar not spent on employee wages or other business priorities. Every dollar spent by an employee on increased premiums, deductibles and co-payments is a dollar not spent on other necessities of life. Congress can move toward fixing our broken healthcare system and solving the mental health crisis by giving EBSA the resources it needs and by removing the barriers placed on private enforcement.

²⁹ See, e.g., *CWA/ITU Negotiated Pension Plan Bd. Of Trs. v. Weinstein*, 107 F.3d 139 (2d Cir. 1997) (actuarial reports not disclosable); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996) (stock valuation reports not disclosable); *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198 (9th Cir. 2003) (financial records used on forms submitted to DOL and IRS not disclosable).

Chairman DESAULNIER. Thank you, Ms. Handorf. Now we will hear from Mr. Biggs. Mr. Biggs, the floor is yours.

**STATEMENT OF MR. ANDREW BIGGS, SENIOR FELLOW,
AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.**

Mr. BIGGS. Thank you very much, Chairman DeSaulnier, Ranking Member Allen, and members of the subcommittee. Thank you for the opportunity to testify today. My remarks will focus on how environmental; social and governance considerations should factor into the duties of fiduciaries such as retirement plan administrators owe to plan participants.

I wish to start by pointing out the overlooked successes of the US retirement system. Despite what you may read about a purported retirement crisis, nearly all indicators of retirement preparedness are pointing in the right direction.

More Americans are saving more for retirement than ever before, with savings increasing among every age, income, educational, and racial or ethnic group.

Americans are working longer and delaying claiming social security benefits. More retirees are receiving benefits from private retirement plans. Retirement incomes are at record highs across the income distribution, and poverty and old age are at record lows.

I am not Pollyannaish when it comes to our retirement system. I point out these successes so that we know what we may put at risk by ill-conceived policies. Under ERISA, fiduciaries are charged with acting solely in the interest of retirement plan participants. The Supreme Court unanimously ruled that those interests should be defined in purely financial terms.

Now it is perfectly reasonable to suppose an environmental, social and governance factors could affect the financial returns on investment, but here is the problem. To the degree that ESG factors directly affect financial returns, those factors are likely already incorporated into the price of those investments.

The firm that is superior in ESG factors in ways that will raise the firm's profits will carry a higher price today before any regulations or legislation has been passed.

A firm whose ESG practices may reduce its profits will trade at a lower price today. Why do I say that? Today that is a supposition that we apply to nearly every factor that can affect financial returns.

Investors like to make money in any factor that they believe will affect the firm's profits will be factored into the price they're willing to pay for the firm's stocks. That is true for ESG characteristics, just as it is true from whether investors think the new Play Station or Marvel movie will be a success. The Federal Thrift Savings Plan offers only index funds for precisely that reason.

However, I am concerned that the regulatory or legislative attempts to force ESG further into the mix could have adverse results. For instance, H.R. 3604 would require that fiduciaries document how they have considered economic issues such as local job creation and affordable housing, employee treatment issues such as health safety, diversity, demographics, human rights, the right to collectively bargain, the prevention discrimination child labor and supply chain management.

Environmental consideration, such as climate issues, species endangerment, environmental justice, worker transitions with respect to the shift to low carbon economy, and governance considerations such as executive compensation and board diversity.

Given that exhaustive list of criteria, and the fact that a fiduciary who violates their duties risks being sued, fined or imprisoned, many fiduciaries might simply opt for the ESG fund to protect themselves, much as physicians practice wasteful precautionary medicine to protect against malpractice suits.

I know that both legislation and regulations say the ESG factors should be included only if they do not reduce the value of an investment to the client. In the real world, including ESG funds, may be seen as an effective safe harbor against litigation.

In an era of increasing lawsuits in 401K plan providers, that may skew fiduciaries' behaviors, but this would effectively negate ERISA's requirements that investors be placed first.

The Americans' savings for retirement will be placed after Congress's desire to promote certain public policy goals, and after financial advisor's desire not to risk litigation for failing to promote Congress's goals.

This could come at the expense of the saver. Research has shown that economically targeted investments conducted by State and local government pension plans are associated with lower investment returns. Other research in peer review journals finds that ESG investments tend to produce lower risk adjusted returns than other investments.

Likewise, a recent study from the Center for Retirement Research at Boston College found that across nearly every asset class the 10-year average return on ESG funds trailed that of a comparable Vanguard index fund by an average of over 3 percentage points annually.

One reason for that is that ESG funds carry far higher fees than index funds. I believe fees help account for the rising popularity of ESG funds in the investment industry. In an era of index funds, actively managed ESG funds can be far more profitable to the fund manager, but this often comes at a cost to the investor's own savings.

Again, I do not oppose fiduciaries considering any factors that would affect the financial value of investment offers, including ESG. We should consider carefully, either regulations or legislation that will push fiduciaries beyond that. Thank you very much.

[The prepared statement of Mr. Andrew Biggs follows:]



Statement before the House Committee on Education and Labor
Subcommittee on Health, Employment, Labor, and Pensions

Improving Retirement Security and Access to Mental Health Benefits

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Tuesday, March 1, 2022

The American Enterprise Institute (AEI) is a nonpartisan, nonprofit, 501(c)(3) educational organization and does not take institutional positions on any issues. The views expressed in this testimony are those of the author.

Chairman DeSaulnier, Ranking Member Allen, and members of the Subcommittee.

Thank you for the opportunity to testify today. My remarks will focus on how environmental, social and governance (ESG) considerations should factor into the fiduciary duties that retirement plan administrators and other fiduciaries owe to plan participants.

I wish to start by pointing out the overlooked successes of the U.S. retirement system. Despite claims to the contrary, nearly all indicators of retirement preparedness are pointing in the right direction. Compared to the 1970s, when participation in traditional “defined benefit” pensions peaked at less than 40 percent of the private sector workforce, more Americans are saving for retirement; they are contributing a larger share of their salaries toward retirement; they have amassed over seven times the total retirement savings, with savings increasing among every age, income, educational and racial or ethnic group; they are working longer and delaying claiming Social Security benefits; more retirees are receiving benefits from private retirement plans; retirement incomes are at record highs across the income distribution and poverty in old age is at record lows; and in survey after survey retirees express satisfaction with their financial situations, with 80 percent of retirees telling Gallup they have “enough money to live comfortably” and only five percent of retirees telling a Federal Reserve survey that they are “finding it hard to get by.”

I am not Pollyannaish when it comes to our retirement system. I believe that investment offerings can be improved and fees reduced. But as we consider steps that would affect the system by which Americans save for retirement, we should be conscious of how well the U.S. retirement savings system is currently working and be wary of policies that might undermine these essential programs.

I take no position on the general importance of environmental, social and governance factors, on which informed Americans of good will have differing opinions. Likewise, I express no strong opinions on general public policies that may or may not be enacted to further ESG-related goals, which might include taxes, subsidies, regulations, or even outright bans on certain activities.

My narrow concern is how consideration of ESG factors might affect the U.S. retirement saving system. In particular, I fear that current proposals to give ESG factors greater emphasis in retirement planning could undermine Americans' retirement savings as a means to pursue public policy goals that are distinct from the retirement system and the legal obligations currently placed upon plan fiduciaries.

Sections 403(c) and 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA) require fiduciaries to act solely in the interests of retirement plan participants and for the "exclusive purpose" of providing benefits to participants and beneficiaries and defraying reasonable expenses of plan administration. Various court rulings have eliminated any ambiguity regarding the meaning of these provisions. In the 1983 case of *Donovan v. Mazzolam*, the Ninth Circuit stated that a fiduciary must act with "complete and undivided loyalty to the beneficiaries." Similarly, in the 2012 case of *Dudenhofer v. Fifth Third Bancorp*, the Sixth Circuit noted that a fiduciary owes a duty of loyalty "pursuant to which all decisions regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries." Similarly, in the same case of *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court of the United States ruled unanimously in 2014 that the benefits of participants, which fiduciaries must treat as their "exclusive purpose," do not include nonpecuniary benefits, such as broader goals concerning the environment, the economy or society.

More recently, however, policymakers have discussed broadening the criteria to effectively require fiduciaries to consider environmental, social and governance (ESG) factors in guiding portfolio allocations. A proposed rule published in late 2021 by the Employee Benefits Security Administration of the Department of Labor states that a fiduciary’s analysis of potential investments “may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”¹ The proposed rule, as well as legislation entered by Members of Congress, includes references to investments that are “socially responsible,” “sustainable” and “responsible,” “environmental, social, and corporate governance (ESG),” “economically targeted,” and so forth.

Background. In 2018 the California Public Employees Retirement System (CalPERS), which is one of the world’s largest pension systems, chose to divest from tobacco products. In one sense, this is entirely reasonable: tobacco use literally kills thousands of Americans each day. Yet, in doing so, CalPERS cost its participants over \$3.6 billion in investment gains over the following two decades.² However laudable the broader goal, it is difficult not to interpret CalPERS’s actions as undercutting its fiduciary duty to maximize the financial benefits to the participants of the program, on whose behalf CalPERS collects and invests contributions. The only saving grace is that, since for every seller there also is a buyer, *someone else* whose investments were not controlled by CalPERS made that \$3.6 billion instead.

¹ See “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.” A Proposed Rule by the Employee Benefits Security Administration on 10/14/2021. <https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>

² “CalPERS Decision to Divest from Tobacco Is Costly.” Chief Investment Officer Magazine. December 12, 2018.

Could the same thing happen with ESG-oriented investing? It is not hard to imagine that it could, for two reasons.

First, to the degree that ESG factors are relevant to investment returns, there is little reason to assume that market prices do not already capture their effects. The efficient market hypothesis, for which Eugene Fama won the 2013 Nobel Prize in economics, holds that the current price of a stock incorporates all the available information regarding the future cash flows that stock will produce, such as the level and timing of dividends, the risks the firm faces, and so on. It is the rapid incorporation of available information that makes stock prices so difficult to predict, since changes in prices will generally arise only from the incorporation of new or previously-unknown facts. This logic lies behind the decades-long shift of retirement plans from actively-managed investments to passive index funds, a shift that is widely-acknowledged to have been of massive benefit to retirement savers by producing higher returns with lower management fees. As Justice Breyer noted in his unanimous court ruling in *Fifth Third Bancorp v. Dudenhoeffer*, “a major stock market ... provides the best estimate of the value of the stocks traded on it.” The Federal Thrift Savings Plan offers only index funds for precisely these reasons.

The movement to incorporate ESG factors in fiduciaries’ investment recommendations assumes that financial markets’ ability to incorporate myriad types of new information into asset prices for some reason does not work for the laundry list of items the proponents favor. If so, including ESG and related information would increase returns and/or reduce the risk of a plan’s investments. However, I see little reason to assume this is the case. Profit-oriented investors already have incentives to seek out investments that will maximize returns over the long run. Proponents of ESG investment practices have not presented a compelling case that markets cannot or do not take these

factors into account when such factors are likely to influence the returns on a given investment. To be clear, under the proposed rule a given investment cannot be included or excluded simply because it is good or bad when judged by ESG criteria. Rather, those criteria must be shown to impact the returns on such an investment in ways that current market prices have not already anticipated.

In simple terms, if ESG criteria make sense from a purely financial standpoint, then profit-oriented investors will adopt them without being prodded to do so. If ESG criteria do not make sense from a purely financial standpoint, then implicitly promoting them via regulation violates the fiduciary standards set out in ERISA.

Moreover, it is not clear that ESG investing practices would even alter the underlying ESG-related factors that are purported to influence investment returns. Remember that for each seller of a stock motivated by ESG concerns, there will be a buyer of that stock who is likely more focused on the pure financial returns of that asset and who judges that it is a good investment. Again, unless we assume that people who are motivated by environmental, social and governance concerns know something about the market that others do not and are not being swayed by their non-financial concerns about ESG factors, there is little reason to suppose that ESG investing will be superior to other investment philosophies, much less to a passive indexing approach.

Second, assets that may not appear attractive from an ESG perspective may nevertheless have value as part of a larger investment portfolio. For instance, research has found that the returns from energy sector firms have a low correlation with the rest of the market.³ A low correlation to other investments provides diversification that allows for

³ Fischel, Daniel R., and Compass Lexecon. "Fossil fuel divestment: A costly and ineffective investment strategy." Compass Lexecon (2015).

higher returns at lower levels of risk. The inclusion of energy stocks in a broader portfolio has been found to increase the annualized risk-adjusted returns by 0.5 percentage points, which over long periods amounts to a significant difference in the funds available to households in retirement. Thus, a bias against energy-sector investments would tend to harm investors' interests.

In theory, the proposed regulations and legislation are purely informational, and more information makes for more efficient markets. However, plan sponsors and fiduciaries face an increasing number of lawsuits.⁴ And, like physicians who practice “precautionary medicine” to avoid malpractice suits, it is not difficult to imagine that fiduciaries would follow suit with regard to ESG issues. Advisors may recommend steering clear of firms that seem to run afoul of the environmental, social or governance practices dictated by the regulation, even if investing in those firms might be in the financial best interest of their clients.

I find it difficult to accept this is not the intended effect of proposals that would require fiduciaries to consider and produce a report on, among other things: economic factors such as local job creation and affordable housing; employee treatment factors such as health safety, diversity, demographics, human rights, the right to collectively bargain, prevention of discrimination and child labor, and supply chain management; environmental considerations such as climate issues, species endangerment, environmental justice, worker transitions with respect to the shift to a low carbon economy; and governance considerations such as executive compensation and board diversity.

⁴ For instance, see J.D. Supra. “Supreme Court Declines to Close Floodgates on 401(k) and 403(b) Fee Litigation.” January 28, 2022. <https://www.jdsupra.com/legalnews/supreme-court-declines-to-close-1375430/>

Moreover, there are reasons to fear that a reliance on ESG investments could materially harm the retirement savings of U.S. investors. The precursor to ESG investing was socially or economically targeted investments designed, for instance, to spur local economic growth. ESG investing has become a major factor only in recent years. However, researchers at the Center for Retirement Research (CRR) at Boston College looked at the

effects of social investing and ESG

investment practices on state and

local government pension

investment returns over the period

2001 to 2018. The CRR study's

authors found that "state

mandates and ESG policies reduce

annual returns by 70 to 90 basis

points... The negative relationship

Table 1. Annualized returns on ESG and Vanguard funds by asset class, 10 years through 2020.

	ESG	Vanguard	ESG minus Vanguard
Bond (short)	3.5%	2.7%	0.8%
Bond (long)	4.5%	8.1%	-3.6%
Equities (large cap)	11.6%	14.0%	-2.4%
Equities (mid cap)	10.1%	12.5%	-2.4%
International	7.2%	10.8%	-3.6%
Real estate	2.4%	9.7%	-7.3%

Source: Center for Retirement Research at Boston College.

between state mandates and returns in both equations is consistent with the results of earlier studies."⁵

The Boston College researchers also compared the returns on a variety of ESG funds to those of Vanguard index funds covering similar asset classes. With the exception of short-term bond funds, the Vanguard index funds handily out-performed competing ESG funds, by an average of over three percentage points per year. Much of this difference was due to ESG fund's substantially higher fees, though substantial performance differences existed even prior to fees being deducted. Indeed, part of the appeal of ESG

⁵ Aubry, Jean-Pierre, Anqi Chen, Patrick M. Hubbard, and Alicia H. Munnell. "ESG Investing and Public Pensions: An Update." Center for Retirement Research at Boston College State and Local Pension Plans 74 (2020).

funds to the investment community may rest on fees: in an era when index funds have driven fees practically to zero, special-purpose investment vehicles such as ESG funds are likely to be far more profitable to the financial industry.

Recent research from the Employee Benefit Research Institute has found that women and employees with low account balances are more likely to choose ESG funds in defined contribution plans.⁶ If these funds do not produce the same risk-adjusted returns as non-ESG funds – and there is reason to fear they will not – then these groups would be made financially worse off and gender and income inequality in retirement savings may be increased.

While the proposed DOL rule purports that ESG factors may not detract from the priority given to risk and return in choosing investments, the inherent subjectivity of these newly-added criteria make treating them as “tiebreakers” difficult or impossible. For instance, over the past 10 years, the Vanguard S&P 500 index fund (VFINX) has a mean annualized return of 16.39 percent, a standard deviation of annual returns of 13.20 percent, a Sharpe ratio of 1.11 and a Sortino ratio of 1.81. All of these figures could be taken beyond two decimal points of precision.⁷ What are the chances of a true “tie” between this investment and an ESG-based alternative?

Moreover, even in the unlikely case of a tie, a prudent advisor would inquire as to the possibility of an actively-managed fund producing higher returns net of fees in future years. According to Wharton School professor Kent Smetters, over a 10-year period actively managed funds focusing on mid- and large-cap stocks underperformed a passive index fund 97 percent of the time. And even the three percent of funds that outperformed

⁶ Bearden, Bridget and Michael Gropper. “ESG Investment Options in Public DC Plans.” EBRI Issue Brief. February 24, 2022.

⁷ The Sharpe and Sortino ratios are measures of an investment’s return relative to its risk.

the index over a 10-year period tended to underperform the index in following years.⁸ In general, any actively-managed fund is a risky bet versus a passive fund, and particularly so if we have reason to believe that the markets may already have incorporated the effects of the ESG factor on future returns.

Concluding remarks on ESG. One does not need to be a denier of man-made climate change or indifferent to social and governmental issues to believe that ESG-driven investment practices may be harmful to investors. One must only believe that when investment is directed at goals other than maximizing the financial gains to savers, that savers' financial interests may be harmed.

Under ERISA, the American saving for retirement comes first. My concern with some proposals regarding ESG investing practices is that, over time, the retirement saver could come third: first would come the public policy interests favored by Congress, followed by the financial interests of fiduciaries who may fear being sued if they do not sufficiently promote those goals. Only then would come the interests of investors. That is not an outcome that would serve Americans well.

It appears that the goal of ESG standards is to raise the cost of capital for firms that do not follow the environmental, social or governance practices that the sponsors of such regulations and legislation favor. If that is what Americans in fact wish to do, there are much more direct and efficient ways to do so, such as explicit taxes on activities we disfavor and subsidies for activities we favor. Government does that all the time. But if Americans don't wish to enact such taxes or subsidies, or at least not in sufficient

⁸ The Wharton School, University of Pennsylvania. "Active vs. Passive Investing: Which Approach Offers Better Returns?" <https://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-wealth-management-initiative/wmi-thought-leadership/active-vs-passive-investing-which-approach-offers-better-returns/>

numbers that Congress is able to pass legislation to that effect, then perhaps we shouldn't be doing them. And, more strongly, I believe we should not be doing them by the back door in a way that may violate the spirit, and potentially the letter, of the law.

Comments on Discussion Draft of Retirement Legislation

In this section I offer specific comments on several issues raised in the Majority's discussion draft of retirement-related legislative provisions.

Section 5, Automatic re-enrollment. This section requires that, when employers use automatic enrollment in retirement plans, an employee who affirmatively declines to participate must restate that decision not to participate every three to five years or otherwise be automatically re-enrolled. These policies must balance questions of how long an employee's decision is deemed to last – does “No” mean “No”? – versus the general benefits to retirement income security of automatic enrollment. While granting the trade-offs, employees should be clearly presented with the option to remain outside of the employer's retirement plan. Most workers do need to save for retirement on top of Social Security, and employer sponsored plans generally offer both a tax benefit and an employer-match, which is effectively “free money” to the employee.

Section 6, Employee ownership and participation initiative. This section would establish a grant program to promote Employee Stock Ownership Plans (ESOPs), in which employees purchase or are granted shares in their employer's stock. While ESOPs are helpful in increasing employees' voice at work and in aligning economic incentives between workers and management, I am not sure whether a new federal promotional program is needed. More generally, I would not wish to see ESOPs expand at the expense of 401(k)s or other retirement plans. A worker preparing for retirement

generally wishes to diversify between his labor income and his savings, since if his employer goes bankrupt, he does not wish to risk losing both.

Section 7, Rainy Day Savings. This section incorporates H.R. 4986, the *Refund to Rainy Day Savings Act*, which facilitates the establishment of “rainy day” savings accounts run by the U.S. Treasury Department and funded with a portion of tax refunds that individuals otherwise would receive. While I favor work to encourage rainy day savings accounts, where possible I would tend to favor doing so as “side car” accounts alongside 401(k) plans rather than through accounts run by the federal government. Section 7 also reauthorizes an expanded Assets for Independence (AFI) program, which facilitates the establishment of Individual Development Accounts (IDA). While I favor IDAs as a way to build financial capacity and establish a broader ownership society, the AFI program itself was found by HHS to be “slow to obligate funds and demonstrate results.” Therefore I suggest that Congress consider these provisions carefully before moving forward.

Chairman DESAULNIER. Thank you, Mr. Biggs, perfect. We will now hear from Mr. Szapiro.

STATEMENT OF MR. ARON SZAPIRO, HEAD OF RETIREMENT STUDIES AND PUBLIC POLICY, MORNINGSTAR, INC. AND MORNINGSTAR INVESTMENT MANAGEMENT LLC., CHICAGO, IL

Mr. SZAPIRO. Thank you, Chairman and members of the subcommittee for this opportunity to discuss ways to improve the U.S. retirement system.

I am head of retirement studies and public policy at Morningstar, Inc., Morningstar Investment Management, LLC, and I also lead our Center for Retirement and Policy Studies, which released new research this morning addressing some of the issues that we are discussing today, and which I excerpted it in my written testimony.

I am going to focus my remarks on the value of regulatory or statutory clarity on how plan sponsors should use environmental social governance, or ESG information, when selecting investments for their retirement plans, and I have a different perspective from Mr. Biggs, and I will try to explain why in this brief time.

As requested in my written testimony, I have also covered two additional important issues, fee disclosures and provisions to expand access to lifetime income products and employer-based plans. Morningstar's mission is to empower investor success, and I bring several Morningstar perspectives to this testimony. We offer a variety of services to retirement plan sponsors and participants, including fiduciary services and managed accounts.

I bring the perspectives of my colleagues who work every day to help investors reach their retirement goals. Morningstar also has specific expertise in ESG analysis, and I have gathered our views on the ESG issues from financial professionals across our organization.

We categorize and rate different pooled investments such as mutual funds based on their ESG attributes. We also identify funds in our data base that claim ESG or sustainable investing as core to their investment approach. Second, our equity analysts use ESG as part of their approach to assessing investments.

Finally, our sustained analytics division is a leading provider of ESG ratings and data. Let me try to be clear here. We believe proposals to encourage plan sponsors to consider ESG information as part of a prudent process for selecting plan investments such as the Department of Labor's proposal from last fall, are consistent with common practices that asset managers use to integrate ESG considerations into their investment processes and selections.

An ESG risk analysis can be part of any premium investment analysis and does not need to be called out for special or unique scrutiny. Indeed, many asset managers view ESG risk as a pecuniary matter that is fundamental to evaluating the likely risk-adjusted performance of an investment.

This view has become widespread in the past decade, and especially the past 5 years, as ESG issues are increasingly seen as potentially material to the performance of an investment, and as more robust ESG data and analytics have become available allowing asset managers greater insight into material ESG issues.

To be more specific, many firms have some financially material amount of exposure to climate risk, but those without a plan to transition away from fossil fuels, or with physical assets vulnerable

to severe weather risk may be caught flat footed in the face of new regulation or environmental realities.

Or to take another example, companies with poor human capital management may find it very difficult to retain or attract talent to remain competitive in the future. They could also face regulatory risks and reputational risks from customers.

Beyond managing the ESG risks, participants themselves may want investment options that align with their personal values, especially around sustainability related issues.

To the extent that plan sponsors can offer options that support these values without sacrificing risk adjusted returns, and over the past half decade data shows many sustainably oriented funds have performed well, such investment alternatives could encourage people to save, or save more for retirement, furthering the overall goal of enhancing U.S. retirement security.

I just want to take a moment to talk about the State of ESG and 401K plans today. Plan sponsors appear to have shied away from considering ESG information and analysis in part because of regulatory uncertainty. In doing so, sponsors have left the U.S. defined contribution system in the aggregate tilted toward investments with more, rather than less ESG risk.

Specifically, just 4 percent of investment options and 2 percent of assets are in strategies with the lowest levels of ESG risk, but 10 percent of all strategies rated by Morningstar are in this category. Unless retirement plan sponsors are convinced that ESG risks are overstated, they might want to reexamine their investment choices through an ESG lens.

When some regulatory uncertainty appears to have a real-world effect, exposing retirement savers to more risks than might be prudent. I also want to note that in our study we find about 60 percent of assets that are not in target date funds, but other designated investment alternative assets, are in actively managed funds.

Many of those managers are considering ESG risks, but some of them are not, so just to address what Mr. Biggs said, I do not think it is the case that all plans are using passive investments today. Thank you.

[The prepared statement of Mr. Szapiro follows:]

Written Testimony of Aron Szapiro
Head of Retirement Studies and Public Policy
Morningstar, Inc./Morningstar Investment Management LLC

Health, Employment, Labor, and Pensions Subcommittee
House Committee on Education and Labor
"Improving Retirement Security and Access to Mental Health Benefits"
March 1, 2022

Chairman DeSaulnier, Ranking Member Allen, and members of the subcommittee. Thank you for this opportunity to appear before you to discuss ways to improve the U.S. retirement system.

My name is Aron Szapiro, head of retirement studies and public policy at Morningstar, Inc. and Morningstar Investment Management LLC. I also lead our Center for Retirement and Policy Studies, which released new research this week addressing some of the issues we are discussing at this markup today, and which I have included in this written testimony.¹

There are several important policy changes before the committee today. I will start with a discussion on clarifying how plan sponsors should use environmental, social, and governance, or ESG, information when selecting investments for their retirement plans. As requested, I am also covering two additional important issues: 1) fee disclosures and 2) provisions to expand access to lifetime income products in employer-based plans.

Morningstar's mission is to empower investor success. I bring several perspectives from across Morningstar to this testimony. We offer a variety of services to retirement plan sponsors and participants, including fiduciary services and managed accounts. So, I bring the perspectives of my colleagues who work every day to help investors reach their retirement goals. Morningstar also has specific expertise in ESG analysis, and I have gathered our views on some of the ESG issues in this testimony from financial professionals across our organization. First, we categorize and rate different pooled investments such as mutual funds based on their ESG attributes, and we also identify funds in our database that claim ESG or sustainable investing is core to their investment approach. Second, our equity analysts use ESG analysis as part of their approach to assessing investments. Finally, our Sustainability division is a leading provider of ESG ratings and data.

1. ESG Information and Selecting Investments for Retirement Plans

Evaluating Long-Term Risks, Including ESG Risks, Is Fundamental to Investing

Proposals to encourage plan sponsors to consider ESG information as part of a prudent process for selecting plan investments, such as the Department of Labor's proposed regulation "Prudence and

¹ Please see <https://www.morningstar.com/lp/retirement-plan-landscape> to download the full report.

Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," are consistent with common practices that asset managers use to integrate ESG considerations into their investment processes and selections.

ESG risk analysis can be part of any prudent investment analysis—and should not be called out for special, unique scrutiny. Indeed, many asset managers view ESG risk as a pecuniary matter that is fundamental to evaluating the likely risk-adjusted performance of an investment.

This view has become widespread in the past decade, and especially the past five years, as ESG issues are increasingly seen as potentially material to the performance of an investment and as more-robust ESG data and analytics have become available, allowing asset managers greater insight into material ESG issues.

To provide a specific example, many firms have some financially material amount of exposure to climate risk. Those without a plan to transition away from fossil fuels or with physical assets vulnerable to severe weather risk may be caught flat-footed in the face of new regulation or environmental realities.

Or, to take another example, companies with poor human capital management may find it not only difficult to retain the talent they need to remain competitive, but they also could face regulatory risks and reputational risks from customers.

Beyond managing ESG risks, many participants want investment options that align with their personal values, especially around many sustainability-related issues. To the extent that plans can offer options that support these values without sacrificing risk-adjusted returns—and over the past half-decade data shows many sustainably-oriented funds performed well—such investment alternatives could encourage people to save, or save more, for retirement, furthering the overall goal of enhancing U.S. retirement security.² While professionals often focus on returns, encouraging more contributions is also an important way to help workers build sufficient retirement savings. Offering appealing investment options may encourage people to save; Congress should enable plans to offer such options.

