118TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
118–226

NO DISCRIMINATION IN MY BENEFITS ACT

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

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5338]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 5338) to amend the Employee Retirement Income Security Act of 1974 to establish that fiduciaries must act with prudence and loyalty when selecting service providers for pension plans, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "No Discrimination in My Benefits Act".

SEC. 2. SERVICE PROVIDER SELECTION.

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(a)(1)) is amended—

(1) in subparagraph (C), by striking "and";

(2) in subparagraph (D), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(E) by selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan—

"(i) in accordance with subparagraphs (A) and (B); and

"(ii) without regard to race, color, religion, sex, or national origin.".

PURPOSE

Employee benefit plans have one purpose: to provide employee benefits. Employee benefit plan assets have one purpose: to fund those benefits. The *Employee Retirement Income Security Act of 1974* (ERISA) was designed to ensure that the financial interests of participants and beneficiaries in their benefits do not take a back seat to advancing political and social interests. H.R. 5338 reiterates a fundamental principle already existing under ERISA: selecting a service provider for an ERISA plan is a fiduciary act subject to ERISA's fiduciary obligations of prudence and loyalty. H.R. 5338 also provides that such selections must not be discriminatory and therefore must be made without regard to race, color, religion, sex, or national origin.

COMMITTEE ACTION

117TH CONGRESS

Second Session—Hearings

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

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

Second Session—Legislative Action

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

First Session—Hearings

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

First Session—Legislative Action

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

On September 5, 2023, Rep. Bob Good (R–VA) introduced the *No Discrimination in My Benefits Act* (H.R. 5338). The bill was referred to the Committee on Education and the Workforce. On September 14, 2023, the Committee considered H.R. 5338 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 23–19. The Committee adopted an Amendment in the Nature of a Substitute (ANS) offered by Rep. Good that made minor technical changes.

COMMITTEE VIEWS

INTRODUCTION

H.R. 5338, the *No Discrimination in My Benefits Act*, reiterates a fundamental principle already existing under ERISA: selecting a service provider for an ERISA plan is a fiduciary act subject to ERISA's fiduciary obligations of prudence and loyalty. H.R. 5338 also amends ERISA to codify a prohibition against discrimination in selecting service providers on the basis of race, color, religion, sex, or national origin.

THE DUTY OF PRUDENCE AND LOYALTY UNDER EXISTING LAW

The selection of a service provider for an ERISA plan is a fiduciary act.[1] Under ERISA, a fiduciary must act solely in the interest of participants and beneficiaries hand for the exclusive purpose of providing benefits to participants and their beneficiaries and of defraying reasonable expenses of administering the plan (the "exclusive purpose rule").[2] Courts have held that ERISA's exclusive purpose rule requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries"[3] and to make decisions "with an eye single to the interests of participants and beneficiaries."[4]

In 2014, the U.S. Supreme Court unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary standards.[5] The Court held that ERISA's duty of prudence does not vary depending on a non-pecuniary goal, even if that goal is set out in the plan document.[6] The Court stated,

> Read in the context of ERISA as a whole, the term 'benefits' must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. . . . The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.[7]

The Court's holding applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG. ERISA also requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character."[8] Thus, fiduciaries are held to an expert prudence standard when selecting service providers.

DEMOCRATS' ATTACK ON ERISA'S FIDUCIARY STANDARD

In June 2022, Sens. Robert Menendez (D–NJ), Elizabeth Warren (D–MA), Alex Padilla (D–CA), Tim Kaine (D–VA), and John Hickenlooper (D–CO) sent letters (the "Menendez letters") to 25 large companies requesting information about the gender and race of the asset managers of their pension plans. The letters stated, "Across the industry, the senior leadership level is overwhelmingly white and male. . . . This is a serious problem. . . ." The letters' questions included "What commitments has your corporate pension fund made to increase opportunities for women and minority owned

[1] DOL, Field Assistance Bulletin No. 2002–02 ("In selecting a service provider, plan fiduciaries must, consistent with the requirements of [ERISA] section 404(a), act prudently and solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan."); *see also* Liss v. Smith, 991 F. Supp. 278, 300 (S.D.N.Y. 1998).

[2] ERISA §§ 403(c), 404(a); 29 U.S.C. §§ 1103(c), 1104(a). Hereinafter, this fiduciary duty is referred to as the "exclusive purpose rule."

[3] Donavan v. Mazzola, 716 F.2d 1226, 1238 (9th Cir. 1983) (citation omitted).

[4] Donavan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir. 1982).

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

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

[7] *Id.* at 421.

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

asset management firms?" and "Does your corporate pension fund have established priorities and expectations for investment staff to seek diverse asset managers?" [9]

In June 2023, the Supreme Court ruled in *Students for Fair Admission v. Harvard* that basing college admissions decisions on race violates the 14th Amendment to the United States Constitution and Title VI of the *Civil Rights Act*.[10] This decision has encouraged skepticism and challenges regarding corporate DEI (diversity, equity, inclusion) policies. Moreover, the U.S. Supreme Court has unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary standards.[11] Therefore, the type of discrimination encouraged by the Menendez letters is impermissible under ERISA and inconsistent with *Students for Fair Admission v. Harvard.*

H.R. 5338, NO DISCRIMINATION IN MY BENEFITS ACT

H.R. 5338 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce. The bill reiterates a fundamental principle already existing under ERISA: selecting a service provider for an ERISA plan is a fiduciary act subject to ERISA's fiduciary obligations of prudence and loyalty. The bill also amends ERISA to codify a prohibition against discrimination in selecting service providers on the basis of race, color, religion, sex, or national origin.