Defined-Contribution Plans Sometimes Offer Sustainable Options, but Plan Investments Take on High Levels of ESG Risk

Plan sponsors appear to have shied away from considering ESG information and analysis, in part because of regulatory uncertainty.

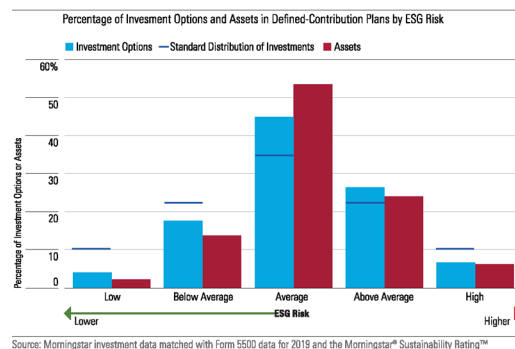
In doing so, sponsors have left the U.S. defined-contribution system in the aggregate tilted toward investments with more ESG risks. Unless retirement plan sponsors are convinced that ESG risks are overstated, they may wish to re-examine their investment choices using an ESG lens.

The evidence that defined-contribution plans are often not helping their participants avoid ESG risks comes from an analysis of ESG risk in defined-contribution plan investment options. The ESG Risk Rating is a measure developed by Morningstar's Sustainalytics division, which seeks to capture the degree to

² Stankiewicz, A. January 2022. "Sustainable Funds U.S. Landscape Report: Another Year for Broken Records." Morningstar Manager Research. <https://www.morningstar.com/ip/sustainable-funds-landscape-report>. The report finds that slightly more than half of sustainable funds finished in the top half of their Morningstar Category, led by equity funds.

which companies fail to manage environmental, social, and governance risks, potentially imperiling their long-term economic value. Exhibit 1 shows that U.S. retirement plans offer investment options that are more likely to have higher ESG risk compared with the overall distribution of ESG risk in investments that Morningstar rates. The exhibit measures the percentage of assets that are in the various categories of ESG risk assigned by the Morningstar® Sustainability Rating™ for funds, or globe rating. On an asset-weighted basis, plan participants generally do not invest in strategies with low levels of ESG risk. Specifically, just 4% of investment options and 2% of assets are in strategies with the lowest level of ESG risk, but 10% of all strategies rated by Morningstar are in this category.

Exhibit 1: Percentage of Investment Options and Assets in Defined-Contribution Plans by ESG Risk



As many as 48% of retirement plans with at least 100 participants already offer investment strategies that use ESG analysis to evaluate investments, but most of these do so in a limited way. (In a recent comment letter to DOL, Morningstar identified 36% of plans as having ESG investment options, and we have since expanded our ability to identify investments on Form 5500.)

Although the department identifies 9% of plans using ESG strategies as a best guess in the regulatory impact analysis, I believe the true number is quite a bit higher, at least among plans with more than 100 participants. Part of the difference in estimates may result from using different definitions for an ESG fund. I begin the analysis by generating a list of funds that as of 2019 used Morningstar's broadest definition of ESG, which includes any fund with a prospectus that references considering ESG information for selecting securities. I then match those funds to data in the publicly available the 2019 Form 5500, which results in the finding that 48% of plans with more than 100 participants offered at least one fund with an ESG component. I believe this percentage is almost certainly higher today as funds increasingly reference ESG analysis in their prospectuses.

Morningstar's data team has refined this definition, and as I get 2020 and 2021 defined-contribution plan filings, I will be better able to separate funds that have a clear commitment to ESG analysis from those that do not.

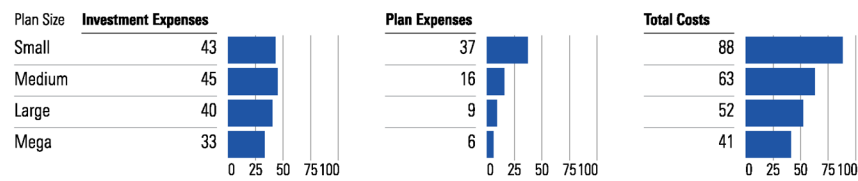
2. Fees Vary Widely Across Plans, Highlighting the Importance of Clear Disclosures for Participants, Plan Sponsors, Third-Party Benchmark Providers, and the Employee Benefits Security Administration

Morningstar has long advocated for increased fee transparency into retirement plan lineups. Proposals to require a review of the investment lineup fee disclosures (also called 404(a)5 disclosures) to plan participants are important, as participants do not always understand the fees they pay.³ Congress could also consider reviewing publicly available fee disclosures on Form 5500, which could help plan sponsors, regulators, and third-party benchmark providers better educate plan sponsors about whether the fees in their lineup are reasonable.

Participants at the Largest Plans Pay About Half as Much as Those Working for Employers With Small Plans, Imperiling Their Retirement Goals

The larger the plan, the less expensive it is likely to be for its participants to invest for retirement, as illustrated in Exhibit 2. I examine the asset-weighted expenses associated with the plan investments, the overall plan administration expenses, and the total cost, which is the sum of both these numbers on a plan-by-plan basis.

Exhibit 2: Median 2019 Defined-Contribution Total Costs by Plan Size (in Basis Points)



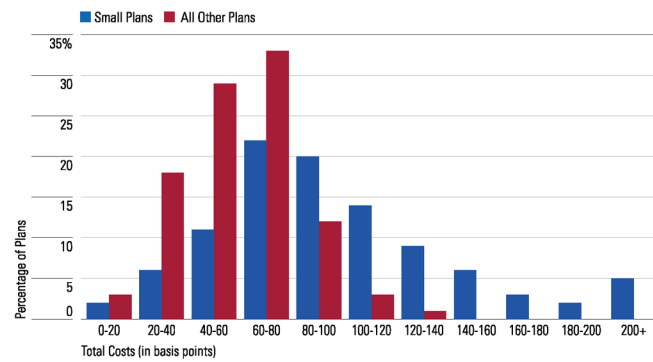
Source: Morningstar investment data matched with Form 5500 data for 2019.

Notes: Mega plans have more than \$500 million in assets; large plans have \$500 million or less in assets, but more than \$100 million; medium plans have \$100 million or less in assets, but more than \$25 million; and small plans have less than \$25 million in assets. The median total cost is not the sum of the medians for investment expenses and plan expenses. Rather, I start with the sum of the investment expenses and plan expenses for each plan and then take the median.

³ U.S. Government Accountability Office. 2021. "401(k) Retirement Plans: Many Participants Do Not Understand Fee Information, but DOL Could Take Additional Steps to Help Them." <https://www.gao.gov/products/gao-21-357>

The spread of fees that plan participants pay is particularly wide among smaller plans. Exhibit 3 shows the total costs for small plans and all other plans. The distribution of total costs for small plans is much wider than for larger ones, meaning a worker is much more likely to be in an expensive plan if her employer's plan is small. Nonetheless, not all small plans are expensive. Some employers with small plans report total costs that are competitive with larger plans. In fact, 23% of small plans cost participants less than the median cost of 63 basis points for medium plans.

Exhibit 3: Total Costs Participants Pay to Invest in Defined-Contribution Plans, Small Plans and All Other Plans



Source: Morningstar investment data matched with Form 5500 data for 2019.

Notes: Small plans have less than \$25 million in assets, and all other plans have \$25 million or more.

In Addition to Requiring a Review of the 404(a)5 Disclosures, Reviewing Form 5500 Fee Information Could Benefit the System

Workers at employers with smaller plans who are saving just as much as those at employers with larger plans could have around 10% less in assets at retirement because of higher fees.⁴ One way to help address this issue would be to arm plan sponsors with better data and benchmarks by examining and, where appropriate, reforming plan disclosures.

Form 5500, Annual Return/Report of Employee Benefit Plan, provides information on more than 730,000 retirement plans, including more than 141 million participants across all plans. Moreover, the Form 5500 helps track more than \$10.7 trillion in assets held for these savers to help support their retirement.⁵

⁴ I use the difference between 88 basis points and 41 basis points and assume constant contributions over 35 years and steady 7% returns for this simple example.

⁵ Employee Benefits Security Administration, U.S. Department of Labor. 2021. "Private Pension Plan Bulletin: Abstract of 2019 Form 5500 Annual Reports." <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2019.pdf>

Revising Form 5500 to display the investment options, qualified defaults, and fees for each would improve the retirement system. First, it would be much easier for regulators, third parties, and plan sponsors to compare plans' investment lineups to see the variety of investment options available to plan participants. Second, it would be much easier to see how much of a saver's hard-earned money goes into investments, how much goes toward investment management (picking which individual stocks and bonds to buy and sell), and how much goes to third parties for related services.

Providing third-party benchmark providers with better retirement plan data would make it easier for everyone to compare retirement plans. Right now, ordinary people can easily compare the cost and quality of different mutual funds on Morningstar.com or similar sites. But if they try to assess what a 401(k)'s strengths and weaknesses are, no one can tell them because the data is not out there. Some providers, such as Morningstar, take the data that does exist to give their best assessment, but there are limits to what they can do.

The DOL has recently proposed some changes to these Form 5500s that could help improve the quality of these disclosures.⁶ An additional review could help modernize the form, helping reduce the costs for participants to save for retirement.

3. The U.S. Employer-Based Retirement System Could Help More People Convert Their Savings Into Lifetime Income

A perennial issue for decades has been finding ways to ensure that American workers who rely on defined-contribution plans do not outlive their savings. This problem has few easy solutions, but bold policy shifts could help more workers hedge their longevity risk, which could help ensure more retirees meet their financial retirement goals.

Although Many Workers Could Benefit From Lifetime Income Solutions, the U.S. Employer-Based Defined-Contribution System Mostly Serves as an Accumulation System Today

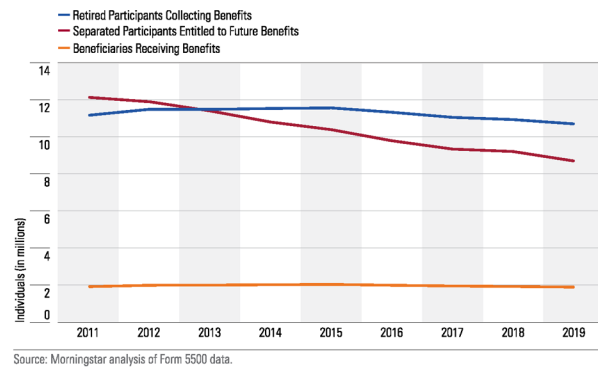
Many Americans would benefit from an increase in guaranteed income in retirement to hedge against the risk of outliving savings, and the proportion for which lifetime income solutions are needed is only growing. There is no one-size-fits-all solution. Retirees have a wide variety of lifetime income needs, depending on their preferences (such as for bequests or to maintain liquidity), their savings levels, the replacement rate they receive through Social Security, and other factors. Products such as deferred-income annuities and single-premium immediate annuities could provide needed stability in their financial plans.⁷ A lack of lifetime income options will become more acute for retirees in the future, as

⁶ Employee Benefits Security Administration, U.S. Department of Labor. 2021. "Proposed Rule: Annual Reporting and Disclosure." <https://www.federalregister.gov/documents/2021/09/15/2021-19713/annual-reporting-and-disclosure>.

⁷ Blanchett, D. "Allocating to a Deferred Income Annuity in a Defined Contribution Plan." *The Journal of Retirement*. Spring 2015. <https://jor.pm-research.com/content/2/4/54>

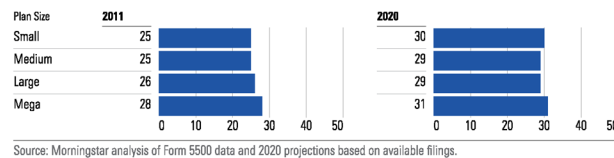
today many retirees have life annuities through coverage from private-sector defined-benefit plans, as shown in Exhibit 4. (Public-sector plans continue to cover new workers in many cases.⁸) As workers with access to only defined-contribution plans approach retirement, they face the challenge of managing their assets in decumulation to generate steady income in retirement.

Exhibit 4: Retired and Separated Defined-Benefit Plan Participants and Beneficiaries, 2011 to 2019



Despite the benefits of guaranteed income, employer-sponsored plans do not generally offer annuity products.⁹ In fact, most participants take their assets from retirement plans to individual retirement accounts, or IRAs, when they retire. Exhibit 5 illustrates the modest gains that plans have made in growing the portion of their participants who are retired or separated.

Exhibit 5: Percentage of Plan Participants Who Are Retired or Separated by Plan Size



VanDerhei, J. "Deferred Income Annuity Purchases: Optimal Levels for Retirement Income Adequacy." Jan. 3, 2019. Employee Benefit Research Institute. <https://www.ebri.org/content/deferred-income-annuity-purchases-optimal-levels-for-retirement-income-adequacy>.

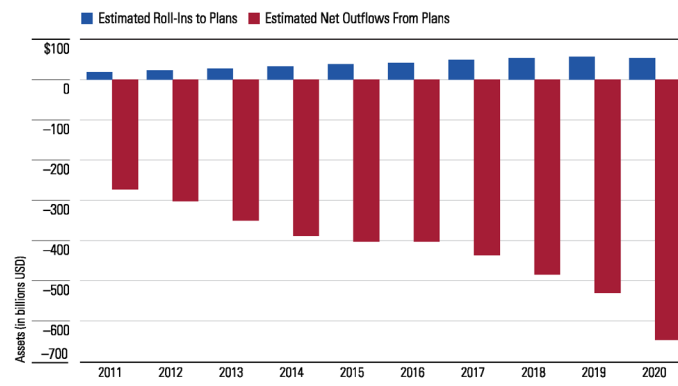
⁸ Bureau of Labor Statistics, U.S. Department of Labor. 2021. "National Compensation Survey: Employee Benefits in the United States." <https://www.bls.gov/ncs/ncspubs.htm#ncs/ncspubs.htm>.

⁹ U.S. Government Accountability Office. 2016. "401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants." <https://www.gao.gov/products/gao-16-433>

Notes: Mega plans have more than \$500 million in assets; large plans have \$500 million or less in assets, but more than \$100 million; medium plans have \$100 million or less in assets, but more than \$25 million; and small plans have less than \$25 million in assets. Plans with fewer than 100 participants do not report this data, so the small category may not be fully representative. I exclude participants who have no assets in the plan.

Further, assets flow out of retirement plans rather than being used to purchase longevity insurance through retirement plans. Most of these withdrawals happen when workers switch employers or retire. I estimate that almost \$4.61 trillion flowed out of defined-contribution plans from 2011 to 2020, mostly in the form of rollovers and cash-outs but including some benefit payments. I estimate the employer-sponsored retirement system was able to retain just \$395 billion of these outflows, when participants shifted money into another defined-contribution plan through a roll-in. Defined-contribution plans, therefore, lost a net of \$4.21 trillion from these outflows. Exhibit 6 shows how small roll-ins are relative to net outflows from the defined-contribution system. Rollovers include all direct and indirect transfers of money from a defined-contribution plan to IRA. Cash-outs include complete or partial withdrawals of a balance or structured withdrawals for retirement income.

Exhibit 6: Estimated Net Outflows From and Roll-Ins to Defined-Contribution Plans, 2011 to 2020



Source: Morningstar analysis of Form 5500 data and 2020 projections based on available filings.

Notes: See methodology section of the Morningstar Retirement Plan Landscape report for details on this calculation. Net outflows include cash-outs, rollovers, and direct payments to beneficiaries, less roll-ins captured by the defined-contribution system when participants shift money into a defined-contribution plan. Net outflows do not include other plan distributions, such as payments for insurance contracts.

Considerations for Allowing Illiquid Annuities in Qualified Default Investment Products

One possibility for increasing the availability of lifetime income solutions in retirement plans is to make more options possible for qualified default investment alternatives, or QDIAs. Most plans do not offer fixed annuities, which are the simplest form of annuity in which a participant receives a stream of

payments for life (starting immediately or in the future) in exchange for a payment. Many of these products come with additional benefits and "free look" periods, but ultimately, they must reduce liquidity as participants pool their longevity risk. In other words, for these products to work, they must have a pool of people, some of whom will live considerably longer than others. In that sense, they are insurance—like any other insurance product—but for the possibility of living longer than expected.

Practitioners know from experience with auto-enrollment into target-date funds, and into employer-sponsored plans more generally, that default options serve as powerful nudges. Many individuals will not change a default. Consequently, a policy recognizing annuities to be QDIAs or annuities in combination with pooled vehicles to serve as QDIAs would open the gate for employers to be more proactive in encouraging such products through default enrollment.

Nonetheless, we believe that most participants would need more than just a default allocation to guaranteed income products. In an ideal world, workers would be on a default path to guaranteed income but with multiple opportunities to receive advice or guidance on their allocations to such a product. Workers need the confidence that such an irrevocable allocation is right for them, and people's needs and wants for guaranteed income vary quite a bit. For this reason, defaults alone without such personalization might not be a magic bullet if many workers opted out. Personalization may be the best way for workers to build confidence in their annuity election.

Major consumer-protection challenges would also need to be addressed if Congress or the DOL were to open the door for such annuity products. Regulatory standards would have to be appropriately prescribed so the annuity products that are QDIAs serve the interests of retirement plan participants, particularly given the new safe harbor. The DOL could set standardized disclosure requirements and either restrict fees or make them so transparent that it would be easy to comparison shop, leading annuities permitted in employer plans to tend toward lower-cost products.

Enhancing disclosures on Form 5500 so that third parties could benchmark lifetime income products would also be important. While QDIA standards would not help increase access to annuities in IRAs directly, the greater transparency around annuities that would result from some regulatory movement in this area would benefit all individuals attempting to purchase annuities. In general, disclosures and facilitating default enrollment, automatic contributions in small amounts, and clarifying safe-harbor standards would make employers, plan participants, and IRA accountholders better able to navigate the operational and legal challenges surrounding annuity purchase decisions.

Managed Accounts Can Offer Personalized Advice on Product Allocation Between Investments and Annuity Options

Although target-date funds are a sensible option for many retirement plan savers, plan sponsors often offer professionally managed accounts that create personalized recommendations for workers based on their goals, assets, savings levels, and risk tolerances, among other factors. Managed accounts can help workers and retirees set their asset allocations, set their goals for retirement, and understand how much they need to contribute to retirement to help achieve their goals. Some plan sponsors have also made these managed accounts QDIAs because of the advantages they can provide.

Managed accounts (or even other one-off advice products) could be the most appropriate vehicle within a QDIA for making product allocation decisions to annuities. Unlike with target-date funds or other defaults without personalized advice, managed accounts accommodate the wide variety of individual preferences and needs in making product allocations. As discussed earlier, while many workers might benefit from an increase in guaranteed income, some would not. Further, the exact amount of optimal guaranteed income varies. Managed accounts could also start with recommendations to help participants maximize Social Security benefits before purchasing insurance products. Nonetheless, in some cases, for certain worker populations, target-date funds with integrated annuity options could improve the welfare of most retirement plan participants, although plan sponsors would need to carefully analyze their worker population before making such an election.

Chairman DESAULNIER. Thank you to all the witnesses. Thank you for being timely in your oral comments. Under Committee Rule 9(a) we will now question witnesses under the 5-minute rule. I will be recognizing subcommittee members in seniority order, again, and to ensure that the member's 5-minute rule is adhered to, staff will be keeping track of time. Please be attentive to the time, wrap up when your time is over, and re-mute your microphone.

As Chair I will begin by now recognizing myself for 5 minutes. Ms. Handorf, when ERISA was enacted with overwhelming bipartisan support in 1974, Congress made clear that its legislative purpose was to provide “appropriate remedies, sanctions and ready access to the Federal courts.”

Could you briefly explain how binding arbitration agreements and class action waivers undermine that core tenant of ERISA?

Ms. HANDORF. Yes. They definitely do because they do not give access to the Federal courts. They make it almost impossible to—for participants to seek relief to the plan as a whole, which is generally what you would want to seek if you were trying to correct a fiduciary misconduct with respect to an investment. In that way it really—it is designed really to keep people out of court, rather than to give them access to court.

Chairman DESAULNIER. Thanks. In my home State of California our mental health parity law prohibits insurance companies from including so-called discretionary clauses in health care contracts, health plan contracts. This is an important protection in my view that ensures consumers have a fair review of their benefit claim if necessary, in court.

Ms. Handorf, how do discretionary clauses make it harder for individuals to access their health benefits? Why is it important that Federal ERISA statute be amended to provide nationwide protections for plan participants considering actions like we did in California?

Ms. HANDORF. Well, I think that when you see the discretionary, the arbitrary and capricious or differential standard review in a benefit claim, the court is really looking to see whether there is anything that supports the administrator’s decision to deny benefits rather than looking to see whether they are really entitled to benefits.

The evidence indicates that a number of courts have said that they would have granted benefits under de novo standard review, but because it was a discretionary standard, they deferred to the decisionmaker, so that really does deny participants their bargain for benefits.

The other thing is that California is a great example of a State that has concluded that these are not good for individuals covered by insurance policies. The problem is that only applies to insurance policies issued in the State of California, and the other states that have adopted those provisions. It also only applies to fully insured plans, not the self-insured plans, and in order to have a uniform standard between insured and uninsured plans, and between—or insured and self-insured plan, and between all states, you really do need an ERISA standard.

Chairman DESAULNIER. Thanks so much. Mr. Biggs, in your written testimony you say that the California Public Employees Retirement System, CALPERS “costs its participants over 3.6 billion in investment gains over two decades,” by choosing to divest from tobacco products. You also mentioned that it undercuts its fiduciary duty by not maximizing the financial benefits for its participants.

This was based on an article from Wilshire Associates. As you are undoubtedly aware, that same firm, investment consultant firm Wilshire Associates, said that the 3.6 billion dollars claim it up-

dated its analysis from that number, and said that CALPERS had done better by having a tobacco free equity portfolio.

In fact, they said that CALPERS gained 856 million by holding no tobacco stocks between January 1, 2017, and June 30, 2020, because those shares lagged behind market during that period. Are you aware of that, and I am respectful of the balance here of responsibility to the investment, but also doing that in the context of short, mid-term and longer-term investments? Would you care to respond?

Mr. BIGGS. Sure. Thank you very much, Mr. Chairman. The 3.6 billion dollars figure I cited has been widely discussed, so it was not reliant entirely on Wilshire. I was not aware of Wilshire's more recent research looking at that. There is a broader picture though of looking at economically targeted investments from State and local pension plans. I would refer you to this study from the Center for Retirement Research at Boston College, but others have done it as well.

Economically targeted investments have a much longer track record than ESG investments, but they're qualitatively similar, and those have tended to be associated with lower returns with pension plans that undertook them. What I was trying to do was highlight the risk of this, that they have a duty to purely the financial returns of their participants, and in these cases, they took choices which seemed clearly skewed by a social desire to get out of tobacco stocks.

Regardless of how that turned out in the end, the research does tend to show that those types of investments are associated with lower returns for State and local pensions. Those are the ones that have used these sort of economically targeted investments most commonly.

Chairman DESAULNIER. I appreciate that. Having been on a Retirement Board when I was a county elected official during that period of time, I appreciate that, but the dynamics of investments as I'm sure you would agree trying to get this balance, and I would include the health care costs, although the legal definition as you mentioned we have to be mindful of it. With that, I would now like to recognize—I am told I recognize our distinguished Ranking Member of the full committee, Ms. Foxx, for her questions.

Ms. FOXX. I thank you distinguished Chairman for recognizing me. Dr. Biggs, I am going to followup a little bit on the line of questioning. ERISA requires retirement plan fiduciaries to act solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits to participants.

In 2014, the U.S. Supreme Court ruled unanimously that under ERISA the term "benefit" refers to financial benefits and does not include non-financial benefits. Does the Biden administration's recent proposed rule on ESG investing comply with the Supreme Court decision? How does the proposed rule treat non-financial factors?

Mr. BIGGS. Well, thank you, Congresswoman. Yes, as I made clear in my written testimony, both the written word of ERISA, and then the Court entered various Court interpretations showed that the obligation of the fiduciary is solely to the participant, and

solely to the participant's pecuniary benefits, meaning the financial benefits they get from the investment.

Those other factors such as environmental social governance economically targeted investments, those can only matter to the degree that they do not detract from the financial returns to participants.

Ms. FOXX. Thank you for—oh sorry, I was going to say thank you for restating that. I have a couple other questions. Let me try to get those in, and then I will let you come back. In September, Pension Benefit Guarantee Corporation stated that while insolvency has been delayed, its insurance program for multi-employer pension plans is still likely to go insolvent.

Moreover, plans receiving lump sum payments from PBGC may still fail. This is happening despite the taxpayer funded bailout of underfunded and failing plans in democrat so-called American Rescue Plan. Should plans that receive a bailout from PBGC, which have already failed to keep their promises to retirees, be allowed to continue making new promises of benefits? Should Congress stop plans from digging a deeper hole?

Mr. BIGGS. With a single employer traditional pension accompanying off the pension plan, if that goes insolvent in general the plan is frozen, meaning the plan cannot continue to promise new benefits in general, but employees would be switched to a 401K plan, then you figure out the liabilities of the plan, what can it continue to pay? What can it afford to pay?

What happened to multi-employer pensions is something very different, and what that was allowed was that the pensions could continue promising new benefits despite the fact that they are going to require at least 100 billion dollars in new Federal money simply to pay benefits they have already accrued.

Moreover, they are continuing to promise benefits that in the future those plans will not be able to pay because the Federal money is not going to be sufficient to keep them going indefinitely. I think the multi-employer situation, both the initial regulation where multi-employer plans were not required to fund sufficiently, and then the bailout, I think to be frank Congress made a botch of it from the beginning.

I think they should recognize that problem, freeze the plans, and then build toward the future. What we have now is not fair.

Ms. FOXX. Thank you very much. Thanks for reiterating that. Dr. Biggs a provision in the Chairman's discussion graph requires an individual to receive the written, notarized consent of his or her spouse before taking a distribution from the retirement plan. One of the many benefits of the 401K-type plan is the flexibility it provides participants to take distributions in times of emergency, which we witnessed during the COVID-19 pandemic.

Does the discussion draft adequately consider instances when a notarized consent may be impractical, or harmful to participants, including for wives who need emergency access?

Mr. BIGGS. Thank you. I have seen cases like the one raised by Ms. Matsui where one spouse would attempt to drain an account, and that's a real problem. At the same time though you could have cases where say in spousal abuse where you know would the abused spouse be required to get her abuser's consent?

More generally, DC plans like 401K's, withdrawals like that are much, much more common than with traditional pensions. I just think this needs additional study to quantify how often these issues come up, and what are the best ways to balance things. I just do not think there is a perfect you know cookie cutter solution.

Ms. FOXX. Sure. Now I got you offtrack in your first answer. Is there anything else that you want to add to that that you didn't get a chance to say?

Mr. BIGGS. Well, I think the material effect of the regulations, or legislation on ESG is going to need to push fiduciaries to over consider ESG factors. Not to consider allowing to the extent that it is allowed on the paper of the law, but to over consider them, and I think that is inconsistent to the spirit of law, but also could reduce financial returns.

Ms. FOXX. Thank you very much. Thank you, Mr. Chairman.

Chairman DESAULNIER. My pleasure, Ms. Foxx. I will now recognize Mr. Courtney for 5 minutes.

Mr. COURTNEY.

Mr. COURTNEY. Thank you, Mr. Chairman, and thank you to our witness. Again thank you, Mark, for mentioning the Work Act in your opening remarks which is a bill that myself and Mark Pocan have introduced along with Brian Fitzpatrick from Pennsylvania to help promote ESOPs, employee stock ownership plans, which is you know a great model for businesses that allow their workers, their employees to become co-owners, and that creates obviously a really healthy incentive in terms of people's buy in to you know the success of companies.

It also provides a really extremely strong retirement you know option in terms of stock ownership. The data shows that ESOPs outperform 401Ks by a wide margin and this bill, which is a very benign bill, will allow the Department of Labor to really give technical assistance to companies who want to make that conversion, purely voluntary, but there clearly is a need to increase people's understanding of ESOPs, and that bill will help provide it.