CONCLUSION

To protect the financial interests of participants and beneficiaries in their benefits and to reinforce ERISA's existing duties of prudence and loyalty, H.R. 5338 ensures that fiduciaries are informed that service provider selection is a fiduciary act subject to ERISA's fiduciary obligations of prudence and loyalty. H.R. 5338 also amends ERISA to codify a prohibition against discrimination in selecting service providers on the basis of race, color, religion, sex, or national origin.

SUMMARY

H.R. 5338 SECTION-BY-SECTION SUMMARY

Section 1. Short title

- Names the bill as the "No Discrimination in My Benefits Act"

Section 2. Selection of service providers

Section 2(a) amends ERISA Section 404(a) by stating that when selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of an ERISA plan, ERISA's fiduciary duties of prudence and loyalty apply. In addition, such actions must be taken without regard to race, color, religion, sex, or national origin.

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[9] Press Release, Sen. Bob Menendez Newsroom, Menendez Leads Push for Big Corporations to Improve Diversity Among Corporate Pension Fund Managers (June 3, 2022).
[10] 143 S. Ct. 2141 (2023).
[11] *Dudenhoeffer*, 573 U.S. 409.

EXPLANATION OF AMENDMENTS

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

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)3 of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 5338 takes important steps to protect the interests of the workforce in their benefits provided under ERISA plans with respect to selecting, monitoring, and retaining fiduciaries, counsels, employees, or service providers of a plan. H.R. 5338 is applicable only to investments subject to ERISA and therefore does not affect the legislative branch.

UNFUNDED MANDATE STATEMENT

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

EARMARK STATEMENT

H.R. 5338 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

ROLL CALL VOTES

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

Date: 9/14/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call:6 Bill: H.R. 5338 Amendment Number: n/a

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

Sponsor/Amendment: Rep. Good/ GOOD_086 MOTION TO REPORT

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

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

Total: 45 / Quorum: 42/ Report:

(25 R - 20 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 5338 is to protect the interests of the workforce in their benefits provided under ERISA plans with respect to proxy voting. The goal of H.R. 5338 is to protect the interests of the workforce in their benefits provided under ERISA plans with respect to selecting, monitoring, and retaining fiduciaries, counsels, employees, or service providers of a plan.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 5338 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

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

REQUIRED COMMITTEE HEARING AND RELATED HEARINGS

In compliance with clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the following hearing held during the 118th Congress was used to develop or consider H.R. 5338: "Examining the Policies and Priorities of the U.S. Department of Labor".

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 5338 from the Director of the Congressional Budget Office:

At a Glance

Pension Legislation

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

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

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

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

* = between zero and $500,000.

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

Generally, the bills would:

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

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

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

beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk."

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

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

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

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

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

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

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

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

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

Under H.R. 5340, plans would be required to warn participants in brokerage windows about the extra potential risk associated with those investments. CBO and JCT do not expect H.R. 5340 to

significantly change participants' investment choices, and to the extent that they do change, we expect an equally likely chance of small increases or small decreases in federal revenues and outlays.

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

Pay-As-You-Go considerations: None.

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

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

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

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

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

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

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

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

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5338. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the committee adopts as its own the cost estimate of the bill prepared by the Director of the

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

* * * * * * *

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

* * * * * * *

SUBTITLE B—REGULATORY PROVISIONS

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

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FIDUCIARY DUTIES

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

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

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

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

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

(E) by selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan—

(i) in accordance with subparagraphs (A) and (B); and

(ii) without regard to race, color, religion, sex, or national origin.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisi-

tion or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

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

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

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

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

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

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

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

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

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

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

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

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

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

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

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

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

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

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

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

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

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

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

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

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

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

preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) For purposes of this subsection—

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

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

(e) SAFE HARBOR FOR ANNUITY SELECTION.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) TIME OF SELECTION.—

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

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

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

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

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

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

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

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

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

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MINORITY VIEWS

INTRODUCTION

H.R. 5338, the *No Discrimination in My Benefits Act,* amends the *Employee Retirement Income Security Act of 1974* (ERISA)[1] to prohibit plan fiduciaries from selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider for the plan based on race, color, religion, sex, or national origin. The bill undermines efforts to increase diversity in the asset management industry that Committee Democrats, among others, strongly support. H.R. 5338 is opposed by organizations such as the AFL–CIO, Americans for Financial Reform, and US SIF: The Forum for Sustainable and Responsible Investment (US SIF).

H.R. 5338 PERPETUATES THE UNACCEPTABLE STATUS QUO IN THE ASSEST MANAGEMENT INDUSTRY

Women and people of color are significantly underrepresented in the asset management industry. Specifically, according to the Government Accountability Office (GAO), 1 percent of the $70 trillion in global financial assets under management are managed by women or minority-owned firms.[2] There have been efforts to increase diversity among asset managers in the private sector and the federal government, including the Pension Benefit Guaranty Corporation's (PBGC) Smaller Asset Management Program. H.R. 5338 is viewed as a "blatant attempt to obstruct efforts to address long-standing racial and gender under-representation in management."[3]

H.R. 5338 APPEARS TO BE PREMISED ON A FALSE CHOICE

During the Committee markup of H.R. 5338, the bill's author noted that Senate Democrats sent letters to companies requesting information about the diversity among asset managers of their pension plans.[4] Specifically, the bill's author claimed such letters requested answers on the companies' plans to diversify their employees based on race and sex rather than the skills and expertise that may lead to higher investment returns; and the bill's author gave

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[1] 29 U.S.C. § 1104.

[2] U.S. Gov't Accountability Off., GAO–17–726, Investment Management: Key Practices Could Provide More Options for Federal Entities and Opportunities for Federal Entities and Opportunities for Minority- and Women-Owned Asset Managers, (2017), https://www.gao.gov/products/gao-17-726.

[3] *See* letter from AFL–CIO to Chrwmn. Virginia Foxx & Ranking Member Bobby Scott, H. Comm. on Educ. & the Workforce, Full Committee Markup, (Sept. 14, 2023), https://aflcio.org/about/advocacy/legislative-alerts/letter-opposing-legislation-would-undermine-retirement-security.

[4] H. Comm. on Educ & the Workforce, Full Committee Markup, (Sept. 14, 2023), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=116367.

the impression that Americans want only the latter.[5] This is a false choice. Retirement savers can have their assets managed by diverse firms and expect strong investment returns. In fact, according to the non-profit Knight Foundation which has conducted research on the diversity of asset managers in the hedge fund, mutual fund, private equity, and real estate industries, non-diverse asset manager firms do not outperform diverse firms across all asset classes.[6] The financial services firm Morningstar looked at women-run funds and found that they are just as good as men at managing funds and there is "some indication that the industry might be better off with more women at the helm of funds."[7]

Had Committee Republicans held a legislative hearing on H.R. 5338, Committee Members could have heard testimony and asked witnesses' questions about the impact of diversity in the asset management industry on investment performance. Unfortunately, Committee Republicans failed to do hold a legislative hearing on H.R. 5338 and instead hastily marked up the bill shortly after it was introduced.

H.R. 5338 IS PART OF COMMITTEE REPUBLICANS' MISGUIDED WAR ON ESG

H.R. 5338 was among the "legislative package" announced by Committee Republicans on September 6, 2023 "to ensure financial institutions are focused on maximizing returns in retirement plans rather than on woke environmental, social, and corporate governance (ESG) factors."[8] This is another false choice. Maximizing returns is connected to careful consideration of ESG factors—and retirement plan fiduciaries and major corporations understand this. One such corporation, which serves millions of retirement plan participants, noted in a comment letter to the Department of Labor that "[t]he brand equity of many publicly traded companies is strongly connected to how they handle various ESG matters, and companies can face significant reputational risk as a result of their decision-making on such matters."[9] If reputational risk occurs, then a company's stock value could suffer and that is directly related to retirement savers' 401(k) plans. H.R. 5338 and the other anti-ESG bills the Committee considered on September 14, 2023 illustrate that Committee Republicans are failing to understand these same connections. Committee Democrats understand ESG's relevance to and impact on workers' retirement security. That is why we join those who strongly support retirement plan fiduciaries' ability to consider ESG factors when making investment decisions.

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[5] *Id.*

[6] John Lerneret al., *Knight Diversity of Asset Managers Research Series: Industry, A Study of Ownership Diversity and Performance in the Asset Management Industry,* Knight Foundation, (2021), https://knightfoundation.org/wp-content/uploads/2021/12/KDAM_Industry_2021.pdf.

[7] Madison Sargis & Kathryn Wing, *Female Fund Manager Performance: What Does Gender Have to Do With It?*, Morningstar, https://www.morningstar.com/views/blog/fund-managers/female-fund-manager-performance.

[8] Press Release, H. Comm. on Educ. & the Workforce, *@EdWorkforce Republicans Unveil Package to Combat Biden's Harmful ESG Rule,* (Sept. 6, 2023), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409502.

[9] Comment No. EBSA–2020–0008–0284, at 8. https://www.regulations.gov/comment/EBSA-2020-0008-0284.

CONCLUSION

As the Committee Ranking Member Bobby Scott (D–VA–3), put it during the Committee's consideration of this bill, we should be leaning in to increasing diversity in a sector that desperately needs it, not layering on more barriers to entry—which is what H.R. 5338 does. For the reasons stated above, Committee Democrats opposed H.R. 5338 when the Committee considered it on September 14, 2023. We urge the House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
GREGORIO KILILI CAMACHO SABLAN.
MARK DESAULNIER.
JAHANA HAYES.
HALEY M. STEVENS.

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