I will however, like to just pivot for a second to the issue of mental health parity. Again, I always hear along with a couple of the other veterans on the committee when we passed the Wellstone Bill that created the Mental Health Parity Act. In one of the provisions was to have the Department of Labor every 2 years give a report in terms of how well we are doing.

The report that was just finished by the Department of Labor unfortunately you know had a lot of shocking data in terms of the number of violations by health plans and insurers. I would like to ask Ms. Handorf again, just sort of again your take on that report, and you know some of the suggestions including you know beefing up enforcement.

Don Norcross's bill I think is really going to go a long way to helping us with that, but again maybe you can just sort of comment a little more directly in terms of that report.

Ms. HANDORF. Yes, I think that the report is rather shocking in the non-compliance. It is not shocking really when you look at the employer's sponsored health care in general because really what you see is a system in which insurance companies either acting as insurers or third-party administrators to plans, are really running

these plans, and the employers are really not paying a whole lot of attention to compliance.

They think that once they sign the contract that is the end of it. If the Department of Labor can deal with the insurers and the third-party administrators directly, they will be able to get compliance in all of the plans that are administered or insured by those third-party administrators. That will be much more effective than to going to each individual employer and trying to get compliance.

I also think that the penalty provisions will put the employers on notice that they need to be paying attention to what is in their plans, and that if they do not, they are going to get a financial penalty or if you give—make whole relief, the ability for the Department to make whole relief for violations, that would be a further incentive because there will be some financial harm that will come along to an employer that does not comply with the statute, so I fully support those recommendations.

Mr. COURTNEY. Great. Thank you. I mean one thing that I think, you know, the shared experience before COVID—of the opioid crisis, and what that has really done in terms of creating tremendous demand for substance abuse and mental health services.

My experience in terms of talking to substance abuse and mental health providers is that they really struggle to a much greater degree interacting with private health plans, versus Medicaid. It just kind of screams out that we really cannot allow that kind of disparity. The COVID behavioral health overhang is just going to aggravate that situation even more.

Again, I mean this is not a very discrete problem. This is a problem that is actually going to be growing in the wake of COVID, and obviously the opioid addiction has not disappeared. Maybe again, based on your experience whether or not that is what you are seeing in that sector of health care.

Ms. HANDORF. I am seeing it in that sector of health care, but I think that is across the board with not just mental health parity. I think that the inefficiencies in our current system have driven up prices, both for employers and for participants who are paying premiums and high deductibles, and I think that while transparency is a really fine thing, you really need employers to feel compelled to look at how their insurers, and third-party administrators are administering the plans.

If they did, they would find a lot of things that would be rather shocking. I think that we have to have a vibrant enforcement of those provisions, and that comes by giving the Department more authority, and also strengthening private enforcement.

Mr. COURTNEY. Thank you. I yield back.

Chairman DESAULNIER. Thank you, Mr. Courtney. We will now recognize the ranking member of the subcommittee, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman. Dr. Biggs, in 2020 the Trump administration Department of Labor issued a final rule prohibiting ERISA retirement plan fiduciaries from subordinating the financial interests of workers retirement savings to other unrelated or collateral objections such as investing in investments based on environmental social governance or ESG factors.

Why is it important that investment decisions be based only on financial factors that are relevant to the risk of return on an investment?

Mr. BIGGS. I think it is important because an ERISA plan, a 401K, is generally superior as a retirement vehicle to something that is not covered by ERISA, say an IRA. You want to keep people participating in those plans, but if they do not feel as if their best interests are being looked after, they may choose to go elsewhere.

We want to have people invested in these plans. They do not clarify a little bit we see disagreement on some of the ESG factors. I am not sure how much there really is. I do not disagree that these factors could affect the profits generated by a firm. If you have a firm that is vulnerable to these factors, the CEO, and the management firm they have the financial incentive to address as best they can.

Next, existing financial market participants, there are hundreds of millions of people investing in these firms. They then will weigh in, and they will not pay as high a price for a firm that has not addressed these factors. At that point you have really gotten on top of that, I think. Considering on top of that you are assuming that the fiduciaries were being pushed into these considerations by ESG regulations.

You are assuming they know something that both the managers of the firm and the investors in the market done. If there is one thing we have learned over the past 20 to 30 years, it is that active management often falls short of simply investing in the market index. ESG is active management like anything else, and so I think there is just a risk of not doing as well for your clients.

Mr. ALLEN. Right. It looks like just focusing on the actual financial returns detects savers and retirees, and they rely on these plan fiduciaries to make the decisions on their behalf, and it is important that they have the freedom to do this versus some one size fits all top down rule from the Department of Labor saying oh, okay, if you are going to get tax deferred retirement savings you have got to have so much percentage in this.

I mean this administration has already been picking winners and losers, so I mean don't you think that the best protections for the plan holders is to have the freedom to use their fiduciaries to give them the proper advice, rather than the Biden administration?

Mr. BIGGS. Sure. I mean I have no doubt if proponents of ESG based investing think they are doing the best thing for the planet, the best thing you know for workers, the best thing for Governors. I do not doubt their motives on that. At the same time though, I also do not doubt that the effect of these regulations is going to be to push fiduciaries in a direction that may overcompensate for this.

Perhaps I can just touch back on a question that came up in Chairman DeSaulnier's questioning earlier looking at CALPERS, they are economically targeted investments. I said that over a 20-year period they had lost 3.6 billion dollars according to Wilshire. Wilshire, quoting the Chairman, has said that over the past 3 years they had made 850 million dollars from this.

What that nets out is over 20 years they still lost several billion dollars by investing in tobacco. That was very clearly driven by a desire to sort of get out of the business of a harmful product. I do

not blame people for wanting to do that, but that did come at the expense of the participants. I just think that the record overall of doing these things of actually benefiting the participants is not very strong, but that is in fact the standard.

That is what ERISA says. If we want to change ERISA that is fine. The standard on there is it has to be in the financial best interest of the participants, and I think too much emphasis on ESG factors is going to detract.

Mr. ALLEN. Well, you know obviously the Biden administration signed the executive order protecting public health and environmental and restoring science to tackle the climate you know crisis, that executive order directs all Federal agencies to review, revise and rescind guidance that is consistent with prioritizing environmental justice and the creation of well-paying union jobs.

That is what we are up against. Unfortunately, I am out of time. Hopefully another member of the committee can follow through on this question. With that, thank you Mr. Biggs, and I yield back.

Chairman DESAULNIER. Thank you, Mr. Allen. I will now recognize the gentleman from New Jersey, Mr. Norcross, for 5 minutes.

Mr. NORCROSS. Thank you, Chairman and thank you for holding this hearing. Since I walked through these doors back in 2014, we have been focused on the golden years. You work your whole life, you play by the rules, you expect at the end that your retirement will take you through those golden years. Unfortunately, we found there are many impediments to that.

Certainly, when we look at a study by CNN Money, the percentage of workers in the private sector, through its own retirement account, it is a defined pension benefit, it is down to 4 percent. Down from 60 percent. That is how much that has changed since 1980.

Today, only about 14 percent of companies have a combined of both types, instead they have a 401. In the 401 there is typically not an option for workers to replicate that what we call a lifetime income option. A feature of defined benefit pension that we all know well. Mr. Walberg and I have introduced a bill the Lifetime Income for Employee Act that allows that to happen.

Mr. Szapiro, with the decline of defined benefit pensions is there a concern that people with 401s could retire and outlive what they have saved?

Mr. SZAPIRO. Yes absolutely. I am sorry.

Mr. NORCROSS. Just followup to that and speaking of that, is it a good idea to increase lifetime income for 401s?

Mr. SZAPIRO. Thank you so much for the question. This has been a perennial issue for decades you know finding ways to ensure people in defined contribution plans they do not outlive their savings.

I fully agree that policy that could help more workers hedge this longevity risk could help more retirees achieve their retirement goals, and that this you know when you look at the studies out there, almost all of them will show many, many Americans would benefit from an increase in guaranteed income in retirement, and that's only going to increase as more and more people exit the defined benefit system.

It is the wave of defined contribution only workers begin to retire. There is a reason they call this lack of annuitization the annuity puzzle. It has been a very hard problem to solve, and I do think

it is important to consider that retirees have a wide variety of lifetime income needs depending on their preferences—requests to maintain liquidity, their savings levels, the replacement rate that they will receive for Social Security and other factors.

Nonetheless, providing greater access to lifetime income solutions is incredibly important. Our view is to the extent that it can come with education, particularly personalized education so that participants can feel confident that the annuity recommendation, especially a recommendation into an illiquid, permanent election, into an annuity product is right for them.

We think if participants have that confidence there would be a big uptick. If those options were available inside defined contribution plans instead of 401K plans. This is a very important issue, and it is only going to get more important.

Mr. NORCROSS. Thank you for your response. Certainly, we want everybody's golden years. I want to thank the committee for coming together in bipartisan. We might have some different nuances, but we all agree to work hard you should be able to retire in those golden years.

A report that Joe Courtney was just talking about is Parity Enforcement Equity Act. It has been on the books for a long time. You talked about some of the enforcement capabilities in the bill that is included, and we appreciate you Chairman putting that in The Parity Enforcement Act. If you could define for us and walk through what happens to a national insurance company who does not include that? Ms. Handorf, if an insurance company elects not to provide that mental health, as bad as it is out there right now in the pandemic, what happens to that company?

Ms. HANDORF. The insurance company?

Mr. NORCROSS. They get caught.

Ms. HANDORF. Nothing.

Mr. NORCROSS. They have to pay for the bill, right?

Ms. HANDORF. Well, the only thing that happens is they have to comply, have to pay for the benefits if it is a fully insured plan. If it is a self-insured plan the employer has to pay the benefits, but that is basically it. Know there are so many barriers to participants who want to enforce their own rights to mental health parity.

You have to have a lawyer. You have to go through an appeal's procedure in which your lawyer does not represent you or does not get paid for it. You are limited in what type of information you can get, and what information you can present. You have anti-assignment provisions in plans, all of those are barriers to participants getting their benefits paid.

On top of it they are dealing with mental illness in some cases. All of those things need to be fixed in order for the system to work. Strengthen employee's rights and strengthen the Department's rights to enforce.

Mr. NORCROSS. It is time to put some enforcement. Nobody is looking for people, but my gosh, if we have not figured out mental health is just as important as physical health, we as a country are going to face in terms of that. I yield back.

Chairman DESAULNIER. Thank you, Mr. Norcross. We will now recognize Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chair, and thanks to the panel for being with us on an important topic. Whenever this committee has approached the subject of retirement policy we have done so generally in a spirited bipartisanship. That spirit still exists, and is highlighted by the Life Act, which was introduced by my colleague Representative Norcross and myself, as he has indicated already.

The Life Act will help guard against savers outliving their retirement savings by expanding the accessibility of products that provide guaranteed life income. Approximately 10,000 Americans turn 65 every day, many of whom are expected to live up to 30 years in retirement. If we are to address anxiety workers and retirees feel about their ability to accumulate sufficient income that will last throughout their retirement years, we must continue the bipartisan progress Congress has made to improve defined covered contribution system.

However, I have significant concerns about some of the other approaches we are discussing today, and the policy priorities of the current administration. It appears the Department of Labor's looking to revive its flawed 2016 fiduciary rule, a regulation which would have made it drastically more difficult and costly for families to save for retirement.

Dr. Biggs, should the DOL revive the fiduciary rule? How would lower to middle income savers be impacted?

Mr. BIGGS. Well, the likely impact of reinstating the fiduciary rule is it would raise the cost of financial advice, particularly, or in a most salient way for low-and middle-income savers. The reason is that currently a part of that advice is paid through fees the fiduciary receives, or the participant receives otherwise, but those fees are going to have to be charged out front.

Back in 2013, the United Kingdom had a very similar regulation where advisors would have to act as fiduciaries, and several studies that I have seen there have shown the intended increase to cost of financial advice for low-income savers. It did so in a way, it raised that upfront cost more than those savers were willing to pay.

Over in the UK it is called the guidance gap, where you know for some people, it worked very well. For high income, people still got the financial advice, but it made it harder for low-income people to do it. In theory, the fiduciary rule sounds great, but we always have to think of what are the other effects of this.

We do not want to cut other people off from financial advice. I think it is just thinking about how we balance these concerns.

Mr. WALBERG. Yes, we definitely want to get people started. If we can get started it is kind of like potato chips, you just keep eating, and to make it difficult and costly. I do not get it, and I believe that is why this rule was invalidated by the Federal Court in 2018. How will the Department be able to revive it even though it was blocked by the Court?

Will the Department be flouting the Court's ruling do you think?

Mr. BIGGS. I am going to credit you in the future for the potato chips analogy, that is a very good one. I am a policy person, economist, not an ERISA lawyer. You want to take that for what it is worth, but the Court ruling in the original fiduciary rule, which I think came out in 2018, simply said that the DOL had gone beyond their legal rights in doing that.

I think if you wanted to go in that route again, I think you would have to do it through legislation, rather than through regulation. In general, that is how I think things should be done. In Congress, people should agree on how you want to do that. That will tend to produce compromise, it will be more lasting over time, than having different administrations changed regulatory rules.

Mr. WALBERG. The Trump administration issued a revised rule regarding investment advice in 2020, and full compliance with that rule does not go into effect until June of this year. In your view, Dr. Biggs, does it make sense for the Department to pursue a new fiduciary rule when full compliance with the current rule has not occurred? Would not it be wise to see how the current rule is working before you try to change it?

Mr. BIGGS. Now, I would stick with what we have, see how it plays out, and then reconsider in the future. I think just trying to jump back in on something which many people think would be harmful, but also is invalidated in Court, I think you are just setting yourself up for trouble, so let us just see how things go, study it, and then look to improve it in the future.

Mr. WALBERG. I concur and seeing I have very limited time I will yield back.

Chairman DESAULNIER. Thank you, Mr. Walberg. We will now go to another member of the Michigan delegation, Ms. Stevens you are recognized.

Ms. STEVENS. Well, thank you so much, Mr. Chairman. I could not be more grateful for today's just incredibly topical hearing, and I really want to commend my colleagues. Congresswoman McBath, for her discussion—direct bill that is in formulation, and I know she is working hard on that. I got a chance to talk with her about it.

Obviously, Congressman Norcross, for his work alongside Mr. Walberg for the Lifetime Income for Employees Act as well. We are working on these annuity contracts, which is just going to be very important. Ms. Matsui, in particular, thank you for your testimony today, to everybody, all of our distinguished witnesses.

Ms. Matsui, in particular you noted that women confront economic challenges in the workplace, pay and retirement savings inequities. Certainly, in my home State of Michigan it has been reported to just a recent March 2021 report from the Michigan Bureau of Labor and Market Information and Strategic Initiatives that women in Michigan experienced a sharp drop in employment in April 2020 due to the pandemic.

What comes next? Loss of retirement savings. This was documented to be a longer period than it was for men, and frankly women have just failed to recover. As the report notes that between February and December 2020, roughly 136,000 women left the labor force, and unfortunately this is likely to have a dramatic impact on lifetime earnings and retirement savings.

Ms. Matsui, is this reflective of what is been happening nationally when it comes to the pandemic's impact on women?

Ms. MATSUI. Thank you very much for the question, Representative Stevens. We have in fact seen significant employment impacts on women from the pandemic, so over 1.8 million net jobs have

been lost since February 2020, and I will also note that nearly a million women have left the labor force altogether.

One of the things about retirement is that it is premised on the time value of money. The assumption is if you start early, if you continue to invest, the cumulative impact of just continuing to contribute and interest means that you will have a nest egg at retirement. Unfortunately, the converse is also true. When there are disruptions to employment, when people are not able to save or to contribute, that sets retirement offtrack.

There is I think a significant concern that the impacts of the pandemic will be to further derail women's retirement security, and for some women later in their careers it may be too late to make up the difference. You know when people are kind of at the height presumably of their income, that is the time when they are supposed to add additional savings, additional cushion.

If they are not able to do that, and in fact, if they have been having to rely on or withdraw those retirement savings, their own retirement can be delayed or indefinitely deferred.

Ms. STEVENS. Yes. I noticed your testimony cites research suggesting younger workers entering the job market in a period of high unemployment may experience reduced earnings for up to 10 years as well as reduced job mobility. Could you elaborate on that based on what you were also just talking about?

Ms. MATSUI. I am happy to. Thank you for the question. This is really something that we saw you know kind of for millennials after the last recession. They left school with a lot of debt. They found you know jobs at lower pay with less mobility, and it really is a challenge, especially for workers at the beginning of their career when they are paying off student loans.

Their salaries are lower. They cannot save for homes. They cannot pay off their debt. They may defer having children. Of all of those things, it seems so far off to start saving for retirement that they do not begin to accumulate the savings that they can, that they need to for the length of their careers.

Just to the extent that we are seeing disparities for pay, for women across the board, as soon as they start in the labor force and throughout their lives, there is also going to be a disparity for women, even among younger workers.

Ms. STEVENS. Yes, sure. Let me just to conclude on a point as well because I served in the U.S. Department of Treasury for a number of years and we did a fair amount of financial education, particularly around retirement. I remember when we rolled out the My IRA and things along those lines that have been really important.

We do need to not only educate ourselves as Members of Congress, particularly around some of these disparities, but we need to make sure that we have got transparency for the American people. With that said, Mr. Chairman, we hope the American people are tuning in today for our hearing, our subcommittee hearing, and I yield back the remainder of my time.

Chairman DESAULNIER. This subcommittee always gets a big crowd of yours. With that, we will recognize the gentleman from Indiana, Mr. Banks, for 5 minutes.

Mr. BANKS. Thank you, Mr. Chairman. We cannot talk about retirement security without talking about social security, and I want to turn our attention to that for a moment as we expect social security to be insolvent by 2033. In fact, the social security and disability insurance programs experience a three trillion dollar increase in their unfunded obligations since just last year.

Dr. Biggs, what would happen to benefits for current social security recipients once the program becomes insolvent?

Mr. BIGGS. Well, thank you, Congressman. I would say at the outset that if social security was handled with the same level of bipartisanship that private retirement savings are, I think we could have fixed the problem. There really is a contrast between how private retirement savings initiatives work with tons of bipartisanship and social security is much more contentious.

People warn of a retirement crisis, which I think is just in general entirely unwarranted. If social security becomes insolvent, the trust fund runs out, legally it can only pay benefits with the money it collects, that will imply an across-the-board benefit cut of somewhere north of 25 percent for not just new retirees, but existing retirees, the disabled survivors. That is where you get the retirement crisis from, so that will be a very concerning event.

Mr. BANKS. Thank you. As you know, many Americans receiving benefits today cannot afford to have their benefits cut due to rampant inflation and soaring costs. Dr. Biggs, what will happen to benefits for our children and grandchildren if benefits for current social security recipients are not lowered?

Mr. BIGGS. It is a little bit of a complex issue in the sense that social security is a pay as you go program, and the taxes I pay today are not saved for me, they go straight out the door to pay for my grandparents or whatever. Really, the benefits available in the future are going to be premises on the wage base in the future, and the taxes that are levied then.

I think the key thing is we want to get this on a sustainable track. You do not have to have cliffs where at some points some dramatic change happens. We have known for 30 years precisely what is going on with social security. You read an article in the New York Times today it is essentially the same as an article in 1990.

What is lacking in information was lacking as political will. We should tell people that the deal you were promised cannot be held up. You either have to pay more in, or get less out, and people can make their choices, but we just need to be honest upfront with people and tell them the sooner you do this the easier it is going to be.

Mr. BANKS. Social security's unfunded obligations are now an astounding 20 trillion dollars. This means that to fund all obligations without reducing benefits, every single American household would have to be pay \$154,000.00. Dr. Biggs, is it economically viable to simply raise taxes to offset social security obligations and interest? Who would bear the main burden of such a proposed tax increase?

Mr. BIGGS. Well, you know, yes in theory you can. I mean there are countries that is—it is very, very, high social security taxes. The issue though is first you know raising the payroll tax, that is a tax on labor. That is going to reduce incentives to work. It is less

money particularly for lower income people to save for retirement on their own.

This is a—it is a costly kind of thing to do. My own view on this is that we should maintain and strengthen the safety net curve for low-income Americans. That is not very expensive to do. Most other countries do it. What we need to do is middle-and upper-income people need to rely more on their own savings, less on social security in the future.

That does not mean a dramatic cut. That does not mean anybody is zeroed out, but it means we just transition to a system in the future where middle-and upper-income people are saving more on their own, relying less on a tax and transfer system from the government. Many countries do that, you know Australia, United Kingdom. It is not crazy, but it actually works.

Mr. BANKS. Give us one more piece of advice, Dr. Biggs, with the minute that we have left. You talked about bipartisanship, what is that one bipartisan solution that we need to take to reduce the burden on American taxpayers to reform social security and do what we need to do?

Mr. BIGGS. That is the tough one. If we were back in the late 1990's, you had a whole number of truly bipartisan bills that could have passed a bipartisan plan then. Today, if you look at something like the Social Security 2100 Act that has shifted to not just fixing a problem entirely with tax increases, but doing more than that, raising taxes above what is needed to pay for full benefits, and the increasing benefits further.

I think everybody needs to get a little more realistic about what they can actually pass. A completely republican plan will not pass. A completely democratic plan will not pass. You really do need to meet in the middle, and that is where you go have lunch with your colleagues and see what they are open to.

Mr. BANKS. All right, thank you very much. I yield back.

Chairman DESAULNIER. Mr. Banks and Mr. Biggs, I will be happy to go to lunch with both of you. We will recognize Ms. Wild.

Ms. WILD. Thank you, Mr. Chair. I would like to recognize you as well as our colleague representative Lucy McBath for your leadership on the important retirement and health care issues being considered by the subcommittee this morning.

I am proud that the legislation I plan to introduce is part of Representative McBath's discussion draft legislation. The Department of Labor requires 401K plans to provide workers with information about the fees that they pay on their retirement investments.

Several years ago, our committee asked the GAO to look into this information and assess its usefulness and last August the agency issued an eye-opening report. It found that almost 40 percent of 401K plan participants do not fully understand the fees they are paying on their retirement accounts, and many are unaware that they are even paying fees.

Clearly there is more work to do here to help workers better understand these fees, and that they are paying fees on their retirement investments. I am leading a bill to have the Labor Department review these rules and explore how they can be improved. I think it is a straightforward common-sense idea that will benefit

workers in all of our districts and make this work easier for employers and plan sponsors.

With that, Mr. Szapiro, I appreciate that your testimony focuses in part on retirement plan fees. Based on your understanding of the data, do you agree with GAO's findings that far too many Americans do not understand the fees that they are paying, and that the Labor Department should give the relevant regulation a fresh look?

Mr. SZAPIRO. Thanks so much for the question. Yes, I would have a hard time disagreeing with my former colleagues at GAO on this study. I think it is very clear, and we see that also through practical experience. Morningstar has long advocated for increased fee transparency and to retirement plan lineups. I think a review of these 404A5 disclosures that participants are supposed to get and understand are certainly called for.

I would also note that Congress could consider directing the Department to review the publicly available fee disclosures that plans provide, and that's on the Form 5500, and that might help plan sponsors, regulators and EBSA itself, and third party benchmark providers, better understand the fees in the lineup that the plan is offering, and that would ultimately help the sponsors to assess whether those are reasonable and improve plans for all participants.

I just want to say you know this discussion around fees. It is not an academic debate. We put out research this morning looking at the variance in fees across different plans, and there are some plans that are quite expensive, there are a lot that are quite good, and it is really important that participants understand what they are paying, where they sit, particularly as they make decisions around rollovers and the like. This can really materially impact their future nest egg.

Ms. WILD. In addition, your written testimony also details the difference in fees that are being paid, depending on the size of a retirement plan. That is that the larger the retirement plan, the less expense it is likely to be for its workers to invest for retirement. Is this correct? If so, would you agree with me that it seems to indicate for those Americans who work for a small business, it is even more imperative that they understand the fees they are paying.

Mr. SZAPIRO. Yes, absolutely. I think that is absolutely the case. You know at the median the fees for people at smaller plans that are offered by smaller businesses could be almost double the median fee for those larger plans, and so it really is important for people to understand that what they pay for retirement may be dependent on their employer.

I do want to note we see a lot of variability with small plans. There are some that are quite inexpensive, but a lot that are in that long tail. Most people are covered by large plans, that makes sense, but there are lots of people who you know may be paying quite a bit more than they think they are, and really need to understand that.

Ms. WILD. Thank you so much. With that, I yield back.

Chairman DESAULNIER. Thank you. We will now recognize Representative Fitzgerald for 5 minutes.

Mr. FITZGERALD. Thank you, Mr. Chair. I just had kind of a quick one that I thought it might take some explanation, but Dr. Biggs, one of the provisions that Chairman Scott has in that discussion draft it prevents a spouse from taking a distribution from a retirement account without the knowledge of the other spouse.

It does not seem—I thought it was odd that this was included, and I was trying to figure out why this would be—and it is kind of a strange precedent I would think. What I wanted to know is how frequently are retirement assets used by one spouse for non-retirement expenses without the knowledge of the other spouse? Is that something that happens? It is just something that kind of stuck out in the actual discussion today.

Mr. BIGGS. Well, thanks, Congressman. The answer is we do not really know, and I think I touched on this a little bit in my earlier discussion of this where I think it would be good to have better data to the degree it is possible on how this plays out. Perhaps there are some plans that already require this, maybe you can test how much it is happening.

With all of these issues that we are thinking about, whether it is ESG, spousal consent, fiduciary role, these are not easy issues. The easy decisions have already been made by your predecessors. Now you get left with the harder ones where you are balancing the different priorities.

I think with this I would just want to look further on it. With all of these I am concerned of the unintended consequences. We are trying to do the right thing, but then it may have bad effects we have not anticipated, so even more up front the better off we are.

Mr. FITZGERALD. Yes, I guess that was my point in bringing it up was it appears that a lot of these areas there has either been some precedent set-in retirement planning in the past, or there has been kind of just a complete negligence in addressing these. Even though the draft looks fairly clear, there are more complex issues that could emerge as implementation happened. You think that is true?

Mr. BIGGS. Exactly. I mean this is just a more complex issue than when we are looking at traditional defined benefit pensions where you essentially make one decision now that these are people that could be taking loans, they could be taking emergency withdrawals, it is just a more complicated issue, I think.

Mr. FITZGERALD. Yes, very good. I yield back. Thank you, Mr. Chair.

Chairman DESAULNIER. Thank you, Congressman Fitzgerald. We will now recognize Congresswoman McBath.

Mrs. MCBATH. Well thank you so much, Mr. Chair. Thank you to all of our guests who have joined us to talk about these really pressing matters. I have read all of your testimoneys. Know that hardworking individuals deserve to retire with security and dignity, and I am proud of the work that this committee has done to improve and secure the retirement benefits for millions of Americans, whether through the RISE Act, or through the saving of multi-employer pension plans, my colleagues and I really remain steadfast in our commitment to the American worker.

I am pleased to continue that work with today's hearing, which is really focused in part on draft legislation that I plan to file in

the coming weeks, and this common sense legislation truly adds you know further protections and clarification for benefit holders and financial managers, and I thank each of my colleagues such as Representative Wild and others, that have contributed to creating this really important package of bills.

One of its key aspects is extending spousal protections that are currently available for traditional defined benefit pensions to define contribution plans like 401K's which we are just discussing now. This provision is also a part of legislation our colleague Representative Underwood of Illinois introduced, and I thank her for her leadership.

For many families in my own district, and across the country, their 401K plan is often their largest asset outside their home, yet there is a loophole in current law that is being exploited, allowing one spouse to make a withdrawal from a 401K plan without the other spouse's knowledge or consent.

Women who are far more often have fewer assets and retirement benefits than men, are the ones who are far more likely to be harmed by this loophole. Ms. Matsui thank you for your thoughtful and compelling testimony. I have a few questions to emphasize what is at stake, and why Congress really needs to act.

Let us say one spouse retires or changes jobs and decides to withdraw a 401K balance that was intended to serve as a retirement nest egg for both spouses. Is there anything in current law to stop this spouse from depleting this account?

Ms. MATSUI. Thank you very much for the question and for this important legislation Representative McBath. Right now, if a withdrawal is made there is nothing to prevent one spouse, the participant spouse from depleting those assets. I will say that you know for in some limited circumstances, if there is a divorce pending, there may be a requirement to kind of hold those assets, or think about those but it is often very difficult to practically protect those since as you noted the 401K, or retirement savings plan could be the biggest asset in the marriage, and if those assets or funds are spent or depleted, there is not really a way to recoup them or get them back.

By the same token some states do have—and only in common law states though have protections in IRAs, but again those are not comprehensive, and there really is no recourse, especially since spouses may not find out until their spouse has passed away.

Mrs. McBATH. Okay, thank you. You have just answered my next question that there is no recourse for that spouse. I can see how this would be a major issue for couples in anticipation of a divorce. Can you speak a little bit more to that?

Ms. MATSUI. Yes, and thank you for the question. Because pension benefits and retirement savings that are accumulated during a marriage are effectively marital property, it is deferred compensation, so it belongs to kind of the marital unit. The one spouse does have kind of a right to share as marital property.

While those benefits can be divided at divorce, again there is a concern that if those funds are depleted, they are not kind of available and ready, and in addition there are sometimes considerations of you know tradeoffs, or one spouse may be interested in keeping the house. It is not always kind of a guarantee that a spouse will

get their share. All of these are points where retirement savings can be lost, and spouses can be put at risk for a less secure retirement.

Mrs. MCBATH. Let us say this becomes law. Can you talk about how these spousal consent provisions would be implemented and administered by retirement plan sponsors?

Ms. MATSUI. Yes, thank you. For almost four decades, retirement plans who administer defined benefit plans have been effectuating and implementing spousal consent provisions. In addition, the Federal thrift savings plan for its recipients does also have spousal protections for their defined contribution plans.

If for example, a participant rolls the account balance over to another defined contribution plan that is employer sponsored, or an IRA where there is spousal protections, no consent would be required, but there's kind of ample precedent. Plans have been doing this for almost 4 years to be able to put these protections in place.

Mrs. MCBATH. Thank you so much. I am out of time, and I look forward to continuing to work on this really vital legislation with my colleagues, and I yield back.

Chairman DESAULNIER. Thank you. We will now recognize Mr. Levin for 5 minutes.

Mr. LEVIN. Thanks, Mr. Chairman, and thanks for convening this hearing. I have long opposed the previous administration's efforts to stymie environmental social and governance, or ESG sustainable investing. I introduced two bills, the Sustainable Investment Policies Act, and the Retiree's Sustainable Investment Opportunities Act to protect and promote transparency in this area.

Workers should be able to invest in accordance with their values relating to environmental sustainability, workers' rights, and corporate governance. Contrary to what some may say, this kind of sustainable investing is not at odds with making a profit. In fact, worker's profit motives are central.

If a company has negative practices, such as high liability risks, or treatment of workers, even in their supply chains, or carbon intensive business practices, their stock could suffer in the long-term. Retirement plan fiduciaries should be able to consider such factors when making investment decisions for their participants.

That is exactly what the Biden-Harris administration's proposed ESG rule seeks to do, and I am a strong supporter of it. For today, I want to explore two important issues—the performance of ESG funds, and the necessity of this Biden-Harris administration regulation.

Mr. Szapiro, in Mr. Biggs's testimony, he cites studies questioning the performance of ESG funds. Based on Morningstar's extensive study of the data, have you seen underperformance with ESG funds?

Mr. SZAPIRO. Thanks so much for the question, and we really have not. We put out every year the sustainable funds landscape report. We published the most recent one in January of this year. What we find when we look across all sustainable funds with different kinds of strategies, funds that incorporate the ESG information into their investment process, what we find is slightly more than half of those funds finish in the top half of their Morningstar category by returns.

At least looking retrospectively, there is really not—there to the argument that these funds systematically, or generally underperform conventional funds. I want to emphasize that that is all net of fees. In previous years we found sustainable funds have actually performed—have been more likely to perform quite a bit better than conventional funds.

Mr. Biggs also cited the CRR study, and I think that is an interesting study, but just in a nutshell I do not think that its findings support the notion that ERISA DC plans should not consider ESG information, or that the Department of Labor's regulation should not be promulgated. They look at, and I am just quoting from the study here, a whole range of approaches that run the gamut of State mandates and ESG policies, so I do not think they are really capturing the kind of ESG analysis that the regulation the Department of Labor is considering would promote.

Mr. LEVIN. Exactly. Well, so I really want to sort of put a fine point on that because clearly in his testimony, Mr. Biggs questions whether the proposed ESG rule is even necessary at all, and he seems to argue that plans are already doing this, and the market is already pricing it in.

Based on Morningstar's study of the data, are plans accounting for ESG factors, and is the proposed ESG regulation needed?

Mr. SZAPIRO. I think it absolutely is, and in my written testimony I provide some charts and figures on this, but I think that the bottom line is something I alluded to earlier, and I want to come back to. 4 percent of strategies, 2 percent of assets that we can identify, around 3 trillion in assets we can identify in the defined contribution system are in funds that we would call five globe, that is that they are best prepared to address ESG risks.

I think it is clear to me that plan sponsors are you know afraid of considering these issues because of the regulatory uncertainty, and that doing so would benefit participants because it would allow the plans to say okay, we are considering whether these risks are financially material, and what they will mean for your future retirement.

Mr. LEVIN. Well, thanks, and you know I really appreciate you underscoring the importance of the Biden-Harris administration's proposed ESG rule. I plan to file legislation to codify the rule once it's finalized by DOL because Congress also needs to provide long-lasting clarity to plan fiduciaries, and I welcome my colleague's support for this bill.

You said something else in your testimony that I really believe, and I am going to expand on it because this is what I think anyway. Young people, young workers, do not save nearly enough for their retirement, and part of the reason is they are not interested, it does not seem to meet their needs.

Letting them invest their values in ways that also maximize their returns over time will get a lot more young people into the game when they need to start saving for their retirement. That is what we need to protect those young workers, that is the whole reason we are here talking about that. Thanks, Mr. Chairman, I yield back.

Chairman DESAULNIER. Thank you. We are now going to recognize the Chair of the full committee, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Szapiro, let me follow through on that because Mr. Biggs said that ESG funds as a whole do not do as well as index funds. Is it true that most other funds, actively managed funds, do not do as well as index funds either?

Mr. SZAPIRO. That has been true for many active funds yes. I think the arguments that get into returns on ESG, I mean obviously we feel our study is the gold standard on this, but I think they tend to sort of cherry pick specific examples. When you look at the totality of funds that are incorporating the ESG information into their strategy, they have performed as well, or better than conventional funds in previous years. That's what we found.

Mr. SCOTT. Okay, thank you. Mr. Biggs, you indicated that because index funds do not do as well—because ESG funds do not do as well as index funds, should not that argument also exclude virtually all managed funds because they do not do as well as index funds either?

Mr. BIGGS. In my point of view, if you are looking out for the pure financial best interests of your participants, an index fund is probably the best choice. Just to touch back on the points Mr. Szapiro made. I would be happy to provide you a variety of cites to references of studies looking at ESG funds. I have some in my written testimony.

I believe that Morningstar's study looked at more recent returns the last 5 years or so. ESG funds are heavily weighted to tech, have done well. The Boston College study looked at the longer term, where I think short-term factors are less important.

Mr. SCOTT. Well, Mr. Biggs, I think you made the point that index funds are probably better.

Mr. BIGGS. Sure.

Mr. SCOTT. Overall, anyway, but on a question of whose money is it, why should not an employee be able to choose from a list of options what they want to invest in, and why would you be excluded from considering, if that is your choice with your money, investments in ESG funds? Why should we even be required to support carbon pollution and gambling and smoking if you do not want to and knowing the risks it may or may not make as much, but that is your choice, and it is your money. Why should not that be your choice?

Mr. BIGGS. Yes, I should be clear. I am much more open to an ESG, or an ethical fund being introduced as an option in a 401K. Where I would have real problems would be if an ESG fund became the default because we know that you know most people are going to go with that. Again, I am not an ERISA lawyer.

There is a distinction between the individual's choice versus what is effectively being chosen on that.

If you are in a defined benefit fund, I think ESG is really problematic.

Mr. SCOTT. Thank you. Ms. Handorf, on mental health parity we have talked about the penalty and the absence of penalties for violation. Who enforces the violation right now? The violation of a mental health parity on insurance policies?

Ms. HANDORF. Basically, the Department of Labor has the authority to make them come into compliance, employers to come into compliance, but that is it, and then to pay whatever the required

benefits are. I think if you look at private litigation, you are going to find some real changes being made because participants have banded together to fix the problems with large insurers, and third-party administrators.

Mr. SCOTT. Well, that sounds like class action to me. What is the problem with banning class action in some of these policies?

Ms. HANDORF. Well, the problem with it is one single person cannot afford to bring litigation that is as complex as ERISA is, and they just do not have the money. It is not worth it to them, so it is really important that they be able to band together, and to get meaningful relief. That is the only way you are going to get change.

Mr. SCOTT. Should there be any relief to insurance companies in terms of mental health parity if there is a provider shortage prior to putting a package together in your provider network in some areas, frankly, are not the providers?

Ms. HANDORF. Well, I think the providers, there are providers. The networks I think are problematic altogether, but networks definitely should—there is no incentive for them to get any greater network coverage and, therefore.

Mr. SCOTT. Well, I mean in some areas network can include everybody, but if everybody—there are not enough providers, some counties do not have psychiatrists.

Ms. HANDORF. That is a problem, and that is why I think the telehealth issue is a good one. It would definitely expand the availability of benefits to people that are underserved areas.

Mr. SCOTT. What is wrong with arbitration clauses?

Ms. HANDORF. Arbitration clauses keep people out of court. They make it impossible. I often see it in the topics of employee's stock ownership plans where it does not really make any sense that you would have arbitration provisions and each person would go into court individually to sue for the exact same violation that occurs for everybody, it just does not work, and it is definitely put in plans to keep the participants from protecting their rights.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman DESAULNIER. Thank you as well, Mr. Scott. That is our last question for members. I want to remind my colleagues that pursuant to committee practice, materials for submission for the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, so by close of business on March 15, 2022, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing. Only a member of the subcommittee, or an invited witness may submit materials for inclusion for the hearing record. The documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the committee clerk within the required time-frame, but please recognize that in the future that link may no longer be operational.

Pursuant to House rules and regulation, items for the record should be submitted to the clerk electronically by emailing submissions to edandlabor.hearings@mail.house.gov. Again, I want to thank our witnesses. You have all been terrific, really good exchange, and for your participation today.

Members of the subcommittee may have some additional questions for you, and we ask the witnesses to please respond to these questions in writing. The hearing record will be held open for 14 days in order to receive these responses.

I remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the majority committee staff, or committee clerk within 7 days. The questions submitted must address the subject matter of the hearing.

Now I would like to thank all of my colleagues. I want to thank my ranking member. I am looking forward to being there in the meeting room with you as well Mr. Allen, and I recognize you for a closing statement.

Mr. ALLEN. Okay, there we go. Thank you, Mr. Chairman, and I ask unanimous consent to enter a statement into the record from the Association for Behavioral Health and Wellness, the ERISA Industry Committee, Fidelity Investments, and the Hispanic Leadership Fund, and a letter from the partnership for employer sponsored coverage.

Chairman DESAULNIER. Without objection.

[The information of Mr. Allen follows:]



Statement for the Record by

The Association for Behavioral Health and Wellness (ABHW) to the
Health, Employment, Labor, and Pensions Subcommittee of the U.S. House Education and
Labor Committee

Hearing:
"Improving Retirement Security and Access to Mental Health Benefits"

March 1, 2022

Subcommittee Chair DeSaulnier and Ranking Member Allen,

The Association for Behavioral Health and Wellness appreciates the opportunity to submit a statement for the record urging the Committee and Congress to not pass additional parity legislation imposing civil monetary penalties (CMP) for violations of the Mental Health Parity and Addiction Equity Act (MHPAEA). As you are aware, we have always supported efforts related to mental health (MH) and substance use disorder (SUD) parity and continue to strive to ensure patients are receiving the behavioral health services they need in a manner that complies with parity requirements.

ABHW is the national voice for payers that manage behavioral health insurance benefits. ABHW member companies provide coverage to approximately 200 million people both in the public and private sectors to treat MH, SUD, and other behaviors that impact health and wellness.

We believe penalties are not the answer, and that concise and comprehensive guidance is needed. Further, these penalties would duplicate existing federal and state authorities to impose fines and to compel public disclosure for noncompliance. The proposed authority to impose CMPs is also inappropriate given the continuing lack of clarity regarding standards for compliance with MHPAEA.

The proposed CMP authority for the Department of Labor ("DOL") would unfairly impact affected health plans by duplicating existing federal and state penalties for MHPAEA violations. The Department of Treasury ("Treasury") can impose an excise tax of \$100 per affected member per day on a group health plan that fails to comply with the parity regulations.¹ State Departments of Insurance can impose civil monetary penalties for MHPAEA violations by fully

¹ IRC section 9834 cross references to IRC section 4980D "for the imposition of a tax on any failure of a group health plan to meet the [IRC's group health plan] requirements of this chapter. . . ."

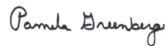
insured individual and group health plans. The U.S. Department of Health and Human Services (“HHS”) has secondary authority to impose civil monetary penalties in the case that State Departments of Insurance fail to substantially enforce or request assistance. HHS also has direct CMP authority over Marketplace plans. In addition to these existing financial penalties that would be rendered duplicative, the Consolidated Appropriations Act, 2021 (CAA), amended MHPAEA to authorize DOL or HHS (depending upon the type of plan involved) to review a plan’s parity compliance documentation and to require the plan to notify its enrollees of any finding of non-compliance. This risk of reputational harm due to the CAA’s notification requirement, while a nonfinancial penalty, is significant, and is sufficient to compel compliance. DOL also has current authority under the Employee Retirement Income Security Act (“ERISA,” codified at 29 USC Chapter 18) to enjoin any act or practice found to violate MHPAEA requirements or to “obtain other appropriate equitable relief i. to redress such violation or ii. to enforce any provision of” ERISA’s Employee Benefit requirements which include the MHPAEA provisions.² The potential for a plan to be subject to multiple forms of penalties for the same determination of noncompliance is unduly punitive and unlikely to enhance actual compliance.

In its recent report to Congress, the tri-Departments indicated that none of the audits conducted by DOL had sufficient information submitted, we believe this underscores the need for additional, specific guidance from regulators to inform stakeholders of expectations during an audit. It is additionally inappropriate to expand DOL’s enforcement authority given that the Departments’ interpretation of MHPAEA and its implementing regulations remains unclear. The Departments have proceeded with a high volume of investigations under the new parity compliance documentation and oversight provisions of the CAA, despite the absence of examples of acceptable comparative analyses or of proposed regulations to implement these new requirements. Given the lack of uniformity in expectations for parity compliance, it is troubling that a plan could be penalized multiple times for noncompliance when the enforcement agencies have not provided clear examples of satisfactory compliance documentation.

We believe that monitoring of the regulators’ enforcement actions under the CAA and other current enforcement authority, including relevant guidance the DOL has indicated is forthcoming, should continue before expanding enforcement mechanisms.

Please let us know if we can answer any questions you have regarding our comments. We thank you for your consideration and look forward to working with you to ensure individuals with mental illness and substance use disorders have access to care. If you would like to speak with us, please contact Maeghan Gilmore, gilmore@abhw.org or 202-503-6999.

Sincerely,



Pamela Greenberg, MPP
President and CEO
ABHW

² 29 U.S.C. Sec. 1132(a)(5).



STATEMENT FOR THE RECORD BY
 THE ERISA INDUSTRY COMMITTEE
 TO THE U.S. HOUSE OF REPRESENTATIVES
 COMMITTEE ON EDUCATION AND LABOR
 SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

HEARING ON

“IMPROVING RETIREMENT SECURITY AND ACCESS TO MENTAL HEALTH BENEFITS”

March 1, 2022

Chairman DeSaulnier, Ranking Member Allen, and Members of the HELP Subcommittee, thank you for the opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC) on improving retirement security and access to mental health benefits. ERIC is the only organization advocating exclusively for large employer plan sponsors that provide health, retirement, paid leave, and other benefits to their nationwide workforces on the federal, state, and local levels.

Americans engage with ERIC member companies many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics. ERIC's members are leaders in every industry sector and provide comprehensive benefits to tens of millions of active and retired workers and their families across the country.

ERIC member companies offer great health and retirement benefits to attract and retain employees, improve health and financial wellbeing, prepare employees for retirement, and provide peace of mind. Employers like ERIC members roll up their sleeves to improve how health care is delivered in communities across the country and promote retirement savings. To support these efforts, ERIC advocates on the federal, state, and local levels for policies that help large employers provide benefits efficiently and effectively. Some of these policies are described below.

IMPROVING RETIREMENT SECURITY

Large plan sponsors invest in their employees and their financial wellness, including retirement security. ERIC's member companies have different workforces and benefits designs, but employers, workers, and retirees can all gain from a retirement system bolstered by policy enhancements. Sometimes, federal rules get in the way of the flexibility that forward-thinking employers need to offer helpful options to their workers.

At other times, arcane rules can inadvertently harm both workers and job creators by unnecessarily increasing costs and administrative burdens, creating inefficiencies, and reducing opportunities. This Subcommittee can play a critical role in promoting policies that reduce barriers and increase opportunities to enable workers to make the most from their retirement savings.

ERIC appreciates the leadership of the Members of the Education and Labor Committee in tackling these challenges in a bipartisan way. For example, in November, the Committee unanimously reported the *Retirement Improvement and Savings Enhancement Act* introduced by Subcommittee Chairman DeSaulnier and Subcommittee Ranking Member Allen, and Full Committee Chairman Scott and Ranking Member Foxx. As Congress continues to refine legislative proposals to enhance the private-sector retirement system, ERIC has the following recommendations:

- Maintain electronic disclosure as an option for default distribution
 - A 2020 Department of Labor (DOL) regulation permitted plan sponsors to provide electronic delivery as the default option for providing retirement plan notices, provided certain conditions were met. This regulation eased administrative burdens and allowed plans to offer notices and information more quickly and usefully (for example, by embedding internet links to provide beneficiaries useful and targeted information). The regulation included substantial safeguards, including a requirement that participants have internet access and the ability for participants to opt out any time. These protections were specifically recognized by the DOL in a report required by the *Consolidated Appropriations Act of 2021*. According to the DOL report, the 2020 regulation “is unlikely to have any negative impact” on rural residents and seniors, but the regulation is critical to reducing administrative burdens that make providing retirement benefits more costly.
- Do not impose burdensome new administrative requirements
 - Retirement policy changes should not make retirement plans more costly and less flexible. Policymakers should carefully scrutinize proposals that would increase administrative requirements for defined contribution plans, make it harder for defined benefit pension plan sponsors to manage their risk, or require plans to provide costly, one-size-fits-all written disclosures. New burdens on employers should always be subject to cost and benefit analysis.

- Simplify reporting and disclosure requirements by eliminating redundant and unnecessary disclosures
 - The Tax Code and ERISA include many rules requiring and governing the reports, disclosures, and notices that employers and qualified plans must provide to employees and participants. We believe that these communications are complex, burdensome, and costly -- and are less informative or effective for employees and participants than they should be. ERIC supports proposals that direct the DOL, Treasury, and the Pension Benefit Guaranty Corporation (PBGC) to issue regulations to consolidate and simplify the existing ERISA and tax reports, notices, disclosures, and other information relating to retirement plans.
- Expand the ability of plans to self-correct plan errors
 - Plan sponsors and administrators should be permitted to play a more significant role in identifying and correcting plan errors, including excess, insufficient, and missed contributions, compensation and services, accrued benefits, and other determinations and calculations. In particular, employers should be allowed more opportunities to self-correct routine, common operational, and plan document mistakes without incurring fees and federal agency oversight and approval. Expanding the Employee Plans Compliance Resolution System (EPCRS) and the Voluntary Fiduciary Correction Program (VFCP) would increase compliance and reduce the cost of plan administration without adversely affecting participants' benefits.
- Affirm the fiduciary responsibility to optimize financial outcomes for plan participants
 - ERISA's duties of prudence and loyalty require plan fiduciaries to operate for the exclusive purpose of providing benefits and defraying expenses. Many factors are relevant when ensuring the best possible financial outcome for plan participants and beneficiaries. ERIC supports the Department of Labor's longstanding policy that plan fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral, social policy goals.
- Strengthen voluntary retiree health care and life insurance benefits by continuing to permit overfunded pension plans to fund them
 - Section 420 of the Internal Revenue Code allows employers with generously overfunded pension plans to use a portion of surplus assets to fund retiree welfare benefits (health care benefits and group life insurance coverage) without jeopardizing the security of the underlying pension promise. This bipartisan policy was initially enacted in 1990 on a temporary basis, and the current extension is set to expire at the end of 2025. Many defined benefit plans have

managed fixed income assets to meet pension liability timing, reducing risk, and the need for excess assets while ensuring pension obligations are met. ERIC urges Congress to modernize the surplus asset rules to allow for small transfers with a reduced overfunding threshold and extend the measure well in advance of 2025.

- Provide a safe harbor for the recovery of retirement plan overpayments
 - Plan sponsors have a fiduciary obligation to ensure that retirement plans are adequately funded and that every participant receives the benefits that have been promised. However, many plan sponsors do not want to burden retirees with paying back often small amounts that were mistakenly overpaid. ERIC supports legislation that would provide a safe harbor to allow plans to forego recouping these overpayments that were not the fault of the retiree.
- Create a searchable Retirement Savings Lost and Found
 - Retirement plans of ERIC's member companies tend to be large and complex, some with significant acquisition histories that could span decades. As a result, these plans are more susceptible to difficulties finding plan participants despite significant and consistent efforts. ERIC supports creating a federal "Lost and Found" searchable database of retirement accounts to help participants find former employers and determine whether they could be receiving distributions. With data security safeguards, such a database would help participants receive earned benefits and decrease the number of missing participants.
- Modernize the definition of a Highly Compensated Employee to reflect salaries in the modern skilled workforce
 - The IRS has complicated rules to ensure that employee benefit plans do not disproportionately benefit "highly compensated employees" (HCEs), intended for decision-makers regarding those same benefit plans. But the HCE definition no longer reflects the salary trend realities of some highly skilled industries or high-cost regions. As a result, junior employees can face limitations on the contributions they can make or receive under a 401(k) plan. Modernizing the HCE definition by allowing an employer to limit its HCEs to the top-paid 10 percent workers (rather than the top 20 percent under current rules) would help ensure that more junior employees are not excluded from savings opportunities.

- Stop unnecessary and harmful PBGC premium increases
 - The PBGC's 2021 Annual Report shows that its single-employer program is overfunded by \$30.9 billion. ERIC urges Congress to correct arcane budget scoring rules that perversely incentivize using premium increases to offset spending proposals completely unrelated to the retirement system. Additionally, past increases have caused many employers to leave the system, reducing the PBGC's premium base. ERIC supports prohibiting premium increases from being used as a funding offset in the future and calls on Congress to prevent further increases and consider lowering the current level of premiums in light of the PBGC's improved financial status.
- Allow workers to access retirement savings in a personal emergency
 - Short-term financial needs and risks create significant financial stress for employees, undermine their productivity, and interfere with their retirement savings. It is crucial to recognize the holistic and lifetime nature of financial well-being (including retirement) and strengthen the connections between short-term financial concerns and adequate savings for retirement. ERIC supports permitting retirement savers to access up to \$1,000 from a retirement savings account for personal emergencies, subject to some conditions. Allowing participants access to savings for emergencies will encourage their participation in retirement programs – particularly for those who may be hesitant to “lock away” money in case they will need it later.
- Defend ERISA preemption against efforts to regulate retirement plans at the state level
 - The ability of large employers to follow a single set of federal rules is critical to their ability to provide benefits to their workers, families, and retirees located across the country. ERIC has been vigilant in protecting ERISA preemption and urges Congress to continue to ensure that employers who voluntarily provide retirement benefits can do so on a uniform basis.

Some of these provisions have already been included in bipartisan proposals, such as the *Retirement Improvement and Savings Enhancement Act*, the *Securing a Strong Retirement Act of 2021* introduced by Congressmen Neal and Brady, and the *Retirement Security and Savings Act of 2021* introduced by Senators Cardin and Portman. ERIC applauds congressional leaders for recognizing the continued need to focus on retirement security.

IMPROVING ACCESS TO MENTAL HEALTH BENEFITS

ERIC is committed to helping employers provide quality, affordable, high-value health coverage to employees, their families, and retirees. Our member companies are passionate about improving mental and behavioral health offerings and coverage and continue to go above and beyond to provide their employees and families tools and benefits to improve their physical and mental wellbeing. We believe that it is time for the government to support employers in this effort.

Specifically, we call for clear-cut, comprehensive guidance that helps employers support their workforce and requires mental health providers to support patients over their bottom line. We are deeply troubled by DOL's recommendation encouraging Congress to authorize the agency to assess civil monetary penalties for parity violations, as mentioned in their 2022 Mental Health Parity and Addiction Equity Act (MHPAEA) Report. Penalties are not the answer. Rather, what is needed is regulatory guidance that ensures that mental health providers put patients first. And which allows employers to support their workforce and families.

Large employers have made available the newly required comparative analyses upon request from DOL. However, despite extensive good faith efforts to comply, our member companies have reported that upon submitting analyses, DOL staff sent back dozens of questions and requests for substantially more documentation without explanation of what changes employers can make to comply with parity rules. DOL has defied Congress, refusing to abide by the *21st Century Cures Act* requirements, which mandated the agency to provide comprehensive guidance to employers on how to comply with parity rules, including positive and allowable examples of non-quantitative treatment limitations (NQTs). DOL's recent report included several suggestions that we urge Congress to consider, including a more systemic approach to compliance and expanding telehealth. However, DOL's recommendation of issuing civil monetary penalties will not help patients receive the care they need when they need it.

Meanwhile, employers are proposing positive solutions. ERIC developed a comprehensive set of recommendations in our report, "[Prioritizing Employee Mental Health: Solutions for Congress](#)". These recommendations are 100 percent focused on improving patient access, making care more affordable, and driving value in the mental and behavioral health system. Some of our recommendations include:

- Allowing mental health providers to practice across state lines
 - ERIC believes that Congress can act to quickly to provide patients with access to needed care by permitting ERISA plans to facilitate telehealth between a willing patient and a willing provider, so long as that provider holds a current license in a state in which the plan operates and is affiliated with a network associated with the plan sponsor, their carriers, and vendors.

Allowing mental health providers to practice across state lines is a direct and simple approach that would instantly solve a huge access problem, especially as it pertains to mental and behavioral health, for patients in self-insured plans.

- Expanding telehealth benefits to ALL employees in two critical ways
 - We urge Congress to act before the end of the public health emergency to ensure that standalone telehealth programs can remain in place and to allow employers to offer the benefit to more workers. If permitted to offer the benefit to those who are unenrolled rather than just those who are ineligible, employers could expand telehealth benefits to more beneficiary cohorts – especially benefitting younger workers and those of less economic means. Additionally, we urge Congress to allow 1st-dollar coverage of telehealth so that workers in these plans can receive the care they need. Millions of Americans have currently lost the benefit to cost-free access to a telehealth visit and are paying the full “fair market value” of care, until they have paid their entire plan deductibles. This would be a barrier to care, and Congress should enact the “*Primary and Virtual Care Affordability Act*” (H.R. 5541) so Americans can have better health care access.
- Incentivizing providers into mental health practice with tuition reimbursement and funding
 - ERIC member companies continue to believe that some of the most important steps Congress can take to address access to mental and behavioral health include facilitating more providers in the field, equipping more providers in other fields (such as primary care doctors or nurse practitioners) to take on mental health roles, and encouraging more coordination between care teams. ERIC’s member companies have explored a number of options Congress could consider in this space. One option would be to specifically target programs like Graduate Medical Education at mental and behavioral health providers, and to promote programs aimed at assisting providers entering into the mental health field (such as perinatal or reproductive psychiatry fellowships).
- Ensuring provider directories indicate whether a provider is accepting new patients
 - With the passage of the *Consolidated Appropriations Act* in December 2020, Congress has now set in motion a requirement that provider directories offered by health plans to participants will be accurate and up to date. However, a patient will still not be able to determine whether a particular doctor is accepting new patients at a given time. The problems created by this are obvious – worst of which could be a patient actually foregoing care due to frustration with getting turned away by providers.

Congress should ensure that insurers have an easy way for providers to “toggle” whether or not they are accepting new patients – and requiring providers to do so. It may not sound like a significant policy change, but for millions of Americans who are leery of seeing a long list of providers who turn them away when they call, this could be the difference in obtaining care or not.

- Improving coordination of care to end the system’s current siloed nature
 - Employers know it is imperative to continue focusing on the transition to coordinated care. We have learned that “scope of practice” laws sometimes hinder the ability of various medical providers (a prime example being nurse practitioners) from meeting unmet mental and behavioral health needs. It has also become clear that a lack of fully interoperable electronic medical records (EMRs) is making it harder for providers and facilities to coordinate. We are interested in how coverage rules may be applied or expanded in order to encourage and facilitate behavioral health options, such as attending group meetings or therapy sessions. While programs such as “Narcotics Anonymous” do not generally constitute medical care, attendance at meetings or the like could well be a part of an individual’s behavioral health regimen, and disruption of that regimen could be seriously deleterious to the patient’s health.
- Publishing provider quality and safety data to drive better patient outcomes
 - Plan sponsors work to ensure that beneficiaries have access to quality care – and this includes building networks that eschew dangerous, ineffective providers and facilities. Unfortunately, too often a plan sponsor lacks critical information needed to make such a determination. Congress should consider taking steps to alleviate the information gap, which is especially pertinent in the mental and behavioral health space. ERIC member companies and our organizational partners have suggested a number of potential ways to improve the availability of quality information. For instance, the Centers for Medicare and Medicaid Services (CMS) could expand the availability of quality ratings, and the Centers for Disease Control and Prevention’s National Healthcare Safety Network could collect and report uniform patient safety data from different sites of care. Congress could also direct the Patient-Centered Outcomes Research Institute to prioritize research on mental health, or direct CMS’ Center for Medicare and Medicaid Innovation (CMMI) to experiment with Centers of Excellence programs, modeled off successful efforts in employer-sponsored coverage.

- Modernizing rules for health care accounts to better support patients and lower costs
 - Rules related to account-based health benefits are currently far from optimized to encourage and empower patients to access mental and behavioral health when they need it. ERIC member companies have suggested several changes Congress should consider to maximize the ability and the likelihood that patients will seek out and obtain the care they need. One option is to update high deductible health plan (HDHP) rules to allow plan beneficiaries to access subsidized care at worksite health centers, which are a critical access point for primary care. Congress could also give HDHP sponsors flexibility to provide a limited amount of 1st-dollar coverage for high-value services, since employers have learned that outcomes can be significantly improved when barriers are removed from high-value care. Similarly, policy could be updated to allow the coordination of capitated benefit models (like Direct Primary Care) with HDHPs. Or Congress could consider permitting funds in dependent care flexible spending arrangements (DCFSAs) to be used to pay a broader definition of “caregivers,” including family and friends, as the COVID19 pandemic has shown employers that plan beneficiaries often sought help from those closest to them.
- Reducing red tape to encourage employers to innovate better mental and behavioral health benefits
 - Congress should consider allowing the creation of limited mental health programs that could be flexible, without being considered “group health plans.” If these programs were designated not to create an employer-employee relationship, they could potentially be offered to independent contractors and gig economy workers. To encourage innovation in benefits subject to MHPAEA, Congress could consider authorizing “compliance certification” entities, who ERISA fiduciaries could rely on to evaluate group health plans for parity compliance. And reducing or digitizing many of the notice and disclosure requirements on plan sponsors would also help free up funds and bandwidth to innovate.
- Create a blue-ribbon panel to focus on the mental and behavioral health aspects of the COVID pandemic, to better plan for the future
 - In 2020, for the first time in recorded history, countless Americans were asked to work from home, limit contact with the outside world, refrain from “elective” medical care, and much more. Every day we learn more about the consequences of the policy decisions made in order to combat the COVID-19 pandemic. It is imperative that the federal government develop a comprehensive categorization of “lessons learned” to determine what could be done better.

To create a needed roadmap, Congress should direct an objective body to suggest how we can better prepare and eliminate said problems should such a disaster ever befall the country again. The roadmap should place a special emphasis on protecting Americans' health, both mental and physical, and providing the needed behavioral health support for individuals who may suffer from substance use disorders.

- Speed the transition to value-based payments to improve care and save patients money
 - The federal government has an unparalleled ability to transform the entire health care system by leveraging the tens of millions of covered lives enrolled in federal health programs. Various employers, in concert or individually, have worked for decades to transition from fee-for-service to a value-driven system. However, it will be impossible to fully make that transition without federal leadership. While good work has already been done by CMS and CMMI, there is more work to do, and a huge opportunity as it pertains to mental and behavioral health. Demonstrations or nationwide programs could be launched to transition away from fee-for-service in the area of mental health, potentially in partnership with employers and private-sector initiatives. We hope that such efforts could include realigning payments to encourage the highest-value treatments, medications, and services, and ensuring that patient-reported outcomes measures are central to these efforts.

CONCLUSION

Thank you for the opportunity to share the perspective of large plan sponsors on these important employee benefits issues. We encourage members of the Subcommittee to consider these recommendations and the critical roles that employers play in promoting retirement security and advancing health care quality and affordability. ERIC and our member companies look forward to continuing to discuss these issues and our proposed solutions with Members and staff.

Fidelity Investments Statement for the Record**To the U.S. House Education and Labor Subcommittee on
Health, Employment, Labor and Pensions****Hearing on “Improving Retirement Security and Access to Mental Health Benefits”****March 1, 2022**

Fidelity Investments is pleased to submit this statement for the record to the U.S. House Education and Labor Subcommittee on Health, Employment, Labor and Pensions for the hearing entitled “Improving Retirement Security and Access to Mental Health Benefits.”

Fidelity is the nation’s largest provider of workplace savings plans, including defined contribution (DC), defined benefit (DB), health and welfare and stock plan services to 25,000+ employers with 34.8 million workplace participant accounts.¹ In addition, Fidelity supports a wide array of investors, including 12.3 million IRA accounts, with services including wealth management, retirement planning, brokerage services, workplace plan administration, college savings, and financial planning and engagement programs.²

Employer-sponsored retirement plans and IRAs are indispensable to the foundation of the U.S. retirement system. Savings and investment through retirement plans will provide trillions of dollars in retirement income, helping our nation’s workers achieve a more financially secure retirement. As the needs of families and individuals continue to evolve, there are ways Congress can help Americans achieve greater financial security including saving for emergencies, modernizing the client and participant experience, ensuring proper investor protections, and reducing burdens on both individuals and businesses. Notably, the retirement system in the United States is already helping tens of millions of savers prepare for retirement and following are a few areas we can build upon that success.

Support for the RISE Act

We applaud the Education and Labor Committee members for unanimously advancing the Retirement Improvement and Savings Enhancement (RISE) Act in November 2021. The legislation includes several reforms that would help ensure a strong and resilient retirement system for businesses and their employees. We are very supportive of the common-sense provision that would no longer require defined contribution plans to provide notices to unenrolled participants, other than an annual

¹ Fidelity data as of December 31, 2021.

² Fidelity data as of December 31, 2021.

reminder notice of eligibility. This change will continue to encourage employees to enroll in their workplace plans without the cost and confusion caused by delivering voluminous information and detail that can be meaningful to active participants, but often can be overwhelming and stifling action among those not yet participating.

In addition, we support the provisions that would expand participation in Pooled Employer Plans (PEPs) to 403(b) retirement plans, and clarification of the duties of PEP trustees. PEPs are an excellent step toward addressing the retirement coverage gap by making it easier for small businesses to access retirement savings plans. Fidelity's PEP, the Fidelity Advantage 401(k), was created to help close the coverage gap. While other providers have chosen to offer PEPs to employers who already offer a plan, Fidelity's initial offering is deliberately focused on helping address the coverage gap by crafting a solution for small businesses who do not yet offer a retirement savings plan today. We have seen significant organic demand since its launch early last year. We believe that adopting a PEP can allow businesses to capitalize on the economies of scale of a larger plan, simplify administration, and provide their employees the coverage they need.

Emergency Savings

Financial wellness has never been more important than it is right now, and the pandemic shed light on just how precarious many Americans' situations are when they need to respond to a financial emergency or immediate finance needs. Fidelity surveyed our participants who defined such emergencies to include home or car repair, loss of employment, a sudden housing change, pregnancy, medical emergencies, legal or travel expenses, and more. Notably, emergencies experienced by many Americans do not always align with the criteria for safe harbor "hardship withdrawal," which are more limited in scope and subject to income tax on the withdrawal in addition to a 10 percent penalty. Even where a participant can take a hardship withdrawal, if permitted by and in accordance with the retirement plan, the participant is not permitted to repay the amount of the withdrawal to their retirement account, eroding long-term retirement savings.

For participants without liquid savings, taking frequent early withdrawals may be their only way to address emergency expenses. However, repetitive withdrawal behaviors can cause severe impacts to retirement balances over time. The percentage of workers who made a withdrawal from their 401(k) plan, including hardship withdrawals, was 3.3 percent in the fourth quarter of 2021, an increase over previous 2021 quarters but still much lower than the 6.1 percent withdrawal rate witnessed during the first year of the pandemic. The average hardship distribution amount in Q4 was \$3,100, and the median amount was \$1,000.³

While the pandemic put a spotlight on this problem, families have been struggling with savings for emergencies for much longer. Families need emergency savings accounts to be more prepared for

³ Based on Fidelity analysis of 23,761 corporate DC plans (including advisor-sold DC) and 20.1 million participants (13.8 active participants) as of December 31, 2021.

addressing the unplanned, but unavoidable challenges of life, not only during a pandemic. Fidelity believes that employers can play a key role in helping workers accumulate short-term savings, and we have seen compelling innovation in this space across employers and financial services providers.

Today, Fidelity enables thousands of employees to save for short-term goals including emergencies. Our “Goal Booster” platform provides savers with paths to a liquid savings and investing options, tracking tools and motivational insights to help them stay on track. While this is a good start to getting participants on track to cover immediate and short-term needs, we are exploring additional innovations that can be offered through the workplace and complement retirement plans—many of these ideas require legislative changes. Fidelity calls on Congress to advance policy changes that could help meet the emergency savings challenge. We strongly support legislation that will allow employers to provide a discretionary “match” in the employer-sponsored retirement plan on contributions made by the employee to an emergency savings account held outside of the employer’s retirement plan. We believe such legislation will effectively incent participants to accumulate short term savings through their workplace, while maintaining flexibility and privacy. This approach will also help participants to accrue long-term retirement savings by benefitting from an employer match in their retirement account, subject to all of the existing withdrawal and tax rules.

Modernization

Modernization and innovation that allows us to evolve alongside the participants we support is critical to the continued success of the retirement system. The U.S. Department of Labor’s (DOL) 2020 electronic delivery (eDelivery) safe harbor rule was a significant step towards disclosure modernization for plan sponsors, recordkeepers, and the millions of ERISA plan participants. In fact, in a response to a Congressional review request, the DOL issued a report on the 2020 eDelivery safe harbor rule finding that the rule is “unlikely to have any negative impact” and notes that important safeguards are included in the rule, such as the requirement that “individuals who prefer to receive disclosures on paper can request paper copies of disclosures and opt out of electronic delivery entirely, at any time, and free of charge.” The DOL’s report also found that 93 percent of U.S. adults, including 99 percent of retirement plan participants, have internet access.⁴

Not only does eDelivery provide investors with access to their document in the most timely and effective manner, but it also encourages participants to engage with their investments, which can result in better outcomes, including higher deferral rates and improved retirement preparedness. Data from the SPARK Institute indicates that savers with eDelivery contribute 72 percent more and are three times as likely to be saving a sufficient amount for retirement than savers who receive paper disclosures.⁵

⁴ Report on Default Electronic Disclosure by Employee Pension Benefit Plans Under Employee Retirement Income Security Act, Department of Labor, February 1, 2022.

⁵ Improving Outcomes with Electronic Delivery of Retirement Plan Documents, SPARK Institute (2015).

Electronic delivery is more accessible than paper, allowing retirement savers with disabilities to access information in a format that meets their unique needs. Nearly 72% of adults over the age of 65 report having a disability;⁶ those experiencing vision loss later in life now have the assistance of new technological advances such as screen readers (e.g., Voice Over on iPhones, Talk Back on Android phones, and Narrator on Windows® 7 machines) to audibly receive the same information contained in a written disclosure. Moreover, having an electronic format for disclosure delivery allows participants with moderate vision impairment to easily enlarge the font on a computer or smart phone screen.

There are numerous other benefits to electronic delivery. Delivering plan information electronically is a faster, more efficient and effective way for participants to get the plan information they need. Electronic delivery is secure, with sensitive documents accessible when an investor securely logs-in to their account, rather than when an envelope is delivered by postal mail. It benefits the environment by significantly reducing paper use and printing and mailing resources. Electronic accessibility enables participants to receive communications in the digital manner they now expect. Communications can be sent and received instantly, without delay, and without the risk of getting lost or misplaced in the daily shuffle of paper mailings. With a digital-first approach, Fidelity supports the delivery of plan related materials in a manner requested by plan participants.

Automatic Portability

A record number of individuals have left their jobs over the past year, often referred to as “the Great Resignation.” According to the U.S. Bureau of Labor Statistics, there are 10.9 million unfilled jobs across the nation.⁷ Most turnover across participants is seen in the younger generations, while a large number of older workers exiting the workforce do not return. These younger generations in particular are at risk of cashing-out their retirement savings or experiencing “leakage” from their accounts when they change jobs.

To reduce the number of participant cash-outs, missing participants and abandoned savings, the concept of automatic portability for account balances less than \$5,000 would facilitate the movement of an employee's 401(k) savings account from their former employer's plan into their new employer's plan. Fidelity believes that addressing industry-wide portability barriers will make it easier for all workers, particularly minority and low-income workers, to reduce premature cash-outs and preserve retirement savings.

Congress should adopt legislation that enables auto-portability solutions delivered through the private sector, such as allowing for the transfer of the participant's small account balance (less than \$5,000) from their prior employer's plan to their new employer's plan upon negative consent as a ministerial (“non-fiduciary”) act.

⁶ U.S. Census Bureau, [American Community Survey, Disability Characteristics](#) (2018).

⁷ U.S. Bureau of Labor Statistics, [Economic News Release: Job Openings and Labor Turnover December 2021](#), Released February 1, 2022.

Spousal Consent

The longstanding rules for ERISA qualified retirement plans require a married participant to obtain written spousal consent if the participant wishes to name a primary beneficiary other than the spouse. Defined benefit and money purchase plans require spousal consent under additional circumstances, including taking a cash distribution, hardship withdrawal or plan loan. Expansion of spousal consent rules for distributions and loans to all qualified retirement plans and IRAs has been floated as a potential policy change, although such an expansion raises several questions and trepidations given the lack of data supporting a change.

Additional spousal consent rules could delay participant receipt of funds that are often needed in a timely manner, as is the case in many emergencies. In addition, the requirement is burdensome not only on participants and their spouses, but also on recordkeepers that will need to capture and maintain documentation of legal marital status and date of marriage for every participant. This is further complicated if participants do not have formal documentation of their legal marital status due to residency in a common law state or those in a same-sex marriage that may not be recognized in their state of residence. For these reasons, we do not believe spousal consent requirements should be expanded beyond the current rules.

Telehealth Benefits Through HSAs

As one of the leading service providers for Health Savings Accounts (HSAs), Fidelity is committed to helping workers and their families save for current and future health care expenses. It is estimated that a couple retiring today will need \$300,000 to cover medical expenses throughout retirement, an 88% increase since 2002, based on the annual Fidelity Retiree Health Care Cost Estimate.⁸ Employers are moving toward HSA-eligible health plans and today, 2 out of 3 large firms offer an HSA-eligible health plan with a savings option.⁹ This not only helps reduce employers' costs, but these plans also offer individuals and families the benefit of saving through an HSA.

⁸ Estimate based on a hypothetical couple retiring in 2021, 65-years-old, with life expectancies that align with Society of Actuaries RP-2014 Mortality Table Healthy Annuitants rates projected with Mortality Improvement Scale MP-2020 as of 2021. Actual assets needed may be more or less depending on actual health status, area of residence, and longevity. Estimate is net of taxes. The Fidelity Retiree Health Care Cost Estimate assumes individuals do not have employer-provided retiree health care coverage, but do qualify for the federal government's insurance program, Original Medicare. The calculation takes into account cost-sharing provisions (such as deductibles and coinsurance) associated with Medicare Part A and Part B (inpatient and outpatient medical insurance). It also considers Medicare Part D (prescription drug coverage) premiums and out-of-pocket costs, as well as certain services excluded by Original Medicare. The estimate does not include other health-related expenses, such as over-the-counter medications, most dental services and long-term care.

⁹ Kaiser Family Foundation annual survey of employer-sponsored health benefits, 2020. Includes companies that offer either an HSA-eligible HDHP or an HDP with an HRA. Based on companies with more than 1,000 employees.

HSAs are also becoming more popular for U.S. workers across all income levels, and HSA holders seek to use those funds for a variety of healthcare needs including access to mental health care. The long-term value of an HSA can position a family for greater financial security, and Fidelity supports legislation that would expand eligible benefits through HSAs such as telehealth access.

Investment Advice Standards

In July 2020, the U.S. Securities and Exchange Commission (SEC) strengthened the standard of conduct for brokers providing recommendations to retail customers through its Regulation Best Interest (Reg BI). Reg BI elevates the customer's best interest as the overarching standard of care for broker dealers. In late 2020, the Department of Labor (DOL) adopted a new prohibited transaction exemption (PTE) enabling investment advice under ERISA and, in the preamble to that exemption, outlined a reinterpretation of the "five-part test" for investment advice under ERISA, expanding the universe of retirement activities, including rollover recommendations, that are subject to ERISA's fiduciary duties.

Fidelity believes the PTE provides a broad and workable exemption that allows retirement investors to maintain access to investment advice. While the reinterpretation of the "five-part test" is a departure from the DOL's long standing approach to defining fiduciary advice, the reinterpretation coupled with the PTE represents an effective regulatory regime that protects investors. Fidelity supports DOL action to ensure a level playing field and a consistent standard applicable to all broker-dealers.

Conclusion

On behalf of Fidelity and the millions of Americans we serve, we appreciate the opportunity to share our views and contribute to this important dialog to build a better future through retirement security. We look forward to continuing to work with Members of Congress to further American workers' retirement security now and for the future.

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February 28, 2022



STATEMENT FOR THE RECORD OF MARIO H. LOPEZ

PRESIDENT, HISPANIC LEADERSHIP FUND

FOR THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR

FOR THE HEARING ENTITLED

“IMPROVING RETIREMENT SECURITY AND ACCESS TO MENTAL HEALTH
BENEFITS”

MARCH 1, 2022

February 28, 2022

Chair DeSaulnier, Ranking Member Allen, and Members of the Subcommittee, thank you for holding this hearing and giving me an opportunity to submit a statement for the record.

The Hispanic Leadership Fund is a non-partisan advocacy organization dedicated to strengthening working families by promoting common-sense public policy solutions. ***I want to share with this Subcommittee an enormous looming threat to retirement security for low and middle-income individuals and especially for Latinos and Blacks. That threat is the U.S. Department of Labor's continued and documented efforts to resurrect a regulation that has been proven to hurt low and middle-income individuals in 2016 and 2017 – the fiduciary rule.***

The Hispanic Leadership Fund recently published an in-depth analysis containing the actual facts on DOL's 2016 fiduciary rule. The rule became applicable in 2017, but then was invalidated in 2018 by the Fifth Circuit Court of Appeals as being completely inconsistent with the laws enacted by Congress.

During the brief time that the 2016 fiduciary rule was in effect, low and middle-income individuals suffered badly. As an example of those effects, the well-known accounting firm Deloitte studied institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market. Deloitte's study found that, as of the DOL rule's first applicability date, ***53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and \$900 billion in savings.***

The Hispanic Leadership Fund's study examined what would happen if the 2016 fiduciary rule is resurrected in part or in whole, as DOL is clearly working toward. I ask that our study be made part of the record of this hearing. https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf

Our analysis confirms that the 2016 fiduciary regulation hurt the very people it was intended to help, especially working families struggling to build retirement savings. Reinstatement of this overregulation in any form similar to the 2016 regulation will once again prevent hard-working Americans from receiving information that is highly relevant for their financial well-being. As our research shows, reinstatement of the fiduciary rule would:

- **Reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years.**
- **Contribute to a roughly 20% increase in the wealth gap for Black and Hispanic Americans, when looking at accumulated IRA savings alone.**

We all believe that advisors should be required to act in the best interest of their customers. That is already being addressed by the Security and Exchange Commission's Regulation Best Interest and by the National Association of Insurance Commissioners' model best interest standard for annuities. Both of these rules require advisors to act in their customers' best interest and neither was in effect in 2016, undercutting any possible rationale for any further action by DOL, much less a resurrection of a counterproductive rule. The DOL rule, on the other hand, was never about a best interest standard. The DOL rule was about effectively banning the commission-based

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means of providing investment assistance because DOL believed that commissions give rise to conflicts of interest.

The fact is that commissions are no different than the price of any other service or product in this country. A customer pays a price for service, just like in any other commercial transaction.

What DOL overlooked in 2016 and continues to overlook now is that the way that low and middle-income individuals, including many working families from underserved communities, get investment assistance is through the commission system—because most cannot afford to pay fees that would be required otherwise. By taking away that system, DOL cut those individuals off from receiving professional investment advice. That was a tragic mistake. I ask this Subcommittee to let the Administration know that this mistake should not be made again.



March 1, 2022

The Honorable Mark DeSaulnier
Chairman
House Education & Labor Subcommittee on
Health, Employment, Labor and Pensions
RHOB 2101
Washington, DC 20515

The Honorable Rick Allen
Ranking Member
House Education & Labor Subcommittee on
Health, Employment, Labor and Pensions
RHOB 2101
Washington, DC 20515

Dear Chairman DeSaulnier and Ranking Member Allen:

We write to share concerns regarding your hearing today: Improving Retirement Security and Access to Mental Health Benefits. The Partnership for Employer-Sponsored Coverage (P4ESC) is an advocacy alliance of employment-based organizations and trade associations representing businesses of all sizes and the over 181 million American workers and their families who rely on employer-sponsored coverage every day. We are committed to ensuring that employer-sponsored coverage is strengthened and remains a viable, affordable option for decades to come.

We are concerned that this hearing – like so many others concerning access to mental health care – is wrongly and punitively focused on employers and other payers for health care and mental health care benefits. The bigger barriers to access to care come from shortages of mental health care providers and mental health care providers who refuse to enter our networks so that employees can access care. Telemedicine has been one positive exception to the shortages during the pandemic; it is our hope that telemedicine access to mental health care services can be made permanent.

Employers work tirelessly to provide quality mental health and substance use disorder coverage for our employees and their families. Employers have innovated and invested in significant new programs during the COVID pandemic. Addressing the current mental health care crisis will require significant efforts in partnership between employers, providers, government, patient groups and other stakeholders. We believe that punitive legislative provisions like civil monetary penalties will poison these efforts and serve only to hurt patients.

Employers and mental health care providers worked together to build the compromise that became the Mental Health Parity and Addiction Equity Act of 2008. Employers and providers worked closely with the late former Senators Edward Kennedy (D-MA) and Pete Domenici (R-NM) to build compromise language that balanced financial parity in coverage with the retained ability to medically manage that coverage. It is this latter element – particularly as regards noneconomic factors, such as network adequacy, formulary design, and step therapy – that is at issue now.

Partnership for Employer-Sponsored Coverage
 March 1, 2022
 Page 2

Civil monetary penalty enforcement proposes to impose network adequacy requirements by penalizing employers based on the raw number of mental health or substance use disorder providers in network. Yet, employer networks consistently report that these providers refuse to bargain in good faith and decline to participate in our networks at reasonable rates. Provider shortages – inside- as well as outside-networks – are rampant. According to HHS, 129.6 million Americans live in areas designated as Mental Health Professional Shortage Areas.^[1] There are 6,559 additional BHC providers^[2] needed to fill these provider gaps.^[3] Provider shortages, in conjunction with limited in-network providers, make it difficult for patients to find affordable in-network providers.

Additionally, employers and other issuers have repeatedly and earnestly urged the DOL’s Employee Benefits Security Administration to provide adequate guidance regarding the applicable mental health parity standards. As evidenced by the DOL’s recent [2022 MHPAEA Report to Congress](#) in which *NO* plans were without findings under agency review – we believe the agency has failed to provide sufficient implementing guidance for any plan to truly comply. While we believe employers and other payers wish to comply, there is and will continue to be no way to do so without additional rulemaking and time to come into compliance.

We implore you to call on the agency to work in partnership with all stakeholders and provide additional guidance. Without this guidance we will continue to see the intent of MHPAEA inadvertently frustrated by well-intentioned plans and payers who are trying to do their best in the absence of adequate agency implementation. We are concerned and wary of a defeating cycle – attempting to comply, but perpetually being found lacking because the rules are not adequate or clear.

We believe the call for civil monetary penalties is premature. Civil monetary penalties, at this point, will add unnecessary tension and fear into what we think should be a partnership to breathe life into the MHPAEA requirements in a fulsome and sustainable way. Penalties distract from and compound the absence of guidance and may escalate a confusing situation into chaos. Plans and payers are doing their best to build a house without adequate blueprints and calling for civil monetary penalties is like the designer standing on the sidewalk, yelling “you’re doing it wrong,” and then charging for design changes after the fact. It’s not fair, efficient, or good for the system as a whole.

^[1] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021, available at: <https://data.hrsa.gov/Default/GenerateHPSAQuarterlyReport>.

^[2] Behavioral health providers are health care practitioners or social and human services providers who offer services for the purpose of treating mental disorders including: psychiatrists, clinical social workers, psychologists, counselors, credentialed substance use specialists, peer support providers, and psychiatric nurse providers.

^[3] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021

Partnership for Employer-Sponsored Coverage
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 Page 3

Imposing penalties on plan sponsors cannot solve provider shortages. The federal government should not put its thumb on the scale in private negotiations between providers and employers. In keeping with the spirit of the mental health parity law, employers should be treated on par with providers.

We would welcome the opportunity to discuss these issues with you or your respective staff. If such a meeting would be of interest to you, please have your staff contact P4ESC's Executive Director Neil Trautwein at neiltrautwein@gmail.com.

Sincerely,

Partnership for Employer-Sponsored Coverage (P4ESC)
www.p4esc.org

cc: Rep. Bobby Scott Rep. Virginia Foxx
 Chairman Ranking Member
 House Education and Labor Committee

Mr. ALLEN. Thank you Mr. Chairman. I would also like to thank the witnesses for their testimony today, and thank you Mr. Chairman for holding this hearing. I am concerned with the timing of the hearing and my colleague's intentions. The committee should focus on enacting bipartisan RISE Act, not jumping to consider new, more partisan retirement package.

It is my hope that the committee continues its important tradition of bipartisan cooperation in retirement legislation. As we heard from today's testimony, the financial interests of retirement savers and beneficiaries must be prioritized. The Biden administration's proposed rule requiring ESG investing and private retirement plans not only contradicts ERISA, but also threatens the savings of American workers and retirees.

DOL's proposed rule and similar legislative proposals would place retirement savers third behind the political whims of the majority and a fiduciary fearing a lawsuit for non-compliance. Thank you again to all the witnesses for participating in today's hearing, and with that Mr. Chairman thank you and I yield back.

Chairman DESAULNIER. Thank you, Mr. Allen. I will now recognize myself for the purpose of making my closing statement. First I ask unanimous consent to enter a letter from the American Federation State, County and Municipal Employees into the record. Without objection so ordered.

[The letter of Chairman DeSaulnier follows:]



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Milwaukee, WI

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Albany, NY

Anthony Wells
New York, NY

Mike Yeszanski
Olympia, WA

AFSCME #201-20

February 28, 2022

The Honorable Mark DeSaulnier, Chairman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman DeSaulnier:

On behalf of the 1.4 million members of the American Federation of State County and Municipal Employees (AFSCME), I ask that you include this letter in the record for the March 1 hearing on Improving Retirement Security and Access to Mental Health Benefits.

AFSCME applauds the work this subcommittee has done to ensure that workers receive affordable and comprehensive mental health and substance use disorder (MH/SUD) benefits. The landmark 2008 Mental Health Parity and Addiction Equity Act advanced equal access to treatment for MH/SUDs, and the historic Affordable Care Act (ACA) extended this protection to individuals buying coverage on their own. Recently, Congress made the federal mental health parity law even stronger with provisions in the Consolidated Appropriations Act (CAA).

CAA improves equal access to MH/SUD services by looking beyond out-of-pocket costs or quantitative differences in benefits. The new law requires plans and insurers to evaluate the use of prior authorization processes, medical necessity determinations and other criteria that limit the scope or duration of MH/SUD and medical surgical benefits. Plans and insurers must supply these comparative analyses to the federal agencies that enforce mental health parity. This information is a valuable tool for enforcement of mental health parity because the law prohibits plans and insurers from using these processes, determinations, and other criteria for MH/SUD benefits more stringently than those for medical and surgical benefits. Enforcement of these non-quantitative limits on benefits is vital to ensure health plans follow not just the letter of the law but its promise.

AFSCME supported House passage of Build Back Better Act for many reasons, including the provision giving the Department of Labor (DOL) the authority to impose civil monetary penalties on plans under its authority that violate mental health parity law.

We now urge Congress to continue to press for enactment of the authority because it will allow DOL to step in more aggressively when it is necessary to change plans' discriminatory coverage practices. We stand ready to work with you to further strengthen mental health parity law by closing loopholes that allow plans to deny workers access to needed services.

American Federation of State, County and Municipal Employees, AFL-CIO

TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB www.afscme.org 1625 L Street, NW, Washington, DC 20036-5687

Before COVID, mental health and substance use disorder services were inadequate to meet demand.ⁱ The pandemic has fueled a mental health and substance abuse crisisⁱⁱ and further strained behavioral health care workers who are now on the brink of exhaustion.

We also urge you to prioritize resources to recruit, retain and empower behavioral health staff. They are the foundation to any solution to this crisis.

Programs to increase the number of behavioral health care workers in the pipeline are important but can never be enough if we maintain the status quo with respect to how we value this workforce. Low pay, understaffing, unsafe working conditions, unacceptably high caseloads, and burnout result in elevated levels of turnover. These burnout and turnover rates directly affect the ability of clients to get prompt, quality care.

One AFSCME member who helped youth with acute mental health issues left her job at a crisis hotline because of an overwhelming workload and unsustainable overtime. She said, “either I keep working at this job or take care of my own mental health.”

Expanding collective bargaining rights and supporting certified labor-management partnerships will help in the retention of this workforce because workers need a strong voice at the job to address their concerns. AFSCME supports enactment of the Public Service Freedom to Negotiate Act, which strengthens the right of public employees to join unions and engage in collective bargaining. We support the House-passed Protecting the Right to Organize Act (PRO Act), which makes it easier for private-sector workers to form and join unions.

Providing behavioral health care workers with a voice at work through a union has resulted in increased staff longevity and feeling supported at work which in turn results in better outcomes for clients.

We urge this subcommittee to establish a robust grant program to support and encourage labor management partnerships in behavioral health care so that workers and employers can together develop ways to improve staffing, caseload, and delivery of services.

Sincerely,



Bailey K. Childers
Director of Federal Government Affairs

BKC:LB:hlf

cc: Members of the Subcommittee on Health, Employment, Labor, and Pensions

ⁱ [In 2015, less than one percent of people](#) aged twelve or older that needed substance use treatment received care at a specialty facility. [In 2016, 11.8 million](#) American adults believed that they had a need for mental health services during the past year that went unmet. Four out of ten of those adults said they could not afford the cost of treatment. Even people with insurance coverage face barriers to accessing mental health care because of the [lack of in-network options for mental health and substance use care](#).

ⁱⁱ In 2020, nearly [92,000 Americans died of drug overdoses](#), a 30% increase from 2019 and a 75% increase over five years. [Preliminary figures suggest the 2021 overdoses death toll](#) will be even higher. In early 2021, emergency room visits for suicide attempts of adolescent girls soared by 50.6% higher than the same period in 2019, according to the [Centers for Disease Control and Prevention \(CDC\)](#). [About 4 in 10 adults](#) have reported symptoms of anxiety or depressive disorder during the pandemic. The mental health of [essential workers](#) has been endangered during COVID. They are more likely than nonessential workers to report of anxiety or depressive disorder (42% vs. 30%, respectively), starting or increasing substance use (25% vs. 11%), or considering suicide in the past 30 days (22% vs. 8%).

Chairman DESAULNIER. Thanks again to the witnesses. I really mean it. It's a good conversation and encouraging. In spite of our differences, I think there's a lot that we can work on together. So thank you very much. Today we discussed, excuse me, the importance of helping workers access secure retirement, high-quality health care.

Unfortunately, as our witnesses shared, many workers continue to face barriers to saving for retirement and receiving the care they need. That is why Congress and this committee advanced legislation to improve retirement security, strengthen health benefits, and protect pensions of more than one million workers and retirees through the American Rescue Plan.

I look forward to continuing our efforts to advance common sense solutions, that meaningfully improve the lives of American workers and retirees. I welcome my Republican colleagues' support for these ideas, and I also welcome our conversation. Thank you again to our witnesses. If there's no further business, without objection the subcommittee stands adjourned. Thanks.

[Whereupon, at 12:07 p.m., the hearing was adjourned.]

[Additional submission by Chairman DeSaulnier follows:]



AMERICAN BENEFITS

COUNCIL

WRITTEN STATEMENT

FOR THE HEARING OF THE
HOUSE EDUCATION AND LABOR COMMITTEE
SUBCOMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS (HELP):

IMPROVING RETIREMENT SECURITY AND
ACCESS TO MENTAL HEALTH BENEFITS

MARCH 1, 2022

The American Benefits Council (the “Council”) thanks Subcommittee Chair Mark DeSaulnier and Ranking Member Rick Allen and all members of the HELP Subcommittee for holding the hearing “Improving Retirement Security and Access to Mental Health Benefits.” Your work and that of the subcommittee have been instrumental in the great bipartisan strides we have made in advancing retirement security. We commend your leadership in further improving retirement outcomes for American workers and their families and supporting mental health.

The American Benefits Council (“the Council”) is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations as well as organizations serving employers of all sizes. Collectively our members directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans

The Council appreciates that a number of important issues were discussed during the hearing. We want to use this opportunity to express our support for the Retirement Improvement and Savings Enhancement (RISE) Act (H.R. 5891), which was introduced by Education and Labor Committee Chair Bobby Scott and Ranking Member Virginia Foxx, along with Subcommittee Chair DeSaulnier and Ranking Member Allen. We commend the full committee for approving the bill on a unanimous and bipartisan basis in November 2021, and we look forward to the RISE Act being combined with the Securing a Strong Retirement Act of 2021 (H.R. 2954, the “Neal/Brady” bill, as approved by the House Ways and Means Committee) and brought to the floor for consideration by the full House. We also want to use this opportunity to express Council members’ strong support for mental health coverage for employees and their families and explain why, at this time, it is unnecessary and inappropriate to enact additional penalties regarding certain aspects of the Mental Health Parity and Addiction Equity Act (MHPAEA).

KEY BIPARTISAN PROPOSALS FOR IMPROVING RETIREMENT SECURITY

The private retirement system has helped millions of Americans achieve retirement security. In recent years, the Setting Every Community Up for Retirement Enhancement (SECURE) Act enacted in 2019 was a major step forward in meeting the challenges faced by Americans in achieving a secure retirement. Even more recently, the American Rescue Plan Act (ARPA) enacted in March 2021 included vital funding reform that provided much-needed stabilization to single-employer pension plans. While the SECURE Act and the ARPA represent the latest examples of enacted bipartisan retirement legislation, there is a more than 25-year history of such legislation meaningfully and continually improving the private retirement system for Americans.

This lengthy history of excellent work has helped produce the following results:

There has been dramatic growth in retirement savings since 1995, including a 75% increase in the mean savings for the lowest income families and over 100% growth for middle-income families.¹

- Coverage of low and middle-income families has increased materially, ranging from a 12% increase for middle-income families to a 20% increase for the lowest income families.²
- Even with the enactment of numerous changes over the past 25 years, the system can be further improved and strengthened. There are numerous existing bipartisan proposals that we believe can help achieve that result. Several of those proposals, including the RISE Act, are discussed below.

There are many retirement policy proposals that are worthy of discussion. We are highlighting several that Council members have identified as important reforms that build on the SECURE Act and would significantly help American workers better prepare for retirement. Several of the proposals below are included in both the RISE Act and the Neal/Brady bill, as well as the Retirement Security and Savings Act of 2021 (S. 1770, the “Cardin/Portman” bill). Some proposals not included in the bills should be considered as well. Some of the proposals are additionally found in in other bipartisan legislation, such as the Pooled Employer Plan (PEP) Fix Act (H.R. 6912, the “Allen/DeSaulnier PEP Fix” bill), the Retirement Parity for Student Loans Act (S. 1443, the “Wyden student loan” bill) and the Retirement Savings Lost and Found Act (S. 1730, the “Warren/Daines missing participants” bill).

PEP and “group of plan” reforms

Policymakers are constantly searching for ways to improve retirement plan coverage and Council members believe that the best way to do so is to build on the employer-based system. Open multiple employer plans (called “pooled employer plans,” or PEPs) present a significant opportunity to do so. Much was accomplished in the enactment of the SECURE Act but additional reforms can make PEPs even more effective in expanding coverage, ensuring consistent participation and providing a solid retirement. We note the following proposals:

- **Provide the same PEP advantages to charities, churches, and public educational institutions:** Currently, the PEP provisions in the SECURE Act do

¹ Retirement Accounts by Percentile of Income, Federal Reserve Board 2019 Survey of Consumer Finances.

² *Id.*

not cover 403(b) plans, which are widely used by charities, churches, and public educational organizations (the only entities permitted to maintain such plans). We support the expansion in the RISE Act, Neal/Brady, and in Grassley/Hassan/Lankford (S. 1703) of the PEP provisions to cover 403(b) plans, so that these entities can enjoy the same new economies of scale being made available to taxable employers.

- **Trustee duties:** The SECURE Act requires the trustee of a PEP “to be responsible for collecting contributions” to the PEP.
 - ***Different business models:*** Based on the input we have received, there are different business models that may be used with respect to the collection of contributions to the PEP. Under one business model, the trustee would be responsible for collecting contributions. Under a second business model, the PEP would use a directed trustee, which would not have any fiduciary expertise or any administrative system that could be used to enforce or oversee the collection of contributions. If the trustee in this second business model were forced to take on this responsibility, it would have to establish new systems to perform a new function, which would trigger unnecessary costs and delays in implementing PEPs.
 - ***Flexibility would expand coverage:*** We believe that it is important to accommodate both business models, as both the RISE Act and the Allen/DeSaulnier PEP Fix bill would do, so that PEP coverage can be expanded to the greatest extent. Accordingly, we ask that that Congress treat PEPs in the same way as all other types of plans. PEPs should be permitted to assign contribution collection responsibility to the entity best suited to this task, which will often be the pooled plan provider. This legislative solution would simply permit the collection process to be assigned to other fiduciaries, which would facilitate the use of the fiduciary with the most experience and expertise in this regard.
- **Service Crediting:** Under a MEP that is not a PEP (a “closed MEP”), if an employee works for one employer in the MEP and then moves to another employer in the MEP, the employee’s service with the first employer counts with the second employer and vice versa.
 - ***PEPs:*** The service crediting rule makes sense in the context of a closed MEP where employees are moving among closely related employers. But in the context of a PEP, it does not make sense. For example, why should a hardware store in Maine have to make a new employee immediately eligible and immediately vested based on prior service by the same employee for a barber shop in Nevada, just because the two employers participate in the same PEP?

- **Statute and policy:** The statute is not clear on whether the MEP rule applies to PEPs. In our view, it should not. From a policy perspective, the growth of PEPs and the expansion of coverage would be inhibited if the MEP rule applied to PEPs.
 - If small employers know that, for example, they may need to treat new hires as immediately eligible and immediately vested, that could mean fewer small employers join PEPs, undermining the extent of the coverage expansion. This is because the potential additional expenses of applying the service crediting rules across the entire PEP could erase the cost savings obtained elsewhere for the PEP through economies of scale, and tracking service crediting based on an employee's previous employers does little to advance administrative simplicity and cost savings.
 - Similarly, many employers would likely be concerned to learn that, under a PEP, a short-term employee who left after a couple of years could become 100% vested later by reason of working for an unrelated employer. Again, this has cost implications.
- **Groups of plans that are permitted to file a single Form 5500 under Section 202 of the SECURE Act:** Under current law, generally, a Form 5500 for a defined contribution plan must contain an opinion from an independent qualified public accountant as to whether the plan's financial statements and schedules are fairly presented (referred to below as the "audit requirement"). However, generally, no such opinion is required with respect to a plan covering fewer than 100 participants.
 - **Audit requirements:** A group of plans that fits within the SECURE Act provision (referred to as a "defined contribution group" (DCG) by the U.S. Department of Labor (DOL) and the U.S. Treasury Department in proposed revisions to Form 5500 released in September 2021) may contain some plans that are subject to the audit requirement and some that are not. Under the proposed change, plans which are subject to the audit requirement may elect to jointly file a single audit as if they were part of the same plan, but the audit requirement and expense would not be imposed on the small plans. This proposal with respect to the audit requirement is critical in minimizing the plan sponsor expenses associated with participating in a group of plans single Form 5500 filing and furthering the goals of Section 202 of the SECURE Act.

Improving required retirement plan reports and disclosures

Under current law, employer-sponsored retirement plans and IRAs are required to provide a variety of reports and disclosures to participants at various times or upon the occurrence of specified events. The Council believes there is a significant opportunity to improve both the content and the timing of required disclosures in a manner that provides for more effective and meaningful communications to participants and account owners, while also decreasing administrative costs for plans and IRAs.

We support bipartisan proposals to take such steps, such as a proposal included in the RISE Act, the Neal/Brady bill, and the Cardin/Portman bill. That proposal would direct Treasury, DOL and the Pension Benefit Guaranty Corporation (PBGC) to review the reporting and disclosure requirements and make recommendations to Congress to consolidate, simplify, standardize and improve these participant communications.

A related issue is one that affects those plan participants who are *not enrolled in the plan* but who nevertheless are considered participants because they are *eligible* to enroll in the plan. Under current law, even non-enrolled participants are required to receive the same reports and disclosures as participants who are enrolled in the plan. Because these non-enrolled participants are receiving plan communications that do not relate to them, the Council strongly supports the proposal in the RISE Act, the Neal/Brady bill, and the Cardin/Portman bill under which non-enrolled participants would not be required to receive the unnecessary notices that they receive under current law. Instead, such participants would receive an annual reminder of their eligibility to participate in the plan.

Reforming the rules regarding inadvertent overpayments to participants

The complexity of administering a retirement plan can result in a plan incorrectly calculating benefit payments for a participant, especially in a defined benefit plan. Sometimes these errors result in an overpayment being made to a participant. IRS correction procedures in some cases require plans to seek to recoup from participants a discovered overpayment, sometimes months or even years after the overpayment was made to the participant. This often causes significant distress for participants – many of whom are retirees – who had no idea that the plan incorrectly calculated their benefits. Further complicating matters, in many cases an overpayment was rolled over to an IRA or another plan because the participant believed that such amount was eligible for rollover treatment when in reality it was not.

In some circumstances, under the IRS' Employee Plans Compliance Resolution System (EPCRS), a plan sponsor may correct for an overpayment without seeking recoupment from the participant. However, the Council's members believe that additional steps to protect retirees should be taken and therefore the Council strongly

supports provisions in the RISE Act and in the Neal/Brady and Cardin/Portman bills that would permit employers not to seek recoupment from the participant and to permit rollovers of inadvertent overpayments.

Missing participants

Our members devote a great deal of effort and financial resources to sponsoring retirement plans and to searching for those who have unclaimed benefits. We wholeheartedly share the goal of reuniting plan participants with their retirement benefits.

In this regard, we welcomed the introduction of missing participant legislation in Neal/Brady, Cardin/Portman, and Warren/Daines, which addressed the missing participant issue. DOL has issued guidance in the nature of best practices but more is needed because it does not define when a participant is missing or unresponsive. The Council believes strongly in the need for comprehensive guidance on plan fiduciary responsibilities with respect to unresponsive and missing participants.

The bills also include a provision that would use data that employers are already required to report to Treasury to create a national, online lost and found for Americans' retirement accounts (the RISE Act includes a modified version of this provision). In addition, under the bills, other than the RISE Act, DOL would be directed to develop standards for determining if an employer has satisfied its fiduciary responsibilities with respect to missing participants. In our view, such standards should be set by Congress. If that is not possible, then all agencies involved should be directed to develop the standards jointly, including Treasury and the PBGC.

We also believe that the bills would require transfers to a new government program of benefits that are currently being transferred to automatic rollover IRAs – a private-sector solution that is working well. We agree with the approach taken in the RISE Act and do not believe that a new government program is needed.

We look forward to continuing to work with Congress on these issues as we collect additional input from our members. Their extensive experience with missing and lost participants provides a valuable resource for policymakers, including input with respect to strategies to improve consistency among agencies with regulatory authority for missing and unresponsive participants.

Self-correction procedures

Plan sponsors should generally be permitted to self-correct inadvertent plan violations under EPCRS without a submission to the IRS or a fee payable to the IRS. This will help employees because errors can be corrected more quickly and more

efficiently. Under a proposal included in the Neal/Brady bill and the Cardin/Portman bill, all inadvertent plan violations could be self-corrected under EPCRS without a submission or fee to the IRS, provided that this rule would not apply if the IRS discovers the violation on audit and the employer has not at that point taken actions that demonstrate a commitment to correct the violation. These bills, which we strongly support, would also make improvements to the self-correction process that would make self-correction a more reliable and effective process.

Recent IRS guidance expands the inadvertent errors that may be self-corrected under EPCRS without a submission to the IRS but does not achieve the full goals of the bills, which would allow substantially all inadvertent errors to be self-corrected. We highly recommend Congress take this additional step to make self-correction as broadly available as possible.

Reducing barriers to saving through student loan repayment programs

The burden of student loan debt serves as a barrier to saving for retirement. Given the benefit of compound interest, putting money away early in one's career — especially through an employer-provided plan with matching contributions and low fees — can have a powerful effect on one's retirement savings account balance at retirement age. But student debt prevents many individuals, especially in their 20s and 30s, from saving optimally for retirement.

Many employers are interested in helping employees save for retirement despite student tuition or debt obligations and are considering a variety of innovative approaches to do so. We urge Congress to support these programs with policies that embrace innovation.

For example, the Council supports proposals that would make it easier for employers to provide matching contributions to 401(k) retirement plans based on an employee's student loan payments. Such a provision is included in the Wyden student loan bill. The Wyden student loan proposal is also included in the Neal/Brady and Cardin/Portman bills and the Retirement Parity for Student Loans Act (H.R. 2917). Measures such as this that would leverage the tax laws and behavioral economics would go a long way toward reducing barriers to retirement savings, particularly for younger workers. Just like saving early, enacting supportive policy as soon as possible will have a positive effect on retirement outcomes.

We are also supportive of other proposals to give employers greater flexibility in helping their employees with student loan debt, including making permanent provisions that make it easier for employers to pay down student loans for their employees without triggering taxable income for their employees, up to an annual limit of \$5,250 on the total of such repayments as well as other educational assistance.

Stop indexing the PBGC variable rate premium for single-employer plans

The Cardin/Portman bill includes a bipartisan proposal aimed at addressing concerns over PBGC premiums, which are a factor in causing employers to terminate or engage in pension plan de-risking activities. Today, single-employer defined benefit plans pay both a per-participant flat-rate premium and a variable-rate premium to the PBGC each plan year. Both types of premiums are currently indexed. But indexing the variable-rate premium does not make sense because the variable-rate premium is calculated based on the plan's unfunded vested benefits, an amount that is inherently indexed. As a result, indexing the variable-rate premium will eventually lead to companies owing 100%, 200% or even more of their underfunding to the PBGC. The Cardin/Portman bill would address this by eliminating the indexing of the variable-rate premium and freezing such rate at the 2018 premium level (\$38 per \$1,000 of unfunded vested benefits).

The Council has also proposed two other critical reforms of the PBGC premium system: (1) adjusting premium levels based on the funded status of the PBGC, to keep premium levels commensurate with the need and slow the exodus from the defined benefit plan system, and (2) taking premium increases and decreases off budget since premiums cannot be used for general budget purposes.

Permitting higher catch-up contributions for older Americans

Even though most Americans understand the benefit of saving for retirement throughout their working years, younger workers in particular often face competing financial priorities, such as buying a home, paying off student loans and raising a family. These expenses can make it challenging for many workers to prioritize saving for retirement until their 40s, 50s, or even 60s. In 2022, most employees are generally limited to making elective deferrals of \$20,500 to a 401(k), 403(b), or governmental 457(b) plan (\$14,000 with respect to SIMPLE IRAs and SIMPLE 401(k)s). But individuals age 50 and older may make a "catch-up" contribution of an additional \$6,500 (\$3,000 for SIMPLEs). To give workers nearing retirement age an even greater ability to better prepare for retirement, the Council supports the provisions in the Neal/Brady and Cardin/Portman bills that would increase the catch-up contributions for certain older workers.

Increasing the age at which RMDs must begin

The Council believes it is important that retirees be allowed to retain their savings in retirement accounts as long as possible to help protect against the risk of retirees depleting their retirement savings during their lifetime. We therefore urge the subcommittee to support bipartisan proposals such as those in the Neal/Brady and

Cardin/Portman bills that would further increase the age at which participants and IRA account owners must begin taking RMDs to age 75.

Expansion of electronic disclosure of plan communications

DOL regulations give plan sponsors the option to provide required notices and statements in an electronic format while providing participants with appropriate protections and the right to receive paper copies of notices at no charge. The Council strongly supported updating the means by which plan sponsors can fulfill their disclosure requirements. We believe that electronic communication can improve employee engagement and help them take more effective and timely action. Bipartisan proposals that restrict this option should be carefully measured against these goals and should be designed to resolve a specific problem so as not to undermine the goals.

Similarly, we support retirement plan proposals to allow remote notarization with strong safeguards to protect participants and spouses. This was acutely necessary during the pandemic and has been allowed on a temporary basis. The success of this system – in terms of efficiency, protections and flexibility – on a temporary basis provides a solid basis for making this rule permanent.

Pension surplus transfers for retiree health and life benefits

The Council supports the provision included in the Cardin/Portman bill that ensures the law permitting surplus pension assets to be used for retiree health and life insurance benefits continues to be available to fund these benefits. Current law (Section 420 of the Internal Revenue Code) allows a portion of a generously overfunded defined benefit pension plan's surplus assets to be used to fund retiree welfare benefits (health care benefits and group life insurance coverage) for the plan's retirees. Extending this provision and making it more usable by companies would provide a prudent financial funding resource and protect these important participant benefits.

New "secure deferral arrangement" automatic enrollment safe harbor

A significant retirement policy success in recent years has been encouraging plan sponsors to automatically enroll their employees in a retirement plan at a default contribution rate and then to periodically increase that rate over time. But as successful as these automatic enrollment and automatic escalation features have been to date, policymakers are now looking at options to continue building on their success.

Under the existing automatic enrollment safe harbor, plans are generally deemed as meeting certain nondiscrimination testing rules if certain criteria are met, including that employees are automatically enrolled at a contribution rate of at least 3% of

compensation in the first year and such rate must increase by at least 1% a year until the contribution rate is at least 6% (but not greater than 15%) by the fourth year.

The Council encourages the subcommittee to consider proposals that would build upon the existing safe harbor by adding a new automatic enrollment safe harbor for “secure deferral arrangements.” A secure deferral arrangement would, among other features, provide for a higher default contribution rate in the first year (i.e., at least six but not greater than 10%) and would remove that 10% cap on default deferrals after the first year. Such proposals have been included in the Cardin/Portman bill, the Collins/Hassan bill, and the 2017 Neal bill.

Emergency savings

The pandemic has highlighted the longstanding need for Americans to save for emergencies. We believe that this can be done in a way that protects and enhances retirement security. In that regard, we were very pleased by the introduction of the Enhancing Emergency and Retirement Savings Act of 2021 (S. 1870).

The bill allows a retirement plan, such as a 401(k) plan, or an IRA to be accessed for a small amount in the case of emergency without any penalty. As a result of knowing they have access to a modest amount in case of an emergency, individuals will be more likely to contribute to the plan or IRA and often will end up not having to make emergency withdrawals, thus enhancing their overall retirement security while improving their financial resilience.

There are a number of ways to improve emergency savings that the Council supports, including programs outside of the retirement plan, and we look forward to a continued dialogue about how to further improve emergency savings and strengthen personal financial security. This bill, however, is an important step toward addressing the critical problem faced by many Americans by offering a solution that harnesses the successful 401(k) or similar plan structure that utilizes payroll deduction and allows for recontribution.

Remove limitations on subsidies resulting from accumulation of retirement assets

Effective retirement saving can improve overall health and financial well-being. Individuals and families should not be penalized for preparing for retirement. The Council urges the subcommittee to support legislation that would exclude current retirement plan assets and future retirement plan benefits from eligibility calculations for state and federal housing and food subsidies.

ABLE programs

The Council supports provisions that address the needs of eligible ABLE individuals. The bipartisan ABLE Employment Flexibility Act (H.R. 4672), introduced by Representatives Thomas Suozzi and Brad Wenstrup, would allow such individuals to elect to have employer retirement contributions made to their ABLE program instead, which is designed to suit their unique needs more effectively than a retirement account.

Parity for CSEC organizations

The SECURE Act, Neal/Brady, and Cardin/Portman together include numerous very helpful tax credits as incentives for taxable companies to start a plan or to adopt certain pro-participant features. For example, the following very beneficial proposals are either in the law or being considered:

- The SECURE Act increased the cap on the small business start-up credit from \$500 to \$5,000.
- The SECURE Act provided a three-year \$500 small business tax credit for adopting automatic enrollment.
- Neal/Brady would increase the start-up credit in two very material ways:
 - Increase the credit from 50% to 100% of start-up costs for companies with up to 50 employees.
 - Provide a contribution-based credit that could be worth over \$100,000 over five years, depending on the size of the business.
- Cardin/Portman would provide a five-year tax credit for small businesses that adopt a new type of safe harbor automatic enrollment 401(k) plan.
- Similar to Neal/Brady, Cardin/Portman would enhance the small business start-up credit by increasing it from a credit equal to 50% of start-up costs to a 75% credit for the smallest employers.
- Cardin/Portman would provide a three-year \$500 small business credit for adopting automatic re-enrollment.

Unfortunately, tax-exempt organizations do not receive any of these credits, so the significant help — well over \$100,000 in total in some cases — that the credits provide is not available to tax-exempt employers. Moreover, tax-exempt organizations do not pay any less to set up a plan.

We strongly believe that something needs to be done to level the playing field to treat tax-exempt organizations more fairly. We therefore urge Congress to support the bipartisan Retirement Tax Credit Parity for Cooperatives and Charities Act (H.R. 6738), introduced by Representatives Ron Kind and Mike Kelly, which would provide tax credits to employees in cooperative and small employer charity (CSEC) plans to make up for the fact that the CSEC employer itself is not eligible to receive the various tax credits available to small for-profit companies. This legislation would accomplish two important objectives: it would provide a significant incentive to the tax-exempt employer to provide retirement benefits (i.e., to obtain a tax credit for its employees), and it would focus the credit on the employees.

A consistent federal framework

We have one key point in conclusion. The fundamental basis for an effective private retirement system is the ability to rely on the single set of national rules applicable to designing and operating retirement plans, especially for companies that operate in more than one state. These rules can be found in Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA). There is no greater threat to the health of the private retirement system than a possible erosion of this principle of current law. We urge Congress to work with us to support and enforce the federal nature of the rules governing qualified retirement plans.

MENTAL HEALTH PARITY

Employers play a critical role in the health care system, leveraging purchasing power, market efficiencies and plan design innovations to provide health coverage to more than 183 million Americans. As part of these efforts, even though neither the Affordable Care Act (ACA) nor MHPAEA mandate that large employers offer mental and behavioral health coverage, Council members voluntarily do so due to their strong belief in the value of mental health and substance use disorder benefits for employees and their families.

These benefits are provided in recognition of the fact that behavioral health care coverage is vital to the health and productivity of the workforce and that these benefits improve employee well-being while simultaneously improving productivity and business performance. Moreover, these benefits are of great value to employers and employees alike because mental health conditions and physical health conditions are often comorbidities and so treating an employee's mental health will also support the employee's general health and well-being.

As such, Council member companies have long worked to support the mental and behavioral health of employees and their families by embarking on innovative solutions

to address the mental health and substance use disorder needs of the workforce, including through collaborative care models that integrate behavioral health with primary care, removing the stigma associated with mental illness, enhancing Employee Assistance Programs (EAPs) and telehealth offerings and combating the opioid crisis.³ Employers have built on these efforts in response to the severe toll that the COVID-19 pandemic has taken on mental health, as explained at length in the Council's *Silver Linings Pandemic Playbook: Shining the Light on Employee Benefits Innovation and Action*.⁴ The Council has also worked to identify and remove barriers to employer efforts to increase mental health support for employees and their families.⁵

Moreover, the Council has been, and continues to be, strongly supportive of mental health parity, as reflected in MHPAEA. However, the ambiguity and subjective nature of the rules related to non-quantitative treatment limitations (NQTLs) has been an ongoing challenge for group health plans. Most recently, the new requirement enacted in the Consolidated Appropriations Act, 2021 (CAA) that plans create an NQTL comparative analysis (the NQTL comparative analysis) has raised many concerns.

In the year since the NQTL comparative analysis requirement was enacted, employers have spent a great deal of time and effort in good faith to prepare these reports. At the same time, there has been widespread uncertainty in the employer community as to what DOL expects in these reports. Employers have asked for more guidance, including in the form of a sample NQTL comparative analysis but these calls have gone unanswered. Anecdotally, the sense has been that DOL is finding NQTL analyses to be insufficient, despite the serious efforts undertaken by employers.

These concerns by employers were clearly validated when, in a recent public report, DOL found that of the 156 employers and plans it investigated during 2021, none of the NQTL comparative analyses were sufficient.⁶ The complete and widespread failure of employers and plans to comply, despite their genuine, extensive efforts, strongly suggests that DOL has not clearly and adequately explained what is required in the NQTL comparative analysis. This is analogous to a situation in which all students fail a test – it calls into question the quality of the instruction on the subject.

With this context in mind, we urge lawmakers to reject proposals to create a new civil monetary penalty regime pursuant to the mental health parity rules, including

³ <https://www.americanbenefitscouncil.org/pub/?id=2f21fbaf-9ed0-db9b-4aab-ceed75ea80b0>.

⁴ <https://www.americanbenefitscouncil.org/pub/7DD9EBE9-1866-DAAC-99FB-6434BC09AA06>.

⁵ See Council response to Senate Committee on Finance Request for Information on Mental Health Coverage and Substance Use Disorder Coverage at <https://www.americanbenefitscouncil.org/pub/?id=CE9ADF59-1866-DAAC-99FB-E648A34C30AE>.

⁶ <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/report-to-congress-2022-realizing-parity-reducing-stigma-and-raising-awareness.pdf>.

along the lines of the proposal in the Build Back Better Act. Due to the current degree of uncertainty as to DOL's view of what the rules require, a civil monetary penalty regime is unwarranted and ill-timed. Employers and plans need to be permitted to implement the new CAA requirements, which have only been effective for a year.

Moreover, DOL already has a robust enforcement structure for the mental health parity requirements, including by requiring retroactive and prospective plan changes and, in some cases, by publicly identifying employers and plans who are non-compliant and by requiring employers notify employees of a finding of non-compliance. Also, employers and plans are already making their best efforts to comply. Over time, separate from the CAA reporting requirement, the mental health parity violations that DOL has found have steadily decreased. Given the complexity of understanding mental health parity compliance obligations, creation of new civil monetary penalties will neither enhance compliance nor address any perceived shortcomings in enforcement. For all the foregoing reasons, it is extremely ill-advised and inappropriate to establish a new civil monetary penalty regime.

Instead, due to the complexity of the mental health parity compliance obligations, the lack of guidance regarding what DOL views as a sufficient NQTL analysis, and DOL's finding of mass (*i.e.*, 0%) non-compliance, it would be much more productive for DOL to focus its efforts on clear guidance and compliance assistance. In fact, DOL has indicated that it will be issuing proposed regulations on mental health parity by July 2022 and is also required to update the DOL's mental health parity self-compliance tool this summer as well.

We note that the Council is working on detailed recommendations to provide to DOL, in advance of the upcoming rulemaking, on the specific areas where clarity is needed. For example, we plan to request examples of compliant NQTL analyses, a clearer list of the NQTLs which DOL is targeting and some design-based safe harbors. The forthcoming guidance needs to be proposed, open to comment, and then finalized before consideration of new penalties are warranted.

* * * * *

We thank the subcommittee for holding this hearing and for a long history of dedicated bipartisan work on protecting and enhancing the private retirement system and supporting Americans' mental health. We look forward to continuing to work with the subcommittee on this critical endeavor.

[Additional submission by Rep. Norcross follows:]



Thasunda Brown Duckett
President and Chief Executive Officer

February 15, 2022

The Honorable Donald Norcross
United States House of Representatives
Washington, DC 20515

The Honorable Tim Walberg
United States House of Representatives
Washington, DC 20515

Dear Congressman Norcross and Congressman Walberg,

I am writing to thank you for introducing the Lifetime Income for Employees (LIFE) Act of 2022, which will help more Americans gain access to annuities through defined contribution plans. Annuities are vital to retirement security because they are the only products that can provide individuals with guaranteed returns and a guaranteed stream of income in retirement. TIAA strongly supports your efforts to improve access to these products.

The LIFE Act addresses certain requirements in the Qualified Default Investment Alternative (QDIA) regulatory safe harbor that prevent employers from being able to benefit from the safe harbor if they include annuities as part of their retirement plan's default investment. Increasingly, retirement plan participants rely on their plan's default product as their long-term investment strategy. While many participants mistakenly believe the default option provides a guaranteed retirement income, most QDIA products do not. By amending the QDIA safe harbor, the LIFE Act will encourage more employers to adopt annuities as part of their default offering so that more Americans will be able to transition seamlessly from saving for retirement to benefitting from a guaranteed income stream when they retire.

By making these changes, the LIFE Act also builds upon the SECURE Act provision that enhanced the safe harbor on which plan sponsors rely when choosing an annuity provider for their retirement plan. While the enactment of this improved safe harbor was a significant step, the LIFE Act will take the critical next step and ensure more savers have access to annuities.

Thank you again for your continued dedication to modernizing and improving the retirement system for employers and their employees. I am hopeful that with your continued leadership, this legislation will be enacted quickly. My team and I look forward to working with you on this important retirement legislation as it advances through the legislative process.

Best regards,

730 3rd Avenue
New York, NY 10017

[Additional submissions by Rep. Walberg follows:]

**Statement of
Professor Robert H. Sitkoff***
on
ESG Investing by Trustees and Other Fiduciaries
Prepared for the House Committee on Education and Labor
March 15, 2022

Expertise in ESG Investing

This statement is based on my expertise in environmental, social, and governance (“ESG”) investing, especially ESG investing by trustees and other fiduciaries. I have undertaken several years of scholarly study of the topic. My article, [“Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,” 72 Stanford Law Review 381 \(2020\) \(“ESG Investing by a Trustee”\)](#), co-authored with Professor Max M. Schanzenbach of Northwestern University Pritzker School of Law, is the leading scholarly study on the fiduciary aspects of ESG investing.¹ In a consulting capacity for Federated Hermes, Inc., I have prepared several white papers and videos and conducted training sessions on ESG investing for trustees and other fiduciary investors. I have also lectured widely in scholarly and industry venues on ESG investing by trustees and other fiduciaries.

Four Distinct Regulatory Questions

There are at least four different regulatory areas implicated by the phenomenon of ESG investing: (1) state corporate law, (2) federal securities law, (3) federal investment company law, and (4) state or federal fiduciary investment law. The DOL’s role in regulating ESG investing arises from its supervisory jurisdiction over employee benefit plans subject to ERISA and falls within category (4). The SEC’s role in regulating ESG

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¹ Portions of this statement are freely adapted from *ESG Investing by a Trustee*, which provides extensive supportive citation to relevant literature and authority, as well as my prior various submissions to the DOL and SEC. *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, Comment Letter on the Department of Labor’s Proposed Rulemaking on the Department of Labor’s Proposed Rulemaking on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (December 13, 2021), available at SSRN: <https://ssrn.com/abstract=3985618>; Max M. Schanzenbach & Robert H. Sitkoff, Comment Letter on the Department of Labor’s Proposed Rulemaking on Financial Factors in Selecting Plan Investments (July 30, 2020), available at <https://ssrn.com/abstract=3667080>; Max M. Schanzenbach & Robert H. Sitkoff, Comment Letter on the Securities and Exchange Commission’s Request for Comment on the Names Rule for Mutual Funds in Light of ESG Investing and Other Market Developments (May 5, 2020), available at <https://ssrn.com/abstract=3600096>.

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 March 15, 2022
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investing arises from its mandate to protect against investor confusion in public securities markets and falls within categories (2) and (3).

Although these four regulatory areas are motivated by different public policies and are governed by different legal frameworks, there is practical overlap. For example, a fiduciary of an employee benefit fund subject to ERISA and so DOL oversight must be able to rely on the SEC's regulatory framework that ensures reliable disclosures of information from issuers of securities and sponsors of mutual funds.

Neutrality in Trust Investment Law

In accordance with sound public policy, the law neither favors nor disfavors ESG investing. In my scholarly and practice-oriented writings, as well as my comment letters on the recent DOL rulemaking proposals concerning ESG investing,² I have consistently argued that ESG investing is subject to the same fiduciary principles of loyalty and prudence that are applicable to any type or kind of investment strategy. A well-reasoned ESG investing strategy motivated solely by improved risk-adjusted return can be consistent with fiduciary duties under ERISA and the background common law of trusts. These principles apply to any investment decision by an ERISA trustee or other fiduciary—whether in the context of a direct investment, shareholder engagement (including proxy voting), or menu construction, and whether reliant on ESG factors or otherwise.

Duty of Loyalty

As interpreted by the Supreme Court, the ERISA fiduciary duty of loyalty requires a trustee or other fiduciary to be motivated solely by the purpose of securing financial benefits for plan participants.³ In assessing the permissibility of an ESG investing strategy under ERISA, therefore, motive matters. ESG factors are sometimes touted as a means toward improving risk-adjusted returns by identifying mispriced assets or guiding shareholder engagement. My co-author and I call this *risk-return ESG*. By contrast, ESG factors are sometimes also touted for their ability to benefit third parties or society at large. We call this *collateral benefits ESG*.

Whether an issuer of a security or a sponsor of a mutual fund practices risk-return ESG versus collateral benefits ESG is sometimes obfuscated, for example by a prospectus touting both motives. Such obfuscation may give rise to investor confusion about the goals of the issuer or sponsor and how it would reconcile conflict between those goals. This confusion is especially pernicious for a trustee or other fiduciary investor, for whom risk-return ESG is generally permissible but collateral benefits is generally not permissible.

² See *supra* note 1.

³ See *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014).

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Duty of Prudence

The Supreme Court has clarified that ERISA's fiduciary duty of prudence aligns with that of the prudent investor rule within ordinary trust law.⁴ Crucially, the prudent investor rule—both under ERISA and ordinary trust law—eschews favoring or disfavoring any type or kind of investment or investment strategy.⁵ Instead, the prudent investor rule prescribes neutral principles for assessing investment management. To this end, the portfolio as a whole must have risk and return objectives reasonably suited to the purpose of the account and satisfy principles of diversification, cost-sensitivity, documentation, and ongoing monitoring.⁶

When ESG factors are used to pick stocks or engage with firm management, ESG investing is a form of active investing. The use of ESG factors, like all forms of active investing, may entail transaction and diversification costs. To be prudent, an active investment strategy must be reasonably assessed to have expected return benefits that are anticipated to outweigh those costs. On the other hand, a prudent and loyal fiduciary need not actively invest, and could reasonably conclude that a passive strategy relying on index funds would be most apt. In other words, an ERISA trustee could opt for a passive rather than an active investment strategy, or vice versa, provided that in all events the trustee has a reasoned, documented analysis showing that its strategy will benefit the plan participants financially.⁷

Plasticity and Subjectivity

Given the inherent subjectivity to active investing, whether based on ESG factors or otherwise, there can be reasonable disagreement among prudent and loyal fiduciaries about whether the same ESG factor is a material risk-and-return consideration (or even if it is material), the direction in which it points, and how much weight to give it. Although there may be abstract consensus on what are ESG factors, there is little consensus in application as to the direction or magnitude of a particular factor and how to weigh that factor against others.

For example, investors could reasonably differ on whether carbon-neutral nuclear power is a positive or a negative E factor; investors could reasonably disagree on the

⁴ See *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015).

⁵ See Unif. Prudent Inv'r Act § 2(e) & cmt. (Unif. Law Comm'n 1994) ("no particular kind of property or type of investment is inherently imprudent"); Restatement (Third) of Trusts § 90 cmt. f (Am. Law Inst. 2007) ("Specific investments or techniques are not per se prudent or imprudent."); see also [Max M. Schanzbach & Robert H. Sitkoff, The Prudent Investor Rule and Market Risk: An Empirical Analysis, 14 J. Emp. Leg. Stud. 129 \(2017\)](#).

⁶ We canvass the relevant principles in *ESG Investing by a Trustee* at pp. 426-30.

⁷ See *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014).

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sufficiency of boardroom diversity under S or G (e.g., is one female board member enough or should there be gender balance?); investors could reasonably conclude that a classified board is a positive G for a firm seeking to protect long-term investments but a negative G factor for a firm seeking to entrench management; and investors could reasonably disagree about the relative weights to be given to E, S, and G factors for a given firm.

Rather than a criticism of the ESG rubric, such subjectivity is inherent to almost any program of active investing, of which ESG investing is a subset. As my co-author and I describe in *ESG Investing by a Fiduciary*, Tesla is a telling case study, as ESG analysts disagree about whether to give Tesla a high or low ESG score.⁸

ESG analysis can also change over time. A good ESG bet today could be a bad ESG bet tomorrow if those ESG factors become overvalued. For example, climate change is often suggested as a material ESG risk factor, and firms are widely believed today to be underweighting the risk of climate change. But even if this is true for many firms today, a risk-and-return ESG analysis for a particular firm, whether now or in the future, could conclude that the market has overpriced the value of that firm's climate change response.

Neutrality Revisited

Departure from neutral application of fiduciary principles, as has been suggested by both proponents and opponents of ESG investing, would require drawing distinctions between ESG investing and other types or kinds of investment strategy. Doing so would entail a definitional morass that would create uncertainty, invite litigation, and raise the cost of fiduciary investment to the detriment of beneficiaries. As my co-author and I discuss in *ESG Investing by a Trustee*, the practice of ESG investing resists such precise definitions.⁹ Instead, the neutral principles of trust fiduciary law should continue to apply to any type or kind of fiduciary investment, whether based on ESG factors or otherwise.

⁸ See *ESG Investing by a Trustee* at pp. 432-33.

⁹ Anticipating that some commentators may urge Congress to mandate ESG investing, I draw your attention to the more extensive analysis of that issue in *ESG Investing by a Trustee*, in which my co-author and I conclude that such a mandate would be contrary to law and sound policy. See *id.* at pp. 430-33.



U.S. Chamber of Commerce

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U.S. Chamber of Commerce Statement for the Record
To the U.S. House of Representatives Committee on Education and Labor's Subcommittee on
Health, Employment, Labor and Pensions
Hearing on "Improving Retirement Security and Access to Mental Health Benefits"

March 15, 2022

The U.S. Chamber of Commerce (Chamber) is pleased to submit this statement for the record to the U.S. House Education and Labor Subcommittee on Health, Employment, Labor and Pensions for the hearing entitled "Improving Retirement Security and Access to Mental Health Benefits," which was held on March 1, 2022. Many of the Chamber's members sponsor health and welfare and retirement plans governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA), and many others are service providers to these plans.

Introduction

The Chamber supports ERISA's goals of protecting participants' benefits while also encouraging employers to voluntarily establish and maintain plans. When Congress enacted ERISA, it "did not require employers to establish benefit plans."¹ Instead, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees.² Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering ... benefit plans in the first place."³ Our statement for the record reflects these goals.

Mental Health Parity

The employer community appreciates the importance of mental and behavioral health services and supports the goals of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). As employees and their families strive to combat the stresses of a global pandemic and 24 months of disruption, the business community remains committed to complying with the MHPAEA and providing mental health and substance use disorder benefits, which serve an important role in employer-sponsored health plans. However, the lack of providers and overly complex and opaque regulatory scheme make compliance with the MHPAE challenging.

A recent Washington Post article shows the unmet needs and overtaxed mental health provider systems across the country:

- At Boston Medical Center, staff recently began contacting parents of children who joined the 170-person wait list nearly 10 months ago April 2021.

¹ *Conkright v. Frommert*, 559 U.S. 506, 516 (2010).

² *Id.* at 516-17.

³ *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

- At a 20-practitioner branch of a nonprofit agency in Columbus, Ohio the wait list has 150 to 200 names, nearly double the norm.
- The federal government's mental health and substance abuse [referral line](#) fielded 833,598 calls in 2020, 27 percent more than in 2019. In 2021, the number rose to 1.02 million.
- 65 percent of the more than 1,100 psychologists who responded to a recent survey said they had no capacity for new patients and 68 percent said their waitlists were longer than in 2020.⁴

Even before the pandemic, according to the American Academy of Child and Adolescent Psychiatry, there are just 8,300 practicing child psychiatrists in the United States for the more than 15 million young people who need them.⁵ The President also acknowledged the significant problems posed by the current talent pipeline and workforce shortage when he stated “[a]t the center of our national mental health crisis is a severe shortage of behavioral health providers. More than one-third of Americans live in designated Mental Health Professional Shortage Areas, communities that have fewer mental health providers than the minimum their level of population would need.”⁶

The lack of service providers is not the only challenge for plan sponsors and insurers offering mental health services. For those offering these benefits, complying with the regulation and guidance that are overly complex and unclear is challenging. Employers, plan sponsors and insurers continue to make every effort to comply with the existing MHPAE regulation and guidance, but they are especially challenged by the lack of clear standards and guidance for compliance with the law's non-quantitative treatment limitation (NQTL) rule. The lack of guidance and aggressive agency enforcement is causing a considerable amount of market confusion and is a major drain on their resources. To address this, we urge Congress to ask the Department of Labor (DOL) to issue a request for information and reevaluate the regulation. Templates, comparative analysis, and a reasonable regulation must be issued to provide greater clarity on how to verify compliance. The business community shares the goals of compliance and is eager to work with DOL to ensure compliance through clear regulatory guidance.

Claim for Benefits Standard of Review

The written and oral testimony presented to the Subcommittee does not fully explain the importance of ERISA's required administrative procedures, and why District Courts, in essence, act as the Appellate Court in reviewing a claim for benefits. Under the current framework, a participant is required to exhaust the plan's internal review procedures before bringing a claim. During this process, the claim procedure regulation requires that on appeal the plan allow claimants to submit written comments, documents, records, and other information relating to the claim.⁷ In addition, the plan must provide the

⁴ See *This is why it's so hard to find mental health counseling right now*, Washington Post, Mar. 6, 2022 available at <https://www.washingtonpost.com/health/2022/03/06/therapist-covid-burnout/>.

⁵ See *Workforce Issues*, April 2019, American Academy of Child and Adolescent Psychiatry available at https://www.aacap.org/aacap/Resources_for_Primary_Care/Workforce_Issues.aspx.

⁶ See *FACT SHEET: President Biden to Announce Strategy to Address Our National Mental Health Crisis, As Part of Unity Agenda in his First State of the Union*, Mar. 1, 2022 available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/fact-sheet-president-biden-to-announce-strategy-to-address-our-national-mental-health-crisis-as-part-of-unity-agenda-in-his-first-state-of-the-union/>.

⁷ 29 CFR § 2560.503-1(h)(2).

claimant, upon request and free of charge, “all documents, records, and other information relevant to the claimant's claim for benefits.”⁸ A document, record or other information is relevant if it:

- Was relied on in making the benefit determination;
- Was submitted, considered, or generated while making the benefit determination, regardless of whether it was relied on in making the benefit determination;
- Demonstrates compliance with the administrative processes and safeguards the regulation requires; or
- For a group health or disability plan, is a statement of policy or guidance concerning the denied treatment option or benefit for the claimant's diagnosis, regardless of whether such advice or statement was relied on in making the benefit determination.⁹

Under the regulation and case law, if a plan does not follow the claims procedures, a claimant is not required to exhaust them and may go directly to court.¹⁰ The result is that the court reviews the fiduciary's decision under the de novo standard rather than the arbitrary and capricious standard.¹¹ This framework provides strong incentives to adhere to the claims procedure regulation that is aimed at safe-guarding participants' rights.

ERISA's administrative process also serves an important purpose of expediting claims at the administrative level rather than requiring courts to conduct a de novo review of claims before the record has been established. Without this, de novo review would require extensive, and expensive, discovery for both the participant and the employer and plan sponsor which frustrates the goal of expedited review. For example, in the United States District Courts “[n]ationally, the average time between filing and trial for a civil case is a little over two years. In many of these overworked courts the average time between filing and trial is much longer, often three or four years.”¹² However, the claim procedure regulation generally requires that appeals be decided within 60 days of the request, however, urgent care health appeals must be made within 72 hours and post-service health claims must be decided on appeal with 30 days if there are two levels of appeal or within 60 days if there is one level of appeal.¹³

Arbitration Clauses

In recent years, some employee benefit plans have been amended to include arbitration clauses in reaction to the onslaught of class action lawsuits aimed at attorney fee recovery rather than protecting participants' rights. A cottage industry has grown around these cases, with several firms filing cookie cutter cases against plan sponsors in hopes of a quick settlement, with large attorneys' fees. On the health side, there are numerous class action lawsuits claiming minor violations of the COBRA notice

⁸ 29 CFR § 2560.503-1(h)(2).

⁹ 29 CFR § 2560.503-1(m)(8).

¹⁰ 29 C.F.R. §2560.503-1(l)(1).

¹¹ *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 60-61 (2d Cir. 2016).

¹² Statement of the Honorable Brian Stacy Miller Judge, United States District Court for the Eastern District of Arkansas Chair, Judicial Resources Committee Subcommittee on Judicial Statistics on Behalf of the Judicial Conference of the United States Before the Committee on the Judiciary United States Senate, “THE JUDICIAL CONFERENCE'S RECOMMENDATION FOR MORE JUDGESHIPS” JUNE 30, 2020 available at https://www.uscourts.gov/sites/default/files/judge_brian_s._miller_testimony_june_2020_0.pdf.

¹³ 29 CFR § 2560.503-1(h)(2).

provisions, such as naming the COBRA administrator rather than the “plan administrator”.¹⁴ Very few have gone to trial, and instead have settled, with individuals receiving very little compared to the attorneys’ fee awards.¹⁵ On the retirement side, what began as a steady increase of class action lawsuits in the past 15 years, has exploded in the past two years, culminating in over 100 excessive-fee suits in 2020, which was a five-fold increase over the previous year, and on track for 2022 to far exceed this.¹⁶ Similar to the COBRA class actions, most of these cases settle, with more going to attorneys’ fees than on a per participant recovery.¹⁷

Including arbitration clauses and limiting class representation¹⁸ is not an attempt to abrogate individual participant ERISA rights, but rather is a reaction to the plaintiffs’ bar strike suits over alleged inconsequential COBRA notice violation and exaggerated excessive fee and investment options.¹⁹ Arbitration is often cheaper and more favorable for individuals.²⁰ However, it likely will not result in attorneys’ fees the same as mass class action litigation would.

Thole, Article III and Representative Standing

Nothing in ERISA prevents representative standing. However, a participant or beneficiary also must establish standing under Article III of the United States Constitution, which requires the participant to show that (1) the participant suffered an injury in fact that is concrete, particularized, and actual or

¹⁴ See *INSIGHT: A New Target of ERISA Class Actions—COBRA Notices*, April 4, 2020, Nancy Ross and Richard Nowak available at <https://news.bloomberglaw.com/employee-benefits/insight-a-new-target-of-erisa-class-actions-cobra-notices>.

¹⁵ See *Brenntag Mid-South Settles COBRA Notice Class Suit for \$65,000*, Jacklyn Wille, Oct. 26, 2021 available at <https://news.bloomberglaw.com/health-law-and-business/brenntag-mid-south-settles-cobra-notice-class-suit-for-65-000> (noting individual class members received \$53 while the attorneys received a separate amount of \$70,000).

¹⁶ See *Understanding the Rapid Rise in Excessive Fee Claims 2*, ALG, <https://bit.ly/3k43kt8>; see also Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), <https://bit.ly/3fDgjQ5>.

¹⁷ See *Surge in Excessive Fee Litigation is Impacting Fiduciary Liability Insurance*, available at <https://www.crcgroup.com/Tools-Intel/post/surge-in-excessive-fee-litigation-is-impacting-fiduciary-liability-insurance> (“To date, fiduciary liability carriers have paid an estimated \$1B+ in settlements and more than \$250 million in attorneys’ fees to a growing group of plaintiff firms looking to capitalize on outsized fee awards.”) For example, in *Hill v. Mercy Health Corp.*, N.D. Ill., No. 3:20-cv-50286, at most, each participant would recover \$25 compared to \$1.3 million in attorneys’ fees. Settlement available at <https://www.napa-net.org/sites/napa-net.org/files/mercy%20hospital%20settlement.pdf>.

¹⁸ DOL has recognized that only health and disability plan claims for benefits pre-dispute arbitration is regulated under the claims procedure regulation. “The regulation is not intended to affect the enforceability of a pre-dispute arbitration agreement with respect to any other claims or disputes. Accordingly, the regulation should not be read to affect the obligation of a participant or beneficiary to arbitrate such other claims and disputes within the scope of the arbitration agreement. See 29 CFR § 2560.503-1(c)(3)(iii).” See *Benefit Claims Procedure Regulation FAQs, Q/A B-6* available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/benefit-claims-procedure-regulation>.

¹⁹ See *Can Mandatory Arbitration Rein in ERISA Litigation? Appellate Courts Weigh In*, Carol Buckmann, Apr. 11, 2021 available at <https://cohenbuckmann.com/insights/2021/4/11/can-mandatory-arbitration-rein-in-erisa-litigation-appellate-courts-weigh-in>.

²⁰ A study from the Chamber’s Institute for Legal Reform found that employees were three times more likely to win in arbitration than in court. Furthermore, the study found that employees who prevailed in arbitration “won approximately double the monetary award that employees received in cases won in court.” Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5-7, 9-10 (2019), <https://bit.ly/3GMVyxV> (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018).

imminent, (2) the injury was caused by the defendant, and (3) the injury would likely be redressed by the requested judicial relief.²¹

To understanding the implications of the decision in *Thole v. US Bank*,²² the facts are very important. The plan in question was a defined benefit plan, which provides a set monthly benefit for life to vested participants. ERISA requires employers that sponsor defined benefits plan to fund the plan and to pay premiums to the Pension Benefit Guaranty Corporation (PBGC), the entity that insures participants' benefits in the case of plan sponsor bankruptcy.²³ If the plan is underfunded, the employer is subject to excise taxes and increased PBGC premiums.²⁴

In 2008, the US Bank plan, like almost all other defined benefit plan, including multiemployer pension plans, in the United States, lost money because of the 2007-08 global financial crisis and fell below the minimum funding requirements of ERISA.²⁵ As required by ERISA, the plan sponsor subsequently contributed to the plan to bring its funding status above the minimum requirements. Even if the employer had gone bankrupt, the PBGC would have covered 100 percent of the named plaintiff's benefits for the rest of their lives.

The Supreme Court held that the participants did not have Article III standing because no matter win or lose, the plaintiffs would be in the exact same position, namely they would receive their monthly benefits for the rest of their lives. The court noted that the plaintiffs' attorneys had at least a \$31 million dollar stake in the litigation (the amount of fees requested at the District Court), but "an 'interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'"²⁶

To create a cause of action against a defined benefit plan that had an investment loss, but all benefits are being paid, would open the litigation floodgates, including claims against multiemployer plans, many of which have lost millions of dollars and are eligible for Special Financial Assistance from the Federal government. There is not one defined benefit plan – single or multi – that has not lost money on an investment at some point, but that does not per se mean that there has been a breach of fiduciary duty. Like other legislation that had unintended consequences on defined benefit plans, creating a cause of action that would provide a monetary recovery on top of a participant's benefits would only benefit the plaintiffs' bar and would give employers another reason to terminate their defined benefit plans.²⁷

²¹ See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992).

²² 140 S.Ct. 1615 (2020).

²³ 29 U.S.C. §§ 1082, 1083; 26 U.S.C. § 430; 26 C.F.R. § 1.430(a)-1 (single employer funding rules); and 29 U.S.C. §§1306, 1307; 29 C.F.R. §§ 4006.1-7 (PBGC premiums).

²⁴ 26 U.S.C. § 4971 (excise tax for underfunding); 29 C.F.R. § 4006.3.(b) (variable rate premium for plans with a certain level of unfunded vested benefits).

²⁵ The aggregate funding status of all Fortune 1000 company pension plans fell from 107% in 2007 to 77% in 2008, but as of 2021, it has rebounded to 96%. See *Financial health of largest U.S. corporate pension plans surges to highest level since financial crisis*, Willis Towers Watson, Jan. 3, 2022, available at <https://www.wtwco.com/en-US/News/2022/01/financial-health-of-largest-us-corporate-pension-plans-surges-to-highest-level-since-financial-crisis#:~:text=The%20aggregate%20pension%20funded%20status, Fortune%201000%20were%20fully%20funded.>

²⁶ *Thole v. U.S. Bank*, 140 S.Ct. 1615, 1619 (2020) (citing *Lewis v. Continental Bank Corp.*, 494 U. S. 472, 480 (1990)).

²⁷ See *What Happened to Private Sector Pensions?*, August 4, 2016 available at <https://protectpensions.org/2016/08/04/happened-private-sector-pensions/> (explaining the negative impact of the Pension Protection Act and other laws on employer's ability to sponsor defined benefit plans).

Spousal Consent for Defined Contribution Plans

Data shows that women's retirement readiness lags their male counterparts based on lower wages, work patterns, caregiving responsibilities and investment risk aversion.²⁸ The same researchers note that both women and men working full-time had nearly the same access rate to defined contribution plans and the same participation rate. However, the difference in account balances was because of the wage differential and the other factors mentioned above.

There is no data to show that spousal fraud or coercion is the cause of the retirement gap and that requiring spousal consent for all distributions would close that gap. Instead, advocates for this rely on "what if" scenarios and anecdotes in their calls for plan administrators and employers to become the arbitrator of marital financial disputes through requiring spousal consent for all distributions from defined contribution plans, including hardship withdrawals and loans.

Currently law has spousal protections by requiring the spouse to be the beneficiary of the employee's individual account, unless the spouse waives that right. In 1984, Congress recognized the value of retirement assets as part of marital assets when it created qualified domestic relations orders (QDRO), which give former spouses a right to an employee's retirement benefit under a divorce order. Once a plan receives a domestic relations order and before it is qualified, the plan must segregate the amount that would be payable under the QDRO.²⁹ In addition, plans generally will put a freeze on a participant's account if aware there may be a QDRO in the near future. For example, if a spouse is anticipating a divorce, the spouse could call the employer (which the spouse should be aware who that is), to put the administrator on notice even before divorce proceedings start.

The proposal to require spousal consent for any distribution from a defined contribution plan will not solve the retirement wealth gap for women, but instead will add administrative cost and burdens not only for plans but for the participants that it is aimed at protecting by:

- Increasing the time to process distributions by at least 6 days, if not more, which is especially troubling for hardship or natural disaster distributions, which generally are used within a week of a request.
- Forcing those who may not be able to obtain consent because of the domestic situation to either forgo a distribution or be put in a difficult position.
- Increasing the cost to participants who must find and pay a notary to witness the spousal consent, including taking time off to do so.³⁰

²⁸ See *How does gender equality affect women in retirement?*, Grace Enda and William G. Gale, Urban Institute, July 2020 available at <https://www.brookings.edu/essay/how-does-gender-equality-affect-women-in-retirement/>. See also *Improving Retirement Security and Access to Mental Health Benefits* U.S. House of Representatives, Committee on Education and Labor Subcommittee on Health, Employment, Labor, and Pensions, March 1, 2022 Testimony of Amy K. Matsui Director of Income Security, National Women's Law Center available at [MatsuiAmyTestimony030122.pdf \(house.gov\)](https://www.nwlc.org/wp-content/uploads/2022/03/MatsuiAmyTestimony030122.pdf) (noting that the retirement income gap for women is based on lower income and care-giving patterns).

²⁹ ERISA Section 29 U.S.C. 1056(d)(3)(H).

³⁰ The cost of witnessing a document range from \$5 to \$15 in most states that set a maximum charge. Some states do not set any fee maximum, such as Alaska and Maine, where cost could be higher. See <https://www.nationalnotar.org/knowledge-center/about-notaries/notary-fees-by-state>. This also does not take into account the difficulty in finding a notary and the cost associated with taking time off of work or travel and the increasing cost of gas.

- Increasing the recordkeeping requirements and costs, which can be passed onto participants, and potentially require plans to obtain personal, sensitive information that participants may not wish to share, especially with respect to IRAs.
- Exposing plan sponsors to frivolous litigation because the legislation allows a private right of action.

Congress should not mandate joint and survivor annuities as the default form of distribution

The Chamber recognizes the importance of lifetime income for participants in defined contributions plans. The Chamber supports legislation that makes it easier for plan sponsors to offer annuities or other lifetime income options in defined contribution plans, where appropriate, such as Section 204 of the Secure Act which provides a fiduciary safe harbor for selecting lifetime income providers. Although well meaning, a proposal that mandates all defined contribution plan distributions default into a joint and survivor annuity is not such a case and ignores the reality of plan administration and participants' varied needs.

Research shows that participants tend to follow the path of least resistance with respect to the treatment of their account balances upon termination.³¹ Therefore, if the default is that all defined contribution account balances must be in the form of a joint and survivor benefit in an attempt to bridge the retirement gap for women, the result likely would inadvertently harm many of those the proposal is aimed to help because joint and survivor benefits for small balances may not be the optimal form of distribution for many women or others with low balances.

Whether to annuitize or otherwise take an account balance as a stream of payments is a very individualized choice that each participant must make, and we support legislation that helps individuals make that decision. According to many financial planners and economist, for participants with lower balances, it makes more financial sense to keep the account balance for unexpected expenses rather than to annuitize it for a very small monthly payment. For example, according to the DOL annuity calculator, a \$5,000 account balance for someone at 65 would produce a \$22 per month annuity for the participant with a joint and survivor benefit of \$11.³² Even at \$60,000, the annuity would only provide the spouse with a monthly benefit of \$130. Furthermore, for many lower income individuals, the account balance represents the majority of their savings, and financial experts agree that it is not advisable to tie up all assets in a lifetime income stream, without leaving some assets liquid for emergency needs.

The proposal also ignores the practical reality for plan sponsors that many annuity providers do not provide annuities below a certain account balance, leaving the employer as a default annuity provider.³³ This proposal will increase administrative burdens and costs for employers, likely resulting in fewer employers establishing or maintaining retirement plans.

³¹ See *The Path of Least Resistance in 401(k) Plans*, NBER, April 2002 available at <https://www.nber.org/digest/apr02/path-least-resistance-401k-plans>.

³² The DOL calculator is available at https://www.askebsa.dol.gov/lia/home?_ga=2.54488363.2022432660.1646331010-1253558101.1636129133

³³ For example, Charles Schwab requires a minimum of \$100,000 for an annuity, which is a typical requirement because lesser amount likely would not make economic sense for either party. See <https://www.schwab.com/annuities/fixed-income-annuity-calculator>

In short, the Chamber supports legislation that strengthens retirement savings by encouraging employers to establish and maintain retirement plans that provide meaningful benefits for all employees at a reasonable cost and helps participants choose the form of distribution that suits the participant's needs.

Conclusion

The Chamber looks forward to working with the Subcommittee to come up with bipartisan solutions that strengthen the employer-provided health and retirement system by ensuring legislation both protects participants and encourages employers to remain in the system.

[Questions submitted for the record for Andrew Biggs follows:]



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March 22, 2022

Andrew Biggs, Ph.D.
Senior Fellow
American Enterprise Institute
1789 Massachusetts Avenue, NW
Washington, DC 20036

Dear Dr. Biggs:

I would like to thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled *"Improving Retirement Security and Access to Mental Health Benefits,"* held on Tuesday, March 1, 2022, via Zoom.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Tuesday, March 29, 2022, for inclusion in the official hearing record. Your responses should be sent to Clerks of the Committee at E&LTestimony@mail.house.gov and Daniel Foster (Daniel.Foster@mail.house.gov) of the Committee staff.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Health, Employment, Labor, and Pensions Hearing
“Improving Retirement Security and Access to Mental Health Benefits”
Tuesday, March 1, 2022
10:15 a.m. (Eastern Time)

Representative Scott Fitzgerald (R-WI)

1. Dr. Biggs, a recently proposed rule by DoL effectively requires fiduciaries to consider collateral ESG factors when making investment decisions—even when they may not be relevant to risk or return. If retirement funds are pushed into more ESG investments, my concern is even if regulators are able to create criteria for what constitutes an “ethical,” “sustainable,” or “good governance” investment, these criteria could reflect a partisan judgment rather than reality.
 - a. Could this lead to a misallocation of capital and skew investment returns for those who rely on that income stream?

[Responses to questions submitted for the record by Amy K. Matsui follows:]



**COMMITTEE ON
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March 22, 2022

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Ms. Amy Matsui
Senior Counsel and Director of Income Security
National Women's Law Center
11 Dupont Circle NW #800
Washington DC 20036

Dear Ms. Matsui:

I would like to thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled *"Improving Retirement Security and Access to Mental Health Benefits,"* held on Tuesday, March 1, 2022, via Zoom.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Tuesday, March 29, 2022, for inclusion in the official hearing record. Your responses should be sent to Clerks of the Committee at E&LTestimony@mail.house.gov and Daniel Foster (Daniel.Foster@mail.house.gov) of the Committee staff.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Health, Employment, Labor, and Pensions Hearing
“Improving Retirement Security and Access to Mental Health Benefits”
Tuesday, March 1, 2022
10:15 a.m. (Eastern Time)

Representative Lucy McBath (D-GA)

1. Ms. Matsui, some may say we need to further study this issue of requiring spousal consent in 401(k) plans or we need more data on it before proceeding.
 - a. Based on your research and analysis, should Congress wait?
 - b. Or do you feel there’s sufficient evidence for Congress to act and pass the provisions in the discussion draft bill? Please elaborate.

Subcommittee on Health, Employment, Labor, and Pensions
Hearing: “Improving Retirement Security and Access to Mental Health Benefits”
Tuesday, March 1, 2022

Response of Amy K. Matsui,
Director of Income Security and Senior Counsel, National Women’s Law Center,
to Question for the Record from Representative Lucy McBath (D-GA)

1. Ms. Matsui, some may say we need to further study this issue of requiring spousal consent in 401(k) plans or we need more data on it before proceeding.

a. Based on your research and analysis, should Congress wait?

b. Or do you feel there’s sufficient evidence for Congress to act and pass the provisions in the discussion draft bill? Please elaborate.

Representative McBath, thank you for the opportunity to respond to this important question. As defined contribution plans, like 401(k)s, have supplanted traditional defined benefit plans, the potential for spouses’ retirement security to be detrimentally impacted has likewise grown. As a result, increasing spousal protections in defined contribution plans has become an increasingly urgent issue, and Congress should act now to address it.

The risk of spouses losing access to a marital share of a worker-spouse’s retirement assets in a defined contribution plan under current law is well-established,¹ as is the fact that spouses may not discover that the worker-spouse’s retirement assets have been spent or transferred to an IRA of which the spouse is not the beneficiary until it is too late – and have little recourse once the funds are gone. Moreover, because women tend have less retirement income of their own, and thus rely more on a spouse’s retirement income than men do, the evidence supports the conclusion that this risk is particularly problematic for women’s retirement security and warrants immediate action by policymakers.

While some have suggested that more information is needed about how frequently spouses lose access to worker-spouses’ retirement assets because of the lack of spousal protections in defined contribution plans, congressional action should not be predicated on obtaining such information. Current law does not prohibit the worker-spouse withdrawing a 401(k) account balance when leaving a job or retiring without the consent of their spouse. Accordingly, in most instances, a spouse who discovers that this has occurred would have no illegal behavior or violation of rights to report – and even if spouses contacted an entity (such as pension counseling projects, plan administrators, or state or federal agencies) to describe the impact that the loss of access to retirement assets will have on their retirement security, there is no agency or entity that would track or compile those reports. If Congress

¹ See, e.g., U. S. GOVERNMENT ACCOUNTABILITY OFFICE, RETIREMENT SECURITY: TRENDS IN MARRIAGE AND WORK PATTERNS MAY INCREASE ECONOMIC VULNERABILITY FOR SOME RETIREES 48 (January 2014) (“[T]here is no protection against the assets being invested unwisely, inadvertently spent down too quickly, or simply withdrawn fully upon a job change and rolled into an IRA, with a change in beneficiary...”), <https://www.gao.gov/assets/gao-14-33.pdf>.

waits to make spousal protections in defined contribution plans commensurate with defined benefit plans (and Thrift Savings Plans), spouses will continue to bear the risk of a less secure retirement.

[Responses to questions submitted for the record by Karen Handorf follows:]



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March 22, 2022

Ms. Karen L. Handorf, J.D.
Senior Associate
Berger Montague, PC
15 Bakers Walk
Alexandria, VA 22314

Dear Ms. Handorf:

I would like to thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled *"Improving Retirement Security and Access to Mental Health Benefits,"* held on Tuesday, March 1, 2022, via Zoom.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Tuesday, March 29, 2022, for inclusion in the official hearing record. Your responses should be sent to Clerks of the Committee at E&LTestimony@mail.house.gov and Daniel Foster (Daniel.Foster@mail.house.gov) of the Committee staff.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Health, Employment, Labor, and Pensions Hearing
“Improving Retirement Security and Access to Mental Health Benefits”
 Tuesday, March 1, 2022
 10:15 a.m. (Eastern Time)

Representative Mark DeSaulnier (D-CA)

1. The topics discussed in this hearing involve technical aspects of ERISA that at times can seem abstract. However, they have very real impacts on workers and their families who are denied benefits and face daunting barriers to asserting their rights.
 - a. Could you provide a hypothetical scenario to illustrate the barriers facing an ERISA plan participant seeking to access mental health and substance use disorder benefits?
2. In *Thole v. U.S. Bank*,¹ the Supreme Court handed down a controversial decision that restricted access to the courts in fiduciary breach claims brought under ERISA.
 - a. Could you briefly explain the Court’s decision and its impact on participants in pension plans?
 - b. In your testimony you note that the Court’s decision could also have implications in the context of health and welfare plans. Could you elaborate on this?
 - c. Although the Court held that the plaintiffs did not have Article III standing – a constitutional issue – do you believe it is possible for Congress to respond to this decision without a constitutional amendment?

¹ 140 S. Ct. 1615 (2020).

Subcommittee on Health, Employment, Labor and Pensions Hearing
“Improving Retirement Security and Access to Mental Health Benefits”
Tuesday, March 1, 2022
10:15 a.m. (Eastern Time)

**Supplemental Testimony of Karen L. Handorf
In response to questions from
Representative Mark DeSaulnier (D-CA)**

- 1. The topics discussed in this hearing involve technical aspects of ERISA that at times can seem abstract. However, they have very real impacts on workers and their families who are denied benefits and face daunting barriers to asserting their rights.**
 - a. Could you provide a hypothetical scenario to illustrate how the barriers facing an ERISA plan participant seeking to access mental health and substance use disorder benefits?**

Gary is a 32-year-old married man with three children who lives in a town of about 3,000 people in Georgia. He is employed as a sales clerk for a large national retail company based in California. He receives his healthcare through his employer's self-funded healthcare plan administered by Big Name Insurance (BNI). His plan is a prototype plan purchased by his employer from BNI.

Gary suffers serious injuries in a car accident and is prescribed opioids to help him deal with the pain. Despite his best intentions, he becomes addicted to the opioids. Realizing the impact his substance use disorder is having on his personal life and ability to hold a job, Gary decides to seek treatment. Gary discovers that BNI had very few in-network providers who treat substance use disorders, that those who are in-network receive low quality ratings and that the closest in-network provider is 100 miles away.

Gary decides to go to a nearby provider that is out-of-network. Gary requests pre-authorization for his treatment from BNI but is turned down. Because his plan has an anti-assignment provision, his chosen provider cannot appeal the claim denial for him. *See, e.g., American Orthopedic & Sports Medicine v. Independence Blue Cross Blue Shield*, 890 F.3d 445, 453 (3d Cir. 2018) (collecting cases). His chosen provider is unwilling to provide treatment without pre-authorization because Gary cannot pay the out-of-pocket cost.

Gary goes to the only lawyer in town who is familiar with ERISA. She tells Gary that he must exhaust his remedies with his plan before filing suit, but he should do this on his own because courts do not award fees for pre-filing work even if the participant is ultimately successful in court. *See, e.g., Cann v. Carpenters' Pension Trust for N. Calif.*, 989 F.2d 313 (9th Cir. 1993); *Anderson v. Proctor & Gamble Co.*, 220 F.3d 449 (6th Cir. 2000).

Gary is determined to get the treatment he needs. He looks up the procedures for appealing his benefit denial in his summary plan description and follows them as best he can with the help of his sister who is a nurse. He puts in some evidence that the treatment he requests is consistent with generally accepted standards of care (GASC) and thus medically necessary. After several months, BMI denies his last appeal, stating that it interprets the plan document as not requiring treatment consistent with GASC. *See, e.g., Wit v. United Behavioral Health*, 2022 WL 850647 (9th Cir. Mar. 22, 2022). At this point his substance use disorder is out of control and he does not go back to his lawyer until 13 months after he gets his final denial. She tells him that she fears that he is out of time to file his complaint because the most analogous state statute (which governs ERISA benefit claims) requires him to file within one year. *See, e.g., Adamson v. Armco, Inc.*, 44 F.3d 650, 652 (8th Cir. 1995). He tells her that the claims procedures in his summary plan description did not give him a deadline for filing a complaint seeking benefits in court. His lawyer tells him that ERISA, unfortunately, does not require that the summary plan description include information concerning the statute of limitations for benefit claims.

Despite her concern that the statute of limitations has lapsed, Gary's lawyer decides to take the case as a *pro bono* matter. Her son has a substance use disorder, she is appalled that the plan does not cover treatment consistent with GASC, and she feels sympathetic toward Gary who continues to struggle to go to work each day. She decides to file in the local federal district court because ERISA allows Gary to bring suit where he resides. BNI immediately seeks to move the case to California, citing the plan's venue provision that says that suit must be brought in California where the plan is administered. The court agrees with BNI that the plan provision governs because it is not inconsistent with ERISA's venue provisions which also provides that suit may be brought where the plan is administered. *See, e.g., Smith v. Aegon Cos. Pension Plan*, 769 F. 3d 922 (6th Cir. 2014); *In re Mattias*, 867 F.3d 727 (7th Cir. 2017). Gary's lawyer tells him that she is not licensed to practice law in California and will not be able to represent him.

Gary's attorney calls an old law school classmate in California who thinks it is outrageous that the plan is not required to pay benefits consistent with GASC and agrees to represent Gary. Gary's California attorney is disturbed that Gary did not include some available evidence in the administrative record and seeks to supplement the record with additional evidence. The court denies his request to supplement the record because, with very few exceptions, ERISA benefit cases are decided solely on the administrative record. *See, e.g., Jett v. Blue Cross and Blue Shield of Alabama*, 890 F.2d 1137, 1139 (11th Cir. 1989) (collecting cases). The court never reaches the statute of limitations defense but rules in favor of BMI on the merits. The court notes that Gary's plan document gives discretion to BMI to interpret the plan and holds that BNI's interpretation that the plan does not require treatment consistent with GASC was not unreasonable. *See, e.g., Wit v. United Behavioral Health*, 2022 WL 850647 (9th Cir. Mar. 22, 2022).

Gary has by this time lost his job and moved in with his parents who live near an in-network provider from whom he is receiving treatment. Gary is outraged by the injustice and decides to bring a class action on behalf of all participants in plans administered by BMI challenging BMI's pre-authorization requirements as inconsistent with MHPAEA because pre-authorization is not required for other medical care. His California lawyer brings a class action on his behalf alleging that the pre-authorization requirement violated MHPAEA. The court grants BNI's motion to dismiss holding that Gary does not have Article III standing to bring the claim because he is now receiving treatment from the in-network provider and cannot show that he has an injury that can be redressed by the lawsuit. *See, e.g., Ryan S. v. UnitedHealth Group, Inc.*, 2022 WL 883743 (9th Cir. Mar. 24, 2022).

Gary becomes very depressed about the judicial system and relapses. His parents get a second mortgage on their house to pay out-of-pocket for a qualified out-of-network provider which BMI now agrees to cover. Because the provider is out-of-network and Gary's claim cannot be assigned to the provider, BMI pays Gary directly for the cost of treatment rather than the provider. Gary uses the money to buy opioids, overdoses and dies. *See* <https://www.cnn.com/2019/03/01/health/anthem-insurance-payments-patients-eprise/index.html>.

2. In *Thole v. U.S. Bank*, the Supreme Court handed down a controversial decision that restricted access to the courts in fiduciary breach claims brought under ERISA.

a. Could you briefly explain the Court's decision and its impact on participants in pension plans?

ERISA was enacted to protect the interests of participants and beneficiaries in employee benefit plans by subjecting those who administer plans to stringent fiduciary standards and by giving participants and beneficiaries ready access to the federal courts to protect those interests. 29 U.S.C. § 1001 *et seq.* ERISA requires that employee benefit plan assets be held in trust by one or more trustees for “the exclusive purposes of providing benefits to participants in the plan and their beneficiaries.” 29 U.S.C. § 1103(a). It imposes on the trustees and other plan managers strict standards of conduct derived from the common law of trusts. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U. S. 409, 416 (2014). These fiduciary duties obligate the trustees and managers to act prudently and “solely in the interest of the plan’s participants and beneficiaries.” 29 U.S.C. § 1104.

Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), expressly gives plan participants and beneficiaries a cause of action for fiduciary breaches that impact a plan and provides for appropriate relief to the plan for those breaches under ERISA § 409, 29 U.S.C. § 1109. ERISA § 409, 29 U.S.C. § 1109, provides for broad remedies, including recovery of losses, disgorgement of profits, removal of a plan fiduciary and other equitable and remedial relief.

In *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020), the Supreme Court ruled that two plan participants lacked Article III standing to assert a fiduciary breach claim involving a defined benefit pension plan where the participants continued to receive vested benefits. The participants alleged that U.S. Bank plan fiduciaries breached their duties of loyalty and prudence and failed to diversify the assets of the Plan by investing almost all the plan’s assets in equities, resulting in over \$750 million in losses. The participants further alleged that plan fiduciaries had invested such a large percentage of assets in equities to seed U.S. Bank’s new mutual funds.

The Supreme Court rejected the argument that the participants had an equitable or property interest in the plan and stated that a defined benefit plan is more in the nature of a contract rather than a trust. Because participants would receive their benefits regardless of how the plan was managed, they had no interest sufficient to confer Article III standing to seek relief for fiduciary breaches. The Court also rejected the argument that the participants had representational standing to sue on

behalf of the plan, stating that the participants had not been legally or contractually assigned the plan's claims. The Court contrasted this with *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, 529 U.S. 765 (2000) where the *qui tam* statute makes a relator a partial assignee and "gives the relator himself an interest in the lawsuit."

The effect of *Thole* is to deprive participants and beneficiaries of the right to hold plan fiduciaries accountable for losses to the plan from fiduciary breaches or to obtain other equitable relief to correct self-dealing unless the plan does not have enough assets to pay benefits. While an injury to a participant's plan will, other things being equal, increase the risk that the plan's participants and beneficiaries will ultimately fail to receive their full promised benefits, the Court did not view this risk as sufficient injury to confer Article III standing.

b. In your testimony you note that the Court's decision could also have implications in the context of health and welfare plans. Could you elaborate on this?

Courts have applied *Thole*'s holding to plaintiffs seeking to hold plan fiduciaries accountable for self-dealing and other fiduciary breaches in the administration of health plans. In *Scott v. UnitedHealth Group*, 540 F.Supp.3d 857 (D. Minn. 2021), a district court found that participants, who paid substantial premiums toward their healthcare, did not have Article III standing to challenge cross-plan offsetting because they had not lost benefits as a result of the practice. Similarly, in *Ryan S. v. UnitedHealth Group*, 2022 WL 883743 (9th Cir. Mar. 24, 2022), the Ninth Circuit held that the plaintiff, who challenged UnitedHealth's practices relating to his substance use disorder, did not have Article III standing to challenge (1) UnitedHealth's policy of requiring pre-authorization for out-of-network outpatient substance use disorder treatment while not imposing the same requirement for other medical care; (2) cross-plan offsetting; and (3) UnitedHealth's use of a system to limit or exclude claims for coverage. In *Gonzales de Fuente v. Preferred Home Care of New York LLC*, 858 F. App'x. 432 (2d Cir. 2021), the Second Circuit held that health plan participants who claimed breach of ERISA fiduciary duties due to alleged misappropriation of employer contributions to the plan (which plaintiffs contended should have been used to provide them a superior plan) did not have Article III standing because they had not lost benefits. In *Atlantic Neurosurgical Specialists PA v. United Healthcare Group, Inc.*, 2021 WL 3124313 (D. N.J. July 22, 2021), the court dismissed a suit brought by providers alleging that the insurer refused to accept the participants' authorized representative forms on Article III standing grounds because they had not been injured by the insurer's procedure for designating authorized representatives even though their claims

on behalf of participants had not been paid. Similarly, in *Crosby v. Cal. Physicians Services*, 498 F. Supp.3d 1218 (C.D. Cal. 2020), the court held that the plaintiff did not have Article III standing to challenge age and care guidelines applied to Applied Behavior Analysis therapy for their autistic child because an independent claims reviewer overruled Blue Shield/Magellan each time it limited care and the plaintiffs received all therapy they sought.

c. Although the Court held that plaintiffs did not have Article III standing – a constitutional issue – do you believe that it is possible for Congress to respond to this decision without a constitutional amendment?

Congress could amend ERISA § 502(a)(2), 29 U.S.C. § 1102(a)(2), to give participants a monetary stake in the outcome of litigation as assignees of the injured plan's claim. This solution would invoke the rationale of the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, 529 U.S. 765 (2000) which held in a *qui tam* action that a citizen, who suffered no individualized injury from a fraud committed against the United States, could nevertheless pursue such a claim on behalf of the United States as the partial assignee of the claim, entitled to share in any recovery. The Supreme Court in *Thole* noted that the participants had not been legally or contractually assigned the plan's claims, unlike the plaintiff in *Vermont Agency* who had been assigned claims in a *qui tam* suit which gave the relator an interest in the lawsuit. Congress could amend ERISA § 502(a)(2) to add a plan as a party entitled to sue for appropriate relief under ERISA § 409 and to allow a participant to sue on behalf of the plan as an assignee of the plan entitled to some small portion of the recovery. Once these changes have been made, the same rationale for Article III standing in a *qui tam* case should apply in an action brought by a participant as assignee of the plan in an ERISA case involving fiduciary breaches where the relief goes to the plan. This amendment would not solve all Article III problems for plan participants, but it would likely give defined benefit pension plan participants Article III standing to address fiduciary breaches.

